SUPREME COURT OF QUEENSLAND

CITATION:	*R v Postchild* [2014] QCA 91
PARTIES:	**R** **v** **POSTCHILD, Jay Michael Henry** (appellant)
FILE NO/S:	CA No 44 of 2013 DC No 36 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	29 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2014
JUDGES:	Margaret McMurdo P and A Lyons and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of the rape of his girlfriend – where the appellant claimed the complainant was not a credible or reliable witness – where the appellant claimed DNA testing of the duct tape used to tie the complainant's hands should have been conducted – whether the jury's verdict was unsafe or unreasonable in light of the evidence *M v The Queen* (1994) 181 CLR 487, [1994] HCA 63, cited *Michaelides v The Queen* (2013) 87 ALJR 456; (2013) 296 ALR 1; [2013] HCA 9, cited *R v Postchild* [2013] QCA 227, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited
COUNSEL:	The appellant appeared on his own behalf P J McCarthy for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** This appeal against conviction should be dismissed for the reasons given by Applegarth J.

[2] **ANN LYONS J:** I agree with the reasons of Applegarth J and the order proposed.

[3] **APPLEGARTH J:** The appellant was convicted of raping his then girlfriend, Ms A, on 10 May 2012. There is no dispute that on that night the appellant tied each of Ms A's wrists to slats on a bedhead with duct tape. The only issue at trial was whether Ms A consented to the sexual intercourse that followed.

[4] The appellant alleges the verdict was unsafe and unsatisfactory, and points to what are said to be discrepancies and inadequacies in the evidence. The issue for this Court is whether it was open to the jury to be satisfied beyond reasonable doubt that the sexual intercourse was without Ms A's consent.

The evidence

[5] Ms A and the appellant formed a relationship in February 2012. She was 19 years old and had a young son. She maintained contact with her child's father, Mr R, and still had feelings for him.

[6] The complainant and the appellant had first met when she was 14 or 15, but they did not reconnect until early 2012. In February that year they started a relationship and the appellant moved from Mackay to live with Ms A in her country town. He moved into a house which the complainant and her son shared with another woman and that woman's young child. The woman and her child moved out in late April.

[7] The relationship between the complainant and the appellant took a turn for the worse on Thursday, 10 May 2012. They took Ms A's child to his father in another town for an access visit. The complainant went inside Mr R's home and spent a long time talking to him. The appellant was left sitting in the car for this time. When the complainant returned, the appellant was hostile towards her because of the amount of time she had spent with Mr R. On the way home in the car the complainant and the appellant had an argument, and the appellant threatened her if she ever got back with Mr R.

[8] When they returned to their home they did not speak to each other for some time. But later that evening the complainant told the appellant that she was still in love with Mr R and could not help her feelings for him because he was her son's father. At around 7.30 pm, after the argument, Ms A went to bed wearing underwear, long pants and a t-shirt. At around 9.00 or 9.30 pm she was awoken by the appellant. As she described it, he was "hitting her up for sex". She told him to "fuck off" and moved away from him in the bed. He complained that she did not love him because she did not give him sex.

[9] According to the complainant, she continued to make it clear that she had no intention of having sex with the appellant. He then grabbed her, rolled her onto her back and removed her shirt. He then straddled her, placing his knees onto her shoulders and used duct tape to fasten her hands to the slats of the bedhead. Ms A protested. Her left hand was tied particularly tight and she lost all feeling in it. The appellant told her he was going to have sex with her, no matter what. He removed her pants and undressed himself. The appellant began screaming and crying. The appellant obtained more tape and put it over her mouth. He inserted his penis into

her vagina. After having sex with her, the appellant rolled off the complainant and removed the duct tape from her mouth and arms. He asked her if he had hurt her, but Ms A did not respond. Her left hip hurt and she was in too much pain to get out of bed and put her clothes on. The whole incident lasted some five to ten minutes, but the complainant said that it "felt like forever". The appellant fell asleep. The complainant was left with a throbbing and bruised left wrist.

[10] The next day, Friday, 11 May 2012, the appellant and the complainant picked up one of her friends, Ms D, from work. As they were driving back to town, Ms D noticed the bruising on the complainant's wrist and asked what had happened. The complainant said "Yeah, Jay. What happened?". According to the complainant, he replied "I raped her" and laughed. Ms D's recollection was that the appellant jokingly said that he had "rape taped her to the bed". Ms D saw tape residue on the complainant's wrists.

[11] Saturday, 12 May 2012 was the appellant's birthday. A birthday party had been arranged for him, but the complainant ignored him for the most of the day. The people at the party, including the complainant, became very drunk. Games of truth or dare were played and some of the embarrassing scenes were recorded on the appellant's phone.

[12] That night, the complainant told Ms D that the appellant had forced himself onto her, had taped her to the bed and had raped her. The complainant resolved to end her relationship with the appellant. She had had enough of him. During that night she had had no interactions with him save for an occasion when she kissed him once for his birthday. She did this because he was annoyed that she had not done so earlier. Either late Saturday night, or in the early hours of Sunday, 13 May 2012, the appellant and the complainant had an argument. She told him that the relationship was over and asked him to leave the house.

[13] Sunday, 13 May 2012 was Mother's Day. The complainant spent the day with her son and Mr R at the coast. By the time she returned home that night, the appellant had left.

[14] When the complainant was with Mr R that Sunday, she told him that the appellant had tied her up and raped her. He advised her to tell the police. But the complainant was reluctant to do so. She explained at the trial that she did not know that you could make a rape complaint against someone that you were in a relationship with. She thought this was something that you would "have to put up with". She also did not know how to tell people what had happened and wondered whether they were going to believe her. She was also concerned about putting herself through the trial process. Ms D detected the complainant's hesitation about making a report to the police. It took the complainant a few days to do so. She went to the police on Thursday, 17 May 2012.

[15] The police investigated the matter, and went to the appellant's home where pieces of duct tape were found in a rubbish bin in the bedroom. It seems that the appellant did not participate in an interview with police. At least, no record of interview became an exhibit.

[16] The appellant did not give evidence at his trial. Defence counsel tendered the video recording made on the appellant's phone on the night of the appellant's birthday party. However, no other evidence was relied upon by the defence.

[17] The jury were instructed about relevant matters, including the fact that the prosecution had to prove beyond reasonable doubt that the complainant did not consent. The jury were told that they had to accept the complainant's version of events beyond reasonable doubt and accept the prosecution case that the duct taping and the sex happened without the complainant's consent. No complaint was made about the summing up.

The appeal against conviction

[18] The appellant was convicted on 5 February 2013. On 4 March 2013, a notice of appeal was filed by the appellant's then solicitors which contended that the verdict was unsafe and unsatisfactory and that the evidence "contained discrepancies, displayed inadequacies, is tainted or otherwise lacked probative force". An application to appeal against sentence also was lodged. On 16 July 2013, the sentence appeal was heard. The appeal against conviction was adjourned to a date to be fixed. The appellant's appeal against sentence was dismissed on 20 August 2013.[1]

[19] The appellant did not obtain legal aid for his appeal against conviction. However, he raised certain matters in November 2013 and, when the appeal against conviction came on for hearing on 3 December 2013 he was granted an adjournment to allow solicitors to consider the points raised by him and to consider filing an amended notice of appeal. However, no amended notice of appeal was filed. Legal aid was not extended beyond providing an advice on prospects, and the appellant was told in December 2013 that he would not have a grant of legal aid for his appeal against conviction. He was self-represented at the hearing on 31 March 2014. He made an application for a further adjournment which was declined.

[20] The appellant raised a number of matters upon the hearing of his appeal in support of his argument that the verdict of the jury was unsafe or unreasonable.

The credibility and reliability of Ms A's evidence

[21] The appellant said that the complainant's evidence about being "very controlling", of not allowing her to go anywhere by herself and wanting to have control over nearly everything she did was inconsistent with the evidence of Ms D, who gave evidence of not having noticed the appellant dominating the complainant. Ms D did not detect that the complainant was afraid of the appellant during their relationship. Ms D's observation of the complainant was of someone who could be very persistent in getting what she wanted done and that she was a "very dominant person".

[22] There was an apparent inconsistency between the complainant's evidence of the appellant being "very controlling" and Ms D's evidence that she did not observe the appellant dominating the complainant. The possibility exists that the appellant was more controlling of the complainant behind closed doors, or when they were not in company with Ms D and others, than he appeared on other occasions. However, the evidence left open the possibility that Ms A exaggerated the extent to which the appellant sought to control her and her activities. The jury was able to assess this apparent or actual inconsistency. Even if the jury found the evidence of the complainant and Ms D inconsistent in this regard, then it would not necessarily render the complainant's evidence as a whole unreliable or incredible.

[23] There was a marked degree of consistency between the evidence of the complainant and Ms D about events. The one difference between their evidence to which the

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1 *R v Postchild* [2013] QCA 227.

appellant pointed in his submissions does not suggest that the appellant's evidence was tainted or otherwise lacked probative force. It does not provide a sufficient basis to conclude that the verdict was unsafe and unsatisfactory. The complainant's evidence was not internally inconsistent. Her credibility was bolstered by the consistency of the account that she gave to others, such as Ms D, Mr R and the police about what had occurred.

[24] The appellant sought to rely upon the recording that was made at the birthday party, and the fact that the complainant was upset when she learnt that the recording, which put her and others in an embarrassing light, had not been deleted. He seemingly relies upon the complainant's behaviour at the party as inconsistent with her having been raped a few days earlier. However, this argument lacks substance. The complainant was heavily intoxicated on the night in question. The evidence was that she was distinctly unfriendly towards the appellant that night. They had a fight and the appellant was told that the relationship was over and that he had to move out. The episode recorded on the phone and which became exhibit 6 did not discredit the complainant's account of being raped.

[25] At trial the defence attempted to argue that the rape complaint was part of an attempt to get rid of the appellant as the complainant's boyfriend. The competing argument, which presumably was persuasive to the jury, was that she had no need to go to the police to complain about being raped in order to get rid of the appellant. He had left her home by the evening of Sunday, 12 May 2012.

[26] It was open to the jury to find the complainant a credible and reliable witness on the issue of consent.

Injuries to the complainant

[27] The complainant was examined at her local hospital by a doctor on 17 May 2012. The medical superintendent of the hospital gave evidence of the matters in the hospital's records. Defence counsel did not complain about this course or the admissibility of the doctor's evidence. There was no request made for the doctor who undertook the examination to be called. Arguably, the defence benefited from the evidence that was called. The doctor gave evidence that there was no obvious bruising on the left wrist, and no other signs of injury. He explained that it was possible for there to be no bruising or bleeding a week after such an event. The medical records reported that the complainant had experienced pain. The doctor who gave evidence acknowledged under cross-examination that there was no other objective evidence. His evidence was that he could not say definitely whether or not there would have been pain or bruising in the scenarios that were put to him.

[28] Bruising to the complainant's left wrist was seen by her friend the next day. The complainant explained why she did not report matters immediately to the police and the medical evidence explained why there might be no signs of injury a week after the event. The absence of observable bruising and other injuries a week after the alleged rape was not sufficient to raise a reasonable doubt so as to render the verdict unreasonable.

Duct tape and DNA testing

[29] When police visited the complainant's bedroom and executed a search warrant on 17 May 2012, they collected several lengths of duct tape. Four were taken from a bin in the corner of the main bedroom.

[30] During the trial the jury raised a question about whether the complainant's saliva and/or facial or arm hair was found or examined by forensics. It was not, for reasons which were given by a forensic science officer at the trial. On his appeal, the appellant again raised the issue of why police did not DNA test the tape.

[31] The prosecutor pointed out to the trial judge that, due to early advice from the defence solicitors, the use of the tape was not in issue and, therefore, testing was not deemed necessary because the accused did not dispute using the tape. In any event, Mr Wilson, a forensic biologist, provided evidence that, even if such testing had been done, current technology could not differentiate between different epithelial cells. Such testing as might have been done would have been inconclusive as to whether the tape was placed over the mouth or wrists. If hair had been found on the tape then it would have been difficult to determine from where the hair had originated. Also, because the duct tape had been bundled together and left in the bin, DNA could have been transferred from one surface to the next. DNA from one piece of tape could contaminate the DNA on the other piece of tape.

[32] The lack of DNA evidence was explained and the absence of DNA evidence did not constitute a discrepancy in the evidence which made it unreasonable for the jury to convict.

The length of the tape

[33] The appellant asserted upon his appeal that no "gag piece of tape" was recovered and that, in her evidence, the complainant claimed that she was gagged with a piece of tape roughly 10 or 15 centimetres long. A piece of tape that length was in evidence.

[34] These matters were not issues at trial. Contrary to the appellant's assertion, the complainant did not give evidence at the trial about the length of the tape that was used to gag her. Ms A was not cross-examined at the trial about the length of the tape that was used to gag her. It was open to the jury to conclude that one of the pieces of tape that was recovered was used to gag her.

Conclusion

[35] Directions impressed upon the jury that they had to be satisfied beyond reasonable doubt that the complainant did not consent. It was open to the jury to conclude that the complainant was a credible and reliable witness in relation to the absence of consent, and that the credibility of her evidence in that regard was bolstered by other evidence.

[36] In *M v The Queen*[2] the High Court stated:

> "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"

The evidence does not have these features

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[2] (1994) 181 CLR 487 at 494; confirmed in later cases including *Michaelides v The Queen* (2013) 296 ALR 1 and *SKA v The Queen* (2011) 243 CLR 400.

[37] The points raised by the appellant do not persuade me that the jury's verdict was unreasonable in the sense of being unsafe and unsatisfactory. In that context one starts with the proposition that the jury is the body entrusted with the responsibility of determining guilt or innocence, and the jury had the benefit of having seen and heard the witnesses.[3] It was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that the complainant did not consent to sexual intercourse with the appellant on the night of 10 May 2012.

[38] I would order that the appeal against conviction be dismissed.

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3 *SKA v The Queen* (2011) 243 CLR 400 at 405 [13].