SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Loughlin* [2011] QCA 123
PARTIES:	**R** **v** **O'LOUGHLIN, Anne Marie** (appellant)
FILE NO/S:	CA No 305 of 2010 DC No 214 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2011
JUDGES:	Margaret McMurdo P, Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **The appeal be allowed.** 2. **The convictions on counts 1, 3 and 4 be set aside.** 3. **There be a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL - PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of one count of deprivation of liberty and two counts of rape – where the appellant was acquitted of one count sexual assault – where the appellant submitted that the verdict was not open to the jury on the evidence – where there was evidence that both the complainant and the appellant were intoxicated – where the kissing between the complainant and the appellant was consensual – where the complainant was reluctant to make the initial complaint to police – where the appellant argued that there was no evidence of distress on the part of the complainant in the immediate aftermath of the incident – whether the verdict was unsafe or unsatisfactory having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL - PARTICULAR GROUNDS OF APPEAL – MISDIRCTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the primary judge directed the jury on mistake of fact in respect of consent – where the

primary judge's initial direction made no reference to intoxication – where the jury requested a re-direction – where the appellant submitted that the primary judge erred in re-directing that the jury could not have regard to the appellant's level of intoxication when considering whether she honestly held a mistaken belief – whether the primary judge's directions gave rise to a miscarriage of justice

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

Daniels v The Queen (1989) 1 WAR 435, cited
R v Gray (1998) 98 A Crim R 589; [1998] QCA 41, cited
R v Hopper [1993] QCA 561, cited
R v Julian (1998) 100 A Crim R 430; [1998] QCA 119, cited
R v MacKenzie (2000) 113 A Crim R 534; [2000] QCA 324, cited
R v Mrzljak [2005] 1 Qd R 308; [2004] QCA 420, cited

COUNSEL: J R Hunter SC for the appellant
M J Copley SC for the respondent

SOLICITORS: Bell Miller Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for allowing this appeal against conviction and with the proposed orders.

[2] **MUIR JA: Introduction**
The appellant was tried on an indictment charging her with unlawfully depriving the complainant of her liberty (count 1), unlawfully and indecently assaulting the complainant (count 2) and raping the complainant (counts 3 and 4). She was acquitted on count 2, which was particularised as pushing the complainant's bra to one side and taking hold of her breast, and convicted on the other counts. She appeals against her convictions on grounds that:

(a) The trial judge erred in directing the jury that they could not have regard to the appellant's level of intoxication when considering whether she "honestly held a mistaken belief as to consent";
(b) The verdicts of guilty were contrary to the evidence, or weight of evidence, and are thus unsafe and unsatisfactory.

The complainant's evidence

[3] After drinking in a hotel on Caxton Street, Milton with her boyfriend of fourteen years and some other friends, the complainant went to the toilet. She described herself as being "quite merry", but not so much so as to have an impaired memory of what happened. She recalled being kissed by a girl in one of the toilet cubicles. She said that she had done nothing to initiate the kissing which "would have been" on the mouth. The kissing, which was consensual, continued for a few minutes until the complainant said that her boyfriend was waiting and tried to open the locked cubicle door. The appellant removed the complainant's hand and relocked the door. She then grabbed the complainant by the hair, pushed her head into the wall, pulled up her oversized T-shirt top and bra and touched her breasts, leaving a scratch. The complainant tried to push the appellant's hands away, but the

appellant pushed her hands down the complainant's hipster jeans and penetrated her vagina and then her anus with a single finger. The appellant then put her fingers in the complainant's mouth and tried to put her hand back down into the complainant's pants. When the complainant resisted and held on to her jeans, the appellant tried to pull them down, scratching the complainant's right buttock. The complainant admitted that at no time did she say, "No".

[4] The complainant called out words to the effect, "Is there anyone out there [or in there]?" The appellant told her to, "Shut up. Shut up." The complainant heard a woman, who had been in the cubicle next door, knock on the door and say, "Don't worry, I'm getting security, you'll be fine." The appellant opened the door and walked out, leaving her bag behind. The complainant examined the bag and found in it a wallet with a photograph of the appellant. She then went outside and spoke to her boyfriend and another friend and told them that she had been "attacked" in the toilet. She gave the bag to security.

[5] About 10 minutes later, the complainant saw the appellant leaning against a wall outside the hotel.

[6] Security video footage taken from inside the hotel shows the complainant and the appellant moving towards the toilet area at different times and later leaving, also at different times. The video establishes that the complainant was in the toilet for about 13 minutes and that she and the appellant were in the toilet together for about 10 minutes. In her statement to police, the complainant said that she had undone her jeans button and fly in preparation for using the toilet and as she turned around she saw the appellant in the cubicle with her. However, when she spoke to her boyfriend immediately after the incident, she said that she had finished using the toilet and pulled up her jeans and opened the door when the appellant forced her back into the cubicle and started to kiss her, but that she had resisted, saying, "My husband's outside". In cross-examination, she said that she didn't actually use the toilet.

[7] In her police statement, the complainant made no mention of trying to force the appellant's hand away as the appellant touched her breasts and said that the first time she had attempted to stop the appellant was after the penetration of her vagina and anus. She said that it was "around the same sort of time" that the finger had been inserted into her vagina and anus that she "first started shouting and was trying to open the door." She said that her jeans were tight even though the button and zip were undone and inserting a hand into her jeans would have been difficult.

[8] The complainant's boyfriend was angry about what had happened and confronted the appellant. The complainant told him to stop and said words to the effect, "nothing happened" and that it was "probably only a joke". She told another friend, Mr McAndrew, that she thought that the appellant was "probably just joking around in the toilet". At the time she said these things, she was upset and "just wanted to go home". The complainant's boyfriend insisted that the complainant make a complaint to police in response to which she probably said words to the effect, "Let's forget about it and go". She admitted that she had said something similar to Mr McAndrew, but "probably not as strong".[1]

The evidence of other witnesses

[9] The complainant's boyfriend, Mr Simione, gave evidence that around 3 am he noticed that the complainant was in a distressed state. She told him that someone

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had tried to kiss her in the toilets, had grabbed her breasts, that her head had been banged into the wall, the door had been locked and that she had never been so scared in her life. A little later, when they were outside the hotel, the complainant pointed out the appellant to him. He confronted her and said she had "attacked [his] wife in the toilets…kissed her…[and] grabbed her breast". A friend of the appellant interceded and the appellant said, "Oh, yeah, we had a kiss." The friend tried to get the appellant into a taxi but Mr Simione impeded their departure until the police arrived.

[10] Mr Simione said in cross-examination that the complainant had not mentioned penetration until they were talking outside the hotel. He agreed that the complainant had told him that the incident had happened after she pulled up her jeans and after using the toilet, and that she was forced back into the cubicle. He agreed that it was definitely his decision to contact the police. He denied hearing the complainant say, "It was probably a joke. She was probably just joking around", and he denied being angry.

[11] Mr McAndrew, who was also known as Mr Hagan, said that he saw the complainant walking towards Mr Simione and himself and crying. Mr Simione asked her what was wrong and she responded to the effect, "She's taken my bag". He subsequently saw Mr Simione yelling at the appellant saying, "What have you done to my wife?" The appellant was crying and shaking her head. The complainant was also crying. He recalled the complainant urging Mr Simione to "leave it alone".

[12] Miss Paton was in a toilet cubicle. She heard a voice from the cubicle next to the one she was in ask, "If there's someone in the cubicle or in the toilets, can they get a security guard." She wasn't sure if the person was addressing her and she enquired, "Sorry, what did you say?" The request was then repeated a number of times and the person making the request appeared "quite distressed". She told a security guard, went back into the toilets to wash her hands and saw a woman at the wash basin looking back into "the cubicle" looking "a little, like, mystified." She didn't notice that the woman was upset. She later said that the woman "looked a bit distressed" and she comforted her saying words such as "You'll be all right. It's all right."[2]

[13] A security officer, Mr Titaset, was approached by a woman who told him that there was someone "going hysterical" in the toilets. He saw the appellant leaving the ladies toilets and noticed that she was intoxicated. After following her until she left the hotel, he entered the toilet and found the appellant's bag on top of a toilet fitting. As he was leaving the toilet, he saw the complainant, who was hysterical, and a male companion. Outside the hotel, he saw the complainant's male companion yelling at the appellant who was crying.

[14] A medical examination of the complainant revealed that she had:

(a) Two bruises and small superficial scratches on her right breast;
(b) A large red-blue bruise on her left buttock with a superficial abrasion where the skin had been scraped into a flap at one end;
(c) A superficial abrasion on her right buttock with a wide area of surrounding tenderness;
(d) Some bruising of her left upper thigh with a linear red welt-like mark on the outer aspect;

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(e) A tender red area just inside her introitus that had the appearance of a superficial abrasion;
(f) A tender red area 1 cm behind her anus that also had the appearance of an abrasion.

[15] The doctor thought that the injuries looked recent. Examination of fingernail swabs taken from the appellant revealed the presence of biological material with DNA consistent with that of the complainant: it was most unlikely that the DNA came from anyone else.

The appellant's record of interview

[16] When interviewed by police on the morning of the incident, the appellant admitted kissing a girl and having "a bit of a…fiddle a round" in the toilets.[3] She denied forcing the complainant to do anything. She said that the girl she had kissed was blonde (the complainant had dark hair) and was wearing leggings and a dress (not jeans and a T-shirt). She also said that the girlfriend of the man who confronted her outside the hotel was not with the girl she kissed and she had not kissed anyone else. She later conceded that she may have kissed another girl, but did not recall doing so. She denied putting her hands into the jeans of a girl and penetrating her, or at least, claimed no memory of doing so. The appellant did not call or give evidence.

The unsafe and unsatisfactory ground

The appellant's argument

[17] It was submitted by counsel for the appellant that it was not open to the jury, having regard to the following matters, to be satisfied beyond reasonable doubt of the guilt of the appellant:

(a) the level of intoxication of both parties;
(b) the striking circumstance of consensual kissing between two women in a toilet cubicle;
(c) the inconsistencies in the account of the complainant as to how her jeans button and fly were undone;
(d) the complainant's inability to recall how she ended up in the cubicle with the appellant in the first place;
(e) the complainant's account to her boyfriend of being forced back into the cubicle by the appellant and the manifest inconsistency between that account and the one that involved consensual kissing for 2-3 minutes;
(f) the level of difficulty involved in the appellant getting her hand sufficiently far into a pair of tight hipster jeans so as to achieve the penetration of both the vagina and anus;
(g) quite a number of other women came and went from the toilet during the period of time within which the complainant was in there with the appellant;
(h) the initial account by the complainant, in the hearing of Mr McAndrew, to the effect that someone had taken her bag;
(i) the evidence that the complainant's boyfriend was very angry about what had allegedly happened and the fact that it was his idea to call the police;

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[3] Police Record of Interview, p 12.

(j) the complainant telling both her boyfriend and Mr McAndrew that what occurred was probably just a joke;

(k) the absence of any distress on the part of the complainant in the immediately aftermath of the incident – as observed by Miss Paton who said that the complainant were "mystified".

Consideration

[18] The fact of the consensual kissing meant that the commencement of sexual contact and its continuation, as long as it took the form of kissing, was conduct to which the complainant consented. That background, however, does not, of itself, provide strong evidence of whether more intimate sexual acts, particularly the anal and vaginal penetration were consented to by the complainant. The level of intoxication of the complainant and the appellant may well explain how the incident came about. As counsel for the respondent submitted, the intoxication of the complainant provides an explanation for inconsistencies in her account of how her jeans button and fly were undone and her inability to recall how she ended up in the cubicle with the appellant in the first place.

[19] The initial complaint made in the hearing of Mr McAndrew was that someone had taken her bag. That and the reluctance of the complainant to make a complaint and the pressure applied on the complainant in that regard by her boyfriend, were all matters which tended to assist the defence case. There is, however, no reason to conclude that the jury failed to give due consideration to all or any of these matters. The complainant explained her reluctance to pursue the complaint by saying that she was upset and wanted to go home. She was concerned also, according to her, not to upset her boyfriend, but after she "started calming down" and had "thought about it", she "knew it was something [she] needed to report." It was open to the jury to accept that explanation.

[20] The complainant's evidence also received substantial corroboration. It does not follow from Miss Paton's evidence of the complainant looking "mystified" when standing at the washbasin looking back into the cubicle that the complainant was not experiencing shock as a result of the incident. Asked in evidence-in-chief whether there were "actual tears coming out of her eyes", Miss Paton said she couldn't recall. Miss Paton did say that the complainant "didn't really say much" and "appeared a bit distressed", and that she then offered her words of comfort. Miss Paton gave evidence that a short while before this she had heard a person who seemed quite stressed asking for a security guard. That suggests that the complainant was unlikely to have been emotionally undisturbed when observed by Miss Paton after the incident. It also provides corroboration of the complainant's assertion that some of the appellant's acts were not consented to by her.

[21] Further corroboration on the complainant's account is provided by the bruising on the complainant's body and the recent injuries to her vagina and anus. The presence of cellular material under the appellant's fingernails having a DNA profile consistent with the complainant's also supported the complainant's account. The appellant, in her police interview, admitted kissing the complainant and feeling her breasts. She said that there "was nothing aggressive about it".[4] She denied touching the complainant below the chest. She said also that although she did remember actually being in the toilet and would probably remember if she had been "in the toilet and forced [herself] on to a girl."

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4 Police Record of Interview, p 30.

[22] Both Mr Simione and Mr McAndrew observed signs of considerable stress in the complainant shortly after she came from the toilet.[5]

[23] Mr McAndrew's recollection differed from that of Mr Simione's in this regard. His recollection of what he was first told by the complainant is supported by his conduct immediately afterwards.

[24] On the whole of the evidence it was plainly open to the jury to be satisfied beyond reasonable doubt that the appellant had digitally penetrated the complainant against her will as the complainant contended. Accordingly, this ground is not made out.

Did the trial judge misdirect in relation to mistake?

The directions on mistake

[25] The trial judge's initial direction concerning s 24 of the *Criminal Code* made no reference to intoxication. After the jury had retired, the primary judge received a note from the jury, "We would like a restatement of 'mistaken belief' defence and how it relates to this case. Does impaired judgment affect mistaken belief?"

[26] The trial judge, in discussing the note with counsel, said:

> "What I might say, subject to any submissions either of you might make in respect of mistake of fact is I propose to recite some of the matters in the Bench Book but to say this: section 4 (sic), defence of mistaken fact, requires consideration of whether the defendant's belief, if honestly or actually held was held on reasonable grounds can therefore take into account a person's personal circumstances such as education, language skills, intellectual impairment but intoxication of the accused is irrelevant when a jury is assessing the reasonableness of a belief.
>
> The question is whether viewed from you, the jury – by you the jury, the mistake was, having regard to any matters personal to the defendant but ignoring her intoxication, both honest and reasonable. It is not sufficient that she may have actually concluded that the complainant was consenting if she was not, in fact, doing so. To obtain the benefit of mistake of fact you, the jury, must conclude such a mistaken belief was both honest and reasonable."

[27] The trial judge directed the jury as follows:

> "1. In this case, the question is did the defendant in the circumstances honestly and reasonably believe the complainant was consenting.
>
> 2. The defence of mistake of fact requires consideration of *whether* the *defendant's belief* honestly was *honestly or actually held and* was *held on reasonable grounds*, it can therefore take into account a person's personal circumstances, their education, their language, their intellectual capacity or impairment, but *intoxication of the accused is irrelevant when you are assessing the reasonableness of a belief*. So things that are innate to

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a person, such as their education, their use of language, whether English is their first language, whether they had intellectual impairment, you are entitled to consider those things, but you are not entitled to consider intoxication.

3. *The question is whether,* viewed by you the jury, *the mistake was, having regard to matters personal to the defendant,* such as I've described, *but ignoring intoxication, both honest and reasonable. It is not enough that she may have actually concluded the complainant was consenting if she was not in fact doing so to obtain the benefit of the defence of mistake of fact you, the jury, must also consider whether such a mistake*[6] *and belief* (sic) *was both honest and reasonable*.

4. I also said to you yesterday to remember the onus of proof. It is not for the accused to prove that she honestly and reasonably believed the complainant was consenting. In this case, it is for the prosecution to prove beyond reasonable doubt that the accused did not honestly and reasonably believe the complainant was consenting.

5. Accordingly, if the complainant wasn't in fact consenting you have got to ask yourself: Can I be satisfied beyond reasonable doubt that the *accused did not have an honest and reasonable belief that she was consenting? And it is when considering that question that the question of reasonableness and intoxication comes into play. As I've said, you've got to ignore intoxication, but you can include any other things that you may have detected about the capacity of the defendant as a result of all of the evidence*. And you can imagine there would be some cases where people with intellectual impairments, et cetera, come before them. You have got to take that into account." (the above paragraphs have been numbered for ease of reference and emphasis added)

The appellant's argument

[28] The appellant's intoxication was relevant to the existence of an honest belief about consent. "A condition of inebriation…may help to induce a belief that a woman is consenting to intercourse; to that extent it may tend to show the belief to be genuine or 'honest'",[7] and "Intoxication is, no doubt, relevant to the question of whether an accused person has an actual belief."[8]

[29] What s 24 requires is "both a subjectively honest and an objectively reasonable mistaken belief".[9] The re-direction given was not only confusing but identified an impermissible basis upon which the jury might reject a defence of mistake of fact,

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6 The transcript reads "mistake and belief". It is likely that this is a transcription error. Even if the words were spoken, their real import would have been apparent.

7 *R v Hopper* [1993] QCA 561 at 10.

8 *Daniels v The Queen* (1989) 1 WAR 435 at 445 per Kennedy J.

9 *R v Mrzljak* [2005] 1 Qd R 308; [2004] QCA 420 at [21].

namely that the appellant did not honestly believe that the complainant was consenting. In the analogous context of self defence,[10] the existence of the belief has been described as the "critical or decisive factor" or the "definitive circumstance".[11] The appellant was deprived by the misdirection of the opportunity to have the jury consider the existence and honesty of any mistaken belief in the context of her significant intoxication. Instead, the jury may have ignored intoxication and concluded that any belief was not honestly held.

[30] The role of intoxication was thus related not simply to the existence of an honest belief but to the question whether the belief was both honest and reasonable.

The respondent's argument

[31] Counsel for the respondent submitted that the first paragraph of the re-direction "correctly quarantined the state of intoxication from only the reasonableness of the belief, not from whether it was honestly or actually held." He submitted also that the matter was correctly put in the fifth paragraph of the re-direction. There, it was submitted, the jury was told that intoxication was relevant to whether the appellant believed the complainant was consenting, but on the issue of the reasonableness of the appellant's belief, the jury had to ignore the intoxication.

[32] It was argued also that the first sentence of the third paragraph was an application of what was said in the second paragraph, namely "…intoxication of the accused is irrelevant when you are assessing the reasonableness of a belief." Counsel for the respondent argued that the last sentence of the third paragraph made the direction clear. That sentence is:

> "It is not enough that she may have actually concluded the complainant was consenting if she was not in fact doing so to obtain the benefit of the defence of mistake of fact you, the jury, must also consider whether such a mistake and belief (sic) was both honest and reasonable."

Consideration

[33] Paragraphs 1 and 2 properly identified the question for the jury and explained that there were two questions for determination: (a) was the appellant's belief held honestly or actually; and (b) was the belief held on reasonable grounds. The direction correctly explained that the appellant's intoxication was irrelevant to the question of the reasonableness of her belief.

[34] Counsel for the respondent submitted that paragraph 3 was an amplification of the direction in relation to the reasonableness of the appellant's belief in paragraph 2. Whatever may have been the primary judge's intention, that was not the effect of his words. The first sentence of paragraph 3 states that the question for the jury is "whether … the mistake was, having regard to matters personal to the [appellant]…but ignoring intoxication, both honest and reasonable." These words could readily be construed, inconsistently with what was said in paragraph 2, as meaning that the appellant's state of intoxication should be disregarded when considering the honesty of her belief. The clarity of the direction was not improved by the primary judge's failure to state expressly in paragraph 2 that intoxication was relevant to the determination of whether the belief was actually held.

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10 *R v MacKenzie* [2000] QCA 324 per McPherson JA at [48].

11 *R v Gray* (1998) 98 A Crim R 589 per McPherson JA at 592-595; *R v Julian* (1998) 100 A Crim R 430 at 433, 434, 438-439, 447 and 448.

[35] It may be that if the direction had concluded with paragraph 3 the clarity of the differentiation between a belief "honestly or actually held" on the one hand and "held on reasonable grounds" on the other may have overcome the blurring of concepts introduced in paragraph 3. Unfortunately, the confusion was compounded by paragraph 5. The primary judge posed the question, "Can I be satisfied …that [the appellant] did not have an honest and reasonable belief that she was consenting?" He continued, "And it is when considering that question that the question of reasonableness and intoxication comes into play. As I've said, you've got to ignore intoxication." The words "that question" plainly refers to the question of whether the appellant had "an honest and reasonable belief".

[36] On a close analysis of the words used, a person with a prior acquaintance with the concepts being explained probably would have deduced that, in paragraph 5, the primary judge was linking the question of reasonableness with intoxication. However, it cannot be assumed that the jury had a prior familiarity with s 24 of the *Criminal Code*. What is known is that they were sufficiently concerned about the concept of "mistaken belief" to request assistance. They did not receive it.

[37] In my respectful opinion, the re-direction gave rise to the distinct possibility that the jury may have been confused about how intoxication was to be taken into account, if at all, in considering mistake. But could the confusion have caused a miscarriage of justice? It was made tolerably plain that intoxication was not relevant to the question of whether the appellant may have had a reasonable belief that her acts were consented to by the complainant. The most obvious way in which the jury may have been misled by the direction was if they were led to conclude that intoxication was irrelevant also to whether the appellant may have held an actual or honest belief that the complainant was consenting.

[38] The application of s 24 was squarely raised on the evidence and was a central aspect of the case. There was evidence that the appellant was affected by alcohol. The appellant was entitled to have the jury properly directed in relation to the role of intoxication in the operation of the exculpating circumstance of mistake. The direction given was inaccurate in part, confused and potentially misleading. It had a distinct potential to confuse and distract the jury.

[39] I consider also that there is some force in the argument that the direction may have distracted the jury from focusing on the existence of the relevant belief on the part of the accused. That has been said to be, "[t]he critical fact for a defence based on s. 24".[12]

[40] This ground of appeal has therefore succeeded and it seems to me that this is not an appropriate case for the application of s 668E(1A) of the *Criminal Code*. The questions for determination depend very much on issues of credibility which this court, not having seen the witnesses, is not in a position to resolve.

Conclusion

[41] For the above reasons, I would order that:

(a) The appeal be allowed;

(b) The convictions on counts 1, 3 and 4 be set aside; and

(c) There be a retrial.

[42] **CHESTERMAN JA:** I agree with Muir JA.

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12 *R v Mrzljak* [2005] 1 Qd R 308 at 321.