

SUPREME COURT OF QUEENSLAND

CITATION: *R v Deviney* [2013] QCA 266

PARTIES: **R**
v
DEVINEY, Stephen Tristan
(appellant)

FILE NO/S: CA No 325 of 2012
DC No 74 of 2012

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 20 September 2013

DELIVERED AT: Brisbane

HEARING DATE: 30 August 2013

JUDGES: Muir and Fraser JJA and Margaret Wilson J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of one count of rape – where the complainant identified the appellant as her assailant by reference to his distinctive white hooded jumper with horizontal colourful stripes – where the complainant gave evidence that she also saw part of her assailant’s face and recognised him as the appellant – where there was conflicting evidence regarding the degree of light at the time of the attack – where the complainant’s boyfriend gave evidence that that the complainant, in her initial complaint, identified a bald man as her assailant – where photographic evidence indicated that the appellant was not bald – where the appellant submits that the complainant’s identification of the appellant as her assailant was unconvincing – where the appellant seeks to rely upon the poor lighting at the time of the attack; the complainant’s initial identification of a bald man; inconsistencies in the complainant’s evidence as to the timing of relevant events; and the fact that the complainant had consumed a significant amount of alcohol when she met the appellant for the first time that evening – whether the verdict was unreasonable or insupportable having regard to the evidence

COUNSEL: K Kelso for the appellant
P J McCarthy for the respondent

SOLICITORS: Bosscher Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MUIR JA: Introduction** The appellant was convicted on 8 November 2012 of rape after a three day trial. He appeals against his conviction on the ground that it was unsafe and unsatisfactory. The rape was alleged to have occurred in the early hours of the morning of 20 March 2011 at a house in which the complainant's male friend, Mr Gillow, resided with three other young males.

The evidence of Callan Gillow

- [2] Mr Callan Gillow gave evidence that he and the complainant "were dating". In March 2011, he resided at 42 Clarke Street, Ripley with Scott Murphy, Joshua Taylor and Curtis Carter. On 19 March 2011, Mr Taylor was absent and a female friend of Mr Carter, Ms Rafter, was present at the residence for part of the day.
- [3] The group, including the females, spent between about 11.30 am until 5.00 pm at Brothers Leagues Club. They then returned to the residence. Some of them continued drinking. Ms Rafter and Mr Murphy both left and various other males came and went. Three of the arrivals were Mitchell Carter, a brother of Curtis Carter, the appellant and his brother, Jonathon.
- [4] Part of the socialising during the evening took place in a shed at the back of the residence where a pool table was situated. At about midnight, Mr Gillow switched off the lights at the shed and "everyone went down to the house". Mr Murphy and Mr Carter went to bed. The Deviney brothers and Mitchell Carter watched television in the lounge. The complainant went to Mr Gillow's room after about half an hour or so. Mr Gillow had a cigarette and followed her to the room, closing the bedroom door behind him. He was woken between about 1.30 am and 2.00 am by the complainant's screams. She said that "the bald man had touched [her]". He was "a bit dazed at the time", but eventually got up and went down the hallway. As he did so, he heard a door shutting, so he went out the front door to the front patio and had "a quick look around", but did not see anything. He entered the lounge room where he saw Mitchell Carter and Jonathon Deviney sleeping on couches. He then went outside and smoked a cigarette before returning to his room where the complainant told him again that "the bald man touched [her]". She was in hysterics, crying. He and the complainant stayed in the room for the rest of the night.
- [5] The following morning, the complainant told Jonathon Deviney and Mitchell Carter in his presence in the lounge room what had happened. Asked if he could remember the words the complainant used, he responded:

"Not the exact words, but I think the word rape was mentioned and how could someone touch me ... Come into the room and touch me."

- [6] Asked if he could describe on a scale of one to 10, one being stone cold sober and 10 being completely inebriated, how he would be rated at the time of his going to bed, he responded, "Would be six and a-half, seven".

- [7] In cross-examination, Mr Gillow accepted that it was “pitch black” in his room when he was woken by the complainant. In a statement given to police on 22 March 2011, he said that after he was woken by the complainant, he “jumped up, searched through the house before [he] heard the front door screen shut ... and ... rushed back but ... couldn’t see anything”. He said that he did not hear any car or have a discussion with the complainant about hearing a car.

The complainant’s evidence

- [8] The complainant said that during the evening, after the departure of Ms Rafter, she and Mr Gillow went into his bedroom. Some time later, they joined a group of people in the lounge room, including Curtis Carter, Scott Murphy and Mitchell Carter. She introduced herself to the appellant who was wearing a “big white hooded jumper” which had horizontal, “pastel fluoro coloured stripes” about five centimetres wide and a few inches apart. Later at the house, those present socialised, drank and arm wrestled. The complainant arm wrestled with the appellant’s brother followed by the appellant and Mitchell Carter in the kitchen. When arm wrestling with either the appellant’s brother or Mitchell Carter, she was slapped on the buttocks by the appellant with whom she strongly remonstrated.
- [9] The complainant and Mr Gillow went to bed together between midnight and 2.00 am. Asked what woke her up during the course of the night, she responded:

“A man in a white jumper. I remember waking up and there was someone who I believe to be – I thought it was Callan waking me up with – there was someone who I thought was Callan had their fingers in my vagina. Their tongue – one hand on my leg and touching everything. I remember feeling my arsehole being licked and there was (sic) still fingers in my vagina and – and then Callan moved next to me then that’s when I realised that it wasn’t him that was doing these things and I scrambled up to the top of the bed, kicking my feet. I clutched onto Callan. I don’t really – I looked down the end of the bed and I saw the white jumper and he was right down the end of the bed on his side. And at this time he was still reaching for my legs. And I said, ‘Get the fuck out’. Callan still hadn’t woken up. I was clutching him. I can remember. And he still didn’t wake up and I started to wake Callan up. I tried to wake Callan up. He moved a bit. Grunted. And then as that was happening [the appellant] was slinking out of the bedroom.”

- [10] Asked to describe the white jumper, the complainant responded, “It was the same ... white hoodie with the colourful strips, white, dirty”. Asked what the lighting was like in the room, she responded, “It wasn’t pitch black ... it was light without being bright”. She could see part of the intruder’s face and recognised him. She answered, “Yep” to the prosecutor’s helpful prompt, “And the same person wearing the jumper earlier on in the night?”
- [11] After she succeeded in waking Mr Gillow, she said to him, “There was one of Mitch’s friends in here and he was touching my vagina”. Mr Gillow left the room. When he was out of the room, she heard the front door open. She explained, “[T]he screen door’s loud so you can hear it opening and closing”. When Mr Gillow came back into the room, she and Mr Gillow heard a car drive up the street. She then cried, went and sat in the shower and then went back to bed. Asked if she went

back to sleep that night, she responded, “It was morning when it happened ... It would have been early, early, early hours of the morning or late hours of the morning or whatever you want to ...” The prosecutor suggested, “[S]o it’s in the early hours of the morning” and the complainant answered, “Yep”. She said that, although she went back to bed, she did not sleep.

- [12] The next morning, after leaving the bedroom, she sat on a couch in the lounge room and said to Mr Gillow, the appellant’s brother and Mitchell Carter, “Your friend’s a psycho ... Like he’s - he’s a fucking creep.” Mr Gillow pointed to the appellant’s brother and said, “That’s ... [the appellant’s] brother”. The complainant responded, “I don’t care. I don’t care. I don’t care”. She also remembered saying, “You’re (sic) brother’s ... a psycho” and that she was going to make a statement to the police. Mitchell Carter said, “That’s not on” and he and the appellant’s brother said that they were going to go and “have a talk to” the appellant. They then left the house.
- [13] The complainant made her complaint to police at midday on Monday 21 March 2011.
- [14] The complainant said that she consumed three beers and two or three rums at the Leagues Club. On returning to the house, she had a can of “Smirnoff Ice Red”, a full strength pre-mixed vodka based beverage. She had part of a second Smirnoff Ice Red before retiring for the evening.
- [15] In cross-examination, the complainant said that she could not recall anyone coming to the bedroom door and trying to wake her and Mr Gillow up. She was also unable to say whether she was under any bed coverings. She recalled that a doona, a sheet and a mattress coversheet were on the bed. She recalled waking up and kicking out at the intruder when she came to; that his hands were reaching her legs; and that she felt him licking her anal area. When she kicked out and “scrambled up the top of the bed ... and he was on his side. [She] could see [the] side of – one half of his face and he was reaching ... still touching [her] legs”. When she kicked out the person was at the end of the bed and not still licking her. When he slunk out, he “like, crawled off and just slunk out, like, exactly like that”. She agreed with the suggestion that “he was low to the ground”.
- [16] Asked what role the jumper played, she responded, “Well, it was one of the brightest things [you] could see. It was white”. Asked, “[Y]ou think that it was the same jumper you saw [the appellant in] that night”, she said, “Yeah” and rejected the possibility that she could have been mistaken in that regard.
- [17] She accepted that in the first statement she gave to police on 21 March 2011 she had said that when Mr Gillow was out of the room she heard the front door open. She accepted that this accorded with her evidence-in-chief. She accepted that in her third statement on 24 March 2011 she told the police officer that just after Mr Gillow came back into the room “the front door opened then the screen door closed, then the car drove off just as he got to the bed”. She accepted that she was certain that she had heard a car drive away and that she had discussed that with Mr Gillow.

The evidence of Curtis Carter

- [18] Mr Carter said that when he woke up on the morning of the subject incident, the appellant’s brother was asleep on the couch. Mitchell Carter was asleep in another

room. He did not see the complainant or Mr Gillow. He did not recall being woken up by anyone during the evening. He accepted that he told a police officer that he “could have woken up but [he] wouldn’t remember it because [he had] had a pretty big night”.

The evidence of Jonathon Deviney

- [19] Mr Deviney said that Mr Gillow’s residence was about 300 metres from the appellant’s house. He observed of the people at the house when he joined them that “they were ... all pretty hammered”. The appellant arrived at the house about an hour or so later. People started leaving the group “roughly, say, about the midnight sort of a time”. He observed, “I wasn’t watching me clock the whole night”.
- [20] In the course of the evening he, the appellant and Mitchell Carter “did go in and try and wake everyone else up to get them to come back out and have drinks”. They were unsuccessful in their attempt. The appellant “walked out the front of the house and down to his house” and Jonathon Deviney went back to the lounge room where he and Mitchell Carter slept on separate couches. They woke at about 8.00 am or 9.00 am. When Mr Gillow and the complainant came into the lounge room in the morning, they were asked “if they wanted to do anything with [Jonathon Deviney and Mitchell Carter that day]”. The complainant responded, “No, we have to go to the cop shop accusing your brother of rape”. Mr Deviney asked, “[W]hat are you on about” to which she responded, “He touched me”. The prosecutor interrupted, “Okay. So ... I’ll just stop you there”.
- [21] In cross-examination, Mr Deviney accepted that he saw his brother leave at about 1.00 am and that he “went out to the front and waved him off”. Asked if he had checked the time, he said, “I’m just guessing, mate”. He accepted that he gave a statement to police on 27 March 2011 in which he reported that the complainant said, “I’m going to charge your brother for assault” and that he had said, “What the hell are you on about” to which the complainant replied, “He touched me”. It was suggested to him that the complainant did not use the word “rape” as it was not in his statement. He affirmed, however, that the complainant said, “He raped me”.
- [22] On the same rudimentary intoxication scale applied by Mr Gillow, Mr Deviney rated himself a six or a seven just prior to going to sleep.

The evidence of Mitchell Carter

- [23] Mitchell Carter’s recollection was that when the complainant came into the lounge room on the morning after the incident, she said to Jonathon Deviney, “[Y]our brother touched me. Your brother touched me” and asked, “[W]as he retarded or something like that”. He did not remember attempting to wake up anybody in the house, but he did not dismiss the possibility of this having happened. His phone records indicated that he made drunken telephone calls to his wife at 1.53 am and 2.18 am. He had no memory of those calls; however, his wife verified them in her evidence.
- [24] Mr Carter rated himself as “probably five” on the inebriation scale when he arrived at Mr Gillow’s house.

Other evidence

- [25] A photograph taken of the appellant on 23 March 2011 showed that the appellant, although having a receding hairline, was not bald. A white jumper with a buttoned

front and a hood was pointed out to police in the master bedroom of the appellant's house on 23 March 2011. The complainant in her evidence identified the garment as one which looked like the garment she had described in her evidence.

The appellant's argument

[26] The thrust of the appellant's argument is that the identification by the complainant of her assailant could not be accepted as convincing in the circumstances in which it was made as:

- (a) the complainant had met the appellant for the first time on the evening of the incident;
- (b) the appellant had arrived at Mr Gillow's residence only a short time prior to the complainant retiring for the evening;
- (c) the complainant had consumed a significant amount of alcohol at the Leagues Club and had continued to drink over the course of the evening;
- (d) in relation to her consumption of alcohol, the complainant spoke of herself, Mr Gillow and Mr Murphy walking down to a patio area where they "hung around, talked, sipped [their] drinks [and] smoked a couple of cigarettes";
- (e) in her first complaint to Mr Gillow, the complainant identified a bald man as her attacker; and
- (f) Mr Gillow said that the room was "pitch black" and, on any view of the matter, the light was poor at the time of the attack.

[27] It was also argued that the complainant's identification was weakened by her timing of relevant events being at odds with the bulk of the evidence given by the other witnesses. Furthermore, counsel for the appellant made reference to the fact that Mr Gillow, in contrast to the evidence of the complainant, did not hear a car.

Consideration

[28] The last mentioned criticisms may be safely discarded. None of the witnesses was able to give anything more than very general time estimates. Nor was it explained how the accuracy of the complainant's identification was affected by the time at which the incident, or any of the other surrounding events, occurred. The divergence in recollection about hearing the car is insignificant. There is no reason to suppose that the car, if there was one, had any connection with the incident.

[29] The time at which the incident happened has some general relevance in that the later it happened, the more light there was likely to be. Although it is impossible to be certain about the precise time of the incident, it is highly likely that it occurred after Mitchell Carter's 2.18 am telephone call to his wife. Mr Gillow found him and Jonathon Deviney sound asleep when he left the bedroom to search for the complainant's molester.

[30] The complainant claimed to have seen and recognised the intruder. The jury were entitled to accept her evidence about the state of the light in preference to Mr Gillow's. By his own estimation, he was quite intoxicated. The complainant had difficulty in waking him up. She was able to give a description of what she saw

in the room after the shock realisation that she was being molested. The jury were entitled to accept her evidence that she saw part of the appellant's face and recognised him. She also recalled seeing the appellant's distinctive white striped jumper.

- [31] It is far from improbable that the complainant recognised that distinctive garment in the ambient light. That the complainant recognised the intruder (or believed that she did) is borne out by the absence of discussion between the complainant, Mr Gillow, Mitchell Carter and Jonathon Deviney about the intruder's identity. Counsel for the appellant relied on Mr Gillow's recollection of the complainant twice telling him that "the bald man" had touched her. Although it may be doubted that Mr Gillow's recollection was accurate, the complainant was describing a particular person and understood that Mr Gillow would know the person to whom she was referring. It was not suggested to her in cross-examination, and the inference is not open from the evidence generally, that she first identified a person other than the appellant as the intruder and then changed her mind.
- [32] In describing the appellant's white striped hooded jumper in her evidence-in-chief, the complainant spoke of its horizontal "pastel fluoro coloured stripes ... [m]aybe an inch or two apart" and "[f]ive centimetres, maybe" wide. The "[m]aybe an inch or two apart" estimate was converted into "a few inches apart" when the prosecutor, after establishing the width of the space between the stripes, asked, "About five centimetres wide, a few inches apart?" and the complainant answered, "Yeah".
- [33] The colours of the stripes, including green, red, yellow and blue, were quite bright against the white background, rendering, to my mind, the "fluoro" description appropriate, but the "pastel" description inappropriate. The stripes were quite narrow, probably one centimetre or less in width, although the white spaces between the stripes may have been five or six centimetres wide.
- [34] It is possible that when the complainant gave her description of the stripes in her evidence-in-chief, she was thinking of the gaps between the stripes rather than the stripes when she gave her estimate.
- [35] The complainant was not challenged on her description of the jumper in cross-examination, in the course of which she said that it was identical to the jumper that the appellant had been wearing "earlier that night. It was white with the stripes".
- [36] Defence counsel relied on the complainant's estimate of the width of the stripes in his address to the jury. However, the description has little significance unless it gave rise to a possible inference that a male, other than the appellant, wearing a white jumper with a hood and horizontal stripes may have entered the house, found his way into Mr Gillow's darkened bedroom through the closed door and assaulted the complainant who was lying on a bed beside Mr Gillow. The jury were entitled to regard that possibility as fanciful.
- [37] The jury were also entitled to conclude that the complainant's ability to effect an accurate identification was not markedly affected by alcohol. The complainant's evidence of her consumption of alcohol was unchallenged. The jury were also in a position to gauge something of the degree of her inebriation by the evidence of her conduct during and immediately after the incident. There was no suggestion of any physical or mental deficit on her part.

- [38] The argument that the complainant's ability to make a persuasive identification was further restricted by her limited acquaintance with the appellant is not strong. The complainant had interacted with the appellant in a small group for an hour or two prior to the incident, including engaging in arm wrestling. Her facial recognition of the appellant, although made in poor light, was at quite close range. The jury could accept that it and the identification of the jumper lent support to each other.

Conclusion

- [39] For the above reasons, it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt.
- [40] I would order that the appeal be dismissed.
- [41] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the order proposed by his Honour.
- [42] **MARGARET WILSON J:** The appeal should be dismissed for the reasons given by Muir JA.