SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rope* [2010] QCA 194
PARTIES:	**R** **v** **ROPE, Robin Paul** (appellant)
FILE NO/S:	CA No 301 of 2009 DC No 723 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2010
JUDGES:	Chief Justice and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed.** **2. The convictions are set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – where appellant tried on three counts of rape – where jury requested a copy of complainant's testimony during their deliberations – where judge declined to give a copy of the transcript and did not offer to read out any part of it – where appellant was convicted – whether trial judge erred in failing to provide the transcript and failing to inform jury of their ability to request him to read out part of the transcript CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where jury had to determine whether the intercourse was consensual and whether appellant honestly and reasonably but mistakenly believed it was consensual – where trial judge did not explain s 24 of the *Criminal Code* to the jury by relating it to the facts of the case – where trial judge explained the law by reference to what a reasonable person in the circumstances would have

believed – where defence counsel did not seek a re-direction – whether the misdirection was sufficient to set aside convictions and order a retrial – whether the proviso in s 668E(1A) should be applied – whether trial judge's direction was inadequate for failing to relate the concept of honest and reasonable mistake of fact to the relevant evidence

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

Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
R v Cutts [2005] QCA 306, cited
R v Dunrobin [2008] QCA 116, followed
R v IA Shaw [1996] 1 Qd R 641; [1995] QCA 45, cited
R v Wilson [2009] 1 Qd R 476; [2008] QCA 349, applied
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: K Prskalo for the appellant
M B Lehane for the respondent

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

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with the orders proposed by His Honour and with his reasons.

[2] **FRASER JA**: I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the orders proposed by his Honour.

[3] **CHESTERMAN JA**: After a three day trial the appellant was, on 4 November 2009, convicted of two counts of rape, but acquitted of a third count at the direction of the trial judge. He was sentenced to three years' imprisonment on each of the two counts on which he was convicted.

[4] On the hearing the appellant was given leave to replace the grounds set out in his Notice of Appeal with the following:

> "(1) The learned trial judge erred in refusing to either allow the jury access to the transcript of the complainant's evidence or informing them they could have the whole or parts of it read out to them;
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> (2) There was a miscarriage of justice because the learned trial judge failed to adequately direct the jury on the defence of honest and reasonable, but mistaken belief as to consent;
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> (3) The learned trial judge erred in failing to instruct the jury that the directed verdict on count 2 was a matter that they could take into account in assessing the complainant's credibility;

(4) The verdict was unreasonable and can not be supported having regard to the evidence".

[5] The appellant abandoned his challenge to the sentences.

[6] The conduct constituting the two counts of rape were the insertion of the appellant's penis into the complainant's mouth and his fingers into her vagina. The conduct was part of a brief encounter between the two in the computer room of a small semi detached house at Birkdale on Brisbane's South.

[7] The appellant and complainant were known to each other, though not well. They had met through mutual friends. On 16 March 2008, a Sunday, the complainant, who worked part time at a nursing home and had finished her shift was invited by a friend, Terry Watson, to a local hotel where a band was playing. She went and met Mr Watson, and three other male friends, including the appellant. They drank together for about three hours, from 3.00 pm to 6.00 pm, listening to music and conversing.

[8] They left the hotel together about 6.00 pm. They were driven to the home of one of the men, Mr Close, who was ill and was not drinking. The complainant and the appellant left their cars at the hotel. Mr Close died before the appellant came to trial. At the home there was more drinking, conversation and listening to music.

[9] The complainant was still in her work clothes. She complained of being hot and asked Mr Close to provide her with a cooler shirt. He did so and the complainant changed into it. Her evidence is that she took off her shirt (she was wearing a bra) and put the tee-shirt on. She then removed the bra while her torso was covered by the tee-shirt.

[10] The appellant claimed in his record of interview that the complainant removed both her shirt and bra before putting on the tee-shirt and that her conduct so scandalised Mr Watson that he left the house. The complainant's account was that he went home because it was late. He left on good terms. He lived about one minutes' walk away. Mr Watson was not asked about the event.

[11] The evidence suggests that the appellant was quite drunk. The complainant was affected by liquor but said she was not drunk. Neither the appellant nor the complainant could go home. Neither had a car and neither was in a fit state to drive. Mr Close told the appellant he could sleep in the lounge and gave him a pillow. The complainant was to sleep in what was described as the computer room in which there was a futon bed.

[12] At some time between 10.00 pm and 11.00 pm Mr Watson had gone home, Mr Ramsay, who boarded in the house and had to work early the next day, had gone to bed, the appellant had gone outside and fallen asleep on the lawn. Mr Close had a bath and then he, too, went to bed. A heavy shower of rain appears to have woken the appellant who came into the house.

[13] The complainant went to the computer room, closed the door (which did not lock) turned out the light and went to bed in her clothes.

[14] The complainant's account of the offence was that about 10 minutes after she went to bed the appellant came to the door but Mr Close called out to him "That's not

your room, that's Christine's room". He went away but came back. He came into the room, and sat on the edge of the futon. She asked him what he was doing and he said "Oh, you know you want me". She said "I don't think so. You're a married man". He said "Oh, well, I think you're sexy". With that he took his shorts off and came closer to her head and said "Stick this in you and start sucking on it, you bitch, you whore". He had taken his underwear off. He held her head and pushed his erect penis towards her mouth. He had one knee on the futon and one foot on the ground. He said "Suck on this. You know you'll enjoy it, you whore and I know you want me".

[15] The complainant was "very scared". She said nothing to him but tried "to get him off" her. She could not remember how his penis came to be in her mouth. After an interval the appellant moved down the complainant's left side level with her hips and quite forcibly pulled down her pants and underpants. At the time he was complaining about his wife whom he accused of infidelity and, in the complainant's estimation, "using (her) like she was (the appellant's) wife." The complainant did not resist when the appellant removed her trousers and pants. She did not say anything and did not struggle. Having removed her clothing the appellant straddled the complainant with his back to her head, facing her feet. He lent forward and inserted his fingers roughly into her vagina. He did this "(p)robably a couple of times". Again the complainant said nothing because she was "too scared". During this time the appellant was "yelling abuse at" his wife and saying "You want it, you little whore".

[16] After a couple of minutes the appellant said "Bend over, bitch, because I'm going to fuck you up the arse". At the same time he got off the complainant who said she was going to the toilet. She left the room and did not return to it until the next morning.

[17] At one time during the encounter the appellant put his lips close to the complainant's and tried to kiss her, but she turned her head away and her mouth and the appellant's mouth came into contact apparently briefly. She described the contact as "sloppy". She managed to avoid a more intimate contact by moving her head from side to side.

[18] When she left the computer room the complainant went to Mr Close's bedroom where she slept on "the edge of (his) bed". The complainant told Mr Close the appellant had been "trying to molest (her)" and that the appellant had "pulled her hair and things like that". She also said that the appellant had said to her "you want it" and that he had "ripped her trousers off".

[19] The complainant's recollection of what she said to Mr Close was that the appellant was "coming on to (her) and (she) didn't like (it)". The next morning she saw the appellant in the lounge but did not speak to him.

[20] The appellant did not give evidence but he was interviewed by police officers and the record of that interview was tendered. The appellant's account was:

> "… when everyone went to bed I walked into her room and made some advances to her. … we were both having a kiss and … playing with each other. … there was a bit of foreplay and then after the foreplay she said ah no I can't do this … . You've got to stop. And then she got up and went to the toilet … I went back to the lounge room."

He was questioned further and said:

> "I … knelt next to her and … looked her in the face. I … looked at her and then … gave her a big pash. … she kiss(ed) (me) back. … I put me hand on her … stomach … (a)nd then she … put her hand up, touched me … on the hand. … after that we were playing with each other a bit. … I …took my pants off … and … I slipped my hands in her pants … (a)nd … she was sucking on my penis … (a)nd I kept playing with her … and fingering her then as well … and then she just sort of jumped up and said I can't do this … I can't do this to your wife … and I said I can do it to her. She's done it to me enough. And then … (s)he got up, went to the toilet … so I left the room."

[21] There were two issues for the jury. One was whether the admitted sexual contact between appellant and complainant was consensual or whether, if it was not, the appellant might have honestly and reasonably though mistakenly believed it was. Counsel for the appellant did not ask the trial judge to put s 24 of the *Criminal Code* to the jury, nor did he address with respect to mistake of fact. He did not cross-examine on the question. His challenge to the complainant was on credit and consent. The trial judge nevertheless felt that the defence was available on the evidence and directed the jury accordingly.

[22] The first ground of appeal concerns the trial judge's refusal to provide the jury with a transcript of the complainant's evidence. What happened was that about three hours after the re-direction I have just mentioned the jury asked for "a copy of (the complainant's) testimony." The trial judge discussed the request with counsel and intimated his assumption that the jury was "asking for the transcript" as to which his Honour said he would "simply inform them that it's not procedure in these courts to supply the transcript of evidence to a jury."

[23] The prosecutor inquired whether the judge intended to tell the jury that parts of the transcript could be read aloud by way of answering the jury's question. His Honour brushed aside the suggestion by saying that he would "wait till they ask for it … ."

[24] The jury returned and were addressed by the judge:

> "… I have your request … . … I assume … you mean you want the transcript? It's not the procedure or practice in these courts to supply the jury with a copy of the transcript of any witness. There are many arguments for and against it, but it is suggested, some arguments, that a jury might be tempted just to sit and piece by piece go through various sections. But, anyway, the situation is that you can't be supplied with a copy of her transcript of evidence. All right? Continue your deliberations, thank you."

[25] An hour later the appellant was convicted.

[26] It is obvious that the jury had a concern about some aspect of the complainant's evidence. It is impossible to know whether they wished to be reminded of it, or parts of it, to confirm their impression that it should be accepted or to consider whether it did give rise to a reasonable doubt that the appellant may, within the terms of s 24, have mistakenly believed she was consenting to his advances. The prosecution case stood or fell on the complainant's testimony. What the jury made of it was critical to the verdict.

[27] Whatever concern the jury may have had about the evidence should have been addressed. Its function was to conscientiously consider the evidence and, applying the judge's instruction on questions of law, return a verdict in accordance with the evidence. If in the discharge of that function the jury required reminding of the evidence, or parts of it, or elucidation of some question of fact which the record of the trial could provide, it should have been given to them.

[28] Counsel for the appellant relied upon the judgment of Kirby J in *Gately v The Queen* (2007) 232 CLR 208 at 219-220 in which his Honour said:

> "A request by a jury to be reminded of evidence should rarely be denied by a trial judge. However, if the request is made, the judge, after affording the parties the opportunity to make submissions … should consider whether the request can be fulfilled either by … Reading the transcript of the evidence … in open court in the normal and traditional way … ."

[29] The judgment was a dissenting one but the statement of principle is not, I think, open to doubt. Indeed, with great respect, the proposition scarcely needs authority.

[30] The effect of the trial judge's ruling was to inhibit the jury from pursuing a legitimate inquiry they had made in order to better understand the evidence on which the Crown case depended. I would not myself criticise the refusal to provide a copy of the transcript of the complainant's evidence to the jury. Views differ about the appropriateness of that course, which may be gaining acceptance. If, however, the transcript was not to be given it was incumbent on the trial judge to ascertain what part of the evidence concerned the jury and to read it to them. That task is not ordinarily burdensome because an experienced judge can edit as he or she reads so as to omit irrelevant parts such as repetitions and misunderstandings which are eventually clarified. But burdensome or not a jury is entitled to have read to it those parts of the evidence about which they seek to be reminded.

[31] The trial judge did not intend to pre-empt a request from the jury to have passages of the evidence read to them. His Honour would no doubt have acceded to any such request. However, the refusal to provide the transcript and the terms in which it was expressed, together with the absence of any intimation that their query could be answered other than by the transcript, was very likely to have had the effect of persuading the jury that they were obliged to return their verdict by reference to what they had already heard. That impression was wrong and should not have been given.

[32] It is, and has been for a very many years, the practice of judges when giving juries general directions as to the manner of conducting their deliberations to advise that it is not customary to give them a transcript of the evidence but to tell them that if they wish to be reminded of any testimony they should inform the judge who will read the required passages of the transcript to them, or have them read. The BenchBook contains a direction in those very terms.

[33] Unfortunately the trial judge omitted the direction and did not inform the jury of that facility. The omission is likely to have confirmed to the jury what the refusal of the transcript indicated, that they had no right to be reacquainted with the complainant's testimony.

[34] Counsel for the respondent points out that the jury had previous experience of a question being answered by reference to the transcript. The jury had asked for two points of facts to be clarified. One question was answered by the judge reading a brief passage from the transcript. The other answer was given by the relevant part of the audio recording of the appellant's interview with police being replayed.

[35] That occurrence does not detract from the appellant's point that the jury was not afforded the opportunity they requested to assist in their consideration of the complainant's evidence: nor does it alter the tenor of the trial judge's refusal to allow the assistance they sought.

[36] Counsel for the respondent also relies upon the failure of defence counsel to object to the ruling. Reliance was placed upon the proposition that:

> "It is for the parties, by their counsel, to decide how and on what bases the proceeding will be fought. Consent by counsel for a party to a course of conduct is usually an important indication that that party suffers no miscarriage of justice by pursuit of the intended course." Per Hayne J in *Gately* at 233.

The principle has no application to the present facts. The point in issue had nothing to do with the conduct of the defence. It concerned the interaction between judge and jury and the former's obligation to ensure the latter were properly assisted in their deliberations.

[37] The first ground of appeal is made out. The trial was irregular.

[38] The second ground of appeal has two aspects. The first is that the trial judge's explanation to the jury concerning s 24 of the Code was wrong. The second is that the direction was inadequate in that it failed to relate the concept of honest and reasonable mistake of fact to the relevant evidence.

[39] His Honour said:

> "… the evidence of the complainant – that the (appellant) entered the room … and without her consent forced his penis into her mouth and the Crown must establish that he knew that she was not consenting. If they prove those matters, you should convict him. If you are not satisfied of those matters you acquit him. Now, the defence case is that she consented. The Crown must satisfy you beyond reasonable doubt that she did not consent.
>
> Now, there's another argument as well, and it comes under what we call section 24. I will read it to you … 'A person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.'
>
> To put it in brief terms in this case, if he honestly and reasonably believed she was consenting, then he's not guilty. … Let me just explain that in a little more detail. A person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person

> believed to exist. So, if the (appellant) acted under an honest and reasonable but mistaken belief that the complainant was consenting, he is not criminally responsible to any greater extent than if the real state of things had been such as he believed to exist. That means that if he had an honest and reasonable but mistaken belief that she was consenting, then he is not guilty. If you conclude that the real state of thing (sic) was that she was not consenting but that the (appellant) honestly and reasonably believed that she was consenting, the (appellant) will not be criminally responsible to any greater extent than if she consented and, of course, if you consent to that, there's no criminal offence.
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> A mere mistake is not enough. The mistaken belief must have been both honest and reasonable. An honest belief is one which is generally (sic) held by the accused. A reasonable belief is one that in the circumstances in which the accused found himself a reasonable person would not have handled (sic)."
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> …
>
> … So, if an ordinary, reasonable person in the circumstances makes an honest mistake that the woman is consenting, then the Crown has not made out its case."

[40] The jury during its deliberations sought clarification of the concept:

> "if a person honestly and reasonably believes another person is consenting, then that person is not guilty."

The trial judge began the redirection by an example of a shopper who mistakenly got into a stranger's car in the car park and drove off believing he was driving his own car. His Honour then went on:

> "Now, that is the concept … we are talking about here. So if, in the circumstances, somebody has intercourse with another person … believing that they are consenting, and in the circumstances their belief is honest and reasonable, but mistake(n) because, in fact, the victim does not consent, then they are not guilty of a criminal offence … of rape."

[41] To make the second aspect intelligible it is necessary to indicate the evidence from which an honest and reasonable mistake as to consent may have arisen.

[42] The points relied upon by Ms Prskalo who appeared for the appellant were:

(i) At no stage during the sexual activity between appellant and complainant did the complainant positively convey a lack of consent;

(ii) The appellant's conduct did not involve any threat of violence to the complainant but consisted of bitter criticism of the appellant's wife;

(iii) The complainant was unable to describe how the appellant's penis got into her mouth;

(iv) The complainant was able to resist the appellant's attempt to kiss her by averting her face despite the fact that he was

holding her by the head with both hands but was unable to resist the appellant inserting his penis into her mouth when the appellant held her head in a similar way;

(v) The verbal abuse commenced when the appellant placed his penis into the complainant's mouth, not earlier when he undressed. At that time the complainant did not object to his obvious sexual overture, or leave the room;

(vi) The complainant did not call for assistance from others in the house who were very nearby and one of whom was a close friend;

(vi) The only explanation given by the complainant for her rejection of the appellant's advances was that he was a married man which may indicate that she was not averse to his sexual interest towards her;

(vii) The fact that he was a married man provided a motive to falsely accuse the appellant of rape for fear of losing her friends' respect because she had been intimate with a married man;

(viii) She was able to leave the room without difficulty when she chose too.

[43] Counsel for the appellant submitted that these factors were so powerful that the convictions were unreasonable. Counsel for the respondent submitted that the evidence was insufficient to raise the possibility of an honest and reasonable mistake about consent and that any errors in the summing-up in that regard could safely by ignored by the application of the proviso, s 668E(1A) of the Code.

[44] In my opinion the factors identified by Ms Prskalo give rise to a small but sufficient basis for the possibility that the appellant might honestly and reasonably have thought the complainant consented to his activities, though, clearly enough on her evidence, she did not.

[45] The error in the trial judge's explanation of the law is that he said:

> "A reasonable belief is one that in the circumstances in which the accused found himself a reasonable person would not have (held)."

The error was repeated a little later in the summing-up:

> "So, if an ordinary, reasonable person in the circumstances makes an honest mistake that the woman is consenting, then the Crown has not made out its case."

[46] The first passage followed a longer explanation in which the trial judge correctly pointed out that the question for consideration was what the accused believed and whether his belief was reasonable. The passages under attack look not at the appellant's belief to assess whether it was reasonable but objectively at whether the belief could have been held by a reasonable person in the appellant's position. (It may be noted that the sentence contains another error: it is expressed in the negative. Assuming that it was appropriate to look at what a reasonable man would have believed the word "not" should have been omitted. To cast the explanation wrongly in the negative may have added to confusion).

[47] Before it exonerates an accused from criminal liability, s 24 requires two things (1) a belief in a state of fact actually held by the accused and (2) the belief is reasonable. It does not require, as the trial judge directed, a reasonable person in the circumstances of the accused to make an honest mistake; or a belief that a reasonable man would entertain.

[48] In *R v Wilson* [2008] QCA 349 the identical error was thought sufficient to set aside a conviction and order a new trial. The President said:

> "[20] … It is clear from its terms that s 24 requires a consideration of whether there were reasonable grounds for the accused person's belief as to a state of things, not, in the primary judge's words, whether a theoretical, ordinary, reasonable person would or should have made the mistake. The belief must be both subjectively honest and objectively reasonable but it is the accused person's belief which is of central relevance. An accused person may hold an honest and reasonable but mistaken belief as to a state of things even though another ordinary, reasonable person may not have made that mistake. This distinction, which is admittedly subtle, was noted by this Court in *R v Julian* when discussing self defence under s 271 *Criminal Code* and more recently in *R v Mrzljak* when discussing s 24. The primary judge instructed the jury to focus on whether the mistake was reasonable in that the jury "must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake". The judge told the jury to "picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and consider whether an ordinary, reasonable person could have made that mistake". The judge instructed the jury that the case really came down to "would an ordinary, reasonable person have looked closely and carefully enough to observe Mr Wood's oncoming motorcycle". The judge asked the jury whether they were "satisfied beyond reasonable doubt that any reasonable person in Mr Wilson's position would have or should have observed the oncoming motorcycle". Nowhere in the judge's directions on s 24 did his Honour emphasise to the jury the need to focus on whether they were satisfied beyond reasonable doubt that Mr Wilson's *belief*, that there were no oncoming motor vehicles when he overtook the Pulsar, was not reasonable." (footnotes omitted)

[49] Fraser JA said:

> [38] In the second group of directions the trial judge directed the jury that whether the appellant's mistake was reasonable was to be determined by reference to the standards of an ordinary, reasonable person in the appellant's position. That required the jury to apply the wrong test. In my opinion the vice in this direction was that it denied the possibility that different people in the appellant's position might have held

> different beliefs, each of which was nevertheless a reasonable belief.
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> [39] The Crown was required to prove beyond reasonable doubt that the appellant's belief was not a reasonable belief. It did not discharge that onus by proving beyond reasonable doubt only that "a" reasonable person would not have held that belief. The principles of criminal responsibility embodied in s 24 do not operate by reference to what might be expected of a reasonable person but by reference to the reasonableness of an accused person's belief. In that way, s 24 allows for the possibility that reasonable people in an accused person's situation might have held a variety of beliefs, perhaps even diametrically opposed beliefs, about the relevant state of affairs.
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> …
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> [41] The standard of care of the "reasonable person" supplies the touchstone of civil liability for injury alleged to have been caused by a defendant's negligence. The effect of the trial judge's direction that the jury must test the application of s 24 by reference to the theoretical conduct of a reasonable person, rather than by reference to the reasonableness of the appellant'(s) belief, was in that respect to assimilate proof of criminal responsibility to proof of civil liability for negligence. That must be regarded as a substantial error." (footnote omitted)

[50] In that case, as in this, it was argued that the error had not caused a miscarriage of justice because defence counsel had not sought a re-direction and, secondly, that the proviso should be applied. Both arguments were rejected. Fraser JA pointed out that the erroneous direction could not have operated to the accused's advantage and might have operated to deny him a fair chance of an acquittal. I would respectfully adopt that reasoning to the present appeal. Moreover I doubt whether in a case where the error in question consists of a misdirection on a question of law that the failure of defence counsel to seek its correction has much significance.

[51] In *Wilson* the proviso was thought inapplicable because a review of the whole record, as required by *Weiss v The Queen* (2005) 224 CLR 300, could not readily answer the question whether the error had caused a substantial miscarriage of justice. Whether or not it had caused such a miscarriage depended upon the jury's assessment of the evidence, including conflicting testimony and the credibility of witnesses. For the trial to have been conducted according to law the jury had to assess those facts with the assistance of an accurate understanding of the law. That had not happened. The court was at a disadvantage in undertaking an assessment of the evidence for itself and should not conclude that the Crown had proved beyond reasonable doubt there was no honest and reasonable mistake of fact.

[52] The same consideration applied to the present appeal. The application of s 24 depended critically upon the jury's assessment of the complainant's evidence. There was a possibility the jury might have entertained a reasonable doubt that the appellant was honestly and reasonably mistaken about the complainant's response

to his intrusion into her room. The defence turning upon such a point it is not appropriate for this Court to substitute its view of the facts for that of a jury, properly instructed.

[53] The second aspect of ground 2 is that the trial judge did not assist the jury to understand the application of s 24 by relating it to the facts of the case. The section's requirement of a belief, both honest and reasonable, should have been put to the jury by reference to the circumstances which might have led the appellant to think, mistakenly, that the complainant had consented to his conduct. This meant identifying the facts I have set out and asking the jury to consider whether they, or some of them, in combination might have given rise to the requisite belief. The direction merely gave (an erroneous) exposition of the section as an abstract proposition. It did not tie it to the particularity of the case.

[54] What was required was explained by Muir JA in *R v Dunrobin* [2008] QCA 116. His Honour said:

> "[38] … None of the three parts of the summing-up which deal or purport to deal with mistake attempts to provide a factual context for the judge's directions. At least as a general proposition " . . . the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case". McHugh J explained the content of a trial judge's obligation to sum up to a jury in a criminal case on questions of law in *Fingleton v The Queen* as follows:
>
> > '[77] Section 620 of the Criminal Code declares that, after the evidence has concluded and counsel have addressed the jury, "it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make". The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is "instruct". That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts. As McMurdo P said in Mogg, ordinarily the duty imposed on a trial judge in respect of a summing-up requires the judge to identify the relevant issues and relate those issues to the relevant law and facts of the case. In the same case, after referring to s 620 Thomas JA said:
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> > > "The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken." [Footnote omitted]

> [78] The statements of the learned President and Thomas JA show that the law concerning a summing-up in trials under the Criminal Code is no different from the law in trials at common law. Their Honours' statements are consistent with the statements of Gaudron A-CJ, Gummow, Kirby and Hayne JJ in RPS v The Queen concerning the duty of a trial judge in jurisdictions that have no counterpart to s 620:
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> > "The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes."'" (footnotes omitted)

[55] Fryberg J said:

> "[72] That structure meant that the summing up failed to comply with the requirements identified in the cases cited by Muir JA. Those requirements would have been satisfied had the judge referred to the evidence and the submissions of counsel in the context of each instruction on the law. The sections of the Code creating offences and those defining criminal responsibility and creating defences are conventionally split into elements in a jury charge. In respect of those elements which are more than formally in issue, the summing up should state not only the proper interpretation of the law, but also the evidence relevant to the element, the party's submissions on that evidence and the judge's own comments (if any) about it; and should do so for each element in turn. The essence of the judicial task is to rearrange the evidence from the serial, chronological or other form in which it was given into a categorised form which places it in the context of the relevant law. The same should be done with the parties' submissions. Of course the better submissions will often have done this, at least in part. It is the judge's task to ensure that it is done comprehensively for all matters in issue. Had it been done in the present case, a number of the errors referred to by my colleagues may have been avoided."

[56] Importantly Muir JA stressed the need for a direction linking the law to the facts of the particular case where a jury had sought redirections. His Honour said:

> "[45] … particularly where the jury requested assistance with the concept of honest and reasonable but mistaken belief, it was incumbent on the primary judge to alert the jury to questions of fact relevant to their determination."

[57] As I have mentioned counsel for the respondent objected that there was no sufficient basis on the evidence for the possible application of s 24. The section cannot operate unless there is some evidence from which it could be reasonably inferred that an accused held an honest and reasonable belief in an appropriate state of affairs. The proposition and the cases in support of it appear in the judgment of Williams JA in *R v Cutts* [2005] QCA 306 at para [35]. The evidence was sufficient to allow the inference. In particular the absence of objection, verbal or physical; the proximate potential assistance of a male friend who was not called on; and the lack of actual or threatened violence against the complainant which might have explained subjection on her part make it possible that the appellant did believe there was consent.

[58] Relevant to this point is the observation of Davies and McPherson JJA in *R v IA Shaw* [1996] 1 Qd R 641 at 646:

> "A complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it. Failing to do so may, however, depending on the circumstances, have the consequence that at the trial a jury may decide not to accept her evidence that she did not consent; or it may furnish some ground for a reasonable belief on the part of the accused that the complainant was in fact consenting to sexual intercourse, and so provide a basis for exemption from criminal responsibility under s 24 of the *Criminal Code*."

[59] The appellant's trial has been affected by two errors. The jury did not consider the evidence as they wished to and as they were entitled to. The possibility that the appellant may have honestly and reasonably though mistakenly believed that the complainant consented to his activities was not accurately explained to the jury nor were they given the assistance they should have received about the application of s 24 to the decision they had to make. The appellant has been deprived of a chance of acquittal reasonably open to him. There must be a retrial which, to say the least, is regrettable.

[60] I would order that the appeal against conviction be allowed, the convictions be set aside and a retrial ordered.