

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Oakley* [2014] QCA 10

PARTIES: **R**  
**v**  
**OAKLEY, Prince Edgar**  
(appellant)

FILE NO/S: CA No 156 of 2013  
DC No 65 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Rockhampton

DELIVERED ON: 14 February 2014

DELIVERED AT: Brisbane

HEARING DATE: 3 December 2013

JUDGES: Holmes and Morrison JJA and Daubney 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 appellant convicted of assault with intent to commit rape and common assault – where appellant appeals against conviction on ground that verdict was unreasonable and cannot be supported having regard to the evidence – where appellant contends there were discrepancies and inconsistencies within the complainant’s evidence, and contradictions between the complainant’s evidence and that of other witnesses – where the complainant provided explanations for those discrepancies, inconsistencies and contradictions – whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, applied

COUNSEL: C Chowdhury for the appellant  
P J McCarthy for the respondent

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

- [1] **HOLMES JA:** I agree with Morrison JA that it was open to the jury on all of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt, and, like his Honour, would dismiss the appeal.
- [2] **MORRISON JA:** On 13 June 2013 the appellant was convicted on two counts, namely assault with intent to commit rape and common assault. On 17 June 2013 he was sentenced to four years imprisonment in respect of the count for assault with intent to commit rape and three years imprisonment for the count of common assault.
- [3] An appeal is brought against that conviction on the ground that the verdict was unreasonable and cannot be supported having regard to the evidence.

### **General circumstances of the offences**

- [4] The complainant was nearly 22 at the time of the offences, which occurred on 9 April 2010. She had become deaf at the age of two or three, and required the assistance of a sign language interpreter to give her evidence. She had difficulties with lip reading, and only limited ability to speak.
- [5] On the evening of 8 April 2010 the complainant was at her mother's house. Her mother and two sisters were present, though not with the complainant. The complainant was drinking alcohol. Just how much she drank, and of what variety, and with whom she did so, were all matters on which the evidence varied. According to the complainant she was drinking rum and coke from a carton, and she thought that she drank the full carton of between 30 and 36 cans.
- [6] At some point in the evening the applicant, her brother (WG) and his girlfriend (Jessica), together with another man (Damien), met at that house, then decided to go for a drive in a car driven by Jessica.<sup>1</sup>
- [7] They drove around for a while, then decided that they would go fishing. Having retrieved fishing gear they drove to a bridge on the Fitzroy River and while the men fished, the complainant and Jessica stayed at or in the car. According to the complainant there was continued drinking while the fishing went on.
- [8] At some point the appellant approached the complainant and Jessica. The complainant "spoke" with the appellant, who claimed to know her name. When asked how he knew her name, the answer was that the appellant knew the complainant's ex-partner.
- [9] The complainant explained that she could lip read a little bit and identify what the appellant was saying, and "there was kind of signing and Aboriginal sign language".<sup>2</sup> According to the complainant they spoke about the complainant's two children, and her ex-boyfriend. She said they walked near the bridge wall, chatting. The others were standing at the car or fishing.
- [10] Soon after WG said they were ready to go, and the complainant needed to come with them. The complainant responded by saying that she was just trying to talk to the appellant, who kept talking to her. She said it was the appellant who kept talking, while she wanted him to finish so she could leave. According to the

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<sup>1</sup> There was another man, Aly, but he receives little attention in the various versions of events, and did not give evidence.

<sup>2</sup> AB 31.

complainant, the others did not wait, but drove off; she ran and yelled at them to wait for her but they could not hear it.<sup>3</sup>

- [11] The complainant said she was “really stressed out”.<sup>4</sup> She told the appellant that she was going home, and “started walking to the old bridge, but I went the wrong way to head home, so I decided to continue walking across the bridge”.<sup>5</sup> As she was walking that way she realised that she was going the wrong way and stopped on the bridge, and “the man was following behind me”.<sup>6</sup>
- [12] The complainant explained that she walked the wrong way because she was very drunk saying: “I was extremely drunk. I couldn’t even walk properly. I was unstable on my feet”.<sup>7</sup>
- [13] The complainant said that the appellant was walking behind her, and whilst he may have been talking to her, she could not hear him. She said the appellant then “tried to touch my shoulder and my arse, and I said fuck off and I said no, fuck off, don’t touch me”.<sup>8</sup> When asked whether he succeeded in touching her, the answer was: “I remember he put his hand up and touched my arse, and I said fuck off, don’t touch me ever. Leave me alone.”<sup>9</sup>
- [14] The complainant said she kept walking away from the appellant, over the bridge. When they got to the end of the bridge she explained the situation:

“He was still following me – behind me, following me. I was a little drunk. I walked around a corner from Alma Street – into Alma Street, and then I went to an older place. I don’t know who lived in the house. There was an old woman and an older man. [The appellant] walked in and I waited outside of that house. I knew those people.<sup>10</sup> I looked down and put my head down. I didn’t look at them, tried to just leave them there, and then I walked on to the road, and he was still following me.”<sup>11</sup>

- [15] When asked how long the appellant was in the house for, the answer was “It wasn’t too long, but I don’t know”.<sup>12</sup> And then when asked where she was while the appellant was inside, the answer was “I was sitting outside – outside of the gate – just outside of the gate”.<sup>13</sup>
- [16] The complainant said that as she walked away she went through a roundabout and then the appellant attacked her. Her description in evidence-in-chief was as follows:<sup>14</sup>

“He tried to grab me. He tried to hold me down, and he tried to touch me and everything, and I said no. I pushed him away. I tried

<sup>3</sup> How it was that she “yelled” was not the subject of further examination.

<sup>4</sup> AB 31.

<sup>5</sup> AB 31.

<sup>6</sup> AB 32.

<sup>7</sup> AB 32.

<sup>8</sup> AB 32.

<sup>9</sup> AB 33.

<sup>10</sup> In light of what is said in the third sentence, and the passage in paragraph [21] below, this should be understood as meaning she did not know the people.

<sup>11</sup> AB 35.

<sup>12</sup> AB 35.

<sup>13</sup> AB 35.

<sup>14</sup> AB 36.

to push him away from me. I said, “Stop.” I tried to stop him. He said something about seeing his penis, and I said no.

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He was holding me. He grabbed me on the shoulders. He tried to get me to give him a head job, and I pushed back. I said, “No. Fuck off.” I yelled at him. I yelled for help. I kept yelling and yelling and pushing him back. He was very angry. He tried to get his penis out and to get it into my mouth, but he smelt like another woman – it smelt like the vagina of another woman. And I pushed him back. I tried to run away. I tried to run, and I was dizzy. I was a little drunk. I fell over, and then [the appellant] ran and jumped on top of my body, and I was pushing and struggling. He hurt me a lot. I was trying to punch him but I couldn’t hit him. He tried – I tried to kick and he grabbed my hair. He pulled my hair and he did something to me. He tried to grab me all over. I was pushing and pushing, and I tried to yell. I’d hurt my eye from falling over on the road. I had a scratch on the side of my face from that fall, but I was very scared. I tried to hit him. I tried and tried and tried to keep him away from – from doing the head job. He wanted one. He was very angry and I kept banging my knees. He kicked my body. He kicked me in the ribs and I was very sore. I tried to kick him and tried to run away from him, to go to the shopping centre and to hide from him behind a wall.”

[17] The complainant went on to describe that she had been grabbed “from behind on the back, grabbed me and grabbed me again on my hair”.<sup>15</sup> She went on: “He pulled my head really, really hard, and I was down on my knees, and it really hurt. My hair hurt and he tried to pull my mouth towards his penis”.<sup>16</sup> She said she did not see his penis, because it was too dark, however, it was close and smelt awful.

[18] She explained that she got the mark on her face when she “fell over the gutter on the corner”.<sup>17</sup> She repeated that the appellant had jumped on top of her, he was angry and yelling at her, tried to pull her hair, and kicked her in the ribs.

[19] She said she hid behind a wall, “Close to where people walk past the shops”.<sup>18</sup> She was hiding because she did not want the appellant to find her. Then she explained:

“I was popping up and down from behind the wall to have a look and see, but I couldn’t see. So I sat and waited and then I saw it was morning. It was very early in the morning as the sun was coming up.”<sup>19</sup>

[20] Once the sun had come up, the complainant explained that she tried to walk back across “the new bridge, the Fitzroy Bridge”, and stopped in the middle. “I was really sore. My ribs were sore and my eye was sore. I sat down on the bridge and the police arrived, and that’s it.”<sup>20</sup>

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<sup>15</sup> AB 37.

<sup>16</sup> AB 37.

<sup>17</sup> AB 38.

<sup>18</sup> AB 39.

<sup>19</sup> AB 39.

<sup>20</sup> AB 40.

- [21] The police took the complainant to the hospital and arrangements were made for a friend of the complainant to come and interpret. She said she could not remember whether she had told her friend what had happened to her because she was on morphine at the time. Nor could she remember, except vaguely, what she had told the police. However, she said: “I just told the police that some man was trying to rape me, and they said, “Okay. Would you like to come into a police statement (sic) to look at some photos?” And they gave me a line-up.”<sup>21</sup>
- [22] Aspects of the complainant’s evidence which were reinforced or given consistently in her subsequent evidence included:
- (a) the appellant followed her when she went across the bridge, and touched her on the shoulder; she told him to fuck off, and not to touch her ever again, then kept walking; the appellant touched her again and again, “touched me on my arse and I said the same thing as I said before”; she stopped in the middle of the bridge when she realised she was going the wrong way;<sup>22</sup>
  - (b) her description of what took place at the house near Alma Street was that: “There was an old woman and an old man. When I saw them, I put my head down. I didn’t know them. I didn’t really see their face because I had my head down. And I sat down waiting outside. He walked in to do something.”<sup>23</sup>
  - (c) she was “really drunk” and “Very drunk”,<sup>24</sup>
  - (d) when she was talking to the appellant at the fishing spot, the appellant was talking about her ex-boyfriend and her children;<sup>25</sup>
  - (e) when she and the appellant spoke it was by way of a sort of signing and some lip reading;<sup>26</sup>
  - (f) when the appellant came up to the car he claimed to know the complainant by virtue of knowing her previous boyfriend;<sup>27</sup>
  - (g) her brother and Jessica tried to get her to go with them, but the appellant wanted to talk to her some more;<sup>28</sup>
  - (h) while she was talking to him the car left;<sup>29</sup>
  - (i) the complainant’s explanation of her escape from the appellant, where she went to, and how she hid behind the wall close to the shops, was repeated;<sup>30</sup> and
  - (j) her explanation of waiting until it was daylight and then crossing the Fitzroy Bridge, where she stopped and was found by the police, was repeated in essentially the same terms.<sup>31</sup>

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21 AB 41.  
 22 AB 92-93.  
 23 AB 93.  
 24 AB 55.  
 25 AB 90-91.  
 26 AB 77, AB 82.  
 27 AB 81-82.  
 28 AB 82.  
 29 AB 82-83.  
 30 AB 99-100.  
 31 AB 100.

[23] Discrepancies in her version of events, which were highlighted by her subsequent evidence, included:

- (a) that in a police statement given about a year after the event, she had said that she had been drinking the rum and coke with her brother and that he had bought the carton, rather than the complainant; the complainant disagreed with that as being a correct version;<sup>32</sup>
- (b) in previous answers in the Magistrates Court the complainant had said that she was not really drunk, having had only three or four drinks;<sup>33</sup> and
- (c) the complainant said that her brother, Jessica and Damien arrived and they wanted a drink, and they were drinking with her; when pressed on whether 36 cans of rum and coke had been drunk by her, her answer was “I don’t know”.<sup>34</sup>

[24] In cross-examination the complainant recounted the events on the bridge, after she had been left at the fishing spot. She said that she had crossed the bridge in the wrong direction because she was drunk and confused about which way to go. The appellant was behind her

“And he walked and touched me on my shoulder. He had a funny kind of look on his face. I said, what, and he looked like he had a smile like he was trying something on, and I said, fuck off, fuck off, don’t touch me ever, and then I kept walking.”<sup>35</sup>

[25] Then when asked about whether the appellant touched her while she was on the bridge the answer was: “Yeah. And again and again. He touched me on my arse and I said the same thing as I said before.”<sup>36</sup>

[26] She also recounted what occurred when she paused at the house in Alma Street:

“And I walked to Alma Street a bit further along and I stopped, and I checked that I knew where I was going. There was an old woman and an old man. When I saw them, I put my head down. I didn’t know them. I didn’t really see their face because I had my head down. And I sat down waiting outside. He walked in to do something.”<sup>37</sup>

[27] She gave an explanation for why she waited outside the house, though how long she waited was not clear. Her explanation as to that was: “I don’t know. I just stopped and I thought, maybe I should wait and wait until he goes, and then I could stand up and go. I thought if I sat down and waited for him to go, then I could go.”<sup>38</sup>

[28] She was questioned about why she did not seek assistance from the people in the house at Alma Street. She said she didn’t know them and that she was trying to get away from the appellant because he was indicating that he wanted to have sex.

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<sup>32</sup> AB 60.

<sup>33</sup> AB 64.

<sup>34</sup> AB 71.

<sup>35</sup> AB 92.

<sup>36</sup> AB 92.

<sup>37</sup> AB 93.

<sup>38</sup> AB 93.

The reason for not asking for assistance from the old people in the house was: “No, I didn’t know them. I didn’t know who they were, because it looked to me, because [the appellant] went in, like, they might’ve been family. I didn’t know who they were.”<sup>39</sup>

- [29] Cross-examination gave the complainant another opportunity to recount what occurred after she walked away from outside the house in Alma Street. She said the appellant caught up with her and then:

“He pushed me. I fell over. He looked like he was angry and I said, “No, I don’t want to have sex with you. I don’t want to fuck with you.” I pushed with him. I tried to push him, and he tried to hit me. I had my hands up and he was pounding on me and punching on me. He looked like he was angry. He looked very, very angry – more and more angry. And then he pulled my hair and I was on my knees crawling – I was on my knees. I was kneeling down, and it was really sore, and I had a lot of pain because he kicked me in my ribs, and he pulled me. He tried to get me to do something to his penis, and I said no and pushed him back.

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I had a scratch on the side of my face from falling on the road, and I rolled over, and he looked really angry and jumped on top of me – and jumped on top of me and punched me. He was angrier and angrier. He kicked me ---”<sup>40</sup>

- [30] The cross-examination of the complainant also exposed a number of areas where she had poor recollection. This included the times at which events occurred, what she had said to the police and in the Magistrates Court on a previous occasion, whether she had had 30 or 36 cans of rum and coke to drink, where the cars were parked at the fishing spot, and how long she hid behind the wall near the shops.
- [31] A close examination of the transcript of her evidence reveals that the areas of poor recollection were mostly to do with the timing of events on the evening. For instance, what time she arrived at her mother’s place, what time they left to go for a drive, what time they arrived to fish, and what time they left from the fishing spot, were all areas where her recollection was poor.
- [32] The same cannot be said of her evidence in relation to the events concerning the appellant, what he did, and the sequence of those events. In all of those respects her evidence did not reveal poor recollection. It was undoubtedly the case that she disagreed with a number of propositions put to her but that was because she evidently rejected the propositions as being accurate.

### **Early complaint to others**

- [33] Evidence was given at the trial by a friend of the complainant who was asked to go to the hospital to assist in interpreting as between the complainant and the medical staff. The account that the complainant gave to her whilst at the hospital closely followed the complainant’s own evidence (with some slight differences):<sup>41</sup>

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<sup>39</sup> AB 95.

<sup>40</sup> AB 96-97.

<sup>41</sup> AB 117-118.

“She said that herself, her brother, a friend of hers (sic) and his partner they all went fishing at about 9.30, 10 o’clock-ish underneath a bridge somewhere. And they were drinking and fishing and then the – [appellant] ... was there as well. And they were getting in the car ready to go and they – she said that they were asking her to get into the car, and she was saying just wait, just wait a minute. I don’t know why, but that’s what she said. And then – and then they drove off and then she was – she was left there. And then they had a bottle of alcohol or something and that he was trying to take it off her, and she got up and she said, no, I’m going to my mum’s, and then he got up and he followed her and then grabbed her on the shoulder and she said, don’t f’in’ touch me.

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don’t fuckin’ touch me. Leave me alone. And she kept walking and then he grabbed her by the hair and ripped her back and grabbed her breasts, the front of her, and then grabbed her head and tried to force her to give him head is what she said to me. And then when she tried to push him away and wouldn’t do it that he’d – he’d hit her in the face and kneed [her] a few times. And then she – she tried to get away from him again and pushed him away, and she finally got away and she ran across the bridge away from – like away from her mum’s house to go and hide, and she said that she hid in a bush somewhere until she couldn’t see him any longer. And then she got up and she started to head back across the bridge to head towards her mum’s house, and she stopped halfway because she felt really sore and sick in the stomach, and that she dropped and then a police officer, I think, came or somebody came and rung an ambulance ...”

- [34] Absent from the account given to the friend was the reference to stopping outside the old persons’ house. Matters that were in that account, but not mentioned by the complainant in her own evidence, were: the specific reference to being grabbed on the breasts; and the reference to the appellant trying to take a bottle from her.
- [35] When the police found the complainant on the bridge, a police officer tried to speak to her, but realised she had trouble communicating. Therefore he asked her to write in his notebook. What she wrote was “One black hurt me”.<sup>42</sup> The police officer gave evidence that the complainant at that time was quite upset, and appeared to have been crying. She had an injury to her eye, and he assessed her demeanour at the time as being “that she was quite scared”.<sup>43</sup>
- [36] The examining doctor at the hospital gave evidence. She took a brief history via the interpreter, which was that the complainant had been “grabbed at her breast, punched and kneed into the stomach”.<sup>44</sup> On examination, both physically and by x-ray and ultrasound scan, the doctor detected a soft tissue injury under the complainant’s right eye, with a graze and some swelling being present. She had abdominal pain across the lower abdomen supra-pubically, and some pain in both her of flanks. There was no obvious visible bruising on the abdomen. An

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<sup>42</sup> AB 127.

<sup>43</sup> AB 128.

<sup>44</sup> AB 148-149.

ultrasound scan was done of the abdomen, it showing that it was unlikely that there was any organ damage. A chest x-ray was done which revealed an old fracture to one of the ribs, but no air under the diaphragm or gas above it.

[37] The doctor described the graze under her right eye as being “sort of on the cheekbone” and “sort of like a gravel rash”.<sup>45</sup> Whilst the doctor did not find any bruising or swelling to the lower abdomen the complainant was tender to palpation.

[38] The history taken by the doctor was that:

“... she was walking home from town on her own early in the morning and a man was following her. ... Repeatedly asking her for sex ... She said no and yelled at him to fuck off ... Repeatedly ... He chased her and grabbed at her breast ... Punched her and kneed her in the stomach as she fought him off.”<sup>46</sup>

### **Evidence of other witnesses**

[39] The complainant’s brother, WG, gave evidence. He said that he, the complainant, Damien, Jessica and Aly were drinking beer at his mother’s house. Eventually they decided to go fishing and did so, though he could not remember precisely what time that was. Jessica and the complainant stayed in the car because they didn’t want to be bitten by mosquitoes. The appellant arrived and the complainant got out of the car. WG walked over to see who the person was, and the appellant identified himself. He said that the complainant “thought she knew him and ... she started talking and, of course, she was a bit drunk and she’s loud”.<sup>47</sup> He said the complainant and the appellant were “talking pretty good”, and they seemed to be getting on well, and “it seemed pretty good to me and I thought they were friends”.<sup>48</sup> When the others came to leave, WG insisted that the complainant go with them, but she said “no I’m staying here. I’m going this way. ... Going drinking.”<sup>49</sup> WG explained that the conversation involved a combination of lip reading and signing and the complainant using her voice to some extent.

[40] In cross-examination WG said he could not remember if anyone was drinking rum and coke, and having said he could not remember some other events, said: “I can’t even remember last week”.<sup>50</sup>

[41] WG’s description of the complainant was that she was not very drunk. He said he could remember her having a fall on the river bank even though the events were some three years ago. He said that he did not leave the complainant there by mistake, because she resisted when he urged her to come home.

[42] When cross-examined about the complainant having fallen and rolled down the bank, he disagreed that she had hurt her eye or cheek bone at that time. He said that she did not injure her face there, she was not complaining of any injuries, and was not complaining of pain in her stomach or anything like that.

[43] Jessica gave evidence as to the events as well. She said all of the people present at the house were drinking and talking, but she was having a glass of soft drink and

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<sup>45</sup> AB 149.

<sup>46</sup> AB 156.

<sup>47</sup> AB 163.

<sup>48</sup> AB 163.

<sup>49</sup> AB 165.

<sup>50</sup> AB 168.

chatting to the complainant's mother. She saw the complainant drinking while she was there. After that they went fishing, and because they were being bitten by mosquitoes she and the complainant were sitting in the car and talking. At that point the appellant arrived and the complainant "signed to me and told me that she knew the fellow ... she hopped out and sat on the ground near my tyre on the passenger side."<sup>51</sup> When it came time to leave WG tried to get the complainant to come in the car, but she would not do so: "Only WG went – went back up to the bridge after we'd packed the car up and she – he come back and said she didn't want to leave with us".<sup>52</sup> Her description of the complainant was that she seemed pretty steady on her feet, and she had not observed her to be highly intoxicated. Jessica agreed that at one stage the complainant took a tumble at the fishing spot, tumbling back and rolling down the bank of the river. She did not observe any injuries on the complainant, and was not aware of whether or not she had sustained any.

- [44] Damien gave evidence as well. He said that they all met at the house of the complainant's mother, and had a few drinks. He knew that the complainant had some drinks, but did not know how many or what. He described the fishing trip and the arrival of the appellant, in terms fairly consistent with those of WG and Jessica. The complainant got out and was talking to the appellant, and Damien went up to speak to them as well. Nothing of consequence was said between Damien and the appellant. He found it hard to understand what the appellant and the complainant were talking about.<sup>53</sup> He then described WG telling them that the complainant was not coming and wanted to stay, so they left to go home.
- [45] When asked if he could recall whether the complainant had taken a tumble at the fishing spot, he said that he could not recall. He also accepted that there was no mention in his police statement about the complainant taking a tumble. Cross-examination continued by reference to the committal proceeding where his evidence was that the complainant had tumbled down the hill, and he was asked whether that assisted his memory. His answer was: "I don't recall that at the moment, but I might have last time when I went to Court".<sup>54</sup> He could not recall what time they went fishing, or how long they stayed there. He described the complainant as not being "rolling over drunk", nor as intoxicated as he and WG.<sup>55</sup>

### **The appellant's contentions**

- [46] The appellant submitted that the complainant's account is simply implausible. She could not have consumed all of the 36 cans in the carton, and, as it was put to her, she was making herself out to be far more drunk than she actually was, in order to explain away the inconsistencies in her account. Those inconsistencies or unsatisfactory aspects of her evidence included:
- (a) no satisfactory explanation as to why she walked away from the fishing spot, in the wrong direction;
  - (b) no satisfactory explanation of why she would walk as far as Alma Street, rather than simply turn back when she realised she was going in the wrong direction;

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<sup>51</sup> AB 184.

<sup>52</sup> AB 185.

<sup>53</sup> This was because of the signing, which he could not understand.

<sup>54</sup> AB 210.

<sup>55</sup> AB 217.

- (c) no satisfactory explanation as to why she waited outside the Alma Street house, and did not seek assistance from the old couple;
- (d) the lack of physical injury was inconsistent with the description she gave of the attack upon her; significantly, there was no complaint that the graze or swelling to the eye was a result of being assaulted by a punch, or a blow to the face, but rather from falling on to the road;
- (e) the time gap between the assaults and when she was located on the bridge was about seven to eight hours, during which time there was no attempt to flag down any passing cars, go to a telephone box or even to walk to a police station or somewhere else for assistance;
- (f) there were inconsistencies between the accounts she gave to her interpreter on the night of the attack, the police and the examining doctor; and
- (g) whilst she had described her breasts being grabbed to the interpreter on the night, there was no mention in her own evidence of that happening.

[47] It was also contended that the complainant's evidence was contradicted by a number of witnesses on crucial matters which included:

- (a) she said she did not know the appellant before that night, whilst Jessica and Damien both gave evidence that she said something to the effect that she knew the appellant, or the appellant was "a mate that I know";
- (b) her insistence that she was very drunk was not supported by WG, Jessica or Damien;
- (c) the complainant gave evidence that she was left behind by the others when they went home from the fishing spot, whereas the account of the others was that WG (her brother) tried to persuade her to come home, but she refused;
- (d) there was evidence that she had taken a fall at the river bank and the injuries to her eye could have occurred in that fall; and
- (e) there were contradictions about who was drinking, what was being drunk and how drunk she was.

[48] In support of those submissions an extensive summary of evidence was handed up detailing all of the alleged inconsistencies and contradictions.

[49] The appellant relied upon the High Court decision in *M v The Queen*<sup>56</sup> where the following was said in the joint judgment of Mason CJ, Deane, Dawson and Toohey JJ:

“[W]here the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to

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<sup>56</sup> *M v The Queen* (1994) 181 CLR 487, at 494-5.

have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.”<sup>57</sup>

### Discussion

[50] The aspects of the evidence to which I have referred above show that there were, in truth, a number of discrepancies and inconsistencies within the complainant’s own evidence, and when her evidence was compared with that of the other persons there on the night. Principal among them are the differing accounts of how much the complainant drank, and to what extent she was inebriated. Further, there is the difference between whether she was left behind at the fishing spot, or declined to go because she was talking with the appellant. An additional aspect is that on her account when she walked away she walked in completely the wrong direction; a fact which the appellant contends is implausible unless her account is wrong.

[51] However, the complainant did explain some of those matters that are attacked by the appellant’s contentions. She said she was simply confused when she walked off in the wrong direction over the bridge. On her account she was being followed in an unwanted way, and the appellant was making approaches to her which were not welcome. She explained her decision to go across the bridge as the product of confusion:

“I thought, well, crap, I have to walk around and I needed to go over the new bridge ‘cause it was closer to go home that way. It was easier for me to walk that way ... I don’t know [why I did not turn back]. I was confused ... I didn’t remember where I needed to go.”<sup>58</sup>

[52] When she was outside the house in Alma Street, and the appellant went inside, the complainant explained that she did not know the old couple who were in the house, and thought they might be family members of the appellant. That was given by her as an explanation for why she did not speak to them, and in the circumstances that explanation could well have been accepted as reasonable by the jury. After all, she had been the subject of unwanted approaches by the appellant, including being touched in an inappropriate way. It is not difficult to accept that she would have been hesitant to seek assistance from people who might have been related to the appellant. Her evidence otherwise as to what occurred at that house is quite consistent with her desiring to be rid of the appellant. She said he went inside and if she waited for him to be gone, then she could leave as well. She tried to do so, but the appellant followed her.

[53] These explanations were ones which a jury could accept.

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<sup>57</sup> Internal references omitted.

<sup>58</sup> AB 93.

- [54] I do not consider that the lack of physical injuries creates the difficulty for which the appellant contends. No witness suggested that the injury to her eye was sustained in the fall at the river bank. It is entirely consistent with her description of being attacked, and falling or being pushed on to the road. The injuries found included tenderness to the abdomen,<sup>59</sup> and the injury to her eye. The history given by the complainant, and the result of the physical examination by the doctor, led to further tests being done on the abdomen by way of an ultrasound scan, and on the chest by way of an x-ray. Clearly the doctor was trying to see if there were internal injuries in both the abdomen and the chest. That is entirely consistent with the complainant's evidence of what happened to her, namely that she was kicked in the ribs and in the abdomen.
- [55] The appellant made much of the fact that there was a considerable time gap between when the alleged assaults occurred, and when she left her place of hiding to cross the bridge in the morning. In my view there are explanations within the evidence which could well lead a jury to discount this as detracting from the acceptability of her evidence otherwise. First, whatever the state of the evidence as to precisely how much was drunk, all witnesses accepted that the complainant was intoxicated to some degree. She may well have fallen asleep at her hiding place. Secondly, to assert the particular time gap is to place greater precision, in a reconstructed way, on the sequence of events and timing, when no witness was accurate as to the time. Thirdly, the time gap is diminished in significance in light of the evidence of the injury. The jury may well have thought what does it matter what the time delay was, if the injury occurred as the complainant said?
- [56] Of greater significance, in my opinion, is the fact that throughout her evidence the complainant's account of how she was attacked by the appellant was entirely consistent. Notwithstanding a very detailed and rigorous cross-examination, the complainant gave a coherent and consistent account of the appellant's attack, its nature and effect.
- [57] Further, there was corroboration of her evidence from her early complaint to the police, her friend at the hospital, and to the doctor. What was said by the complainant then was consistent with her evidence of the attack by the appellant. Even the short account that she wrote in the police notebook, namely "one black hurt me", coupled with the police officer's evidence that she was in a distressed state and scared, lends support for her version of events.
- [58] In my opinion it was open to the jury to accept and act upon that core consistency of the complainant's evidence, supported by her early complaint, and supported by the medical evidence. I do not consider that the inconsistencies and contradictions to which the appellant points are so great that it could prevent a jury, properly directed, from accepting the complainant's evidence and convicting the appellant. Put in terms of the High Court decision of *M v The Queen*, in my opinion it was open to the jury to be satisfied on the whole of the evidence, beyond reasonable doubt, that the appellant was guilty. I am by no means persuaded that there is a significant possibility that an innocent person has been convicted.

### **Disposition**

- [59] For the reasons given above I would dismiss the appeal.
- [60] **DAUBNEY J:** I also agree with Morrison JA.

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<sup>59</sup> Identified by physical examination, though there was no bruising.