# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Pryor* [2007] QCA 232 |
| PARTIES: | **R**<br>**v**<br>**PRYOR, Anthony Paul**<br>(appellant/applicant) |
| FILE NO/S: | CA No 299 of 2006<br>DC No 93 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Townsville |
| DELIVERED ON: | 20 July 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 July 2007 |
| JUDGES: | de Jersey CJ, Williams and Jerrard JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal against conviction dismissed**<br>**2. Grant leave to appeal against sentence**<br>**3. Appeal allowed**<br>**4. Set aside the serious violent offence declaration**<br>**5. Otherwise confirm the sentences imposed** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of rape and assault occasioning bodily harm but acquitted of one count of assault – whether any inconsistency between convictions and acquittal – whether convictions unsafe, unsatisfactory or unreasonable<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF LEGAL PRACTITIONERS – where appellant revoked instructions to first counsel – where counsel had cross-examined complainant about prior sexual relationship with appellant – where Judge critical of counsel's cross-examination – whether counsel's approach was a "rational tactical decision" – whether conduct of first counsel gave rise |

to a miscarriage of justice

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JURIES – DISCHARGE AND EXCUSING FROM ATTENDANCE – PREJUDICE TO ACCUSED – where appellant revoked instructions to counsel – where trial resumed with second counsel, who unsuccessfully sought discharge of jury – whether circumstances led to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where appellant convicted of rape and assault occasioning bodily harm – where appellant sentenced to seven years imprisonment and serious violent offence declaration made – whether serious violent offence declaration rendered sentence manifestly excessive

*Criminal Code Act* 1899 (Qld), s 24
*Evidence Act* 1977 (Qld), s 132B

*TKWJ v The Queen* (2002) 212 CLR 124, applied

COUNSEL: A W Collins for the appellant/applicant
M J Copley for the respondent

SOLICITORS: Aboriginal and Torres Strait Islander Legal Service (Townsville and Surrounding Districts) for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ**: The applicant was convicted following a trial of rape and assault occasioning bodily harm. He was acquitted on a further charge of unlawful assault. That charge had been amended, from assault occasioning bodily harm, following the prosecutor's concession there was no evidence of bodily harm.

**Brief summary of the facts**

[2] The offences occurred in mid-2005 at Townsville, a month or so into a sexual relationship between the 33 year old appellant and the 29 year old complainant. They had met six months earlier.

[3] On the relevant night, the complainant stayed over at the appellant's house. The appellant took offence over the circumstance that the complainant's pantyhose were torn, which he alleged evidenced her having been unfaithful to him. Over the relevant period, the appellant's sister's children were in the house with the appellant and the complainant. In that period, the appellant made threats of violence against the complainant, based on the allegation she had betrayed him. The complainant nevertheless went to his bed, in which she slept, naked, and at that stage alone.

[4] When the appellant's sister's children left, the appellant violently assaulted the complainant while she was in the bed. She screamed for help, and he muffled her voice. She was left, from the assault, with black eyes and split lips. (That was count one.)

[5] Later, the complainant awoke to find the appellant had removed a tampon from her vagina. After obscene threats and commands, he threw the tampon out the window. A police officer recovered it the following morning. When the appellant told her he was going to "fuck" her, she said "no". A little later she said: "No you don't understand. No. This is rape." The appellant then raped her. (That was count two.)

[6] The following morning, on the complainant's evidence, the appellant punched her about the face. It was on that (amended) count of common assault (count three) that the jury acquitted the appellant.

[7] The complainant left the house that morning with the appellant, ostensibly so that he could on her behalf call in sick to her employer, from a pay phone. But the complainant decamped to her mother's place, leading to what may be considered a timely fresh complaint.

[8] Both the complainant's mother, and a government medical officer, gave evidence of the complainant's distressed condition, and the latter of injuries consistent with the initial assault.

[9] A neighbour gave evidence of hearing a cry for help from next door, and in the case of her husband, of hearing: "Stop Tony", "Don't Tony don't".

[10] There was evidence of a turbulent, violent relationship between the appellant and the complainant. A focus of defence counsel's cross-examination of the complainant was the question why she stayed with him in those circumstances.

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

**The course of the trial**

[12] The major thrust of the challenge to the convictions arose from the approach taken by the appellant's trial counsel. The appellant was represented by two successive counsel. The appellant revoked his instructions to the first counsel during counsel's cross-examination of the complainant.

[13] At an earlier stage, counsel had sought leave to cross-examine the complainant concerning her prior sexual relationship with the appellant. What emerged is usefully summarized in this part of the Judge's direction to the jury:

> "You were told about the history of the relationship, that there was rough sex, and that the accused was always in control. On her account, she had previously been raped but she had not complained, and even though she was able to go to her mother's house, she had come back to his house and had further rough subservient sexual intercourse with him after that time. She had the opportunity to complain at work, to the police, to her mother, but she had not done so until after the incident in question."

[14] Particular attention before this Court was given to evidence elicited by defence counsel, from the complainant, that on one night, the appellant raped her five times. The complainant's evidence was that she left and went to her mother's place. When asked by counsel whether she continued the sexual relationship with the appellant after that, she agreed, but explained that she was yielding to threats from the appellant.

[15] Counsel for the appellant before us conceded that there was benefit to the Crown in leading evidence about the nature of the relationship between the appellant and the complainant, and to the defence in seeking to counter that, with evidence of "a history of rough sex". But on appeal, counsel focused on the evidence of the five rapes. At the trial, the Crown Prosecutor had informed the Judge that he did not himself lead that evidence because its prejudicial effect would far outweigh any probative value.

[16] In the absence of the jury, the Judge made extremely critical observations about counsel's cross-examination of the complainant, which the Judge suggested would have served only to excite "enormous sympathy" for the complainant. Then, mid-afternoon, the appellant withdrew that counsel's instructions.

[17] The trial resumed the following morning, with another counsel representing the appellant. That counsel unsuccessfully sought the discharge of the jury. He was then prepared to continue to represent the appellant, however, and no adjournment was sought. The trial continued without interruption to a conclusion.

[18] The issue now arising is whether a miscarriage of justice occurred because of the conduct of the first counsel. If his questions were driven by a particular forensic purpose, then a miscarriage of justice will not have ensued because the questions may not have drawn forth the desired answers, or may have led to the complainant's taking the opportunity of reinforcing her position. Counsel's apparent purpose was, in the first place, to establish that while the sexual relationship was rough in character, it remained consensual. Another purpose, in eliciting the evidence of the five rapes, followed by a resumption of the relationship, was to impugn the credibility of the complainant in relation to her instant complaint of lack of consent. The theory presumably was that the jury would have been left querying whether rapes did occur on that earlier night, in circumstances where the complainant made no complaint to the police, for example, and was prepared later to resume her relationship with the appellant. In theory, that could have provided a springboard for a contention that her present claim of lack of consent should be doubted.

[19] The question to be asked is whether the approach of counsel, in exploring that territory, was the result of "a rational tactical decision" (*TKWJ v The Queen* (2002) 212 CLR 124, 131. See also at p 158.) Viewed objectively, counsel's approach did reflect a rational tactical decision. That being so, a miscarriage of justice has not occurred. The appellant's position is not advanced by a point emphasized by counsel before us, that the appellant's second trial counsel was effectively constrained by the conduct of his predecessor. That was practically so, but because the first counsel's approach was forensically driven, the appellant cannot now legitimately complain about that feature and its consequences.

[20] A separate question arises, however, whether the complainant's answering of defence counsel's questions itself led to a miscarriage of justice. I have mentioned

her apparently taking the opportunity to reinforce her position. As put by the Judge when ruling on the application for the discharge of the jury:

> "Part of the problem with the cross-examination was that questions it seemed to me were frequently being asked in a way which made it easy for the complainant to make statements which were damaging to or adverse to the accused."

But His Honour did not consider that to continue the trial would lead to a miscarriage of justice, and his view, having heard the evidence to that point and having reflected on the issue overnight before giving his ruling, should now be seen as highly significant.

[21] Having reviewed the transcript, my impression is that the complainant's responses were not so bold, unresponsive or repetitive, as to prejudice the jury impermissibly against the accused. It is important to note, for example, the jury's acquittal on count three, which depended like the others on the credibility of the complainant, and the jury's having asked for redirection in relation to s 24 of the *Criminal Code*. In short, as put by Mr Copley for the respondent upon the hearing of the appeal, the jury was not "carried away" by what might be suggested to have been the complainant's "performance".

[22] I turn now to the particular grounds of appeal.

**Grounds of appeal**

[23] The first and second grounds of appeal are that the convictions were unsafe, unsatisfactory and unreasonable. The jury was instructed convictions depended on acceptance of the complainant's evidence. But in addition, there was arguably strong, potentially corroborative evidence: the discovery of the tampon, the evidence of the cries for help and denial, and the evidence of the complainant's distressed and injured condition. A review of the evidence confirms these grounds cannot be sustained. A reasonable jury was plainly entitled to convict.

[24] Then there is complaint, in ground five, that the convictions are inconsistent with the acquittal.

[25] The acquittal on the count of common assault, allegedly committed the following morning, is sufficiently explained by the comparative sparsity of the evidence supporting that count, by contrast with the comprehensiveness of the evidence relating to the earlier counts. They were on any view the major counts, and they were supported by potentially corroborative, and importantly corroborative evidence. There was none in respect of count three. The jury were entitled to distinguish counts one and two on the one hand, and count three on the other, by reference to the quality of the evidence. Significantly, it was not contended for the defence at the trial that the first assault did not occur, but rather, that it occurred after consensual intercourse.

[26] The appellant contends, in respect of ground three, that the learned trial Judge erred in admitting evidence about prior acts of violence and rape. The Crown led the evidence about the violence in the relationship, and that evidence was admissible under s 132B(2) of the *Evidence Act* 1977 (Qld).

[27] As mentioned, it was defence counsel who elicited the evidence of prior rapes, and that was forensically driven. The major defence point was that a complainant, subject to that past treatment, would not have remained with the appellant, so that her instant allegations should not be accepted as credible. But for reasons previously expressed, the appellant cannot now seek to impugn the convictions by reference to that forensic approach, one which could legitimately and rationally have been adopted.

[28] The remaining ground of appeal relates more broadly to the conduct of the trial. It is expressed as follows:

> "The trial Judge erred in law in failing to discharge the jury due to unfairness arising from:
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> (i) the course of cross-examination prior to change of counsel;
>
> (ii) the non-responsiveness and prejudicial answers given by the complainant in her evidence;
>
> (iii) the difficulty faced by the replacement counsel appearing part way through the complainant's evidence."

[29] I have dealt above with the matters raised in (i) and (ii). As to (iii), the second counsel indicated his preparedness to continue with the trial without interruption. That was a matter for him, and insofar as a question has been raised whether the appellant was thereafter appropriately represented, a perusal of the transcript dispels any such view. There is no basis for thinking the appellant was disadvantaged by the continuation of the trial, with his new counsel, without break.

[30] The convictions were substantially justified by a strong Crown case, especially strong because of the independent supporting evidence. None of the grounds of appeal has been established. The appeal against conviction should be dismissed.

**Sentence**

[31] The application for leave to appeal against sentence fastens on the addition, to the seven year term of imprisonment imposed for the rape, of a serious violent offence declaration.

[32] These offences occurred in June 2005. In 1990, the appellant was convicted of assault occasioning bodily harm while in company. In 1992, he was convicted of entering a dwelling house with intent. In 1997, he was imprisoned for 12 months for the indecent treatment of a child. In June 2006, he was imprisoned (wholly suspended) for breaching a domestic violence order.

[33] The sentencing Judge referred to the following particular features: the appellant's earlier threat; that the assault occasioned real injuries; that the complainant's lack of consent was manifest; the complainant's residual psychiatric problems; and the appellant's subsequent domestic violence breaches.

[34] It is the serious violent offence declaration which the appellant contends renders the sentence manifestly excessive. As special features warranting the declaration, the Judge identified the circumstances that the rape was preceded by serious and sustained violence, and committed in degrading circumstances, with serious consequence for the complainant's health and wellbeing.

[35] In my respectful view those features were not sufficient to warrant the making of a declaration. Unfortunately, violence is not an unusual feature of rapes. It is of course significant that the complainant and the appellant had a previous sexual relationship, and that on this occasion, notwithstanding the preceding threats from the appellant, the complainant chose to sleep naked in his bed. That is not to suggest the appellant's conduct is in any way excused. But when all the circumstances are considered together, the rape is not in the end to be regarded as falling within a category justifying the declaration made. The making of the declaration rendered the seven year term imposed for the rape manifestly excessive, especially noting that seven years fall mid-way in the six to eight year range presented to and apparently accepted by His Honour. Removing the declaration leaves the seven year term appropriate.

[36] I would grant leave to appeal against sentence, allow the appeal, and set aside the serious violent offence declaration, but otherwise confirm the sentences imposed.

[37] **WILLIAMS JA:** I agree with all that has been written by the Chief Justice with respect to the appeal against conviction and application for leave to appeal against sentence. I would however add one further observation.

[38] Where there is a change of counsel in the course of a criminal trial before a jury the trial judge will always have to assess whether that change materially affects the accused's right to a fair trial. In some cases the very fact that there was such a change could engender in the mind of a reasonable juror some prejudice against the accused. Jurors could well speculate as to the reason for the change and not, for example, give due weight to the conduct of the defence by the first counsel.

[39] Here an application for the discharge of the jury was made by the second counsel but it was refused by the learned trial judge. Given the subsequent conduct of the defence by second counsel, and given the strength of the evidence against the appellant, I have come to the conclusion that the learned trial judge did not err in so ruling.

[40] It is true that the first defence counsel emphasised the fact that the complainant contended that she had been raped on earlier occasions, whereas the emphasis by second counsel was more on the fact that the sexual relations between the parties prior to the occasion in question should be described as "rough". Given what was said in final addresses and the summing up, the change in emphasis was more semantic than real, and I am not persuaded that the change of counsel, and the change of emphasis on the evidence thereby occasioned, deprived the appellant of a fair trial. As pointed out by the Chief Justice the case against him was particularly strong, and there was significant corroboration of the want of consent.

[41] In the circumstances I agree with the orders proposed by the Chief Justice.

[42] **JERRARD JA:** I respectfully agree with the reasons and orders proposed by the learned Chief Justice.