SUPREME COURT OF QUEENSLAND

CITATION:	*R v Holmes* [2003] QCA 546
PARTIES:	**R** **v** **HOLMES, Christopher Gordon Michael** (appellant)
FILE NO/S:	CA No 286 of 2003 DC No 1376 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2003
JUDGES:	McPherson and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTIONS AND NON-DIRECTION – verdicts reflected that jury accepted only some of complainant's evidence – whether judge's direction adequate for the requirement discussed in *R v M* *Criminal Code* 1899 (Qld), s 24, s 349 *R v M* [2001] QCA 458; CA No 126 of 2001, 26 October 2001, considered
COUNSEL:	M J Byrne QC for the appellant D L Meredith for the respondent
SOLICITORS:	Bell Miller for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** The appellant was arraigned in the District Court on four counts of rape of the complainant alleged to have taken place in Brisbane, as to count 1 between 1 June and 5 August 2002, and as to counts 2, 3 and 4 on 25 August 2002. The jury found him guilty of counts 2 and 3 but not guilty of counts 1

and 4. The charges in counts 1, 2 and 3 relied on the extended meaning now given to the offence of rape provided in s 349 of the Code. Count 4 charged a single act of rape in the primary or original sense of that word.

[2] The appellant had just turned 21 at the time of the incidents and the complainant was 15 going on 16 years old. Her evidence at the trial was that she worked at a fast food outlet in the suburbs. One night in June or July 2002, the appellant, with whom she was acquainted, arrived there with a friend A who was driving a car. They offered her a lift home at the end of her shift. When they all left in the car, she was sitting in the back seat and the other two in front; but, after they had travelled some distance, the appellant jumped into the back seat with her, and began kissing her, which she did not resist. He then took her hand and placed it on his penis before exposing his penis, and forcing her head down on to it and holding it there while she licked his penis (count 1). She resisted this, but went on doing it, she said, for about three to five minutes, after which she got back up and they resumed kissing.

[3] In cross-examination the complainant agreed that the time for which she had had the appellant's penis in her mouth was not five minutes but 30 to 45 seconds which was what she had previously said at the committal proceedings. She also agreed that when she was dropped off at her home at the end of the journey, she had thanked A for the lift, and had kissed the appellant goodbye. She said she had not complained to her mother about what had happened on that occasion because she and her mother were not on the best of terms at the time.

[4] Counts 2, 3 and 4 all related to a single occasion on 25 August 2002, which was a Sunday night. The complainant was working at the same fast food outlet when the appellant arrived in a car driven by another friend M and offered her a lift home. They waited for her to finish the shift, whereupon she got into the back seat and they drove off. At first the car was driven in a direction away from her home. The appellant climbed into the back seat and started kissing her. Her evidence at the trial was that he undid her belt and tried to take her pants off, and then slipped his hand down and put his fingers inside her vagina (count 2). She resisted and pulled them out. Then he grabbed her hand and put it on his exposed penis before pushing her head down on to it forcing her to take it in her mouth (count 3). She was struggling and resisting this. Eventually he sat her on his lap with her back towards him, and inserted his penis in her vagina (count 4). She said "No" and managed to free herself. They then engaged in kissing again. When they arrived at her home, she got out of the car, went inside and telephoned a male friend RH. She was in a state of distress and told him just "I said no". In his evidence at the trial RH said she told him she had "just been raped."

[5] Her evidence was enough to prove counts 2, 3 and 4 if the jury accepted what she said; but there were some discrepancies or inconsistencies in her testimony in chief and other evidence she gave in cross-examination or had given at the committal hearing. She agreed that the kissing in the back of the car was consensual. She also said the appellant had offered her "weed" to smoke, which she refused, and she described the weed in some detail. At the committal hearing she had said that she had never in fact seen it. She also agreed that at those proceedings she had given no evidence of oral sex having taken place on the night of 25 August.

[6] Dr Leadbeatter examined the complainant at 8:10am at the Royal Brisbane Hospital on 26 August 2002, which was the morning after the offences charged in counts 2, 3 and 4 were alleged to have taken place. She found two 2mm tears in the posterior fourchette and a 1mm abrasion on the labium minora. They were consistent with having been forcibly rubbed by fingers or with having been caused by the insertion of a penis. The complainant had complained to her of a penis being inserted in there. Dr Leadbeatter took vulval swabs and smears, as well as wet and dry swabs from her lips and surrounds. She also said that the complainant had related to her that the driver M had urged the appellant in the car to use a condom, and that the complainant had said she protested that she did not want to have a baby. She said she was afraid to apply to M for help because there were two of them and they were friends.

[7] M, who was driving the car on the Sunday night 25 August, gave evidence that he had seen consensual kissing and embracing between the complainant and the appellant, but had not seen, or been able to see, her sitting on the appellant's lap, nor had he noticed any sign of distress on her part. He had, however, heard her at one stage say "No I don't want to", and the appellant had called out to M "I'm not screwing her", or words to that affect. The appellant gave a lengthy recorded interview to the police (ex C), which was tendered at the trial, in the course of which he made a number of assertions as well as some admissions; but he did not himself give evidence at the trial.

[8] On appeal the appellant was given leave to incorporate as grounds of appeal that (1) the verdicts were unreasonable, and also (2) that they were inconsistent. Essentially, the submission on appeal was that at the trial the prosecution case against the appellant on all four counts had depended primarily on the testimony of the complainant; but that, having rejected her evidence on counts 1 and 4, the jury ought also to have rejected her evidence on counts 2 and 3, and that they were unreasonable or inconsistent in not having done so.

[9] There were, however, some matters that differentiated the Crown case on counts 2 and 3 from the other two. In particular, in the police interview the appellant had denied that the incidents forming the basis for counts 1 (the oral sex on the night in June or July) and count 4 (the penile rape on the night of Sunday 25 August) had occurred at all. As to counts 2 (inserting his fingers in the complainant's vagina) and count 3 (forcing her head down on to his penis), he admitted that these events had taken place, but claimed that she had consented to them. In addition, there was, in relation to count 2, the evidence of Dr Leadbeatter that on the morning of 26 August she found tears and abrasions to the appellant's vagina, which could have been caused by either a finger or a penis. Because the doctor could not say which it was, it was reasonable for the jury to conclude that something had been inserted; and, having regard to the appellant's admission to the police, that at the very least it was his finger or fingers.

[10] In short, it seems likely that the jury were prepared to accept the evidence of the complainant about what she said had happened in circumstances where her evidence was supported (as it was in the case of counts 2 and 3) by other evidence; but that they entertained a reasonable doubt about it in the case of counts 1 and 4, where it was not supported by anything else either from Dr Leadbetter or from the appellant himself. It can hardly be suggested that it would have been irrational for

them to have approached the matter in that fashion or to have distinguished between the two combinations of charges in that way.

[11] That left for their consideration the question whether the complainant had consented to the appellant's actions forming counts 2 and 3. It is true that the issue of her consent was common to all four charges, as to which it was for the prosecution to prove that the complainant had not consented to the appellant's action. In relation to count 1, the appellant said in the record of interview that he believed she was consenting to the oral sex that took place on the first occasion in June or July. His Honour directed the jury on this element in some detail, pointing out that it was for the Crown to prove that his belief in that state of affairs was not reasonable (Code, s 24). It may very well be that the jury were left with a doubt about that element on that occasion, and that that was the or one reason why they acquitted on count 1. Such a conclusion could properly have been reached without compromising the credibility of her evidence that the appellant's conduct in relation to count 1 had taken place without her consent in fact.

[12] The more difficult case is count 4. Although one cannot be sure about it, it is perhaps more likely that the jury retained a doubt whether the rape she alleged on that occasion had actually taken place. Logically, such a conclusion might be seen as diminishing her overall credit in the eyes of the jury. It was submitted that his Honour ought therefore to have cautioned the jury in accordance with what was said in *R v M* [2001] QCA 458 § 18. As to that, several comments are apposite. One is that no direction to that effect was sought at the trial. Another is that it is not a complaint or ground raised in the notice of appeal. A third and more important weakness in the submission is that the learned trial judge did not give the jury a direction that they could accept parts of the complainant's evidence and reject other parts. Instead, what he said was that the jury might choose to give some evidence a lot of weight, and other evidence some but not very much weight, adding that:

> "You are not confined to accepting or rejecting in total the evidence of any particular witness."

[13] What is more to the point, his Honour went on:

> "You may consider, for example, that some things a witness said cannot be accepted, but that other things the witness said deserves some weight or even considerable weight. These are entirely matters for you and I would merely caution you on one point. If you form the view that a witness had deliberately misstated something while giving evidence to you, you should be particularly cautious about accepting any other evidence of that witness and carefully consider what weight can be properly attributed to any which you do accept."

This, in the circumstances of this case, was in every way an adequate direction for the purposes of the requirement discussed in *R v M* [2001] QCA 458, and no challenge to its sufficiency has been directed against it on appeal. It would have been quite inappropriate for the judge to go beyond that caution and tell the jury that they were bound to reject the evidence of the complainant if they did not accept every part of it.

[14] It is therefore not correct to say that the summing up failed to caution the jury of the danger described in *R v M*, or that in accepting her evidence in relation to counts 2 and 3, but not count 4, the verdicts are inconsistent. It was open to the jury

to conclude that, in relation to the much more serious conduct charged in count 4, they were simply not satisfied beyond reasonable doubt that he had raped her in the manner alleged. In that particular, they may reasonably have thought that the evidence of Dr Leadbetter and of the driver M went some way towards supporting her testimony on counts 2 and 3 but not necessarily count 4. The injuries on her vagina were not unequivocally referable to the action of inserting the appellant's penis rather that his finger, and the jury cautiously ascribed it to the latter. The differing verdicts on each of the two sets of four counts are capable of being explained not as demonstrating inconsistency but rather careful discrimination by the jury.

[15] I would dismiss the appeal against conviction.

[16] **WILLIAMS JA:** I agree that the appeal should be dismissed for the reasons given by McPherson JA.

[17] **MCMURDO J:** I agree that the appeal should be dismissed for the reasons given by McPherson JA.