SUPREME COURT OF QUEENSLAND

CITATION:	*R v Motlop* [2013] QCA 301
PARTIES:	**R** **v** **MOTLOP, Grainger Smith** (appellant/applicant)
FILE NO/S:	CA No 39 of 2013 DC No 20 of 2013 DC No 33 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	11 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2013
JUDGES:	Fraser JA and Douglas and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction be dismissed.** **2. Leave to appeal sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant pleaded guilty to offences of unlawful wounding and unlawful assault occasioning bodily harm and was convicted of one count of rape and acquitted of a second count of rape – where the complainant's evidence was that she submitted to the acts of intercourse out of fear – where there was no evidence the complainant relayed her lack of consent to the appellant – where there was no evidence the earlier assaults were related to a request or demand by the appellant for sex – where there was no evidence the prior relationship between the appellant and the complainant involved violence to overcome free will in respect of sexual intercourse – where the complainant made statements before at least one of the acts of intercourse that she loved the appellant – where the appellant contends the evidence was not sufficient for a jury to be satisfied beyond reasonable doubt that any consent was "obtained" by factors in s 348 *Criminal Code* – whether the verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT

VERDICTS – where the appellant was convicted of one count of rape and acquitted of a second count of rape – where both rapes were alleged to have occurred within minutes of each other – where there was no distinction between the two physical acts of intercourse – where moments before the second act of intercourse the complainant expressed her love for the appellant – where the appellant contends the verdict of guilty of one count of rape and a verdict of not guilty of the other count of rape is an affront to logic or commonsense – whether the verdicts defy reasonable explanation such that there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant contends the trial judge's directions in respect of consent were insufficient – where the appellant contends the directions in respect of a defence of honest and reasonable but mistaken belief were also insufficient – where the appellant contends the directions limited the jury to only parts of the evidence rather than allowing the jury to consider the whole of the evidence – where no re-direction was sought in respect of either matters – whether the directions resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to eight years imprisonment for one offence of rape – where the offence of rape occurred after the applicant attacked the complainant using a stick, a chair and a knife – where the offences were committed whilst the applicant was subject to a partially suspended sentence – where the sentencing judge made reference to the applicant's mother's demeanour and also the applicant's demeanour when interviewed and in Court – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 348

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
R v CX [2006] QCA 409, applied
R v Pryor [2007] QCA 232, distinguished
R v PS Shaw [1995] 2 Qd R 97; [1994] QCA 551, cited

COUNSEL: D C Shepherd for the appellant/applicant
G P Cash for the respondent

SOLICITORS: Legal Aid Queensland for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the orders proposed by his Honour.

[2] **DOUGLAS J:** I agree.

[3] **BODDICE J:** On 31 January 2013, the appellant was convicted by a jury of one count of rape. The jury acquitted him of a second count of rape. Both rapes were alleged to have occurred within minutes of each other.

[4] On 1 February 2013, the appellant was sentenced to eight years imprisonment for the offence of rape. He was sentenced to lesser, concurrent sentences for offences of unlawful wounding and unlawful assault occasioning bodily harm, offences to which he had pleaded guilty on 29 January 2013. The appellant was also ordered to serve the whole of a suspended sentence concurrent with those other sentences. A period of 317 days in custody was declared as pre-sentence custody.

[5] The appellant appeals against his conviction of the offence of rape. The grounds for the appeal against conviction are:

(a) that the verdict of guilty was unreasonable and not supported having regard to the evidence;

(b) that the verdict was unsafe and unsatisfactory as it was inconsistent with the verdict of acquittal on the other count of rape;

(c) there was a miscarriage of justice because the trial judge failed to adequately direct the jury on the element of consent;

(d) there was a miscarriage of justice because the trial judge misdirected the jury by telling them that in determining whether the prosecution had proved beyond a reasonable doubt the appellant did not have an honest and reasonable belief that the complainant was consenting they could only have regard to certain aspects of her evidence and the fact that the appellant had consumed alcohol.

[6] The applicant also seeks leave to appeal against his sentence for the offence of rape on the grounds that the sentence is manifestly excessive in all the circumstances, and the trial judge erred in placing too much weight on the appellant's criminal history and by taking into account irrelevant considerations.

Background

[7] The appellant was born on 18 June 1982. The offences to which he pleaded guilty, together with the two offences of rape, were all alleged to have been committed on 17 March 2012. The complainant in each offence was a female in her mid twenties. She had first met the appellant approximately one month before. During that month, they had commenced living together in a relationship.

Evidence

[8] On the evening of Friday, 16 March 2012, the complainant attended a nightclub with the appellant to celebrate the appellant's mother's birthday. They returned to the appellant's residence, where he lived with his mother, at about 7.30 the next morning. The complainant described herself as being tipsy, and the appellant as being intoxicated. The appellant's mother was also intoxicated.

[9] The complainant said that after eating something, the appellant's mother retired to her bedroom. The complainant and the appellant then sat down on a bed which was located adjacent to a sofa in the lounge area of the unit. As they did so, the appellant picked up the complainant's telephone and read a message sent to the complainant on Facebook. The complainant had not yet seen the message.

[10] The message asked if the complainant was single. The complainant said when the appellant read the message he "was wild". He swore at the complainant and challenged her as to who had sent the message. The complainant tried to calm the appellant down, repeating "I don't know" because she had not seen the text.

[11] The complainant said the appellant then grabbed a knife from the kitchen and commenced waving it around saying he was going to kill her. He approached the complainant and cut her hand with the knife using a chopping action. This act constituted the offence of unlawful wounding. The complainant said there was blood all over her clothes, on the sofa and on the bed.

[12] The complainant said after she had been struck with the knife the appellant said "I can kill you right now and no-one would know that you're ever gone". He then commenced to strike the complainant with a stick. She was struck in the back of the head and on her arm and leg. As the appellant was striking her with the stick he said "why the fuck do you cheat on me for". The appellant then hit the complainant with a chair three times over the back. In doing so he bent the legs of the chair.

[13] The complainant said she was in considerable pain after being struck with the stick and chair but was made by the appellant to walk into the bathroom to wash her hands and get rid of the blood. The appellant removed her clothes and told her to get into the shower. Whilst in the shower, the complainant commenced crying. The appellant told her "shut up and don't let no-one hear you".

[14] When the complainant left the shower, the appellant gave her his clothes. She wore underpants and shorts together with a T-shirt. She returned to the living area where she sat first on the floor and then on a chair. Whilst she was sitting on the floor, the appellant grabbed her mobile phone and stabbed it with the knife. It broke apart with the force.

[15] Whilst the complainant was sitting in the chair, the appellant was sitting on the mattress. He complained about a photograph the complainant had decorated when she had not decorated their photograph. The complainant said the appellant again got angry and punched her with his closed fist. He "uppercutted" her twice in the eyes. He also punched her in the ear. Whilst doing so the appellant was saying "why you fucking cheat on me for". The complainant said she was trying to convince him what she was telling him was the truth. The appellant still had the knife in his hand. These events constituted the offence of assault occasioning bodily harm.

[16] Eventually, the complainant convinced the appellant to put the knife down. He then left the unit for a brief time before returning back inside. When he returned the complainant was on the bed lying on her back. The appellant said "we'll go to sleep now" and lay down on the bed beside her.

[17] The complainant said after a short time the appellant said "can we have sex". She replied "why do you want to do that for?… 'cause I'm in fucking pain". The complainant said the appellant then pulled down her shorts and underpants to about her knees and rolled her onto her side. She asked "what are you doing", and the

appellant replied "just be quiet". The appellant then placed his penis inside her whilst he was still behind her. The complainant said she was angry and scared. After approximately five minutes, the appellant ejaculated inside her. The complainant said she did not consent to that act of intercourse.

[18] The complainant said after the intercourse ceased, the appellant pulled her clothes back up. After approximately five minutes, the appellant said "let me do it again". The complainant replied "why do you want to – isn't the first time good enough? What, you've got to do it the second time?". The complainant also told the appellant she loved him. She said she was scared and it was "my way of survival". The appellant then did "the same thing [as] the first time". This act also lasted for five minutes. The complainant said she did not consent to that act of intercourse.

[19] After that act was completed, the complainant said she went dizzy and unconscious and went to sleep. She awoke that evening. She remained at the appellant's unit that night and the following day. The complainant said there was "no way out" and she was frightened for her life.

[20] The complainant left the unit on Sunday evening. At that stage, her hand still had an open cut with a shirt wrapped around it. She returned to her home and stayed there until the following Wednesday. Throughout that time the appellant remained in her home with her. The complainant said she could not report what had happened as she was scared something would happen to her.

[21] The complainant said when she did leave the house she saw some police driving to a service station. She walked past them so that they could see "that I had damage to my body". She said her eyes were bloodshot and her hand was cut and had bandaids. She ultimately went with the police to the police station.

[22] In cross-examination the complainant agreed that shortly after she first met the appellant they commenced living together at her home. They would also stay at the appellant's residence. She agreed they were in a relationship. The complainant agreed she told police she was quite tipsy when she returned to the unit with the appellant and his mother.

[23] The complainant also agreed that in her statement to police she was recorded as saying the appellant only hit her with a chair once, not three times and that he hit her in the head and on the ankle but not the arm. The complainant said she had told the police he had struck her three times with the chair, and that he had also struck her arm with the stick. She denied the appellant had slapped her with an open hand across the face rather than punched her. The complainant said when she commenced to bleed the appellant said it was her fault it had happened. She agreed he had said he was sorry. She also agreed the appellant helped her undress in order to have a shower.

[24] In respect of the offences of rape, the complainant accepted in cross-examination that when they initially went to bed the appellant had said "go to sleep now". She denied she had initiated sexual intercourse by placing her hand on the appellant's penis. She also denied she had asked the appellant to help her remove her pants. She agreed on a previous occasion she had said the appellant had asked "do you want me to help you" and had then helped her to take her pants off, slowly, being careful not to hurt her. She denied telling the appellant to get on top of her or that she had placed his penis inside her vagina.

[25] The complainant agreed that after the first act of intercourse she said to the appellant "I love you and I want you for life". She agreed she did not tell police she had said those words to the appellant. She denied she had had consensual sex that evening. She also denied there had only been one act of intercourse. The complainant accepted in evidence that the appellant had left the unit on an occasion. She agreed she remained at the unit at that time.

[26] The appellant's mother gave evidence she did not hear anything on the morning in question. In the days following, she observed the appellant and the complainant together laughing and giggling and talking normally. She agreed she had seen the complainant with two swollen eyes but did not ask her how she had received them.

[27] Two police officers were also called to give evidence. The first, one of the officers who observed the complainant at the service station, confirmed the complainant's first statement to them was a request for a lift into town. The second police officer gave evidence of having interviewed the appellant.

[28] The appellant did not give evidence at trial. However, the lengthy recorded interview with police was tendered as an exhibit and played to the jury. During that interview, the appellant told police he had "slapped" the complainant after what he perceived to be a suspicious message on her telephone. He initially denied damaging the telephone but later admitted he had thrown it "softly" on the ground.

[29] In the interview, the appellant referred to striking the complainant with a stick and a chair. He also mentioned using a knife to injure the complainant. He initially denied having sexual intercourse with the complainant. Towards the end of the interview, he alleged the complainant had initiated sexual intercourse and that they only had sex once. The appellant said he "blame(d) her" as he did not want to have sex with the complainant. He only wanted to sleep.

Appellant's submissions

[30] The appellant submitted the verdict of the jury was unreasonable as the complainant's evidence that she submitted to the acts of intercourse out of fear following the earlier assaults had to be viewed against the background that there was no evidence those assaults were in any way related to a request or demand by the appellant for sex. There was also no evidence their prior relationship involved the use of violence to dominate or overcome the complainant's exercise of free will in respect of sexual intercourse. It was never suggested by the complainant she relayed her lack of consent to the appellant. In those circumstances, the complainant's evidence could not satisfy a jury beyond reasonable doubt that any consent given by the complainant was "obtained" by the appellant by the use of force or other factors set out in s 348 of the *Criminal Code*.

[31] Further, evidence the appellant assisted in removing the complainant's clothes, and that the complainant made statements before at least one of the acts of intercourse that she loved the appellant, must have raised a reasonable doubt as to whether the complainant was consenting, and whether the appellant had an honest and reasonable but mistaken belief she was consenting to the acts of intercourse.

[32] The appellant also submitted the verdict of guilty of one court of rape cannot stand with a verdict of not guilty of the other count of rape as it constitutes an affront to logic and commonsense. The complainant's evidence, in respect of the offences of rape, was, in essence, precisely the same. The two events were said to have occurred within five minutes of each other. There was no reasonable basis for the

jury to be satisfied as to a lack of consent or the exclusion of an honest and reasonable but mistaken belief as to consent in respect of the first count but not the second count. The fact the complainant said she loved the appellant prior to the second act was insufficient to justify different verdicts. Such a conclusion could only result from an inexplicable rejection of part of the complainant's evidence.

[33] Further, the trial judge's directions about consent were insufficient to assist the jury as to whether any consent was obtained by "force or by threat or intimidation or by fear of bodily harm". The directions in respect of a defence of honest and reasonable but mistaken belief were also insufficient as they limited the jury to only parts of the evidence and the fact the appellant was drunk rather than allowing the jury to look at the whole of the evidence, including that the complainant and the appellant were in a relationship, that the previous violence was not connected to the subsequent request for sexual intercourse, the contents of the appellant's interview with police, the lack of complaint and that the complainant had not relayed any objection to the sexual activity to the appellant.

[34] In respect of sentence, the appellant submitted a head sentence of eight years imprisonment for one offence of rape was manifestly excessive as the act of intercourse was not accompanied by any violence or threat. The sentencing judge also erred in concluding there was a lack of remorse for the earlier violence.

Respondent's submissions

[35] The respondent submitted there was no basis to conclude the verdict of the jury was unreasonable and not supported by the evidence. The only issues in the trial were whether the complainant had consented to sexual intercourse and whether the Crown had proven the appellant was not acting under an honest and reasonable mistake of fact. It was a matter for the jury whether they accepted the complainant's evidence. Even if they accepted the complainant did not overtly express she was not consenting to intercourse, the jury could be satisfied, in circumstances where the act of intercourse followed soon after a vicious assault using a variety of implements, that any honest belief that the complainant was consenting was not a reasonable belief in the circumstances.

[36] The respondent also submitted the verdicts were not inconsistent. They do not defy reasonable explanation. By the time of the second act of intercourse, the complainant had expressed her love for the appellant saying she wanted him for life. It was open to the jury to conclude, in circumstances where there was no overt resistance to either act of intercourse, that by the time of the second act of intercourse any honest belief was also a reasonable belief.

[37] The respondent submitted the directions of the trial judge in respect of consent were orthodox and sufficient in the circumstances. The complainant's clear evidence was that she did not consent. The choice for the jury was to accept or reject that evidence and, depending upon their findings, to consider whether the Crown had negatived the defence of honest and reasonable, but mistaken belief. No re-direction was sought by counsel for the appellant at trial.

[38] There was also no misdirection concerning the evidence the jury could consider in respect of the defence of honest and reasonable but mistaken belief. The trial judge's directions focused the jury on the important issues but did not require the jury to ignore everything else. The matters referred to by the appellant were obvious and not of significance. As such, there is no basis to find that in the

absence of an application for re-direction at trial, a miscarriage of justice has resulted from a failure to give the direction now sought by the appellant.

[39] In respect of sentence, the respondent submitted the sentence of eight years imprisonment was not manifestly excessive. The offence of rape occurred after a vicious attack upon the complainant using a stick, a chair and a knife. The appellant made only limited admissions which were not demonstrative of remorse. The appellant also had a significant criminal history.

Discussion

Unreasonable verdicts?

[40] A review of the complainant's evidence reveals she gave clear and unambiguous evidence she did not consent to either act of intercourse. She also clearly asserted her failure to resist was due to fear and/or survival. That evidence could only properly be seen as a reference to the sustained violence inflicted upon her by the use of various implements earlier that morning.

[41] If the jury accepted the complainant's evidence, that evidence was sufficient to establish beyond reasonable doubt that the acts of intercourse referred to by the complainant were non-consensual acts of intercourse with any perceived consent being obtained by threat or intimidation or by fear of bodily harm. Such a consent is not freely and voluntarily given.[1]

[42] The appellant's submission there must be a temporal connection between the infliction of acts of violence and the obtaining of consent is not supported by any authority. It is also inconsistent with the concept of consent in rape. The issue of consent is not determined by reference to the intention of the person inflicting the violence. The issue is whether consent was freely and voluntarily given by the complainant. That involves a consideration of whether the consent of the particular complainant was obtained or induced by the conduct in question.[2]

[43] The issue the jury had to determine, beyond reasonable doubt, was whether any consent by the complainant was obtained or induced by the earlier force or the threat or intimidation of further force should she not comply with the request for sexual intercourse. In determining that question, it was irrelevant whether another may have ignored or resisted a similar threat or what was the intention of the appellant at the time of the infliction of actual violence.

[44] Once it is understood that that was the issue to be considered by the jury when determining whether the complainant had given any consent freely and voluntarily, there is no basis to conclude the jury's verdict was unreasonable or against the weight of the evidence. If the jury accepted the complainant, they could be satisfied beyond reasonable doubt that the act of intercourse occurred without consent.

[45] The inconsistencies and other matters raised by the appellant in respect of whether the complainant's evidence ought to have been accepted were ultimately matters for the jury. It cannot be said it was not reasonably open to the jury, on the whole of the evidence, to accept the complainant's evidence. Once they did, it was open to the jury to be satisfied beyond a reasonable doubt that the appellant was guilty of the offence of rape.[3] That ground fails.

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1 *Criminal Code*, s 348(2).

2 See, generally, *R v PS Shaw* [1995] 2 Qd R 97.

3 *M v The Queen* (1994) 181 CLR 487 at 493.

Inconsistent verdicts?

[46] Differing verdicts of a jury that defy reasonable explanation may indicate a miscarriage of justice. The test was explained in the joint judgment of Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*:[4]

> "… (I)f there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury. … Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside."

[47] A court will be slow to accept a submission that verdicts are inconsistent in the relevant sense. The principles in undertaking an assessment were enunciated by Jerrard JA in *R v CX*:[5]

> "1. Where inconsistency is alleged as to verdicts of acquittal and conviction on different counts, the onus is on the party alleging that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. Where that inconsistency rises to the point that the appellate court considers that intervention is necessary to prevent possible injustice, the relevant conviction will be set aside.
>
> 2. Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts?
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> 3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent in the sense described, and if there is a proper way by which an appellate court can reconcile the verdicts,

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4 (1996) 190 CLR 348 at 367-368.

5 [2006] QCA 409 at [33], cited with approval in *R v CBF* [2012] QCA 294.

> allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted. It is not the role of an appellate court to substitute its opinion of the facts for one which was open to the jury, if there is some evidence to support the verdict alleged to be inconsistent.
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> 4. The view may properly be taken in a criminal trial that different verdicts, claimed to be inconsistent, reveal only that the jury followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, an appellate court can conclude that a jury took a merciful view of the facts on one or more counts, a function which is open to a jury.
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> 5. Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant.
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> …
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> (Citations omitted)

[48] In the present case, the jury found the appellant guilty of one count of rape and not guilty of a second count of rape, where both acts of rape were said to have occurred within minutes of each other. Such a scenario properly raises for consideration the question of inconsistency of verdicts.

[49] Leaving aside the possibility of a merciful view of the facts, there are two possible explanations for the differing verdicts on the counts of rape. First, the jury did not accept the complainant's evidence that there were two acts of intercourse but accepted there was one act of intercourse (as was the appellant's version) which occurred without any consent being freely and voluntarily given by the complainant. Second, the jury accepted the complainant's evidence there were two acts of intercourse but was not satisfied beyond reasonable doubt the prosecution had excluded the appellant had an honest and reasonable but mistaken belief the complainant was consenting to the second act of intercourse.

[50] If the first be the basis for the jury's verdict, it strongly suggests a compromise of the performance of the jury's duty. In order to find the first act of intercourse was non-consensual, the jury had to accept the complainant was reliable and credible. There was no other evidence from which the jury could properly conclude the act of intercourse occurred without consent. The complainant accepted she expressed no resistance to engaging in the act. She did not resist when the appellant asked if she wished him to remove her clothes. She did not resist when he did remove her clothes. She did not resist during the act of intercourse. She also did not say anything which indicated she did not consent to the act.

[51] Against that background, for a jury to accept the complainant's evidence that she did not consent to the first act, but not accept her evidence there were two acts of

intercourse, would be an affront to logic and commonsense. There was no proper basis upon which a jury could accept there was only one act of intercourse, as asserted by the appellant, but also be satisfied beyond reasonable doubt not only that that act of intercourse occurred without consent but also that the prosecution had excluded beyond reasonable doubt that the appellant had an honest and reasonable but mistaken belief the complainant was consenting to that act of intercourse.

[52] If the second be the case, the jury has accepted the complainant's evidence that two acts of intercourse occurred without consent but not been satisfied beyond reasonable doubt the prosecution had excluded that the appellant had an honest and reasonable but mistaken belief the complainant was consenting to the second act of intercourse. That conclusion must follow because if the jury were to have concluded it was not satisfied beyond reasonable doubt the complainant had not consented to the second act, that would again involve an acceptance of part of the complainant's evidence in circumstances where there was no logical basis for the jury to draw a distinction between the reliability of that evidence and her other evidence.

[53] Whilst the evidence of the complainant drew no distinction between the two physical acts of intercourse (both occasions involved a statement by the appellant that he wanted to have sex, a statement by the complainant questioning why he would want to do that when she was in pain, and each act occurring without expressed resistance, either by verbal statements or by physical actions), the complainant's expression of love and wanting to be with the appellant was a significant distinguishing feature.

[54] To draw a distinction between the reasonableness of an honest but mistaken belief held by the appellant, who was intoxicated, as to the complainant consenting to acts of intercourse only minutes apart may seem fine, but there was a rational basis for the jury to draw such a distinction having regard to the complainant's acceptance that she told the appellant prior to the second act of intercourse that she loved him, and wanted to be with him.

[55] Against that background, there was a logical basis for the jury to have drawn a distinction between the first act of rape and the second act of rape. The verdict of guilty to the first act of rape is not an affront to logic or commonsense. This verdict is not inconsistent. This ground also fails.

Inadequate directions?

[56] The trial judge directed the jury:

> "Now, consent is defined as meaning consent freely and voluntarily given by a person with the cognitive capacity to consent. The relevant section goes on to say without limiting that particular subsection, 'A person's consent to an act is not freely and voluntarily given if it is relevantly obtained by force, or by threats or intimidation, or by fear of bodily harm, or by exercise of authority'. In this regard, you need to remember the lapse in time between the violence inflicted upon her and the alleged sexual intercourse giving rise to each count.
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> If you are satisfied beyond reasonable doubt that the complainant did not consent in respect of either or both counts, there is another matter you must consider. Our law provides that a person who does 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 to any greater extent than if the real state of things had been such as the person believed to exist.
>
> In the context of this case, that means you must consider, even though the complainant wasn't consenting, did the defendant in the circumstances honestly and reasonably believe that she was consenting. And the only way to really consider that is to have regard to the relevant parts of the transcript that deal with her response to his overture or overtures of sexual intercourse."

[57] After giving that direction, the trial judge read to the jury the complainant's evidence on these matters. The trial judge then continued:

> "You need to think about whether the prosecution has proved beyond reasonable doubt that the defendant was not acting in an honest but mistaken belief, reasonably held in the way I've described to you that she was consenting. And you also need to look, or have regard to what was said in cross-examination when Ms Growden asks at page 29, 'Do you recall him saying to you, "Do you want me to help you?" talking about your pants?' Answer: 'Yeah'. And a bit lower down, 'And he's' – then there's discussion about him taking off her pants, and there's a question, 'And he's done that slowly, careful not to hurt you, is that right?' Answer: 'Yes'.
>
> Now, Mr Crane then asks some questions, going back to page 15, about the second incident, and relevantly it begins, 'Now, how long did that second – the second time you had sex last for?' Answer – oh, sorry, I've gone too far. I'll go back. It begins a bit higher up. The question is:
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> Page 15 Line 17 to Page 15 Line 34 Read.
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> Now, a mere mistake is not enough. The mistaken belief in consent must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant. In this regard you need to take into account the fact that he had consumed alcohol throughout the evening before the alleged incidents. Indeed, according to the complainant he was intoxicated when they left the nightclub at 5 a.m. To be reasonable the belief must be one held by the defendant in his particular circumstances on reasonable grounds. And that's why you need to look very closely at the response of the complainant; what she said and what she did.
>
> The complainant says that she did not consent. If you accept the complainant's evidence quoted above you might think that the defendant could not have honestly and reasonably believed the complainant was consenting. Remember, however, the onus of proof: it's not for the defendant to prove that he honestly and reasonably believed that the complainant was consenting, but for the prosecution to prove beyond reasonable doubt that the defendant did not honestly and reasonably believe that the complainant was consenting. Accordingly, if the complainant wasn't in fact consenting, you must ask yourself, 'Can I be satisfied beyond

> reasonable doubt that the defendant did not have an honest and reasonable belief that she was consenting?'
>
> If the prosecution have satisfied you beyond reasonable doubt that the defendant did not have such a belief, you must find the defendant guilty. If you're not so satisfied, even though the complainant wasn't consenting, you must find the defendant not guilty."

After giving these directions, the trial judge summarised the rival contentions.

[58] Having regard to the issues, and reference to the complainant's specific evidence on those issues, the directions given in respect of consent were relevant and appropriate. They directed the jury's attention to the issues, in the context of the evidence. In reaching this conclusion it is significant to note there was no request for a re-direction in respect of consent.

[59] The directions in respect of an honest and reasonable but mistaken belief were also adequate, having regard to the issues in dispute. The trial judge directed the jury to specific matters which were appropriate matters for the jury to consider. It cannot reasonably be concluded the direction meant the jury was to consider those matters in isolation of all of the other circumstances of the case. Again, it is significant no re-direction was sought in respect of these matters. These grounds also fail.

Sentence

[60] The applicant was born on 18 June 1982. He was aged 29 years at the time of the offences and 30 years when convicted and sentenced. He has an extensive criminal history, including a number of offences for violence. The present offences were committed whilst the applicant was subject to a partially suspended sentence.

[61] The rape occurred following a vicious attack upon the complainant. That attack involved the use of a stick, a chair and a knife. It resulted in multiple injuries. Following that attack, the complainant was required to engage in a degrading act of intercourse when she was in extreme pain. The applicant was convicted of the offence of rape following a trial.

[62] Relevantly, the trial Judge said in sentencing the applicant:

> "I consider that in view of the serious nature of the offences you have committed, and in light of your personal circumstances, including your appalling criminal history, and in particular the sentences imposed by Judge Harrison on 31 October 2011, significant terms of imprisonment are required to achieve the purposes outlined earlier. It is important for me to have regard to considerations of totality, however, and not impose a crushing sentence.
>
> In respect of the count of rape, you are convicted and sentenced to imprisonment for eight years. In respect of the count of unlawful wounding, you are convicted and sentenced to imprisonment for three years. In respect of the count of assault occasioning bodily harm, you are convicted and sentenced to imprisonment for 18 months. Each of the sentences imposed for unlawful wounding and assault occasioning bodily harm are to be served concurrently with each other and concurrently with the sentence imposed in respect of the count of rape.

> As indicated earlier, I order that you serve the whole of the suspended imprisonment imposed by his Honour Judge Harrison on 31 October 2011, but that this be served concurrently with the other sentences. I declare that 317 days from 21 March 2012 to 31 January 2013, inclusive, spent in custody, solely in relation to the offences in the indictment, is to be imprisonment already served under these sentences. I direct that the registrar inform the Commission of this declaration."

[63] Against that background a sentence of imprisonment of eight years for the offence of rape without a recommendation for early release on parole, cannot be said to be manifestly excessive. That conclusion is reinforced by a consideration of the circumstances that the eight year sentence was to be served concurrently with the suspended sentence previously imposed on the applicant.

[64] The authorities referred to by the applicant support a sentencing range which included a sentence of eight years imprisonment. Whilst a sentence of seven years imprisonment, without a declaration of a serious violent offence, was imposed on an offender of similar age to the appellant in *R v Pryor*,[6] that offender had a somewhat lesser criminal history and the assault did not involve the use of any weapons.

[65] The applicant contended the sentencing judge erred by taking into account the demeanour of the applicant's mother when concluding there was a lack of remorse for the violence, and in failing to take into account evidence of the applicant's apology and attempts by him to tend the plaintiff's wound. However, the sentencing judge's remarks must be viewed in context.

[66] Relevantly, the sentencing judge said:

> "You have a history of sickening violence towards young female partners which was again the subject of serious criminal charges. Your attitude to what you had done was not indicative of serious remorse at the time you were interviewed by police. Quite how you perceive your conduct is unclear. You do get the benefit of the pleas of guilty in respect of counts 1 and 2, but your demeanour in the course of the police interview, the demeanour you exhibited in Court, and indeed your mother's demeanour when she was asked about her reaction to seeing the state of the complainant later on that day leaves me to have serious reservations as to whether you really perceive just how inappropriate your behaviour is. You are a coward, a thug, and your behaviour towards young women is quite frankly sickening and disgraceful. I'm also imposing the sentence to make it clear that community acting through the Court denounces this sort of conduct."

[67] The reference to the demeanour of the applicant's mother occurred in the context of a discussion that the applicant's demeanour, when interviewed and in Court, raised serious reservations about the degree of the applicant's insight into his offending. That is not an irrelevant consideration.

[68] There is no basis to conclude the sentencing judge did not give due and proper regard to all of the relevant circumstances, including those matters raised by counsel for the applicant. The sentence given was within range for an offence of rape, committed following a violent attack resulting in significant injuries, by an offender subject to a suspended period of imprisonment.

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6 [2007] QCA 232.

Orders

[69] I would order:

(a) the appeal against conviction be dismissed;

(b) leave to appeal the sentence be refused.