SUPREME COURT OF QUEENSLAND

CITATION:	*R v Danine* [2004] QCA 102
PARTIES:	**R** **v** **DANINE, Ashir** (appellant)
FILE NO/S:	CA No 323 of 2003 DC No 615 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	25 March 2004
JUDGES:	McPherson JA, Williams JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against convictions dismissed**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CORROBORATION – whether trial judge erred by directing the jury that the medical evidence, that was admitted or not contested by the appellant, was capable of constituting corroboration of complainant's evidence CRIMINAL LAW – EVIDENCE – EVIDENCE OF SEXUAL EXPERIENCE, REPUTATION AND MORALITY – whether if, in a rape trial, the complainant gives evidence of virginity to establish good character the defence is entitled to leave to cross-examine her on sexual conduct occurring some months after the acts complained of *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4 *R v Allingham* [1991] 1 Qd R 429, considered *R v Barrow* [2001] 1 Qd R 525, applied *R v Baskerville* [1916] 2 KB 658, applied *R v Berrill* [1982] Qd R 508, applied *R v Kerim* [1988] 1 Qd R 426, referred to *R v McK* [1986] 1 Qd R 476, applied
COUNSEL:	A J Rafter SC for the appellant D L Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: This is an appeal against conviction at a trial on an indictment in the District Court charging three counts of rape alleged to have been committed upon the complainant on 22 February 2002. Ground 1(a) in the notice of appeal having been abandoned, the grounds of appeal as amended are now that: (b) the trial judge erred in not giving leave under s 4 of the *Criminal Law (Sexual Offences) Act 1978* to cross-examine the complainant about other sexual activity; (c) that the judge was wrong in directing the jury that medical evidence concerning injuries to the complainant's vagina was capable of supporting her testimony; and (d) that the verdicts of the jury were unreasonable.

[2] In 2002 the complainant was a 16 year old student attending a suburban high school. She had a disagreement with her mother, as a result of which she went to stay in a caravan at her grandmother's house, where a 14 year old school friend Joanna was also staying. On Friday 22 February, the two of them were collected in a motor vehicle by Jamie Anne, who was also a student at the school. They were planning to go to the coast late in the day, but in the course of the afternoon met the appellant, then aged 26, whom Joanna appeared to know. The group, which by then included Shane, another student from the school, decided to go with the appellant; but his vehicle was giving trouble, so they all travelled to the coast in Jamie Anne's car. Some marihuana was smoked beforehand, and on the way Archie, as the appellant was known, bought a carton of beer which they drank.

[3] It was dark when they arrived at the beach. They all went down to it together. Jamie Anne soon went back to the car, leaving the complainant and the defendant walking together along the beach alone, where they sat down. It was there that the appellant was alleged to have penetrated the complainant digitally and with his penis, as well as forcing her to take his penis in her mouth leading to ejaculation. The appellant, who gave evidence at the trial, claimed that the complainant had consented to his doing these things. However, when the vehicle stopped on the return journey, Joanna, sensing something was amiss, followed the complainant to the toilet and asked her if she had been raped. The complainant replied "whatever happened, happened", and said she did not want to talk about it.

[4] At school on the following Monday morning she told her friend Grace what had happened. She was referred to the school guidance officer and the police were called. She was examined by Dr Margaret Mobbs, who is a medical practitioner of experience. The appellant was later charged, and committal proceedings took place, leading to the convictions in September 2003 after a trial at which evidence was given by the complainant and the appellant and those who had travelled in the group to the coast on the day in question.

[5] The complainant gave evidence that it was dark on the beach at Miami where they sat down alone. They were chatting, when the appellant said "Can you handle?" She asked what he meant; he upbraided her for pretending not to know, and kept asking her the same question. When he kissed her, she turned her head away, and said she wanted to go back to the car; but he pulled her pants down to the

knees, pushed her shoulder to the ground, and held her down. He pulled her underpants off and started touching her vagina, putting his fingers inside, which hurt her. He took his pants down exposing his erect penis, and lay on top of her, trying to push his penis into her. It went part of the way in, and was very sore for her. She tried to push him off. She was scared, and kept saying she wanted to return to the car. He said if he couldn't get in there, then she had to suck on it, and he pushed his penis well into her mouth. He eventually ejaculated, told her to swallow it, and then to kiss him, which she did. She did not consent to any of this. On the way back in the car, she sat away from him and said nothing.

[6] The appellant's account of what had happened on the beach differed from hers. They sat some distance from the car, and the complainant started kissing him. They both initiated the kissing. Then she placed her hand inside his board shorts and started playing with his penis. They each moved their pants and underpants down to their knees. He placed a finger in her vagina, and said to her "Can you handle?" He got on top of her; then they stopped and removed their lower clothing. He was trying to put his penis inside her; but he didn't think he had succeeded when she told him to stop because it was sore, saying "Sorry, I'm sorry". He asked her to give him a head job, which she did, and he ejaculated. They saw the car lights being flashed and started to walk back to it. They were holding hands at first but she let go when they were about five metres from the car, and walked there by herself. They got back into the car. On the way back to Brisbane, she sat on his lap, and told him that she had been unable to have sex that night because she did not feel like it. He said "All right. Some other night?", to which she said "Yep, some other night". She denied having this conversation.

[7] Turning to ground (b) of the appeal, in the course of her evidence in chief, the complainant was asked and said that before that night she was a virgin. It was put to her in cross-examination that she had seen her opportunity and "went for it". Her answer (trs at p 67) was that she wasn't really interested in having sex with anyone, especially Archie. Her family went to church and were taught not to have sex with anyone until marriage. In cross-examination, defence counsel asked the trial judge for leave under *Criminal Law (Sexual Offences) Act 1978* to ask questions of the complainant about her sexual activity. The application was made on the strength of the answer she had given in cross-examination at p. 67. Defence counsel submitted that she was now the mother of a baby only some months old, having not long after this incident become pregnant to another man whom she had not married. After hearing argument, his Honour refused leave to cross-examine the complainant on that matter, holding that it was not substantially relevant to the facts in issue, and not likely to materially impair confidence in the reliability of her evidence.

[8] In this his Honour was, in my opinion, correct. This was a trial relating to a sexual offence, as to which s 4 of the Act prescribes a series of rules, which are as follows:

> **"1.** The court shall not receive evidence of and shall disallow any question as to the general reputation of the complainant with respect to chastity.
>
> **2.** Without leave of the court -
> (a) cross-examination of the complainant shall not be permitted as to the sexual activities of the complainant with any person;

(b) evidence shall not be received as to the sexual activities of the complainant with any person.

3. The court shall not grant leave under rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.

4. Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons must not be regarded as having substantial relevance to the facts in issue only because of any inference it may raise about general disposition.

Without prejudice to the substantial relevance of other evidence, evidence of an act or event that is substantially contemporaneous with any offence with which a defendant is charged in an examination of witnesses or a trial or that is part of a sequence of acts or events that explains the circumstances in which such an offence was committed shall be regarded as having substantial relevance to the facts in issue.

5. Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons is not proper matter for cross-examination as to credit unless, because of special circumstances, the court considers the evidence would be likely to materially impair confidence in the reliability of the complainant's evidence.

The purpose of this rule is to ensure that a complainant is not regarded as less worthy of belief as a witness only because the complainant has engaged in sexual activity."

[9] The reference in his Honour's ruling to substantial relevance to facts in issue is in rule 4, and as to materially impairing confidence in the reliability of the complainant's evidence is in rule 5. The ultimate fact in issue at the trial of this appellant was whether the complainant had consented to the acts of sexual penetration charged against him. In *R v Allingham* [1991] 1 Qd R 429, a majority of the Court of Criminal Appeal held that it was permissible for the prosecution in the circumstances of that case to adduce evidence in chief from the complainant that, before the occasion of the alleged offence, she was a virgin. Speaking of the Act of 1974, Williams JA (as he is now) said ([1991] 1 Qd R 429, 441) that, since it was passed, a trial judge would "almost certainly have to permit cross-examination of the complainant as to her previous sexual activities if she first introduced evidence of her good character by saying that at the material time she was a virgin". It is, however, quite clear that by "previous sexual activities" his Honour was there referring to the sexual activities which had taken place before, and not after, the incident giving rise to the charge being tried. This is made clear by the second paragraph of rule 4, which excepts evidence of an act or event that is "substantially contemporaneous" with an offence with which the defendant is charged, or explains

the circumstances in which it was committed. Sexual activity with another person, which occurred some months after the sexual acts charged here took place, is not capable of throwing any light on the question whether the complainant consented to the acts alleged to have been carried out by the appellant on this occasion on 22 February 2002.

[10] The same is true here in relation to rule 5 of s 4. To learn that she fell pregnant to someone else at some time after that date throws no shadow on the credibility or reliability of the complainant's evidence, whether as to her being a virgin on 22 February or otherwise. If that were not so, every woman, married or otherwise, would become liable to cross-examination about her subsequent sexual activities once she claimed to have been a virgin on an earlier occasion when she said she was raped. Apart from defeating the plain object of the Act, it could do nothing to shake confidence in the reliability of her evidence to know that she had engaged in sexual activity later on. Many women do so at some time after being raped without affecting their credibility about that event.

[11] Ground (b) therefore fails. Ground (c) complains of the portion of the judge's summing up with respect to her physical condition when examined at 5.15 pm on the Monday following the incident. There were two small injuries to the vagina, one of which consisted of a split on the right side of the labium minorum, likely to have been caused by stretching of the skin, which was described as still healing and tender. There was also an abrasion apparently caused by something like fingers moving across and removing superficial layers of skin. Dr Mobbs said it was quite possible for penetration to occur without a tear in the hymen, especially on the first few occasions. On examination, her attempts to insert a finger in the complainant's vagina still caused pain, and she did not persist in trying to do so.

[12] In summing up, the learned trial judge warned the jury to scrutinise the complainant's evidence with great care and only to find the accused guilty if, after doing so, they were satisfied beyond doubt that she was telling the truth. In scrutinising her evidence, they should look for any independent evidence from a source other than the complainant that supported her testimony that the acts of penetration were without her consent. He said that there was some independent evidence which, if they accepted it, might support her evidence. He read passages from Dr Mobbs' testimony, saying that it was entirely a matter for the jury whether they thought it supported what the complainant had said.

[13] The complaint that the appellant makes is that the medical evidence was "intractably neutral" (*R v Kerim* [1988] 1 Qd R 426, 447), meaning that, as between the complainant and the accused, it was equally consistent with the prosecution case and the defence case. Both the complainant and the appellant testified to sexual acts capable of causing the injuries revealed on examination, although that is not necessarily fatal to its capacity to support the complainant's version (*R v McK* [1986] 1 Qd R 476, 480; *R v Burrow* [2001] 1 Qd R 525, 535). The appellant in his evidence seemed inclined to doubt that he had in fact succeeded in effecting penetration of her vagina with his penis; but from what the complainant said, the jury could well have been satisfied that he had done so, and Dr Mobbs supported her testimony in that material particular.

[14] As regards the narrower issue of whether the medical findings were capable of supporting the complainant's account of events, the question is whether it tended to

show in some material particular or respect that the complainant's story was probably true: see *R v Baskerville* [1916] 2 KB 658, 665, referred to in *R v Berrill* [1982] Qd R 508, 524. Its function was not to provide proof, independently of her testimony, that rape had been committed on her: if that were its effect, her own evidence would not have been needed to establish the prosecution case. It must also be borne in mind that when the complainant gives her evidence in chief, she seldom knows precisely what, if any, of the detail of her account the accused is proposing to admit. Independent evidence is therefore capable of supporting material particulars of a complainant's evidence whether or not he later admits some of it to be correct or refrains from contesting it. There is authority that an accused "cannot neutralise potentially corroborative evidence by admitting it and giving non-incriminating explanations": see *R v Barrow* [2001] 2 Qd R 525, 535. In this instance, the medical evidence went some way to support her claim that penetration had occurred and that sufficient force was used to hurt and slightly injure her, irrespective of whether, as she claimed she was not, or, as he claimed, she was, a consenting party.

[15] Ground (c) therefore fails, and I turn to ground (d), which is that the verdicts were unreasonable and that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. This ground has several different constituents, which on closer examination appear to be related in some ways to other events that took place principally after the complaint was made to the police. There was evidence from some of those present, notably Joanna and Shane who testified for the defence, that the complainant and the appellant had returned from the beach holding hands until they neared the car; and that on the return journey home in the car the complainant had been sitting on the appellant's lap and kissing him. These statements, which were subsequent additions to the original statements given to the police by Joanna and Shane, were denied by the complainant, whose version was in this respect partly confirmed by Jamie, who gave evidence for the prosecution at the trial. She said that in the car on the return journey the complainant was shaking and in a distressed condition.

[16] The complaint of rape became, as perhaps naturally it would, a talking point among students at the school, with various individuals holding differing views about the justification for the complaint. The complainant in her evidence said she was put under pressure by some of her peers, notably a fellow student Adam Berry as well as outside school by the appellant's wife Cathy, to withdraw her complaint against the appellant. Eventually she did so, attending at the offices of the firm of solicitors acting for him, where she provided a lengthy and detailed signed statement in which she withdrew her earlier allegations. Later, however, she retracted her withdrawal, and confirmed the substance of her original complaint, which she gave in her evidence at the trial.

[17] Being inconsistent with her present testimony at the trial, the complainant's statement withdrawing her complaint was inevitably the focus of cross-examination by counsel for the defence. Her explanation for her action in withdrawing her complaint was that she had become the target of harassment by Adam and others at the school, which drove her to the point where she succumbed to the pressure she claimed they were exerting. The defendant's wife also approached her with the same end in view, and on another occasion visited the complainant's home and engaged in a contretemps with her mother, in which feelings ran high and words were exchanged. Those concerned in exerting these forms of influence (if in fact

they did so) appear to have been ignorant or reckless of the risk they ran of perverting the course of justice.

[18] The upshot was that witnesses at the trial tended to line up on one side or the other to give evidence in support of or against the complainant, and of her claim that she had been subjected to pressure to withdraw her complaint. Adam, who admitted he was a good friend of the appellant, denied he had confronted the complainant about the matter or tried to persuade her to withdraw the charge. On the other hand, the complainant's friend Grace gave evidence of having overheard Adam speaking in such terms to the complainant at school. It may be that at some point in the process, the investigation of these questions at the trial threatened to raise a separate issue collateral to the main issue of whether the complainant had in fact consented to the acts complained of; but the questions were obviously closely related. It was, however, the defence who introduced the matter through cross-examination and evidence; and, if it verged at times on becoming a collateral inquiry, no objection was made about it either at the trial or on this appeal.

[19] It is clear that the jury concluded that pressure had been exerted on the complainant to abandon her complaint. I do not mean by the appellant's solicitors, who, according to the complainant's own account of it, acted with complete propriety. But if the jury had not formed an affirmative view of that matter, it is difficult to believe that they would nevertheless have gone on to find the appellant guilty. There were matters which may have led them to form an unfavourable impression of the appellant's credibility. One was that, when first approached by the police, he denied knowing the complainant at all. Another was that, when asked about it by the complainant at the beach, she said he denied it was true that he lived with a "lady" and their children. On the contrary, he told her that he was only 20, and lived at home with his parents, so how, he asked, could he have kids? To my mind, it is rather surprising that a married man, aged 26, with four children should be such apparent close friends with high school students who were aged between 14 and 17 years old. It was a matter of which something was made in cross-examination of the appellant by prosecuting counsel. Whether it influenced the jury, who would have had a keener perception than any judge of prevailing standards of social behaviour among young people, was entirely a matter for them to determine.

[20] Having read the evidence of the complainant, which appears to have been given in clear and forthright terms, I consider that the jury were entitled to accept it and the testimony of the other prosecution witnesses, and that they acted reasonably in doing so. It is not a case in which the verdict ought to be set aside. Ground (d) in the amended notice of appeal also fails.

[21] I would dismiss the appeal against the convictions on all three counts.

[22] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA and will not unnecessarily repeat factual matters recorded therein. Though I agree with the conclusion he has reached it is desirable that I add some brief reasons of my own.

[23] There were a number of features of this case which called for careful consideration by the jury. The young complainant went to some lengths to deceive her grandmother as to her plans for the evening in question. Being aware that her

grandmother would not approve of her going out at night with males, the complainant obtained the agreement of the others for a change of plans. Instead of a male driver picking her up, she was to be collected by one of the girls on the pretext that they were going to the movies to celebrate a birthday. Thereafter the complainant voluntarily participated in the smoking of marijuana and the drinking of alcohol with the males in the party, including the appellant. There was also evidence, some disputed, of acts of familiarity between the complainant and the appellant during the drive to the Gold Coast and before they went onto the beach. Further, there was evidence, much of which was disputed by the complainant, of acts of familiarity between the complainant and the appellant after the episode on the beach and during the drive back to Brisbane. Then there is the evidence, discussed at length by McPherson JA, of the complainant's retraction of her complaint.

[24] The jury had to give careful consideration to all of those matters before they could arrive at the conclusion that the appellant was guilty. The learned trial judge adequately addressed all of those matters in the summing up, and there was no submission that the summing up was deficient in that regard.

[25] As McPherson JA has pointed out, the complainant gave her evidence in clear and forthright terms, and her explanation for her signing the withdrawal of the complaint was also given in a convincing way. Against that there were aspects of the appellant's evidence which the jury may well have found to be of concern. For example, there was his initial denial to the police of knowing the complainant at all, and also there was no satisfactory explanation for his association with a group of school girls. A reasonable jury may well have been troubled by the evidence that he misrepresented his status to the complainant.

[26] I agree with McPherson JA that the learned trial judge was correct in refusing to allow the defence to cross-examine the complainant about sexual activity some months after the incident in question. I would add to all that McPherson JA has said on that issue another consideration which I consider relevant. It is generally accepted that a young virgin who is raped suffers significant emotional trauma in consequence. It is not inconceivable that a young girl may well be so affected by what happened that she would participate in some sexual activity a few months later which was out of character with her attitude and conduct prior to the rape. If cross-examination of the type suggested here was permitted then it would follow that a collateral issue was raised, namely the relationship between the sexual episode in question between the complainant and appellant and the subsequent sexual conduct. That reinforces the conclusion that the subsequent conduct would not be likely to materially impair the jury's confidence in the reliability of the complainant's evidence as to what occurred on the occasion in question.

[27] That leaves for consideration ground (c), namely that the learned trial judge erred "in directing the jury that they could find support for the complainant's contention that she did not consent to sex in the medical evidence of the injuries to the complainant's vagina." The relevant passage in the summing up is as follows:

> "Independent evidence which supports the complainant's evidence is evidence from a source other than the complainant which supports her evidence that the penetration was without her consent. In this case there is some independent evidence which, if you accept it, may support the complainant's evidence."

[28] Thereafter the learned trial judge quoted the medical evidence as to the relatively minor injuries to the vagina. As McPherson JA has pointed out, the prosecution evidence was led before the jury knew exactly what the appellant's evidence would be. It was incumbent upon the prosecution to prove beyond reasonable doubt that there had been penetration. That is why the medical evidence was led, and it clearly supported the complainant's evidence that the appellant had penetrated her vagina. Given the authorities to which McPherson JA has referred, there could be no complaint with the second sentence in the passage from the summing up quoted above.

[29] The submission of counsel for the appellant concentrated on the first sentence in that quote, wherein it was said that the learned trial judge was impliedly indicating that the medical evidence could support the complainant's evidence that the penetration was without her consent. That interpretation received some support from a later passage in the summing up where the learned trial judge was summarising the prosecution case. There he said that the prosecutor "finally said that the vaginal injuries support the complainant's evidence that what occurred wasn't consensual."

[30] The medical evidence supported the complainant's evidence to the extent that it confirmed her evidence that her vagina had been penetrated on the occasion in question. However, that evidence was strictly neutral on the issue of consent. When the sentences quoted above from the summing up are read in the context of the summing up as a whole it does appear to me that the learned trial judge was saying no more in a positive sense than that the medical evidence supported the complainant's evidence as to penetration. On that basis, given the authorities to which McPherson JA has referred, there was no error in the summing up.

[31] This was a case where it has to be said that there was a significant advantage in being able to see both the complainant and appellant give evidence. Ultimately the critical issue for the jury was one of credibility. As I have indicated above, there were parts of the evidence which could clearly have justified a jury concluding that the appellant's evidence should be rejected and that the complainant was telling the truth when she said she did not consent to what occurred on the beach. It is impossible for this court to determine the extent to which the conclusion reached by the jury was affected by the fact that the jury had the opportunity of assessing both the complainant and the appellant whilst they were in the witness box.

[32] Ultimately I have come to the conclusion that there were no errors made by the learned trial judge and that the verdict of the jury should not be regarded as unsafe and unsatisfactory.

[33] I agree with the reasons of McPherson JA in concluding that the appeal against convictions should be dismissed.

[34] **PHILIPPIDES J:** I agree with the reasons of McPherson JA and the additional reasons of Williams JA. The appeal against conviction should be dismissed. The learned trial judge properly declined to give leave under s 4 of the *Criminal Law (Sexual Offences) Act* 1978 to cross-examine the complainant about other sexual activity alleged to have taken place after the incident the subject of three charges of rape. I fail to see any basis on which cross-examination as to the alleged subsequent events could have been permitted. *R v Allingham* [1991] 1 Qd R 429 on which

reliance was placed by the appellant provides no support for the appellant's contentions.

[35] As to the second ground of appeal, there was no error in the learned trial judge's directions concerning the medical evidence of the injuries to the complainant's vagina. For the reasons given by McPherson JA and Williams JA, I agree that the directions in question were merely directed to the proposition that the medical evidence supported the complainant's evidence as to penetration.

[36] As to the final ground of appeal, I agree that this is not a case where the jury's verdicts can be said to have been unreasonable.