

SUPREME COURT OF QUEENSLAND

CITATION: *R v Murdock & Williams* [2005] QCA 168

PARTIES: **R**
v
MURDOCK, Dereck John
(appellant)

R
v
WILLIAMS, Wayne Lewis
(appellant)

FILE NO/S: CA No 297 of 2004
CA No 318 of 2004
DC No 23 of 2004
DC No 24 of 2004

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Bowen

DELIVERED ON: 20 May 2005

DELIVERED AT: Brisbane

HEARING DATE: 15 March 2005

JUDGES: Jerrard JA, Cullinane and Jones JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **1. In CA No 297 of 2004 the appeal against conviction is dismissed**
2. In CA No 318 of 2004 the appeal against conviction is dismissed

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – appellants convicted of rape where the complainant asserted she was so affected by alcohol and cannabis that she was unable to consent – appellants claimed they had obtained the complainant’s consent prior to sexual intercourse – complainant denied any such conversation taking place – both appellants knew the complainant had ingested alcohol and cannabis – whether on the whole of the evidence it was open to the jury to find a lack of consent by

the complainant

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – prosecutor obtained leave to cross-examine a prosecution witness regarding a prior statement – defence counsel did not object in the context of allowing the prosecutor to interview the witness – judge apparently misunderstood this lack of objection as authorising cross-examination – evidence admitted in prosecutor’s cross-examination entirely consistent with defence case – whether prosecutor’s suggestion that witness had given conflicting evidence at trial and in statement tended to discredit the witness – whether judge erred in permitting cross-examination – whether that error caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – defence case put possibility that consensual sex occurred which the complainant subsequently regretted and therefore exaggerated her level of intoxication – whether the judge erred in not putting the defence of mistake of fact to the jury

Criminal Code 1899 (Qld), s 24, s 668E(1)

Evidence Act 1977 (Qld), s 17

Danhhoa v R (2003) 199 ALR 547, applied

MFA v R (2002) 213 CLR 606, cited

COUNSEL: J D Henry for the appellants
R G Martin SC for the respondent

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

- [1] **JERRARD JA:** On 23 August 2004 Wayne Williams was convicted in the District Court on two counts of raping Ms X on 6 December 2002, and Dereck Murdock was convicted on one count of raping her that same day. Both were sentenced to imprisonment, and appeal their respective convictions on the same grounds. These are:

- that the verdicts of the jury were unreasonable, or could not be supported having regard to the evidence;¹

¹ Section 668E(1) of the *Criminal Code*

- that the learned trial judge erred in permitting the Crown Prosecutor to cross-examine the prosecution witness Darryl Lea;
 - that the learned judge erred in not leaving the defence of mistake of fact to the jury.
- [2] That first ground of appeal requires that this Court ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the respective defendant was guilty.² As described in *MFA v R* in the joint judgment of McHugh, Gummow, and Kirby JJ that test affords a protection against the prospect that an innocent person has been wrongly convicted upon unreasonable and unsupported evidence, and has thereby suffered a miscarriage of justice. The second and third grounds of appeal, alleging errors by the learned judge, respectively describe matters about which no objection was taken, and no direction was sought, by counsel for either appellant during the trial. It follows that the comments of McHugh and Gummow JJ in *Dhanhoa v R* (2003) 199 ALR 547 at 555 are applicable, namely that the appellants can only succeed on those grounds if a miscarriage of justice is established by reason of the Crown Prosecutor having cross-examined the witness Darryl Lea, or the learned judge having not left the defence of mistake of fact to the jury. No miscarriage will have occurred unless, firstly, that cross-examination should not have been permitted, or that direction should have been given; and, secondly, it is reasonably possible that the identified error may have affected the verdict.

Background Matters

- [3] The incident giving rise to the charges happened in a provincial city in Queensland on 6 December 2002. Ms X was 17 at the time, and employed as a store checkout operator. She knew Mr Williams (then 33) by the name “Wayne”, and knew Dereck Murdock, who was then 28. She regarded both men as friends prior to 6 December 2002, having met them through a boyfriend of hers. In November 2002 her relationship with that male broke up, and she was then living by herself in the flat she and the boyfriend had previously occupied together. Before 6 December 2002 she had spoken with Wayne Williams about the fact that her previous relationship had broken up, and she had invited Mr Williams around to the flat. He had visited it, in company with a mate, and had had a shower in the flat before leaving. He had left behind a pair of boxer shorts which she washed, dried, and kept to return to him on his next visit. She obviously assumed there would be a next visit.

Ms X’s account

- [4] On 6 December she decided to take a day off work, because she had influenza. She walked from her flat to a general practitioner’s premises in quest of a medical certificate, and on the way passed a hotel at which she saw Mr Williams. They spoke, she went on to the doctor’s premises, but was told to return later for the certificate. She went back to the hotel where she saw there Mr Williams, Mr Murdock, a person she knew as “Sonny”, another she knew as “Faron”, and some other people. At Mr Williams’ suggestion she drank two rums with Coke, for which he paid, and she then agreed with a suggestion he made that she go back with him and the man Faron to her place, to relax. She gave Mr Williams \$10 and he bought

² See *MFA v R* (2002) 213 CLR 606; 193 ALR 184

her two cans of bourbon and Coke, and bought himself a carton of VB Beer. She pushed his push-bike back to her flat while he carried the alcohol. Faron accompanied them.

- [5] When they arrived at her flat the drinks were put in the fridge and she got one for herself. She sat down on a lounge chair next to Mr Williams, and Faron sat on a chair facing them. To her surprise other men arrived at the unit from the hotel, and she recalled Mr Murdock, Sonny, and at least one other man arriving. When she gave evidence she believed that there were more people than that who had come, but she could not recall their names. She did not mind their turning up as they did; and those people then sat on her floor and started drinking.
- [6] She went to the toilet. She was suffering at the time from a bladder infection, and when she returned to her lounge room some of those present were smoking what she assumed to be marijuana, from a bong. She swore she had not previously smoked that substance herself, although her ex-boyfriend used to blow it into her mouth. Mr Williams suggested more than once that she try some of the marijuana, and eventually she agreed. She smoked one “cone” by herself, had a little more of her bourbon and Coke, and then started feeling a very significant adverse affect from what she had consumed.
- [7] She felt dizzy and tired, and that her eyes had started rolling into the back of her head. Her arms and legs were limp and she felt she could not move them. She could not speak at all. Mr Williams asked her to go into the bedroom with him, and she simply shook her head. Despite that, he put his arm underneath hers and made her stand up, and then walked her into the bedroom. In there nothing was said between them, and he sat her on the edge of the bed. He then pushed her down onto it with his hands and removed her jeans and underwear. She could recall his sitting on her chest and that he had no shorts on, while her shirt was pulled up and his was open, and he then put his finger in her mouth and opened it. After that he put his penis into her mouth.
- [8] She described then that “someone else” came up behind Mr Williams, and lifted her leg onto the bed; and then that other person – a male – had sexual intercourse with her. She could not see who it was, because Mr Williams’ body obstructed her view. When that male person unknown to her finished his act of intercourse, Mr Williams slid down her body, put her legs over his shoulder, and he then had sexual intercourse with her.
- [9] Her evidence was vague as to the time of day when this occurred, or for how long the group had been in her lounge room before she and Mr Williams went to the bedroom. The next thing she described with any clarity was that Mr Williams had dressed and gone into the lounge room, and she heard the others present tell Mr Williams that they were leaving. He then returned and lay down on the bed next to her. There was still no conversation between them, and he went to sleep. She got up to put her clothes back on, and was sick into a bucket near her bed which she was using as a rubbish bin. After that she went to a neighbouring flat and asked the occupant if she could use that occupant’s telephone, but the neighbour did not have one. That neighbour went back to Ms X’s premises to search for Ms X’s telephone, but could not find it. Ms X then went to a neighbouring house and called the police from there. She recalled falling asleep at the table in that house, and that police officers then arrived and asked her questions. She could not then recall all that had

then happened. She said that at that time she still felt terrible and could not open her eyes.

Assessment of her condition by others

- [10] The occupant of the adjoining flat recalled Ms X coming to that occupant's flat at around 2.00 pm that afternoon, and that Ms X appeared devastated and had said words to the effect that she had been raped by five men. The neighbour in the adjoining house to which Ms X then went after the fruitless search for her own telephone described Ms X as being "very trembly" very "shaky", and extremely distraught and sobbing when at that neighbour's residence. Ms X asked that neighbour to call the police, and said she had been raped. She told that neighbour that she had been raped by "six guys".
- [11] Mr Murdock's counsel established in cross-examination that Ms X, when first spoken to by police officers in the neighbour's residence, had only described one man raping her, named "Wayne" and whose surname she thought was Allen. She told those police officers that after the "bong" had been made by the men she could really remember nothing from then on. She had said she could not move, "or anything", and had just gone to sleep; she said the man who had taken her into the bedroom and who raped her had kept telling her his name was Wayne Allen. The questions asked by those police officers, which were recorded, show that they knew the man was actually Wayne Williams, as Mr Williams' own evidence established. The police officers who attended had recorded the conversation because the principal investigating officer thought that Ms X appeared drowsy and non-alert and as if under the influence of a drug, although the officer could not smell liquor on her breath.
- [12] A medical examination was arranged and that happened at 4.30 pm that day. The examining doctor recalled Ms X as having blunted responses and emotions, and said her body movements were very slow and disorientated. The doctor described her speech as not being slurred, but as quickly lapsing into a semi-trance like state. His opinion was that there had either been heavy cannabis intoxication or that she had had some form of drug administered apart from cannabis and alcohol. The learned trial judge questioned the doctor as to the consistency, between the amount of alcohol and cannabis Ms X said she had consumed and her appearance when seen by the doctor, and the doctor's view was that that amount was inconsistent with Ms X's demeanour when seen by him. That is, in the doctor's opinion Ms X ought to have had a much heavier ingestion of cannabis or much more alcohol than the quantity she described. Other evidence of blood analysis was that it revealed the presence of the active ingredient of cannabis sativa, but that was the only drug detected and in a minor to moderate quantity depending upon the time since ingestion.
- [13] Mr Williams' wallet was found outside her unit that afternoon by some school children, and when her bedroom was carefully searched a used condom was found pushed down between the bed and the wall. It had seminal fluid in it with Mr Williams' DNA. Ms X was clear in her evidence that 6 December 2002 was the only occasion on which that condom with that seminal fluid could have been left in her bedroom, but she had no recollection at all of Mr Williams having put on a

condom before having intercourse with her. Nor could she recall telling Mr Williams that she had a bladder infection.

How Mr Murdock was identified

- [14] Mr Murdock's counsel established in cross-examination that there had been two committal hearings, one in which Mr Williams was committed for trial, and a second one in which Mr Murdock was. That second one occurred at a later date because as at the date of the first, 14 November 2003, Ms X had had no idea who the other male person was with whom she had had sexual intercourse on 6 December 2002. That cross-examination established that she could not see that person because of where Mr Williams had been sitting on her chest at the time, and accordingly she had not identified anybody as that male to the police. This was although Mr Murdock was known to her, and had been identified by her to the police by name as a person who had been at her flat that day. That cross-examination established that it was Mr Murdock who had identified himself as the second male, in a statement he had supplied to the police. Ms X agreed in cross-examination that the first that she had any inkling that Mr Murdock was the other male was in the course of conversations she had with the arresting officer after 14 November 2003 and prior to 23 June 2004, the date on which Mr Murdock was committed for trial.
- [15] The Crown led evidence of the circumstances in which Mr Murdock had identified himself as that other male. On 14 November 2003 the police officer conducting the prosecution of Wayne Williams on the charges of raping Ms X was approached by Mr Murdock and Darryl Lea, both of whom had been summoned as witnesses but neither of whom had provided statements at that stage. Each produced an unsigned document to the prosecutor, saying that they were aware that some other people who had provided statements had not been required to give oral evidence. Mr Murdock and Mr Lea both suggested to the police prosecutor that perhaps that course could be followed with them. That officer read Mr Murdock's statement and established that its contents were true and correct, that the statement had been recently made, that he was not then affected by liquor or drugs, and that he was aware that if a sworn statement contained falsehoods that its maker could be prosecuted. That conversation, from the prosecutor's point of view, had been a routine or standard one prior to the prosecutor having the witness complete the necessary statutory declaration as to the truth of the contents of the document, and it had taken place as the prosecutor was reading Mr Murdock's typed statement. The prosecutor realised when he reached the fifth paragraph of the document that it contained admissions against interest, and terminated the conversation. He then provided a copy of the documents to the police officer who had arrested Mr Williams, and withdrew from the role of prosecutor, because his independence from the investigation had been compromised.

What Mr Murdock said

- [16] That officer's evidence as to the conversation he had with Mr Murdock when the statement was given to the prosecutor was not challenged in any way in cross-examination, and the Crown case against Mr Murdock essentially depended upon its

content.³ In it Mr Murdock describes how at about midday a group of men had gone from the hotel with Ms X and Mr Williams back to Ms X's flat, and how those with whom he travelled there arrived separately from and a little after Mr Williams, Ms X, and Faron. Mr Murdock described alcohol being drunk by himself and others, and a rum and Coke being drunk by Ms X, and how after about half an hour Mr Williams had taken Ms X into the bedroom. Mr Murdock walked into it a couple of minutes later, asking for the key to the toilet, and saw that Mr Williams had Ms X's right breast in his mouth. Mr Murdock then asked if he could join in, as he noticed she was "moaning and getting turned on", and she replied "yes". He then joined in by "having sex". The door was open and those in the lounge room could see and hear what was happening.

- [17] After he had had sexual intercourse he went into the shower, had another beer, and then Mr Williams came out of the bedroom. Mr Murdock could hear Ms X being sick, so he went into the bedroom and asked her if she was all right. She said she was fine. He asked if she wanted any aspirin or a Panadol, or a drink of water. She said "yes" to the latter, so he got a cup of water and took it into the room. He again asked if she was all right or if he could get her anything else, and she said "No thanks, I'm all right". He suggested she have a cold shower and she repeated that she was "all right", and he then left the bedroom. Not long after that Mr Williams returned to it, and soon Mr Murdock left the flat.
- [18] In her cross-examination Ms X could not recall any of those statements by Mr Murdock, expressing apparent concern about her condition. It was common ground between her evidence and his statement that she did vomit. By implication his statement conveyed that she appeared unwell. It said nothing about cannabis being consumed by anyone. The jurors may have considered that if, as he said, he had those short conversations with her, it was odd that she did not see his face.

Mr Williams' evidence

- [19] Mr Williams gave evidence, although Mr Murdock did not. Mr Williams confirmed Ms X's evidence that they had known each other before 6 December 2002, that he had previously visited her once at her flat where he had by accident left his boxer shorts (he said her boyfriend was present at the time), and that they had met by chance at the hotel on 6 December 2002. He agreed she had been on her way to a medical practitioner, that she had consumed two rums and Coke which he had purchased, and that he had suggested going around to her place, to which she agreed, and also that they get some alcohol. They returned to her flat as she described, but he said she produced the bong from under her sink. That was in response to a request by one of the group who had arrived a short while after he, Ms X and Faron had. Everyone present had some cannabis, apparently supplied by the visitors, and Ms X's statement and conduct implied some familiarity with cannabis. He swore that within 10 minutes of sitting down together on the lounge they had begun touching and kissing each other, and had moved at her suggestion into her room. There they lay on the bed and he removed her top. He began sucking her breasts and removed his trousers, and she then began performing oral sex on him.
- [20] At that stage Mr Murdock walked into the room, and asked for the key of the toilet. He obtained it, left the room, and then returned. On his return he asked Ms X if she

³ It became exhibit 19 at the trial, and appears at AR 296-7

“had ever had two fellows before?” and Mr Williams “just seen her go like that.” Mr Williams assumed by whatever gesture Ms X made that she “meant yes”. He then said Ms X was whispering to Mr Murdock, who had sexual intercourse with her while Mr Williams sucked Ms X’s left breast. When Mr Murdock completed sexual intercourse he left the room, and then Mr Williams said to Ms X: “You didn’t mind that happening?” to which she said “No”. She then asked him “Do you want to make love to me?”, and he asked “Are you sure?” She said “yes”, whereupon he took a condom out of his wallet, and she reminded him she had a bladder infection and that he should wear a condom. She had told him earlier at the hotel that day that she had the infection. He again asked “Are you sure you want me to make love to you?”, and upon receiving the affirmation “Yes”, they had sexual intercourse.

- [21] Afterwards he felt sleepy and he could recall others leaving. When he awoke he was alone and assumed she was in the shower, and he left to collect his child from school. He noticed later his wallet was missing. He returned to her home, but police were there. He recalled her vomiting, and said that happened before she asked him to make love to her, but after she had performed oral sex on him, and after Mr Murdock’s act of intercourse. She spoke normally at all times and there appeared to be nothing wrong with her physically. He did not help her to stand up.
- [22] Ms X denied the suggestion in cross-examination that she had demonstrated any physical affection towards Mr Williams when sitting on the couch with him, and before going into the bedroom. She also denied the suggestion she had invited Mr Williams to have sexual intercourse with her, and had told him to wear a condom because of her bladder infection. She agreed that she had attended at her local police station to discuss the possible withdrawal of her complaint, subsequent to Mr Williams’ arrest, and she said that the police then suggested she think about whether she wished to withdraw it or not, and she chose not to. She agreed that in early 2003 she had approached Mr Williams outside a snack bar, and invited him to speak with her behind some toilets, which he did; she said that she had done that because she just wanted Mr Williams to “admit to it”. She denied suggesting that he should come to her place and continue the conversation held behind the toilet, or that she had told him she had agreed to intercourse with him but not with Mr Murdock.

Mr Lea’s evidence

- [23] Darryl Lea, one of those present in the flat that day, gave evidence-in-chief that Mr Williams had had his arm around Ms X when Mr Lea, Mr Murdock, a Mr Paul, and a Mr Howell, all arrived at her flat. He saw Mr Williams kissing Ms X, playing with her hair, and fondling her breasts. He recalled them getting off the couch together and walking to the bedroom together, and he could see Mr Williams partially undressing Ms X by removing her top. After that he heard moaning and groaning. He also saw Mr Murdock go into the room, and heard more moaning and groaning. When cross-examined by the prosecutor on the basis of a statement he had supplied to Legal Aid, he agreed that in that statement he had described seeing Ms X and Mr Williams both without their shirts on, and Mr Murdock between Ms X’s legs and moving up and down. He also agreed he had said in that statement that Mr Murdock then had a shower, and offered Ms X a glass of water, and that that happened after Mr Lea saw Ms X vomiting into a bucket not long after Mr Williams had emerged naked from the bedroom.

- [24] Mr Lea agreed that in that statement he described that the spectators felt uncomfortable at being there, and that he did too in particular because he did not even know Ms X's name. He agreed his statement recorded that when he and his cousin Faron, and Mr Murdock were walking along together after leaving the flat, Mr Lea had remarked that he hoped Mr Williams did not fall in love with Ms X, which remark he made because he thought her willingness to have sexual intercourse was "shameful" in a girl as young as Ms X was.
- [25] In cross-examination Mr Lea said he was not sure whether Ms X herself smoked any cannabis that afternoon, but that the bong had been in her unit. He agreed that she had not appeared to him to be heavily under the influence of alcohol or any drug, and had not appeared "speechless or paralytic". He also agreed that the "moaning" he described hearing appeared to him to be the sort of moaning "like when two couples are in love".

The directions to the jury

- [26] The learned trial judge directed the jurors that the prosecution had to prove that Ms X did not consent to the sexual acts which had occurred, those being the penetration of her mouth and vagina by Mr Williams' penis, and penetration of her vagina by Mr Murdock's penis. Those acts constituted the separate counts of rape against each.⁴ The judge instructed the jurors that consent meant consent freely and voluntarily given by a person with the cognitive capacity to give consent.⁵ He explained to the jurors that Mr Williams had sworn that throughout any penetration Ms X had been fully cognisant, and neither disabled nor incapacitated, and apparently in full possession of her faculties.⁶ The judge had reminded the jury earlier that Ms X said she had done nothing during the penetration of her mouth or vagina on any occasion by way of resistance,⁷ and that the prosecution case was that it was the combination of the ingestion of alcohol and cannabis which had resulted in her having a physical and mental state such that she was not consenting, although there had been no manifest or demonstrated resistance by her at any particular time.⁸
- [27] The judge directed the jury that the conflict between the accounts was so clear that there could not really be any shades of grey involved, in that Mr Murdock said that he had specifically asked whether he could join in and received an affirmative response, whereas Ms X said that no such conversation had taken place. Elsewhere in the summing up the learned judge reminded the jurors of Mr Williams' evidence of his having been very respectful towards Ms X⁹, and that both defendants had said she actually consented. The jurors had heard Mr Williams swear that he had been specifically invited to have sexual intercourse by Ms X, and had twice confirmed the invitation.
- [28] The judge put to the jury that the Crown case was that Ms X did not consent to what occurred,¹⁰ and that she was not capable of "satisfying the mental element of

⁴ Section 349 defines both carnal knowledge without another's consent, and penetration of the mouth of another without that other person's consent, as rape

⁵ At AR 257. The direction accords with the definition of "conduct" in s 348 of the *Criminal Code*

⁶ At AR 258

⁷ At AR 257

⁸ At AR 258

⁹ At AR 278; the evidence was at 232-3.

¹⁰ At AR 257

consenting or dissenting from what took place.”¹¹ Those directions, and the earlier direction that her physical and mental state was such that she was not consenting,¹² revealed that the prosecution had contended both that Ms X lacked the cognitive capacity to give free and voluntary consent, and that if she had that capacity, she had not given that consent. Her evidence included that she had not consented to intercourse of any kind with anyone, and had been incapable of moving her arms and legs.¹³ She also said she had not given permission to either man to have oral or vaginal intercourse¹⁴ and that she did not want to have sex with anybody.¹⁵ She said the reason that she had remained, as she agreed she did, on the bed when Mr Williams put his shorts on before lying down next to her on the bed again, was that she “couldn’t move still”.

- [29] There was evidence supporting the prosecution proposition that she may have lacked both the cognitive capacity to consent, and the physical capacity to dissent. That included her own evidence, the description of her apparently distressed condition given by the neighbours, and the separate observation of the police officer and doctor. As against that there was her evidence which did describe her being able to move her neck to indicate “no”; and which described regaining the capacity to walk and move her limbs fairly soon after losing it; the evidence of Darryl Lea; the evidence of Mr Williams, and Mr Murdock’s statement.
- [30] Her evidence was supported by the fact which Mr Murdock’s counsel introduced, namely that she had not known the identity of the second man, the first one to have sexual intercourse. If events had occurred as Mr Murdock’s statement and Mr Williams’ evidence asserted, she had seen Mr Murdock when he sought and was given permission to join in. But the cross-examination by his counsel established she had not named him as that second man, and it did not suggest any reason why Ms X would not identify Mr Murdock as one of two men who had had intercourse with her, if she knew who the other man was. The learned judge was accordingly correct in the observation to the jury that it was not a case where there were “shades of grey”. Her account clearly contradicted the evidence of Mr Williams. If the jurors rejected his account of her having made an articulate request for sexual intercourse, after she had initiated oral sex with him, then in the case against him they were left only with her evidence, which emphatically asserted physical incapacity to resist and non-consent. As against Mr Murdock, to that the Crown could add the point that she had not even realised his identity.

Mistake of fact

- [31] Mr Henry, counsel for both appellants on their appeals, submitted that the comment by the learned trial judge that there were no “shades of grey” in so far as consent was concerned overlooked the real possibility that Ms X, intoxicated by cannabis, engaged in consensual sex with Mr Williams (in whom she had shown some interest) and had gone further than she would have if sober when she permitted Mr Murdock to have sexual intercourse with her. Then, upset at what had transpired, she had subsequently exaggerated the degree to which she had been affected by

¹¹ At AR 275

¹² That direction appears at AR 258

¹³ At AR 31

¹⁴ At AR 42

¹⁵ At AR 68 and 88

drugs, in an attempt to explain away the absence of any verbal or physical communication of her asserted lack of consent.

- [32] Mr Henry submitted that the possibility that events had transpired in that way would explain the inconsistency between Ms X's presentation to the doctor and the amount of drugs she admitted consuming. He submitted that the risk of that possibility (of consensual intercourse with both men and subsequent regret) being overlooked by the judge and jury would have been removed had the learned judge instructed the jurors on s 24 of the *Criminal Code* (Qld) and about the possibility of a reasonable mistake of fact by the appellants as to consent.
- [33] That direction had not been sought by either of the appellants' separate counsel at the trial. Further, the possibility of actual consent followed by shame and a false accusation is not an example of a mistaken belief that Ms X was consenting. It is the opposite, namely a dishonest claim by her that she was not. The learned judge, when summarising the defence and prosecution arguments, repeated the submissions advanced by defence counsel, which argued that Ms X had exaggerated the extent to which she had been affected by drugs, both in her subsequent behaviour displayed to her neighbours, the doctor, and the police, and also in her oral evidence.
- [34] Her evidence had described her being aware of what was happening to her, and her not consenting to it. What she described was being rendered incapable of offering either physical resistance or verbal objection to sexual acts committed with her, with her incapacity caused in all likelihood by the effect of the cannabis she had consumed. Mr Williams' evidence showed that he knew she had taken cannabis,¹⁶ because he described having seen her smoking it and having had some himself. Mr Murdock's statement did not show knowledge she had taken cannabis, but Mr Lea's evidence was that the bong had been passed around the group; he had arrived with Mr Murdock and they were all seated in the one room. The jury could conclude that Mr Murdock knew Ms X had had cannabis.
- [35] The prosecution case was therefore that Mr Williams and Mr Murdock each knew that Ms X's cognitive capacity to give consent to sexual activity, and her physical capacity to resist unwanted sexual activity, was affected if not taken away by the effect of the cannabis. The Crown case was that both men knew Ms X had been affected by the drugs she had taken and that because of those drugs was not giving cognitive consent to intercourse with one older man nearly twice her age, and one other man whose identity was possibly unknown to her. The directions the learned trial judge gave put that case to the jury.
- [36] The conclusion that both defendants knew of her drug consumption and understood its effect on her was open on the evidence, if the jurors disbelieved the evidence of Mr Williams and the statement by Mr Murdock. The argument that the learned judge ought to have directed the jurors on s 24 is only valid if the jurors could not be satisfied beyond reasonable doubt that each defendant knew that Ms X was affected by the drugs they had seen her consume. If the jurors could not be so satisfied, then Ms X's passivity might have been mistakenly taken as consent, even in the rather odd circumstance that a young woman who was unwell would want to have sexual intercourse with two men.

¹⁶ At AR 206

- [37] The problem for the appellants is that neither of them put his knowledge of drug consumption in issue at the trial, or relied on her lack of manifest opposition to what was happening to justify a belief that she was consenting to it. Instead, Mr Williams gave evidence that Ms X was an eager participant who had started fondling his groin before Mr Williams removed his trousers, and that Ms X had then initiated the oral sex which occurred between them. His evidence accorded with the picture presented by Mr Lea, who described himself as shocked by Ms X's conduct. Mr Murdock's statement included the apparently disapproving comment that the other men in the unit could plainly see and hear what was going on between Ms X, himself and Mr Williams; and that he had suggested joining in when he saw that Ms X had been "moaning and getting turned on" when Mr Williams was sucking her breast.
- [38] The prosecution did not suggest that if those accounts by Mr Williams, Mr Murdock, and Mr Lea, were truthful, that Ms X had not freely and voluntarily consented when having cognitive capacity to do so. The prosecution case was that that evidence, of overt if not sexually aggressive consent, was simply untrue. If the jurors rejected that evidence, as their verdict shows that they necessarily did, then there was simply no basis for the application of s 24. Neither Mr Murdock or Mr Williams denied knowledge of her drug consumption, but instead they challenged the Crown case that the effect of those drugs rendered Ms X to their knowledge a mute and immobile victim whom they exploited. Rejection by the jury of their descriptions of her drug affected behaviour did not leave room for a defence of an honestly different but reasonably mistaken understanding of her drug affected conduct.¹⁷ That ground of appeal, added by leave, should be dismissed.
- [39] It follows from that that in my opinion the ground complaining that those verdicts are unreasonable and cannot be supported by the evidence must also be dismissed. If the jurors accepted Ms X's evidence, they could be satisfied that she had not consented and had been unable to resist, and that both defendants knew that.
- [40] Then remains the ground which complains about the cross-examination of Mr Lea. His evidence-in-chief when called by the prosecution has been described. In that, he had said he saw Mr Murdock enter the room, but could not recall seeing him touch either of the people in there. At the end of that evidence-in-chief, the prosecutor requested that the jury retire, stating he had a matter to raise in its absence. The learned trial judge clearly anticipated that that was an application to have Mr Lea declared a hostile witness, and upon the jurors (and witness) leaving the courtroom, the judge asked for the "relevant page" of the depositions. The prosecution, confirming the judge's anticipation of the application, said he was relying on the signed statement Mr Lea had provided. The judge inquired if the prosecutor had interviewed the witness, and the prosecutor said he had not had an opportunity to.
- [41] At that stage counsel for Mr Murdock informed the court that he had no objection, stating "If he hasn't had the opportunity to proof him, I've got no objection to him doing it now." Counsel was plainly describing having no objection to the prosecutor interviewing Mr Lea. The learned judge observed that that was very much an appropriate approach, and counsel for Mr Williams stated that he too had no objection. The judge thereupon requested that the jury return, and forthwith

¹⁷ The position is the same as in *R v CV* [2004] QCA 411; there was no room for a defence of mistake to operate

gave the prosecutor leave to cross-examine. It appears that the learned judge had misunderstood the declaration of no objection by each counsel as meaning no objection to the prosecutor cross-examining the witness on his statement, and inferentially no objection to the witness being declared hostile.

- [42] As it transpired the learned judge did not actually make any finding that Mr Lea was an adverse witness under s 17 of the *Evidence Act* 1977 (Qld), or even that he had made a statement earlier which was inconsistent with the evidence he was then giving. The prosecutor established in the cross-examination which the judge had permitted – and without any objection from either defence counsel – that Mr Lea had provided a statement to Legal Aid (presumably the one Mr Lea produced to the police prosecutor), which statement contained a true version of what Mr Lea recalled. Mr Lea expressed uncertainty as to whether that statement differed from the evidence that he had given, and was taken through the description in it of having observed “that Wayne was playing with her tits”, and that Mr Williams and Ms X had gone into the bedroom, where he observed that neither retained their shirt. The prosecutor then obtained Mr Lea’s agreement that the statement recorded the matters about Mr Murdock described earlier herein.
- [43] Mr Henry made a strong submission that what happened had simply not followed authoritative pronouncements on the proper procedures to be followed before the Crown could cross-examine a witness it called. He referred to *R v Lawrie* [1986] 2 Qd R 502, *R v Andrews* [1987] 1 Qd R 21, *R v Hadlow* [1992] Qd R 440, *R v Paul Mullins*; *R v F* [2001] QCA 440 and *R v Folland* [2004] QCA 209. His general submission was that those cases demonstrated that usually a *voir dire* was held, and that the judge should have regard to the inconsistency between accounts given at different times, demeanour and manner of answering questions, and the like; none of which had happened in the instant trial, where there had clearly been a complete misunderstanding as to what it was defence counsel expected that the judge had authorised.
- [44] There was considerable force in those submissions, but equal force in the submission by counsel for the Crown on the appeal, namely that the evidence extracted by the prosecutor from Mr Lea was all evidence that would have been extracted from Mr Lea in any event by defence counsel. That is, the evidence Mr Lea gave supported in its entirety the defence advanced by both men on trial, and they would have had grounds for complaint if their own counsel had not cross-examined Mr Lea to ensure that the jurors heard that evidence.
- [45] Mr Henry submitted that the fact the evidence had been adduced by the prosecution tended to discredit or weaken it, particularly because the prosecutor’s question ended with the suggestion that the evidence Mr Lea had given before the jury had differed from the contents of his statement. In truth it did not differ in respect of Mr Williams, but did differ in respect of Mr Murdock, about whom Mr Lea had said nothing incriminating in his unprompted evidence-in-chief, but about whom he did give an incriminating description in Mr Lea’s statement. That description largely accorded with Mr Murdock’s own statement. In the circumstances, while I accept the submission that an error of law occurred in the proceedings, the outcome was that the jurors got to hear evidence they would have heard anyway. There was no advantage in Mr Murdock’s counsel not extracting from Mr Lea evidence according with his statement and of potential benefit to Mr Murdock, whose own statement admitted intercourse. Neither defendant’s counsel interrupted the Crown’s cross-

examination at any time to object to it, and Mr Williams' counsel cross-examined Mr Lea to emphasise the matters described in his statement. In the result the error did not cause any miscarriage of justice.

[46] Accordingly, I would dismiss both appeals against conviction.

[47] **CULLINANE J:** I have read the reasons of Jerrard JA in this matter and agree, for the reasons given by him, that both appeals should be dismissed.

[48] **JONES J:** I have had the advantage of reading the reasons of Jerrard JA. I agree that both appeals against conviction should be dismissed.