SUPREME COURT OF QUEENSLAND

CITATION:	*R v H* [2003] QCA 147
PARTIES:	**R** **v** **H** (appellant)
FILE NO/S:	CA No 428 of 2002 DC No 3400 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2003
JUDGES:	McPherson and Williams JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant convicted of two counts of rape – where background evidence of prior sexual acts by the appellant on the complainant was admitted at trial – where this evidence was not available to either party before the trial – whether there was a miscarriage of justice because the disclosure of highly prejudicial evidence was not made prior to trial CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – GENERALLY – where blood from two females and sperm found on pyjama pants worn by complainant at time of offence – where trial judge directed jury that they may find the blood sample to be

of little importance – where appellant sought redirection suggesting some other person may have worn the pants after they were last washed – whether trial judge was justified in not giving such a redirection

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – OTHER MATTERS – where prosecution asked complainant's mother whether she had offered complainant to the appellant for money – where prosecution stated in closing address to jury that it was the defence who had brought up that issue – where a redirection on the matter was given – whether there was a mistrial due to the way the matter was introduced and the use made of it by the prosecution during closing address

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where appellant sentenced to eight years imprisonment – where appellant had both physical and psychological dominance over complainant – where particular vulnerability of complainant due to reliance on appellant for a visa to remain in the country – whether sentence manifestly excessive

R v F [1996] QCA 490; CA No 418 of 1996, 6 December 1996, cited
R v P [2001] QCA 25; CA No 298 of 2000, 9 February 2001, cited
R v Williams [2002] QCA 211; CA No 36 of 2001, 21 June 2002, cited

COUNSEL: A W Byrne QC for the appellant
L J Clare for the respondent

SOLICITORS: Ryan & Bosscher for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: I have read and agree with the reasons of Williams JA for dismissing the appeal against conviction and for refusing leave to appeal against sentence. The orders of the Court will take the form he foreshadows in his reasons.

[2] **WILLIAMS JA**: The appellant was convicted in the District Court on 10 December 2002 of two counts of rape, and one count of indecent dealing with a circumstance of aggravation. The offences occurred on or about 3 November 2000. The complainant in each case was the same 14 year old girl. In the course of the incident which will be detailed later the appellant inserted his finger into the complainant's vagina; that constituted the first count of rape. Very shortly thereafter he had intercourse with her; the second count of rape. The particulars

given for count 1 involved the appellant bringing his mouth into contact with the breasts and vagina of the complainant in the lead up to the act of intercourse.

[3] The appellant did not give evidence, and there was no police interview which contained any version of events from the appellant. The suggestion put to Crown witnesses was that he had simply gone to the unit in which the complainant was then residing to look for his wallet; he then left alone and nothing of a sexual nature occurred between he and the complainant. There was also an alternative defence to the rape charges advanced at least in counsel's address to the jury; the complainant consented, or at least the jury could not be satisfied beyond reasonable doubt that she did not consent.

[4] A number of grounds were raised in the Notice of Appeal against conviction but senior counsel for the appellant abandoned all but two, and a further ground was added by leave during the hearing. The grounds argued were:

(1) The learned trial judge erred in admitting alleged "background" evidence of alleged sexual acts by the accused on the complainant.

(2) The learned trial judge erred in failing to direct the jury that the unknown female blood stain on the pyjama was of importance in the light of the fact that unidentified semen was found on them.

(3) The prosecution introduced an irrelevant and prejudicial matter into the case and later addressed the jury that the defence had raised the issue.

[5] It is necessary in the circumstances to set out something of the relationship between the appellant and the complainant. The appellant advertised in Korea for families to come to Australia for purposes of attending a missionary school. The complainant's family was one of six Korean families who arrived in Australia in August 2000 on tourist visas. The adults could not speak English, and the children had only a limited command of the English language. The appellant took the families initially to a farmhouse at Mt Tamborine where conditions were cramped. Subsequently he organised accommodation for children from two of the families, including the complainant, in a unit at Merrimac, about an hour's drive away from the parents' accommodation. The unit was very close to the appellant's house. The families were extremely dependent upon the appellant. They had no transport other than such as was arranged by him. The appellant held details of all their banking accounts and was responsible for settling their affairs. They were dependent on him to organise necessary extensions of visas. The appellant had the telephone to the farmhouse disconnected and there was no telephone in the children's unit. The appellant was the only person with a key to the children's unit, even the children were not given one. He would let himself into the unit in the early morning and at night. He undertook responsibility for the children's education, taking them to the library and classes and the farm. The complainant's father was persuaded by the appellant to return to Korea in September 2000 to recruit more "investors" for the farm. He did not return until after the complaint of rape.

[6] On the night of the offence the complainant, another young girl aged 14, and that other girl's brother aged 13, were in the unit. The boy was asleep. The two girls were apparently in the one room talking; the complainant was dressed in pyjamas.

The appellant arrived in his van at about 1.00 am. The appellant entered the unit and the evidence from the girls was that he was angry, screaming at them. There was evidence that he said, amongst other things: "Well, are you lesbians or something?" It was put to the complainant in cross-examination she and the other girl were indulging in lesbian activity at that time; that was denied. The other girl then moved into the room where her brother was sleeping. A short while later she heard the appellant's van move off; she and her brother looked for the complainant in the unit but could not find her.

[7] It was put to each of the girls by counsel for the appellant at trial that he indicated he had come to the unit in order to find his wallet. Each of the girls denied that.

[8] According to the complainant the appellant asked her to go outside with him to talk about an episode earlier that day when he had kissed her. She got into his van and he drove it for some 30 or 40 minutes into the mountains before stopping at an isolated spot. The complainant's evidence was that he asked her whether she had told anyone about him kissing her earlier that day. Thereafter her evidence was that he began touching her breasts and removing her pyjamas. He laid her down on the seat, sucked her breasts, and then her vagina. It was at that point he inserted his finger into her vagina. She was screaming and crying. She gave evidence they both fell to the floor from the seat of the van and that he injured his arm. She then gave rather graphic evidence of the appellant handling his penis before he pushed her legs apart and had intercourse with her. She was crying and the appellant told her she had caused herself more pain by resisting.

[9] Immediately after the act the appellant warned her against telling her parents, reminding her that that was the very day on which she needed him to get her visa extended. She pretended to be sick and that resulted in the appellant desisting from further sexual activity. He gave her a tissue to clean herself and thereafter he drove her back to the unit.

[10] Her friends in the unit gave evidence of her return. She immediately gave them some details of the sexual assault. After sleeping for a period she walked to a telephone booth where she rang her father in Korea and told him the appellant had sexually assaulted her. She then contacted her mother through a mobile telephone at the farm.

[11] The complainant's mother was in fear because of the position with respect to the visas. They went with the appellant to Brisbane that day to have their visas renewed, acting as if nothing had happened.

[12] On hearing from his daughter the complainant's father immediately flew from Korea and on his arrival in Queensland the police were contacted.

[13] The complainant was examined by a doctor on the morning of 6 November. She found injuries, within a few days old, including:

(i) Bruising on the right elbow, left knee and shin;

(ii) The introitus was inflamed;

(iii) The posterior forchette was abraded;

(iv) There were two complete tears to the hymen;

(v) There was a linear abrasion to the right lateral wall of the vagina.

[14] The doctor gave evidence that the tears to the hymen were caused by the penetration of a "fairly large object", bigger than a finger. The doctor expressed the view that the injury to the posterior forchette indicated penile rather than digital penetration. The evidence was that the injury to the hymen was "consistent with a first time episode of intercourse rather than repeated intercourse".

[15] Forensic testing did not reveal spermatozoa on swabs taken from the complainant, but that was not unexpected as the swabs were taken three days after the incident and menstrual bleeding had occurred. However five areas of seminal fluid were found on the complainant's pyjama pants, but insufficient sperm were located to profile them. The forensic scientist also found blood from an unidentified female on the pyjama pants, and also a minor DNA trace consistent with the complainant. That blood stain was located on about the waist band of the pyjama pants.

[16] Two other pieces of evidence should be noted. Firstly, the complainant alleged that the appellant was wearing a pair of green and black striped underpants on the night when she was raped. Investigating police located a pair of underpants matching that description in a plastic bag in the garage area of the place where the appellant was residing. Secondly, when the appellant was medically examined on 6 November 2000 the doctor noted a healing abrasion above the elbow which was up to a week old. The jury could have regarded that as significant in the light of the fact that the complainant said that when they fell off the seat he injured his elbow.

[17] I now turn to the grounds of appeal.

[18] It was clear from the depositions at committal that the complainant alleged some sexual activity by the appellant prior to the night during which the offences in question occurred. She referred at the committal hearing to episodes of kissing and one occasion when the appellant lay on the bed with her. No specific sexual act was referred to in that evidence.

[19] Early in the complainant's evidence-in-chief (she was the first prosecution witness called) she referred to the fact that the appellant asked her to leave the unit to talk about a kissing incident. When asked when did that kissing happen she responded, "Lots of times". She was then asked: "Apart from kissing, did anything else happen before this night?" to which she replied: "He used to touch my body too". She then indicated that these incidents were matters that "I haven't told the police".

[20] At that stage defence counsel said, in front of the jury, that the defence "haven't been given any notice of this. This is the first time we've heard this. …" He then asked for a short adjournment which was granted. The learned trial judge intimated, again in front of the jury, that during the adjournment a statement should be written out by hand and a copy given to the defence.

[21] On resumption (in the absence of the jury) there was a discussion between the learned trial judge and counsel as to what should happen. The fresh evidence involved two occasions on which the appellant massaged the complainant which

conduct included massaging her breasts and touching her pubic hair. It also involved cuddling on the bed twice and numerous occasions of kissing. After debating the problems created by the revelation of that fresh evidence for some time it was agreed that further consideration thereof should be stood over until the following morning and in the meantime evidence should proceed on other issues.

[22] The following morning there was further debate about the evidence of uncharged acts. Ultimately defence counsel did not ask for a mistrial, and did not ask to examine the complainant on a voir dire with respect to the fresh allegations. He indicated that he proposed to cross-examine the complainant and wanted a short adjournment before finishing that in order to seek further instructions. It was on that basis that the trial proceeded.

[23] The complainant girl was cross-examined about the omission from her original statement to the police of such matters and undoubtedly much was made of that by defence counsel in the course of his address to the jury.

[24] The learned trial judge gave the jury full and proper directions as to the limited relevance of the uncharged acts. Senior counsel for the appellant made no complaint about the summing-up in that regard.

[25] The argument before this court was that, given the attitude of the learned trial judge, counsel at trial failed to ask for a mistrial or to hold a voir dire into the evidence in question. It was contended that in the circumstances there was a miscarriage of justice in terms of s 668E(1) of the Criminal Code because the disclosure of highly prejudicial evidence was not made prior to trial and that in consequence the appellant did not have a fair trial.

[26] The complainant girl, as already noted, was a young Korean who had been in Australia for only a short period of time. Given her initial reluctance to contact the police, her dependence upon the appellant, and her age it is not surprising that a problem such as this did occur in the course of the trial. On the basis of reading the evidence of the complainant and the principal Crown witnesses in detail it has to be said that this was a strong prosecution case. In the circumstances, particularly given the way in which the matter was addressed in the summing-up, I am not persuaded that the appellant was prejudiced by the way in which the evidence in question emerged. It was clearly evidence which if disclosed in full at committal would have been admitted at trial without objection. At committal some relationship evidence was forthcoming, and in consequence it could not be said that the defence was taken completely by surprise. It is unfortunate the evidence in question was not disclosed earlier but, as I have said, I am not persuaded that the appellant did not have a fair trial.

[27] In the circumstances no basis has been made out for a new trial on this ground.

[28] The next ground essentially relates to the summing-up dealing with the blood stain on the pyjama pants. The full passage in question is as follows:

> "Now, the blood sample she found was female blood. A major component of that female blood came from some unknown female. Now, a minor part of that sample came from material which was identified as belonging to the [complainant]. It is a matter for you

> what you make of Dr Bentley's evidence, but you might think she was saying that, well, it could be some material left by the [complainant] without necessarily being blood. That is a matter for you.
>
> You might think that the evidence relating to that sample of blood is a loose end in the case. It is a matter for you what you make of it, but you might think that the blood sample is of little importance. You might think the really important evidence is the finding of seminal fluid and spermatozoa on the pyjamas".

[29] Counsel asked for a redirection on the basis that the unknown female blood was of some importance because "it could explain that another person's sperm was on those pyjamas rather than my client's sperm if another female had worn those pyjama pants". The learned trial judge declined to give the redirection sought.

[30] There was no challenge in the evidence to the fact that the girl was wearing those pyjamas on the night in question. Given where the blood stain was (near the waistband) it may have had no relevance at all to the events in question. The seminal staining was to the front and rear in the general area of the crutch. Counsel for the appellant relied heavily on some evidence given by the complainant to the effect that the pants were clean when she put them on, she had washed them herself a couple of days before. However, it appears there was no washing machine in the unit and the children washed by hand. The scientific evidence was that all of the biological material must have been deposited after the last machine wash of the garment; it could survive a hand rinse.

[31] The evidence-in-chief and cross-examination of the complainant was rather inconclusive as to when and how the pyjama pants had last been washed.

[32] In the circumstances the passage in the summing-up is unobjectionable. Suggesting some other person might have worn the pants after they were last washed properly would have been pure speculation and the learned trial judge was justified in not giving the redirection sought.

[33] There was no misdirection such as would justify setting aside the conviction.

[34] The circumstances giving rise to ground 3 are somewhat unusual. Defence counsel sought leave pursuant to s 4 of the *Criminal Law (Sexual Offences) Act* 1978 to cross-examine the complainant as to alleged prior sexual history. In the course of making submissions in support of that application he said that he intended putting to the complainant that she had been offered by her mother to the appellant for $300,000.00 for sexual purposes so that the mother could have that money for a family migration visa.

[35] After hearing submissions the learned trial judge gave counsel for the appellant leave to cross-examine. Thereafter he put to the complainant allegations of sexual activity with her 13 year old male flatmate, a 30 year old Indonesian student, and lesbian sex with her female flatmate. It was also suggested to her in an indirect way that the complaint of rape was an attempt to extort $300,000.00 from the applicant. All such allegations were denied by the complainant.

[36] Later in the course of the trial the complainant's mother was called by the prosecution to give evidence. The very last question in evidence-in-chief was as follows: "Did you at any stage talk to H about offering your daughter … to him?" To that the reply is recorded as: "What – why do I offer my daughter to H? I never said that."

[37] Whether or not because of that answer, defence counsel did not raise the matter further with the complainant's mother. However reference was made in the course of cross-examination of both parents of the complainant that $300,000.00 was needed to get a family visa.

[38] Thus it was defence counsel who raised the matter first in the course of the trial (albeit in the absence of the jury) and it was counsel for the prosecution who asked the only question directly in point. However, in the course of his address the Crown prosecutor apparently suggested to the jury that it was the defence who put to witnesses that the complainant's mother had offered the complainant to the appellant. After the summing-up counsel for the appellant sought a redirection on that matter and it was given. The learned trial judge told the jury that "both counsel agree that at no stage did defence suggest that to the mother".

[39] It is nevertheless contended by counsel for the appellant that there was a mistrial because of the way the matter was introduced and the use made of it by the prosecution during closing address.

[40] In my view this point cannot be considered in isolation. It must be looked at in the light of the allegations which were put to the complainant and denied by her, including the insinuation that the complaint of rape was false and calculated to extort $300,000.00 from the applicant.

[41] It is unfortunate that counsel for the prosecution made the error which he did in the course of his address to the jury, but in the overall context of the trial that was corrected by the redirection given by the learned trial judge. I am not persuaded that what occurred amounted to a mistrial. However, should I be in error in so concluding this would clearly be, in my view, a case for the application of the proviso.

[42] The appeal against conviction should be dismissed.

[43] The appellant also seeks leave to appeal against the sentence of eight years imprisonment imposed on the second rape count. A sentence of six years imprisonment is contended for.

[44] The appellant was aged 47 and has no prior convictions. The submission on his behalf is that a sentence of eight years is too high for a man of his age, with no previous convictions, where no violence or weapon was used, and where there is no evidence of long term injuries or psychological problems to the complainant.

[45] It is, in my view, a major aggravating factor in this case that the appellant had both physical and psychological dominance over the complainant. He was essentially in a position of trust, and used that position in order to overbear the will of the complainant. She was particularly vulnerable because of the situation with her visa.

[46] The appellant has shown no remorse and subjected the complainant to baseless allegations of sexual activity with others.

[47] Whilst it is true to say that there is no specific evidence of long term injuries or psychological problems for the complainant, the evidence nevertheless does indicate that she was traumatised by what occurred and was in shock when she returned to the unit. It is also clear upon her evidence that she was distressed and felt shamed by what had been done to her.

[48] It is virtually impossible to reconcile the sentences imposed in all rape cases; one is always able to find a sentence to support an argument that a particular sentence should be imposed in the case in question. Further, it must be recognised that the penalties for a variety of sexual offences were significantly increased in 1997. Though, of course, the penalty for rape remained at a maximum of life imprisonment, in order to maintain appropriate relativity with less serious sexual offences, sentences imposed for the offence of rape after 1997 had to be increased. For that reason sentences prior to 1997 are of little or no relevance at the present time.

[49] The respondent relied on the sentences imposed in *F* CA No 418 of 1996, *P* [2001] QCA 25 and *Williams* [2002] QCA 211 as supporting a sentence of eight years in this case. In broad terms those decisions do suggest that a sentence of eight years imprisonment here is within range.

[50] Given all the circumstances I am not satisfied that the sentence imposed is manifestly excessive and I would refuse leave to appeal against sentence.

[51] The orders of the court should therefore be:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[52] **ATKINSON JA:** I have had the advantage of reading the reasons for judgement of Williams JA. I agree with the proposed orders, for the reasons expressed by his Honour.