[2012] QCA 251

COURT OF APPEAL

MARGARET McMURDO P
McMEEKIN J
HENRY J

CA No 65 of 2012
DC No 113 of 2010

THE QUEEN

v

COOK, Genai Morris **Appellant**

BRISBANE

DATE 18/09/2012

JUDGMENT

THE PRESIDENT: The appellant was convicted by a jury after a two day trial of raping the complainant on 27 June, 2009, at Thursday Island. He was sentenced to seven and a half years imprisonment. He was granted an extension of time within which to appeal against conviction, and to apply for leave to appeal against sentence on 23 April, 2012. He originally appealed against his conviction on the grounds that it was unsafe and unsatisfactory. He also contended that his sentence was manifestly excessive. He was initially refused Legal Aid on 27 July, 2012, but that decision was later reversed after an officer of the Director of Public Prosecutions (Queensland) informed Legal Aid Queensland of concerns that a miscarriage of justice had occurred in this case. I commend the DPP for this approach in ensuring that the criminal justice system of Queensland operates fairly.

At the hearing of the appeal today, the appellant was given leave to abandon his grounds of appeal, and his application for leave to appeal against sentence, and to argue the following grounds of appeal against his conviction:

"1. The learned trial judge failed to discharge the duty of the Court under s 620 *Criminal Code* to instruct the jury as to the law applicable to the case.

2. The learned trial judge failed to accurately and fairly put the defence case when summing up.

3. The learned trial judge erred in not directing the jury as to the excuse, pursuant to s 24 of the *Criminal Code*, of honest and reasonable mistake as to consent."

In this most unusual case, counsel for the respondent, Ms Merrin, whose outline of argument was filed before that of counsel for the appellant, identified errors in the judge's summing up to the jury, and conceded that these shortcomings incorporated in grounds 1 and 2 of the appeal, had resulted in a miscarriage of justice, necessitating the allowing of the appeal, the setting aside of the guilty verdict, and the ordering of a new trial. Ms Merrin conceded in her oral submissions that ground 3 was also established.

Despite that very fair concession, this Court cannot make the orders proposed by both counsel without satisfying itself that those orders are correct.

The prosecution evidence at trial was as follows. The appellant and the complainant knew each other by sight and name as fellow residents of Thursday Island but they were not close. During the evening of Friday, 26 June, 2009 they had been drinking with others into the early hours of the next morning. The householder of the house where they arrived after the Torres Hotel closed, Mr Wayne Thompson, offered the complainant a room in which to sleep. She retired there and went to sleep whilst the appellant continued drinking with others. He asked for directions to the toilet and set off for it. He did not return and Mr Thompson inferred that he had left and gone home. In fact, the appellant entered the room where the complainant was sleeping.

The complainant gave evidence that she went to sleep fully clothed. She woke up to find she was on her back with a man on top of her with his penis in her vagina. She touched his body and realised he was naked, and when she touched the hair on his head, she knew she was being raped. She felt two thrusting movements of the penis. She said to the person, "Thommo", to which there was no reply. She then asked "Who you?" The appellant replied, "Me, Genai". She told him she needed to use the toilet. He "moved back, pulled his penis out, moved back at the end of the bed". She swung her legs off the bed and said, "No, no, no". The appellant said, "I thought you want me". She responded, "How could you? How could you?" and was crying. She saw she was naked from the waist down. She did not know how her clothing came to be removed. She grabbed her skirt and tights from the floor, and walked quickly to the bathroom. She sat at the end of the bathtub and cried. She put on her skirt and tights before hearing Mr Thompson outside the door. She remained in the bathroom for five minutes before moving to the kitchen and hallway and attracted Mr Thompson's attention. She was talking to him, trying to explain what had happened, when the appellant came down the hallway fully clothed. Mr Thompson was angry and was planning to ring the police. The appellant said, "I love em". There was evidence that in Creole this meant "I love her". Mr Thompson demanded that the appellant leave and he complied.

The complainant found her underwear on the other side of the bed the next morning. She told her sister and daughter about the incident before reporting the matter to police the following Tuesday. The complainant's sister and daughter gave evidence of preliminary complaint consistent with the complainant's evidence.

The complainant told Mr Thompson, "I wake up and this fucker was on top of me". She initially thought it was Mr Thompson, but he was bald. When she felt her assailant's head, it had tight curly hair so she knew it was not Mr Thompson and she pushed him off. She was distressed and confused and looked as if she had been crying.

A vaginal swab taken from the complainant a few days after the incident did not detect any

spermatozoa. No seminal fluid or spermatozoa were found on the bed sheets or in the complainant's clothing. Some underpants were found in the bathroom. They contained DNA consistent with that of the appellant.

The appellant gave the following evidence. He was heavily intoxicated and fell asleep in an uncomfortable chair for about 15 to 30 minutes in Mr Thompson's house. When he woke up he wanted to use the toilet. He walked down the hallway and went to the toilet. He was there for about half an hour as he was getting headaches, sweating and feeling weak. He struggled out of the toilet and saw an open door which he entered. He closed the door, took off his clothes, stood under the ceiling fan and sat on the bed. He saw something on the mattress and put his hands under it to lift it before realising it was a person. He had intended to lift the mattress off the bed and put it under the ceiling fan. The complainant stood up, saying she was going to the toilet, and yelling "Rape, rape, rape". He apologised to her and to Mr Thompson, telling them that nothing had happened. He had no sexual contact with the complainant.

The evidence concluded at 12.15 pm on the second day of the trial. In the absence of the jury the judge stated that he did not think mistake of fact was raised and no direction was required. Defence counsel agreed, stating that he was not seeking such a direction. Defence counsel stated that his address would only be about 20 minutes, to which the judge responded, "Yes, I can understand why, in a case like this".

Defence counsel addressed the jury from 1.48 pm. The address is contained in less than nine pages of transcript. It was essentially as follows. The complainant genuinely thought she had been raped, was clearly distressed and made complaints which she thought were genuine to Mr Thompson, her sister and her daughter. The appellant's evidence should be assessed on the basis that he is an Indigenous man from Thursday Island who was not used to giving evidence in court before people wearing wigs and gowns. On the night of the offence, the appellant had been drinking heavily. He had fallen asleep at Mr Thompson's house in an

uncomfortable chair not long before the incident. He woke up and went to the toilet. He was obviously affected by alcohol. The complainant, a 59 year old woman, had been up since 6.30 am. On her account, she had drunk about ten cans of XXXX Gold (mid strength beer) during the day and evening. She would have been very tired. On the appellant's version she would have been shocked to wake up from a deep sleep to find someone grabbing her legs. She may have been mistaken about what she thinks happened. The only DNA linking the appellant with the offence was DNA found on his own underpants. This was hardly surprising, and did not strengthen the prosecution case. No other DNA or medical evidence linked the appellant with the crime of rape. When the complainant said she wanted to go to the bathroom, he allowed her to do so. The absence of any damning DNA evidence was consistent with the appellant's evidence that he did not have sex with the complainant. It was more likely that the complainant had forgotten that she took off her own lower clothing as the appellant was too drunk to have done this. It was implausible that the appellant would have chosen to rape the complainant when there were many others nearby. Had he raped her, he would have fled once detected. But instead, he went to the kitchen where he was abused and threatened. He nevertheless tried to give his account of events. His actions were consistent with innocence. His evidence was of a drunken recollection but one consistent with the forensic evidence. And the fact that he did not run away meant that it raised a real doubt about whether he committed the rape.

The prosecution counsel also addressed the jury for about 20 to 30 minutes.

The judge commenced his jury directions at 2.53 pm., a little over an hour after counsel's addresses commenced. His Honour completed those directions in 16 minutes. His complete directions as to the elements of the offence and the competing contentions of the parties were follows:

> "This brings me to the elements of the offence of rape, and they're very simple. The prosecution must prove that the [appellant] had carnal knowledge of or with the complainant, in other words, conventional sexual

> intercourse, and it must prove that it was without her consent. This brings me to a summary of the rival contentions.
>
> The prosecution submits that you should accept the evidence of the complainant which was accurate, detailed and consistent, and find beyond reasonable doubt that she had been raped by the [appellant] while she slept. The defence submits that although there is no doubt that the complainant genuinely thought that she had been raped, she was mistaken in her intoxicated state. It is submitted that the case against the [appellant] is implausible in many respects, and you simply cannot be satisfied beyond reasonable doubt that the [appellant] is guilty of raping the complainant."

The jury retired at 3.09 pm, and returned with their verdicts at 4.03 pm.

The appellant's counsel adopts the respondent's submissions on grounds 1 and 2, which are as follows. The judge erred in not instructing the jury as to the meaning of "unlawful carnal knowledge" and the evidence relating to that element of the offence of rape. Whilst the jury were told they had to be satisfied the complainant did not consent to the appellant having carnal knowledge of her, they received no instruction as to the meaning of "consent" and in what circumstances the complainant cannot consent. The summing up did not identify for the jury the issues in the trial, the evidence relevant to those issues and did not fairly put the defence case.

The evidence in the trial was certainly of short compass, concluding at 12.15 pm on the second day. It would have been fresh in the juror's minds. And nor were the issues in the trial complicated. They were whether the complainant's evidence could be accepted by the jury as both truthful and reliable beyond reasonable doubt. This involved a consideration of whether the prosecution had proved beyond reasonable doubt that the appellant had unlawful carnal knowledge of the complainant, and whether the complainant was not consenting to that carnal knowledge. The fact that the complainant's evidence was that she awoke after drinking

alcohol to find the appellant penetrating her vagina with his penis meant that the jury should have been instructed as to the meaning of "consent" in s 348 *Criminal Code* 1899 (Qld), namely, "consent freely and voluntarily given by a person with a cognitive capacity to give the consent". Carnal knowledge, contrary to the trial judge's direction, does not simply mean "conventional sexual intercourse". In this case they should have been just instructed that any degree of penetration of the female genitalia by the penis is sufficient: s 6.1 *Criminal Code*. The judge did not relate the evidence to these critical elements of the offence of rape.

It is true that defence counsel's submissions were reasonably brief but his Honour's five and half lines summarising them, did not do them justice. The judge should have reminded the jury that the defence contended that the absence of any DNA evidence implicating him in the offence supported his version of events rather than the complainant's, as did the fact that when confronted with the allegations of rape he did not run away but tried to explain himself.

In my opinion, the mistake of fact, under s 24 *Criminal Code*, was raised by the evidence of the complainant, that she ran her hand up the appellant's body when she woke up and found him having sex with her; that he told her his name when she asked him; and that after he withdrew she became upset, and said, "I thought you want me". Later, in trying to explain himself to the appellant and Mr Thompson, he said "I love em", Creole for "I love her". It is true that he gave evidence that he did not have sex with her at all and the jury obviously rejected his evidence. That did not mean the jury should necessarily convict him. They were then obliged to consider whether the prosecution had proved his guilt beyond reasonable doubt on the evidence they did accept. The jury should have been directed that, if they got to that point, they must consider s 24 *Criminal Code* and only convict if satisfied beyond reasonable doubt that the appellant did not honestly and reasonably believe that the complainant was consenting to his actions.

It is true, defence counsel did not ask for a direction on s 24 and did not seek any re-directions on that point or any point at all. But defence counsel's decision not to rely on s 24 did not

exempt the trial judge from directing the jury as to any excuse or defence that fairly arose on the evidence: *Pemble v The Queen*[1] and *Stephens v The Queen*.[2] Judges must be particularly astute in determining whether s 24 is raised in cases where, as here, there is evidence that the complainant was intoxicated or asleep at the time of the sexual assault: *R v Sax*;[3] *R v Solomon*[4] and *R v Elomari*.[5] Of course, whether a s 24 direction will be necessary in any retrial in this matter, will turn on the evidence that is adduced then.

The case against the appellant was certainly strong. It did not require long and complex directions to the jury. But the charge against him was amongst the most serious under Queensland's Criminal Law. He was entitled to a fair trial, according to law. As both parties in this case rightly contend, the judge had a solemn duty to identify the relevant issues, to relate those issues to the relevant law and facts of the case, and to outline the main arguments of counsel: *R v Mogg*,[6] approved by McHugh J in *Fingleton v The Queen*,[7] and more recently by this Court in *R v FAC*.[8] The judge's failure to do that has meant that the appellant has not had a trial according to law. The appeal must be allowed, the guilty verdict set aside, and a re-trial ordered.

McMEEKIN J: I agree with the reasons expressed by the President.

HENRY J: I also agree.

THE PRESIDENT: The orders are:

1. The appeal is allowed,
2. Conviction set aside.
3. New trial ordered.

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1 (1971) 124 CLR 107, 117–118, 138, 141.
2 (2005) 227 CLR 319.
3 [2006] QCA 397, [2].
4 [2006] QCA 244.
5 [2012] QCA 27, [43].
6 (2000) 112 A Crim R 417, 427 [54], [73].
7 (2005) 227 CLR 166, 196–198, [77]–[80].
8 [2012] QCA 27, [30]–[34].