SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baldwin* [2014] QCA 186
PARTIES:	**R** **v** **BALDWIN, Ian David** (appellant/applicant)
FILE NO/S:	CA No 269 of 2013 DC No 122 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	8 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 July 2014
JUDGES:	Fraser and Morrison JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was found guilty after trial of indecent assault – where the appellant argues a miscarriage of justice was occasioned by the trial judge's failure to direct the jury about s 24(1) of the *Criminal Code* – where at trial defence counsel had put the defence case as that the conduct charged as an indecent assault had not happened – whether the evidence at trial raised a case that the appellant honestly and reasonably but mistakenly believed that the complainant consented to the appellant's conduct CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was found guilty after trial of indecent assault and was sentenced to three months imprisonment wholly suspended for an operational period of two years – where defence counsel had advocated against community service or probation due to the appellant's

	poor cognitive capacity and inability to work, and advocated for a good behaviour bond – where the appellant does not consent to a sentence of community service or probation, argues a good behaviour bond is appropriate and, further, that an operational period of two years is excessive – whether the sentence of imprisonment imposed was manifestly excessive
	Criminal Code 1899 (Qld), s 24(1)
	Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, cited *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, cited *R v Cutts* [2005] QCA 306, cited *R v Getachew* (2012) 248 CLR 22; [2012] HCA 10, cited *R v Jones* [2003] QCA 450, distinguished *R v Millar* [2000] 1 Qd R 437; [1998] QCA 276, cited *R v Owen* [2008] QCA 171, distinguished *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, cited *Stevens v The Queen* (2005) 227 CLR 319; [2005] HCA 65, cited
COUNSEL:	C W Heaton QC for the appellant/applicant M R Byrne QC for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant/applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was found guilty by a jury at a District Court trial of unlawfully and indecently assaulting the complainant. He was sentenced to three months' imprisonment, wholly suspended for an operational period of two years. Two days of pre-sentence custody were declared to be time served under the sentence. The appellant has appealed against his conviction and he has applied for leave to appeal against the sentence.

The issue in the conviction appeal

[2] The sole ground of the appellant's appeal against conviction is that a miscarriage of justice was occasioned by the trial judge's failure to direct the jury about s 24(1) of the *Criminal Code*. Section 24(1) provides: "A person who does or omits to do 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 or omission to any greater extent than if the real state of things had been such as the person believed to exist."

[3] The question in this appeal is whether or not there was an issue at the trial whether, in terms of s 24(1), the appellant honestly and reasonably but mistakenly believed that the complainant consented to the appellant's conduct.

The relevant evidence

[4] At the time of the alleged offence on 19 May 2011 the complainant was 20 years old and the appellant was 39 years old. The trial was held on 5 September 2011. The appellant did not give or call evidence.

[5] The complainant gave evidence that the appellant contacted the complainant in response to her advertisement seeking a room in which to live. After they met on 18 May 2011 by arrangement at a shopping centre, the appellant drove the complainant to his house. In the lounge area the appellant offered the complainant a beer. There was talk of the complainant's facial piercings. The appellant asked the complainant what was her most painful piercing. She responded that it would have been her nipple piercing. The appellant asked her to show it to him. The complainant responded, "no, I have a boyfriend". (In cross examination the complainant said that her response was, "of course not, and I have a boyfriend").

[6] The complainant asked to see the available room. The appellant showed her an upstairs room. The complainant said that she would take it. Afterwards they went downstairs and sat on a couch, talking about the room and about what the appellant did. They arranged that she would have the room. The appellant kept saying to the complainant that she was "a really cool chick" and he couldn't wait for her to move in. He put his arm on her leg and rubbed it, and he put a hand on her back. The complainant said she had to leave as she was going to work.

[7] The appellant then drove the complainant back to where they had originally met, with a view to her catching a bus home. After they got out of the car and were talking, the appellant gave her a hug from behind, holding her really tight with his arms around her crossing diagonally below her breasts. (In cross-examination the complainant agreed that the appellant brushed against her breasts). The complainant asked the appellant whether he hugged all his housemates like that and said that they were just friends. The appellant responded "no", and let the complainant go. The appellant then drove the complainant to her home.

[8] On the next afternoon, 19 May 2011, the appellant sent a text message to the complainant that two other girls were taking the room promised to the complainant and that the appellant wanted to show the complainant another room, which was downstairs. The appellant collected the complainant from her house and drove back to his house at about 4.00 pm. During the conversation they had on the way, the complainant said that she "reiterated the fact that I have a boyfriend, we are just friends", and that the appellant "kept saying, yeah, that's cool, that's fine."

[9] At the appellant's house the complainant told the appellant that she did not like the downstairs room at all. The appellant invited the complainant upstairs to talk. They went down a hallway to the appellant's bedroom. The appellant told the complainant that the third bedroom upstairs was occupied by a girl who was moving out in two weeks. The appellant said that the complainant could share his room with him whilst the other girl remained and until the complainant could move into the third bedroom. The complainant responded, "no, my boyfriend wouldn't be happy with that and neither would I." That conversation occurred whilst the complainant was standing at the doorway of the appellant's bedroom and the appellant was on his bed. The appellant kept asking the complainant to lie down or sit down and try to envisage his room with the complainant's belongings in it. The complainant declined those requests.

[10] The complainant subsequently sat down on the end of the bed. The appellant commented that she had nice hands. The appellant got up to look for something and the complainant went outside. The appellant followed her and, because the appellant said that they should see what could be done, they went downstairs and sat

on the couch again. The appellant sat on the complainant's left. The appellant kept talking about the complainant moving in. He put his hand on the complainant's back. She had her legs crossed with one of her hands on one of her legs. The appellant put one of his hands on top of her hand. The complainant moved the appellant's hand off her hand. The appellant then put his hand on her thigh and moved his hand under her dress towards her vagina. The complainant told the appellant to stop. She said that this was not going to work. She said that she would leave and was going to work. They walked back up the stairs. (There was no exit from the house in the downstairs area.)

[11] The appellant followed the complainant outside, making strange noises, and when they were on the driveway he gave her a big hug and touched her all over her neck. When the complainant walked down the road the appellant got in his car and followed beside the complainant slowly, asking her to talk to him. The complainant said that she would talk to him later.

[12] After fulfilling a prior arrangement to look at a room in a different residence, the complainant went to the police station and reported the appellant's conduct. There the complainant participated in a pretext telephone call with the appellant. The complainant told the appellant that she would not be moving into the house because she was uncomfortable with his conduct. She referred to the appellant trying to kiss her and continued, "… and when you tried to go into my pants, yeah, like, it isn't cool. That wasn't cool at all." The appellant responded "yeah". (Counsel for the appellant accepted that the appellant did not dissent from, and apparently accepted, the complainant's allegations). Immediately after that exchange the complainant said, "Okay, I liked the idea at the start… ." At that point in the recording the appellant's voice is obscured by noises associated with the termination of the telephone call by the appellant. The complainant explained in evidence in chief that by her statement that she "liked the idea at the start" she meant that she initially liked the idea of moving into the appellant's house.

[13] In cross examination defence counsel put to the complainant that the appellant did not put his hand on the complainant's leg up near her vagina and that the appellant did not at any stage touch her inappropriately. The complainant denied those suggestions. Defence counsel elicited from the complainant that, at a time earlier than the time spoken of by the complainant in her evidence in chief, the appellant and the complainant had made contact on Facebook; the appellant "friended" the complainant and sent her a message in response to her advertisement that he had a room available. There were text messages between the appellant and the complainant on 27 April 2011. (There was nothing of present relevance in those text messages). Defence counsel also cross-examined with reference to text messages sent between 17 and 19 May. The appellant's messages were in very friendly and familiar language. The complainant's messages also seem friendly, but there is nothing in them which could be thought to have encouraged any physical intimacy.

[14] The complainant said in cross examination that on 18 May she had thought that the appellant was "a little funny" and "a little over-friendly" but that moving into the room in the appellant's house would work out.[1] The effect of her evidence in cross-examination on that topic was that it was only after the appellant's conduct on 19 May that she regarded the appellant's touching of her on 18 May as being inappropriate.

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1 Transcript, 5 September 2013, at 1-29.

[15] Defence counsel cross-examined the complainant upon her statement in the pretext telephone call that she "liked the idea at the start". The complainant substantially repeated her explanation that she was referring to her attitude to moving into the house before the events of 19 May. Defence counsel suggested that this was a false explanation and that the complainant had liked the idea of the appellant touching her at the start. The complainant did not accept the suggestion. She said that she had intended to convey that, although she had initially liked the idea of moving into the appellant's house, she would not be moving in because of the appellant's behaviour.

Request for re-directions

[16] After the trial judge summed up to the jury, defence counsel submitted that it would be wise for the trial judge to direct about s 24(1) but that defence counsel was not really asking for such a direction. In the course of the ensuing debate, defence counsel accepted that the way in which the defence case had been put was that the conduct charged as an indecent assault had not happened. The trial judge observed that the issue in the trial was whether or not the conduct happened and declined to give directions about s 24(1).

Submissions

[17] Counsel for the appellant argued that s 24(1) was raised by the following matters: before the alleged offence, there had been light hearted, friendly and arguably flirtatious communications between the appellant and the complainant; the complainant's evidence was that it was not until after the appellant's conduct on the day of the alleged offence that she had drawn any adverse conclusions about the appellant's conduct towards her on the day before the alleged offence; that evidence suggested that the complainant had not responded negatively to the appellant's advances on the day before the offence; despite the complainant's evidence of what she meant by her statement in the pretext telephone conversation that "I liked the idea at the start", it was open to the jury to interpret that statement as meaning that the complainant had liked the appellant's initial conduct towards her; and that interpretation would have allowed the jury to infer that the complainant had not communicated to the appellant that she rejected his initial advances. The appellant's counsel argued that: the evidence as a whole was capable of supporting an inference that, when the appellant touched the complainant on her thigh, he had an honest and reasonable belief that his touching would be well received, thereby excusing his conduct; the Crown bore the onus to negative that excuse; the appellant was entitled to be acquitted if the jury had a reasonable doubt whether the Crown had negatived that excuse; and the jury were entitled to reason in that way even though it was not a view contended for by either party. The appellant argued that the trial judge's failure to direct the jury about s 24(1) therefore deprived the appellant of a chance of an acquittal and brought about a substantial miscarriage of justice.

[18] The respondent argued that the evidence was insufficient to require the trial judge to direct the jury about s 24(1). The appellant's case at trial was that the event alleged to constitute the offence did not occur. The earlier communications between the appellant and the complainant were insufficient to raise any possible application of s 24(1) where the appellant did not give evidence and the complainant's evidence was that she rebuked the appellant on each occasion upon which he made advances towards her. Whilst the jury could make whatever use they saw fit of the evidence and inferences properly arising from it regardless of each party's case, the jury had no licence to act outside the boundaries of the case established by the evidence.

Consideration

[19] In *R v Getachew*[2] the High Court re-affirmed the principle that the directions to the jury in a criminal trial must be moulded in the light of applicable statutory provisions "and, no less importantly, having regard to the real issues in the trial", and that, as the High Court had repeatedly pointed out (in *Alford v Magee* (1952) 85 CLR 437 at 466 and, for example, in *Melbourne v The Queen* (1999) 198 CLR 1 at 52 – 53 [143], and *RPS v The Queen* (2000) 199 CLR 620 at 637), "the judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury need to know to decide those issues."

[20] For the following reasons there was no issue at the trial whether, in terms of s 24(1) of the *Code*, the appellant honestly and reasonably but mistakenly believed that the complainant consented to the conduct alleged against the appellant.

[21] The application of s 24(1) may be raised even though the accused does not give evidence about the elements of that section (*R v Cutts*[3]), but that provision can apply only if there is "some evidence that the appellant in fact held the belief that the complainant was a consenting party to the acts in question" such that the jury "could in a meaningful way give consideration to whether that belief was honestly and reasonably held".[4] To put it in a way which reflects the Crown's onus of proving the offence, there must be "material on which the jury could legitimately have entertained a reasonable doubt about… whether the appellant honestly and reasonably believed that the complainant had consented…".[5]

[22] The messages exchanged between the complainant and the appellant before they met could not conceivably have induced or contributed to a reasonable belief in the appellant at the much later date of the offence that the complainant consented to the appellant touching her in the way alleged to constitute the offence. The messages exchanged between 17 and 19 May evidence nothing more than the complainant and appellant being on friendly and familiar terms up to the time when the complainant went to the appellant's house on 19 May. The appellant's submission that s 24(1) was raised by the evidence of the pretext telephone call is also unsustainable. Whether or not the complainant's words in that telephone call were admissible evidence in relation to the present issue may be put to one side. Because the complainant's statement was interrupted by the appellant's termination of the call, no construction of that statement could be a reliable indication of the complainant's state of mind. Furthermore, the appellant's construction of "the idea" as referring to the appellant's conduct is quite artificial, as well as being inconsistent with the complainant's evidence of what she meant to convey. It is also not readily reconcilable with the complainant's immediately preceding complaints about the appellant's attempts at intimacy. For all of these reasons, the statement upon which the appellant relied could not be regarded as evidence that the complainant consented to the appellant touching her, much less evidence that the appellant held any belief to that effect.

[23] Even if the expression "the idea" in the complainant's statement was capable of being construed as a reference to the appellant touching the complainant (which I do not accept), the complainant's statement conveyed only that the complainant liked the idea "at the start" of her communications with the appellant in person. If, again

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2 (2012) 248 CLR 22 at 34 – 35 [29].
3 [2005] QCA 306 at [4] (McMurdo P) and [48] (Williams JA).
4 *R v Cutts* [2005] QCA 306 at [44] (Williams JA).
5 *R v Millar* [2000] 1 Qd R 437 at 439 (McPherson JA).

contrary to my own view, that made it open to the jury to infer that the complainant might have manifested her liking of that "idea" by some act or omission during her communications with the appellant in person, and even if – piling improbable inference upon improbable inference – that justified a conclusion that the appellant reasonably believed that the complainant liked the appellant's initial physical contact, the limiting expression "at the start" nonetheless precluded an inference that, at the time of the alleged offence on the afternoon of 19 May, the appellant believed that the complainant consented to the appellant's much more intimate conduct. Whatever may have been the appellant's belief about the complainant's attitude to his attempts at intimacy at the start of their communications in person on 18 May, the only evidence capable of founding inferences about the appellant's belief at the end of the ensuing period on 19 May was the evidence of the complainant's communications with the appellant in that period. The effect of that evidence was that, whilst the complainant remained friendly with the appellant notwithstanding his various attempts to embark upon a more intimate relationship, she repeatedly rebuffed those attempts and, immediately before the offence, she rebuked him by removing his hand from her hand on her leg. That evidence was inconsistent with any hypothesis that the appellant reasonably believed that the complainant consented to his indecent touching of her on 19 May.

[24] The jury were not obliged to accept the complainant's evidence of those matters (although there is every reason to think that the jury did accept it), but there was no evidence to the contrary. Furthermore, the appellant's case in cross examination of the complainant did not involve any proposition that the complainant said or did anything to make it reasonable for the appellant to believe that the complainant consented to the offending conduct.

[25] There was no basis in the evidence for any application of s 24(1) to relieve the appellant of criminal responsibility for the offence. The trial judge did not err in law in refusing to direct the jury about that provision.

Sentence application

[26] At the sentence hearing, the prosecutor referred to the circumstances of the offence, to the appellant having no previous convictions, and to the complainant's evidence in cross examination that the offence left her shaken and petrified. The prosecutor referred also to the sentence of four months' imprisonment which the Court did not disturb in *R v Jones*.[6] The 70 year old applicant in that case, a bus driver, indecently dealt with a 16 year old school girl in the bus. (The prosecutor mistakenly described the sentence as being eight months, wholly suspended, but it was not submitted and it should not be accepted that this mistake led to any increase in the severity of the sentence imposed upon the appellant.)

[27] Defence counsel referred to the appellant's personal circumstances and to a report dated 25 May 2005, in which a psychologist opined that the appellant had sustained severe injuries in an accident in 2004, including a severe head injury which led to a fall in his general level of cognitive functioning to within the low average to average range. The psychologist reported that the appellant's profile was consistent with preoccupation with health issues, emotional lability, impulsive behaviour and mild depression. The report included various recommendations designed to enhance the appellant's recovery. Defence counsel referred to additional circumstances: the appellant had been unemployed since the accident; he had some problems with his concentration and "cognitive memory"; he was unable to follow his profession as

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6 [2003] QCA 450.

a captain of large commercial vessels; he had to learn to walk again; and he underwent lengthy periods of physiotherapy. Defence counsel argued that it would be unjust to impose any term of actual imprisonment and that for this low level event involving touching on the thigh the sentencing options were not restricted to actual imprisonment. Defence counsel advocated against community service, on the ground that it might be setting up the appellant to fail because of difficulties with his cognitive capacity and his incapacity to work; he advocated against probation, on the ground that it was doubtful whether assistance could be given to a man with the appellant's conditions and whether that would be a burden on the system. Defence counsel argued that the sentencing options were a wholly suspended term of imprisonment, a good behaviour bond, or a fine, and that a bond was appropriate.

[28] The sentencing judge found that the appellant's offending was at a low level, he stopped when the complainant protested, and the offending was probably opportunistic. After observing that the appellant had taken the complainant to his house apparently for a legitimate purpose and then assaulted her whilst she was in the house and that there was a significant age difference between them, the sentencing judge took into account that the appellant had suffered a serious injury in 2004 and that in 2005 the preliminary reports indicated he needed further treatment. The sentencing judge observed that it was necessary to send a message not just to the appellant but to the whole community that this sort of behaviour was unacceptable; to release the appellant on a good behaviour bond would send the wrong message. A short sentence of imprisonment was the only way to mark the seriousness of the offence, particularly having regard to the significant age difference and the appellant's apparent lack of remorse.

[29] The appellant argued that: the sentencing judge over-emphasised the disparity in ages between the appellant and the complainant; the complainant was an adult and there was no real significance in the fact that when the appellant committed the offence he was about 19 years older than the complainant; the sentence of three months imprisonment suspended for two years was manifestly excessive for an offence which was at the lowest end of the range of offending of this kind and where the offender was a mature man with no criminal history; the particular difficulties experienced by the appellant as a result of his accident in 2007 made community service problematic but not out of the question; and whilst probation, community service, or a good behaviour bond were available sentencing options, a bond should be imposed. In a further outline of submissions delivered with leave after the hearing of the appeal the appellant conveyed that he would not consent to an order for probation or community service.

[30] The respondent argued that: whilst the sentencing judge properly characterised the offending as being at a low level and probably opportunistic, all cases of sexual assault were serious; considerations of general deterrence featured prominently in sentencing for such offences; it was relevant that the offence was between relative strangers and that the offender was in a position of superiority compared to the complainant in terms of their comparative ages and the context of the offending; in circumstances in which the appellant demonstrated no remorse or rehabilitation, a short period of wholly suspended imprisonment was not outside the sentencing discretion.

[31] In addition to *Jones*, the Court was referred to *R v Owen*,[7] in which the Court varied a sentence for sexual assault of nine months imprisonment by ordering that the

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[7] [2008] QCA 171.

imprisonment be suspended after the 25 days imprisonment which the offender had already served. The offender was a 47 year old massage therapist who, in breach of trust during a massage administered to the 37 year complainant when they were alone in her home, brushed his lips on her pubic hair. *Owen* and *Jones* involved factually different and more serious offences. Those decisions do not indicate that the appellant's sentence is manifestly excessive.

[32] The disparity in the appellant's and the complainant's ages was potentially relevant, in so far as it was reflected in the appellant being in, and taking advantage of, a superior position in their relationship. Whether this was significant in the circumstances and, if so, what weight should be attributed to it in the sentence were matters for the trial judge to consider. Bearing in mind that the trial judge was in a much better position than this Court to discern any such effect of the age difference, the appellant has not shown that the sentencing judge erred in the weight attributed to that factor. The sentencing judge was not bound by defence counsel's submissions advocating against community service and probation, but the sentencing judge was entitled to take those submissions into account in assessing the various sentencing options. It was also open to the sentencing judge to consider that a bond was too lenient for this offending.

[33] There was no error in principle in the sentencing judge's explanation for imposing a short sentence of imprisonment, mitigated as it was by the provision for suspension. The appellant argued in his further outline of submissions that the operational period for the suspended sentence of two years should be reduced to 10 months, but that looks like mere tinkering. Whilst community service and probation were available sentencing options even though defence counsel advocated against them, the wholly suspended, short term of imprisonment for the operational period of two years imposed by the sentencing judge was not manifestly excessive in circumstances in which, in addition to general deterrence, personal deterrence was relevant in light of the complainant's unchallenged evidence of the appellant's unrepentant behaviour outside his house immediately after he had committed the offence (see [11] of these reasons) and the absence of evidence that the appellant was remorseful. There is no ground which might justify the Court in setting aside the sentence.

Proposed orders

[34] The appeal against conviction should be dismissed. The application for leave to appeal against sentence should be refused.

[35] **MORRISON JA:** I agree with the reasons for judgment of Fraser JA and the orders proposed by his Honour.

[36] **PETER LYONS J:** I have had the advantage of reading the reasons for judgment of Fraser JA. They provide much of the factual and legal context for my brief reasons.

[37] As his Honour's reasons demonstrate,[8] the directions given by a trial judge at the end of a criminal trial must be moulded by reference to the "real issues in the trial"; and it is the responsibility of the trial judge to decide what those issues are. Nevertheless, in *Stevens v The Queen*[9] Kirby J, consistent with the approach of

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8 By reference to *R v Getachew* (2012) 248 CLR 22 at 34 – 35 [29]; *Alford v Magee* (1952) 85 CLR 437 at 466; *Melbourne v The Queen* (1999) 198 CLR 1 at 52 – 53 [143] and *RPS v The Queen* (2000) 199 CLR 620 at 637. See also *R v Cutts* [2005] QCA 306 (*Cutts*) at [3].

9 (2005) 227 CLR 319.

McHugh J and Callinan J, pointed out, with extensive citation of authority, that it is the duty of the trial judge to instruct a jury concerning any defence, even if not raised, or indeed if disclaimed, by the parties, that fairly arises on the evidence.[10] It follows that, in a criminal trial, the issues are not confined to those expressly raised by the parties. Nevertheless, they do not extend beyond those which fairly arise on the evidence.

[38] Since the issue on this appeal is whether the trial judge in the present case should have given a direction to the jury about s 24(1) of the *Criminal Code*, it is necessary to consider whether a defence of mistake of fact fairly arises on the evidence. In the present case the only relevant mistake of fact was whether the complainant was consenting to the assault with which the appellant has been charged. Moreover, to come within s 24(1), the mistake had to be both honest and reasonable. It is not necessary the evidence be sufficient positively to establish the defence; rather, it is enough for the evidence to raise it, so that a jury might be left in reasonable doubt as to whether it has been rebutted by the prosecution. While there must be evidence that the defendant in fact held the relevant belief at the time of the offence,[11] that could be provided by proven facts from which such belief might be a reasonable inference, so that the jury could have entertained a reasonable doubt about whether the defendant held the belief.[12]

[39] In my view, the evidence disclosed a degree of overfamiliarity in the dealings between the appellant and the complainant, the complainant's attitude to which the jury might have regarded as being, at least on occasion and as it would appear to the appellant, ambiguous. Although some weeks before the date of the alleged offence, some overfamiliarity is apparent in the exchange of text messages on 27 April 2011. It seems to me to be reflected in the complainant's reference, on 18 May 2011, to her nipple piercing, notwithstanding her subsequent reference to her boyfriend. It was shown by the fact that shortly afterwards, the appellant "put his arm on my leg and just like a rub sort of … you're a cool girl, hand on my back …",[13] none of which appears to have attracted a protest from the complainant. The ambiguity in the complainant's attitude to the appellant's conduct may also be said to be shown by the fact that after he gave her a "big bear hug", at which time, she accepted in cross-examination that he had rubbed or brushed his hand along her breast,[14] she changed her plans to go home by bus, the appellant driving her home. Subsequently that day the appellant sent to the complainant a text message, which included "Pretty cool to feel your warm energy…plenty more to come…your a little winner…"; to which she responded, "Haha thanks, u too! Talked to Mummy and all good, so move day Friday". Further, on the day of the alleged offence, in the appellant's bedroom, where the appellant was lying on his bed, although the complainant did not come and lie on the bed when asked, she nevertheless then sat on the end of the bed. Subsequently, they were sitting downstairs on a couch. At this point, the appellant had his hand on her back, apparently without complaint.

[40] I have referred to these events because they put the evidence in its most favourable light for the appellant. It nevertheless seems to me to be a step of some significance

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10 Ibid at [68].

11 *Cutts* at [44].

12 Compare *Cutts* at [31] and [34]; and see also *Sancoff v Holford; ex parte Holford* [1973] Qd R 25 at 33; and in particular *R v Millar* [2000] 1 Qd R 437 at 439; both referred to by Williams JA in *Cutts* at [35] and [37].

13 Transcript, 5 September 2013 at p 10, lines 23 – 24.

14 Ibid at p 22, line 3.

from the overfamiliarity to which I have referred, to the conduct which formed the basis of the charge against the appellant. Although I have indicated that the complainant's reaction to the appellant's overfamiliarity may have been seen as ambiguous, at no time did she positively indicate acceptance of any physical intimacy. Moreover, as Fraser JA has pointed out, on a number of occasions the complainant referred to the fact that she had a boyfriend, and that she and the appellant were "just friends". Immediately before the conduct the subject of the charge, the complainant had her hand on her leg, the appellant placed his hand on hers "really strongly", and she then lifted his hand off. It seems to me that, notwithstanding any ambiguity which might have been open about the complainant's attitude to the appellant's overfamiliar behaviour, her conduct could not have provided a reasonable basis for a belief that she was consenting to the act the subject of the charge. Without that, and without any other basis for inferring the belief, any doubt about whether the appellant held such a belief would have been speculative.

[41] I agree with the views expressed by Fraser JA about the pretext telephone call.

[42] Accordingly, I agree that the appeal against the appellant's conviction should be dismissed. I also agree, for the reasons given by Fraser JA, that the application for leave to appeal against his sentence should be refused.