SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomas* [2007] QCA 226
PARTIES:	**R** **v** **THOMAS, Robert John** (appellant)
FILE NO/S:	CA No 81 of 2007 DC No 541 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	18 July 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2007
JUDGES:	de Jersey CJ, Jerrard JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction upheld** **2. Convictions quashed** **3. Appellant be retried on both counts on the indictment**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – where appellant convicted of two counts of rape – where case in respect of count one left to the jury on the basis the complainant was asleep – where Crown case and Judge's direction contrary to the evidence – whether conviction unreasonable CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – MENS REA AND HONEST AND REASONABLE MISTAKE – where appellant convicted of two counts of rape – where second count of rape consisted of anal penetration – where some dispute regarding whether anal penetration was deliberate – whether deliberation must descend to the

particular orifice penetrated

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – POWER TO ORDER NEW TRIAL OR QUASH CONVICTION AND DIRECT ENTRY OF JUDGMENT OF ACQUITTAL – PARTICULAR CASES – NEW TRIAL GRANTED – where appellant convicted of two counts of rape – where conviction on first count quashed – whether retrial on both counts should be ordered

Criminal Code Act 1899 (Qld), s 24

COUNSEL:	B G Devereaux SC for the appellant R G Martin SC for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant was convicted by a jury on two charges of rape and sentenced to concurrent terms of six years' imprisonment. He appeals against the convictions on the ground they are unreasonable. Another ground of appeal was not pursued.

The charges arose out of sexual activity which occurred in the early morning of the 3rd of December 2005. The 18 year old complainant was at a friend's house with a number of other people. She was drinking alcohol and consuming some ecstasy tablets.

In the course of the evening the appellant arrived. There was evidence of his intoxication through the consumption of alcohol and also of his consumption of ecstasy.

At about 4 a.m. the complainant went off to sleep in a made-up bed in the living room at the house. She was aware that the appellant would also be sleeping in due course on that bed.

The complainant's evidence was that she awoke feeling a sharp pain in her vagina with the appellant on top of her. Her jeans and underpants were down to her ankles. Her shirt was unbuttoned and her bra was undone. Her evidence was that she said nothing because she was scared. She said that the appellant was "trying to penetrate [her] vagina a few times". Next she felt him lift her knees. She next "felt a pain in my bottom". She said she felt him "trying to in my bottom" with his penis. Again, she did not say anything because she was scared, on her evidence. The pain, she said was caused by "his penis penetrating".

The sexual activity stopped after she started "to squirm because it was hurting and [she] wanted him to realise and to think [she] was waking up". The complainant left the house and made fresh complaint of rape.

She was later medically examined. That examination revealed bruising of the anal margin and lacerations on the perianal skin consistent with "a penetrative blunt force to the orifice that caused it to be stretched". The two counts were based on the complainant's evidence of first vaginal penetration and second anal penetration.

In his interview with the police the appellant gave this account:

> "Half an hour after we have all gone to bed, while we were in the middle of touching and feeling each other, and then, I don't know, we both started taking clothes off. I started taking her clothes off and then we had sex. Then, um, I know we weren't having sex for that long and she just stopped, put on her clothes, and walked out."

The appellant described having intercourse in two positions, first, consistently with the complainant's evidence, when he was on top of her, and second, when he lay beside her. He said he moved because he was getting tired holding himself up.

Although he denied anal intercourse several times, he ultimately conceded to the police that it was possible. I refer to this passage:

> "And penile vagina sex?-- Yes, sir, that's all I thought it was. Um, I wasn't looking where I was putting it and I was on the side position. Mmm-- So she said I was having anal sex with her. I don't know. It is all the same to me."

The Crown case on the count of vaginal rape, count 1, was put squarely on the basis that the complainant was asleep at the time of penetration and so was incapable of consenting. Consistently, her Honour directed the jury in these terms:

> "If you have a reasonable doubt whether she was asleep, then the Crown has not discharged its onus of negativing consent."

Yet, as has been seen, there was evidence from the complainant that she was awake before penetration occurred. On her own evidence she was sufficiently conscious to be aware of what was happening and to be afraid. There was no evidence of actual penile penetration before the complainant awoke. It was not open for the jury to find beyond reasonable doubt that penetration occurred while the complainant was asleep. It was contrary to the evidence led at the trial.

If the complainant's account were accepted and the appellant's rejected, then the appellant had undressed the complainant while she was asleep. If he did that, then placed himself on top of her immediately prior to sexual intercourse while she was still asleep, that would have assisted the Crown substantially in excluding a defence under section 24 of the Criminal Code. But the matter was just not left with the jury on that basis.

On the Crown case, as delineated before the jury, and as reflected in her Honour's direction, the jury simply could not, on the evidence, convict the appellant on count 1. The conviction on that count should therefore be quashed.

Mr Devereaux, who appears for the appellant, submitted that no re-trial should be ordered because of the way the case

was presented by the Crown. On the other hand, we now see a body of evidence which could perfectly reasonably be left to a jury, with the Crown particularising its approach to the matter properly in accordance with that evidence, and the jury directed in orthodox terms consistently with that Crown approach. In my view a re-trial should be ordered on count 1. The public interest would otherwise not be served.

Now, the position was different in relation to the count of anal penetration. That count was not left to the jury on the basis it could convict only if it found the complainant was asleep. The jury was given a conventional direction on consent, and on the possible application of section 24 of the Criminal Code as to honest and reasonable mistake of fact. There was evidence from the complainant of anal penetration and the medical evidence was consistent with non-consensual penetration. The appellant's statement to the police effectively left open the possibility anal penetration occurred when he said:

> "She said I was having anal sex with her. I don't know. It is all the same to me."

In the course of their deliberation the jury asked the Judge this question:

> "In count 2 does it make a difference if the defendant accidentally enters the complainant's anus as opposed to a deliberate act designed to enter this orifice?"

The Judge directed the jury:

> "It makes no difference as to whether the penis deliberately or accidentally penetrated the anus of the complainant."

On any reasonable view, the penetration which did occur was deliberate in the sense that the appellant believed himself to be penetrating some part of the complainant's body. That was his goal. His actions were directed at achieving penetration of some sort.

I accept the Crown's submission that if the only question is whether deliberation must descend into the particular orifice penetrated, then the answer must be that it does not. Her Honour's direction was, in my view, correct. I may add, however, that the question of the particular orifice being penetrated may obviously, nevertheless, bear upon the jury's assessment on the question of consent.

The conviction on count 1 means that the jury found that during the vaginal intercourse the complainant was asleep. We know that she was not and the Crown effectively concedes now that the conviction on count 1 must therefore be set aside.

Because of the temporal proximity of the two alleged offences, the complainant's state during the commission of the vaginal intercourse could be relevant to the jury's assessment of the issue of consent in relation to the

alleged anal intercourse, including whether the prosecution excludes a section 24 defence.

It would not be appropriate to quarantine count 2 from count 1 in the assessment of the matter of consent and the question of honest and reasonable mistake as to consent. That being so, with the necessary quashing of the conviction on count 1, the conviction on count 2 must also unfortunately be quashed with re-trials on both counts.

I say unfortunately because of the need for the complainant again to give evidence at a re-trial and, frankly, because the prosecution case on count 2 would appear to be a strong one. But this Court is left with no alternative because of the jury's plainly impermissible treatment of count 1. One hopes that when the matter is retried, very careful consideration will be given by the prosecution to the way in which count 1 is left to the jury.

The appeal against conviction must be upheld. The convictions should be quashed. And it should be ordered that the appellant be retried on both counts on the indictment.

JERRARD JA: I agree with the reasons of the learned Chief Justice, with the orders his Honour proposes, and with the remarks he has made.

MULLINS J: I also agree.

THE CHIEF JUSTICE: The orders are as I have indicated.
