SUPREME COURT OF QUEENSLAND

CITATION:	*R v S* [2003] QCA 245
PARTIES:	**R** v **S** (appellant)
FILE NO/S:	CA No 117 of 2003 DC No 2225 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	5 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2003
JUDGES:	Davies and McPherson JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant convicted on one count of rape - where appellant acquitted on one count of assault occasioning bodily harm - where jury unable to agree on two further counts - where complainant was appellant's wife - where complainant was the only person to give evidence about the events - whether a rational explanation for differing verdicts existed CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - OTHER MATTERS - where there was corroborative evidence of complaint in respect of charge of rape - where appellant did not give evidence at trial - whether trial judge ought to have directed the jury that in the context of sexual offences, allegations are easily made but difficult to disprove CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW

TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - OTHER MATTERS - where appellant did not give evidence at trial - where it appeared from cross-examination by appellant's counsel at trial that appellant admitted to digital penetration having occurred - where there was no evidence from the appellant to indicate that he believed penetration was consensual - whether trial judge ought to have directed the jury with respect to s 24 of the *Criminal Code* 1899 (Qld)

Criminal Code 1899 (Qld), s 24

COUNSEL: P J Callaghan for appellant
C W Heaton for respondent

SOLICITORS: Robertson O'Gorman for appellant
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: After a trial in the District Court, the appellant was convicted on 16 April this year on one count of rape. At the same time he was acquitted on a count of assault occasioning bodily harm. The jury was unable to agree on two further counts, one of attempted rape and one of rape. He appeals against that conviction on two grounds, one of which was permitted to be entered by leave. They are:

(1) that the verdict was unsafe and unsatisfactory, this ground being intended to encompass an argument as to inconsistent verdicts, and the absence of a direction that the jury ought to approach the complainant's evidence with caution because, as it was put in the written outline but not so strongly by Mr Callaghan before us, allegations of this kind are easily made and difficult to disprove;

(2) that the learned trial judge erred in failing to direct the jury in accordance with the provisions of s 24 of the *Criminal Code*.

The circumstances giving rise to each of the charges, on the first of which only the appellant was convicted, occurred over two days, 6 and 7 July 2001. However, in order to understand the evidence with respect to those days, it is necessary to commence the narrative at an earlier time.

The appellant is a medical practitioner of 30 years of age. The complainant, who is his wife, is an accountant of 25 years of age. They married in India in January 2001, having met there early in the previous year pursuant to a family arrangement. The appellant was then a resident of India. The complainant was a resident in Australia visiting India for the purpose of meeting the appellant and some other possible suitors.

After the marriage the complainant returned to Australia and the appellant followed on 4 May 2001. Another marriage ceremony took place here on 19 May 2001. However, at no time prior to the events the subject of the charges was the marriage consummated.

The complainant explained in evidence that she did not have intercourse with the appellant because she was scared to. He would get angry and she was afraid. Even when they were getting to know each other in India, she began to become a little afraid of him and as time went on she became more and more afraid of him.

When they first came to Australia they stayed in a room at her parents' house, however, whenever he would get angry she would

go and sleep by herself in the lounge room. Eventually he moved out of the bedroom which had been allotted to them and which they had shared, into a bedroom downstairs. It was then decided that they would move out of the house to the house of her uncle and aunt in order, the complainant said, so that they could have a little time alone to talk.

They moved there on Thursday, 5 July 2001. When they went to bed together that night he started rubbing her back and legs and bottom and he was, she said, "quite aggressive". She asked him what he was doing and he said, "I'm caressing you." She told him she did not like it and went to leave the room. He grabbed her by the pyjamas, there was a struggle but she managed to get free and go into the lounge room and lie on the couch. She realised that her nose was swollen, and that she must have hit it somehow or that he had hit her. She was not sure how it had happened.

Her uncle and aunt, apparently aroused by the noise, came out to see what had happened. By this time the appellant was also in the lounge room. The complainant was crying but the appellant grabbed the back of her head and shoved it backwards and forwards, at the same time telling her aunt how disappointed he was in the complainant. He later managed to persuade her to return to the bedroom, promising that he would not do anything and so she returned.

I pause here to say that the complainant was the only person to give evidence about the events alleged to constitute the

offences with which the appellant was charged. The appellant himself did not give evidence, nor did the complainant's uncle or aunt with respect to the incident which I have just described.

On the following morning, the appellant and the complainant were left alone in the house at 8.30 a.m., the uncle and aunt having left to live with her parents. The complainant said that she was watching television when the appellant lifted her from her chair, threw her to the ground, pulled off her clothes and dragged her into the aunt's bedroom. According to her he then pinned her to the bed, sucked her shoulder and chest and slapped her about the head. She was struggling all this time. With the complainant continuing to resist, the appellant managed to prise the complainant's legs apart and put two fingers in her vagina. He then moved them in and out. It was hurting and the complainant asked him to pull them out, however he did not. This continued for a few minutes. He then put his moist fingers in her mouth which she attempted to resist as best she could. She was crying.

Finally he desisted and told her to go and have a shower. She did so but noticed then that she was starting to bleed from her vagina. There was quite a lot of blood. After a time he said he was hungry and wanted some lunch so she made him some lunch, but because she was not concentrating, being still upset, she did not make it properly. He then criticised her cooking. He ate lunch but she did not. He then went to the toilet. She took this opportunity, she said, to attempt to

escape but found the house had been locked from the outside. Both doors and windows were locked from the outside and she was unable to leave.

The act of digital penetration which I have described was the offence of rape on which the appellant was convicted. A little later the appellant said according to her, that he wanted to sleep and he wanted her to lie naked with him on the bed. She said that she was scared but if she did not do what he said he would hit her again. Accordingly she did as he said. He slept for about an hour. She did not. He then attempted to manoeuvre her into a position in the bed so that she was lying on her back with her legs apart. He did this by putting his thumbs in her armpits. She tried to keep her legs together. He put his knee between them and tried to keep them apart. He tried to insert his fingers in her vagina, again with a view it seemed to guiding his penis in. However, she said his fingers did not penetrate her vagina nor did his penis. During this episode she said he slapped her a number of times.

This was the count of attempted rape on which the jury disagreed. It is not difficult perhaps to see the reason for the disagreement. The count as originally charged was rape, and it is plain from what the learned trial judge said in his summing up to the jury that the complainant's evidence had been open to the jury by the prosecutor as including an act of penetration. Confusion as to what in fact occurred may have caused one or more members of the jury not to be satisfied

beyond reasonable doubt that the appellant had attempted to rape the complainant.

The complainant's aunt and uncle returned about 9 p.m. The complainant said that she showed them her swollen wrists and said, "Can't you take me home? I don’t want to be here." They told her that they would not, that she had to stay and work things out with him. She replied that she had tried but she was scared.

The complainant said that she later rang her mother and asked her to come and get her otherwise she would kill herself. She said the appellant grabbed the phone from her and told her mother that everything was all right and not to worry. They went to bed that night without further incident though, according to the complainant, the appellant insisted upon her sleeping without clothes.

I should add that the complainant's evidence about the phone call to her mother was not supported by her mother's evidence. However, there were unsatisfactory aspects of her mother's evidence not least that she did not support what was plainly said in her presence to Constable A in a conversation to which I shall shortly refer.

The next morning, according to the complainant, there was a further incident similar to the second incident I have described. He manoeuvred her to a position on the bed where she was lying on her back but moved her legs up into a

crouching position. He then got on top of her and inserted his penis in her vagina. She told him it hurt and asked him to take it out. He left it there for some time and then took it out. This was the third count, one of rape, on which the jury also disagreed.

Immediately after this act of intercourse, the complainant said that he pinned her down by kneeling on her upper arms. She said that he then punched her in the mouth twice and her lips bled. As she turned sideways, blood from her mouth went onto the doona. He accused her of spilling blood on the doona deliberately. This was a count on which the jury acquitted the appellant.

She said that she then made the appellant breakfast and after breakfast he went into her aunt's room to play Nintendo. He did this for a couple of hours. While he was there she remained in the kitchen and attempted to call the police, she said, but they could not hear her because she was whispering down the phone so she put the phone down. He then came out for lunch and she made him some lunch. He then went back and played Nintendo again and this time she managed to speak loudly enough on her phone call to the police so that they could hear. They arrived about 20 minutes after her call. Her aunt had to be called to open the house and she arrived with her uncle and the complainant's mother and her brother.

The complainant then went to the police station where she spoke to a female constable then Ms B but, at the time of

giving evidence, Ms D. She said that she told Ms D what had happened and showed her all her bruises. She was asked if she wanted to make a complaint and she said "no" she did not because she was scared of what he would do to her family. She was also concerned, she said, that the Indian community might think less of her family and she just wanted the matter to be over. However, she later changed her mind and on 9 September went to the police station again and made a complaint.

Ms D, who gave evidence, had taken notes on 7 July about what the complainant had told her. It seems, however, that her notes went only to the circumstances of count 1 in which she related the circumstances in her notes in some detail.

This may explain why the jury acquitted on count 4 and convicted on count 1. The complainant gave contemporary and detailed accounts of the events of count 1 but possibly not of the others.

There was a considerable body of evidence at the end of this two day period; that is, the two days in which they were apparently locked in the house together. The complainant was bruised on both arms, above her breasts, to her face and to her legs. She also had a cut on her lip that was bleeding and swollen. She also had damage to her vaginal region consistent with, but not consistent only with, violent penetration, namely two tears in her hymen and blood in her vagina.

Counsel for the appellant in cross-examining the complainant put to the complainant that the appellant had apologised for what had happened which she denied. He put to her that the appellant put his fingers in her vagina, that she told him it hurt and that he took them out. She agreed that he put his fingers in her vagina but denied that he took them out. It may be inferred from this that the appellant admitted inserting his fingers in her vagina.

Mr Callaghan for the appellant pointed to what he submitted were discrepancies and inadequacies in the complainant's evidence. Among those which were mentioned either in his written outline or his oral submissions were a false denial of ever attempting suicide, an inherently implausible account as to the extent of the violence, that some things of which she complained were not mentioned in her original statement and that there were some internal inconsistency in her evidence.

I have read her evidence which appeared to me to be on the whole consistent and convincing. I did not find any exaggeration in it. In particular, the extent of the violence of which she complained were supported by the photographs and medical evidence.

There was also a complaint by Mr Callaghan that the complainant's evidence was tainted by bias; in effect, that she only complained to the police eventually because she wanted to get rid of the appellant. However, her explanation of the circumstances, in my opinion, adequately explains her

conduct in a way which casts no discredit on her. She did not wish to make a complaint on 7 July because of concern for her family but, by September, it was clear to her, she said, that he was threatening her to silence her and it was then that she decided to complain.

Then it was said by Mr Callaghan that there was an inconsistency between the conviction on count 1 and the acquittal on count 4 which cannot rationally be explained. However, for the reason I have already given, in my opinion, there was a rational explanation for the inconsistency, namely that the complainant gave a contemporaneous account in her complaint to Constable A of the events of count 1 but either she did not mention or Constable A did not record the circumstances of her complaint in respect of count 4 or, for that matter, in respect of the other counts. This may have persuaded the jury to have a reasonable doubt in that respect.

There also appears to have been a question from the jury which indicates that they were in some doubt as to the circumstances in which the count 4, as alleged, occurred; for example, whether it occurred on the bed or somewhere else. This may have been an additional reason why the jury gave the appellant the benefit of the doubt in respect of count 4.

Finally, it is said with respect to ground 1 of the appeal that the learned trial judge should have told the jury, as it was put in the written outline but as I said not so strongly here, that in the context of sexual offences, allegations are

easily made but difficult to disprove. I do not think that any such direction is an essential part of directions in any specific category of offence and, perhaps, undesirable.

No doubt in some cases the accused's guilt may depend solely on the evidence of the complainant and there may be no corroboration. In such a case, a jury should be more careful than when there is supporting evidence. In the present case, however, in respect of count 1 there was, as I have already said, a contemporaneous account in some detail and there was evidence of injury to the complainant's vagina observed by the doctor which was consistent with, though not consistent only with, violent penetration of the vagina.

It follows, in my opinion, that these matters neither separately nor cumulatively justify a conclusion that the verdict of the jury was unreasonable and, in my opinion, that ground must fail.

In support of ground 2, counsel for the appellant submitted that the learned trial judge ought to have directed the jury, and failed to do so, with respect to s 24; as to the reasonable possibility that the appellant had an honest and reasonable but mistaken belief that the complainant had consented to the act of penetration the subject of count 1.

I would accept that such a direction may be given, notwithstanding that the only evidence directly on the question in issue comes from the complainant; that is, where

there is no evidence from the defendant. And it does appear from cross-examination by the appellant's counsel at the trial that the appellant admitted to digital penetration having occurred but apparently asserted that it was consensual. On the other hand, there is nothing from the appellant in this case, for example in a police interview, to indicate that he had any such belief as Mr Callaghan now says was open as a matter which ought to have been put to the jury by way of direction.

The only evidence of the circumstances of this offence were given by the complainant and, on her version, there could have been no possibility that the appellant had any reasonable belief that the complainant was consenting to digital penetration. This was no doubt the view of trial counsel who adverted to the question but did not seek a direction from the trial judge in this respect. On the contrary, when asked by the learned trial judge about this he said, "No, because she said she was dragged in there kicking and screaming basically."

In my opinion, the appellant's counsel at trial was correct in his approach and this was not a case where there could have been any possibility on the only version given at count 1 that the complainant consented or that the appellant could have had a reasonable belief that she did so.

In my opinion, this ground must fail also and the appeal must accordingly be dismissed.

McPHERSON JA: I agree.

ATKINSON J: I agree.

DAVIES JA: The appeal is dismissed.
