SUPREME COURT OF QUEENSLAND

CITATION:	*R v Awang* [2004] QCA 152
PARTIES:	**R** **v** **AWANG, Samuel Daniel** (appellant)
FILE NO/S:	CA No 394 of 2003 DC No 124 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	14 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2004
JUDGES:	McMurdo P and McPherson and Williams JJA 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 – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of deprivation of liberty but acquitted on assault with intent to commit rape and sexual assault – where complainant extremely intoxicated at time of offence – where there was evidence from other witnesses about the deprivation of liberty offence but not about the other offences charged – where learned trial judge directed jury that they may wish to only act on complainant's evidence where it was supported – whether verdicts inconsistent – whether verdict on deprivation of liberty unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – AVAILABILITY AT TRIAL; MATERIALITY AND COGENCY – PARTICULAR CASES – MATERIALITY AND COGENCY – EVIDENCE DIRECTED TO CREDIT – where complainant indicated in cross-examination that she had not considered that it was possible for her to get criminal

compensation as a result of the offence – where it emerged after conviction that complainant had consulted solicitors regarding compensation – where appellant's solicitors could not by exercise of reasonable diligence have become aware of this evidence before verdict – whether jury would have arrived at a different result if additional evidence had been before it

Criminal Code 1899 (Qld), s 355

Go v The Queen (1990) 102 FLR 299, cited
Meering v Grahame-White Aviation Co Ltd (1919) 122 LT 44, cited
R v Armstrong [2001] QCA 559; CA No 208 of 2001, 7 December 2001, distinguished
R v Inwood [1973] 1 WLR 647, considered
Reppas v The Queen (1998) 20 WAR 178, considered

COUNSEL: P J Callaghan for the appellant
M J Copley for the respondent

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

[1] **McMURDO P:** I agree with Williams JA that the appeal should be dismissed for the reasons he gives. I only wish to add the following brief observations.

[2] The offence of deprivation of liberty under s 355 *Criminal Code* is based on the common law crime of false imprisonment. The essence of the offence is the deprivation of liberty of the complainant. The phrase "or otherwise" in s 355 recognises, as the common law recognised, that people may be deprived of their liberty not only against their will but also where the deprivation is achieved by fraud, done without knowledge or the victim lacks capacity. An example would be to lock a sleeping or intoxicated woman in a room to prevent her from leaving should she try. Even if she did not know that the offender had locked her in and did not try to leave, she would have been deprived of her liberty under s 355. See *Meering v Grahame-White Aviation Co Ltd*[1] and *Go v The Queen*.[2]

[3] That was not the evidence here. Despite the complainant's drunkenness, she was able to telephone her friend, Mr Land, and ask for assistance. Later when he arrived, she again called out for help. When the police attended she was pleading "please let me go". This evidence supported her testimony that she was detained against her will. Nor was this a case like *R v Armstrong*[3] where the defence of honest and reasonable mistake of fact was equally apposite to the offence of deprivation of liberty as to the issue of consent in the sexual offences. Here, that defence was not raised on the prosecution case and the appellant did not give or call evidence.

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1 (1919) 122 LT 44, Atkin LJ 53-54.
2 (1990) 102 FLR 299; (1990) 73 NTR 1, 19-21, Asche CJ, Angel J agreeing.
3 [2001] QCA 559; CA No 208 of 2001, 7 December 2001.

[4] The jury were entitled in this case to not be satisfied beyond reasonable doubt of the complainant's evidence as to the sexual offences. There were weaknesses and inconsistencies in her testimony. She was intoxicated and her evidence as to the sexual offences was unsupported. The jury were nevertheless entitled to be satisfied beyond reasonable doubt that the appellant unlawfully deprived her of her personal liberty because there was other evidence which supported her testimony as to this offence. The verdict was reasonably open on the evidence and was not so inconsistent with the verdicts of acquittal as to establish a miscarriage of justice. The appeal should be dismissed.

[5] **McPHERSON JA:** For the reasons given by Williams JA, with which I agree, I consider that this appeal should be dismissed.

[6] **WILLIAMS JA:** On 26 November 2003 the appellant was convicted of the offence of deprivation of liberty, but acquitted on the other counts on the indictment, namely assault with intent to commit rape and sexual assault. He appeals against the conviction on the ground that the verdict was unreasonable (relying as a subheading on the contention that the verdicts were inconsistent) and on the further ground that the prosecution failed to disclose material in its possession which in the circumstances was adverse to the complainant's credibility.

[7] The events in question occurred on 30 November 2002. The complainant and the appellant were acquainted primarily through the dependence of each upon alcohol. Prior to that date the complainant had visited the appellant's house on some three or four occasions for the purpose of having some drinks. On the day in question she went to the appellant's residence and had a few beers and some red wine. According to the complainant's evidence, whilst they were sitting in the lounge room the appellant asked her on a number of occasions to sit on his lap. She declined. Thereupon the appellant grabbed her by the back of her head and walked her to the bedroom where he threw her on the bed and sat on her. Shortly after that he took some telephone cord from a drawer and tied her hands together. The complainant's evidence was that thereafter the appellant kissed her neck, and touched her breasts and vagina on the outside of her clothing. He poured some red wine down her throat and repeatedly said he "wanted to fuck" her, to which she kept replying "no". According to the complainant she was "scared." In a statement to police the complainant said her feet were also tied together with rope. In evidence at the trial she said she believed that to be so, but acknowledged that she had been told that was not the case.

[8] When the appellant left the room to go to the toilet the complainant used his mobile phone to dial the number of a friend by the name of Land. His evidence was that he could hear her crying and she told him that her hands were tied and "he was going to rape her". She told him where she was, and that appears to have been the end of the conversation. Land then walked to the appellant's residence, taking between 30 and 40 minutes to do so. Relevantly his evidence was as follows:

> "I knocked on his door, said could I talk to Denise – when he opened the door that was. He said that Denise was tired and he shut the door then – wouldn't let me see her.
>
> …

> [On looking through a bedroom window] I seen Denise laying on the bed.
>
> …
>
> Her hands are like that, she had white rope, or cord, around her wrists. I couldn't –
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> …
>
> see her head and I couldn't see her waist down.
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> …
>
> I could not see him in the room at first but he came along later and shut the window and the blinds.
>
> …
>
> I could still hear her screaming out my name and yelling for help so I said I'd go call the police."

Land made it clear that the complainant's arms and wrists were tied together when he looked through the bedroom window.

[9] Senior Constable Lear arrived at the appellant's unit at about 3.40 pm on the afternoon in question. On approaching the door he could hear a female calling out for help, saying "please help me" or "please let me go". When asked to describe the tone of the voice he answered: "It was upset, like she was almost crying or she was crying and it was reasonably faint." The door was closed as was a window near it; the curtains were drawn across the window. He banged on the window and door calling out "Police, open up". He again heard the voice calling out "Please help me". There was no response to his knocking on that door so he went to the back of the unit and knocked on the door there. Again there was no response and he returned to the front door. After what he described as a "few minutes" the appellant opened the door. On entering the bedroom the Constable saw the complainant lying on her back on the bed: "She had her hands tied in front of her body with her palms together with a phone cord …". The Constable was unable to untie the cord because it was "too tight" so he used a pocket knife to cut it off.

[10] He agreed under cross-examination that there was no rope in the bedroom apart from the cord tying the hands and wrists. There was no rope around her feet.

[11] Lear was accompanied by Constable Watts: his evidence essentially confirmed that given by Lear.

[12] Constable Turner arrived at the appellant's residence shortly after the other police and took a statement from the complainant. In evidence he said: "On her wrists, I noticed that she had pressure marks around her wrists, which appeared to be consistent with a telephone cable that was shown to me by Senior Constable Lear." He went on to say that it "looked like the cable had been tied tightly to put pressure against her skin and cut off the circulation to a certain degree".

[13] The appellant did not give evidence.

[14] On the hearing of the appeal no real challenge was made to the summing up by the learned trial judge. Given the matters which were raised in argument the following extracts from the summing up are relevant:

> "You must consider each charge separately. . . . You could find him guilty of one or two of the charges, and not guilty of one or two of the charges. You should bare [sic] in mind, however, that if you are thinking of returning different verdicts in respect of the separate charges, each charge depends substantially on the credibility of the one complainant. If you have doubts about her evidence in respect of a particular charge, those doubts must be taken into account when considering her evidence in respect of other charges.
>
> . . .
>
> The final count on the indictment is a count of deprivation of liberty.
>
> . . .
>
> Detain means to keep in confinement or under restraint. It does not necessarily mean physical restraint in that restraint can be exercised by threats. The accused does not have to use force or take hold of the complainant to detain her. If the accused compels the complainant by threats to remain in a place against her will, then he has detained her. In this case the Crown says that the accused detained the complainant by restraining her in the bedroom by tying her wrists and by threatening her by his presence, that he would do something to her if she left the room.
>
> You have heard evidence from which you might conclude that the complainant was severely intoxicated on this particular afternoon. If you were to conclude that the only reason the complainant was unable to leave the premises was because she was too intoxicated to walk or run away, you could not find the accused guilty on that basis alone of depriving the complainant of her liberty."

[15] A little later the learned trial judge dealt with issues going to the complainant's credibility. The following is an extract from the summing up on that topic; many points quoted were expanded upon by the learned trial judge but it is not necessary for present purposes to set out more than the critical statements:

> "In this trial the Crown case in respect of each count depends substantially on the evidence of the complainant. . . . There are several reasons in this case why you must scrutinise the complainant's evidence with very great care. Firstly, at the time these offences are alleged to have been committed the complainant was on any view of the evidence, you might think, very intoxicated. . . . A police officer gave evidence, she was too intoxicated to be interviewed and she fell asleep at the police station. …
>
> . . .

> A second reason why in this case you must scrutinise the complainant's evidence very carefully, indeed, is that she has an extensive criminal history. In particular, she has numerous convictions for offences of dishonesty. . . .
>
> A third and important reason why you should and must consider the complainant's evidence and scrutinise it very carefully indeed, is because there are some major inconsistencies between her evidence in this Court and evidence of statements she has given in relation to the incident on previous occasions. Those inconsistencies are so significant that you must scrutinise her evidence very carefully indeed before acting on it.
>
> . . .
>
> When scrutinising the complainant's evidence, you should look to see whether there is any independent evidence which supports or confirms the complainant's evidence that the accused committed the offences on her that she alleges."

[16] Thereafter the learned trial judge referred to the police evidence that the complainant was found with her hands tightly tied up and was heard calling out to be let go. The jury were told that they could use that evidence to confirm evidence given by the complainant.

[17] In the course of summarising the Crown case the learned trial judge reminded the jury that the crown prosecutor "said that there can be no dispute that when the police arrived she was very tightly bound by the wrists, that she was calling out and that she was crying and appeared distressed." The jury was then reminded that defence counsel told the jury that the lies in the complainant's account had "a common thread". The learned trial judge reiterated that defence counsel said in his final address "that in this case the inconsistencies are so significant that they cannot be explained on the basis of honest confusion and that you would find that the complainant is a contemptible liar".

[18] In the light of the summing up it is not surprising that the jury acquitted on the charges of assault with intent to rape and sexual assault. Many of the inconsistencies referred to in the summing up related to the complainant's evidence as to those matters. Clearly the jury was not prepared to act on the complainant's evidence alone in order to found a conviction.

[19] There is little authority as to what in law constitutes deprivation of liberty for purposes of s 355 of the Criminal Code. There was no such offence at common law; the common law recognised offences of kidnapping and false imprisonment (the latter being both a crime and a tort). The original Griffith Code provided for offences of kidnapping and deprivation of liberty, though kidnapping initially was defined differently. In the original Code kidnapping was limited to the circumstance where a person was forcibly taken or detained with intent to compel the person detained to work against his will. In the light of that it could be said that the offence of deprivation of liberty was complementary to the offence of kidnapping; the latter involving a specific intent whereas the former did not.

[20] Regardless of that history it is the language of s 355 which must define the elements of the offence. Relevantly the section is in these terms:

> "Any person who unlawfully confines or detains another in any place against the other person's will, or otherwise unlawfully deprives another of the other person's personal liberty, is guilty of a misdemeanour . . ."

[21] The terms "confines", "detains", "deprives" and "liberty" should each be given their ordinary and natural meaning. The most apposite meaning of "liberty" found in the Oxford English Dictionary is: "The condition of being able to act in any desired way without restraint; power to do as one likes." Again one finds in the dictionary "deprive" defined as including the denial of enjoyment of something, and "detain" has a variety of meanings including "keep in confinement", "hold back, delay, stop".

[22] Essentially it will always be a question of fact for the jury whether there has been conduct on the part of an accused person which deprives another of that person's liberty. It is not possible to provide a simple, all inclusive definition of the offence. Words of the Court of Appeal (Stephenson and Orr LJJ and Caulfield J) in a somewhat different context are apposite here. In *R v Inwood* [1973] 1 WLR 647 the court was concerned with the question whether or not a person had been arrested by police, that is had he been deprived of his liberty so that he was no longer a free man. In that context the court said at 652-3:

> "It all depends on the circumstances of any particular case whether in fact it has been shown that a man has been arrested, and the court considers it unwise to say that there should be any particular formula followed. No formula will suit every case and it may well be that different procedures might have to be followed with different persons depending on their age, ethnic origin, knowledge of English, intellectual qualities, physical or mental disabilities. There is no magic formula; only the obligation to make it plain to the suspect by what is said and done that he is no longer a free man. However, what we think is clear is that it is a question of fact, not of law, and it must be left to the jury to decide whether a person has been arrested or not, at least where there is a real dispute as to the question whether the defendant understood that he was being arrested."

[23] As I have said that statement is apposite to the offence of deprivation of liberty. The factors as mentioned in that quoted passage could also be relevant in determining as a fact whether a particular person was deprived of liberty. Here the complainant was not so bound that she could not, for example, walk around. Her hands were bound together tightly and that did severely limit her freedom of movement. Further, the appellant exercised control over the relevant doors and windows.

[24] A somewhat comparable case came before the Court of Criminal Appeal in Western Australia: *Reppas v The Queen* (1998) 20 WAR 178. There the allegation was that the appellant forced a young girl into a room where he sexually assaulted her. The jury acquitted of the three counts of indecent assault but convicted of the charge of unlawful detention contrary to s 333 of the Western Australian Criminal Code. The majority (Wallwork and Murray JJ) upheld the conviction. The evidence in support of the unlawful detention was that the appellant:

> ". . . took hold of her right wrist and pulled her into a room at the rear of the shop behind the counter saying, 'Come here.'
>
> Once in the back room she was forced to sit in a chair. She wanted to leave the room, but she was unable to do so because the appellant blocked her way. She cried and said, 'Please let me go.' . . .
>
> . . . On that account it can be seen that the alleged unlawful detention commenced when the appellant was said to have taken her forcefully into the back room and it continued until she was allowed to leave that room."

[25] The learned trial judge in the instant case adequately directed the jury as to the elements of the offence of deprivation of liberty. It was a question of fact for the jury whether the conduct of the appellant in tying the complainant's hands together, acting in a threatening way towards her, refusing her to allow her friend Land access to her, closing the curtains so that Land could no longer see her, and refusing the police immediate access to her constituted the offence of deprivation of liberty. In my view the jury were entitled to conclude that the evidence of the police officers and Land satisfied them beyond reasonable doubt that the offence had been established.

[26] By returning verdicts of not guilty with respect to sexual counts the jury clearly indicated that, in conformity with the judge's directions, they were only willing to act on the complainant's evidence where it was supported. With respect to the charge of deprivation of liberty that other evidence not only supported the complainant's evidence, but it was also capable of independently establishing the offence in the absence of any evidence suggesting the complainant consented to the appellant's conduct.

[27] Given the state of the evidence there was no inconsistency between the jury verdicts and it could not be said that the conviction for deprivation of liberty was unreasonable.

[28] It is now necessary to turn to the second ground of appeal.

[29] During cross-examination the complainant was asked whether she had heard of criminal compensation; she replied that she had. The following exchange then occurred:

> "Q. Has it entered your mind that you might be entitled to get some money as a result of what you say Mr Awang did to you? A. No.
> Q. You say it hasn't? A. No."

[30] Subsequently she admitted that a female police officer whom she had assaulted had obtained an order for compensation against her. Under questioning it appeared that she was generally familiar with orders for compensation in such cases.

[31] Then during the course of submissions on sentence it emerged that prior to the trial the complainant had in fact consulted a firm of solicitors on the subject of compensation. That had not been communicated by the prosecution to the legal representatives for the appellant prior to that point of time. The material available to the prosecutor would appear to have been very vague and it is not a case where any criticism can be directed to the prosecution on the ground that there was failure

to disclose material evidence. Nevertheless it is the appellant's contention that fresh evidence became available following the verdict of the jury which was potentially of great significance. It can be assumed for present purposes that the appellant's solicitors could not by the exercise of reasonable diligence have become aware of the evidence prior to the jury verdict.

[32] The appellant's contention is that if his counsel was aware of the fresh evidence when the complainant gave the answers quoted above she could have been confronted with the name of the solicitor she had consulted and her perjury could have been proved.

[33] The topic in question was collateral to the charges and the fresh evidence could only have been relevant to the complainant's credit. As already noted she was a witness virtually devoid of creditability on essential issues and it is clear that the jury was not prepared to treat her as a witness worthy of credit. Given, as already noted, that the guilty verdict on the charge of deprivation of liberty was clearly based on the evidence of witnesses other than the complainant, it is impossible to conclude that a jury would have arrived at a different result if that additional evidence had been before it. There was, in my view, no significant possibility that a jury, armed with this fresh evidence, would have acquitted the appellant on the count of deprivation of liberty.

[34] Counsel for the respondent submitted that the fresh evidence would not, in any event, have been admissible. That submission was primarily based on the proposition that the evidence went to a collateral issue and, further, the complainant's answers to the questions quoted above had no real probative value with respect to the issues. In the circumstances it is not necessary to rule on that submission. It is sufficient to say that in the circumstances of this case the fresh evidence, even if admissible, was not such as to give rise to a significant possibility that the jury's verdict would have been different.

[35] It follows that the appeal should be dismissed.