SUPREME COURT OF QUEENSLAND

CITATION:	*R v Everton* [2016] QCA 99
PARTIES:	**R** **v** **EVERTON, Benjamin** (appellant)
FILE NO:	CA No 27 of 2015 DC No 251 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 23 February 2015
DELIVERED ON:	19 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2015
JUDGES:	Fraser and Gotterson JJA and Henry 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 – where the appellant was charged on indictment with 25 offences – where the appellant was found guilty of nine charges, including eight counts of rape – where the appellant appealed those rape convictions – where the appellant alleged that the evidence was insufficient to prove beyond a reasonable doubt that the appellant did not honestly and reasonably believe that the complainant had consented to the sexual acts charged – where the appellant alleged that the evidence relied upon was vague and unsatisfactory – where there had been prior consensual sexual activity – where the complainant gave evidence that she pretended to enjoy the sexual activity – where the appellant did not engage in actual violence against the complainant concurrently with his sexual conduct – where the appellant was unpredictably and irrationally violent – where the appellant dominated the complainant – whether the jury could reasonably conclude that any supposed consent was obtained by force, threat or intimidation – whether the verdict was supported by the evidence *Criminal Code* (Qld), s 348

COUNSEL: C W Heaton QC for the appellant
S J Farnden for the respondent

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

[1] **FRASER JA:** The appellant was charged on indictment with 25 offences. Some charges were discontinued before verdict. The appellant was found not guilty of some charges and guilty of others. The offences and verdicts are as follows:

Count	**Date of offences**	**Nature of offences**	**Verdict**
1	Between 20 August, 2013 and 28 August, 2013	Torture	Not Guilty
2	20 August 2013	Stealing	Not Guilty
3	Between 21 August 2013 and 28 August 2013	~~Rape~~ (Nolle)	Discontinued
4		Rape	Not Guilty
5		Rape	Not Guilty
6		~~Rape~~ (Nolle)	Discontinued
7		Rape	Not Guilty
8		Rape	Not Guilty
9		Assault occasioning bodily harm whilst armed (Plea of guilty to Common Assault)	Guilty of Common Assault
10		~~Rape~~ (Nolle)	Discontinued
11		**Rape**	**Guilty**
12		**Rape**	**Guilty**
13		**Rape**	**Guilty**
14		Common Assault	Plea of guilty
15		~~Rape~~ (Nolle)	Discontinued
16		**Rape**	**Guilty**
17		**Rape**	**Guilty**
18		Assault occasioning bodily harm whilst armed	Plea of Guilty
19		Common Assault	Plea of Guilty
20		**Rape**	**Guilty**
21		**Rape**	**Guilty**
22		**Rape**	**Guilty**
23		Stealing	Not guilty
24		Assault occasioning bodily harm whilst armed (Plea of guilty to Common Assault)	Guilty
25		Deprivation of Liberty	Not Guilty

[2] The appellant has appealed only against the convictions of rape on the counts emphasised in that table, counts 11, 12, 13, 16, 17, 20, 21 and 22. The sole ground of the appeal is that no reasonable jury, properly instructed, could have delivered the guilty verdicts on those counts and "they [the verdicts] are unsafe and unsatisfactory having regard to the evidence."

The Crown case

[3] The real issues at trial in relation to the counts of rape in issue in the appeal were whether the prosecution proved beyond reasonable doubt that the complainant did not consent and that the appellant did not engage in the sexual conduct under an honest and reasonable, if mistaken, belief that the complainant did consent.

[4] Upon the complainant's evidence the appellant and the complainant met in the caravan park where they resided in the middle of 2013. They became friends and a few weeks later began a sexual relationship. They had consensual sex once a day for a period of about three weeks. The complainant described the nature of the sexual relationship as involving "mutual respect. Missionary, sometimes myself on top of [the appellant]", and as not involving oral sex at the beginning and never involving anal sex. The appellant proposed marriage to the complainant and she accepted his proposal. They made plans to get married. After three or four weeks the appellant began to call the complainant a witch. He told her that she had ungodly things in her home and she had to get rid of them. She complied with his wishes. After they attended a barbecue where the complainant was the only woman in the group, the appellant became angry and yelled at her that she should not have been looking at or talking to other men at the barbecue. After that incident the appellant moved out without telling the complainant that he was leaving. A couple of days later the complainant bumped into him when she and her infant son were at a park. The complainant formed the impression that the appellant was sorry for the way things had been. He spoke about getting married. The complainant was confused about the status of their relationship. The complainant next met the appellant when he was staying at a different caravan park. At that time they "were meant to be going to see the Pastor about getting married" but when the complainant arrived she told him that, "I couldn't marry him. I'd rather kill myself", and she drove off.

[5] Some days later in August 2013, the complainant received a text from the appellant, who was in Evans Head. She thought this was about 13 days before she spoke to police. Shortly after receiving the text message the complainant set off with her son to see the appellant. She packed a mattress and some clothes in case she and her son wanted to stay there. A tent was always kept in the car. She felt bad for what she had said to the appellant and wanted to see if he was okay. In cross-examination the complainant did not agree that she was then in love with the appellant but she agreed that she wanted to be with him. The appellant seemed happy to see the complainant and her son. She was comfortable, felt safe with the appellant, and wanted to marry him. In the tent that night they had consensual sex whilst the complainant's son was asleep. They spent time together on the following day, which was their first full day together in Evans Head. Nothing much happened on that first day.

[6] On the second night at Evans Head the appellant began acting strangely. He told the complainant she was ungodly, she was a witch, she and her son "had a spirit between us", she was not a very good mother, and she was not healthy for her son. The appellant and the complainant slept on different sides of the tent and the appellant kept the

complainant's son away from her. The complainant felt a bit frightened. She did not feel safe anymore. She did not know what to do or how to get her son and leave. She did not know why she was ungodly or a witch. She was confused and "rattled". During the night the complainant's son snored. The appellant smacked him and said that he was speaking the "devil's lingo". The child woke up and whimpered. The complainant was too afraid to say anything. The appellant smacked the complainant's son again during that night. The complainant continued to stay with the appellant on the following day because she was confused and felt a need to understand. They spent that second day at Evans Head together. They went to the beach and engaged in other activities.

[7] On the evening of her third night at Evans Head, the appellant drove the complainant and her son into town. The appellant stopped the car behind a surf lifesaving club. He was listening to a worship CD. The complainant interrupted the CD. The appellant grabbed her hair at the top of her head, and slammed her head forcefully onto the window pelmet. The complainant could not believe what had happened and was shocked. She tried to punch the appellant back but was too weak. The appellant forcefully punched her right leg and arm four or five times, leaving her with bruising. She was devastated. The appellant drove on further and parked behind a service station. He got out of the car, came around to the passenger's side of the car with a knife, and told the complainant to stab him. She fell to her knees and cried. She asked the appellant to throw the knife in the bin and he did so.

[8] They drove back to the tent. The appellant made the complainant carry a large water container on her shoulder to the camping area. (The water container was almost the size of the upper half of the complainant's body.) The complainant did so because she thought that the appellant would hurt her if she did not. They got into the tent and went to sleep together. The complainant did not want to be there but was afraid to leave. She was afraid of being hurt. She explained that sometimes she had the key to her car but not her child, and sometimes she had her child but not the key to her car. The appellant always had one or the other. The complainant's mobile phone disappeared whilst they were in the tent at Evans Head.

[9] On the following morning, her third day at Evans Head, the appellant told the complainant that she had to get rid of her child, she was no good for him, she was a bad mother, she was ungodly and that she and her son had a "a devil bound between" them. The complainant did not respond because she was confused. The appellant drove the complainant and her son to Grafton, abandoning their belongings at Evans Head. They arrived at the premises of a charitable organisation. The appellant told the complainant that she needed to write a letter saying that she was not a good enough mother and had to give her son to those people. She wrote a letter in which she said something along the lines of that she was tired and exhausted, she could not look after her son any more, he was a good boy, but they were spiritually unsound. She wrote that letter because she felt it best to do as the appellant asked but she then ripped it up. The appellant drove the complainant and her son to a retirement village and told the complainant to leave her son there. She refused. The appellant drove to a hospital and told the complainant she had to leave her son there. The complainant did so because she was concerned about the appellant hurting her son and she believed that it was safer for her son to do as the appellant asked. They approached the hospital administration. The complainant asked to see the Chaplain but there wasn't one. She gave a note to the administrator. They were told to sit whilst they waited for a nurse. During that time the appellant "hissed" but did not say anything. The nurse arrived

and the complainant gave the nurse the note. The nurse read the note and left the room. The appellant said that they had to leave. The complainant told her son that she loved him and left.

[10] A police officer gave evidence that he obtained the note left by the complainant at the hospital. It read: "Please care for my son and find him a good home as I am unable to support, love and give him the life that he deserves. I am tired and worn out and am in a spiritual battle with him. He is a good boy, intelligent and full of joy and would be a blessing to any home, but our relationship is not healthy. As a mother, I believe I need to give my child a good life. Unfortunately, I cannot do that."

[11] The appellant then drove the complainant at random down different roads, including dirt roads that ended on farms where they were told to go away. He behaved in a paranoid way, suggesting that someone was following them. Ultimately they arrived in a town on the border of New South Wales and Queensland where they spent the night. The complainant did not recall anything in particular happening that night.

Count 2 (not guilty)

[12] On the following day they drove into Queensland. In Nerang the appellant bought a doona, pillows and a red handled paring knife. The appellant said that he bought the knife for roadkill. He used money the complainant had withdrawn earlier in New South Wales because the appellant needed it. She may have withdrawn more money in Nerang or somewhere else, probably in an amount of $720. (A bank document in evidence recorded a cash withdrawal from the complainant's account of $750 at Nerang on 20 August 2013.) The complainant did not want to give the money to the appellant but did so when asked because she thought it would save her from being harmed. In cross-examination the complainant agreed that she had the opportunity at various shops at the Gold Coast to say that she had a problem and that she did not take advantage of those opportunities. She denied that she had formed a new relationship with the appellant and was willingly on a road trip with him. When it was put to the complainant that she gave the appellant money so that the two of them could buy petrol, food and clothing, the complainant answered that the appellant "had the money and chose to buy what he chose with that money. I did not make suggestions for a road trip, or to buy fuel, clothing or the things that he chose to buy". The complainant agreed that she "went along with it".

[13] The appellant and the complainant drove further north, spending the night at Donnybrook. That happened before or after the car broke down at Morayfield. (The complainant repeatedly said in evidence that she was unsure about the dates upon which certain events occurred.) The evidence of a RACQ patrolman and a locksmith who attended at the car placed the date and place of the breakdown as 20 August 2013 at a service centre on the northbound side of the Bruce Highway at Morayfield. Their evidence was to the effect that the man did all the talking and the woman was timid and shy.

[14] The complainant gave evidence that the reason why she was still with the appellant was that she was afraid of being beaten. When they arrived in Donnybrook she slept in the car. Because the caravan park was closed when they arrived they stayed overnight on the beachfront outside the caravan park in the car.

[15] On the following day they drove to Bribie Island where they stayed in a caravan park. The complainant did not recall what date that was. (A financial statement from a Bribie caravan park recorded that the appellant paid for a tent site on 21 August. A receptionist

at the caravan park gave evidence that on 21 August a male booked that tent site and gave the relevant details.) The complainant gave evidence that she did not speak to anyone and when they arrived at the caravan park she stayed in the car whilst the appellant spoke to a man camping beside them. She did that because the appellant had told her not to speak to or look at men. After staying in the car for a long time they set up the tent and later in the evening they went inside. Whilst they were at Bribie Island the appellant called the complainant by first names other than her own name. He changed the name by which he called her a few times. He did not tell the complainant why he did that.

Counts 4 and 5 (not guilty)

[16] The complainant gave evidence that when they went into the tent the appellant pulled down his pants, held his penis, and nodded at his penis. The complainant fellated the appellant, after which he had vaginal sex and then required the complainant to fellate him again. The complainant did not want to do those things. She did them because she was worried that if she "did not do those things" she would be beaten. Neither of them spoke during those events.

Counts 7 and 8 (not guilty)

[17] On the following morning they left the caravan park and went to a beach and into bushland. The appellant put a rug on the ground, took off his pants, and again gestured by nodding his head for the complainant to fellate him. He did not say anything. The complainant fellated the appellant and then he had vaginal intercourse with her. The complainant told the appellant that someone was watching. The appellant told that person to go away. The complainant said that she did not want to fellate the appellant or for him to have sex with her at that time. She did so because she "felt it would be better for my wellbeing to do as I was told." Afterwards they picked up the rug and walked back to the car.

Count 9 (guilty)

[18] The next thing the complainant could remember was that it was late in the evening and the appellant pulled over the car. He was upset with the complainant because she had not cooked his dinner. Whilst they were still inside the car, the appellant told the complainant she should be doing something, grabbed her hair on the top of her head and forcefully slammed her against the passenger side door about three times, and shook her around. The appellant repeatedly, forcefully punched her arms and her legs. He punched her towards the right shoulder area and on the top of her thigh using a clenched fist. She protected herself with her hands. Her left hand was injured and bleeding. She felt pain in her head and her hand. When the appellant saw the blood he got some lavender oil, poured it into the wound, then dried up the wound and put a bandage on her fingers. He did not say anything to her at the time. They got out of the car and the appellant started cooking eggs on a camp stove. The complainant said something (she could not recall what) and the appellant hit her on the head with a full gas can, bending the can.

[19] The complainant gave evidence that she considered leaving that night. She did not do so because she did not think she would be quick enough and was afraid that if the appellant woke up she did not know if he would beat her again. Early in the morning of the following day they went to a medical centre to see if the complainant's hand needed stitching. The complainant told the nurse that she went for a tumble and fell

on something sharp. The appellant was standing next to her. The complainant said that she was afraid for the nurse and herself. The doctor came into the room and looked at the injury. The nurse taped up her fingers. The appellant stayed with the complainant the whole time. The complainant said that whilst the nurse and doctor were present the appellant asked for the complainant to be given a tetanus shot in her backside.

[20] The nurse gave evidence that not long after she started work at 8.00 am on 23 August she was told that a patient was waiting to be treated. The lady did not speak at all and the man answered for her. He said that she had fallen over and hurt her hand. The nurse tried to speak to the lady during the time they were together but the man kept answering for her. When the nurse asked her whether she had had a tetanus injection, the man answered that she needed one. The man held onto the woman, even when they walked. The nurse cleaned, dressed, and bandaged the complainant's hand. When the nurse asked the woman whether she wanted the tetanus injection in her arm, she did not reply. The man said "no" and that the complainant wanted it in her backside. The nurse said to the woman that she needed to tell the nurse what she wanted. The woman just nodded, and took her pants down for the injection.

[21] The complainant gave evidence that after leaving the medical centre they drove around Bribie Island all day until evening, when they parked on a vacant lot in a residential area on a canal.

Count 11 (guilty)

[22] The complainant gave evidence that whilst they were parked on a vacant lot that night the appellant pulled down his pants and nodded his head, gesturing for the complainant to fellate him. He did not say anything and nor did the complainant. The complainant fellated the appellant. The complainant gave evidence that she did not want to do that. She did it so that the appellant would not hit her.

Counts 18 – 20 (guilty)

[23] The complainant could not recall what she did the following morning. The next thing she could remember happening with the appellant was that it was about dusk and they were parked behind an RSL or a rugby field. The appellant was upset with her and threw her into bush, pummelled her with eggs, and told her that he wanted to kill her. The complainant could not recall whereabouts on her body the appellant picked her up but could just remember flying into the bush and landing in the bush on her side. She felt eggs smashing onto her but they did not hurt. The appellant hit her on the head with butane cans. She got back into the car and the appellant strangled her. The complainant remembered "just coming out thinking that none of it had happened and then realised – that none of the past few days had happened. I was blacked out and I woke back up … [w]ell, I got back in the car and I was just sitting there and he was behind me. I didn't know what he was doing. And then all of a sudden, I get a sensation around my throat and I wake up." The complainant did not feel the force of her throat being strangled. It "happened instantly".[1]

[24] Later that night the appellant sat in the driver's seat, put the car seat back, pulled down his pants, held his penis, and nodded and gestured for her to fellate him. Again, the complainant did that although she did not want to do it. This happened quite late during the night. On the following day the complainant remembered just driving around again.

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1 Count 19.

Counts 12 and 13 (guilty)

[25] The complainant gave evidence of an occasion when they were in a housing area on a closed beach track which gave access to or closed the beach. The appellant put a rug down, and gestured for the complainant to fellate him by pulling at his penis and nodding. The appellant then had vaginal intercourse. The complainant did not want to do those things. The complainant recalled that the appellant picked up the rug and went and spoke to a man who was walking a dog. The complainant did not know if that man had seen them or not.

Counts 16 and 17 (guilty)

[26] The complainant gave evidence of another occasion when the appellant took her into a bushland area where there was a water tower. The appellant gestured to the complainant to fellate him. Afterwards the appellant turned her over and commenced to have anal sex with her. The complainant told him that she did not believe in anal sex and that it hurt. The appellant told her to relax and to push as though she wished to defecate. The complainant was on her hands and knees and the appellant was behind her. Again, she did not want to do what the appellant asked. These events occurred before they arrived at a beach on Bribie Island and set up a tent.

Counts 21 and 22 (guilty)

[27] The tent was set up five to seven metres off the main track at the beach, which was where the appellant wanted the tent site. The main track could be seen "vaguely" from the tent site. Whilst they were in the tent, the appellant gestured for the complainant to fellate him. Afterwards the appellant had anal sex with the complainant. The complainant did not say anything to the appellant. She did not want to do the acts. She did so because she was afraid that the appellant would hurt her. The complainant gave evidence that during the anal sex, he placed the red handle of the knife in her anus whilst he masturbated for a while and he then reinserted his penis to ejaculate and removed the knife. Before the appellant used the knife he told the complainant that he was doing that "so my bowel doesn't close". The complainant gave evidence that she did not agree to this occurring and she did not say anything to him at the time. She did not recall that the appellant said anything else to her.

[28] During cross-examination, the complainant gave evidence that whilst the appellant was lying down he gestured for her to fellate him. She began to do so. The appellant then pulled down her pants and turned her over, rubbed her vagina, and inserted his penis into her vagina, after which he had anal sex with her and placed the knife in her anus (as she had described in her evidence in chief).

[29] The complainant also gave evidence that in the tent at the beach on Bribie Island there were occasions on the first two mornings when the appellant pulled down his pants, held his penis, and nodded and gestured for her to suck his penis. She did so although she did not want to.

Count 14 (guilty)

[30] The complainant gave evidence of another occasion which might have happened on the third night on Bribie Island. She was unable to say when this happened in relation to the other incidents she had described. At a barbeque area on the beachfront near some residential houses, the appellant asked her to cook. After telling her to read a bible, the appellant said that she was a witch and that he didn't like her tone. The

complainant gave evidence that, "he's hooked me into the head, and I've fallen to the ground." The appellant told the complainant to get up. After she did so, the appellant, "hooks me in the other side of the head and I've fallen to the ground."

Count 24 (guilty)

[31] The complainant referred to another occasion at dusk at the same beach. The appellant was outside the tent with a candle whilst the complainant was lying inside the tent. The appellant was talking about his childhood and said that when he was a young boy making a candle a little boy came and smashed it. The complainant asked the appellant what he did. The appellant got up and asked the complainant what she meant. The appellant then "picked up my head and he slammed and slammed it and slammed it and then he threw it – me out of the tent and he's thrown me to the ground and he's hit me in the head with butane cans and then he's picked up – a stick and began to belt me. He then picked me up from a laying position, got a knife and chopped off my hair and told me I do not deserve God's covering." The appellant dragged her into the tent, kicked her body, and beat her in her ribs with a clenched fist. The appellant also hit her on the head with butane cans and an empty olive oil bottle. The complainant was bruised and winded and perhaps had a small cut on her head.

Count 25 (not guilty)

[32] The complainant gave evidence that that night the appellant tied her legs together and tied her feet together using a ripped up towel. She was not able to move her hands and feet until he later untied them. She could not recall for how long they were tied. She could not remember anything else that happened that night. She remained in the tent during that day only leaving to go to the toilet. On the following morning she left the tent to go to the toilet. She lay outside the tent for a short while until the appellant told her to go back into the tent. The appellant left. Later, he told her that the police had arrived because they were camping without a camp permit. When the police asked the complainant to come out of the tent she did not leave because the appellant pushed a food basket which the complainant carried as a bag back into the tent and told her that she could talk from there. The complainant left the tent later, once she knew that the appellant had gone with the police. She then told the police what had happened. A paramedic took her to the hospital by ambulance where she was seen by doctors and nurses.

Evidence of a police officer

[33] A police officer gave evidence that on 28 August 2013 at about 10.35 am she and another police officer went to a beach carpark at Bribie Island in response to a call about a car which had been reported as abandoned. The registered owner of the car (the complainant) had been reported in New South Wales as a missing person. They found the appellant. He had with him a knife similar to a kitchen paring knife, with a red plastic handle. He told the police that the car was his and his wife's. The police officer said that they needed to see his wife to make sure that she was okay. The appellant led the police off the track into the bush behind the sand dune, about 100 metres or so into the bush, where the tent was visible. The tent was covered in branches and leaves as though it had been camouflaged. The entrance to the tent was barricaded up with branches and leaves. Before the police spoke to the complainant, the appellant spoke to her and told her that police were there. The police officer called for the complainant, using a first name which the appellant gave (which was not the complainant's first name). The police were unable to persuade the complainant to leave the tent. They took the appellant to the carpark. The police returned to the

camp site. The complainant was still reluctant to come out of the tent. She asked where the appellant was. The police officer told her that he was in the carpark with other police. They took branches off the tent and saw the complainant. Both her eyes were black, she had a cut on her forehead, and her right arm was severely bruised. She was dishevelled and looked as though she had not washed for a couple of days. She was distressed and upset.

[34] When the police officer asked the complainant to say what had happened to her the complainant said that she could not tell and was afraid to tell. When the police officer reassured the complainant that she was safe, the complainant said that she had hurt herself running through bushes at night. After further questioning, the complainant described various ways in which the appellant had beaten her and she complained of sexual assaults by him. The complainant's hair had been crudely cut off. She needed assistance to walk. The complainant was taken to hospital by ambulance. A police officer spoke to the complainant whilst she was still in the ambulance. That conversation was recorded. On the following day the complainant made a formal statement to police after she had been discharged from hospital.

[35] In the conversation on 28 August 2013 the complainant said that "the days were all muddled up". She said that the appellant wanted sex five times a day, she had to suck his penis four times a day, and she had had anal sex with the appellant on five days straight. The formal statement the complainant made on the following day did not include those statements.

[36] The appellant referred to the following exchanges in the recorded conversation in the ambulance:

> "I also understand from talking with other police officers that it got to the stage in the relationship where you the last couple of days that you had sexual intercourse with Benjamin that you didn't wish for that to take place. Is that correct --- I didn't want to. He was having anal sex with me, which I didn't like, which I didn't want, but I thought if I just went with it it would be easier for me…than fighting him. Because then I would just get hurt more. So I just pretended that I enjoyed it so he would be happy.
>
> Okay. And so did you tell him at any stage to stop --- I said I didn't like it and he'd apologise but then he'd do it again.
>
> If Benjamin said that he wanted to have anal sex and you said no, did he strike you or hurt you in any way?...I never said no because I was afraid of him and he's always make me suck his penis constantly, day after day, about five times a day. He would always make me do it and I just abided because I was afraid if I didn't do it what would happen.
>
> …I just went with whatever he wanted. Whatever he wanted I did because I knew if I didn't do what he wanted, I was afraid that I'd be dead."

[37] The police detective gave evidence that when the complainant made the preliminary complaint in the ambulance she was very teary and upset. On the following day when the complainant made the formal statement she seemed to be clearer and attempted to work methodically through various locations on Bribie Island and when incidents occurred. When the complainant gave the formal statement she had more time to deliberate. She was not rushed as she had been when she made the preliminary complaint in the back of the ambulance heading to the hospital.

[38] The appellant did not give or call evidence.

Submissions

[39] The appellant submitted that the evidence was insufficient for the jury to conclude that the prosecution proved beyond reasonable doubt that the appellant did not honestly and reasonably believe that the complainant was consenting to the sexual acts charged in the counts under appeal. Aspects of the evidence relating to this were so powerful as to make the convictions on those rape counts unreasonable. The appellant argued that the evidence upon which the prosecution relied to prove that the appellant did not honestly and reasonably believe that the complainant consented was vague and unsatisfactory, particularly in circumstances in which: the appellant and the complainant spent a lot of time together and the evidence did not say anything about whether or not the complainant was hostile, quiet, or submissive; there was nothing to suggest that there were not periods during which the appellant and the complainant had cordial relations and consensual sexual activity, including during the days following the assault in count 9; the complainant did not positively convey a lack of consent to the appellant's sexual conduct – she said that she pretended to enjoy it so that he would be happy; the appellant did not threaten or engage in actual violence against the complainant concurrently with his sexual conduct; the complainant never attempted to escape the appellant in spite of opportunities to do so and there was no overt manifestation of a desire by her to be away from him; the complainant acceded to the request of the appellant to leave her son behind at the Grafton Hospital and thereafter remained in the appellant's company; the complainant refused to leave her son at places they visited earlier without any suggestion of violent repercussions for her non-compliance with the appellant's wishes; although the appellant was abusive and violent towards the complainant from the beginning of the relevant events she remained, ostensibly willingly, in his company thereafter; the sexual activity charged in the relevant counts invariably occurred following a simple gesture by the appellant which was acted upon by the complainant without overt resistance or hesitation; the complainant did not call for assistance from others who came upon them whilst they were having sex; the occasion when the complainant did complain of pain (in relation to the anal intercourse), the appellant essentially gave her instruction as to how to make it more comfortable for her and the activity continued (implicitly, with the complainant complying with the suggestions made by the appellant); and the complainant did not give any evidence that might support a conclusion of callous disregard for the complainant in the context of the sexual activity that might suggest he was not honestly acting on the basis that she was consenting.

[40] The appellant acknowledged that the jury found him not guilty of the sexual offences alleged against him before the offence of common assault of which he was convicted (count 9), and that the jury found the appellant guilty of the sexual offences which the appellant was alleged to have committed after that assault. The appellant also acknowledged that the level of violence in count 9 exceeded the level of violence and abuse which preceded that count. The appellant argued that, notwithstanding those features of the case, upon the whole of the evidence it was not established that any mistake by the appellant about the complainant's consent was not honest and reasonable. The appellant submitted that the prosecution thesis that the appellant's belief in the complainant's willingness to engage in sexual activity was unreasonable was undermined by the pattern of the appellant's behaviour suggested by the evidence; after being violent towards the complainant, the appellant attended to her and secured remedial medical assistance, after which he took her to the doctor for treatment; the complainant's evidence did not paint a picture of the appellant behaving as a continuously violent and abusive man; and at times there was no

hostility or violence between them and the appellant demonstrated some capacity for compassion and concern for the complainant. Upon the complainant's evidence, her conduct towards the appellant did not alter after the assault the subject of count 9. There was nothing to communicate to the appellant that the relevant circumstances between the appellant and the complainant had changed. This was particularly relevant in circumstances in which it was not alleged that the appellant's violence was concurrent with the sexual activity. It was also significant that the jury convicted the appellant only for common assault, rather than for assault occasioning bodily harm whilst armed, as was charged in count 9.

[41] The appellant submitted that there was no significance in the circumstance that the complainant went to Evans Head with few belongings, since she did take a mattress and a tent and was well equipped to spend a period of time with the appellant. There was also no significance in the circumstance that the appellant did not seek the complainant's consent to travel with him or tell her where they were going, because the evidence did not suggest that the appellant deliberately tried to keep the complainant in the dark. Nor was it significant that the appellant kept possession of the complainant's keys or controlled her son such as to control her movements, because there was no evidence to suggest that the appellant deliberately adopted that as a method of control. The circumstance that the complainant's mobile phone disappeared was not significant because the evidence did not suggest that the appellant had taken it to isolate the complainant. The assault at Evans Head, and the absence of an apology or reconciliation afterwards, were not significant because of the dynamic aspects of the relationship, in which there were or might have been cordial relations between the appellant and the complainant in the following days.

[42] The appellant submitted that the circumstance that the complainant obeyed the appellant's instruction to give up her child at the hospital in New South Wales out of fear for the child's wellbeing did not suggest that the appellant did not honestly and reasonably believe that the complainant subsequently consented to his sexual acts. The appellant endorsed the view that this suggested that the appellant had a psychological grip upon the complainant, which might have led to her conveying the impression that she consented to sexual conduct with the appellant even if she later regretted that. This was not diminished by the subsequent violence by the appellant because of the absence of correlation between that violence and the sexual activity. The circumstance that the appellant was continually present with the complainant at the hospital did not deprive the complainant of an opportunity to complain.

[43] In the appellant's submission, there was nothing to indicate that the appellant might not reasonably have believed that the complainant consented to the sexual activity which he initiated. The appellant also submitted that the closest the complainant got to expressing resistance or absence of consent concerned her expressed reluctance to engage in anal sex, but the appellant's response was to give her advice about how to make it more comfortable for her, and thereafter the sexual activity continued without further complaint.

Consideration

[44] The definition of "consent" in s 348 of the *Criminal Code* provides, so far as is directly relevant, that:

> "(1) In this chapter, *consent* means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
(a) by force; or
(b) by threat or intimidation; or
(c) by fear of bodily harm …"

[45] The jury's verdict that the appellant was guilty of count 9, which upon the complainant's evidence involved an escalation of the appellant's violence towards her, provides a rational explanation for the difference between the not guilty verdicts on the alleged offences preceding the assault in count 9 and the jury's guilty verdicts on the sexual offences alleged to have been committed after that assault. The appellant did not contend to the contrary.

[46] The counts which are in issue in this appeal charged offences of rape occurring in the days after that escalation of the appellant's violence on 22 August. (The date can be ascertained by reference to the evidence that the complainant and the appellant stayed at the caravan park at Bribie Island on 21 August and the assaults in count 9 occurred late on the evening of the following day.) The complainant gave evidence that the pretext for this assault was that the complainant had not cooked the appellant's dinner, although she was still in the car with him, and the appellant again assaulted the complainant after she had started cooking when she said something. The jury could reasonably conclude that the appellant suddenly, violently and irrationally attacked the complainant with no provocation. Upon the complainant's evidence regarding count 9, and yet more clearly when that evidence is understood in the context of her evidence of the appellant's earlier irrational and controlling behaviour, the jury could reasonably conclude that at all times after the assault in count 9 the complainant must have been terrified that the appellant might again violently attack her without warning. The evidence as a whole, allowed the jury to decide that thereafter the complainant held a well-founded fear of sudden and violent reprisals by the appellant if she did not cooperate in the appellant's sexual conduct.

[47] The complainant gave evidence to the effect that the appellant engaged in the penetrative sexual conduct alleged for each count. That evidence was not challenged. The complainant's evidence was generally consistent and it was not contradicted by any other evidence. In relation to count 11, the first alleged rape by the appellant after the assault in count 9, the complainant gave evidence to the effect that she did not consent to the appellant's sexual conduct and said nothing because of her fear of the appellant. Some of the complainant's subsequent evidence about the very similar alleged offences in other counts was given in a shorthand fashion, but in the context of her evidence on counts 9 and 11 the complainant's evidence conveyed that she did not consent to any of the appellant's sexual conduct after the assault in count 9 but acquiesced because of her fear of the appellant.

[48] The complainant seemed unable to give the date or order of some of the alleged offences and there were various inconsistencies in the details of some of the evidence in the Crown case, including inconsistencies between some details in the complainant's preliminary complaint and her formal statement the following day. Those matters were for the jury to consider, but they did not necessarily suggest that the complainant's evidence of the elements of the offences themselves was not credible and reliable. The jury, acting reasonably, could accept the complainant's evidence and conclude that the prosecution had proved beyond reasonable doubt that the complainant did not freely and voluntarily consent to any of the sexual conduct alleged in the relevant counts. The appellant did not contend to the contrary.

[49] The real question in the appeal is whether the prosecution proved beyond reasonable doubt that the appellant did not have an honest and reasonable, if mistaken, belief that the complainant consented. The evidence already discussed requires an affirmative answer to that question. The appellant could not reasonably have been unaware that his unpredictable and apparently irrational violence so subdued and frightened the complainant as to ensure her acquiescence in his sexual conduct. The appellant's conduct in establishing control and domination over the complainant to the extent of making her give up her son, taking her to another State, requiring her to answer to different names, keeping her isolated from other people, barricading her in the tent, and attempting to prevent her from speaking to police, could be treated by the jury as further evidence that the appellant knew that the complainant did not consent, or at least that it was unreasonable for him to believe that she did consent. The jury could reasonably conclude that, upon any reasonable view, any supposed consent by the complainant was obtained by the appellant's force, threat and intimidation and the complainant's fear of bodily harm such that it did not amount to "consent freely and voluntarily given" in terms of s 348 of the *Criminal Code*.

[50] There was no evidence of any resumption of cordial relations between the complainant and the appellant after the assault on 22 August. Although the complainant told the police that she "just pretended that I enjoyed it so he would be happy", there was no direct evidence of any act or statement by her upon which the appellant could rely as a basis for any belief that the complainant freely and voluntarily consented to his sexual conduct. The circumstances that the appellant tended to the complainant's wound on 22 August and that on the morning of 23 August he took her to a medical centre where she did not complain of the assault did not require the jury to find that the complainant's fear of the appellant might have dissipated or that the appellant and the complainant might have effected some reconciliation, especially when regard is had to the complainant's evidence that the appellant remained silent when tending her injury and the confirmation in the nurse's evidence that the complainant was then under the appellant's control. It remained reasonably open for the jury to conclude that any belief the appellant held that the complainant consented to his sexual conduct charged in count 11 could not have been reasonable in light of his previous and apparently irrational violence and threats of violence, his domination over the complainant, and the absence of any discussion or indication of consent when the appellant, merely by a gesture, required the complainant to acquiesce in his unwanted sexual conduct.

[51] The same considerations apply in relation to the remaining counts of rape which are in issue in the appeal. That is so even though which of counts 18-20, 12-13, and 16-17 happened on 24 August and which happened on 25 August was not clear upon the complainant's evidence. The jury could reasonably find that it did not detract from the complainant's credibility or the reliability of her account of the events themselves that she did not give clear evidence of the order in which those three groups of offences occurred. The evidence of the further unprovoked and apparently irrational assaults by the appellant upon the complainant in that period reinforced what the jury could find was the manifest unreasonableness of any belief the appellant may have held that the complainant consented to the subsequent sexual activity. The jury could reasonably regard the complainant's lack of objection and resistance as being manifestly explicable by a rational fear in the complainant engendered by the appellant's violence in count 9 and (in relation to some of the counts of rape after count 11) in counts 14, 18, and 19.

[52] For those reasons, which substantially accept submissions made by the respondent, I conclude that it was open to the jury to find that the prosecution proved beyond reasonable doubt that the appellant did not hold an honest and reasonable belief that the complainant consented to any of the conduct in respect of which the jury found the appellant guilty of rape in relation to the counts under appeal.

[53] The guilty verdicts were reasonably open to the jury upon the whole of the evidence.

Proposed order

[54] I would dismiss the appeal.

[55] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[56] **HENRY J:** I have read the reasons of Fraser JA. I agree with those reasons and the order proposed.