SUPREME COURT OF QUEENSLAND

CITATION:	*R v Soloman* [2006] QCA 244
PARTIES:	**R** **v** **SOLOMAN, Basil Adam** (appellant)
FILE NO/S:	CA No 1 of 2006 DC No 1839 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 June 2006
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2006
JUDGES:	Jerrard JA, White and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Appeal against conviction allowed** **2. Conviction set aside** **3. New trial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – whether trial judge erred in failing to give a direction to jury in relation to good character CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE – MISDIRECTION AND NON-DIRECTION – consent in dispute – intermediate version of events that appellant had honest and reasonable, but mistaken, belief that complainant gave consent was open – whether trial judge erred in failing to direct jury in relation to s 24(1) *Criminal Code 1899* (Qld) – whether miscarriage of justice occurred CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – whether trial judge directed jury

as to use of appellant's conduct after the alleged rape as evidence of his consciousness of guilt

Criminal Code 1899 (Qld), s 24

Cumberbatch (No 5) (2002) 130 A Crim R 599; [2002] VSC 289, 6 May 2002, considered
Melbourne v The Queen (1999) 198 CLR 1; [1999] HCA 32, 5 August 1999, considered
R v Cutts [2005] QCA 306; CA 97 of 2005, 23 August 2005, distinguished
R v CV [2004] QCA 411; CA No 182 of 2004, 5 November 2004, distinguished
R v Falealili [1996] 3 NZLR 664, considered
R v The Queen (1999) 198 CLR 1; [1999] HCA 32, 5 August 1999, considered
Simic v The Queen (1980) 144 CLR 319, cited
Stevens v R (2005) 80 ALRJ 91; [2005] HCA 65; B20 of 2005, 21 October 2005, considered

COUNSEL: A J Rafter SC for appellant
D L Meredith for respondent

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

[1] **JERRARD JA:** On 14 December 2005 Mr Soloman was convicted by a jury of having raped S on or about 13 December 2003. He was sentenced to four years imprisonment and has appealed his conviction, relying on three grounds. The first is that the learned trial judge erred in failing to give a direction to the jury in relation to his good character; the second that the judge erred in failing to give a direction on the way in which the jury could use his conduct after the alleged rape as evidence of a consciousness of guilt; and the third that the judge erred in failing to direct the jury in relation to s 24 of the *Criminal Code 1899* (Qld).

[2] The circumstances giving rise to the charge were as follows. Mr Soloman was the coach of a softball team and S was a member of the team. On 13 December 2003 a Christmas party was held at the team clubhouse and after that a number of team members, their partners and children, and Mr Soloman, went to where S lived with her son and with L, another team member. At some stage it was determined that Mr Soloman would stay that night at that residence, because his own was so far away. S's account in evidence of what happened, and Mr Soloman's, were very different.

S's version

[3] She described Mr Soloman as a good friend whom she had known for three or four years, and with whom she had attended a lot of social gatherings through softball. There had never been any physical intimacy between them. On 13 December 2003 she had been drinking alcohol at the club party and at her premises, and a considerable quantity, but still had her "wits about me".[1] At her premises people

1 At AR 39.

were drinking, dancing in the lounge room, and just chatting. Eventually the other people departed leaving only herself, L, and Mr Soloman there. Her son was staying at a friend's home that night.

[4] S arranged with Mr Soloman that he would sleep in the lounge room, with a fan on him. He had been offered her son's room, described in the evidence as the spare room, and Mr Soloman said he was fine on the lounge. The fan he had there was the one from S's bedroom, so, it being a hot night, S decided to sleep in the spare room; it had a fan. She went to bed wearing a tank top, a sarong, and underwear.

[5] She was woken from her sleep to find Mr Soloman on top of her, penetrating her vagina with his penis. When she asked what he was doing, he penetrated her a little more, then removed himself and said "oh sorry, sorry."[2] She shut her eyes and rolled over noticing that her sarong was hitched up and she had no panties on, although her top still was. She then heard him walking down the hallway. She realised that he was leaving, and she got up and went out and said "[y]ou can't drive. You're drunk." He went outside, got into his car, and drove off. She went and sat on the front balcony and L came out and asked what was wrong. She told L that "Basil" had "snuck into my room" and had "just got on top of me"[3]; she could not recall whether she used the word "rape" when telling L what had happened.

[6] Perhaps two days later S received a telephone call from K, another team member, who described to S having received a telephone call from Mr Soloman. K asked S if she was "all right" and S said she was okay[4]; S told K that "Basil had snuck into my room" and that "he had penetrated me".[5] Following that phone call S saw her doctor on 16 December 2003, and was tested for sexually transmitted diseases. The doctor's evidence was that S had said she was raped by someone whom she knew, on the preceding Saturday.

[7] S did not make a complaint at that time to the police. She did receive a Christmas card from Mr Soloman, accompanied by a letter of apology. Relevantly that read:

> "I know sorry will not make things right but I truly am sorry. All I can think of in the last few days is why I did it and how much I hurt a true friend. Maybe two good friends.
>
> I do not deserve your trust in me again, let alone talk to me again. I know you and K trusted me. I love you both in trust and friendship, but know I that will not be the same again.
>
> I don't care what people say about me. I deserve everything I get. Hoping you come through all this unscarred. Sorry for what happened.
>
> S, you are one of my best friends and if I lose that friendship I blame myself. And if I can win that friendship back I will.

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2 At AR 41.
3 At AR 42-43.
4 At AR 44.
5 At AR 44.

> Please forgive me S and please let me know how you are. If you don't I'll understand. I'm hurting for you. If we can rekindle this friendship again, I promise I'll make it up to you.
>
> Love always
>
> Baz"
> (I have made some very minor corrections to punctuation and spelling).

[8] Some six to eight months later S met Mr Soloman by chance at softball, when he was coaching another team. Seeing him upset her and she sat for about 20 minutes or so by herself crying; she was surprised she was so upset. Another team member N, came and sat with her for a while. N asked S what was wrong, and S said that "Basil's here", and that he had raped her at the Christmas party.

[9] Then she saw Mr Soloman again, on another day, when playing softball finals. He was watching another game. She approached him and asked him what he was doing there, knowing what he had done to her, and Mr Soloman said to her words to the effect "S, it's been about a year, get over it. I'll go where I like". After that S made a complaint to the police.

[10] In cross-examination S declined to say whether she had consumed any cannabis at the party, but agreed that she was intoxicated, and also added the detail that Mr Soloman had been supplied with a couple of pillows and a blanket with which to sleep on the lounge. She denied being awake when Mr Soloman came into the spare room and lay down on the bed with her, or turning over to face him and holding his head while he removed her bra and kissed her breasts, or of having allowed him to perform cunnilingus upon her. She also denied assisting him to remove her underwear by lifting her buttocks to let that happen. She insisted throughout the cross-examination that she was only aware of his presence in the bed when she woke up to find him penetrating her.

Mr Soloman's account

[11] It was consistent with what his counsel put to S. His evidence began with the disclosure that he had never previously been convicted or charged with any criminal offence, said by his counsel to go to his good character, and that he had believed S was consenting to intercourse with him, because she was responding to all the movements that "we" were doing.[6] He said she was conscious, demonstrated by the fact that she was saying his name in the bed, and "...she turned around in the bed towards me and she starting kissing me and she was responding to everything I was doing – touching her, kissing her on the breast, and when I went down on her vagina, she was holding my head down between her vagina and all that – everything she was doing was responding, and she was saying my name as well."[7] He swore that the first time he had any reason to stop was when she said "Basil, stop." He felt "pretty bad" at that moment, because he had taken advantage of "her drunken advances".

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6 At AR 101-2.
7 At AR 102.

[12] His evidence was that he had consumed at least a carton of stubbies of full strength beer during that day and evening, a dozen cans of rum and cola, and about five cones of cannabis. When she told him to stop he felt "[p]retty bad. Pretty upset."[8] She had followed him out of the room, and there she went onto a balcony. He went out onto it, and when she put her hand up, he told her he was leaving; she had said he should not go because he had too much to drink.

[13] On his account the arrangement that he sleep at S's residence, in her son's bedroom, had been made before the club Christmas party, and he had actually collected S from her residence to take her to that party. He had left a bag in the spare room before he and S left her residence for the clubhouse. S said in cross-examination that she could not recall but could not exclude the possibility that she had gone to the clubhouse with Mr Soloman, and that he had brought a bag with him to her residence. Mr Soloman said that later at S's residence people were drinking, smoking cannabis, and dancing, and that both he and S had cannabis there. They were both intoxicated, and that when they were both on her veranda she told him about a "Kiwi bloke called John", who was a coach and who was a "good fuck".[9] She then placed her hand on his lap and said "let's go to bed". Mr Soloman accepted that invitation and got up and followed S into the premises, first going to the toilet. When he emerged from there he went into the spare bedroom, and S was in it. Intercourse followed; they were both drunk and to him she was responding to what he was doing.

[14] In cross-examination he denied that he had agreed to sleep on the couch, or that he was given any bedding, and said the arrangements made were that he would be sleeping in the spare room. He insisted S was not asleep prior to penetration occurring, and that she had assisted in his removing her underwear.

Evidence from others

[15] L's evidence was that Mr Soloman was offered the bed in the spare room, but wanted to sleep on the couch and watch cable TV, and that he was given a rug. L woke up during the night to go the toilet, and could hear crying, and found that it was S. She asked what was wrong, and S said that "Basil raped her".[10] She agreed a number of the guests had smoked cannabis in the premises at the party, and that she had; she said Mr Soloman had supplied it. She also agreed that S had said to her words to the following effect:

> "Do you know what it is like to be in a drunken haze? When I got through the fog of the alcohol I realised there was someone on top of me. It finally just clicked and I realised it was Basil who had penetrated me."

That was what she had said to the police when asked questions in late 2004.

[16] K's evidence was that she had known Mr Soloman about five years through softball, and that she had heard from Mr Soloman the day after the party, when he had telephoned her. He said words to the effect "I fucked up" and when asked what he meant, had told K that he had raped S.[11] He told K he did not know why, but that

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8 At AR 103.
9 At AR 108.
10 At AR 74.
11 At AR 85-86.

he had gotten up off the couch and gone to the toilet, and he went to lie down in the spare room and saw S's white legs. Mr Soloman was very distraught and repetitive in the conversation.

[17] Following that K described having gone to see S, who said that she had woken up and that Mr Soloman had raped her.

[18] In cross-examination K agreed with suggestions that she had always known Mr Soloman to be an honest and trustworthy friend, and that she had not given a statement to the police until 10 October 2004, some 11 months after the incident. She agreed that she may have described to them that Mr Soloman had said that he had taken advantage of S, but insisted (in cross-examination) that Mr Soloman had also used the word "rape." She also agreed that both she and S had had cannabis at the party.

[19] N was called, and she described an occasion in mid-2004 or thereabouts at softball when she had remarked to S that she had just "[run] into Basil"[12]; S became very upset, and S then said she had something to tell N, which was that at the Christmas party she had woken up and found "Basil on top of her".[13] N's evidence was that she then told S that, disregarding whether Mr Soloman was a friend or not, Mr Soloman had raped S. A few months later she met Mr Soloman at a party, who said that there always two sides to a story, and that he knew what he had done to S was wrong, but he did not want to be called a rapist. N's evidence was that she had responded by saying that he had raped "our friend"; Mr Soloman said that "[w]e had too much to drink."[14]

[20] The Crown led the complaints of rape or descriptions of the intercourse given by S to her friends and her doctor pursuant to the provisions of s 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld). It relevantly provides that evidence of how and when any complaint, other than a complainant's first formal witness statement to a police officer, was made by a complainant about the alleged commission of a sexual offence by a defendant is admissible in evidence, regardless of when that complaint was made. That section further provides that a judge must not warn or suggest in any way to a jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a complaint. The evidence of what Mr Soloman had said and written to S, and said to K and N, was led as evidence capable of being regarded as admissions that he had commenced having sexual intercourse with a woman he knew to be asleep and not consenting.

[21] There is no complaint about any of the directions the learned judge gave the jurors on the contents of S's complaints to others, which included directions that the jurors could not regard the things said in those out of court statements as proof of what had actually happened.[15] The directions explained that the jurors might only use that evidence as it related to S's credibility, either because of consistency or inconsistency in the accounts she gave to others. Regarding what Mr Soloman had said to others, the judge directed the jurors of the necessity to be satisfied both as to what Mr Soloman had said, and also that what he said (and wrote) was an admission

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12 At AR 93.
13 At AR 94.
14 At AR 95.
15 At AR 156.

against interest,[16] which the learned judge described as an acceptance that there was no consent.[17]

Ground 1

[22] This ground relied on the opinion elicited in S's cross-examination by Mr Eberhardt, Mr Soloman's counsel at the trial, that as at 13 December 2003, Mr Soloman was a reliable and trustworthy friend, as far as S was concerned. It also relied on the opinion elicited from K that she had always known Mr Soloman to be an honest and trustworthy friend, and the evidence that Mr Soloman had not been previously charged with or convicted of any criminal offence. Mr Eberhardt submitted to the judge that in totality that put evidence of good character before the jury for their consideration, and counsel wanted the jury directed on "good character".[18]

[23] The learned judge, who alerted both counsel to the decision of Flatman J in *Cumberbatch (No 5)* (2002) 130 A Crim R 599[19] (with which judgment the learned trial judge agreed), observed that there was very little probative value (as to character) in simply saying that a person had no prior convictions. The learned trial judge was quite unpersuaded that the fact Mr Soloman was a loyal and trusted friend demonstrated that he was of good character, and I respectfully agree. A number of people currently in jail serving long sentences for serious violent offences would undoubtedly be described by some others, both in the prison and outside it, as loyal and trusted friends. However, K's evidence had described Mr Soloman as an honest and trustworthy friend, which marginally improves the argument. But that was not evidence of Mr Soloman's general reputation; and K's cross-examination included the evidence, elicited by Mr Eberhardt, that the week after Mr Soloman had told her both that he had taken advantage of S and had raped S, she had told Mr Soloman that she would not be speaking to him again and that she was S's friend. Her previously good opinion of Mr Soloman does not qualify in those circumstances as evidence of his good character relevant to the probability or improbability of his having raped S, or supporting his creditability in his denial on oath that he had. It was evidence only that until December 2003 K had had a good opinion, changed by what both S and Mr Soloman – on her account – had told her about the matter.

[24] Then there is the evidence that he had no prior convictions. People who are mean, greedy, ruthlessly ambitious, devoid of sympathy for the weaknesses or needs of others, exploitative, ungenerous, and unkind, can go through life without any convictions for criminal offences. An absence of them says very little about character.

[25] The learned judge agreed in this matter that the judge would mention to the jury that Mr Soloman had no prior convictions, but declined otherwise to direct the jury as to what was said to be evidence of what was said to be his good character, and Mr Eberhardt accepted the position. As it happened, the judge did not remind the jurors of the absence of those convictions, and Mr Rafter SC (for Mr Soloman on the appeal) submitted that, while the evidence as to good character was not strong, it

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16 At AR 162-165.
17 At AR 165.
18 The submission is at AR 128.
19 [2002] VSC 289, 6 May 2002.

was more substantial than the mere absence of prior convictions, and a direction should have been given about it. I respectfully disagree; Mr Rafter's submission readily acknowledged that in *Melbourne v The Queen* (1999) 198 CLR 1[20], a majority in the High Court held that where evidence was led of good character, a judge was not obliged to direct the jury as to the manner in which that could be used. The joint judgment in *Simic v The Queen* (1980) 144 CLR 319 (at 333) held that there is no rule of law that in every case in which evidence of good character is given the judge must give a direction as to the manner in which it can be used. That judgment added that no doubt, generally speaking, if such a direction was asked for it would be wise to give it.

[26] But the evidence in this matter as to good character was simply so slight that it failed to raise it as an issue for the jury's consideration. The evidence led as to "good character" was irrelevant to the improbability of Mr Soloman having committed the offence, and irrelevant to assessing his credibility in the witness box. The jurors heard such evidence as there was upon which the ground of appeal relies, but more importantly, heard the statements, capable of being understood as confessions, which he made afterwards. Those statements demonstrated a great deal of regret for what had happened, and were therefore evidence of some good character. They reflected what S's evidence acknowledged, namely that Mr Soloman and S had been good friends before that night, and each was upset at what had happened. That evidence of their prior relationship, rather than of anyone's good or bad character, was properly before the jury for its consideration. The defence argued the evidence established only what Mr Soloman described in the witness box, namely that he had taken advantage of a consent being offered, offered because S, like Mr Soloman, was affected by alcohol and cannabis; but a knowing consent for all that.

[27] If the learned judge had reminded the jurors that Mr Soloman had no prior convictions it could have made no difference at all to the verdict, and nor could a reminder, in context, of the previously favourable opinions of him held by S and K. The position is the same as that described in the dissenting judgment of Thomas J in *R v Falealili* [1996] 3 NZLR 664, quoted with approval by McHugh J and Gummow J in *Melbourne v The Queen*, at pages 671 to 672 that:

> "Consequently, if the evidence of the accused's good character is both probative and relevant the judge will, almost as a matter of course, direct the jury as to its significance in summing up the defence case. It would be unfair not to do so. If, on the other hand, the purported character evidence is lacking in probative force and of remote relevance to the charge in issue, the judge may decide that a good character direction is not warranted. Or the judge may consider that it would be prudent to proffer a good character direction, but then to qualify it in order to put it in perspective having regard to the circumstances of the case. To proscribe that, whenever character evidence is adduced or elicited, a good character direction should be given and that it must generally embrace both the credibility and propensity limits of the direction is an unnecessary fetter on that discretion."

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[20] [1999] HCA 32, 5 August 1999.

[28] I respectfully agree with those remarks, and consider that ground 1 should be dismissed.

Ground 3

[29] This ground relies on the proposition that a potential defence was available under s 24(1) of the *Criminal Code*. That section provides that:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

Mr Rafter's submission accepted that Mr Soloman's defence asserted unmistakable, albeit intoxicated consent, following an unmistakable invitation to go to bed with S. Mr Soloman's evidence of an express invitation strongly tended to exclude the possibility of any later mistake.

[30] However, that possibility was raised in discussions between counsel and the learned trial judge prior to the addresses by counsel. Mr Eberhardt submitted at the trial that the jury might find that the complainant did not have the cognitive ability to consent when the intercourse happened, but that she had behaved, when in the bedroom, in the way in which Mr Soloman described, and that he had been misled. The learned judge considered after that discussion that the appropriate direction was that if the jury were in any doubt as to whether S had acted in the way that Mr Soloman described, then they should acquit. The judge considered that that would resolve any issue of mistake, and that that direction would be more beneficial to S than what the judge described as the "technically open grey area of mistake."[21] Mr Eberhardt agreed with that approach.

[31] The learned judge did direct the jury as undertaken, and in these terms:

> "I want to give you these directions then: If you accept that any part of the sexual activity that is described by the defendant in which he described the complainant as a willing and active participant took place with the complainant, or if you are left in a state of doubt as to whether any of that sexual activity which was, according to the defendant, willing and active participation by the complainant with the defendant, if you are in any state of doubt as to whether any of those acts of sexual activity that I have described took place between the defendant and the complainant, then you must acquit."[22]

[32] The sexual activities which the judge had just described to the jury were in these terms: that S had rolled over when Mr Soloman got into bed with her, she had spoken his name, she freely and actively consented to his touching her breast, to oral stimulation of her genital area, and then to intercourse, and that during the course of those events that she had spoken Mr Soloman's name. The directions continued:

> "You may convict the defendant only if you are satisfied beyond reasonable doubt that the defendant penetrated the complainant with his penis when the complainant was asleep, and that none of those

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21 These discussions were at AR 120-125.

22 At AR 155.

> particulars of sexual activity, which was the willing and active participation described by the defendant, took place. So you may only convict the defendant if you are satisfied beyond reasonable doubt that the defendant penetrated the complainant with his penis when the complainant was asleep and that none of those particulars of that sexual activity I have described occurred between the defendant and the complainant."[23]

[33] Mr Rafter conceded that he could not identify any specific disadvantage to Mr Soloman from those directions. They effectively directed the jurors that if they had any doubt about whether any of the acts by S in the bed, described by Mr Soloman, had happened (and on which Mr Soloman would rely for a defence of honest and reasonable mistake), then the jury were obliged to acquit.

[34] But there is still a problem with those directions. They did not apply the law, which required the jurors to consider whether the prosecution had excluded the possibility of an honest and reasonable, but mistaken, belief that S was consenting. Mr Rafter referred the Court to the statement by McHugh J in *Stevens v R* (2005) 80 ALRJ 91[24] at [29], where His Honour wrote that a jury is entitled to refuse to accept the cases of the parties and to "work out for themselves a view of the case which did not exactly represent what either party said", referring to the unanimous judgment in *Williams v Smith* (1960) 103 CLR 539 at 545. On the assumption the jurors might have favoured some intermediate version of events – as it was open to them to do - the directions that were given (being limited to the evidence given) could not assist the jury on the issue of mistake, in the way that directions actually in the terms of s 24 would have.

[35] Apart from that potentially crucial omission, there was a curious risk for Mr Soloman posed by the directions that were given, namely that the jurors were simply too surprised at the extent to which the law favoured Mr Soloman to apply it as directed. I add that this case differs from each of *R v CV* [2004] QCA 411[25] and *R v Cutts* [2005] QCA 306[26], in that in this matter counsel did raise s 24 and a possible defence of mistake, before the judge directed the jury. The directions the judge gave were obviously intended to deal with that possible defence, in a way thought favourable to Mr Soloman or which did not disadvantage him, and the judge wanted to avoid complexity in the direction. But the terms of s 24 are an important part of our criminal law, upon which Mr Soloman was entitled to rely and to have the jury accurately directed.

[36] The evidence included Mr Soloman's written apology, which the jury could find was inconsistent with the description he gave at the trial of an unmistakable invitation followed by apparent enjoyment of pre-intercourse events, and which therefore admitted different events happened, not described in his evidence, but described in hers. But even so, I cannot conclude that had the jury been directed in terms as to the possibility of mistake, that the verdict would have been the same. I am not satisfied that no miscarriage of justice occurred by reason of the course the learned trial judge took. Trial judges should direct juries accurately on the applicable law. That ensures everything has been done to secure a verdict based on

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23 At AR 155-156.

24 [2005] HCA 65; B20 of 2005, 21 October 2005.

25 CA No 182 of 2004, 5 November 2004.

26 CA 97 of 2005, 23 August 2005.

the law, after a jury has heard the mixture of commonsense, understanding of human passions, and requirement of self-restraint and respect for others, that characterised Sir Samuel Griffith's drafting.

[37] I would allow that ground of appeal.

Ground 2

[38] Mr Rafter accepted that the trial judge had directed the jurors regarding Mr Soloman's possible admissions of guilt, and given redirections as requested, and he could not point to any errors in those directions or redirections. That ground should be dismissed.

[39] The appeal should be allowed, the conviction set aside, and a new trial ordered.

[40] **WHITE J**: I have read Jerrard JA's reasons for allowing this appeal and I agree with them and the orders which he proposes. It is particularly important, as his Honour has emphasised, that a jury be fully equipped by appropriate and correct directions to return a verdict according to law. The very divergent evidence of the parties here might well have caused the jury to moderate both versions of what happened. If that were the case, and it was a real possibility, then a jury needed to be directed about s 24 irrespective of whether the direction given might be said to favour the appellant.

[41] **PHILIPPIDES J**: I agree with the reasons for judgment of Jerrard JA and the orders proposed.