SUPREME COURT OF QUEENSLAND

CITATION:	*R v LR* [2005] QCA 368
PARTIES:	**R** **v** **LR** (appellant)
FILE NO/S:	CA No 122 of 2005 DC No 21 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court
DELIVERED ON:	30 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2005
JUDGES:	McPherson and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Convictions quashed** **3. New trial ordered on counts 1 and 3**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - GENERAL PRINCIPLES - where appellant was alleged to have committed six counts of rape - where these rapes were alleged to have occurred after the appellant and the complainant had been drinking together for several hours - where the appellant was interviewed by police soon after the alleged incidents occurred while still intoxicated - where the appellant's father, who had accompanied the appellant to the police station, requested an opportunity for the appellant to speak with a solicitor - where this request was not acted upon - where the appellant made several admissions against interest in the course of the interview - where the record of interview was admitted at trial despite the objections of defence counsel - whether the interview had been conducted in accordance with the requirements of the *Police Powers and Responsibilities Act* 2000 (Qld) - whether any irregularities that occurred resulted in such unfairness to the

appellant that the record of interview should have been excluded by the learned trial judge

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL ALLOWED - where the only rational basis for reconciling the verdicts reached by the jury was that the jury had believed the evidence of the complainant in relation to some counts but not others - where the learned trial judge directed the jury to consider the evidence in relation to each count separately - where the learned trial judge did not direct the jury that any doubt as to the credibility of the complainant's evidence with respect to any one count should be considered when assessing her credibility in relation to the other counts - whether the failure to direct the jury in this way meant that there was a real risk that the jury misunderstood their task and that a miscarriage of justice had occurred

Evidence Act 1977 (Qld), s 130
Police Powers and Responsibilities Act 2000 (Qld), s 5, s 249, s 250, s 254
Police Powers and Responsibilities Code 2000 (Qld), s 34
Police Powers and Responsibilities Regulation 2000 (Qld), Sch 10

Doyle v City of Glasgow Life Insurance Co (1884) 53 LJ Ch 527, cited
George v Rockett (1990) 170 CLR 104, cited
Lefroy v The Queen [2004] WASCA 266; (2004) 150 A Crim R 82, considered
Liversidge v Anderson [1942] AC 206, distinguished
Markuleski v R [2001] NSWCCA 290; (2001) 52 NSWLR 82, cited
The Queen v Swaffield [1998] HCA 1; (1998) 192 CLR 159, applied
R v Batchelor [2003] QCA 246; CA No 335 of 2003, 10 June 2003, distinguished
R v Hayes [1998] QCA 415; (1998) 29 MVR 146, cited
R v PMT [2003] VSCA 200; (2003) 8 VR 50, considered
Sinclair v The King (1946) 73 CLR 316, distinguished

COUNSEL: A W Moynihan for the appellant
M R Byrne for the respondent

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

[1] **McPHERSON JA:** I have read and I agree with the reasons of Keane JA for allowing this appeal.

[2] In speaking of the common law rule in *Sinclair v The King* (1946) 73 CLR 316, Dixon J said that a confession made by a defendant "more or less" under the influence of intoxicating liquor "is not inadmissible as evidence unless the degree of intoxication is so great as to deprive him of understanding what he was confessing". The interviewing police officer in the present case appears to have been applying some such test in the present case when he continued to interview the appellant at a time when he was, to some extent at least, plainly under the influence of alcohol.

[3] But, as Keane JA has pointed out, s 254 of the *Police Powers and Responsibilities Act 2000* has altered the law in this respect. By s 254(1) the section applies if a police officer "wants to question or continue to question" a person "who is apparently under the influence of liquor or a drug". It is clear that the appellant in this case was, to some extent, "apparently under the influence of liquor". That being so, the officer was under s 254(2) required to delay the questioning until "reasonably satisfied" that the influence of the liquor "no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions". The criterion applied is different from the common law test adopted by Dixon J in *Sinclair v The King*, under which the intoxication must be such as to destroy the capacity to know "what he was confessing". Under s 254(2) the focus is the person's ability to understand his rights *and* to decide whether or not to answer the questions being or about to be put to him. It is enough for this purpose if his ability to do either of those things is "affected" by the influence of alcohol.

[4] The statutory criterion is predicated upon the police officer's being "reasonably satisfied" that the influence of liquor no longer has that effect. The decision of the majority in *Liversidge v Anderson* [1942] AC 206 was to the effect that a statutory formula requiring that there be "reasonable cause to believe" in the existence of a particular state of affairs was satisfied by a belief in its existence irrespective of whether or not that belief was or could be objectively justified. The majority decision of the House of Lords has in the light of subsequent authority been overshadowed by the opposite view so forcibly expressed by Lord Atkin in his dissenting opinion in that case. In Australia, the approach adopted by Lord Atkin is now the received view. See *George v Rockett* (1990) 170 CLR 104, 113-114, applying *Nakkuda Ali v Jayaratne* [1951] AC 66, 76-77 and *Bradley v Commonwealth* (1973) 128 CLR 557.

[5] The various formulas considered in this context vary slightly from statute to statute. Most of them use expressions such as reasonable cause to believe, or reasonable grounds for suspecting, or the like. In speaking of the police officer in s 254(2), the formulation is "reasonably satisfied". I cannot doubt, however, that it is designed to set up an objective criterion to be determined by reference to the external evidence or indicia of the influence of liquor rather than simply according to the officer's subjective even if honest impression of the matter. Otherwise, I can see no reason why the expression used in s 254(2) is "*reasonably* satisfied". In view of the legislative and judicial history of similar expressions and the interpretation placed upon them, it would be astonishing if the legislative selection of the first of these expressions in this instance was not deliberate.

[6] For the reasons given by Keane JA, I agree that the present case was one in which in the circumstances the police officer carrying out the questioning must or ought to have been aware of the appellant's ability to understand his rights and to decide whether or not to answer the questions; or, more precisely, that he could not

have been "reasonably satisfied" that the appellant's ability to do so was no longer affected by the influence of liquor. It may be added that s 254 is directed specifically to a case where a police officer "wants to question or to continue to question a relevant person". On the face of it, the section would therefore appear to have no application where the confession was made spontaneously to a police officer who had, when it was made, no wish to question or intention of questioning the person making the confession or admission. Such a state of affairs may seem to be unlikely to occur in practice, but it happened in *R v Batchelor* [2003] QCA 246 at least in relation to the accused's initial confession in that instance. In such a case, the common law rule as stated by Dixon J in *Sinclair v The King* presumably continues to apply. In *R v Batchelor* the appellant in due course made it clear that he was well aware of his rights.

[7] I agree that the appeal should be allowed and the convictions quashed; and that there should be an order for a new trial on counts 1 and 3 of the indictment.

[8] **KEANE JA:** On 5 May 2005, the appellant was found guilty by a jury on two counts of rape. He was acquitted on four counts of rape. All six offences were alleged to have been committed on 19 May 2004. The appellant was sentenced to four years imprisonment.

[9] The appellant desires to appeal against the convictions. In this regard, his principal contentions are that his record of interview by the police should have been excluded from evidence in the exercise of the trial judge's discretion, and that the guilty verdicts were unreasonable, particularly having regard to the verdicts of acquittal on four of the charges on which he was tried. The appellant also raises other grounds of appeal. Having regard to the conclusions which I have reached in relation to the appellant's principal contentions, it is not necessary to address the appellant's other grounds of appeal.

[10] An understanding of the appellant's arguments requires an appreciation of the evidence presented at the trial. It will then be possible to discuss the merits of each of the appellant's arguments in turn.

The Crown case at trial

[11] The complainant was the principal witness for the Crown. She was 20 years of age. On 19 May 2004, she was staying with a friend, and her friend's two infant daughters, in a flat in a town located in northern Queensland. On that day, the complainant was at the flat looking after one of her friend's daughters while her friend went out.

[12] At about 2.00 pm, Mr C, the occupant of a neighbouring flat, visited the complainant in her flat. They drank together for a while. Mr C left the complainant's flat and later returned after nightfall with the appellant who was carrying a bag with beer in it. The complainant introduced herself to the appellant. They were strangers to each other, but it emerged during the evening that the appellant was the cousin of the complainant's boyfriend.

[13] After a short time, Mr C went back to his own flat and left the complainant and the appellant sitting at the kitchen table engaged in conversation. They each drank a considerable quantity of alcohol. The complainant gave evidence of having drunk about seven bourbon and cokes, drinking most of a bottle of bourbon. In his record

of interview with the police, the appellant gave evidence that he drank about 12 cans of full-strength beer.

[14] The complainant gave evidence that, after she had spent a reasonable period of time in conversation with the appellant, the little girl she was babysitting became upset so the complainant carried the child to her mother's bedroom. The appellant followed her. While the complainant was holding the little girl, the appellant pushed her from behind. She landed on the corner of the bed. She let go of the child and rolled over. She saw the appellant come into the bedroom, pick up the crying child with one hand and place her in her cot. With his other hand, he held the complainant down on the bed.

[15] The complainant's evidence was that the appellant then stood over her and forced her arms above her head. Holding her arms in place with one hand, the appellant used his other hand to push her trousers and underpants down to her knees before he used his knees to remove them completely. He then removed his shorts. The appellant was laughing as he moved "along [her] body" so as to place his erect penis in the complainant's mouth for a short time (count 1). He then moved down and placed his penis in the complainant's vagina for three or four thrusts (count 2). He then removed his penis and inserted it in the complainant's mouth again for a short time (count 3). She said that, while he was doing this, he said, "Isn't this funny. You're Justin's girlfriend and I'm his cousin." He then removed his penis, moved down between her legs and inserted it again in her vagina (count 4). He again withdrew his penis and placed it in her mouth again for a short time (count 5) before withdrawing it and placing his penis in her vagina "for three or four times" before his penis went flaccid (count 6). The appellant continued to hold the complainant down on the bed while these incidents took place.

[16] According to the complainant, the appellant then stood up, put his shorts on, walked out of the room and left the unit. The complainant got dressed, picked up the little girl, and ran to Mr C's flat where she complained to Mr C. The complainant agreed in cross-examination that this could have been up to 15 minutes after the incident with the appellant.

[17] Mr C went to another flat and returned with Mr J. Both Mr C and Mr J said that they observed that the complainant appeared to be distressed.

[18] The complainant denied that she consented to any of the acts of penetration about which she gave evidence. She accepted that she said nothing and made no noise throughout the incident. She said that this was because she thought she or the little girl might get hurt, and because she was in shock. Her evidence was that she was not crying during the incidents of which she complained. The complainant accepted in the course of cross-examination that no express threats of violence had been made by the appellant towards her or the little girl.

[19] The appellant's counsel put to the complainant in cross-examination that she and the appellant had been flirting in the kitchen before she went into the bedroom and lay on the bed. It was put to the complainant that the appellant had then come into the bedroom and asked her if she "wanted to play?". It was then suggested to the complainant that the appellant had gone on to remove his clothes and that they had wrestled "quite freely" on the bed before he placed his penis in her mouth for a while. It was put that the appellant then went and checked on the little girl who was

playing outside the bedroom before he returned to the bedroom, fondled the complainant's vagina and put his penis in her mouth again. He then got dressed, said goodbye to the complainant and left. It was put to the complainant that she had complained of rape by the appellant to maintain her relationship with her boyfriend whom she knew to be the appellant's cousin.

[20] Mr C also gave evidence that during the evening of 19 May 2004, after he had left the appellant and the complainant alone and returned to his own flat, the appellant knocked at his door and asked for a drink. Mr C told him that he had none and that he was going to bed. The appellant then left. Between 15 and 30 minutes later, the complainant knocked at his door. She was crying, holding the little girl, and said: "I've been raped by Justin's cousin". Mr C took her into his flat, then he spoke to Mr J next door. Mr J called the police, while Mr C called the complainant's boyfriend.

[21] Mr J gave evidence that he had been sitting in his flat listening to music when he heard a banging on his door. When Mr J opened the door he saw that the person responsible was Mr C who said to him "You better come and give us a hand". Mr J said that when he came into Mr C's flat he saw the complainant lying on the couch crying. After initially telling him to keep away, she latched onto him, complained that she had been raped by her boyfriend's cousin and that "he's coming for me". Mr J estimated that these events occurred "between 6 and 8 o'clock".

[22] The police arrived at 9.13 pm. The complainant was still upset. She said that the appellant "just forced himself on to me".

[23] Later that night, the complainant was examined by Dr Daley. In his evidence, Dr Daley said that he found no physical injury to the complainant. Mr Buchanan, a Queensland Health chemist, gave evidence about tests which had been carried out on samples of blood and urine provided by the complainant. Her blood sample showed a blood alcohol content of .156 per cent; her urine sample showed an alcohol concentration of .251 per cent.

[24] Mr Ryan, a forensic scientist, gave evidence that the complainant's DNA was found in cells removed from fingernail clippings from the appellant's right hand. Mr Ryan found no spermatozoa or seminal fluid on vaginal swabs taken from the complainant. Seminal fluid was detected in the appellant's underpants but Mr Ryan testified that there was no way of aging that fluid to determine when it may have been deposited.

[25] The Crown also relied upon statements made by the appellant in a record of interview which commenced just after 10.00 pm on the night of 19 May 2004. At this interview, the appellant was accompanied by his father. They attended the police station voluntarily after the police had called at the appellant's home while he was not there. The appellant's counsel applied to the learned trial judge to have the record of interview excluded from the evidence on the grounds that the appellant was intoxicated when interviewed and that his father's request that the appellant be allowed to consult a solicitor was ignored. It will be necessary to return to consider these matters further in the course of discussing the appellant's grounds of appeal. At this point, however, it is necessary to note some matters of evidence which might have had some bearing on the issue of guilt or innocence. A review of the content

of the record of interview also affords some appreciation of the appellant's state of sobriety.

[26] When the investigating police officer informed the appellant at the beginning of the interview that the complainant had made a complaint of rape, he replied: "Oh, you're fucking joking." Shortly after, he said: "I knew what was going on and she knew what was going on then." He said several times: "She didn't say no." And later: "If she said no I'd back off." When he was asked "Did she say anything at all?" he replied "She was moaning that was - yeah. Saying, 'Yeah'. And, 'Yeah'. And like - like that, yeah."

[27] When the appellant was asked whether there was any discussion about having sex, he replied: "Yeah. Well we were all - yeah. It was - yeah. We were flirting. We were flirting. We were - her and I were flirting there and like that. Yeah. A flirty sort of thing. Yeah. Yeah."

[28] When the appellant was asked "Did you have sex with her?" he said "We didn't have sex but - yeah. Yeah. Bloody - we - we were just rolling around the bed but - yeah. Yeah."

[29] When the appellant was asked questions along the lines of "Did you take your clothes off or did she take her clothes off or - just some of the questions I need to ask - ?" he responded "Yeah, no, yeah … Yeah, no I just - yeah, yeah … Yeah no. I didn't even get undressed, no … She didn't get undressed."

[30] When the appellant was asked "Did you have intercourse?" he replied "Didn't have intercourse, no." Later, he went on to say "She was - she was - she was giving me head on the bed."

[31] The appellant was asked "Did you touch her vaginal area or anything like that?" He replied "Yeah. Yes, I did, yeah." He was then asked "And what did you do there?" He replied "Was playing around. She was - she was - she was right with that." He was asked "What did you touch her with?" He replied "This is too - too much for me, eh. Fuck this."

[32] The appellant was then asked again "… did she have any of her clothes off?" He replied "Not fully clothes off, no. No." When he was prompted by the suggestion "Partly?" he relied "Partly." When he was asked "Which - which clothes were partly off?" he responded "Oh, bloody - bloody top. Her top was partly off and her bloody - what she was - fucking shorts or fucking blouse that she wearing partly off, yeah." He was then asked "What about her underwear?" he replied "Yeah, yeah." When asked "Was it off?" he said "Yeah, yeah." He was then asked "Do you know what she was wearing?" he replied "No, I wouldn't have a clue what she was wearing." After further prompting he went on to say "She didn't have her clothes off. I didn't have me clothes off. But we - we were rolling around on the bed and we were - you know."

[33] The appellant was asked about whether he had any conversation before he left the complainant. He gave some answers which were not recorded distinctly, and then he said "She was crying. She was crying. I know that. But I thought she was just doing that just to - because she was doing that beforehand when we - when we were flirting around, she was - you know, it was - she was crying, flirting and bloody well doing that and I - you know, I just thought that's how - how she was." He was

then asked "What do you mean, she was crying?" He replied "I don't know. That's how women are, aren't they?" When he was asked again about the complainant's crying he said "I don't know. Fucking lock me up. I - I did nothing fucking wrong. Just fucking lock me up."

[34] The police officer concluded the interview, and the appellant then volunteered the comment "Yeah. Yeah, well, I'm a bloke, she's a female. [Indistinct] I go to prison for a few months. That's all."

[35] It is convenient now to discuss the question whether the record of interview should have been excluded from the evidence considered by the jury.

The record of interview

[36] In the course of a voir dire in relation to the admissibility of the record of interview, the investigating police officer gave evidence that, in interviewing the appellant, he formed the opinion, on the basis of the appellant's answers, that "[the appellant] was not intoxicated to any extent that he couldn't understand what was being asked of him, or that he couldn't take part in the interview in a fair way".

[37] In ruling on the voir dire in this regard, the learned trial judge found that:

> "The interview, by reference to the tape-recording of the initial interview before both an audio and visual interview were recorded, indicates generally, by reference to the defendant's demeanour, his manner of expression, his use of foul language and slurring of his voice, that there were features consistent with him being adversely affected by alcohol during the course of the interview with the investigating police sergeant".

His Honour went on to reject the appellant's application to exclude the record of interview, saying:

> "That there was some effect of alcohol appears to be apparent from the listening of the tape, and the manner in which and the content of the answers given. I consider, however, that it is a matter for the jury to make such allowances as they think fit when assessing the reliability of the answers, taking those features of the evidence into account. The consumption of the alcohol and the demeanour of the defendant will be afforded [sic], so I decline the application."

[38] As to the appellant's argument that the record of interview should be excluded because the appellant had not been afforded the opportunity to consult a solicitor, the learned trial judge held that, "in the context of the warnings that had been given earlier and the information communicated earlier to the defendant", the circumstance that the interview had proceeded without affording the appellant the opportunity to take legal advice was not sufficient to cause him to exclude the record of interview from the jury's consideration. His Honour's reasons are not entirely clear on this point, but it seems that he may have been disposed to accept the police officer's suggestion in evidence on the voir dire that he received some acknowledgment from the appellant that it was appropriate to proceed with his questions after the appellant's father had asked that the appellant be permitted to consult a "solicitor first". The transcript of the record of interview does not support that view and there is no reason to doubt the transcript's accuracy.

[39] The following facts emerge from the record of interview as material in relation to whether the record of interview should have been excluded as a matter of judicial discretion. First, the investigating police officer ascertained at the beginning of the interview that the appellant had been drinking. The following exchange occurred:

> "What's your state of sobriety now? Right now?-- Right now? Well I'm - I'm charged."

It is painfully obvious from the record of interview that the appellant was, as he said, "charged". As has been seen above, some of his answers, while generally responsive to the questions asked, teetered on the edge of incoherence.[1]

[40] Secondly, at an early stage, the investigating police officer told the appellant that he did not have to take part in an interview if he did not want to, and that he could consult a solicitor if he wished to do so. The appellant said that he understood, and that he had "nothing to hide". Shortly after that, the appellant's father said to the investigating police officer: "It's just that you said something about a solicitor. Is he advised to get one before we have this interview or what?" The investigating police officer replied in effect "It's up to you", and the appellant's father then said: "I think he should get a solicitor first because it's pretty serious." The record of interview shows that the appellant's father's expression of a wish to "get a solicitor" was simply ignored. The police officer continued to ask the appellant questions, albeit at first questions directed to establishing the appellant's ability to understand the questions he was being asked. At this time, the appellant was perseverating "She didn't say no". The question that arises is whether the information obtained from the appellant in the course of this interview was obtained in conformity with the provisions of the *Police Powers and Responsibilities Act* 2000 (Qld) ("the PPR Act").

Was there compliance with the requirements of the PPR Act?

[41] One of the main reasons advanced for the passage of the PPR Act in 2000 was to "provide powers necessary for effective modern policing and law enforcement" however it was also the intention of the legislature to "ensure fairness to, and protect the rights of, persons against whom police officers exercise [those] powers…"[2] Section 5 of the PPR Act states that it "is Parliament's intention that police officers should comply with this Act in exercising powers and performing responsibilities under it". A breach by a police officer of an obligation imposed by the PPR Act amounts, at minimum, to a breach of discipline.[3]

[42] Part 3 of Chapter 7 of the PPR Act contains a number of statutory safeguards in order to ensure fairness to persons, such as the appellant in the present case, who are being questioned in relation to indictable offences.[4] Relevantly for this appeal, the PPR Act provides as follows:

> "**249 Right to communicate with friend, relative or lawyer**

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1 Cf *Sinclair v The King* (1946) 73 CLR 316 at 324.

2 Explanatory Memorandum, Police Powers and Responsibilities Bill 2000 (Qld) at 1.

3 *Police Service Administration Act* 1990 (Qld), s 1.4.

4 A number of these safeguards may be dispensed with if a police officer reasonably suspects that compliance with those safeguards may endanger the safety of others, lead to the destruction of evidence or give an advantage to an accomplice: *Police Powers and Responsibilities Act* 2000 (Qld), s 268. None of these considerations are applicable to the circumstances giving rise to the present appeal.

> (1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may -
>
> …
>
> (b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.
>
> (2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).
>
> …
>
> **250 Speaking to and presence of friend, relative or lawyer**
>
> (1) If the relevant person asks to speak to a friend, relative or lawyer, the investigating police officer must -
>
> (a) as soon as practicable, provide reasonable facilities to enable the person to speak to the other person; and
>
> (b) if the other person is a lawyer and it is reasonably practicable - allow the relevant person to speak to the lawyer in circumstances in which the conversation cannot be overheard.
>
> (2) If the relevant person arranges for another person to be present during questioning, the investigating police officer must also allow the other person to be present and give advice to the relevant person during the questioning.
>
> …
>
> **254 Questioning of intoxicated persons**
>
> (1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.
>
> (2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions."

[43] It is convenient to start with the obligations imposed by s 254, the purpose of which is, at least in part, to ensure the reliability of the evidence given in a record of interview. That section applied because the appellant was obviously under the influence of alcohol. The interviewing police officer admitted as much in his evidence given on the voir dire at trial. That being so, the interviewing police officer was under an obligation to delay any further questioning of the appellant unless the officer could be "reasonably satisfied" that the influence of liquor was not affecting the appellant's ability to understand his rights and to decide whether or not to answer questions.

[44] If a person is to decide that he or she is "reasonably satisfied" as to something it means that there must have been evidence available to him or her which can objectively be seen to support the decision that has been reached. A person may still be "reasonably satisfied" about a matter despite it being possible for another person to reach a different view based on the same material. As North J said in a slightly different context in *Doyle v City of Glasgow Life Insurance Co*, "reasonable

persons may reasonably take different views".[5] It is only if there is no evidence that could reasonably be seen to support a particular conclusion that it is possible to conclude that the original decision-maker was not "reasonably satisfied".[6]

[45] Whether or not the interviewing police officer in the present case held the honest belief that proceeding to conduct the interview with the appellant in the circumstances in which he did was not unfair to the appellant, and there is no reason to think that the officer did not hold such an honest belief, it is my view that, when examined objectively, there was no basis on which the officer could have been reasonably satisfied that the appellant's level of intoxication was not affecting his ability to understand his rights or to decide whether or not to answer questions. It may be noted immediately that the investigating police officer did not, in his evidence on the voir dire, assert in terms that he was satisfied that the influence of liquor was not affecting the appellant's ability to understand his rights and to decide whether or not to answer questions. That the appellant was affected by alcohol was obvious. Moreover, the police officer was aware that the appellant had consumed a significant quantity of alcohol in the hours leading up to the interview. That the appellant was displaying a disturbingly cavalier attitude to his right not to answer questions and to decide whether to exercise that right was also obvious, both by reason of what the appellant was saying and, more importantly, by reason of the contrasting attitude manifested by his father. The attitude of the appellant was significantly different from what one might normally expect from a person who has been informed by the police that he or she is the subject of a complaint of rape. Further, the only assurances the officer had that the appellant did understand the sense and gravity of the allegations being put to him were those proffered by the appellant himself. The assurances of an obviously intoxicated person that he or she is not adversely affected by that intoxication are a cause for circumspection on the part of the interviewer. To continue to conduct the interview in those circumstances meant, in my opinion, that the interview took place in contravention of s 254(2).

[46] There is also the question of whether or not the appellant was afforded his right to consult with a lawyer pursuant to s 249 and s 250 of the PPR Act. These provisions exist to ensure that a suspect is able to obtain advice about what should be said to the police. In other words, the purpose of these provisions is to ensure that a suspect is aware of, and in a position to exercise, the right to silence in the face of police questioning. With respect to the obligations of police officers in this regard, it should be noted that s 34 of the *Police Responsibilities Code* 2000 ("the Code"), which is appended as Schedule 10 to the *Police Powers and Responsibilities Regulation* 2000 (Qld), provides that:

> "**34 Right to communicate with friend, relative or lawyer**
>
> (1) If a police officer must advise a relevant person of his or her right to contact a friend, relative or lawyer, the advice the police officer gives must substantially comply with the following -
>
> 'You have the right to telephone or speak to a friend or relative to inform that person where you are and to ask him or her to be present during questioning.
>
> You also have the right to telephone or speak to a lawyer of your choice to inform the lawyer where

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5 (1884) 53 LJ Ch 527 at 529.

6 Cf *Buderim Ginger Ltd v Booth* [2002] QCA 177 at [7], [26]; [2003] 1 Qd R 147 at 152 - 153, 157.

> you are and to arrange or attempt to arrange for the lawyer to be present during questioning.
> If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.
> Is there anyone you wish to telephone or speak to?'."

The right of the appellant to consult a lawyer was raised with him by the interviewing officer as part of the following exchange during the course of the interview:

> "All right. You can consult a solicitor if you wish to. Do you understand that?-- Yes. [Indistinct].
> Anything - anything you say will be recorded and may later be used as evidence in a Court of law. Do you understand that?-- I do, mate. I do. Can't understand-----
> You also-----?-- -----this, eh. Can't understand.
> Okay. You're also entitled to have an interview friend here or another person of your choice here whilst you're being spoken to by police and you can make that choice. Whether it be your father or someone else. Do you understand that?-- I do. I do.
> And that's - that's your rights. Okay. Do you want me to explain those further to you?-- No. No."

[47] The advice that was actually given to the appellant about his right to consult a lawyer differed substantially from that recommended by the Code. Most importantly, while the appellant was informed that he had the right to see a solicitor, he was not asked whether or not he wished to contact one.[7] Instead, the matter was raised a little later in the interview by the appellant's father where it was said:

> "MR [L]: Yeah. I'm happy to stay here. It's just that you said something about a solicitor. Is he advised to get one before we go on with this interview or what?
> SGT INMON: It's up to you. You can consult a solicitor if you wish to or you can consult a solicitor at any stage during the interview. It's your choice. I don't make choices for people. I don't - I don't tell them what to do?-- [The appellant then said] She didn't say no.
> Mr [L]: I think he should get a solicitor first because it's pretty serious."

The interviewing officer did not respond to this comment from the appellant's father but proceeded to conduct the interview.

[48] What is clear is that it was never squarely put to the appellant whether or not he wished to contact a lawyer as he was entitled to do and that the questioning would be delayed for a reasonable time for that purpose. It remains unclear whether or not the appellant understood either that this right existed or that he was entitled to exercise it. It is true that the investigating officer had no responsibility to determine whether or not the appellant required legal representation. That was a decision for the appellant. It was the responsibility of the interviewing officer however, pursuant to s 249(1), to ensure that the appellant understood that there was an important decision to be made and that that decision needed to be made decisively one way or the other.

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7 Cf *R v Adamic* [2000] QSC 402 at [11] - [14]; (2000) 117 A Crim R 332 at 336.

[49] The appellant gave no indication as to whether or not he wished a lawyer to be present. His father did request that the appellant be given an opportunity to obtain legal advice. This request was not acted upon. It may be said, in this regard, that the terms of s 250(1) would appear to suggest a request to speak to a lawyer need only be acted upon if it is made by the suspect. On the other hand, it may be argued that no narrow view should be taken of a provision such as s 250(1) especially if, as a matter of fact, the appellant adopted his father's suggestion. However this difference of views may be resolved, the evidence given by the interviewing officer was that he would not have proceeded with the interview if the appellant had reacted positively to the request made by his father. It was the statutory responsibility of the officer to determine definitively at that point whether or not the appellant wished to contact a solicitor. That was not done. It would therefore seem to me that, while a contravention of s 250(1) may not be made out because it is unclear what the appellant's reaction was to his father's request for legal advice, there are good reasons for concluding that the interviewing officer did not discharge the obligations he owed to the appellant pursuant to s 249(1).

Should the record of interview have been excluded?

[50] The questions which then arise are whether the conclusion that the interview proceeded in breach of s 249(1) and s 254(2) of the PPR Act warrants the further conclusion that the record of interview should have been excluded under s 130 of the *Evidence Act* 1977 (Qld) on the grounds that to admit it was unfair to the person charged and, if it should have been excluded, whether the appellant suffered a miscarriage of justice because it was not excluded.

[51] The circumstance that the record of interview was obtained in contravention of the PPR Act does not of itself mean that it should have been excluded by the learned trial judge. Illegality or impropriety on the part of law enforcement officers that results in the making of a confession merely enlivens a discretion to exclude the confession on the grounds of unfairness.[8] The provisions of the PPR Act to which I have referred do not purport expressly to govern the admissibility of evidence, but the authorities suggest that they are to be "regarded as a yardstick against which issues of unfairness (and impropriety) may be measured".[9]

[52] The decision of the High Court in *The Queen v Swaffield*,[10] and in particular the joint judgment of Toohey, Gaudron and Gummow JJ,[11] requires that the discretion to exclude confessional evidence should be exercised, where voluntariness is not in issue, by reference to considerations of reliability and respect for the right of an accused to stay silent. As their Honours said:

> "… the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence."[12]

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8 *The Queen v Swaffield* [1998] HCA 1 at [26]; (1998) 192 CLR 159 at 181; *R v Kassulke* [2004] QCA 175; CA No 336 of 2003, 28 May 2004 at [25].

9 *The Queen v Swaffield* [1998] HCA 1 at [55]; (1998) 192 CLR 159 at 190; *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666.

10 [1998] HCA 1; (1998) 192 CLR 159.

11 [1998] HCA 1 at [66] - [79], (1998) 192 CLR 159 at 193 - 198.

12 *The Queen v Swaffield* [1998] HCA 1 at [78]; (1998) 192 CLR 159 at 197.

[53] In this case, the record of interview shows that the appellant was quite seriously affected by alcohol when he gave the interview. The learned primary judge himself concluded as much. The appellant's father unsuccessfully sought to have the appellant consult a solicitor before the interview proceeded. On the face of the record of interview itself there were passages prejudicial to the appellant which went beyond, and indeed contradicted, the evidence of the complainant in a way which was highly prejudicial to the appellant. I have in mind here the appellant's vague assertions that the complainant was crying during the course of the incidents. That the complainant was crying could well have been treated by the jury as evidence of a lack of consent. Further, the jury may have regarded the appellant's invitation to lock him up as an indication of a consciousness of guilt.

[54] In these circumstances, the judicial discretion also fell to be exercised against the background that the interview had proceeded in breach of provisions of the PPR Act designed, not merely to protect against the possibility of coerced confessions, but also to ensure the reliability of what an accused may say against his or her own interest and to ensure the free exercise of the right of the accused to stay silent.

[55] There may be cases where, despite a confession being obtained in breach of the requirements of the PPR Act, there is no real reason to doubt that the accused was willing and able to give a reliable account of events. This case was not such a case. In my respectful opinion, the learned trial judge should have exercised his discretion to exclude the confession.

[56] As to whether the inclusion of the record of interview caused a miscarriage of justice, it is not possible to conclude that the appellant's prospects of an acquittal were not adversely affected in a material way by the learned trial judge's decision to allow the record of interview into evidence. Insofar as the record of interview was, to a large extent, consistent with the case put on the appellant's behalf to the complainant, it may be said that its admission into evidence was not likely to have deprived him of a fair chance of an acquittal. But the appellant's ramblings in the record of interview to the effect that the complainant was crying in the course of the incidents were as prejudicial to him as they were, on the complainant's evidence, unreliable. This conclusion means this ground of appeal cannot be met by application of the proviso in s 668E(1A) of the *Criminal Code* 1899 (Qld). As Thomas JA and Chesterman J said in *R v Hayes*:[13]

> "In most cases … the improper reception against an accused person of his admission of a fact that is of primary importance in the case would render the application of the proviso highly unlikely."

[57] In my opinion, the admission of the record of interview deprived the appellant of a fair chance of an acquittal and so amounted to a substantial miscarriage of justice.

Unreasonable verdicts

[58] It is well settled that a verdict of guilty on some counts cannot be impugned as unreasonable merely because the jury also acquitted the accused of other counts arising out of one episode of alleged criminal conduct where there is a rational basis on which the different verdicts can stand together.[14]

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13 [1998] QCA 415 at [9]; (1998) 29 MVR 146 at 148.

14 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

[59] The appellant contends that the different verdicts rendered by the jury indicate that the verdicts of guilty on counts 1 and 3 were unreasonable. In this regard, the appellant accepts that the jury may have reasoned that the two incidents of fellatio admitted by the appellant in his record of interview, and put by the appellant's counsel to the complainant, were the only incidents of penetration which they were satisfied had occurred beyond reasonable doubt, and that they were so satisfied because the appellant, in effect, acknowledged that they had occurred. But the appellant argues that the jury also had to be satisfied that those acts of penetration were not consensual and that the jury could not have been so satisfied if they regarded the complainant as an unreliable witness. There is force in this submission.

[60] If the jury did not regard the complainant's evidence as sufficiently reliable to be satisfied that the acts of non-consensual penetration charged in counts 2, 4, 5 and 6 had occurred, it is difficult to see how they could have been satisfied beyond reasonable doubt that the admitted acts of penetration charged in counts 1 and 3 were non-consensual. The jury either did not accept beyond reasonable doubt that the acts of penetration involved in counts 2, 4, 5 and 6 occurred at all, or did not accept that these acts of penetration were non-consensual. On either view, the jury did not accept the significant aspects of the complainant's version of events beyond reasonable doubt.

[61] The jury may have regarded the case put by the appellant's counsel in cross-examination, especially in light of the appellant's admissions in the record of interview, as providing sufficient support for the complainant's evidence that the acts of penetration involved in counts 1 and 3 occurred to lead them to find those charges established beyond reasonable doubt. It is thus possible to identify a rational basis on which the different verdicts may be reconciled; but it is necessary to recognise that the jury was not prepared to accept the complainant's evidence in respect of counts 2, 4, 5 and 6 where it had no such support as might be thought to have been available in relation to counts 1 and 3. But to adopt this basis for reconciling the verdicts highlights the importance of both the record of interview and of the learned trial judge's direction as to the use which the jury might make of the evidence on each count in assessing the credibility of the evidence relating to other counts.

[62] I have already discussed the record of interview. As to the learned trial judge's direction to the jury, his Honour said:

> "The complainant's case is that she consented to nothing and the accused's account is that, although it is somewhat unclear in the record of interview, he certainly alleged that there was consent given for an act of oral sex. In the course of the record of interview and through his counsel it becomes clear, and the conduct of the case, that it is alleged that there were two penetrations of the mouth that are admitted on the defence case but, again, it is suggested that they were consensual acts. So, at least in relation to four of the matters you will have to consider whether there was penetration, whether that element has been proved. And with respect to each of them you have to consider whether there has been nonconsent established to the standard of proof, beyond a reasonable doubt, in each matter.
> Now you must not adopt the approach here, members of the jury, that you can allow your verdict in one count to affect your determination

> of another. There are effectively six separate trials going on here. So you would not, for example, consider Count 1 and say, 'Well, all right, having considered the matter we're satisfied that the accused is guilty of that offence' - this is only as an example - 'Therefore that has a bearing on what attitude we should take for Counts 2, 3, 4, 5 or 6.' Conversely, if you were not satisfied about Count 1, you would then still nonetheless consider separately the evidence that is forthcoming against the accused in relation to each of the counts …"

[63] While no further direction was sought on this point by the appellant's counsel at trial, it should have been made clear to the jury that a doubt as to the complainant's evidence in respect of one count **should** be considered by them when assessing her overall credibility and reliability in relation to the other counts.[15] In order to provide the jury with an accurate instruction as to the law in this regard, the learned trial judge could have availed himself of the guidance afforded by the *Queensland Higher Courts Benchbook* at 34.1. There the following direction, drawn from the decision of the New South Wales Court of Appeal in *R v Markuleski*,[16] is proposed:

> "If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to her demeanour or for any other reason, that must be taken into account in assessing the truthfulness or reliability of her evidence generally."[17]

[64] It is not a "binding rule of law or procedure"[18] in this State that such a direction, which I shall refer to for convenience as a *Markuleski* direction, must always be given though it has been recognised as having been desirable in some instances. The desirability of giving such a direction has been questioned in other Australian jurisdictions. Sitting as a member of the Victorian Court of Appeal in *R v PMT*, Buchanan JA said:[19]

> "I think it unlikely that a jury given a separate consideration direction will be entirely uninfluenced by the impressions they derive from the evidence of a witness taken as a whole; I doubt that such a natural tendency needs judicial encouragement in the form of a *Markuleski* direction. Further, I am of the opinion that the proposed direction is likely to promote propensity reasoning and produce confusion rather than assist a jury to properly evaluate the evidence. In my view, in this case it was well within the ability of the jury to assess the evidence of the complainant in the light of their own experience and with the benefit of the addresses of counsel, without the necessity of the warning advocated by counsel for the applicant."

In the same case Charles JA said:[20]

> "If a jury has been left with a reasonable doubt as to one count, either on the ground that the complainant may be lying or has exaggerated,

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15 *R v Scott* (1996) 131 FLR 137 at 148.

16 [2001] NSWCCA 290 at [186] - [191]; (2001) 52 NSWLR 82 at 121 - 122. See also *Jones v The Queen* (1997) 191 CLR 439.

17 See also *R v M* [2001] QCA 458; CA No 126 of 2001, 26 October 2001 at [17] - [22]; *R v S* [2002] QCA 167 at [8], [29]; (2002) 129 A Crim R 339 at 342, 349.

18 *R v M* [2001] QCA 458; CA No 126 of 2001, 26 October 2001 at [22]; *R v Rutherford* [2004] QCA 481; CA No 295 of 2004, 17 December 2004 at [19] - [21].

19 [2003] VSCA 200 at [32]; (2003) 8 VR 50 at 59 (citations omitted).

20 [2003] VSCA 200 at [5]; (2003) 8 VR 50 at 52.

> I doubt very much that they would, as Buchanan JA has put it, need judicial encouragement to bear that factor in mind in considering a second count. On the other hand, the giving of the *Markuleski* direction may lead a jury to convict improperly on the basis that, having found the complainant inherently credible on one count, they may think it follows that they should also do so in considering another. The jury may well reason that if they are permitted to diminish the complainant's credibility on this basis, why then cannot they also enhance it by similar reasoning? The potential for the proposed direction to promote propensity reasoning tends, in my view, against the giving of any such direction."

[65] In *Lefroy v The Queen*,[21] Murray J, with whom Steytler and Miller JJ agreed, referred to the views expressed in *R v PMT* and said that:

> "I am in respectful agreement with that point of view and would not be prepared to follow *Markuleski* on this point. It seems to me that the jury do not need help to understand that their decisions about the credibility and reliability of the complainant generally will have an overall impact upon their assessment of the extent to which, if at all, they are prepared to rely upon the evidence of the complainant in considering whether or not the evidence as a whole persuades them of the accused person's guilt beyond reasonable doubt in respect of all or any of the offences charged. I see no reason to give a direction which assumes that the jury will react adversely to a challenge to the credibility of the complainant. And rather than promoting a fair trial it seems to me that a direction of the kind envisaged by the NSW Court of Criminal Appeal may work an injustice to the complainant. On the other hand, I agree that it would be difficult to control the way in which the jury might use such a direction in a form of propensity reasoning, impermissibly, in a way which would be adverse to the accused."

[66] The possible dangers that might accompany the giving of a *Markuleski* direction identified in the Victorian and Western Australian decisions must be acknowledged; but, in my respectful opinion, the giving of such a direction in appropriate terms may actually help avoid the occurrence of the problems described. The importance of the direction lies in requiring the jury to consider, in a global sense, whether or not they find a complainant to be a witness whose evidence is reliable. What needs to be made clear is that the credibility of the complainant, whether good or bad, is a separate question from that of whether or not an accused should be convicted on each separate count. Finding that the complainant is a credible witness generally should only lead to conviction if the evidence given by that complainant is sufficient to allow the jury to find beyond reasonable doubt that each offence was committed. It may be, that while a witness is regarded as generally credible, there are features of the totality of the evidence on a particular count which could rationally lead to a rejection of the witness' evidence on that count. It may also be that, while a witness is to be regarded as generally not credible, there are features of the evidence on a particular count which provide sufficient support for the jury to accept the witness' evidence on that count only. It may also be possible, for example, for a jury to find that a complainant was a credible witness but also come

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21 [2004] WASCA 266 at [32]; (2004) 150 A Crim R 82 at 89.

to the view that the account given of a particular incident, while honest, did not amount to reliable evidence that the offence charged had actually been committed.

[67] One way in which considerations of this kind might be communicated to a jury in terms which received approval from this Court[22] is as follows:

> "Your general assessment of [the complainant] as a witness will be relevant to all counts, but you will have to consider her evidence in respect of each count when considering that count.
>
> Now, it may occur in respect of one of the counts, that for some reason you are not sufficiently confident of her evidence to convict in respect of that count … a situation may arise where, in relation to a particular count, you get to the point where, although you're inclined to think she's probably right, you have some reasonable doubt about an element or elements of the offence, that particular offence.
>
> Now, if that occurs, of course, you find the accused not guilty in relation to that count. That does not necessarily mean you cannot convict of any other count. You have to consider the reason why you have some reasonable doubt about that part of her evidence and consider whether it affects the way you assess the rest of her evidence, that is whether your doubt about that aspect of her evidence causes you also to have a reasonable doubt about the part of her evidence relevant to any other count."

[68] A direction of that kind was not given by the learned trial judge in the present case. The learned trial judge did direct the jury that "the complainant's case was that she consented to nothing" while the appellant's case was that consent was given for an act of oral sex. The jury convicted the appellant on the two counts of oral sex that were expressly argued by the defence to have been consensual. The jury acquitted on those charges that were founded entirely on the evidence of the complainant. One possible explanation for this difference, which cannot be discounted, is that the jury determined that the complainant was telling the truth in relation to some counts but not others. There was no reason for them to make such a distinction unless they were proceeding under the impression that credibility was to be determined anew with respect to each count. That impression, if it was the basis on which the jury acted, was mistaken. That impression could have been encouraged by the direction which the learned trial judge gave. In what was a case where the two versions of events, at least so far as consent was concerned, were diametrically opposed and where the disputed events took place within a short period of time, it was necessary for the learned trial judge to take steps to prevent any such misunderstanding arising from the direction which the learned trial judge gave the jury.

[69] There is, in my view, a real possibility that the jury did not understand that any doubts entertained by them in relation to the reliability of the complainant's evidence on counts 2, 4, 5 and 6 should be taken into account by them in their consideration of the evidence relating to counts 1 and 3, and that this misunderstanding explains the different verdicts. Even though the appellant's counsel at trial did not seek an appropriate redirection in this regard, the real possibility that the failure to prevent this misunderstanding by way of an appropriate

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22 *R v JK* [2005] QCA 307; CA No 78 of 2005, 23 August 2005 at [19], [28].

direction may have affected the verdict suggests that a miscarriage of justice has occurred.[23]

Conclusion and orders

[70] In my opinion, the appeal should be allowed, and the convictions quashed. There should be an order for a new trial on counts 1 and 3.

[71] **DOUGLAS J:** I have had the advantage of reading the reasons for judgment of McPherson JA and Keane JA and agree with them and the orders proposed.

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23 *Dhanhoa v The Queen* [2003] HCA 40 at [38]; (2003) 217 CLR 1 at 13.