SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rutherford* [2004] QCA 481
PARTIES:	**R** **v** **RUTHERFORD, Scott Anthony** (appellant)
FILE NOS:	CA No 295 of 2004 DC No 4 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	17 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2004
JUDGES:	McMurdo P, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal** **2. Set aside the verdict in the District Court** **3. Order a new trial**
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 series of three alleged offences – where verdicts of guilty on last count and not guilty on others – where appellant told not to visit complainant before last incident – where complaint made promptly after last incident – whether verdicts inconsistent CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – CONSIDERATION OF SUMMING UP AS A WHOLE – where complainant dyslexic and slow learner – where opposing evidence of nature of relationship between appellant and complainant – where opposing evidence about initiation of sexual advances – where appellant warned off between incidents constituting count 2 and count 3 – where complainant troubled mood after

count 3 – where complaint made after incident constituting count 3 in answer to questions of boyfriend – where absence of direction about use of evidence of distressed state – where absence of *Markuleski* direction – whether direction necessary concerning a possibility inconsistent with parties' cases – whether trial miscarried for failure to give directions or redirection

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A

Gilbert v The Queen (2000) 201 CLR 414, cited
Kilby v The Queen (1973) 129 CLR 460, cited
R v M [2001] QCA 458; CA No 126 of 2001, 26 October 2001, considered
Mackenzie v The Queen (1996) 190 CLR 348, cited
R v LSS [1998] QCA 303; CA No 128 of 1998, 2 October 1998, cited
R v Markuleski (2001) 52 NSWLR 82, considered
MFA v The Queen (2002 213 CLR 606; (2002) 193 ALR 184, cited
R v Roissetter [1984] 1 Qd R 477, applied

COUNSEL: A J Rafter SC for the appellant
D L Meredith for the respondent

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

[1] **MCMURDO P:** I agree that the appeal against conviction must be allowed and a new trial ordered for the reasons given by Mackenzie J.

[2] **JERRARD JA:** In this appeal I have read and respectfully agree with the reasons for judgment of Mackenzie J, and the order His Honour proposes. On a re-trial on count 4 the prosecution will need to consider if unfairness to the defence or prosecution can be avoided where the prior relationship between the appellant and complainant would seem relevant to the allegations that rape occurred in mid-November 2003. That prior relationship includes an occasion on which she alleges an act of rape of which he has been acquitted.

[3] On any re-trial I consider it would be appropriate for a trial judge to specifically direct the jury that the prosecution must exclude the possibility that the appellant was exploiting a vulnerable woman, irrespective of whatever defence he advanced.

[4] **MACKENZIE J:** The appellant was tried for four offences of rape. He was acquitted of counts 1 and 2, convicted of count 3, and count 4 was terminated at the end of the Crown case by *nolle prosequi.* The reason was that it had been particularised as an act of digital penetration which occurred after count 3 whereas the evidence was that it had occurred prior to the penile penetration which formed the basis of count 3.

[5] The further amended grounds of appeal against conviction are the following:

1. The verdict of the jury on Count 3 is unreasonable and/or inconsistent with the verdicts on Counts 1 and 2.
2. A miscarriage of justice has resulted by reason of the failure of the Trial Judge to direct the jury that a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts must be taken into account in assessing the truthfulness or reliability of the evidence generally.
3. A miscarriage of justice has resulted by reason of the failure of the Trial Judge to redirect the jury in relation to the complainant's distressed condition.
4. A miscarriage of justice has resulted by reason of the failure of the Trial Judge to direct the jury that the Crown was required to exclude the possibility that the applicant [sic] was exploiting the complainant.

Grounds 3 and 4 resulted from issues raised during the course of the appeal.

Versions of relationship between appellant and complainant

[6] According to the complainant, she had first met the appellant in August 2003, a couple of months before the events in count 1. She had been introduced to him by a female friend of hers. On the occasion they first met they, in company with other people, had spent about two hours together at her home. She said that she saw him occasionally, usually when he was passing by in the street. Within a month of meeting the appellant, she met a man DL. He was living next door to her. One day they began speaking over the fence, which resulted in him staying that night at the complainant's home, immediately following which he began living with her. She had two children from a previous relationship and, according to her evidence, she felt comfortable with the support he gave to her and her children. According to the tenor of her evidence, the appellant was no more than an acquaintance.

[7] His evidence was that, from the first time they met, the complainant showed affection towards him and expressed a desire that he move in to live with her. She continued to display affection towards him on subsequent occasions when they met. According to him, this resulted in two consensual acts of sexual intercourse. It was common ground that the occasions to which he was referring were those comprised in counts 2 and 3. He denied that any act of oral sex, which is the act alleged in relation to count 1, had occurred, although he conceded that he may have asked her whether she engaged in it on one, possibly the first, of the occasions that they had sexual intercourse. When she displayed a lack of interest in engaging in it he dropped the subject.

[8] There was evidence from the complainant that she had attended a Special School because she was dyslexic and a slow learner. She said that she had difficulty communicating properly, by which she meant "Just coming across with what I've got to say to people". Ground 4 of the further amended grounds of appeal has some relation to this.

Count 1

[9] This offence was alleged in the indictment to have been committed in the month of October 2003. There was evidence that suggested the complainant alleged it occurred in mid-October. It was alleged to have involved the appellant coming to the complainant's home, inviting her to suck his penis and when she said she did not want to, placing his hand on the back of her head and forcing her mouth onto his penis. When spoken to by the police on 14 November 2003 she did not mention this act. It was, however, included in a statement taken on 15 November 2003. The accused gave evidence denying that any such incident had happened. He was acquitted.

Count 2

[10] This was originally alleged to have occurred on 30 October 2003 at about 12:30pm. Because of uncertainty in the complainant's evidence, the indictment was amended to cover the month of October. However, defence counsel did not dispute that the relevant date was 30 October. According to the complainant, the appellant, who had arrived uninvited, asked her to have sex with him. She said that she did not want to. She went to the bedroom and attempted to ring DL but could not contact him. The appellant followed her, got on top of her, punched and 'rubbed' her and then put his penis into her vagina. She said that she was telling him not to do it. She said that he had taken her clothes off, having "ripped them off with his hand and that". She said that, during the event, she tried to pinch him to get him off her. When the investigating police officer inspected the appellant's body on 14 November 2003, two weeks later, there was no evidence of bruising or other marks.

[11] The appellant gave evidence that there was a consensual act of sexual intercourse after he had been invited inside after the complainant saw him passing by. He said that she had instigated sexual advances towards him. The foreplay engaged in ended with them going to the bedroom and having consensual sexual intercourse. He was acquitted of this count.

Count 3

[12] This count, on which he was convicted, was alleged to have occurred on 13 November 2003. According to the complainant, the appellant let himself in through a screen door and asked her to come to the bedroom because he wanted sex. When she declined, he pushed her into the bedroom, pulled her clothes off, undressed himself and had sexual intercourse with her.

[13] The appellant gave evidence that on the Monday before the incident, the complainant came to his place of work, wanting to speak to him. He told her that he was busy and that the only day he was not really busy was Thursday. An arrangement was made for him to call her when he finished work with the result that on Thursday he rang her from a public phone booth near his place of work. She said that she was on her way to a takeaway shop and he arranged to meet her there. When she arrived, she asked him to go back to her place. He told her that he was in his work clothes and still dirty. She suggested he have a shower at her place.

[14] On arrival at her home she made a cup of coffee. While they were drinking it, she started kissing him and asked him if he wanted to have a shower. She had a shower first and called him into the bathroom while she was washing her hair. She invited him into the shower and made sexual advances to him. After they had finished showering, she invited him into the bedroom to get dressed. She lay on the bed and

invited him to lie down as well. After further foreplay, she asked him to have sexual intercourse with her, which he did.

[15] There were two other aspects of the evidence particularly relevant to this count. Later that day, DL noticed that the complainant appeared stressed and withdrawn. The next morning, her unusual mood was persisting. According to DL, he asked her what was up. She said "If I tell you … you'll go round and bash someone". He said "You can't tell me that and then not finish the conversation". She then said "That bloody Scott raped me." He immediately rang the police and passed the phone to her. In examination-in-chief, DL was asked by the Crown Prosecutor:

> "And did she say how many times that had happened? -- Actually – okay. You've reminded me of something that's happened there. And then I said, "Is that all that's happened?" and I – and she said, "No. And he did something a week before or roughly a week before and that – that – and something a bit before that about maybe three or four weeks before that or three weeks before that."

After further questioning, he said she eventually said that she was also raped about a week before and also said that the appellant had forced her to give him a "head job" approximately a week before that. However, in cross-examination, it was established that he had not included any reference to such an act in his statement which was given the day after the complaint to the police was made.

[16] The second significant body of evidence was that, although neither the complainant nor DL mentioned it, the appellant gave evidence in cross-examination that, about a week or so before the second time he and the complainant had sexual intercourse, she had told him that she did not want him to come around any more. After that, DL also told him not to come around any more. He said that he had tried to contact the complainant by phone but DL had answered and told him that the complainant did not want to speak to him. He did not try to raise the issue with her again, or try to find out why.

[17] The appellant professed not to have known that the complainant and DL were in a relationship until after the final act of intercourse. He said that, on other occasions before that, he had asked her whether she was in such a relationship because of his perception that they may have been, but she denied it.

Ground 1 – Inconsistent Verdicts?

[18] It is apparent from the summary of the evidence relating to counts 1, 2 and 3 that there were factors in the evidence relating to count 3 that were absent from the evidence relating to counts 1 and 2. In relation to counts 1 and 2, there was not independent evidence supporting the complainant's evidence. In relation to count 1, the evidence whether a complaint about it was consistently made was somewhat unsatisfactory. There is no reason to find that the verdict of guilty on count 3 is inconsistent with the verdicts of not guilty on counts 1 and 2. There was a rational basis for a jury properly instructed, to come to different verdicts in the case of counts 1 and 2 from that reached on count 3 (*Mackenzie v The Queen* (1996) 190 CLR 348 at 366). The different verdicts are not an affront to logic and commonsense.

Ground 2 (Markuleski Direction)

[19] Some analysis of the evidence and the summing up is necessary for the purpose of resolving this ground and ground 3. In relation to ground 2, the appellant submitted that the learned trial judge erred by not directing the jury that a verdict of not guilty on one count should be taken into account in assessing truthfulness or reliability of the complainant's evidence generally. It was submitted that, as the case involved word against word, such a direction was desirable. Reliance was placed on *R v Markuleski* (2001) 52 NSWLR 82 where Spigelman CJ said, at 121, that in light of the number of cases in which Courts of Criminal Appeal had acted on the basis that the jury may have failed to appreciate that a reasonable doubt about one aspect of the complainant's evidence ought to be taken into account when assessing that witness' evidence on other matters, it is desirable that the traditional direction as to treating each count separately is supplemented in word against word cases by making reference to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count. Wood CJ at CL pointed out, at pages 135 to 136, that the strength of the warning may vary according to the circumstances of the particular case, from strong comment to none at all.

[20] In *R v M* [2001] QCA 458, McPherson JA accepted that it is undesirable to elevate the proposition that such a warning should be given the status of a binding rule, while acknowledging that, in some, perhaps many, cases it is desirable that such a direction be given, even though the trial judge cannot tell in advance that disparate verdicts will be returned. In the present case the direction was restricted to the traditional directions that the jury could accept the witness completely, reject the witness completely or accept some things that a witness said, yet reject other things said by the same witness. The jury was reminded that a person may be mistaken about some details or even be deliberately untruthful in some respects yet be accurate and honest in other respects. The mere fact that the jury might not accept every word a witness said did not mean that every word the witness said must be rejected. The jury was also told that the mere fact that they might return a particular verdict in relation to one or more of the charges did not mean that they must return that same verdict in relation to the remaining charges. It was not suggested that the directions were in themselves flawed in any way.

[21] In my view, the trial did not miscarry because such a direction was not given. The case is one where a properly directed jury was entitled, logically, to differentiate between the verdicts because there was evidence, in relation to count 3, that a properly directed jury might consider to be supportive of the complainant's evidence. That is a somewhat different situation from the kind of case where a direction of the kind contended for becomes critical.

Ground 3 (Direction concerning distress)

[22] The jury's verdict must be taken to mean that it was not prepared to act on the complainant's evidence alone that the act alleged in count 1 occurred and that she did not consent to the act alleged in count 2. Such an outcome does not necessarily mean that the complainant's evidence was rejected (*MFA v The Queen* (2002) 193 ALR 184). Consistently with that view of the outcome on those counts, to convict on count 3, the jury might, if properly directed, have placed significance on the facts set out below as a basis for accepting the complainant's evidence beyond reasonable doubt. The matters are the following:

(a) that the complainant was observed to be in a stressed and unusually quiet state on the evening when, and the morning after, count 3 was alleged to have occurred; and/or
(b) that, when asked the next day about the reason for her troubled mood, she complained of being raped the previous day and on a previous occasion; and/or
(c) that, between the date alleged in count 2 and the date alleged in count 3, both the complainant and DL had told the appellant that she did not want him coming to their home any more.

[23] It is, of course, impossible to identify any particular one or any particular combination of these additional factors as the basis upon which the jury concluded that they were prepared to accept the complainant's evidence beyond reasonable doubt with regard to count 3, except to say that, because of the directions given with respect to (b), the jury should not have taken it into account.

[24] The evidence shows that the reason why DL asked the complainant questions that led to her making the complaint of rape was that the previous evening, and when she woke up the next morning, she was in an unusual mood which suggested that she was troubled by something. When pressed by DL, she made a complaint, initially at least with respect to being raped by the appellant the previous day.

[25] The learned trial judge told the jury the following with respect to her complaint to DL:

> "It is before you as part of the narrative of events, if you like. It's part of the history of this whole complaint, how it emerged and how ultimately, in a sense, it finds itself before you in the District Court ….
>
> However, it is important to understand this: that you should not regard that evidence, that is, the making of the complaint, as evidence of proof of what actually occurred. In other words, it is not itself proof that there was an incident of rape on the 13th of November. Nor can you use that evidence in the circumstances here as in some way buttressing the credibility of the complainant."

[26] No complaint was made about the third and fourth sentences. However, the Crown submitted that the fifth sentence is unduly favourable to the appellant, since the fact that a complaint has been made may show consistency of the complainant's conduct and thereby buttress her credit (*Kilby v The Queen* (1973) 129 CLR 460; *R v LSS* [1998] QCA 303). Inclusion of the words "in the circumstances here" by the very experienced trial judge in juxtaposition to the reference to the concept of buttressing the credibility of the complainant suggests two things. One is that he did not overlook that, in an appropriate case, use of such evidence is as an aid to the complainant's credibility by demonstrating consistency between her conduct and her evidence. The other is that the learned trial judge thought that, in the circumstances of the case, the evidence could not be used for that purpose. The reason for this is not explicit on the record. For example, it is unclear whether it relates to the fact that the complaint was generated by an inquiry by DL about the reason for her troubled mood (although not of a kind that might ordinarily enliven the question whether the evidence ought to be excluded (s 4A(2), (3) *Criminal Law (Sexual Offences) Act* 1978)).

[27] If what was said was intended to convey that the complainant's troubled mood was a neutral factor from which an inference adverse to the appellant could not be drawn, it does not do so expressly. In any event, drawing inference from the complainant's troubled mood is a separate and distinct issue from the use that can be made of the complaint itself. Coalescing the two into one direction runs the risk of the issues for consideration being insufficiently exposed for the jury's consideration.

[28] However that may be, the effect of the direction given was to attribute, at best, neutral value to the fact that a complaint was made. It could not assist to prove what had happened; nor could it be used to buttress the complainant's credibility. After giving a direction in which he said that differences in the evidence as to the terms of the complaints were something the jury could take into account in considering the issue of credibility of witnesses, he concluded by saying:

> "… if you accept that the complainant did tell [DL] of those additional incidents, and that's a matter for you, then you must not use that evidence as in some way boosting the complainant's credibility, nor must you use that evidence as proof of the matter on which complaint was made. It is again part of the narrative of events."

[29] There is no reason to suppose that the jury would not have followed and acted on the clear direction (*Gilbert v The Queen* (2000) 201 CLR 414). The direction precluded them from using the fact that the complaint was made either as evidence of rape or as a buttress for the complainant's credibility; its only use was as part of the narrative of events.

[30] The summing-up does not suggest that the question whether an inference could be drawn, from her troubled mood, that the reason for it was that she had been raped was raised as an issue. There was no specific reference in the summing up to her troubled mood; nor was there any application to redirect in a way that would have drawn the jury's attention to the need to consider other possibilities for its existence. The question is whether the absence of any direction on the subject may have led the jury to assume uncritically that it was consistent with what she said had happened, without considering other possibilities.

[31] In *R v Roissetter* [1984] 1 Qd R 477 at 482, McPherson J, giving the judgment of the Court of Criminal Appeal, discussed this issue and concluded as follows:

> "At the foundation of the court's reluctance to allowing evidence of a distressed condition to be left to the jury without some particular warning as to its reliability there is evidently a fear that the condition in question may be feigned so that the jury may be led astray by a consideration of it. Such distrust hardly seems compatible with the traditional role of the jury as the assessors of matters of credibility and fact at a criminal trial. …. If the circumstances are such that the causal connexion or apparent relationship between the distressed condition and the alleged assault is tenuous or remote, then the duty of the trial judge is to withdraw it from the jury as a circumstance capable of being considered corroborative: see *R. v. Flannery* [(1969) VR 586]; *R. v. Berrill* [1982] Qd. R. 508, 527. But, given that it is, in the particular circumstances, fairly capable of affording corroboration, the matter of the inferences if any to be drawn from,

> and the weight if any to be allowed to, a state of distress in a complainant is pre-eminently one for the jury. No fixed verbal formula is capable of being laid down for determining what direction should be given by judge to jury, or whether any specific direction as to the weight or lack of it is necessary or desirable in a particular case."

In the particular circumstances of this case the reference to a "feigned" mood is not apposite; there can be no real doubt that her troubled mood was genuine. The reason for it was the question for the jury. In the particular circumstances of this case there are complex issues to which reference will now be made.

[32] Evidence of her troubled mood would, as a matter of practicality, have been difficult to exclude, since it was an integral part of the evidence about the process which led to the matter coming to trial. The alternative would have been to simply present the matter to the jury as if she had complained of being raped the next morning. There may have been good reason why the defence preferred the evidence to be presented in the form in which it was. If the jury was satisfied that it was genuine distress, as they almost certainly would have been, and did not proceed from some other cause than distress over being raped, it was capable of supporting the credibility of her evidence that the sexual intercourse on the occasion of count 3 was non-consensual.

[33] The argument has tendency to be circular in some cases, especially where there is no other evidence supporting the complainant's. To conclude that other possible explanations are excluded because the complainant's evidence has been accepted adds nothing. Caution has always been exercised in relation to this kind of evidence. However, this case was one where it appears that the jury was prepared to act on the complainant's evidence, if supported by other evidence. There was other evidence which, if accepted, was consistent with the conclusion that the appellant was no longer welcome at the complainant's home which may have assisted the jury to decide that the troubled mood was due to distress over being raped.

[34] As previously observed, one complication is that it seems not to have been an element in the case, as conducted, that the complainant's troubled mood supported her evidence that the undisputed act of sexual intercourse was non-consensual. Another is that the jury appears not to have been prepared to act on the complainant's evidence in the absence of supporting evidence. That follows from their verdicts on counts 1 and 2. That fact has to be considered, with the clarity that hindsight gives, in analysing whether the verdict on count 3 may have been affected by the lack of a direction of the kind referred to in *Roissetter*.

[35] The problem about the absence of a direction to the effect that it was necessary to be satisfied that the complainant's troubled mood was not attributable to some other emotion such as remorse over unfaithfulness, is that the jury may have simply assumed that her troubled mood was due to being raped without considering other possible reasons. The nature of her relationship with the appellant was a live issue because of his evidence that she was the initiator of sexual advances including on the two occasions when sexual intercourse admittedly occurred. If the jury started with the preconception that her troubled mood was due to rape, it is difficult to be confident that consideration of the other evidence may not have been influenced by it.

[36] As against this, there was the evidence, to which the jury may well have given weight, that the appellant had been told prior to the second occasion that the complainant did not want him to come to her home any more, that he made no enquiry about that attitude, having regard to his assessment of the state of their relationship and other matters referred to in [39]. The differentiation in verdicts in relation to counts 1 and 2 shows that the jury must have rejected, beyond reasonable doubt, his evidence as to what happened on the occasion alleged in count 3. The rational reason for doing so was that the jury concluded that there was other evidence supporting the complainant's version of events with respect to count 3. If that included a mere assumption that the troubled mood was a consequence of rape, the reasoning was flawed.

[37] Regrettably, it seems to me that there is no sound basis for being certain that an adverse assumption about the complainant's troubled mood was not a factor in the jury's rejection of the appellant's evidence. It may or may not have been. In my view, in the absence of a direction that drew attention to the need to be satisfied that her mood was not attributable to some other cause than distress caused by being raped, there can be no certainty that the jury's reasoning was not affected by the absence of a direction in that regard. Issues relating to (c) need no further exploration since they have been relevantly discussed in the course of the discussion above.

Ground 4 – No direction about exploitation

[38] The evidence of the appellant was that, because of what the complainant said and did, he thought she was falling in love with him at an early stage of their acquaintanceship. He said that he was not a person who rushed into a relationship but he considered her to be his girlfriend after a time. His work restricted the time he could spend with her but he spent as much time with her as he could. He said that by the time of the last incident he was "in love with her badly".

[39] He was cross-examined about describing her to the police, when they approached him about the complaint as "the girl that lives in T… Street" rather than as his girlfriend. He also accepted in cross-examination that he did not mention to the girl who was the friend who had introduced them and who had been his flatmate previously that he was in a relationship with the complainant. During cross-examination, he gave evidence about being told, between the dates of the incidents in counts 2 and 3, first by the complainant and then by DL, that she did not want him to go around to her home any more. He was also challenged about his lack of inquisitiveness, after the message had been passed on to him, about the reason for the complainant's reluctance to have him visiting, given his description of his relationship with her. He was also questioned about his evidence that it was only after the incident in count 3 that she told him, after he asked about it again, that she was in a relationship with DL. He said that, up to that point, because of her denials of such a relationship, he thought he was just a nice friend for her to have.

[40] The issue raised was whether, if the jury disbelieved the appellant's evidence about the nature of his relationship with the complainant, it was nevertheless necessary for a direction to be given that the prosecution must exclude the possibility that the appellant was, on the occasion of count 3, merely exploiting an emotionally vulnerable woman's desire for affection. Put another way, the prosecution had to exclude the possibility that, even though there was no relationship of the depth

described by the appellant, he nevertheless opportunistically persuaded the vulnerable complainant to engage in consensual sexual intercourse.

[41] In my view no direction of this kind was required. The learned judge told the jury that in giving evidence the appellant did not assume any responsibility to prove his innocence and even if they disbelieved all his evidence, they would not convict him unless the prosecution made out each element of the offence beyond reasonable doubt. Whether or not the relationship was of the depth claimed by the appellant, his case was that the two admitted acts of sexual intercourse were not only consensual, but actively encouraged by the complainant. The kind of case implicit in the proposed direction was not relied on by him. His case was that the acts of sexual intercourse, and in particular that on the occasion of count 3, were the result of a relationship he had with the complainant and at her encouragement. She denied any such relationship and denied consenting. The jury also had before it the other features of the evidence, particularly the appellant's, that were incongruent with his version of the nature of the relationship.

[42] Having regard to the way the case was conducted, the issue before the jury was not that the appellant opportunistically took advantage of the complainant's emotional vulnerability to persuade her to engage in consensual sexual intercourse, but whether, because of her interest in him, she was the instigator of conduct on the occasion referred to in count 3 calculated to persuade him to have sexual intercourse with her. Because of the appellant's case presented to the jury, there was no need for a scenario that was hypothetically possible, but not the appellant's case, to be left for its consideration. In the circumstances, failure to give a direction of the kind suggested was not erroneous.

Conclusion

[43] I would, for the reasons given, allow the appeal against conviction, set aside the verdict in the District Court, and order a new trial.