SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAP* [2016] QCA 349
PARTIES:	**R** **v** **KAP** (appellant)
FILE NO/S:	CA No 69 of 2016 DC No 1500 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 22 March 2016
DELIVERED ON:	23 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2016
JUDGES:	Morrison and Philip McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted, by jury trial, of one count of rape – where the appellant and the complainant had been married for two years, but were separated at the time of the incident – where the sexual intercourse took place in contested circumstances, with the prosecution alleging the complainant was raped whilst being forcibly held down by the appellant and threatened, and defence alleging that the intercourse was consensual and initiated by the complainant – where the prosecution adduced evidence from a medical expert witness, who gave evidence as to the frequency of genital injury in sexual assault cases – where the appellant contends that this was prejudicial and should not have been adduced as part of the prosecution case – whether the expert evidence as to frequency of genital injury should not have been adduced CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISIDRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant contends that the evidence given by the medical expert witness should have been the subject of a direction to the jury in the learned trial judge's

summing up – whether the learned trial judge erred in not giving a direction to the jury about the use of the expert witness's evidence

Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited

COUNSEL: C C Minnery for the appellant
D R Kinsella for the respondent

SOLICITORS: Raniga Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** Mr KAP and his wife (**HMN**) separated in 2013 after a two-year marriage. On 8 May 2014 Mr KAP went to HMN's house, ostensibly for the purpose of visiting their child. Sexual intercourse took place, in circumstances which were contested. HMN complained that she had been raped when Mr KAP forcibly held her down on the bed and verbally threatened her. Mr KAP's case was that the sexual intercourse was consensual and initiated by HMN.

[2] After a trial Mr KAP was convicted of one count of rape. The sole issue at trial was whether HMN had consented to the sexual intercourse. An expert witness who had medically examined HMN gave evidence about the frequency of visible injury in sexual assault cases. No objection was raised about that evidence being lead, and no specific direction was sought about the jury's use of it.

[3] Mr KAP appeals against his conviction on two specific but interlinked grounds:[1]

(a) evidence as to the frequency of injury in sexual assault cases should not have been adduced as part of the prosecution case; and

(b) the learned trial judge erred in not directing the jury as to how to use that evidence.

Circumstances of offending

[4] Mr KAP and HMN were married in January 2011. They had a child in August 2013. HMN gave evidence that before the child was born the relationship was "pretty good … except for he didn't want me to have any separate bank accounts or any freedom of going to see my friends or my family."[2] He was unhappy with the idea of having a child and asked for an abortion. She gave evidence that he used to slap or hit her. They argued over his having an affair with someone in India.

[5] They separated for the first time in June or July 2013, whilst HMN was still pregnant. After three weeks, they moved back in together but stayed in separate rooms. She moved out again towards the end of the pregnancy and after the child was born.

[6] In October or November 2013, she moved back in with Mr KAP.

12 November 2013 incident – uncharged act

[7] HMN gave evidence that in November 2013 when she was breastfeeding her baby, Mr KAP started touching her.

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1 Leave was granted at the appeal to add these grounds, but in substitution for the existing ground (unreasonable verdict). The oral submissions on appeal confined the appeal to these points.

2 AB 21.

[8] She described the incident in the following way:[3]

(a) she was on the bed in her bedroom, breastfeeding, when he started touching her;
(b) he touched her legs and body, in between her thighs and her hip;
(c) he tried to kiss her;
(d) she told him to stop but he would not; she tried to get away from him;
(e) when he stumbled she ran into the bathroom and barred the door;
(f) he ran after her and grabbed her dress, which ripped; and
(g) in the bathroom she called the police and did not come out until they arrived.

[9] This account was used by the prosecution as prior discreditable conduct and to provide context to the charge of rape.[4] It was not the subject of a charge at trial.

[10] In cross-examination it was put to HMN that Mr KAP did not touch her on this occasion,[5] and that she called the police because she was angry over an argument they were having about bank accounts. She denied this. It was put to her that her account as to this occasion was an "outrageous lie",[6] which she denied.

8 May 2014 incident – offence of rape

[11] HMN gave an account as to the occasion of the rape, as follows:[7]

(a) in the morning she had taken the child to day-care by taxi; Mr KAP had borrowed her car for his own purposes; he returned the car at about 2.15 pm;

(b) they were to pick up their child from day-care that afternoon;

(c) HMN left Mr KAP in the living room; she had a shower and came out of the bathroom in a dressing gown, intending to get dressed in her bedroom;

(d) he came into the bedroom and started kissing her on her neck and back; he had closed the door behind him;

(e) she asked what he was doing in the bedroom, and he replied that he had not seen her for ages;

(f) he continued to kiss her neck and back, and touch her back; she was standing next to the bed at this stage;

(g) he grabbed her by the right arm and twisted it; he pushed her onto the bed, face down, and then he sat on top of her;

(h) he took her underwear off while holding on to her arm, and then pulled her right shoulder and rolled her around to face upwards towards him; her gown had slipped off by this point; he was still sitting on her; he unzipped his trousers;

(i) she was struggling, "trying to push him away" but she could not move; whilst she was struggling under him, he reached over to the bedside table and took the child's passport out; he put it in his back pocket and "told me that if I … move around or anything like that he's going to … take my baby away from me, and if I resist or do anything …"; he threatened to take the child away if she went to the police;

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3 AB 23-25.
4 AB 15.
5 AB 50-51.
6 AB 50.
7 AB 30-40; AB 55.

(j) at the threat of taking the child's passport she "thought at the time I shouldn't do anything, so I was just laying there and didn't resist"; she said "I just couldn't resist at all to … move or do anything. … That's what happened, and I just thought that something's going to happen to my baby as well …";

(k) he took his penis out; her legs were under him and she was not opening her legs; he put pressure on her thighs to force her to open her legs, and then inserted his penis into her vagina; and

(l) it was hard and forceful, "pushing really hard inside my vagina"; he did not use a condom; during the intercourse he was kissing her breast and neck.

[12] After the incident, she told him she was going to report the matter to the police, and he responded with a threat:[8]

> "Just before you get to that point, did you say anything to him immediately after he finished having sex - - -?---Yes. I did tell him that I was going to report the matter to the police.
>
> And what did he say in response to that?---And he said if I do anything like that or even go to anyone or talk to the police about it, he still has the passport with him and he's going to take the baby with him."

[13] Mr KAP told her to get dressed and they went to pick up their child from day-care. After driving around to various places, HMN managed to seize a moment when he got out of the car leaving the keys in the ignition. She locked the doors and drove off. Shortly thereafter she went to the police.

Cross-examination of HMN

[14] HMN consistently adhered to her evidence in cross-examination,[9] and denied the defence version of events put to her. She also gave evidence of the disagreements between herself and Mr KAP in relation to his having access to, and payment of support for, the child.

[15] It was suggested that HMN had called Mr KAP a number of times for him to come over, and that was why he visited on that day. It was suggested that when HMN got up to have a shower, she kissed Mr KAP on the cheek, and that after the shower she kissed him on the cheek again and invited him into her bedroom. It was put that Mr KAP initially rejected her advances, was tired and lay down on the bed to rest. HMN was then said to have lied down next to him, and removed her clothing. They then had consensual sexual intercourse. It was put that Mr KAP did not handle the child's passport at all during this period.[10]

[16] It was put to her that after the event, when Mr KAP left the car, she said "[w]hy aren't you coming home?" They argued about money, and then he left.

[17] Defence counsel put it that the whole story was a lie and a fantasy:

> "… this whole story about an act of domestic violence in the – on the 12th of November 2013 leading through to this story about you being

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8 AB 41.
9 AB 55-60.
10 AB 56-60.

> raped by your husband under threat of him taking and keeping your son's passport and then stealing your son is just fantasy."[11]

Admissions of fact

[18] A medical examination of HMN was carried out on the evening of 8 May 2014. That and further DNA testing was the subject of formal admissions.[12] The admissions included that DNA testing revealed that Mr KAP's sperm and skin cells were found in HMN's high vagina, and his DNA was found on HMN's neck, right breast and left breast.

Medical evidence of Dr Griffin

[19] Dr Griffin was the Director of the Clinical Forensic Medicine Unit, and a forensic medical officer, whose work included examining those who complained of sexual assault.[13] He gave evidence as to conducting a forensic examination of HMN on 8 May 2014.[14] HMN reported to him with the following history:[15]

> " … she had been grabbed by the hair by a male person, who then started kissing her on her mouth, neck and breasts, before pushing her onto a bed, where he had her – twisted her right arm, by the wrist, behind her back, and pushed her forward onto a bed, lied on top of her and reportedly, she stated that he verbally threatened her before he penetrated her vagina with his penis …".

[20] Dr Griffin identified that she had tenderness to her right hand, especially her third knuckle. There was also a bruise of four millimetres in diameter seven centimetres above her left knee, which was tender to touch.

[21] Dr Griffin gave evidence that there were no genital injuries, but that was common in many cases of sexual assault.

Ground 1 – admissibility of evidence

[22] The first ground of appeal contends that evidence given by Dr Griffin as to the frequency of injury should not have been adduced as part of the prosecution case.

[23] The specific evidence occurred in this exchange, in Dr Griffin's examination in chief, after he had given evidence as to the nature of the injuries found, and the sampling for DNA:[16]

> "Okay. Now, just finally, in most cases of sexual assault, are there no findings of genital injuries?---So in the cohort studies that we've looked at and review studies across the world, in fact, we've found there's an incidence of around 32 per cent of cases that have injury at the time of examination who've reported sexual assault. My own cohort is actually slightly smaller than that. Instead of about one in three, it's 10 about one in four in the group that I'm attending to. So

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11 AB 60, lines 25-29.
12 AB 106; Ex 1.
13 AB 63.
14 AB 63-66.
15 AB 64 lines 5-9.
16 AB 65 lines 5-28.

> it's injury that's visible to the naked eye is what we're specifically looking for. So the absence of injury, not seeing injury there, doesn't mean that penetration didn't occur. It may have still occurred, there's just no injury to actually see on examination.
>
> And it's not definitive as to whether someone was assaulted or had consensual sex?---That's correct.
>
> Okay?---It's still possible to have injury with consensual sex [indistinct] it's just less frequent than it is with non-consensual sex.
>
> Okay. All right. And you said, in your experience, you averaged about one in four. How many such examinations have you conducted?---So this year alone, I've suffered 16 examinations.
>
> Okay?---And previous to that, it's around 40 a year.
>
> Yeah. And you've been doing this for about 20 years?---I've been doing this particular role for eight years."

[24] Mr KAP contends that because the case presented by the prosecution relied solely on the complainant's version of events, the evidence of Dr Griffin could have been used by the jury to bolster the credibility of the complainant and was thus prejudicial.

[25] It was put that because the "cohort studies" referred to by Dr Griffin were in no way contextualised by the expert witness, the jury had no way of knowing if those cases were at all comparable to the facts they had to consider. The evidence was therefore irrelevant and inadmissible. The admission of the evidence therefore resulted in a miscarriage of justice.

Discussion

[26] Counsel for Mr KAP submitted that the questions by the prosecution led to irrelevant and prejudicial evidence being given. In order to deal with that contention it is instructive to set out the component parts of the questions and answers, and the context in which they occurred.

[27] Dr Griffin had just identified the injuries that had been found on HMN. They were to the right hand (specifically the third knuckle), and the area above her left knee.[17] He did not identify any sign of injury to the vagina or genital area.

[28] The question asked whether, in most cases of sexual assault, there are no findings of genital injuries. That question cannot rationally be considered separately from the one that followed in the passage above. It asked whether the absence of visible injury was definitive of whether someone was sexually assaulted or had consensual sex.

[29] The answer referred to the incidence of reported sexual assaults that had exhibited injury at the time of examination. The type of injury was identified, namely "injury that's visible to the naked eye". Dr Griffin referred first to "cohort studies that we've looked at and review studies across the world", then to "[m]y own cohort…". As to the first, the incidence of reported cases with no injury was 32 per cent. As to his own cohort, the incidence was 25 per cent, described by Dr Griffin as "slightly smaller" than the first category. He said that his own cohort consisted of about 40 cases a year for the last eight years, and in the three months to March 2016, 16 cases.[18]

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17 AB 64 lines 12-18.

18 AB 65 lines 21-28.

[30] There are a number of reasons why I do not accept the contention that the question elicited irrelevant and prejudicial evidence.

[31] First, the jury were confronted with a case where there was an occasion of sexual intercourse said to be an assault,[19] but no visible injuries to the vagina or genital area. The question sought an expert opinion as to the significance of there being no genital injury. That was crystallised in the second question in the passage above, i.e. is the absence of injury definitive of whether there was a sexual assault or consensual sex. Those were the two positions in the trial. There was no question of sexual intercourse; the only question was whether it was consensual or not.

[32] Thus, in my view, the expert opinion pursued in the questions was relevant to a matter the jury had to determine.

[33] Secondly, the answer compared two sources of data. First mentioned was the "cohort studies that we've looked at and review studies across the world". In my view, the jury would have understood that to refer to cases that others had reported upon, rather than those that Dr Griffin had personally experienced. Then Dr Griffin referred to his own cohort of cases, giving the percentage applicable there. The difference in percentages was not wide, 32 per cent compared to 25 per cent. It was plain in what Dr Griffin said that either was sufficient to permit the opinion expressed, that the presence of injury was not definitive of whether the event was consensual or not. Thus, it is evident that Dr Griffin's opinion was expressed on the basis of his own studies. That he referred to other studies does not detract from that, nor render the opinion inadmissible or likely to create prejudice.

[34] In any event, it was well within Dr Griffin's expert status to give evidence as to any statistical studies he has undertaken or relied upon, including his general observations. Such evidence did not positively bolster the complainant's evidence or credibility,[20] as submitted by counsel for Mr KAP. It was for the jury to determine whether what they had heard, in context with the rest of the evidence, was enough to convince them beyond reasonable doubt that the act occurred without consent: see paragraph [39] below.

[35] Thirdly, the evidence fell within the scope of expert evidence. In *Osland v The Queen*,[21] the High Court discussed the admissibility of expert evidence, distinguishing the opinions given by an expert in Court from opinions of a lay person:

> "Expert evidence is admissible with respect to a relevant matter about which ordinary persons are '[not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in the area' and which is the subject 'of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'."[22]

[36] Injury arising out of sexual assault is accepted as being part "of a body of knowledge or experience" which ordinary lay people would not have.[23]

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19 The DNA evidence put beyond argument that sexual intercourse had occurred; the only question was consent.

20 Appeal Transcript 1-4, lines 16-25 and 1-6, lines 44-47.

21 (1998) 197 CLR 316.

22 *Osland* at 336 at [53] per Gummow and Gaudron JJ. See also *R v Jones* [2015] QCA 161 at [16]-[17]. Internal citations omitted.

23 *R v S* [1999] QCA 311 at [18]-[19] per Margaret McMurdo P.

[37] The giving of expert evidence was not prima facie contentious, in that it was not the subject of an application under s 590AA of the *Criminal Code* to consider its admissibility prior to the trial commencing. Such applications and rulings were evidently made in relation to other matters.[24] Of course, it is possible that the particular aspect of Dr Griffin's evidence that is the subject of this appeal was not foreshadowed prior to the trial, but if so, the next factor becomes relevant.

[38] Fourthly, there was no objection to the evidence when it was adduced. Indeed, defence counsel sought to use the evidence to his own advantage, by attempting to establish that "forceful" or "rough" sexual intercourse increased the likelihood of visible genital injury.[25] In that way defence counsel went beyond the scope of the evidence already given and called upon Dr Griffin to express an opinion based on his own cohort as well as other known studies. It was accepted on the appeal that there was a tactical decision involved in that line of cross-examination.[26]

[39] Dr Griffin rejected that thesis, responding:[27]

> "… the likelihood of injury increases with the force of penetration, also, the size of the penetrating object and the state of the tissues. … So all of those are independent risk factors, but not one alone stands as being causative of injury, so it's a combination, usually … of those factors.
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> …
>
> It's roughly the same incidence that we're seeing, because we're not differentiating those particular matters. We'll see more severe injury and injury in more than one location, but that's usually with repeated forceful penetration. A single incident where penetration has occurred is … the incidence of injury is 32 per cent."

[40] Fifthly, Dr Griffin said that lack of injury is not necessarily indicative of consensual sexual intercourse, but similarly, that it was possible to have injury with consensual sexual intercourse.[28] As noted above he said the likelihood of injury increases with the force of penetration, the size of the penetrating object, and the state of the tissue, irrespective of whether the act is consensual or not.[29] Therefore, his evidence was that the absence of injury could not be taken to speak one way or the other as to the sole issue in the trial, namely consent. It was, therefore, neutral.

[41] Sixthly, as counsel for the Crown submits, the evidence given by Dr Griffin was necessary to dispel a common fallacy that physical injury would normally follow an incidence of rape or sexual assault.[30] It necessarily put the jury in the more informed position of being able to assess the significance of the physical state of HMN.

[42] For the above reasons, the first ground of appeal fails.

Ground 2 – Non-direction by learned trial judge on expert evidence

[43] During the summing up, the learned trial judge gave a direction to the jury as to how they could use the evidence from Dr Griffin as to what he was told by HMN about

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24 AB 15-16, 70, 81.
25 AB 65-66.
26 Appeal transcript T1-5 lines 9-12.
27 AB 65 line 42–AB 66 line 10.
28 AB 65, lines 11-19.
29 AB 65, lines 42-44.
30 Appeal Transcript 1-5, line 45 to 1-6, line 8.

the events of 8 May 2014. They were instructed that it could only be used in relation to HMN's credibility.[31]

[44] No direction was given as to how the jury should use the expert evidence of Dr Griffin in relation to the frequency of genital injury in sexual assault cases.[32]

[45] The contention was that the learned trial judge erred in not giving such a direction, specifically that there was no warning given to the jury that they should "not use the evidence to bolster the complainant's evidence or to negate a doubt they might have about her."[33]

[46] *RPS v The Queen*[34] discussed the required extent of judicial instructions in criminal trials:

> "Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence."[35]

[47] Therefore, the test is whether the directions given were sufficient to instruct the jury "about so much of the law as they need to know in order to dispose of the issue in the case."

[48] In my view there are considerable difficulties confronting this ground.

[49] First, it was conceded that a direction of the kind contended was not sought by defence counsel. During discussion with counsel about which directions were required, the following exchange took place:

> "MR MacKENZIE: I did raise DNA, but I conceded that there was no need for any specific direction on that because - - -
>
> HIS HONOUR: Yes. **Or about** - - -
>
> MR MacKENZIE: - - - of the admission.
>
> HIS HONOUR: - - - **experts**. **You're not challenging** - - -
>
> MR MacKENZIE: No.
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> HIS HONOUR: - - - **anything he – that the expert says**."[36]

Therefore, not only was a direction not sought, but it was expressly declined.

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31 AB 95-96.
32 Which would take the form of Benchbook Direction 55.
33 Relying on *R v CAU* [2010] QCA 46 at [103].
34 (2000) 199 CLR 620 at [41] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ.
35 Internal footnotes omitted.
36 AB 77, line 37 – 78, line 1.

[50] Secondly, the sole issue at trial was consent. The true import of Dr Griffin's evidence was, on that issue, intractably neutral. That being so, no direction was necessary and one can well understand that defence counsel decided not to ask for one.

[51] Thirdly, there was, in my view, no risk of the jury using the evidence to bolster HMN's credit. Her evidence was that she ceased to resist because of threats made by Mr KAP. The case for Mr KAP was that the sexual intercourse was consensual; in other words, HMN did not resist. Therefore each version of events was that, at the time of the intercourse, there was no resistance. That being so, that part of Dr Griffin's evidence the subject of the appeal could not have bolstered HMN's credit on the real issue, i.e. did she consent.

[52] Fourthly, I do not accept the submission that potential prejudice followed from the effect that the expert status of Dr Griffin might have on the jury's readiness to accept his evidence. Using the term "cloaked with the importance of expert evidence,"[37] it was submitted that a direction was necessary to ensure the jury were aware that they did not have to accept an expert's opinions. However, as is evident from the exchange referred to in paragraph [48] above, the evidence was not being challenged.

[53] In my view, the jury were able to fairly assess all of the evidence in a balanced way. The absence of the contended direction did not create the risk of an unfair trial or loss of an opportunity for acquittal.

[54] This ground of appeal fails.

Conclusion

[55] For the reasons expressed above, I would dismiss the appeal.

[56] I propose the following order:

1. The appeal is dismissed.

[57] **PHILIP McMURDO JA:** I agree with Morrison JA.

[58] **MULLINS J:** I agree with Morrison JA.

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[37] Appeal Transcript 1-7, line 13.