SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sailovic-Jeremic* [2011] QCA 211
PARTIES:	**R** **v** **SAILOVIC-JEREMIC, Sasa** (appellant/applicant)
FILE NO/S:	CA No 32 of 2011 DC No 223 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2011
JUDGES:	Muir and Fraser JJA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the appeal against conviction be dismissed.** **2. That the application for leave to appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where the appellant was convicted of one count of rape and one count of attempted rape – where the appellant orally penetrated the complainant and intended to penetrate her vaginally – where the offences perpetrated by the appellant occurred in circumstances where other males also took advantage of the complainant – where the complainant gave evidence that she "knew of" some of the males involved – where the appellant submitted that the trial judge erred in declining to order a mistrial and/or that the appellant be tried separately to his co-accused – whether the primary judge erred in declining to order a mistrial or separate trial CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant made admissions to friends at a police station whilst waiting to be interviewed by police – where the appellant submitted that the statements constituted no more than "big noting" amongst the appellant and his friends – where another

witness gave evidence that was inconsistent with the appellant's statements to his friends – whether the jury's verdict was unsafe and unsatisfactory

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – where the complainant gave evidence – where the jury made a request for statements given by the complainant to police – where the primary judge directed the jury as to why no prior inconsistent statements were put to the complainant in court – where the appellant submitted that the primary judge erred in inviting the jury to conclude that the lack of prior inconsistent statements could be treated as strengthening and corroborating the complainant's oral evidence – where the appellant argued that the primary judge erred in failing to warn the jury as to how to treat the complainant's evidence of alleged unproven offences committed against her by others at earlier times and having no connection with the offences concerning the appellant – whether the primary judge erred in so directing on prior inconsistent statements and in failing to direct on the relevance of any alleged unproven offences by persons other than the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to five years imprisonment for rape and to three years imprisonment for attempted rape – where the appellant submitted that sentences of three years imprisonment and 18 months imprisonment were more appropriate for the offences of rape and attempted rape respectively – whether the sentence was manifestly excessive

R v Breckenridge [1998] QCA 136, considered
R v HX [2005] QCA 91, considered
R v Kanaveilomani [1995] 2 Qd R 642; [1994] QCA 193, distinguished
R v Stringer [1998] QCA 327, considered
R v Troop [2009] QCA 176, distinguished

COUNSEL: M J Byrne QC for the appellant/applicant
D L Meredith for the respondent

SOLICITORS: Potts Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: **Introduction** The appellant was convicted after a trial in the District Court of raping the complainant on 8 July 2007 and of attempting to rape her, also on that day. On 4 March 2011, he was sentenced to five years imprisonment for the

rape offence and to a concurrent three year term of imprisonment for the attempted rape. His parole eligibility date was fixed at 10 August 2013. The appellant appeals against his convictions and applies for leave to appeal against the sentences imposed. Before discussing the grounds of appeal, it is useful to say something about the evidence before the jury.

The complainant's evidence

[2] At the time of the offence the complainant was a 17 year old university student attending a university on the Gold Coast where she resided for that purpose. She gave evidence to the following effect. On Saturday 7 July 2007, she arranged with friends to meet at a nightclub in Brisbane. That evening at the nightclub, she met a youth whom she knew and whom I will refer to as Mario. He was with a group of friends or acquaintances.

[3] The complainant became inebriated and kissed "[a] few" of Mario's acquaintances when on the dance floor. Late in the evening, she was asked by Mario if she would like to go back with him, and presumably others, to an apartment which had been obtained for the purposes of a friend's going away party. The complainant agreed and she, Mario and a number of other young men walked to the apartment which was in or near Margaret Street. There was also another young woman, Ms W, with whom the complainant was friendly, in the group at this stage.

[4] After arriving at the apartment, the complainant and Mario had consensual intercourse. Thereafter, a number of other youths in succession removed or displaced the complainant's clothing as she was lying on the bed in the apartment's bedroom and had intercourse with her. Some of them inserted their penises in her mouth. At times, a number of the men were in her room. Throughout these events, the complainant was intermittently unconscious and unable to move or talk. At one stage, two of the men assisted the complainant to the apartment bathroom where she dry retched. After going to and from the bathroom for a while, she lay down on the bed and woke up with her breasts exposed, her jeans and G-string down to her ankles, with one of the men having intercourse with her. Again, she was unable to move or speak. When she woke up again two other men came into the room. One of them, who was dark skinned, displaced her clothes. This person, whom she heard ripping a condom packet, enquired, "Do you want to put it on for me?" She said she couldn't speak. He then had intercourse with her. Neither he nor she spoke whilst this was happening. The man removed the condom and ejaculated in the complainant's mouth.

[5] The other man then had intercourse with her and ejaculated on her neck. She then lost consciousness. When she awoke she was lying on the bed. She saw eight to ten men in the bedroom. Her clothes were displaced again. One of the men inserted his fingers in her vagina. Others used cameras and mobile phones to take photographs of her. She then blacked out again.

[6] She was awake, fully clad and sitting up on the bed when the appellant and another man came into the room. She said to the appellant that she wanted to go home. He responded, "just suck it for 10 seconds … [a]nd then I will take you home." The complainant again said she wanted to go home. The appellant proceeded to put his erect penis in her mouth and to place his hands behind her head, pushing her head. She tried to pull her head back, but couldn't move. She remembered the appellant and the other man leaving the room.

[7] Some time later, a female came into the room. By then, there were a number of males there. They were instructed to leave by the female. A taxi was called for the complainant and she was able to walk to it without assistance, although feeling "really sick and confused".

[8] After arriving home, she went to bed. She awoke at around 11 am that day feeling sick, tired and hungover. Later in the day, she caught the train back to the Gold Coast. That night she found an image of her breasts not taken by her on her mobile phone.

[9] The complainant accepted that between arriving back at her Gold Coast accommodation on Sunday and seeing the police on the following Tuesday, she had been ringing friends and that she had sent one friend the following text message:[1]

> "…last night I was so drunk. Mario took me back to an apartment in the City and we had sex and then three other guys came in and … were trying to have sex and I kept trying to push away but couldn't and they were putting their penis in my mouth and then this other guy came in and told them to get away and then everyone left except the nice one and this other one and I was nearly passed out on the bed and the other guy had sex with me and the nice guy was pushing him off me and looked after me and he was trying to get me awake because all the other guys were coming, but I passed out and I woke up, there were like 10 guys in the room all trying to do shit with me, and they were, like, 'Suck my cock and then I'll take you home,' and they were shoving them in my mouth. Then another lot came in and started doing it and … then there was one chick in the apartment and she told everyone to get out and she helped me get my stuff, and Mario's brother was helping as well, and he rung up a cab for me and walked me down…"

[10] Cross-examined by counsel for the appellant, the complainant conceded that she had admitted in cross-examination on a previous occasion that her memory of what happened in the unit was vague. She admitted that after her sexual encounter with Mario and after he had left the room, she pulled up her jeans and "fixed up" her top. She accepted that at that time, she knew where she was. She accepted that when one of the men had attempted to place his penis in her anus she groaned and moved slightly. She accepted also that when her female friend said that she was going back to the nightclub with Mario and would get one of her friends and come back for her that she heard and understood what was being said.

[11] The appellant's counsel also obtained the following admissions or concessions. When the appellant came into the bedroom, the complainant was sitting up on the bed. Her muscular control "was definitely an improvement on what it was [before]". She had told police that when the appellant came in she was "feeling better". What she meant by that was that she was "sobering up". She remained upright on the bed when the appellant's penis was in her mouth.

[12] In response to the suggestion that the appellant did not prise open her mouth, she said, "…I don't know how he did it, but he put his penis…". In response to the suggestion that she could have closed her mouth, she replied, "Well, I don't know.

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1 R151.

I don't know – that is what happened that night and he put his hands behind my head."

Ms W's Evidence

[13] A female friend of the complainant, Ms W, gave evidence to the following effect. She had been in the lounge room of the unit sitting on a couch with one of the men for about 30 minutes while the complainant and Mario were in the bedroom. On coming into the lounge room after this interval, the complainant, who was fully clad,[2] fell to her knees and then forward onto her face.[3] Two of the men picked the complainant up and placed her on the bed in the bedroom. She was "pretty limp" and didn't speak. After the complainant was placed on the bed, Ms W spoke to Mario for about 10 minutes. The two of them then left the apartment. That was the last time that she saw the complainant that evening.

[14] At around 11 am the next day, the complainant telephoned Ms W and told her that she had been raped. She said, " 'While I passed out, guys were having sex with me', shoving their penis in her mouth and taking photos of her." Asked if the complainant mentioned any of the names of the people who had raped her, Ms W responded, "Mario was one of them." Cross-examined by counsel for the appellant, the witness accepted that, when the complainant fell to her knees, her level of intoxication did not appear to be any different in degree to when she and the complainant had gone into the bathroom in the apartment together. She accepted that they spoke in the bathroom and that the complainant was happy and giggling.

Ms G's evidence

[15] Another female friend of the complainant, Ms G, gave evidence that she was telephoned by the complainant on the Monday after the incident. She recounted:[4]

> "She had told me that she had been raped - well, that she had gone to Friday's and that she'd seen Mario and all of them and that she went with Mario to the apartment and they had sex and then she said that she blacked out and when she woke up she saw guys in the room, like having sex with her and stuff, and then she's blacked out again and then she woke up again and there were different guys and then – I can't remember how much after that except that she remembers a girl coming in helping her get dressed, get out of bed and stuff and then she left. I can't remember – I think she said one of the guys called a cab or something. I can't remember."

Ms T's evidence

[16] Ms T gave evidence that she was a friend and university colleague of the complainant. She noticed that the complainant was visibly upset when she picked her up from the Robina station late in the afternoon of 8 July. When Ms T enquired how the complainant's weekend was, the complainant burst into tears. The complainant told Ms T that she had gone to the apartment with Mario, that she had had sex with him and that she couldn't "really remember parts of the night…she had broken memory of it." The complainant told her that "other boys had come into the room and had been on top of her and put their penis in her…mouth". She also said that she thought there had been photos taken of her.

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2 R258.
3 R256.
4 R284-285.

[17] Ms T said, in effect, that her recollection of exactly what had been said by the complainant was vague. She "didn't really understand what had happened" and said, "So they raped you?" The complainant, who was crying at the time, responded, "Yes."

[18] After having dinner with the complainant, Ms T enlisted two other friends to assist in comforting the complainant. Ms T admitted in cross-examination that she was keen for the complainant to go to the police. She agreed that the complainant herself "wasn't very enthusiastic about going" and that the complainant was concerned about the possible consequences for the men involved if she proceeded with a complaint.

Ms To's evidence

[19] Another friend of the complainant's from high school Ms To gave evidence of receiving the text message set out in paragraph [9] above. She said that after receiving the message she rang the complainant who seemed "[s]ort of shaky, upset". She asked the complainant how many men she thought had raped her and the complainant said, "it could have been seven but she wasn't sure".

Ms V's evidence

[20] Ms V gave evidence to the following effect. After going to Fridays nightclub, Ms V went to the apartment with her boyfriend and another male at about 3 or 4 o'clock in the morning. When the group arrived at the apartment "it was just like a party room…just bottles and people in the room and there was music going lightly." There were about 10 to 12 people in the room. People were moving to and from the balcony. She noticed two men looking through the sliding door of the bedroom laughing as they did so. After a while she went back inside and sat on a couch. She noticed people going in and out of the bedroom and the door being shut after them but she wasn't "a 100 per cent sure" about the latter detail. This went on for five minutes or so, "it wasn't for long".

[21] After she overheard somebody say something, Ms V went into the bedroom and saw the complainant and two men on the bed sleeping or attempting to do so. One of the complainant's breasts was exposed. The bedding was up over her waist. Ms V covered the complainant's breasts and pulled the bedding up to cover her. Another man walked into the bedroom and was walking up and down.

[22] After another five or ten minutes, Ms V heard the complainant mumbling and went back into the room. She then noticed a used condom near the curtains. The complainant, who was alone (although she couldn't be sure whether the males previously in the room went out as she went in), "sat herself up on her arms" and was helped up by Ms V. The complainant asked, "Where am I?" Ms V responded, "It's okay, you know, nothing happened." The complainant's clothing was then around her ankles and the complainant pulled the clothing up.[5] "She didn't look happy" or well so Ms V "pulled her up the rest of the way." At this time, one of the men present called a taxi for the complainant.

The appellant's record of interview

[23] In a statement to police, the appellant gave the following account:[6]

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5 R238.

6 R559-560.

"Ivan and Milan were with me and we opened the door and saw [the complainant] lying on the bed. I recognize the girl as [the complainant] immediately.

We closed the door and stayed out in the lounge area.

Mario arrived at the room some time later, maybe half an hour or 40 minutes.

I talked to Mario and he told me that…and that he had sex with her earlier on. I had seen her at Friday's nightclub earlier on.

I then went into the bedroom. When I went into the bedroom there were two guys in the room with [the complainant], One of the guys was Milan but I didn't know the other guy. This guy may have walked with us from Friday's to the unit at the Oaks…

These guys were standing in the bedroom and [the complainant] was sitting on the edge of the bed.

I asked [the complainant] "Can I get a headjob?"

She said something like "Oh I don't know"

I asked her again and she said "Oh Okay"

I told the other guys to leave the room and they went out onto the balcony of the bedroom.

I closed the curtain near the balcony.

I walked back to the bed and took my penis out. My penis was erect and I put it near [the complainant's] face. She then sucked my penis and was also holding it with her hand.

She sucked on my penis for about a minute or two and then I didn't want it any more and I put my penis back into my pants. I don't think my penis was erect when I put it back into my pants. I then left the room.

I didn't say anything to [the complainant] when I left the room and she didn't say anything to me. Milan and the other guy were still out on the balcony when I left the room.

I sat in the lounge and talked to my friends…

Some other boys walked into the bedroom but I don't know what they did.

…

Some time later a girl came into the unit and then went into the bedroom. I heard her tell everyone in the bedroom to get out. I heard her say "Everyone out, leave her alone"...

I think about two or three people came out of the room but I don't know who they were. …

[The complainant] came out of the room straight away and left and went home."

[24] The appellant did not give or call evidence at the trial. In another interview with police on 17 July 2007,[7] the appellant denied having sexual intercourse with the complainant. The following exchange occurred:[8]

> "S: well that's it that's all I got is a head job when I came back in the morning and that's it that was it
>
> C: well mate that's pretty important can you go over that?
>
> S: oh yeah I just walked into the room she was already awake then I asked her for a head job and that's it she gave me one and I just went out and that's it you know the boys stayed in the room and I dunno what happened
>
> C: alright so were they present while you got the head job off her?
>
> S: yeah they were
>
> C: alright mate can you just UI
>
> S: they weren't like they weren't in the room their were just out on the balcony sort of thing
>
> C: oh
>
> …
>
> C: that's all that is yeah so your penis in her mouth
>
> S: yeah yeah
>
> C: UI sure um we'll go over that mate how did that come about?
>
> S: um I dunno what to say UI I just walked in and she was there and then I asked for a head job and I said get up everyone so everyone got out and that's it
>
> C: alright how long um did this did this take place for?
>
> S: two minutes and minute and a half if that
>
> C: alright did you ejaculate?
>
> S: no
>
> C: alright why why did you stop? Or she stop? Why did the head job stop?
>
> S: oh I just stopped UI
>
> C: alright why didn't you want anymore mate?

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7 R564.

8 R581-582.

> S: I just had UI you know what I mean and you you just don't want it hey anymore."

[25] I now turn to the grounds of appeal.

Grounds One and Two – the trial judge erred in declining to order a mistrial and/or in declining to order that the appellant be tried separately to his co-accused Faraji

[26] On day two of the trial, during cross-examination by counsel for the appellant's co-accused, the following exchange took place:[9]

> "Why did it take you so many days to get to the police? I think it was about two, two-and-a-half?-- Because I was scared, like, didn't know what I wanted to do.
>
> Scared of the police?-- No, not scared of the police. Scared of the boys.
>
> Scared to complain?-- Not to complain. I was scared of the boys.
>
> Oh, yeah, but you really only knew one of them by the sound of it?-- No, I knew a few of them, and I knew of them."

[27] An application was made by defence counsel to discharge the jury or, alternatively, for a separate trial. The primary judge dismissed the application.

[28] The primary judge, after referring to the above exchange, gave the following reasons for refusing the application:[10]

> "Mr Frigo argues that those answers in combination raise an inference of a propensity of violence or a general reputation of violence against his client. The evidence is that [the complainant] had known of Sailovic-Jeremic prior to this night, albeit with no real contact or personal contact or friendship with him.
>
> Mr Frigo has denied that his client does have a reputation for violence, and his complaint is that the question was asked and answered in the way that it was, and further, that it was asked by another counsel.
>
> The explanation for the delay in complaint, however, is something which might reasonably have been elicited in the prosecution case. Furthermore, the allegations of a series of serious sexual assaults by many men connected with that unit that night implicitly raises - the narrative of the complainant implicitly raises her fear of the people who were assaulting her.
>
> Mr Frigo argues that the prejudice to his client is now incurable. It seems to me that that is not so, that the matter - if there is an unfair inference open against his client, that matter can be cured by

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9 R111.

10 R124.

> appropriate cross-examination or re-examination, and at this point I am not prepared to miscarry the trial against Mr Sailovic-Jeremic."

[29] After the trial judge's ruling, the Crown prosecutor, with the consent of defence counsel, conferred with the complainant with a view to the Crown admitting that the complainant had no knowledge of any history of violence on the part of either accused. It emerged from the conference, however, that the complainant did have an impression that the men in the apartment, including the appellant, were dangerous. In the course of further argument, the primary judge observed: [11]

> "[I]t's the fact that she's said it, and whether it raises – it leaves open an inference for the jury that would create a risk of impermissible reasoning."

[30] Nevertheless, the primary judge gave the following ruling:[12]

> "I have been asked to reconsider the short passage of page 90 of the second day's transcript and I have taken time out to reconsider that passage separate from the expanded version given to the prosecution by the complainant out of Court.
>
> A rereading of the passage has reinforced my impression that the evidence given by [the complainant] yesterday was inocuous (sic). At the time that it was given, I had thought only that it was an obvious response to the circumstances of the night itself; in other words, that ongoing fear was an understandable consequence of the experiences she had described.
>
> On her evidence, [the complainant] had endued (sic) a series of rapes over a protracted period by groups of youths while she - her evidence was that she did not know or barely knew some of them. She had seen some of them around. They appeared to mix in overlapping social circles.
>
> I do not accept the defence submission that the passage at page 90 reasonably raises an adverse imputation against the propensity or reputation of either accused person. That evidence is consistent simply with the Crown case.
>
> Left as it is in the context of this trial, the passage does not fairly raise any impermissible prejudice. It does not cause a miscarriage of justice and it does not deprive either accused of a fair trial. I will leave the evidence as it stands.
>
> Unless anyone wishes to make a submission about - unless any counsel wish to make a submission about how it might be dealt with further, I don't propose to say anything about it at all."

[31] Counsel for the appellant submitted as follows. It was plain from the evidence under consideration that the complainant was stating that she knew some of the men in question, including the appellant, and that she was scared because she knew of their history, such that she was too scared to complain. In other words, it was

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11 R130.

12 R132.

contended, the complainant's fear was said to have arisen not out of the events of the subject incident, but because of matters specific to persons, including the appellant, of which she had particular knowledge and reason to fear. This was in the context of there being no evidence of any threats of violence during or relating to the subject incident. The complainant's evidence was thus grossly prejudicial in a case in which the defence relied entirely on consent and mistaken belief.

Consideration of Grounds One and Two

[32] The concerns voiced by counsel for the appellant lack substance. It was highly unlikely that the jury would draw any inference adverse to the appellant from this brief exchange, the import of which was unclear: the complainant appeared to be saying that she was not "scared to complain". There was no suggestion that the appellant or any of the other men had behaved violently during the incident or that the complainant had been threatened in any way. Her reason for being scared was not explored and the jury had no means of knowing whether the appellant was justified in being frightened if, in fact, she was frightened.

[33] Nor is it immediately apparent that the jury would have understood the words "and I knew of them" as conveying that the complainant knew something about the men which caused her to be afraid. Those words could well have been taken as responsive to the query, "You only knew one of them by the sound of it?" Nor could the jury have readily concluded that there was anything the complainant knew about the appellant which caused her to be afraid of him. The evidence did not establish that the males who participated in the assaults on the complainant were all close friends or had close social or other connections.

[34] It will be recalled that the complainant was reluctant to make a formal complaint, not out of fear of her assailants, but out of concern for the possible consequences for them. That would not have suggested to the jury that the complainant knew things about the men which caused her to fear one or more of them. The primary judge concluded that no specific directions on the matter were warranted but invited counsel to re-visit the matter if they wished. Her invitation was not taken up. The primary judge gave the jury the usual direction that the case had to be decided on the evidence before the jury and it is appropriate to proceed on the basis that the warning was understood and followed.

[35] The cross-examination by counsel for the appellant's co-accused which gave rise to the evidence under consideration was something of a puzzle. The cross-examiner, seemingly, intended to persuade the jury that there was a late complaint which damaged the complainant's credibility. The incident occurred early in the morning of Sunday, 8 July 2007. The complaint to police was made early in the afternoon of Tuesday, 10 July 2007. On the Sunday, the complainant, a 17 year old girl who woke up late in the morning badly hungover and unwell, travelled back to the Gold Coast on the train. Even so, she communicated that day with female friends by mobile phone informing them, in a general way, of having been the victim of non-consensual sexual interference by a number of males. She said that when she saw the picture taken of her breasts on her mobile phone she "just lost it and…just cried" because she didn't know what to do.

[36] Ms T, who picked the complainant up from the Robina train station, noticed that she was visibly upset. The complainant "burst into tears" when asked how her weekend was. The general but brief account of the events of Saturday night/Sunday morning recalled by Ms T was consistent with the complainant's evidence. The complainant

agreed with Ms T's proposition that she had been raped. At around 11 am on the Sunday morning, the complainant had also told Ms W that she had been raped.

[37] The complainant attended lectures on Monday and was taken by Ms T to the police station on the Tuesday.[13] To my mind, the complainant's reservations about making a formal complaint assisted rather than detracted from her credibility and the exploration of the circumstances surrounding the complaint in cross-examination was likely to prove unproductive, at best, for the defence. These grounds were not made out.

Grounds Five, Six, Nine and Twelve - The jury's verdict of guilty of attempted rape was unreasonable

[38] Counsel for the appellant's submissions were to the following effect. The attempted rape allegation was based solely on statements made by the appellant to friends at a police station whilst waiting to be interviewed by police. The complainant gave no evidence about this alleged incident. The witness, Ms V, made no mention of it. Counsel for the appellant contended that, in those circumstances, a reasonable jury should have had a doubt that the statements by the appellant were no more than "big noting" to his friends. It was submitted also that, given the dearth of evidence, it was wrong for the trial judge to construct a scenario and direct the jury, "It is open to you to think that getting on top of a sleeping woman in those circumstances was an overt act, but it's a matter for you."

Consideration of Grounds Five, Six and Twelve

[39] Before going in to be interviewed by police, the appellant said to his friends in a waiting room:[14]

> " 'Sasha: The worse thing is she just wrote in the statement that she sucked my dick. Now next time she can't say that I fucked her. … But I wanted to fuck her. I was just about to … put in my dick and who comes in, that pussy. What's her name?'… 'the friend of that girl, that guy's girlfriend.'
>
> 'Senad: Yeah, yeah, yeah, Denis's.'
>
> 'Sasha: Yeah, his. I was just about to put my dick in and I said, 'Fuck, I won't … but I wanted to fuck her. We, the idiots, paid for her cab home and everything nicely and she does this to us, the fucking bitch.'
>
> At 9.38, 'Sasha: I was in the room by myself too. I was alone in the room.'
>
> At 9.45, 'Sasha: I swear I told the truth, you idiot. I swear.'
>
> 'Sreten: The worst thing is to lie to them.'
>
> 'Sasha: I swear I wanted to fuck her. I swear I was on her and I said I was alone in the room. That's what is going to save me when I say that. I was because I was' something inaudible. … 'Couldn't get it up so I walked out.' 'Sasha: That's the best.' …

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13 R209.

14 R360 (reformatted).

> At 9.46, 'Sasha: This is where you fuck up the other person and yourself. You fuck up the other person because they didn't see what you did and you fuck up yourself because I was by myself and no-one can say he did it.' That is why I said it last time' "

[40] After being interviewed, the appellant told his friends:[15]

> "He didn't ask me if I fucked her or nothing … He asked you did you fuck her and I said no, I really didn't fuck her. I wanted to and I was on her and then I didn't."

[41] In her summing up, the primary judge said:

> "The first issue in relation to count 4 is whether what Sailovic-Jeremic claimed to his friends, about being on top of this girl and so on, was actually true. Neither … [Ms V] or the complainant mentioned Sailovic-Jeremic being in the room when [Ms V] went in, and neither of those women describe any sexual act happening at that time.
>
> It appears that [the complainant] has no memory of Sailovic-Jeremic ever being on top of her. Her evidence was that after the oral sex, after Sailovic-Jeremic had put his penis in her mouth, about 10 men had walked in. She recognised Nino. Nino was putting his penis in her mouth. Others had their penises out and were saying, 'Me next, me next'. She said that after that she blacked out. Her next memory was when [Ms V] had walked in and told everyone to get out and the complainant thought there were about 10 men in the room at that stage.
>
> [Ms V] only mentioned seeing two men on the bed and she spoke about people, or at least one man walking in and out whilst [Ms V] was in the room.
>
> Now, you need to be satisfied that when Sailovic-Jeremic told his friends about being on top of this woman and so on he wasn't just bragging or making it up. To do that you need to look at what he actually said to those people in that room. You need to look at the context. He said it at a time when he was with these people – these other boys in a waiting room while they were under investigation for a sexual assault or for sexual assaults and while they were waiting to be further questioned by the police. Look at the detail of what he said, the tone of what he said and the context in which he said it."

[42] The trial judge drew attention to the fact that the appellant's counsel argued that what his client had said to his friends as well as what he had said to the police was true. She did not "construct a scenario" as the appellant's counsel submitted. Rather, she accurately recorded the facts.

[43] The failure on the part of the complainant to give evidence of the matters narrated by the appellant does not assist the appellant a great deal. She was obviously highly intoxicated and unconscious as well as disorientated from time to time. It will be

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15 R361.

recalled that Ms V went into the room on two occasions. On the first occasion, she saw the complainant and two men lying in the bed, the bedding was over the complainant's waist and one of her breasts was exposed. She was on the far left side of the bed looking at the bedhead. There were also two men in the bed; one in the middle and another on the right side. She recalled the man on the right side being slightly obese. That description fitted the appellant. Ms V was "pretty sure" that the men were sleeping. On the second occasion that she entered the room, which was perhaps five or ten minutes later, the complainant was still lying on the far left hand side of the bed and there was no one else in the room, although it was possible that persons may have left the room as she went in. The complainant's "clothing was around her ankles", but it is not possible to say whether the clothing had been disturbed since Ms V's first visit to the room. On neither visit to the room did Ms V notice any physical contact between the complainant and any male.

[44] If Ms V was the female referred to in the appellant's admissions, his account of being "on" the complainant is inconsistent with Ms V's. Another inconsistency in the two accounts was that Ms V said that when she came into the room the first time, there were two men in the room. The appellant's account is that he was alone in the room with the complainant.

[45] Ms V was only in the apartment for a relatively short space of time. She observed no actual sexual activity taking place but it is plain from her evidence that there was ample opportunity for sexual conduct to have occurred unobserved by her. It was open also to the jury to conclude that Ms V's recollection was deficient or faulty and that the appellant was in a far better position than Ms V to know what he did. Alternatively, he may have been disturbed by another female.

[46] It was open to the jury to conclude that it was highly unlikely that the appellant, who must have been aware that he was facing serious criminal charges, would be exaggerating the nature and extent of his sexual dealings with the complainant in the circumstances in which the subject admissions were made. Accordingly, it was open to the jury, on the appellant's admissions, to conclude that he had begun to put his intention to commit the offence of rape into execution by means adapted to its fulfilment. This ground was not made out.

Ground Eight – The trial judge erred in inviting the jury to conclude, as there was no direct challenge to specific passages in the complainant's statement, that this could be treated as strengthening and corroborating the complainant's oral evidence

[47] The direction was as follows:[16]

> "So the normal reason why something might be before you from a statement is if there's an inconsistency. So counsel are allowed to cross-examine a witness about an inconsistent statement, about something that they've said previously which might be seen as different to what they're now saying. Nothing was put to [the complainant] from her statement or her statements that's said to be inconsistent with the evidence that she gave in this Court.
>
> So to that extent I say that just with a caveat about identification and I'll come to that in a minute. But you conclude - can conclude from the fact that prior inconsistent statements weren't put to her from her

16 R480.

> statement, that there was nothing of significance in this trial that was inconsistent. It suggests that there's no significant inconsistency with what she said here."

[48] The primary judge, after explaining that the complainant's evidence stood to be assessed like the evidence of other witnesses, explained:[17]

> "Now, her statement is another thing that she's given out-of-Court, another lot of things that she said out-of-Court and the general rule is that out-of-Court statements by witnesses - the accused are in a different category, but out-of-Court statements by witnesses are not generally admissible in the trial. So they just can't be tendered unless there's some additional evidentiary value."

[49] Counsel for the appellant submitted that the direction was both unfair and wrong. It was said to be unfair because the complainant, when faced with previous inconsistent accounts by her, would slavishly recite that her "statement" was true and correct. Counsel for the appellant gave one reference to support this submission. It does not bear it out. Challenged in relation to the content of one of her text messages, the complainant stated that it was only intended to be brief and not to be a compendious account of what had happened. She observed, "My statement is the true and correct version of what happened, not that." Her explanation seems to me to be perfectly unexceptionable.

[50] Counsel provided five references to the content of telephone calls or text messages made with or to her friends on the Sunday or the Monday which were, by their nature, far less comprehensive than her statements to police. Also relied on was the evidence of a witness which conflicted with the complainant's evidence that her physical contact on the dance floor with him did not extend beyond kissing as counsel for the respondent pointed out.

Consideration of Ground Eight

[51] The jury was not bound to prefer that witness's evidence over that of the complainant. Even if they did, they could have concluded that the differences in recollections arose in whole or in part from a difference in the perceptions of persons affected by alcohol.

[52] The part of the summing up under consideration resulted from a request by the jury that they be given the statement or statements given by the complainant to police. The primary judge explained that the jury had to decide the case on the evidence before them and that out of court statements by witnesses were generally not put into evidence. She then, with respect, appropriately explained that a witness could be cross-examined on such statements with a view to showing inconsistencies between the witnesses' evidence on trial and the earlier account.

[53] The primary judge's statement that the jury could conclude from the fact that prior inconsistent statements weren't put to the complainant from her statement, that there was nothing of significance in this trial that was "inconsistent" with the contents of the statement was unexceptional.

[54] The primary judge did not instruct the jury directly or indirectly that the complainant's oral evidence was strengthened or corroborated by the absence of

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17 R480.

direct challenge to specific passages in her police statement or statements. This ground was not made out.

Ground Ten – the trial judge erred in not warning the jury as to how to treat and assess the complainant's evidence of alleged unproved offences committed against her by others at earlier times and having no connection with the allegations against the appellant

[55] The appellant's counsel argued that although the complainant gave evidence of a number of sexual acts perpetrated on her during the course of the incident, no direction was given to the effect that these allegations had not been proved. Nor, counsel complains, was any direction given as to how these acts were to be used by the jury. It was not suggested that the appellant was present during such conduct and its relevance was therefore marginal.

[56] The appellant's co-accused was tried on two counts of rape at the same time as the appellant. It was not contended that the appellant's trial should not have proceeded with that of the co-accused, except for the reasons advanced in grounds one or two. The offending conduct alleged against the appellant took place against a background of other sexual acts of other males in the apartment and it would have been inappropriate for the jury to determine the true facts in relation to that conduct without an understanding of the context in which it was alleged to have occurred. Some of that conduct was relevant to the assessment of the reliability and credibility of the complainant's evidence. Defence counsel cross-examined the complainant at length on what she had told her female friends in telephone conversations and text messages about the incident. He also cross-examined the complainant about her evidence of the sexual assaults perpetrated on her with a view to demonstrating the weaknesses in her recollection, her state of mental alertness and her continuing physical capability. The cross-examination highlighted the complainant's ability to pull up her jeans and adjust her top after her sexual encounter with Mr Sailovic-Jeremic and after being "violated" by three other males. He also obtained the admission that the complainant moved "slightly" and groaned when one of the men attempted to penetrate her anally.

[57] Defence counsel did not see the need for the direction now said to be wanting. No such direction was sought. Counsel may well have formed the view that, as the conduct relied on by the prosecution to prove the subject offence was very restricted in its scope and relatively clear in is nature, and as no other sexual misconduct was alleged against the appellant, the jury was unlikely to be distracted by the background evidence when considering the case against the appellant. This ground was not made out.

Appeal against conviction – Conclusion

[58] For the above reasons, I would order that the appeal against conviction be dismissed.

Application for leave to appeal against sentence

[59] The appellant seeks leave to appeal against the sentences imposed on him on the grounds that they were manifestly excessive.

[60] Counsel for the appellant submitted that the appellant's conduct, whilst deplorable, was, on any sober assessment, at the lower end of offending for such offences. He submitted that the applicant had good prospects of rehabilitation; his conduct

included no violence, threats or physical injuries and he desisted of his own will in respect of both offences.

[61] Particular reliance was placed on *R v HX*[18] in which the 27 year old offender forcibly removed the complainant's jeans and underwear after pushing her to the front passenger seat of a car where he inserted his tongue and then two fingers into her vagina as she struggled to get away. Concurrent sentences of three years for two offences of rape were found on appeal not to be manifestly excessive. The sentences were described as being "within the appropriate range for these offences".

[62] Two other cases were relied on: *R v Troop*[19] and *R v Kanaveilomani*.[20] In *Troop* the applicant was sentenced to three years imprisonment for a count of breaking and entering a dwelling with intent in the night time and indecent assault. The indecent assault involved the offender, after he had entered the complainant's room at night, removing her underwear while she slept and "licking her vaginal area". Rape was not alleged. Leave to appeal against sentence was refused.

[63] *Kanaveilomani* was a case in which a sentence of three years was substituted on appeal for a five year sentence for an attempted rape offence. Plainly, it and *Troop*, because of the different offences involved, can offer little support for the appellant's argument.

[64] Counsel for the respondent referred to *R v Breckenridge*,[21] in which the offender was sentenced to five years imprisonment after a guilty plea for the rape of a drunk 17 year old girl, and *R v Stringer*.[22] In *Stringer*, the offender took advantage of a 20 year old female and, after a late plea of guilty, was sentenced to four years imprisonment for the offence of rape.

[65] The appellant took advantage of a young woman incapacitated by alcohol in circumstances in which her condition and consequent vulnerability were abundantly plain. The appellant's conduct, moreover, added to the degradation which had been heaped on the complainant, to the appellant's knowledge, by the other males in the apartment. The sentence was not shown to be manifestly excessive and I would refuse the application for leave to appeal.

[66] **FRASER JA**: I agree with the orders proposed by Muir JA and with his Honour's reasons.

[67] **MARGARET WILSON AJA**: I agree with the orders proposed by Muir JA and with his Honour's reasons.

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18 [2005] QCA 91.
19 [2009] QCA 176.
20 [1994] QCA 193.
21 [1998] QCA 136.
22 [1998] QCA 327.