SUPREME COURT OF QUEENSLAND

CITATION:	*R v CU* [2004] QCA 363
PARTIES:	**R** **v** **CU** (appellant)
FILE NO/S:	CA No 100 of 2004 DC No 523 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	5 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2004
JUDGES:	de Jersey CJ, Jerrard J and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. The convictions entered on 17 March 2004 for the counts of rape against the appellant be quashed, and that there be a further trial of the appellant on those charges** **3. The matters be adjourned to the next call-over of the District Court in Cairns and the notices to the Crown witnesses be enlarged**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – GENERAL PRINCIPLES – where the appellant was convicted by a jury of two counts of rape – where the appellant appeals against conviction – whether the trial Judge incorrectly directed the jury in relation to the defence of honest and reasonable mistake of fact – whether the trial Judge erred in directing the jury that the honesty of a mistaken belief, for the purposes of s 24 of the *Criminal Code*, needed to be assessed objectively

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – whether the learned trial Judge should have exercised her discretion to exclude evidence of so-called pretext telephone calls

COUNSEL: J D Henry for the appellant
R G Martin for the respondent

SOLICITORS: Philip Bovey & Co Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant was convicted by a jury on two counts of rape.

He appeals on three grounds: first, that the learned trial Judge should have exercised her discretion to exclude evidence of so-called pretext telephone calls; second, that the Judge incorrectly directed the jury in relation to the defence of honest and reasonable mistake of fact in that her direction implied that the defence needed affirmatively to establish that defence; and third, that the Judge erred in directing the jury that the honesty of a mistaken belief, for purposes of Section 24 of the Criminal Code, needed to be assessed objectively.

To set the context for what I have to say about those grounds, it is convenient to say something of the facts, substantially as they emerge from the evidence of the complainant.

The complainant is an adult woman who was living in Cairns. She had known the appellant and the appellant's wife for about three years; they were friendly, had visited each other's homes.

The offences allegedly occurred on the 15th of February 2003.

In January that year the appellant's wife had told the complainant that she was shortly to travel to Melbourne and asked that since the appellant did not have many friends, would the complainant keep in touch with the appellant while she was away.

Accordingly, about a fortnight later the complainant telephoned the appellant. They met at a hotel. The appellant told the complainant he had to absent himself from his house the following evening because his daughter wanted that. He asked could he see the complainant and she said he could occupy her spare bedroom if needed.

According to the complainant the next day she swam with her daughters at their house. After the swim she was dressed in her swimsuit with a sarong around her waist. At about 9.30 p.m. the appellant arrived, bringing some beer with him. They drank some beer together, she made up the spare bed, and there was subsequent conversation in which the appellant adverted to the circumstance that he and his wife had not had sexual relations for over a year.

The appellant also asserted that the complainant had not been sexually active. She became uncomfortable and left the lounge-room. She later met the appellant in the hallway and asked had he been making a pass at her. The appellant said that he had been doing that, to which she replied she was not really interested.

Drinking continued for a time. The complainant went out and had a swim. After a while, feeling unwell, she went inside and was physically sick. The appellant, who also had been swimming, was sitting in the lounge-room wearing only his underwear. The complainant told him she was going to bed and she did so.

She had fallen asleep on her stomach and woke up to experience the pushing of a vibrating object in and out of her vagina at the instance of the appellant: that was the conduct involved in the first count of rape.

The second instance of rape occurred later in the evening when she again had fallen asleep, expecting the appellant by that stage to have followed her command that he leave the house. She woke again, on this occasion, to experience the appellant on top of her with his tongue in her vagina and his penis within her mouth. That was the second count of rape.

It is not necessary for the present to go into any more detail of the circumstances of the offences of which the appellant was convicted.

It is convenient now to turn to the third ground of appeal, that her Honour wrongly directed the jury that the honesty of the belief for the purposes of Section 24 of the Criminal Code needed to be assessed objectively. The problem emerges from this passage during re-directions:

> "That belief is a subjective thing that only he could form that belief. It is a subjectively held belief, but the issue then to be determined is whether or not that belief was honest and reasonable in the circumstances. When you are looking at his belief, it is a subjective thing as to what his belief is, what is in his mind, but when you are looking to see whether that was reasonable and honest, you are looking at the objective circumstances as you find them on the evidence."

Mr Henry, who appeared for the appellant, submitted that her Honour erred in saying that the honesty of any such belief was a matter for objective, rather than subjective, consideration. As he submitted:

> "Plainly the honesty of the appellant's belief was a matter which fell for consideration in the subjective sense, namely a consideration of what he honestly believed. It was only the reasonableness of his belief, not the honesty of his belief, which fell to be considered objectively."

I agree.

Mr Martin, for the respondent, submits in response that a belief which is not honestly held ceases to be a belief at all and that her Honour made plain the subjective nature of the belief falling for consideration.

It is instructive to pause to consider Mr Martin's analysis of the point. He put it this way:

> "A belief which is honestly held but not reasonable is commonplace, however the reverse is seldom, if ever, encountered. The room in which a jury might find a belief to be simultaneously actually held, objectively reasonable, and subjectively honest, but yet not objectively honest, is vanishingly small.
>
> In the present case the jury either rejected the holding of the belief or its reasonableness, and rejecting either of those propositions was fatal to the defence, whatever epistemological debates might be made about the distinction between subjective and objective, honesty and belief."

I see a lot of substance in that analysis but I fear the way the matter was left to the jury involved confusion of sufficient moment to invalidate the conviction.

In other words, I cannot be persuaded that, however rational Mr Martin's analysis, the jury might themselves be expected to have gone through that process and ignored her Honour's fallacious direction that they should assess the honesty of the belief objectively.

For that reason, in my view, the conviction regrettably cannot stand.

I should say something briefly about the other grounds of appeal. As to the second, the suggested reversal of the onus of proof in relation to the defence of honest and reasonable mistake of fact under section 24 of the Criminal Code, her Honour's directions, especially from page 133 of the record, began in perfectly orthodox fashion; that is, emphasising the

need for the prosecution to exclude the defence beyond reasonable doubt.

The appellant focused on a direction appearing at page 136, which was in these terms:

> "So essentially what this case comes down to are two questions. First of all, did the complainant consent to the sexual behaviour, engaging in the sexual behaviour with the appellant that night and if she did not, did the appellant nevertheless honestly and reasonably but mistakenly believe that she did?"

Obviously, I interpolated the terms "appellant" and "complainant".

Counsel for the appellant fairly criticised that direction on the basis it did not mention the need for the prosecution to exclude the possibility beyond reasonable doubt of the appellant's honestly and reasonably, mistakenly having believed that the complainant was consenting.

What then emerged was that the jury sought redirection in relation to two particular questions, which indicated they were likely grappling with the issue arising under section 24. Although those questions were not directly answered by her Honour, the jury through its speaker appears to have been satisfied with the response given. But unfortunately, in the course of that redirection, her Honour said this:

> "The issue probably is that if on the facts as you find them you can't exclude the fact, the possibility that the appellant had a mistaken belief that the complainant was consenting, then you have to consider whether that

> mistaken belief was honest and reasonable in all the circumstances."

Now, it may fairly be said, as Mr Martin has, that reading the learned Judge's directions to the jury on this issue as a whole, one may see a sufficient emphasis on the burden borne by the prosecution to exclude this defence.

I feel that were this the only point in the case, that is probably the position to which I would in the end have been persuaded. But since there will, on my judgment, need to be a re-trial of the charges, it is important to emphasise now that there is really little room in a summing-up for any confusion such as has been suggested here by Mr Henry in relation to the issue of section 24. One can only urge the Judge conducting the re-trial of this matter to have very close regard to the sample directions contained within the bench book on this issue.

The final point concerns the so-called pretext telephone calls. The complainant telephoned the appellant from a police station on two occasions, the 1st and 2nd March 2003. She was alone in the room and the calls were tape-recorded.

During the first of these the complainant asked the appellant why he had brought the vibrator to her house. He said that it seemed like a good idea. The complainant also asked him, "Did I once say to you or give you any indication that I wanted to have sex with you?" In what Mr Henry described as "the most

potentially incriminating" response made by the appellant, he said, "No, not really."

In the course of the second recorded conversation on 2nd March 2003, the appellant said that he had "misread" the complainant's "body language". The complainant said later, "What body language? At what stage were we touching and affectionate in any manner?" The appellant replied, "Well, in the end I thought - I misread your body language and I apologise for that." Later during that conversation the appellant said to the complainant, "I was attracted to you and I felt like an experience, that's all."

Counsel for the appellant submitted the learned Judge should have exercised her discretion to exclude evidence of the pretext telephone calls on the basis that its "extremely limited probative value" was outweighed by its possible prejudicial effect, referring to Swaffield (1997) 192 CLR 159.

Counsel contended there was a risk a juror might impermissibly use the somewhat sparse material coming from the appellant during the telephone calls as suggesting a consciousness of guilt on his part. Counsel also emphasised the presence of the appellant's wife as the appellant spoke to the complainant over the telephone.

As to the presence of the appellant's wife, which obviously potentially bears on the reliability of what was said, that certainly was a relevant factor, but not in my view such as

necessarily to destroy the probative value of what was said, and it may be noted the Judge drew the jury's attention to the significance of the appellant's wife presence in that way.

I take the view that the admissions which may be drawn from what the appellant said during those telephone calls were of some potential importance to the Crown case. I add, in response to another contention made by Mr Henry, that the availability to the Crown of evidence of statements made by the appellant to the police in the course of the interview which took place on 3rd March 2003, obviously did not mean that the Crown should be denied the right to rely on other probative evidence, such as that contained within the pretext telephone conversations.

I wish to record my view that the statements made by the appellant during those conversations were of not insubstantial potential probative value, such that the obviously converse prejudicial effect so far as his case was concerned, should not have led to their being excluded from evidence.

In all the circumstances, I would order that the convictions entered on 17th March 2004 on the counts of rape against the appellant be quashed, and that there be a further trial of the appellant on those charges. I would order that the matters be adjourned to the next call-over of the District Court in Cairns and that the notices to the Crown witnesses be enlarged.

What happens about release? Is he only serving a term on this count, on these counts?

MR HENRY: Yes, that's so.

MR MARTIN: Ordinarily, your Honour would make this order and then he would apply for bail at some point.

THE CHIEF JUSTICE: Then the District Court in Cairns would work out the conditions.

MR HENRY: Yes, it's sitting this week.

THE CHIEF JUSTICE: But the - they're the only orders I need make?

MR MARTIN: I think so, your Honour.

HIS HONOUR: Yes.

JERRARD JA: I agree with the orders proposed by the learned Chief Justice and generally with his reasons. I add only the following comments.

As to the pretext telephone calls, I respectfully agree with the Chief Justice that those did contain potentially probative statements by the appellant, but I consider that they also contained material which ought to have been excluded. In particular, those were the comments that a third or unidentified person is recorded as making (probably the appellant's wife) in which a number of opinions were expressed by that speaker.

On the more important issue on the appeal, the directions as to mistake appear to have started to go wrong at the point at which the learned trial Judge declined to give further directions sought by the Crown Prosecutor, when the jury first retired.

The Crown prosecutor made what appears to have been, in the circumstances, a correct submission that, up to that stage, the jury had been given very little assistance as to what an honest and reasonable mistake was in the circumstances, and that that was at the heart of the case the jury was considering.

The prosecutor accordingly asked the Judge to give further directions. Curiously, and unfortunately, the giving of these was opposed by counsel for the appellant, who is not the counsel who appears on the appeal.

In the result the learned trial Judge was persuaded not to give the jury any further directions and soon enough they returned, seeking some. They asked two questions. The first is, and I quote:

> "If she doesn't have the cognitive ability to give consent as she was drunk, but could he have taken an honest and mistaken belief that she was awake, but she was unaware of her actions as she was so drunk?"

One can understand what the jury were asking, and in the circumstances the answer to that question was "yes". The second question the jury asked was:

> "Does alcohol excuse you from criminal charges if you have made an honest and mistaken belief while intoxicated?"

The answer to that question is no. The issue, on a defence of mistake, is whether the belief is shown to have been

unreasonable, and that is the critical question, not whether alcohol has contributed to it.

If the jury were satisfied beyond reasonable doubt that no ordinary person could reasonably have considered that the complainant was a cognitive and consenting adult, then it is irrelevant that the appellant held that opinion, if he did so because he was affected by the intake of alcohol.

However, the jurors got no direct answer to either question, although the learned Judge probably gave a direction which was accurate on the second one. In the circumstances, in my opinion, both questions ought to have been answered, and the answer should clearly have conveyed an affirmative answer to the first and a negative answer to the second.

JONES J: Yes, I agree with the orders proposed by the Chief Justice and broadly for the reasons that he has given. I only wish to add a comment for my own part in relation to the receipt of the pretext telephone conversations which were objected to at trial on the basis that the conversations were held in the presence of the appellant's wife and that there was concern about their reliability in those circumstances, and also on the basis that the conversation contained many self serving statement on the part of the complainant.

It seems to me that the presence of the appellant's wife, and perhaps one other member of his family, was a circumstance

that severely limited the appellant's opportunity to explain his position.

That left the potential probative value open to some misuse, in my view. The question of whether the pretext telephone conversations should be allowed needed to be considered on the basis of fairness in those circumstances.

As to how that unfairness could be avoided, there are a number of approaches. One would be to edit the terms of the pretext conversation, alternatively to perhaps exclude those conversations altogether. Some of the statements emerging from the pretext calls were referred to during the recorded interview.

This would not necessarily result in the statements and questions based on those statements being excluded from the record of interview, but it would require some consideration of how that material ought to be introduced if the approach taken was that the pretext statements were excluded in their entirety.

I simply add that, in my view, the receipt of the pretext telephone conversations in their entirety did result in unfairness to the appellant.

THE CHIEF JUSTICE: The orders are as I have indicated with the addition of the appeal is allowed.