SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mrzljak* [2004] QCA 420
PARTIES:	**R** **v** **MRZLJAK, Esad Eso** (appellant)
FILE NOS:	CA No 165 of 2003 DC No 768 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2004
JUDGES:	McMurdo P, Williams JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made, Williams JA and McMurdo P dissenting in part
ORDERS:	**1. Appeal allowed** **2. Convictions quashed** **3. Re-trial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – where appellant was convicted of two counts of rape – where the complainant was intellectually impaired – whether the trial Judge misdirected the jury on the question of the complainant's cognitive capacity to consent to intercourse CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – IGNORANCE AND MISTAKE OF FACT – HONEST AND REASONABLE BELIEF – GENERALLY – where the appellant did not speak English – where fresh evidence showed that the appellant suffered from mild mental retardation – whether evidence of intellectual impairment and language difficulties is relevant to the assessment of the

reasonableness of mistake under s 24 of the *Criminal Code*

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – INSANITY – GENERALLY – whether the excuse of insanity under s 27 of the *Criminal Code* was available to the appellant

Criminal Code (Qld), s 24, s 27, s 216, s 229F, s 348

Daniels v R (1989) 1 WAR 435, distinguished
GJ Coles & Co Ltd v Goldsworthy [1985] WAR 183, considered
Hart v R [2003] WASA 213, cited
Jiminez v R (1992) 173 CLR 572, considered
Masciantonio v R (1995) 183 CLR 58, considered
Osland v R (1998) 197 CLR 316, considered
Ostrowski v Palmer (2004) 78 ALJR 957, cited
R v Fitzpatrick (1926) 19 Cr App Rep 91, cited
R v Graham [1995] QCA 190; CA No 101 of 1995, 19 May 1995, cited
R v Julian (1998) 100 A Crim R 430, cited
R v Lavallee [1990] 4 WRR 1, considered
R v Kagan 2004 NSCA 77; June 10, 2004, considered
R v Kusu [1981] Qd R 136, cited
R v Masters [1987] 2 Qd R 272, considered
R v McCullough [1982] Tas R 43, considered
R v Miers [1985] 2 Qd R 138, cited
R v Nelson 71 CCC (3d) 449, considered
R v Pacino (1998) 105 A Crim R 309, distinguished
Stingel v R (1990) 171 CLR 312, cited

COUNSEL: B G Devereaux 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 Holmes J that the appeal should be allowed and a new trial ordered. The relevant facts and issues are set out in the reasons of Holmes J. I will only repeat or add to those as necessary to explain my own reasons for reaching different conclusions on some issues.

Some relevant facts and issues at trial

[2] The appellant was charged and convicted after a trial of two counts of rape, the first involving penile penetration of the vagina, the second involving penile penetration of the mouth. The issue at trial was consent or honest and reasonable mistake as to consent.

[3] The complainant, who was intellectually impaired, gave evidence that the appellant committed the charged acts. She did not want to have sex with the appellant on the night of the offences. She told him to "stop", said "no", then tried to push him

away. Although he kissed her, she did not kiss him back. He asked her to take off her clothes and she complied. She touched his penis and moved her hand up and down on it because he asked her to.

[4] Psychologist Dr Attwood gave evidence for the prosecution that the complainant had an IQ of 52. This placed her clearly within the intellectually disabled range, giving her a mental age of between six and ten years. She was within the meaning of "intellectually impaired person" as defined in s 229F *Criminal Code*. Whilst her disabilities would be easily apparent to anyone speaking to and engaging with her, someone who did not speak English would have more difficulty in detecting those disabilities, although her disabilities would also become manifest in non-verbal ways. The complainant had cognitive capacity to give consent to sexual acts, but that ability was lessened by her intellectual incapacity.

[5] The appellant, a Bosnian immigrant, gave evidence through an interpreter that he did not realise the complainant was intellectually impaired. He spoke very few words of English. The complainant was responsive to his physical advances and he helped her undress. She fondled his penis and voluntarily put it in her mouth before they had vaginal intercourse. He withdrew before ejaculating, wiped up the ejaculate and they each dressed. She did not say "no", nor "stop", nor did she push him away. He gave the following evidence through an interpreter in cross-examination:

> "Did any other young lady ever come and behave like that? -- Not in Australia, never.
>
> In Bosnia? -- Well, in Bosnia I spoke the language so when you are with a girl, you know how it is, you ask her and if she says 'yes' you have sex, but I couldn't ask [the complainant]. I still can't because I don't speak the language.
>
> Well, I put to you, I put it to you that you didn't ask her, you just took advantage of her? -- No, I didn't force anyone.
>
> I put it to you that she wasn't consenting and you knew perfectly well that she wasn't consenting? -- No.
>
> I put it to you that it was obvious to you, as it is to every adult, Bosnian or Australian, that that girl is profoundly affected? -- I can't. For example, when I was with my previous barrister, David, we were in this elevator and he spoke to a lady who was between 40 and 50 years old and when we got into the office the interpreter told me that this was a lady who had the similar condition and I haven't noticed that, I swear that I didn't."

[6] The prosecution case was primarily that the complainant did not consent and made it perfectly plain to the appellant that she was not consenting to the sexual acts. The prosecution's secondary position was that the complainant did not have the cognitive capacity to consent[1] to the sexual acts. An alternative count open on the first count of rape was that the appellant had unlawful carnal knowledge of an intellectually impaired person under s 216(1) *Criminal Code.* The term "intellectually impaired person" in s 216 *Criminal Code*, defined under s 229F *Criminal Code*, is a much wider concept than that of "cognitive capacity" under s

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1 See the definition of "consent" in s 348 *Criminal Code.*

348 *Criminal Code*. The absence of consent is not an element of an offence under s 216 *Criminal Code* and it is rightly uncontentious that an intellectually impaired person as defined can have the cognitive capacity to consent and can give consent within the meaning of "consent" in s 348. It is a defence to a charge under s 216 to prove that the accused person believed on reasonable grounds that the complainant was not an intellectually impaired person[2] or that the circumstances of the carnal knowledge did not constitute sexual exploitation of the intellectually impaired person.[3]

The direction on cognitive capacity

[7] I agree with Holmes J that his Honour's direction to the jury as to consent confused the concept of the complainant's cognitive capacity to give consent referred to in s 348(1) *Criminal Code* with the much wider concept of "intellectually impaired person" defined in s 229F *Criminal Code*. There was a real danger that, on the direction given, the jury may have thought that because the complainant was intellectually impaired within s 229F, they must then conclude that she necessarily lacked the cognitive capacity to give consent under s 348(1) *Criminal Code.* That was not so. In fact, her evidence seemed more consistent with her being intellectually impaired and having the cognitive capacity to give consent but not consenting. This is, however, very much a question for a jury who have the real advantage of observing her give her testimony. It follows that the appeal must be allowed and a re-trial ordered.

The further evidence called on the appeal

[8] The much more difficult question for me is whether the further evidence adduced on this appeal is relevant on any re-trial to the issues of criminal responsibility because of either mistake of fact under s 24 *Criminal Code* or insanity under s 27 *Criminal Code.*

[9] Material placed before this Court, which was not before the primary court, establishes that the appellant, as well as the complainant, is probably in the intellectually disabled range. It seems he has an IQ of 56 and, like the complainant, he is also an "intellectually impaired person" within s 229F *Criminal Code.* Psychiatrists, Dr Fama and Dr van de Hoef, both gave evidence in the appeal.

[10] Dr Fama said that an IQ of between 50 and 69 earns the diagnosis "mild mental retardation", a distinct handicap making the sufferer unable to perform normally at school, in training or in a job; some people in this IQ range have difficulty reading, in understanding words, particularly complex words and abstract concepts, and have problems in learning new knowledge and adapting to different societies, cultures or different situations. The appellant was aware at the time of the sexual acts that it was wrong to force sex on someone who did not want sex or to have sex with someone who was so intellectually impaired they lacked the cognitive capacity to give consent. His mental retardation was a natural mental infirmity which made him unable to discern that the complainant was also mildly mentally retarded. This was the primary reason why he could not evaluate whether, what appeared to him in the absence of protest to be the complainant's consent, was given with cognitive capacity. Had someone taken the appellant aside and explained that she was intellectually handicapped he would not have had sex with her. Because of his

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2 Section 216(4)(a), *Criminal Code*.

3 Section 216(4)(b), *Criminal Code*.

natural mental infirmity and his language difficulties, he was unable to pick up the social cues to allow him to make a rational judgment as to whether she had the cognitive capacity to consent. He "wasn't capable of understanding that this girl was a mentally retarded girl who could not give valid consent … he was not aware that she was mildly mentally retarded [and] he could not evaluate her consent as questionable or false". At the time, he was deprived of the capacity to understand that he ought not to do the sexual acts without confirming that as an intellectually impaired person the complainant was capable of giving and gave true consent.

[11] Dr van de Hoef's evidence was of largely similar effect. Had the appellant not been mentally retarded and been able to detect that the complainant was intellectually handicapped, he would not have committed the offence because he appreciated the wrongness of having sexual intercourse with someone with an intellectual handicap. She did not think the appellant's mental retardation meant that he forever lacked the capacity to understand that he ought not have had sexual intercourse with the complainant if she did not have the capacity to give cognisant consent; rather the fact that both he and the complainant were similarly mentally handicapped combined with his lack of functional English, was an extraordinary constellation of circumstances which at the time of the sexual acts made him unable to detect social cues to make appropriate judgments.

[12] In deciding whether this extraordinary constellation of circumstances raises the issue of the appellant's criminal responsibility under either or both s 24 or s 27 *Criminal Code* my conclusions differ from Holmes J.

Insanity under s 27 *Criminal Code* or mistake of fact under s 24 *Criminal Code*?

[13] Section 24(1) *Criminal Code* relevantly provides:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

[14] Section 27(1) *Criminal Code* relevantly provides:

> "A person is not criminally responsible for an act … if at the time of doing the act … the person is in such a state of … natural mental infirmity as to deprive the person of capacity … to know that the person ought not to do the act or make the omission."

[15] The psychiatric evidence now before this Court is that the appellant knew at the time of the sexual acts with the complainant that it was wrong to have sexual contact with her either without her consent or if she was so intellectually impaired that she was unable to consent. Primarily because of his intellectual impairment, which constituted a natural mental infirmity, and also because of his English language difficulties, he was deprived of the ability to know at the time of the sexual acts that the complainant was intellectually impaired, so that she did not or may not have had the cognitive capacity to consent and the ability to convey that she was not consenting, and that he therefore ought not have committed the sexual acts. In my view, this evidence raises a defence under s 27(1) *Criminal Code* to aspects of the charges and is of limited relevance to a mistake of fact under s 24 *Criminal Code*.

(a) The offences of rape

[16] On the evidence, both before the primary judge and before this Court, it was not in dispute that the appellant committed the sexual acts.

(i) Cognitive capacity to consent?

[17] Logically, the first and fundamental issue for determination was whether the prosecution established beyond reasonable doubt that the complainant did not have the cognitive capacity to consent under s 348 *Criminal Code*.

[18] If the jury were satisfied that she lacked cognitive capacity to consent, they would then consider the psychiatric evidence and s 27 to determine whether the appellant was criminally responsible for sexual acts with the complainant when she did not have the cognitive capacity to give consent. If they were satisfied on balance that, in all the circumstances, his natural mental infirmity deprived him of the capacity to know, at the time he committed the sexual acts, that the complainant lacked the cognitive capacity to consent, the jury would find the appellant not guilty to the charges of rape because of insanity. If not, they would convict.

(ii) Actual consent?

[19] If the jury were not satisfied that she lacked cognitive capacity to consent they would then consider whether the prosecution established beyond reasonable doubt that she did not consent to either sexual act. If the jury were not satisfied beyond reasonable doubt of non-consent to one or other count of rape, they would find the appellant not guilty on that count. If the jury were satisfied beyond reasonable doubt that she did not consent to either or both sexual acts, the jury would next consider the issues raised on the evidence as to his mistaken belief as to her consent discussed below.

(iii) Mistake of fact under s 24 Criminal Code as to consent

[20] Despite the persuasive analysis of Holmes J, I am not convinced, in the absence of binding authority, that the evidence of the appellant's intellectual impairment constituting a natural mental infirmity under s 27 can be relevant to the issue of whether his honest mistaken belief as to the complainant's intellectual abilities and consent was also a reasonable belief under s 24(1) *Criminal Code.*

[21] Unlike the element of *mens rea* required at common law, s 24 *Criminal Code* requires that a mistaken belief in the existence of any state of things be not only honest but also reasonable. This requires a consideration of whether there were reasonable grounds for the belief, not what a reasonable person would have believed: *R v Julian.*[4] The terms of s 24(1) require both a subjectively honest and an objectively reasonable mistaken belief. It is clear, for example, that self-induced intoxication cannot turn what would otherwise be an unreasonable belief into a reasonable one: *R v Graham.*[5] In any case, s 28 *Criminal Code* is intended to cover the field for criminal acts committed by someone whose capacity to apprehend is affected by intoxication: see *R v Kusu*[6] and *R v Miers.*[7]

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4 (1998) 100 ACrimR 430.

5 [1995] QCA 190; CA No 101 of 1995, 19 May 1995, pp 5-6; that is also the position at common law: see *R v O'Grady* [1987] QB 995.

6 [1981] Qd R 136.

[22] Assistance on this difficult issue can be gleaned from the somewhat analogous cases considering the defence of provocation to the charge of murder, a concept which, like s 24(1) *Criminal Code*, involves elements of both subjectivity and objectivity. Provocation requires evidence of something objectively capable of causing an ordinary person to lose self-control and to act as the accused person has done and also that the provocation must actually and subjectively cause the accused person to lose self-control and commit the act whilst deprived of self-control before having had the opportunity to regain it. In *Masciantonio v The Queen*[8] Brennan, Deane, Dawson and Gaudron JJ stated:

> "The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age.
>
> However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions."[9]

[23] These observations do not suggest that intellectual or mental characteristics amounting to a natural mental infirmity under s 27 *Criminal Code* should be taken into account in determining this objective test. Consistent with those observations and *Stingel v The Queen*,[10] applied in the Code State of Western Australia in *Hart v The Queen*,[11] the question whether an honest mistake of fact was held on reasonable grounds must be considered in the light of an accused person's immaturity and physical attributes such as deafness, blindness or, relevantly, language difficulties. That a person suffers from a syndrome such as battered wife syndrome, which I do not understand to constitute a mental disease or natural mental infirmity under s 27 *Criminal Code*, may also be considered in determining whether an honest mistake of fact was reasonably held: cf *Osland v The Queen.*[12] I am not, however, persuaded that an accused person's intellectual incapacity amounting as here to a "natural mental infirmity" under s 27 *Criminal Code*, can be considered by a jury in determining whether there were reasonable grounds for an accused person's honest mistake of fact. The presumption of sanity under s 26 *Criminal Code* supports the conclusion that a consideration of the issue of whether an accused person's honest

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7 [1985] 2 Qd R 138.
8 (1995) 183 CLR 58, 66-67.
9 At 66-67.
10 (1990) 171 CLR 312.
11 (2003) 27 WAR 441, 455-456, [53]-[54].
12 (1998) 197 CLR 316, Gaudron and Gummow JJ 335-338.

mistaken belief was also reasonable under s 24(1) *Criminal Code* must involve the standards of a person of sound mind.

[24] Just as s 28 *Criminal Code* is intended to cover the field for criminal acts said to have been committed by those whose capacity to apprehend is affected by intoxication, so s 27 *Criminal Code* is intended to cover the field where the evidence is that a person is suffering from a natural mental infirmity, depriving the person of the capacity at the time of doing an act to know that they ought not so act. I think it is likely that this is why I have been able to find no example since the passing of the *Criminal Code Act* 1899 (Qld) where a person who makes an honest mistake of fact because of a natural mental infirmity causing the person to do an act which would otherwise constitute an offence has been able to avoid criminal responsibility based on the person's honest and reasonable mistake of fact under s 24 *Criminal Code.*

[25] Whilst the result reached by Holmes J on the facts here is not unattractive, I fear that such an interpretation of s 24(1) may give rise to startling results. For example, a new mother may have a natural mental infirmity, namely a very low IQ, and honestly believe she can safely leave her new-born baby unsupported in a bathtub full of water. The mother would be able to rely on s 24(1) to avoid criminal responsibility: she honestly believed her newborn baby could have a bath without supervision or support; the jury in assessing the reasonableness of that belief would have to take into account her extremely low IQ and consider whether it was a reasonable belief for someone of that IQ. If a natural mental infirmity can be considered in determining the reasonableness of an accused person's honest mistaken belief, why not also a mental disease which affects a person's perception? For example, a mother suffering from a mental disease may kill her child by putting the newborn baby into a bath tub full of water honestly believing, because of her mental disease, that the baby is able to and wants to swim. The mother would be able to rely on s 24(1) to avoid criminal responsibility: she honestly believed her newborn baby could and wanted to swim; she had that perception because of a mental disease; the jury in assessing the reasonableness of the belief would have to take into account her subjective perceptions as affected by her mental disease. The accused in both examples could be released into the community unsupervised by either the criminal justice system or the mental health system, an undesirable outcome and one unlikely to be intended by the legislature.

[26] In my view, a natural mental infirmity under s 27 cannot be considered in determining whether, under s 24(1), an honest but mistaken belief is also a reasonable belief.

[27] Returning then to the matters for a jury's consideration of the issues on the evidence as it is before this Court. In considering whether the prosecution had established beyond reasonable doubt that the appellant did not honestly and reasonably believe the complainant was consenting, the psychiatric evidence is not relevant as to whether the mistaken belief was reasonable, but only as to whether it was honestly held. The jury could consider as to reasonableness that the interaction between the appellant and the complainant took place over a relatively short period of time and that the appellant's English was extremely limited. If the jury were not satisfied the prosecution disproved honest and reasonable mistaken belief as to consent on either count they would acquit the appellant on that count.

(iv) Honest mistake because of natural mental infirmity

[28] If the jury were satisfied he was not acting under an honest and reasonable mistake as to her consent, the jury would then consider the psychiatric evidence and s 27. If on balance they were satisfied that at the time of each sexual act he was in a state of natural mental infirmity to deprive him of the capacity to know that she was not consenting and that he should not commit each sexual act, they would acquit him of each count. If not, they would convict.

The offence of abuse of intellectually impaired persons

[29] If the jury found the appellant not guilty on count 1, they would next be required to consider whether the prosecution had established beyond reasonable doubt that the appellant had unlawful carnal knowledge of the complainant and that she was an intellectually impaired person. There is ample evidence of both these elements although specific defences are provided in s 216(4) where the accused believes either on reasonable grounds that the complainant was not an intellectually impaired person[13] or that the carnal knowledge was committed in circumstances not constituting sexual exploitation of the intellectually impaired person.[14]

[30] In considering the former, evidence of the appellant's natural mental infirmity is irrelevant because it cannot constitute reasonable grounds for a belief. The jury could however consider the language difficulties and the limited period of time over which the protagonists had contact in determining the appellant's belief on reasonable grounds.

[31] In considering whether the latter defence is established, the section makes no reference to the concept of reasonableness and the evidence of the appellant's low IQ is relevant. If the jury are satisfied on balance of either of those defences, they would acquit the appellant.

[32] If not, they would next consider the psychiatric evidence and s 27. If the jury were satisfied on balance that the appellant was suffering from a natural mental infirmity so that at the time he had carnal knowledge of the complainant, he did not have the capacity to know that she was intellectually impaired and that he ought not have sexual intercourse with her without ensuring she was able to and did consent, then the jury would find the appellant not guilty on grounds of insanity. If they were not satisfied, they would convict. In practical terms the issues for consideration raised by the defence in s 216(4)(b) and s 27 overlap but all defences raised on the evidence must be left to the jury.

Conclusion

[33] The appeal should be allowed and a re-trial ordered because of the learned primary judge's error in directing the jury as to consent.

[34] On the evidence before this Court, the issue of whether the appellant was criminally responsible, under s 27(1) *Criminal Code*, for the acts of sexual intercourse because at the time he was in a state of natural infirmity as to deprive him of the capacity to know that he ought not do those acts is raised as to the issues of whether the complainant had the cognitive capacity to give consent because of her intellectual impairment and whether he believed she was consenting on the rape counts and as to the alternative count to count 1 under s 216 *Criminal Code* as explained above.

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13 Section 216(4)(a).

14 Section 216(4)(b).

Section 27 *Criminal Code* is not raised on the issue of actual consent to the rape charges.

[35] The psychiatric evidence before this Court is not relevant to the issue of whether an honest but mistaken belief was reasonable under s 24(1) *Criminal Code.* That issue is, however, raised on the evidence and the appellant's English language difficulties and the limited period of contact between the protagonists are relevant matters for a jury's determination as to whether the appellant acted under both an honest and also reasonable mistaken belief as to her consent.

[36] The psychiatric evidence was not before the primary judge. Should the appellant be convicted and the sentencing judge accept the evidence of the appellant's low IQ, it would be an important mitigating factor on sentence. His intellectual disability would diminish the degree of culpability because it places him outside the more serious category of offenders deliberately taking advantage of young women with intellectual disability. Because there will probably be a re-trial, it is impossible for this Court to predict what evidence will be before the court at any re-trial and what evidence may be accepted or rejected, making it unnecessary and imprudent for this Court to further consider the application for leave to appeal against sentence.

Order:

The appeal is allowed, the conviction is set aside and a re-trial is ordered.

[37] **WILLIAMS JA:** I will not repeat herein background facts set out in the reasons for judgment of Holmes J which I have had the advantage of reading.

[38] One of the issues raised by the appeal against conviction was whether or not the learned trial judge erred in his summing up on the issue of consent.

[39] The jury was told that the issue of consent, which "concept is given a meaning by the criminal law", would be the matter of most concern to them. The jury was correctly directed that: "Consent means consent, freely and voluntarily given by a person with the cognitive capacity to give the consent." There followed some unremarkable observations with respect to "consent", and then the learned trial judge turned specifically to "cognitive capacity". He reminded the jury that counsel had read to them dictionary definitions and went on: "I will repeat the definition contained in the Macquarie Dictionary. Cognition is the process of knowing or the product, the end result, of that process. In other words, you have to know, if you are the girl, that what will happen is the penetration of a part of your body, that sexual contact between the two of you will take place. And the question then is: do you freely consent, voluntarily consent, to that happening?" There then followed a passage concerning the communication of consent or lack thereof.

[40] At that stage that the learned trial judge introduced the issue of the complainant's "impaired intellect". The critical passage is in the following terms: "It is conceded that [the complainant] has an impaired intellect. That may be so in ordinary parlance. There is the question of whether she is an intellectually impaired person, as defined by the Criminal Code." Thereafter the learned trial judge read to the jury from a definition of "intellectually impaired person" found in s 229F of the Code. The summing up then went on:

> "In considering [the complainant's] cognitive capacity to freely and voluntarily consent, you have the evidence of her aunt, you have the evidence of Ms McKenna – Ms McKinnon, and the observations of

> Ms Hauff, Mr Hannabery, and finally, Dr Attwood. I want to give you this special explanation of the use that you can make of Dr Attwood's evidence. He is, as he told you, a registered clinical psychologist and has been a practising psychologist for something like the last quarter of a century. His task was not to answer the question, "Is [the complainant] an intellectually impaired person?", within the definition that I have read to you. It is for you to make that finding. Dr Attwood comes before you to give you the benefit of his expertise, his experience, and his conclusions on the question of whether or not [the complainant] is intellectually impaired. It is a question for you to decide whether you accept and act upon Dr Attwood's conclusions and whether or not you then find that she is intellectually impaired.
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> You, as laymen, as all the other witnesses were in relation to this matter, have seen [the complainant] in the witness box answering questions. You have seen her in the video tapes answering questions. You may have seen her, because attention was not particularly drawn to the aspect, as she walked into Court and as she left Court. All of these matters can be looked at and considered and weighed by you, but as I have said, at the end of the day, the question is, did she consent freely and voluntarily, knowing what was to happen, understanding the significance of the act, and agreeing to participate in it?"

[41] Subsequently in the summing up the learned trial judge again told the jury that there was "one central question and that is consent." He then said that the jury had to be satisfied beyond reasonable doubt that penetration took place "without her consent, as I have explained to you what consent involves."

[42] It is clear, as Holmes J has pointed out in her reasons, that an intellectually impaired woman will often have the cognitive capacity to give consent to sexual intercourse. The mere existence of intellectual impairment does not mean that the woman is incapable of giving or withholding consent. But equally, in my view, a woman's intellectual impairment will be a relevant matter for the jury to consider when determining whether or not she had the necessary cognitive capacity. Apart from the situation where the mind is deranged consequent upon the ingestion of alcohol or drugs, the want of cognitive capacity will ordinarily be due to some intellectual impairment. Whilst the definition found in s 229F of the Code is more directly related to the offences created by s 216 of the Code against intellectually impaired persons, it nevertheless does provide some guidance as to the matters that may, in a particular case, be relevant in determining whether a person's intellectual impairment has deprived that person of the relevant cognitive capacity.

[43] The problem in this case is highlighted by the fact that the learned trial judge in his summing up said to the jury: "You had a statement by [the complainant] that she had great difficulty, indeed could not follow what [the appellant] was saying, and an acknowledgment that [the appellant] could not follow what [the complainant] was saying", shortly before reading the definition from the Code containing the expression "substantial reduction of the person's capacity for communication, social interaction ...". The concern raised on the hearing of the appeal was that the juxtaposition of those observations may have resulted in the jury believing that

substantial reduction in the capacity for communication meant there was no cognitive capacity to give or withhold consent.

[44] Ultimately I have come to the conclusion that although the matter could have been better expressed, no reasonable jury would have taken the words of the summing up as meaning that, because the parties had difficulty in communicating orally, the complainant lacked the cognitive capacity to give or withhold consent.

[45] The complainant's statement to police, which became her evidence-in-chief, was not remarkably different in detail from the evidence frequently given by complainants in rape cases which have come before the courts. Her answers under cross-examination were, on the whole, responsive. She maintained that at one critical point of time she said "No", and that she otherwise indicated her unwillingness to participate in the sexual occurrences. She made an immediate complaint of rape.

[46] In evaluating all of that evidence the jury had to bear in mind her degree of intellectual impairment, and it was for the jury to determine whether or not she had the cognitive capacity to give or withhold consent. Once satisfied that she had that capacity, the question was whether or not, on the evidence, what occurred was "without her consent".

[47] In cases where the complainant has some degree of intellectual impairment it will be incumbent upon the trial judge to make it clear that intellectual impairment of itself does not necessarily deprive the woman of the cognitive capacity to give or withhold consent, and it will also be necessary for the summing up to contain appropriate directions as to the relationship in the particular case between the intellectual impairment and the cognitive capacity to give or withhold consent.

[48] In the instant case the learned trial judge could have given clearer directions to the jury on this issue, but I am not persuaded that there was an error in the summing up such as constituted a misdirection. At the end of the day the jury would clearly have understood that, before they could convict, they had to be satisfied beyond reasonable doubt that the complainant had the cognitive capacity to give or withhold consent, and that in fact she did not consent.

[49] It would follow that there was no misdirection in relation to the issue of consent.

[50] Having regard to the reports and cross-examination of both Dr Fama and Dr van de Hoef I agree with Holmes J that there was evidence that "the appellant, because of his retardation combined with his language difficulty, was inhibited in his ability to pick up the cues which might have led another person to appreciate that [the complainant] was intellectually impaired."

[51] Neither the evidence at trial, nor the additional evidence available to this court, taken alone or in combination, is capable of supporting a conclusion that the appellant was in such a state of natural mental infirmity as to deprive him of the capacity to understand what he was doing, or of the capacity to control his actions, or of his capacity to know that he ought not to do what he did. In other words, there is no evidence currently before the court capable of supporting a conclusion that the appellant was of unsound mind for the purposes of s 27 of the Code.

[52] The question then remains whether the appellant's mental retardation and his difficulty with comprehension of the English language are relevant to a defence of mistake based on s 24 of the Code.

[53] The critical fact for a defence based on s 24 is the offender's belief. For the defence to arise the belief held by the offender must be both honest and reasonable. Whilst that means that the belief must be based on reasonable grounds it is nevertheless the belief of the offender which is critical. That must mean, in my view, that the critical focus is on the offender rather than a theoretical reasonable person. It is the information available to the offender which must determine whether the belief was honest and also was reasonable. That must mean that factors such as intellectual impairment, psychiatric problems and language difficulties are relevant considerations though none would be necessarily decisive.

[54] Holmes J has in her reasons carefully analysed relevant authorities and it is sufficient for me to say that I agree with that analysis. I also agree with what her Honour has said as to the appropriate direction required in the light of the evidence now available.

[55] Intoxication was not a factor in this case, but for completeness I would observe that in view of the provisions of s 28 of the Code, self-induced intoxication would not be a factor relevant in determining whether a belief was honest and reasonable for purposes of s 24; so much would, in my view, follow from the reasoning of the majority in *R v Kusu* [1981] Qd R 136.

[56] The appellant is entitled to have a jury consider the issues raised pursuant to s 24 by the evidence now available to him, and in consequence there has to be a re-trial.

[57] The appeal should be allowed, the convictions quashed and a re-trial ordered.

[58] **HOLMES J:** The appellant was convicted by a jury of two counts of rape of the complainant, R. R was intellectually impaired; she was 21 years old but had an IQ of 52, and was closer to a 10 year old in intellectual capacity. Two grounds of the appeal were argued: that the trial judge misdirected the jury on the question of R's cognitive capacity to consent to intercourse, and that fresh evidence, showing that the appellant himself suffers from mild mental retardation, raises issues of mistake and insanity under s 24 and s 27 of the *Criminal Code*. A third ground, that psychiatric evidence suggested that the appellant was not fit for trial, was not pressed by his counsel.

The evidence at trial

[59] R lived not far away from the appellant, although she had not had anything to do with him before the day of the offences. On that day, 25 July 2001, she had gone to his house because she saw an ambulance taking his wife to hospital, and she wanted to commiserate. During her visit, she watched some television with his daughter, and drank some tea or coffee offered by the appellant. R said that the appellant (who is Bosnian) spoke very little English to her. When it was dark, R decided to go home. What happened thereafter was a series of events which, as described by R in her accounts to the police and in evidence, bears a general resemblance to what the appellant recounted in his evidence; the significant differences are as to whether the relevant acts were solely the appellant's doing or whether they occurred with R's encouragement and consent, real or apparent.

[60] R's account of events, as given to a police officer on the night of 25 July 2001, was put into evidence. She did not expand on it in her evidence in chief, but she did make some concessions (the extent of which was not always entirely clear) when she was cross-examined. She had set off to walk home when the appellant pulled up beside her in his vehicle. He told her he had to go to the shop, and said he would

drive her home. She got into the car with him. While the car was still stopped he kissed her, then they drove off. She told him where she lived but he drove instead up a small road and stopped the car. He "tongue-kissed" her and touched her on the chest and groin through her clothes. R told the police officer that the appellant had undressed her; but in cross-examination she said that she had taken her clothes off when the appellant asked her to do so. She slid across to the driver's seat. The appellant put his penis against her breasts and asked her to put her hand on it; she complied.

[61] R said that the appellant put his penis in her mouth (the rape on which the first count was based) and then in her vagina (the second count). At some point the appellant had put his mouth on the entrance to her vagina, and he had also put his penis back in her mouth after vaginal intercourse. R said she had pushed him away, told him to stop, and said "No", although she was not sure at which stages of the incident she had done so. Afterwards the appellant got out of the car and wiped himself and the car seat with tissues. They dressed, and the appellant drove R to the vicinity of her house. On the way back, the appellant stopped the car and kissed her; at the point where he let her out he kissed her again, and told her to meet him at 10 o'clock. R went to her home and reported to the relatives she lived with that she had been raped.

[62] The appellant said in evidence (through an interpreter) that he had arrived in Australia in October 2000. He did not speak English, although he knew some words: "no", "yes", "stop", "come", "refidex", "speed limit". While R was at his house he communicated with her through his 11 year old daughter. R appeared "normal" to him. He had noticed that she was looking at him and smiling, and it had occurred to him that she wanted a sexual relationship with him. As she was leaving the house, she had nodded at him, in a way which he demonstrated, and which, one infers, he took to be encouraging. (R agreed in cross-examination that she had nodded to him as she left.)

[63] The appellant said he had set off in his car for the shopping centre to buy a cake for his son's birthday, and saw R in the street. He called her by name, saying "Come", and she got into the car. (R agreed he had used the word, "Come.") They kissed before driving off. After going through a couple of intersections and roundabouts he drove the car up what seems to have been a dead-end road. He stopped the car with the engine running and they kissed again; then he drove a little further before pulling up and turning the ignition off. They kissed and touched for a couple of minutes, then proceeded to take their clothes off; he helped R to remove hers. Then she moved onto the driver's seat; she took his penis, which was touching her breast, and rubbed it against her chest before putting it in her mouth. He next put his penis in her vagina, but withdrew before ejaculation. He wiped up the ejaculate with tissues. On the way back in the car R leaned over and kissed him while he was driving. When he stopped the car, on the appellant's account, R kissed him again and said the words "10 o'clock" which he took to mean a meeting time. He believed that R was consenting to intercourse because she did not say "no" or "stop"; nor did she push him away.

[64] In cross-examination, the appellant agreed that in the course of his interview with police (also conducted through an interpreter) he had said this: "I wouldn't do anything forceful. If she– if she looked like she was ill or she was handicapped I would have given up. I thought just as she – she was like [indistinct] and she was young and I looked at her, everything was normal."

R's intellectual impairment

[65] A psychologist, Dr Attwood, gave evidence at the trial of R's low intellectual capacity. The definition of the term "intellectually impaired person" contained in s 229F of the *Criminal Code* was read to him. It is in these terms:

> "A person is an **"intellectually impaired person"** if the person has a disability –
>
> (a) that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
>
> (b) that results in –
>
> (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
>
> (ii) the person needing support."

[66] Dr Attwood, addressing that definition, confirmed that R had an intellectual and cognitive impairment which had a substantial effect on her ability to communicate, her speech, her capacity for learning and social interaction and her daily living skills. That evidence was relevant because an alternative count to count one, that of having unlawful carnal knowledge of an intellectually impaired person, was left to the jury. The first ground of appeal, however concerns the learned trial judge's reference to it in the context of directing on R's cognitive capacity to consent, which was, of course, an issue in both of the counts of rape.

The direction on cognitive capacity

[67] Section 348(1) of the *Criminal Code* defines "consent" as meaning "consent freely and voluntarily given by a person with the cognitive capacity to give the consent". The learned trial judge began his direction by explaining to the jury what "cognitive" meant. Then he raised the issue of whether R was an intellectually impaired person as defined by the Code, and read out the definition to the jury. He referred them to the evidence of her relatives and carers, and to the evidence of the psychologist Dr Attwood. He told them that it was not Dr Attwood's task to answer the question whether R was an intellectually impaired person; it was up to them to make the finding. They had, he said, seen R in the witness box and on the video tape of her interview. The ultimate question for them was whether she consented "freely and voluntarily, knowing what was to happen, understanding the significance of the act, and agreeing to participate in it".

[68] Parts of the direction are unexceptionable; but the introduction into it of the concept of intellectual impairment, and, more importantly, the equation of it with lack of cognitive capacity was an error. The former is much broader than the latter. Indeed, the definition of intellectual impairment in s 229F is so broadly expressed as to embrace many persons who would not by any stretch of the imagination be regarded as intellectually impaired as that term is ordinarily understood. One can be "intellectually impaired" under the Code definition without in fact suffering any intellectual impairment or any diminution in the capacity to acquire knowledge; a neurological impairment affecting the power to communicate will suffice. As I observed in the course of argument, it seems to me that the definition is so wide as to include a cerebral palsy sufferer of genius IQ. The mischief in the direction was its implication that if the jury were to conclude (as it must have done on the breadth

of that definition) that R was intellectually impaired, a conclusion of lack of cognitive capacity would follow.

[69] Mr Devereaux for the appellant also pointed to other problems, not the subject of any ground of appeal, in the directions. Firstly, the learned trial judge while directing the jury on the issue of honest and reasonable but mistaken belief as to consent told the jury that the question of reasonableness was to be viewed objectively, and that they "effectively represent[ed] the community and the community view"; the reference to community views was, Mr Devereaux contended, a diversion from the real inquiry. Secondly, the trial judge failed to make any reference to the issue of whether the appellant honestly and reasonably believed that the complainant had the capacity to consent. That left open as a possibility that the jury, while accepting that the appellant honestly and reasonably believed that the complainant was consenting, nonetheless convicted, having found that she was not capable of doing so, without giving consideration to whether he might also have believed honestly and reasonably that she was of full capacity.

[70] Both are legitimate matters of complaint. In any event, the introduction of intellectual impairment as defined in s 229F into the direction of cognitive capacity was itself an error of such significance as to warrant a new trial. However, because the further evidence as to the appellant's own intellectual impairment will be of significance in any new trial it is appropriate to consider that basis of appeal also.

The new psychological and psychiatric evidence

[71] While the appellant was in custody commencing to serve his sentence, he was examined by a Bosnian-speaking psychiatrist to whom it became apparent that he suffered from cognitive deficits. Intelligence tests were carried out by a psychologist who was able to translate them into Bosnian. The conclusion was that the appellant had an IQ of 56 and a diagnosis of mild mental retardation. That evidence was not challenged as being new and fresh in the sense required to warrant its receipt on appeal.

[72] Two other psychiatrists, Dr Fama and Dr van de Hoef, examined the appellant for the purposes of this appeal. Dr Fama expressed a view that because of a want of understanding about the proceedings the appellant was "probably unfit for trial" while Dr van de Hoef thought that he was currently unfit for trial but with some assistance and explanation might become fit for trial. Although it was raised in his outline, Mr Devereaux did not press this point on the appeal, unsurprisingly I think, given what seems from the transcript of the trial to have been the appellant's ability to give instructions for the cross-examination of R, and to give evidence himself and be cross-examined without apparent difficulty in comprehension of what was going on.

Insanity

[73] Both Dr Fama and Dr van de Hoef expressed the view that the appellant, because of his mild mental retardation, was in "such a state of ... natural mental infirmity as to deprive [him] of capacity ... to know that [he] ought not to do the act[s]", in this case the rapes, and thus that he was not, by virtue of s 27(1) of the *Criminal Code*, criminally responsible. However it emerged, both from the content of their reports and from cross-examination, that what they meant was that the appellant, because of his retardation combined with his language difficulty, was inhibited in his ability to

pick up the cues which might have led another person to appreciate that R was intellectually impaired.

[74] That is not, it seems to me, a state of affairs which falls within the compass of s 27. Indeed the appellant made it clear to the police and to both psychiatrists that he would not have had sex with R if he had appreciated that she suffered from an intellectual disability. He knew too that he ought not to force himself on a woman not giving consent. Quite clearly, as Dr Fama conceded, the appellant knew, in the abstract at least, that to have intercourse with someone who either did not or could not consent was wrong. It is, therefore, apparent that the appellant was quite capable of appreciating that he ought not commit the acts of rape as alleged by the Crown. The excuse of insanity was not available to him.

The assessment of reasonableness of mistake under s 24

[75] What the psychiatrists were, in effect, saying was that the appellant's retardation had contributed to a mistaken belief that the appellant was capable of consenting, and was consenting, to intercourse. That raises the question of whether the evidence of his retardation could assist in excusing him from responsibility under s 24 (1), which provides:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

It is to be noted that the excuse of honest and reasonable but mistaken belief under s 24 is not on all fours with the common law defence of honest and reasonable mistake of fact; the relevant belief is "in the existence of [a] state of things" as opposed to fact. The former "implies a concept somewhat wider and different from a mere mistaken belief of a fact or a fact exclusively".[15]

[76] Here there were actually two particular features of the appellant which might have contributed to any mistake: his inability to understand English and his mental retardation. And there were two respects in which mistake was relevant: whether the appellant had held an honest and reasonable but mistaken belief that R was consenting to intercourse, and whether he had held a similar belief that she had the capacity to consent to intercourse. Both issues were alive on the evidence; there were some aspects of compliance by R which might be capable of misinterpretation as competent consent.

[77] Whether a mistake which is to some extent induced by intellectual impairment can be a reasonable one is a question of considerable difficulty, and one on which authority is surprisingly scant. Mr Copley, for the Crown, submitted that intellectual impairment could be relevant only to the element of honesty in the defence of honest and reasonable mistake. Reasonableness was objective, and the reasonable person by whose standard the assessment was to be made was not an intellectually impaired person. Mr Devereaux, for the appellant, argued to the contrary with diffidence, deterred somewhat by references in *Daniels v R*[16] to the "reasonable man" as the arbiter of reasonableness in mistake. The Western Australian Court of Criminal Appeal in *Daniels* held that intoxication was relevant to whether an

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15 *Ostrowski v Palmer* (2004) 78 ALJR 957, 973.

16 (1989) 1 WAR 435.

accused person actually held the belief in question, as opposed to the reasonableness of that belief. "A reasonable man", Kennedy J said, delivering the leading judgment, "is a sober man"; thus an actual belief by an intoxicated person in the existence of a state of things would "not avail him if a reasonable man would not have been mistaken"[17].

[78] Similarly, in *R v Pacino*[18] the Court of Criminal Appeal (in a judgment again written by Kennedy J) referred to the s 24 defence in terms of what "a reasonable person might honestly have believed".[19] In *Pacino*, the critical question on appeal was whether the defence was available at all where the charge was one of criminal negligence; how the relevant test was framed was, therefore, not crucial.

[79] But the question here is whether the section provides an excuse from criminal responsibility where the mistaken belief is one which is honest and which would have been held by a reasonable person; or whether it applies where the mistake is honest and the belief is one held by the accused on reasonable grounds. It is clear that a requirement that a belief be on reasonable grounds does not equate to a requirement that a reasonable person would have held it. [20]

[80] In *Jiminez v The Queen*[21], the High Court, in considering the availability of the common law defence of honest and reasonable mistake to a charge of dangerous driving causing death, regarded the question as one of whether the driver "might honestly have believed on reasonable grounds that it was safe for him to drive."[22] The court addressed the question in that case in terms of the applicant's circumstances – the facts that he had had some sleep, had not consumed alcohol or drugs, had not been driving for an excessive period, and had experienced no drowsiness – which, it said, laid "a foundation for [his belief that it was safe to drive] being an honest and reasonable belief". [23]

[81] In the *Criminal Code* context, a similar approach to the requirements of s 24, focussing on whether the accused's belief was held on reasonable grounds, better reflects the terms of the section. The section directs attention to the actual belief of the accused; nothing in its language invites reference to the reasonable man's putative belief. What must be considered, in my view, is the reasonableness of an accused's belief based on the circumstances as he perceived them to be. That approach is consistent with this observation by Burt CJ on the equivalent provision of the Western Australian *Criminal Code*:

> "The belief 'under' which the act is done must be honest, which is to say no more than it be held in fact; it must be reasonable, which is to say that it must be based on his appreciation of primary objective fact which is in reason capable of sustaining the belief; it must be mistaken and it must be a positive belief because the extent of the criminal responsibility is not to be greater 'than if the real state of things had been such as he believed to exist'."[24]

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17 At 445.
18 (1998) 105 A Crim R 309.
19 At 320.
20 *R v Julian* (1998) 100 A Crim R 430.
21 (1992) 173 CLR 572.
22 At 584.
23 At 583.
24 *GJ Coles & Co Limited v Goldsworthy* [1985] WAR 183, 187-188.

Belief "on reasonable grounds" in self-defence

[82] Some assistance as to the framework in which the reasonableness of grounds for a belief is to be assessed can be derived from self-defence cases. Section 271(2) of the *Criminal Code* excuses from criminal responsibility an accused person assaulted in such a way as to cause " reasonable apprehension of death or grievous bodily harm" who "believes, on reasonable grounds, that [he] cannot … preserve [himself] from death or grievous bodily harm" except by the use of force.

[83] The importance of a focus on the accused's belief in that context was emphasised in *R v Masters*[25]. The court held that the appellant was entitled to lead evidence of information he had been given which caused him to fear the man whom he killed. It was, Thomas J observed, inevitable, given the requirement that the belief for the purposes of s 271(2) be held on reasonable grounds, that the accused be permitted to state the basis for his belief, even if that were something that he was told by a third party[26]. He referred to *R v Fitzpatrick*[27] for the propositions that "the state of a man's mind is as much a fact as the state of his digestion, and that an accused person must be permitted to give his account of it".[28]

[84] The Tasmanian Court of Criminal Appeal in *The Queen v McCullough*[29] accepted that there must be an aspect of the subjective in assessing the reasonableness of an accused's belief. One of the questions on appeal was whether the trial judge ought to have directed the jury in respect of s 46(2) of the Tasmanian *Criminal Code*, the equivalent of s 271(2), that intoxication was relevant to whether the appellant's apprehension and belief were reasonable or held on reasonable grounds. While concluding that intoxication was relevant to whether the applicant actually held the belief in question but not to its reasonableness[30], the court said this,

> "In our opinion the learned trial judge in these passages properly directed the jury that the test of reasonableness under s 46(2) is a subjective test, in the limited sense that the question to be considered by the jury was whether it was reasonable for the applicant in all his then circumstances to hold the relevant apprehension and to have the relevant belief."

[85] The more difficult question for present purposes is the extent to which personal characteristics, such as intellectual impairment, psychiatric disorder or language difficulties, may be taken into account. Some Canadian cases on self defence lend assistance. Section 34(2) of the Canadian *Criminal Code* sets up self defence in terms virtually identical to those of s 271(2): an accused who causes death or grievous bodily harm is justified if he causes it "under reasonable apprehension of [his own] death or grievous bodily harm" and "he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm". In *R v Lavallee*[31], the landmark case on battered woman's syndrome, expert psychiatric evidence as to the psychological effects of an abusive relationship was admitted because it might explain why a woman who had been beaten did not simply leave the abuser. That expert evidence would thus assist the jury in assessing the

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25 [1987] 2 Qd R 272.
26 At 274.
27 (1926) 19 Cr App R 91, 92.
28 [1987] 2 Qd R 272, 275.
29 [1982] Tas R 43.
30 At 53.
31 [1990] 1 SCR 852.

reasonableness of the belief required by s 34(2); in that case, that killing the abuser was the only way for the accused to save her own life.

[86] The proposition that "expert evidence of heightened arousal or awareness of danger" in a "battered woman" context could be relevant to self defence was specifically accepted by Gaudron and Gummow JJ in *Osland v R*[32], and indeed by the other members of the court, with certain reservations as to how and when such evidence might be received, and the need for it to be adduced within the constraints of the existing law on self-defence and provocation[33].

[87] *R v Nelson*[34], another Canadian case, has considerable relevance to the circumstances of the present case. The issue there was whether the appellant, who was described as of "diminished intelligence", held a reasonable, albeit mistaken, belief that he was being threatened by the deceased so as to provide justification under s 34(2) of the *Criminal Code* for the killing. Morden ACJO, delivering the judgment of the Ontario Court of Appeal, referred to a statement in an earlier case to the effect that an intoxicated person could not hold a belief based on reasonable grounds, since a "reasonable man is a man in full possession of his faculties".[35] That situation was to be distinguished, he said: a person with diminished intelligence might well be in full possession of his faculties; the difficulty was that they were, through no fault of his own, diminished.[36] It had been accepted in earlier cases that it was appropriate to allow for youth, so as, for example, to apply the standard of a 14-year-old to an accused boy of that age. If youth were properly to be taken into account, Morden ACJO said, so was "a condition of arrested intellectual or mental development"; both "may equally affect [the accused's] perception of, and reaction to, events. Both, too, are beyond the control of the accused".[37] He went on to add this caution:

> "...the evidence relating to the nature of the accused's intellectual impairment is of central importance. All people are not of equal intellectual ability and it cannot be said that any variation below what may be thought to be the norm would entitle an accused to have his or her alleged intellectual deficit taken into account in the application of the reasonableness requirement in s. 34(2). However, where the accused has an intellectual impairment, not within his or her control, which relates to his or her ability to perceive and react to events – an impairment that clearly takes him or her out of the broad band of normal adult intellectual capacity – I think the deficit should be taken into account."[38]

Thus the jury should have been instructed to consider whether the appellant's apprehension and belief for the purposes of s 34(2) were reasonable in the light of his diminished intelligence.

[88] In *R v Kagan*[39], the appellant, who had been convicted of aggravated assault, appealed on the basis of misdirection on expert evidence, relevant to self-defence,

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32 (1998) 197 CLR 316, 337.
33 At 339, 370-378, 407-408.
34 (1992) 71 CCC (3d) 449.
35 *R v Reilly* (1984) 15 CCC (3d) 1.
36 71 CCC (3d) 449, 467.
37 At 468.
38 At 469.
39 2004 NSCA 77; June 10, 2004.

from a forensic psychiatrist. The evidence was to the effect that the appellant suffered from some features of Asperger's Syndrome which had disposed him to misinterpret certain actions of his victim as threatening. The Nova Scotia Court of Appeal, having reviewed various authorities, including *Lavallee* and *Nelson*, identified, inter alia, these principles: on the legal issues involving the apprehensions and beliefs of the accused, the jury should consider whether the perception of the accused was reasonable, given his "specific situation and experience"; and "[e]xpert evidence of the accused's specific mental disorder is helpful, and necessary to appreciate why the accused's fear might have been reasonable in his situation".[40] A direction to the jury on the issue of whether the accused's apprehension and belief were reasonable given without reference to the relevant expert evidence was inadequate.

The relevance of the accused's personal characteristics in mistake

[89] The circumstances of the present case point up the inevitability of reference to the characteristics of an accused in considering the reasonableness of mistake. It would be absurd here to introduce a fiction that the appellant had a full command of the language into the process of considering whether he laboured under a reasonable but mistaken apprehension as to the existence of consent. But if one accepts, as Mr Copley seemed to, that a language handicap is a feature of the accused relevant to assessment of the reasonableness of his belief, it becomes difficult to assert that an intellectual handicap is not similarly such a feature.

[90] It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.

[91] And although it was suggested in the course of argument that a recognition of such personal characteristics might produce difficulties where the accused suffered from a psychiatric disorder producing delusions, that situation is independently catered for in the *Code*: s 27(2) makes this concession to an individual suffering from delusions but not a mental disease or infirmity with consequences such as to give rise to excuse under s 27(1):

> A person whose mind, at the time of the person's doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to exist.

[92] The new evidence of intellectual impairment was, it seems to me, relevant to possible excuse from criminal responsibility under s 24, as indeed was the evidence of the appellant's language difficulties. If the jury accepted that evidence, both those features had the potential to affect the appellant's appreciation of the situation in which he found himself, and more particularly to inhibit his capacity to recognise

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40 At 23.

R's condition and to interpret her responses. In those circumstances, a jury might be prepared to accept that a belief which would not be reasonable if held by a native English speaker of normal IQ was honestly held by the appellant on reasonable grounds.

[93] Mr Copley argued that the evidence would not have produced any different verdict, pointing to differences between the accounts of R and the appellant as to whether she had resisted, which, he said, could not be explained as a product of misunderstanding. Those differences, it seems to me, while clearly relevant on the issue of mistake, were essentially matters for a jury to consider; but one could not say that the result must have been the same had they been considered in the light of the evidence as to the appellant's intellectual deficits.

Conclusion

[94] The appellant should, because of the erroneous direction on cognitive capacity and the effect of the fresh evidence on any s 24 excuse, have a new trial. I would allow the appeal, quash the convictions and order a re-trial.