SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jassar* [2013] QCA 115
PARTIES:	**R** **v** **JASSAR, Sunveer** (appellant/applicant)
FILE NO/S:	CA No 290 of 2012 DC No 462 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2013
JUDGES:	Holmes and Fraser JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of an offence of rape – where the appellant did not give evidence – where the appellant contends there was a miscarriage of justice because there was a direction from the trial judge making reference to the fact the appellant was entitled to give evidence if he wished to do so – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where there was a direction from the trial judge that there was evidence supporting the complainant's account – where the appellant contends there was a miscarriage of justice because the evidence did not support the complainant's account – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where there was a direction from the trial judge that the appellant's answers in a police interview had not been tested by cross–examination – where it was factually inaccurate to say so – whether the misdirection amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to seven years imprisonment – where the appellant contends the sentence was manifestly excessive – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 668E

Azzopardi v The Queen (2001) 205 CLR 50; [2001] HCA 25, cited
Dyers v The Queen (2002) 210 CLR 285; [2002] HCA 45, cited
Mule v The Queen (2005) 79 ALJR 1573; [2005] HCA 49, considered
R v Allen [1937] St R Qd 32, cited
R v Clarke [1934] St R Qd 23, cited
R v Cohen and Bateman (1999) 2 Cr App R 197, cited
R v Cox [1986] 2 Qd R 55, considered
R v Cutts [2005] QCA 306, considered
R v DAH (2004) 150 A Crim R 14; [2004] QCA 419, considered
R v Dutton [2005] QCA 17, considered
R v Eastwell [1992] QCA 109, cited
R v Heal [2001] QCA 572, considered
R v Kooyman (1979) 22 SASR 376, cited
R v Rankmore; ex parte Attorney–General (Qld) [2002] QCA 492, considered
R v Smith [1937] QWN 16, cited
R v Surrey [2005] 2 Qd R 81; [2005] QCA 4, considered
R v Tooma [1971] Qd R 212, considered
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, considered
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered
Weissensteiner v The Queen (1993) 178 CLR 217; [1993] HCA 65, cited

COUNSEL: P D Kelly for the appellant/applicant
D L Meredith for the respondent

SOLICITORS: Stephens & Tozer Solicitors for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I have had the advantage of reading the judgment of P Lyons J. In relation to the first ground of appeal, I depart from his Honour's reasoning only to this extent: I do not think that the trial judge's statement that the appellant's answers had not been tested by cross-examination amounted to a mis-statement of fact. I doubt that a jury would interpret the reference to cross-examination as anything other than the popular notion of questioning by opposing counsel in court. If there were any misdirection in the statement, "the accused (sic) answers have not been tested by cross-examination in this Court, or at all", it was in the phrase "or at all". That is because it was irrelevant to allude to what might have happened elsewhere than in the trial court, rather than because it was wrong. Any such misdirection was trivial, however, and could not have affected the verdict. Otherwise, I agree with all that P Lyons J has said, and with the orders he proposes.

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

[3] **PETER LYONS J:** The appellant was convicted of rape, and a sentence of seven years imprisonment was imposed. He has appealed against the conviction, on the ground that there were errors in the summing up. He has applied for leave to appeal against the sentence, on the ground that it was manifestly excessive.

Evidence at trial

[4] The complainant, a Thai national, gave evidence through an interpreter. On the night of the alleged offence, she was drunk. She travelled with other persons in a taxi driven by the appellant. The others were dropped off, the last stop being in Margaret Street in the City. She then asked the appellant to drive her to Fortitude Valley. However, he drove across the Story Bridge to Holman Street, Kangaroo Point. The complainant rang a friend and then gave the phone to the appellant, so that he could get the friend's address (the friend gave evidence of two such calls; in the second call the taxi driver said they were at Kelvin Grove). The driver stopped the taxi, alighted, and then entered the back seat of the taxi where the complainant had been travelling. He then pulled off her shorts and raped her. Ejaculation occurred.

[5] Shortly afterwards, another driver picked the complainant up. She then travelled to a friend's place, where she told her friend what had happened. She was taken to a hospital. A doctor carried out a medical examination which, together with a DNA analysis of a sperm sample from the complainant taken by a high vaginal swab, demonstrated the presence of sperm matching the appellant's in the complainant's vagina.

[6] Sperm samples were also obtained from three locations on the back seat of the taxi. Analysis of them demonstrated either a full or a partial match to the appellant's DNA profile.

[7] The appellant did not give evidence. However, he had provided two records of interview, through an interpreter. In the first, he said that after the other passengers had been dropped off, the complainant had bitten him on the upper arm, and then kissed him when he stopped at a red light. She then hugged him from behind. She then engaged in some indecent acts. She took her clothes off, and entered the front seat of the taxi. At some point, the complainant "came up onto the steering" and

took off the appellant's clothes, at least to the extent of unbuttoning his trousers. His private parts could have touched the complainant. However, he did not have sex with her, nor did he ejaculate. He dropped her off at some apartments near the Story Bridge. At one point, the appellant said that he was 100 per cent certain that his penis had not been erect. He also said that he had never ejaculated in the taxi.

[8] The complainant was cross-examined on the basis of the version given by the appellant during the interviews. Her response in respect of some matters was, "I don't think so". She did not accept that she moved into the front seat of the taxi, or that she took her clothes off after doing so. She denied other matters that were put to her.

References to appellant's not giving evidence, and the testing of his version

[9] The first ground of appeal is based in part on a statement in the summing up that the appellant was entitled to give evidence if he wished to do so. It was submitted that that invited the jury to draw an inference that the fact he had not done so could be used against him. It was submitted that the effect of this direction was to reverse the onus of proof.

[10] Reference was to made to the fact that the summing up did not include a sentence found in the relevant direction in the Benchbook, namely (with respect to the appellant) "he is not bound to give [or to call] evidence".

[11] In summing up, the primary judge referred to the appellant's version of events which emerged from the interview. He stated that the answers given by the appellant had not been tested by cross-examination in court, or at all. This was initially relied upon as support for the proposition that the onus of proof had been reversed.

[12] It was submitted that the primary judge should not have departed from the direction appearing in the Queensland Supreme and District Courts Benchbook. It was submitted that the directions were outside the scope of permissible comment by a trial judge in a criminal case, by reference to *RPS v The Queen*[1] and *Azzopardi v The Queen*[2]. Reference was also made to *Dyers v The Queen*[3]; *R v DAH*[4]; and a passage from *R v Surrey*[5].

[13] After their addresses, but before the summing up, the primary judge raised several matters with counsel. At one point he stated that while an accused is under no obligation to give evidence, he had every right to give evidence and asked whether defence counsel had any objections to the jury being informed of that. The response by defence counsel was:

> "No, I don't. I mean, that's quite fair: he has an opportunity."

[14] The following is taken from a transcript of the summing up:

> "Now as you know, the burden rests on the prosecution to prove the guilt of the accused. There is no burden on an accused to establish

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1 (2000) 199 CLR 620 at [20] and [47]-[48].
2 (2001) 205 CLR 50 at [64].
3 (2002) 210 CLR 285 at [5], [24].
4 [2004] QCA 419 at [86].
5 [2005] 2 Qd R 81 at [35]-[36].

> his or her innocence. The accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove beyond reasonable doubt that he is guilty. This means that, in order to convict, you must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged, and I shall explain those elements to you very shortly. It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence. If you are left with a reasonable doubt about guilt, your duty is to acquit, that is, to find the accused not guilty. If you are not left with any such doubt, your duty is to convict, that is, to find the accused guilty."

[15] His Honour then gave conventional directions relating to sympathy and prejudice and the credibility of witnesses. He then said:

> "Now in this case, the accused has not given evidence. However, the prosecution has led as part of its case the accused's version of events given to police out of Court but the accused has not given evidence in this trial. However, since the Crown has led the record of interview in its case, the credibility and reliability of that version given out of Court also necessarily comes under scrutiny by you."

[16] From that point, his Honour gave further directions relating to credibility. The summing up then continued (for convenience, a passage relied upon by the appellant appears in italics):

> "Now as I mentioned a short while ago, the accused has not given evidence in this trial. That is his right. *Equally, you would bear in mind that an accused is entitled to give evidence if he or she wishes to.* The accused is entitled to insist that the prosecution prove the case against him if it can. The prosecution bears the burden of proving the guilt of the accused beyond a reasonable doubt and the fact that the accused did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the prosecution. The fact that he elected not to give evidence proves nothing at all and you must not assume that because he did not give evidence that that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, and most certainly, it does not make the task confronting the prosecution any easier. It cannot change the fact that the prosecution retains the responsibility to prove guilt of the accused beyond reasonable doubt."

[17] His Honour then addressed the elements of the offence of rape, noting that penetration was in issue in the trial. He also stated that consent was in issue in the trial, and gave further directions in relation to it. He then dealt with the significance to be attached to evidence that the complainant was in a distressed condition after these events, and what the complainant had said about them shortly afterwards. No complaint is made about those directions.

[18] His Honour then dealt with the interviews, noting that the prosecution relied upon certain statements as true, but also said that some of the statements were lies. He dealt with that aspect of the prosecution case in a way which is not subject of complaint on the appeal. He then made the following statement:

> "Now, further, in relation to the interview with police, it is argued on behalf of the accused that he gave answers which indicate his innocence. You are entitled to have regard to those answers, if you accept them, and to give them whatever weight you think appropriate, bearing in mind that the accused (*sic*) answers have not been tested by cross-examination in this Court, or at all."

[19] His Honour continued:

> "In relation to both the answers which the prosecution rely upon, as indicating guilt, and those which point to his innocence, applying the instructions which I have given you, it is up to you what use you make of any answer and what weight you give it."

[20] One of the grounds of appeal in *R v Surrey* was that the primary judge had misdirected the jury in giving what was described as a "micro-*Weissensteiner* direction"[6] in reference to the failure by the appellant to provide any innocent explanation for certain circumstantial evidence. The primary judge in *Surrey* had not followed that direction by a repetition, in accordance with what was said in *Azzopardi v The Queen*[7], of directions that the fact that a defendant had not given evidence was not an admission, and it could not be used to fill in gaps in the prosecution case[8]. In that context, Jerrard JA said[9]:

> "I respectfully observe that it would reduce the number of matters about which complaint could be made on appeal, and in any event would be better, if trial judges avoided giving unnecessary 'micro-*Weissensteiner*' directions, and gave full *Azzopardi* directions where appropriate … It would also probably be safer for trial judges not to refer to the prosecution evidence as being such as 'to call for an explanation', although this expression is suggested in the current *Bench Book* direction and impliedly required by the joint judgment in *Azzopardi* …Using the term 'call for an explanation' has the capacity to reverse the onus of proof."

[21] At the conclusion of the prosecution case, the accused was asked whether he intended to give or call evidence. Through his counsel, he indicated that he would do neither. Since the jury were already aware that the appellant had the right to give evidence, it was unnecessary in the summing up to inform them of this. No proper reason for referring to the matter in the summing up was identified by the respondent, nor is any apparent. Looked at in isolation, the statement about the appellant's right to give evidence if he wished to do so could convey that his failure to do so might be taken into account in determining guilt.

[22] It is clear that a trial judge must warn the jury that an accused person's silence in court is not evidence against that person, nor does it constitute an admission by that

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6 Referring to *Weissensteiner v The Queen* (1993) 178 CLR 217.
7 (2001) 205 CLR 50, [51].
8 *Surrey* at [28]-[29].
9 At [36].

person, nor might it be used to fill gaps in the evidence of the prosecution, nor may it be weighed when assessing whether the prosecution has proved its case beyond reasonable doubt[10].

[23] In *DAH*[11] White J (as her Honour then was) referred to the direction in the Benchbook based on *Azzopardi*. Having noted a difficulty with one of the expressions used in that case, her Honour continued:

> "So long as the essential elements which must be conveyed to a jury, that is, that no adverse inference may be drawn from the defendant's failure to give evidence, that the onus of proof lies upon the prosecution, that the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and that the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence, then there is no error."

[24] That statement, in my respectful opinion, provides appropriate guidance in the present case. The fundamental question must be whether the directions conveyed to the jury, those things which they were required to convey. The sentence relating to the appellant's right to give evidence followed directions given a little earlier relating to the burden of proof resting on the prosecution and the absence of any burden on the appellant to establish his innocence. Immediately before the sentence, the jury was reminded that it was the appellant's right not to give evidence; and immediately afterwards, in a series of sentences, it was made very clear to the jury that the fact that the appellant did not give evidence could not be used in determining whether the prosecution had established the guilt of the appellant beyond reasonable doubt. I do not consider that there is any real possibility in this case that the jury thought, by reason of the reference in the summing up to the appellant's right to give evidence, that any onus was placed on him, or that any inference adverse to him could be drawn from the fact that he did not call evidence. I have reached this conclusion without reliance on the position taken at the trial by Counsel then representing the appellant.

[25] The considerations just mentioned dispose of the argument relating to the omission of the sentence from the Benchbook direction, to the effect that the appellant was not bound to give or call evidence. The effect of the statement in the Benchbook is substantially similar to the statement in the summing up that there was no burden on the appellant to establish his innocence; and to the statement that it was the appellant's right not to give evidence in the trial, but was entitled to insist that the prosecution prove the case against him if it could.

[26] Nevertheless, the reference in the summing up to the appellant's right to give evidence was unnecessary. It had the tendency to work against the matters which, as identified in *Azzopardi*, have to be brought to the attention of the jury. If that tendency is overcome, as was the case here, the reference serves no purpose. If it is not, a defendant will be furnished with a ground for overturning a conviction. Consistent with the caution urged by Jerrard JA in *Surrey*, reference to the appellant's right to give evidence should not be made in a summing up, unless some unusual feature of the case calls for it.

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10 *Azzopardi* at [51].

11 At [86].

[27] The statement in the summing up to the effect that the answers which the appellant had given in the course of his interview had "not been tested by cross-examination in this court, or at all" was advanced in the written submission in support of this ground, that is, as demonstrating the imposition on the appellant of a burden of proving exculpatory material. How it might do so was not explained. In argument, it appeared the submission became a submission that the statement was inaccurate, the questioning of the appellant during the interviews amounting to cross-examination.

[28] The relevant Benchbook direction[12] includes a reference to statements made in the course of an interview by an accused person indicating innocence, and continues:

> "You are entitled to have regard to those answers if you accept them, and to give them whatever weight you think appropriate, bearing in mind that they have not been tested by cross-examination."

[29] In *R v Cox*[13] Thomas J had discussed the directions which might be given in respect of statements made out of court by an accused person, which included exculpatory statements. His Honour said:

> "There is, of course, no reason why the trial judge should not point out that such statements have not been made on oath and (where appropriate) that they have not been tested by cross-examination."

[30] That part of his Honour's discussion was approved by the High Court in *Mule v The Queen*[14]. The trial judge in his summing up in *Mule* pointed out that assertions made by the defendant were not supported by evidence from him on oath in the witness box and did not have the same weight as inculpatory admissions[15]. However, he had emphasised that it was entirely up to the jury as to the view which it took of the evidence.

[31] The High Court drew attention to the statutory authorisation given to a trial judge to make such observations on the evidence as the trial judge might think fit[16]. It concluded the direction was proper[17].

[32] In my view, reference to this part of the summing up does not provide support for the ground of appeal in respect of which it was originally advanced. It does not detract from the earlier directions relating to the fact that the appellant had not given evidence at the trial. It was necessary for the trial judge to refer to the interviews, including those parts which were exculpatory. To do so did not suggest that the appellant bore any onus of proof.

[33] In such circumstances, as is made clear in *Mule* and in *Cox*, it is appropriate for a trial judge to make some comment about the weight to be given to exculpatory statements made out of court. That can extend to the fact that such statements were not tested by cross-examination.

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12 Direction 36.
13 [1986] 2 Qd R 55, at 65.
14 (2005) 79 ALJR 1573, 1579.
15 See *Mule* at 1576.
16 Compare s 620 of the *Criminal Code* 1899 (Qld) ('Code').
17 *Mule* at [20] – [21].

[34] In the present case, it would have been permissible for the trial judge to refer to the fact that the exculpatory statements in the interviews were not supported by sworn evidence of the appellant; nor were they tested by cross-examination of the appellant in the court. Examination of the transcript of the interviews, however, shows that there was some considerable testing of the appellant's account which may at least be described as being in the nature of cross-examination. Thus, the appellant was asked to go back over the course of events on more than one occasion. Specific questions were raised with him. To some extent, these might fairly be described as attempts to get further detail and greater clarification. However, it is not hard to detect a genuine attempt to test the veracity of his account. It was therefore factually inaccurate to say that his answers had not been tested, whether by questioning which might be described as cross-examination or at all.

[35] The circumstances in which an appeal against conviction might be set aside are stated in s 668E of the Code. None was specifically relied upon by the appellant, but that which seems most appropriate for consideration is whether "on any grounds whatsoever there was a miscarriage of justice".

[36] In *R v Tooma*[18] a convicted person argued on his appeal that the trial judge had, in his summing up, incorrectly stated that the police officer who had interviewed the appellant had not been cross-examined about whether he gave the customary warnings to the appellant at the commencement of the interview. Hanger J held that the direction was correct.[19] Matthews J held that there was a misdirection, but concluded that it was not "reasonably possible that, had there not been a mis-direction, the jury, would have returned in favour of the applicant a verdict of not guilty", and accordingly there was no miscarriage of justice[20]. Skerman J in dissent held that there had been a misdirection, and would have allowed the appeal. His Honour did so because he could not be satisfied that the misdirection could not have affected the jury. He referred to earlier cases where misquotations of evidence had resulted in a new trial: *R v Smith*[21]; and *R v Allen*[22].

[37] In *Simic v The Queen*[23] the High Court was considering whether there had been a miscarriage of justice[24] by reason of a misstatement in the summing up as to the effect of the evidence. It was said that in Queensland, the test which had been applied was whether the appellant had shown that it must be reasonably possible that, without the misstatement, the jury would not have come to the verdict of guilty[25], referring to *Allen* and *Tooma*, as well as *R v Clarke*[26].

[38] In *Simic*, after an extensive review of the authorities, the Court cited with approval the following passage from *R v Cohen and Bateman*[27]:

> "A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of

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18 [1971] Qd R 212.
19 At p 217.
20 See at p 236-237.
21 [1937] QWN 16.
22 [1937] St R Qd 32
23 (1980) 144 CLR 319.
24 For the purposes of s 568(1) of the *Crimes Act* 1958 (Vic).
25 At 329-330.
26 [1934] St R Qd 23, 31.
27 (1999) 2 Cr App R 197, 207; see *Simic* at 330-331.

> a point of law, but merely comes within the very wide words 'any other ground', so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted.... . If, however, the court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso."

[39] Their Honours then noted the importance of the distinction between an error of law and an error of fact, and observed that the scope for a misstatement of the evidence will often be very wide, and the effect of it might vary a great deal; and concluded that it was right and proper that an onus rest upon an appellant to demonstrate a miscarriage of justice[28]. They also observed that minor inaccuracies and omissions would not be likely to make it possible that the verdict was affected by the misdirection; and that bare and remote possibilities might be disregarded. The Court continued[29]:

> "…if it is considered reasonably possible that the misstatement may have affected the verdict and if the jury might reasonably have acquitted the appellant if the misstatement had not been made, there will have been a miscarriage of justice, and a substantial one."

[40] This statement appears to represent the current state of the law[30]. The relevant passages in *Simic* were analysed by McHugh J in *TKWJ v The Queen*[31]. His Honour concluded:

> "Thus, *Simic* holds that, in most cases of misdirection on facts, the appellant has the onus of establishing a misdirection, that it might have affected the verdict and that, if it had not been made, the jury might have acquitted the appellant."

[41] It would appear that McHugh J, like the court in *Simic* in the passage set out above, was considering not only whether there had been a miscarriage of justice, but also the operation of what is referred to as the proviso to s 668E(1)[32]. Subject to that qualification, it seems to me that the passage cited from the judgment of McHugh J provides an appropriate way to approach a determination of this aspect of this appeal.

[42] In my view, the appellant has established that there has been a misdirection. It is, however, by no means clear that it might have affected the verdict.

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28 *Simic* at p 331-332.
29 *Simic* at 332.
30 C*esan v The Queen* (2008) 236 CLR 358 at [82].
31 (2002) 212 CLR 124 at [73].
32 See s 668E(1A).

[43] The jury had available to it a DVD recording of the interviews, which had been played in court. It also had access to the transcripts of those recordings. The jury had ample opportunity to observe that the appellant had been questioned at considerable length, the questioning returning on a number of occasions to matters with which he had previously dealt, and at times focussing on matters suggesting a degree of improbability about his account. In my view, it is unlikely that the brief but inaccurate observation of the primary judge would have affected the jury's appreciation of the nature of the questioning.

[44] In any event, it seems to me difficult to see that the extent to which the appellant's version of events had been subjected to testing would have been of any real significance to the jury. Both the appellant's version of events, and the version of the complainant, were clearly before them. There were quite significant difficulties with the appellant's version. Thus, on his evidence, penetration did not occur; and he denied ejaculation. That was inconsistent with the objective evidence resulting from the medical examination of the complainant and subsequent DNA analysis. The appellant's version was that the relevant events occurred in the front seat of the taxi; and he had never ejaculated in the taxi. That was inconsistent with evidence showing presence of his sperm on the back seat. There were also substantial difficulties raised by what would seem to be the inherent improbability of some aspects of the appellant's version, not the least being his account that the complainant had climbed from the back seat to the front seat in the taxi, and had then positioned herself on its steering wheel, before it came to a stop. In the circumstances, it would be quite surprising if the extent to which the appellant's version had been subject to testing or cross-examination played any real role in the jury's decision to accept the evidence of the complainant as establishing the guilt of the defendant beyond reasonable doubt.

[45] Accordingly, I do not accept that it is a reasonable possibility that the misdirection of the primary judge relating to the testing of the appellant's version might have affected the verdict. Accordingly I do not consider that the misdirection resulted in a miscarriage of justice.

[46] I conclude that the appellant has failed to establish his first ground of appeal.

Direction on evidence said to support complainant's evidence

[47] The summing up included the following:

> "Ladies and gentlemen, there is this evidence, if you accept it, capable of supporting the complainant's evidence that the accused raped her as she described in the back seat of the taxi and in doing so, the accused ejaculated inside her. It is a matter for you whether or not you do find that any of these matters support the complainant's evidence:
>
> (1) the evidence that the accused's sperm was found inside the complainant's vagina from all three swabs - high vaginal, low vaginal and vulval;
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> (2) the evidence that the accused's sperm was found in three locations on the back seat of the taxi; and
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> (3) the tenderness in the vagina upon examination by Dr Griffin.

> If you accept that evidence, it's entirely a matter for you as to what it means and what weight you give to it."

[48] For the appellant, it was submitted that the evidence referred to in this passage did not support the complainant's evidence that she had been raped by the appellant. Neither the presence of sperm in the complainant's vagina, nor tenderness of the vagina, was evidence of rape; and the sperm on the back seat could have been a consequence of intercourse in the front seat, and the complainant's moving to the back seat shortly thereafter.

[49] The medical evidence made clear that tenderness of the vagina may be a consequence of consensual sexual intercourse. Accordingly, it is not capable of providing corroboration of an allegation by a complainant that sexual intercourse had occurred without consent.

[50] However, on the case presented by the prosecution, penile penetration by the appellant was an essential element of the charge. It was not the subject of a formal admission by the appellant; and his version given in the interviews suggested that (at the most) his penis (which he said was not erect) could have touched the complainant.

[51] In my view, that the sexual penetration of the complainant by the accused was an issue in the case is apparent from the versions presented to the jury in the course of the trial. It was clearly identified as such in the summing up[33], without any dissent from Counsel then appearing for the appellant.

[52] It follows that it would have been correct to identify tenderness in the complainant's vagina as corroborative of an essential element of the prosecution case.

[53] The passage of the summing up set out above identified matters said to be capable of supporting "the complainant's evidence that the accused raped her as she described in the back seat of the taxi and in doing so, the accused ejaculated inside her".

[54] The complainant's version was that she was sitting in the back seat of the taxi when it stopped; the appellant got out of the taxi and came to the back seat, and pulled her jeans off; he tried to have sex with her, which she resisted; she could feel he was having sex with her which she tried to resist; and, later on, she felt pain in her vagina. She subsequently said that she did not at the time realise that he had put his penis in her vagina because, being drunk, she was numb; but did so later, because it hurt around the vagina[34].

[55] Tenderness in the vagina was confirmed by Dr Griffin, who carried out a genital examination of the complainant.

[56] The complainant's version of events, therefore, was based on her direct evidence of the conduct of the appellant while she was in the back seat of the taxi cab; together with her experience of tenderness in the vagina shortly thereafter. It seems to me

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33 Appeal Record p 184.

34 This version of the evidence might be considered to be particularly favourable to the appellant. There was evidence from the complainant, consistent with the evidence of her friend, that during the event the complainant used her mobile telephone to call her friend, saying that she was being raped, and that he "fucked me". This would form part of the *res gestae*: compare *R v Kooyman* (1979) 22 SASR 376, 380-381.

that the summing up simply pointed out that Dr Griffin's evidence confirmed the complainant's evidence of tenderness in the vagina, from which, together with her evidence of the conduct of the appellant, the complainant had concluded that sexual penetration had occurred, and that she had accordingly been raped.

[57] In my view, it was not erroneous for the primary judge to say that the evidence of Dr Griffin was capable of supporting the complainant's evidence that the accused raped her as she described, and in doing so, he ejaculated inside her. It does not seem to me that the reference to Dr Griffin's evidence was presented as a matter relevant to the absence of consent.

[58] If I were of a different view, then it would be necessary to consider whether the appellant established that a miscarriage of justice had occurred. As mentioned, it would be necessary for the appellant to demonstrate that, had the primary judge not referred to Dr Griffin's evidence in the way that he did, the jury might have acquitted the appellant. That could only be so, if, on that basis, the jury was not satisfied that the complainant had not consented to sexual intercourse.

[59] There was a stark contrast between the complainant's evidence, and the appellant's version of events as it emerged from the interviews. In the latter, sexual activity was initiated by the complainant, with the appellant's involvement in that activity being, at most, passive. On the appellant's version that activity occurred in the front seat, not the back seat of the taxi cab.

[60] It is apparent that the jury accepted the complainant's version of events, and not the appellant's. The complainant's version of events included ejaculation, supported by evidence of the presence of the appellant's sperm inside the complainant's vagina, whereas the appellant's version did not accept that penetration occurred, and denied ejaculation. The complainant's version of events was that these things occurred in the back seat of the taxi, and was supported by evidence of the presence of the appellant's sperm there. There was also the difficulty of the inherent improbability of some aspects of the appellant's account of events; and (on the prosecution case) that the appellant lied when he said he did not know what address he was to take the complainant to; when he said that he did not ejaculate inside the complainant or at all; and when he said that his only activity in the back seat of the taxi was to lean in to pull the complainant out of the cab.

[61] In the context of the case presented to the jury at trial, if the direction about tenderness in the vagina were to be regarded as a direction that it was corroborative of the absence of consent, I am not satisfied that it might have affected the jury's verdict.

[62] It follows that the second ground advanced on behalf of the appellant is not made out.

Sentence

[63] The appellant submitted that the sentence imposed by the primary judge was manifestly excessive. The submissions made on his behalf referred to the fact that the prosecutor at first instance had submitted a sentence of six years was appropriate, referring to *R v Heal*[35], *R v Cutts*[36] and *R v Eastwell*[37]. The

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35 [2001] QCA 572.
36 [2005] QCA 306.
37 [1992] QCA 109.

submissions also pointed out that the violence was limited to the rape itself, and did not involve prolonged relentless abuse or torment, or accompanying acts of degradation, found in other cases, referring to *R v Rankmore: ex parte Attorney-General (Qld)*[38] and *R v Dutton*[39].

[64] The respondent's submission referred to the same cases, save for *Rankmore*. They emphasised that the appellant took advantage of an inebriated woman with a poor understanding of English, and committed a breach of trust placed in him as a taxi driver. They also noted that he was not deterred, even though on two occasions he had spoken with a friend of the complainant by mobile phone, so that there could be no mistake about the address to which he was to take the complainant.

[65] The submission stated that there was some violence, but it was not prolonged and was not severe, with no resulting injury except for tenderness. It also pointed out that the appellant had no previous convictions.

[66] *Eastwell* involved circumstances and conduct significantly different from the present case. A head sentence of ten years imprisonment was imposed after a conviction following a trial, for an offence of attempted rape. I do not consider that *Eastwell* provides much guidance in the present case.

[67] The complainant in *Cutts* was a 26 year old woman, confined to a wheelchair by cerebral palsy. However, her condition did not affect her mental capabilities, and she managed to live alone. The appellant was a taxi driver, 29 years of age at the time of the offence, with limited criminal history. He was convicted of rape and three counts of indecent assault. He was sentenced to a term of imprisonment of six years for rape, and to terms of two years on each count of indecent assault, all sentences to be served concurrently.

[68] The appellant had driven the complainant from a shopping centre in his Maxi cab, to her unit. He asked whether he might come in to use the toilet, to which she agreed. Subsequently, he asked whether he might kiss her, to which she replied, "No". She said she was by then in a state of shock. He then engaged in sexual activity, the subject of the charges of indecent assault. He subsequently placed his legs over the arms of the wheelchair, and inserted his penis into her mouth. This constituted the count of rape. His application for leave to appeal against sentence was refused.

[69] It might be thought that the dependence on others and the vulnerability of the complainant in *Cutts* was more significant than in the present case, because these things were permanent. Moreover, the criminal conduct in that case extended over a greater period of time, and involved the presence of the appellant in the complainant's home, contrary to her wish. Since the issue was whether the sentence was manifestly excessive, the reasons for judgment tended to focus on the serious nature of the offending. However, there was no suggestion of violence, and the complainant's own evidence indicated some compliance and cooperation by her, though her evidence was that she did not consent to what happened, but felt she had no option but to comply. Williams JA expressed the view that the sentence "was clearly well within the appropriate range"[40]. McMurdo P considered the sentence to be supported by *Dutton*[41].

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38 [2002] QCA 492 at [36]-[37].

39 [2005] QCA 17.

40 *Cutts* at [50].

41 *Cutts* at [23].

[70] The complainant in *Heal*, a British backpacker tourist visiting Cairns, was placed in a car at a time when she was clearly affected by alcohol. She wrongly believed the car to be a taxi. The appellant, the driver of the car, was also clearly affected by alcohol. The appellant drove the car past the street where the complainant was staying and, despite her protests, drove her out to some cane fields. By this time she was hysterical. She attempted to escape, but the appellant restrained her. He then took her by the arms, pulled her out of the car, pushed her onto the ground, and inserted his penis into her mouth. For this he was charged with indecent assault. He then pulled her by the arms and forced her onto the back seat of the car, where he raped her. After that, she got out of the car and stumbled around towards the front of it. The appellant again raped her on the bonnet of the car. He subsequently drove her back to the caravan park where she was staying. After his convictions at trial, a head sentence of six years imprisonment was imposed. The sentence was held to be "clearly within the limits of the exercise of a proper discretion by a trial judge in circumstances such as this"[42].

[71] The appellant in that case did not take on a position of trust, in the way that a taxi driver does; nor did he do anything to encourage the complainant to enter his motor vehicle. He was also clearly affected by alcohol. Nevertheless, his offending was highly opportunistic; extended over a period of some time; involved the use of force both to prevent escape and to enable the commission of the offences; and included two counts of rape, as well as the indecent assault. His conduct was considered to have amounted to an abduction[43].

[72] By comparison with *Cutts* and *Heal*, the sentence in the present case may be considered severe. However, these cases considered in isolation, do not establish an appropriate range for a sentence of this kind.

[73] In *Dutton*, the applicant had been convicted of a number of counts of sexual offending. For the count of rape, a sentence of seven years was imposed, accompanied by a declaration that it constituted a serious violent offence. Terms of two years were imposed for a count of indecent dealing, involving the same complainant; and a count of exposing an intellectually impaired person to an indecent act, committed on the same occasion. The applicant's sexual offending extended thereafter over a period of some weeks, involving other complainants. For his subsequent offending, the sentences imposed were made cumulative with the first three sentences which I have mentioned.

[74] The applicant had pleaded guilty to all offences. The sentencing judge reflected this by reducing the total term of imprisonment which he would have imposed by two years[44], treated on the application as amounting to a reduction of 12 months in respect of the first three offences[45]. There was also a period of 400 days of pre-sentence custody, taken into account in respect of the subsequent offending, and in the way in which a suspended sentence had been activated[46]. On this analysis, it would appear that the sentence for rape would have been eight years, but for the plea; and was unaffected by any consideration relating to pre-sentence custody.

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42 *Heal* at [20].
43 *Heal* at [20].
44 *Dutton* at [5].
45 *Dutton* at [11].
46 *Dutton* at [13].

[75] The complainant on the count of rape and the count of indecent dealing was a disability support worker who cared for a 22 year old woman with profound physical and intellectual disabilities which prevented her from communicating. The applicant had accosted them on the Wynnum mangrove boardwalk. Despite the complainant's pleas that he leave the two women alone because of the vulnerable condition of the other woman, the applicant committed the indecent dealing, with some violence or roughness. He forced the complainant to take his penis into her mouth on three or four separate occasions, these together apparently constituting the count of rape[47]. He made threats that he would do the same thing to disabled person if the complainant did not comply with his wishes.

[76] The applicant had an extensive criminal history, but not of sexual offending[48]. It was considered that his personal circumstances and history attracted some sympathy, particularly because of his disadvantaged upbringing[49]. The sentence on the count of rape was not disturbed, though some adjustment was made to the sentences for his subsequent offending, to achieve the result intended by the primary judge. That was because some of those sentences were affected by the declaration, with the consequence that the applicant would have been required to serve 80 per cent of those sentences, as imposed at first instance[50].

[77] There are obvious difficulties in relating the sentence in *Dutton* to the present case. Nevertheless, it did not involve any question of a breach of trust. It did involve the exploitation of the complainant's vulnerability, by reason of the threatened conduct towards the other woman. The rape in that case did not involve vaginal penetration with ejaculation.

[78] While the sentence in the present case may be regarded as high, it seems to me that it is not manifestly excessive, when compared with the sentence for rape upheld in *Dutton*. In light of that, it seems to me that its severity by comparison with the sentences considered not to be manifestly excessive in *Heal* and *Cutts* is not such to warrant appellate intervention. Accordingly, I would refuse the application for leave to appeal against sentence.

Conclusion

[79] I would order that both the appeal, and the application for leave to appeal against sentence, be dismissed.

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47 *Dutton* at [6].
48 *Dutton* at [4].
49 *Dutton* at [4].
50 *Dutton* at [14].