SUPREME COURT OF QUEENSLAND

CITATION:	*R v Elomari* [2012] QCA 27
PARTIES:	**R** **v** **ELOMARI, Safwen** (appellant)
FILE NO/S:	CA No 174 of 2011 DC No 875 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2012
JUDGES:	Margaret McMurdo P and White JA and Atkinson J Separate reasons for judgment of each member of the Court, White JA and Atkinson J concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where appellant convicted of rape – where defence counsel did not contend at trial that mistake of fact was raised at the evidence – whether trial judge erred in failing to direct the jury in relation to s 24(1) *Criminal Code* 1899 (Qld) – whether a miscarriage of justice occurred CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where appellant gave evidence of motive of complainant to lie at trial – where appellant convicted – whether the trial judge erred in failing to give a *Palmer* direction – whether a miscarriage of justice occurred *Criminal Code* 1899 (Qld), s 24

Loveday v Ayre and Ayre; Ex parte Ayre and Ayre [1955] St R Qd 264, followed
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, distinguished
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, considered
R v Di Bella [1998] QCA 288, followed
R v Hall [2011] QCA 26, followed
R v Hunt [1994] QCA 226, considered
R v Millar [2000] 1 Qd R 437; [1998] QCA 276, followed
R v SAX [2006] QCA 397, distinguished
R v Soloman [2006] QCA 244, distinguished
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, considered

COUNSEL: C F C Wilson for the appellant
S P Vasta for the respondent

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

[1] **MARGARET McMURDO P:** The appellant has appealed against his conviction on one count of rape. Atkinson J has set out the relevant evidence at trial in her reasons so that I am able to concisely state why, unlike my colleagues, I would allow the appeal.

[2] The prosecution case turned largely on the complainant's evidence that the appellant raped her by forcing her to suck his penis. The defence case was that the oral sex occurred with the complainant's consent and that she made a false complaint of rape against the appellant to induce him to withdraw an earlier complaint he had made against others in an unrelated criminal matter. Defence counsel told the trial judge prior to closing addresses that the case was not an appropriate one for a direction on s 24 *Criminal Code* 1899 (Qld) (honest and reasonable mistake of fact). Counsel stated the case had not been litigated as one of mistaken belief and there was probably no evidence of it.

[3] It is true that the case was not litigated as one of mistake as to consent but I consider counsel's concession that there was no evidence of mistake was wrongly made. Defence counsel's position did not relieve the Judge from his duty to put to the jury any matters raised on the evidence upon which they might find for the appellant, even where this was inconsistent with the conduct of the defence case: *Pemble v The Queen.*[1]

[4] The evidence which I consider raised s 24 was as follows. When the appellant was asked by his barrister whether the complainant's sucking of his penis was a consensual act, he responded "I believe so". It is true that the jury may have considered this was simply the appellant's turn of phrase in stating that the complainant was in fact consenting. But if the jury were satisfied beyond reasonable doubt that she did not consent, they would have been entitled to treat the appellant's response as evidence that he believed the complainant was consenting.

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1 (1971) 124 CLR 107.

[5] There was other evidence capable of supporting an honest and reasonable belief as to consent. The complainant had accepted the appellant's invitation to come alone to his house after midnight. Inside the laundry of the house they kissed consensually. When he kissed her on the neck and grabbed her buttock she giggled. She smoked three large cones of marijuana with him and was, on her evidence, "very stoned". Some of the marks later found on her body could have been made consensually. The previous day she had a tattoo executed on the lower part of her back and this was hurting her at the time of the alleged offence. A jury could have considered that she may not have communicated her lack of consent effectively to the appellant because she was heavily affected by marijuana. They may have considered that he misinterpreted any signs of displeasure and discomfort as being caused by the pain from her recent tattoo rather than a demonstration of her lack of consent.

[6] The area where the incident occurred was cramped so that the appellant's grabbing of the complainant's hair to prevent her head from hitting the bottom stair was not necessarily inconsistent with a belief she was consenting. Prior to the act of oral intercourse she was sitting astride him. It is true that the complainant gave evidence that the appellant grabbed her hair and put her head down to his crotch before putting his penis in her mouth. But in the complex area of human sexual relations, the jury may have considered that even the appellant's hand on the complainant's head during the act of oral sex did not necessarily negate an honest and reasonable belief that the appellant was consenting. After the incident, the appellant asked her to help him up and she did. He told her he would phone her the next day. The jury may have considered his conduct in this respect was consistent with him honestly believing the complainant had consented. In my view, these were all factual matters for the jury's determination.

[7] Judges routinely tell juries that they may accept all, part, or none of the evidence of witnesses. In this case the complainant and the appellant gave very different versions as to what occurred. Had the question of honest and reasonable mistake as to consent been left for the jury's consideration, it is possible the jury may have found that the truth lay somewhere between the two competing versions: see McHugh J's observations in *Stevens v The Queen*,[2] cited with approval in *R v Soloman*[3] and *R v SAX*.[4] The jury may have considered that the prosecution had not established beyond reasonable doubt that the appellant did not honestly and reasonably believe the complainant was consenting.

[8] The judge's omission to direct the jury as to s 24 has deprived the appellant of a real chance of an acquittal and has resulted in a miscarriage of justice. For those reasons I would allow the appeal, set aside the conviction and order a retrial.

[9] **WHITE JA:** I have read the reasons for judgment of Atkinson J and agree with her Honour's reasons that the appeal against conviction should be dismissed.

[10] **ATKINSON J:** The appellant, Safwen Elomari, has appealed his conviction on one count of rape committed on 6 June 2009. He was convicted by a jury on 26 May 2011 in the District Court in Brisbane and sentenced to three and a half years imprisonment. He was acquitted on one count of attempted rape which was alleged

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2 (2005) 227 CLR 319, [29].
3 [2006] QCA 244, [33]-[35].
4 [2006] QCA 397, [23].

to have occurred on the same date. The trial was a retrial, a jury having failed to reach agreement on an earlier occasion.

[11] In his outline the appellant raise the two following grounds of appeal:

1. The learned trial judge should have left the provisions of s 24 of the *Criminal Code* 1899 (Qld) to be considered by the jury; and

2. A *Palmer*[5] direction should have been given.

Summary of the evidence at trial

[12] Both the appellant and the complainant, SE, were 23 years old at the time of the offending which is the subject of this appeal. They knew each other from about 2001 when they had attended the same school. After school they did not see each other except for a chance meeting. About a month before the incident SE obtained the appellant's telephone number from a friend and saw him on "a couple of occasions" at his home "probably at least once or twice a week." She was happy to see him again as they had been friends at school and "he was a source of getting marijuana".

The prosecution case

[13] On 5 June 2009, Ms SE attended a birthday party for her housemate's mother. Prior to that she had been with a friend, Josh Jackson, with whom she had engaged in consensual sexual intercourse. She left the birthday party at about midnight with her housemate who wanted to look for her boyfriend. Ms SE sent the appellant a text message and he invited her to come to his home by herself. She went inside while her housemate waited in the car. She entered around the back of the house as instructed in a text message from the appellant, knocked on the door and waited while she heard him unlock it before she went in.

[14] They engaged in conversation in the laundry area. Shortly after she arrived she briefly returned to her car to retrieve something she had forgotten. Her housemate's evidence was that that was her "wallet or something". The appellant gave her some marijuana to smoke in his "bong". She recalls having about three large cones of marijuana and, as a result, being "very stoned". They discussed star signs and kissing and then he asked her if she was the kind of girl who did one night stands and she replied that she was not. He asked her if she would lie in his bed for half an hour and she declined. She said they could meet up the following day. They kissed consensually. She then said she would leave and turned around to go.

[15] The appellant continued with his sexual advances. He kissed her on the neck and then grabbed more intimate parts of her body such as her buttocks. She said she giggled a little and did not feel threatened at that point. She told him that she did not want to do that and that she had to go. He then pulled and twisted her hair and engaged in pelvic thrusting while trying to lift up her leg. She continued to tell him to stop and tried to push him away. She said that she realised he was not listening to her and he was hurting her as well because the day before she had had a tattoo inked on the lower part of her back and it was hurting her. She said she was in pain and was becoming scared and started to cry and told him to stop.

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5 (1998) 193 CLR 1.

[16] The appellant grabbed her breasts, lifted up her shirt and kissed her on the breast while she was up against the laundry tub. He was trying to lift up her legs and she lost her footing. They ended up on the ground when he grabbed her and laid her down. She was on her back and he lay on top of her continuing to thrust. She said her head was hitting the bottom of the stairs and then he grabbed her hair so that her head was not hitting the bottom of the stairs. Her hair was being pulled and then he grabbed her so that she was sitting on top of him and then he tried to insert his penis into her vagina. In the course of doing so he showed her a ball bearing which he had on his penis. After he tried to insert his penis into her vagina he said to her "You have to wet it first", grabbed her hair and put her head down to his crotch and tried to put his penis into her mouth. She said her mouth was closed; he had one hand pulling her hair and the other hand was on his penis. He managed to get his penis into her mouth and after thrusting a couple of times ejaculated into her mouth. She spat out the ejaculate onto her clothes. A scientific examination of those clothes showed that it was his semen.

[17] He let go of her and she jumped up and asked him angrily and sarcastically if it was good for him. He then asked her to help him up which she did. She then asked him to let her out, he unlocked the door and told her that her hair was a bit messy and that he would give her a call on the following day.

[18] Ms SE went to the car where she was dry retching and crying and told her housemate what had happened. While she was in the appellant's house, her housemate had been impatiently beeping the horn from time to time. She then drove to Mr Jackson's house.

[19] Ms SE told him briefly what had happened but he was not sympathetic so she left. She then decided that making a complaint to the police was the right thing to do in the situation and flagged down a police car. The complaint was made to the police at about 2.30 am and she followed them to the police station where she made a formal statement.

[20] A police officer who was flagged down by Ms SE gave evidence that Ms SE said she wanted to report a rape when she was asked why and what had happened she said "Well, is it rape when someone makes you give them a blow job?" He replied that it could be considered rape and she told him what had happened between herself and the appellant. She gave a full statement at the police station.

[21] Ms SE was examined by Dr Thomas at the Royal Brisbane Hospital. He found bruising to her left breast consistent with blunt force or suction, her right arm, a tender bruise on her left thigh and bruises to her lower back as well a tattoo injury on the upper part of her right buttock. There were also bruises on the back of the neck and the right side of the neck which were consistent with suction or pressure.

[22] In cross-examination it was suggested to her that it was the tattoo that caused her not wanting to take part "in this amorous extended cuddle". She denied that, saying it was because she did not want to engage in anything sexual with the appellant.

[23] The defence case that was put to Ms SE was that she was paid in money and/or cannabis in order to make up a false complaint against the appellant to discredit him in a forthcoming trial where he was the victim of a stabbing. She absolutely denied that. It was explicitly suggested to her that she was paid by Josh Jackson, probably through Graham Hayes or one of his associates who were friends with those

accused of the stabbing, to discredit the appellant by making this false allegation against him.

[24] She was cross-examined about the fact that after the first trial of this matter where there was a hung jury she was informed by the DPP that there would have to be another trial. She said she was upset and said she did not know if she should go through it again. It was suggested to her that she was told to hold off telling the DPP whether or not she wanted the trial to proceed to see if the stabbing complaint had been discontinued. She absolutely denied that.

[25] At the defence request, the Crown Prosecutor and the officer from the DPP who instructed him on the trial which resulted in a hung jury were called. The Crown Prosecutor said the complainant was distressed when told by him that there had been a hung jury and conveyed to him that she found the experience of going to court and giving evidence quite difficult and was not sure if she wished to go through another trial. Just over a week later she indicated that she did wish to proceed. His instructing clerk who heard a conversation between the Crown Prosecutor and Ms SE said that to the best of her recollection, Ms SE was upset but "she did sound genuine and confident that she would like the trial to be run again and she would be willing to participate."

The defence case

[26] The appellant's case at trial, which was put to the complainant, was that the appellant lay down on the floor and put his hands behind his back. Ms SE got on top of him and straddled him, undid his pants, grabbed his penis and then performed oral sex upon him; in other words that she was the aggressor and he was merely a willing recipient of what occurred. The defence case was this was done to discredit the appellant as a witness in a forthcoming trial. She absolutely denied those suggestions.

[27] After the complainant made her statement to police, the appellant took part in a record of interview with police where he said that Ms SE came to his place to smoke marijuana with him. They met in the garage. He said they kissed. He said, "At first I thought she wanted to kiss and then she's just gone, pulled back and said I've got to go and then she's just [fucking] walked off and left me."

[28] He denied that there was any sexual contact after the kiss. He said, "Nuh we didn't like the kiss that was it." He said "as soon as she felt my hand go near her bum she just [fucking] went see you later." He absolutely denied putting his penis in her mouth and said it was never out of his pants. He was quite adamant that she pushed him away as soon as he put his hands on her buttocks and then walked away. He said she kept saying she had to go.

[29] In his evidence, the appellant said he was stabbed by two named men on 1 March 2009. The persons who stabbed him were shortly thereafter arrested by the police. He said that he met with Graham Hayes whom he regarded as a friend not long before the previous trial of this matter. They discussed the stabbing charges and the rape case. He said they discussed that if he dropped the stabbing charges, Mr Hayes would get Ms SE to drop her complaint. He said that Mr Hayes said he had set him up. He asserted that a deal was made between him and Mr Hayes that he would withdraw his complaint in the stabbing matter and Ms SE would drop her complaint against him. The appellant said he withdrew his complaint about being stabbed on 19 May 2010. The first trial in this matter commenced on 24 May 2010,

notwithstanding the "deal" that had been made. He admitted that he had never had any conversation with Ms SE which suggested that she knew of or was any part of any such "deal".

[30] So far as the events in question in this matter are concerned, in his evidence the appellant said that after Ms SE arrived they had a conversation about star signs and kissing. They smoked two or three cones of cannabis together. He asked her for a kiss and she kissed him. She did not then express any desire to leave. The appellant said he then lay on the concrete floor of the laundry with his hands behind his back (or later, head). She sat on top of him, rocking back and forth, and she then pulled his penis out of his pants with her hand and put it into her mouth. He then ejaculated. She asked him if he liked that and pulled him up off the floor and then she left.

[31] In evidence-in-chief he gave the following answers to his counsel's questions:

> "Safwen, if I could ask you this, please? I'm taking you back to the night of the 5th of June or the early hours of the 6th of June 2009 and SE was in the laundry with you in accordance with your evidence. Did you force her to put your penis in her vaginal area or attempt to put your penis in her vaginal area? - - No.
>
> Did you force her or make her place your penis in her mouth? - - No.
>
> All right. Was the act a consensual one as far as you were concerned? - - I believe so."

[32] It is the last question and answer which appear to form the basis of the submission made for the first time on appeal that a s 24 direction should have been given to the jury notwithstanding that his experienced counsel at trial said that such a direction would not be appropriate as it had not been litigated as a "mistaken belief" case.

[33] In cross-examination the appellant said "I laid back. I didn't do anything. I just copped it sweet." He admitted that he lied to the police when he said that there was no interaction of a sexual nature other than a kiss and that it had taken place in the garage rather than the laundry.

[34] Matthew Schonfeldt, a school friend of the appellant and of Ms SE, gave evidence that Ms SE told him that she was being paid by Graham Hayes to set up the appellant with the charge of rape. She denied that any such conversation took place.

[35] The jury reached verdicts of not guilty of attempted rape and guilty of rape in less than two hours. In so doing they obviously entertained a reasonable doubt about whether penile penetration of the vagina had been attempted but were satisfied beyond reasonable doubt that the appellant had inserted his penis into the complainant's mouth without her consent.

The *Palmer* direction

[36] The question of a *Palmer* direction was not pressed although counsel did not have instructions to abandon it. However he quite properly conceded that the learned trial judge had dealt with the question "quite well".

[37] As the appellant submitted, the onus lay on the prosecution to prove its case beyond reasonable doubt. Notwithstanding the defence case being run on the basis that the

complainant set up the appellant, the onus did not shift to the appellant to prove anything, including that the complainant had a motive to lie.

[38] The *Palmer* direction refers to the High Court decision in *Palmer v The Queen*.[6] In that case, the appellant was convicted of several counts of sexual offences against a child aged 14. The appellant was unable when cross-examined at trial to suggest any reason for the complainant to lie in court. The question was improper in that it suggested that there is some onus on the accused to suggest a motive for the complainant to lie. Such a question is ordinarily irrelevant and has a tendency to impermissibly reverse the onus of proof.

[39] This case is quite different in that it was the appellant's case that the complainant was lying as part of a false setting up of the appellant.[7] The learned trial judge correctly directed the jury on the onus of proof and then specifically directed them that "you do not have to believe the defence evidence before the accused is entitled to be found not guilty." No further direction was required.

Section 24

[40] Section 24(1) of the *Criminal Code* provides:

> "(1) A person who does or omits to do 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 or omission to any greater extent than if the real state of things had been such as the person believed to exist."

[41] The appellant argued on appeal that notwithstanding the fact that his experienced counsel had submitted at trial that a s 24 defence was not open and there was no occasion for the judge to direct the jury on that defence, the direction should have been given. The appellant submitted that the jury might have formed a mid-range position between the version given by the complainant and the version given by the appellant. This might have been that the complainant did not consent to the sexual intercourse but the appellant was honestly and reasonably mistaken as to this and therefore a s 24 defence should have been left to the jury.

[42] The s 24 defence was described by Philp J in *Loveday v Ayre and Ayre; Ex parte Ayre and Ayre* [1955] St R Qd 264 at 268 as follows:

> "Section 24 provides that a person is 'not criminally responsible' if he acts under an honest and reasonable mistake of fact; the *onus* then is on the prosecutor to satisfy the court beyond reasonable doubt of the non-existence of operative mistake. Of course the section does not operate unless there be some evidence, looking at the case as a whole, of operative mistake."

[43] The appellant relied upon *R v SAX* [2006] QCA 397 and *R v Soloman* [2006] QCA 244. Both *R v Soloman* and *R v SAX* were cases in which the complainant gave evidence that she was so intoxicated at the time the sexual assault commenced that she was not capable of giving consent. The defendant in each case gave evidence of behaviour by the complainant which, notwithstanding the complainant's intoxication, led to the defendant's belief that the complainant was consenting to the

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6 (1998) 193 CLR 1.

7 See *R v Di Bella* [1998] QCA 288.

sexual activity that occurred. It was open to conclude that the denial by the complainant of such behaviour was because she was too intoxicated to recall. In such a situation the complainant may well have been too intoxicated to consent but behaved in such a way as to leave open the possibility that the defendant had an honest and reasonable belief that she did consent. In such a case a s 24 direction is required. As Jerrard JA observed in *R v SAX* at [2]:

> "Cases of this nature, where a considerable quantity of alcohol or another drug has been consumed, and when intercourse occurs in circumstances of which a complainant has no recollection of the intercourse or of the prior events, almost always raise for consideration whether there was obvious stupefaction from alcohol and cognitive incapacity, of which a defendant simply took advantage; or whether a defendant mistakenly but honestly and reasonably believed actual consent was given with cognitive capacity. The issue is not concluded for the prosecution because it establishes to the jury's satisfaction that a complainant did not have sufficient understanding to know what was happening and give consent to it. There remains the issue of whether that lack of cognitive capacity was either obvious or also actually known to the defendant, excluding the possibility of reasonable mistake about it."

[44] These cases may be distinguished from those decisions of this court where it has been held that it was not necessary to give a s 24 direction: *R v Hunt* [1994] QCA 226; *R v Millar* [1998] QCA 276 and *R v Hall* [2011] QCA 26.

[45] In *R v Hunt*, there was a history of violence between the parties. There was evidence of frightened submission but no evidence of an honest and reasonable mistake by the defendant. Accordingly the direction was not required.

[46] In *R v Millar*, there was no reason to doubt on the evidence given by the complainant that the appellant knew that the complainant was asleep when he digitally penetrated her. Accordingly there was no evidence on which a s 24 direction could or should have been given to the jury.

[47] In *R v Hall*, the complainant gave evidence that sexual intercourse occurred when she was virtually comatose from alcohol intoxication. The appellant's evidence was that no sexual intercourse took place. As Muir JA held, mistake did not arise on the evidence.

[48] It is important therefore to refer to the evidence in the case to see whether there is evidence sufficient to mean that the prosecution must prove beyond reasonable doubt that the defendant did not honestly and reasonably believe that the complainant was consenting. This would only arise if the jury accepted the complainant's case that the relevant sexual activity took place in the way in which she gave evidence without her consent. The appellant submitted the need for a s 24 direction arose from the evidence that the complainant went to the house late at night, at his request, on her own, her friend who was waiting in the car outside beeped the horn, the complainant giggled initially, she ended up on top of the appellant, she helped him up afterwards, he said that he would call her the next day and her consumption of cannabis (which may have impaired her ability to communicate her refusal).

[49] In this case, the appellant's experienced counsel made a forensic decision not to seek a s 24 direction. While that is not determinative of the judge's duty to give a direction about any defence which is open on the evidence, it was a rational decision by counsel given the lack of evidence to support a reasonable and honest but mistaken belief on the part of the appellant that if sexual intercourse occurred as the complainant described it, she was consenting to it. The real contest was found in the evidence by the complainant that "he grabbed my head and put it down to his crotch" and that when he put his penis in her mouth "one hand was on my hair, like, pulling my hair and the other hand was on his penis" as opposed to his evidence that she sat on top of him, he had his hands behind his back and she pulled his penis out of his pants and put it in her mouth until he ejaculated.

[50] The guilty verdict necessarily meant that the jury not only rejected the appellant's version of events that he was set up by Ms SE and also his version of what occurred on that night; but were also satisfied beyond reasonable doubt of Ms SE's evidence as to what occurred, that is that the appellant grabbed her head and pulled it to his crotch. It also included her persistent attempts to leave and her repeated statements that he should stop. In the face of this evidence, there was no middle ground by which the jury could have accepted that he sexually assaulted her without her consent but he honestly and reasonably but mistakenly believed that she was consenting. The statement of belief referred to in his answer to his counsel's question was predicated on his evidence he was the willing recipient of her sexual advances rather than a situation where he believed she consented to his sexual advances. There was no evidence to suggest that, if the jury accepted that sexual activity occurred as she described it without consent, the appellant could have entertained an honest and reasonable but mistaken belief that she did consent.

[51] It is incumbent upon trial judges to give directions on any defence which is raised by the evidence, even in the absence of a request by the defendant.[8] However, the defence must be raised by the evidence rather than on speculation which does not accord with the evidence.[9] In this case there was no evidence from which the jury could infer, if they accepted that the sexual activity described by the complainant took place without her consent, that the appellant made an honest and reasonable mistake that the complainant consented.

[52] The appeal should be dismissed.

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8 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118, 138, 141; *Stevens v The Queen* (2005) 227 CLR 319.

9 cf *Stevens v The Queen* at 348 per Kirby J.