SUPREME COURT OF QUEENSLAND

CITATION:	*R v SBC* [2007] QCA 283
PARTIES:	**R** **v** **SBC** (appellant)
FILE NO/S:	CA No 106 of 2007 DC No 12 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	31 August 2007
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2007
JUDGES:	McMurdo P, Mackenzie and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Allow the appeals on counts 1, 3 and 4** **2. Convictions set aside** **3. On count 1, acquittal entered** **4. On counts 3 and 4, new trial ordered**
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 charged with two counts of taking an indecent photograph of a child under 16 – where appellant admitted to taking a photograph different to that relied on by the Crown – where the jury was directed they were to decide if the admitted photograph was indecent – whether there was a real prospect that the conviction was based on an act different from the alleged act CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – where appellant

charged with rape, alternatively of indecently dealing with a child under 12 – where jury convicted of indecently dealing – where appellant submitted at trial that he was mistaken as to identity – where trial judge directed jury as to mistake of fact – where trial judge made irrelevant references to issues of consent – whether the effect of the directions may have resulted in the jury being unable to exclude an honest and reasonable belief as to identity

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – where appellant submitted the directions as to intoxication were erroneous and/or inadequate – whether intoxication is relevant to s 24 *Criminal Code 1899* (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – where appellant charged with maintaining an unlawful relationship of a sexual nature with a child under 16 – where the jury was directed they did not need to be satisfied that any specific acts had occurred – whether particularisation of the acts is a necessary component of s 229B

Criminal Code 1899 (Qld) s 23, s 24, s 28, s 210(1)(f), s 229B, s 352(1)(a), s 578(1)

R v Kusu [1981] Qd R 136, cited

COUNSEL: S J Hamlyn-Harris for the appellant
M J Copley for the respondent

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

[1] **MCMURDO P:** I agree with Mackenzie J.

[2] **MACKENZIE J:** This is an appeal against conviction and an application for leave to appeal against sentence in respect of convictions in the District Court. The appellant was charged with two counts under s 210(1)(f) of the Code taking an indecent photograph of a child under 12 (counts 1 and 2), one count of rape (count 3), upon which an offence of indecently dealing with a girl under 16, with the circumstance of aggravation that she was under 12, was open pursuant to s 578(1), and one count of maintaining a sexual relationship with a child under 16 (count 4). The appellant was convicted on count 1, acquitted on

counts 2 and 3 but convicted of the alternative count to count 3, and convicted of count 4. He was sentenced to three years imprisonment on each count of which he was convicted.

[3] Leave was given to substitute four grounds of appeal for the grounds in the appeal record. Ground 1 is concerned with an alleged misdirection in respect of s 24 *Criminal Code 1899* (Qld) in relation to a professed honest and reasonable belief that the appellant was touching the complainant's mother, not the complainant. Ground 2 concerns an alleged misdirection with respect to intoxication. Ground 3 is concerned with an alleged misdirection with respect to the requirements of proof of maintaining a sexual relationship under s 229B of the Code. Ground 4 had its genesis in the analysis by counsel for the respondent of the verdicts on counts 1 and 2, which raised a problem that the jury may have convicted the appellant on the basis of an act other than those upon which the Crown had based its case.

The evidence

[4] To put these grounds into context, it is necessary to summarise the evidence. The complainant's version of events was that on the evening of the appellant's birthday, she fell asleep on the lounge while watching TV, at about 9:30pm she thought. Earlier in the evening, about 8:30pm she thought, the appellant had said to her that he would give her $20 if she took her pyjama pants off before she went to bed. She was unclear whether she had complied with this request or had kicked them off in her sleep, as she sometimes did. (He denied any such conversation).

[5] Later in the evening, she woke up and went to the toilet. At that time, she was dressed in her pyjama top and knickers. When she came back, she went to put her pyjama pants on but the appellant "put his foot down" and said "no, no, no just sleep without them". He then asked her to lie on the carpet under a blanket to go to sleep rather than on the lounge, which she did. He then got under the blanket next to her.

[6] She did not go back to sleep immediately, as she was watching a show on television. After a while, the appellant put his hand under her knickers, started playing with her vagina and then inserted his finger into it. At first she did not say anything because she was afraid. When it started to hurt, she jumped in fright. He then said:

> "Oh, I am so sorry. You should have woken me up. I thought you were Mum."

This incident formed the basis of count 3.

[7] She also said that, prior to this evening, the appellant had, on an unspecified number of occasions, pulled her knickers aside and looked at and felt her vagina without penetration. He would ask her to spread her legs to facilitate this. These events happened on occasions when the appellant stayed at the complainant's home. She estimated that they occurred every two or three

weeks. As events turned out, the generalised evidence of other acts became of some significance in relation to count 4. More will be said about this later.

[8] When the girl's allegations were put to the appellant by the investigating police, he said at one point:

> "I was drunk and that's the reason that – that I did it, ah, and I thought I was with (the girl's mother)".

He also said:

> "Um, the – the only time that I've ever touched her was on my birthday. Um, we laid down together to watch TV, we've done it before. She's – she would lay on the couch, lay on my lap, put her head on my lap. Um, we've – I was – I was absolutely blind drunk. We – we fell asleep and I woke up with my hand. I did not digitally penetrate her at – whatsoever but I had my hand on her vagina. She was trying to roll away from me and at – as she did that, I woke up and I basically had a go at her, and I said, 'Why didn't you wake me? I thought you were your mother'. I was – I was – dreamt I was actually with (your mother). And, um, she said 'Oh, well, I was asleep too'. I said, 'Well, if you were awake, you should have woke me. I" – 'I'm sorry', I said and that's it."

[9] In a similar passage, quoted in the summing-up, he said:

> "I woke up and I did have a go at her. I said, 'Why didn't you wake me?' and she said, 'I couldn't because I was asleep.' That's when she rolled away from me but I woke up and – and, um, and I did think I was – I just dreamt that I was actually beside (her mother). I really did. And that's the reason my hand was there 'cause – that's well – that's what well me and (her mother) do so."

[10] The accused also told the police that on the evening of the incident he was "absolutely blind drunk" and that he was "very, very drunk" because he had been "drinking from .. 8 o'clock that morning and pretty solidly .. all day". The duration of his drinking was confirmed by the complainant's mother. She said that the appellant had got a drink from the refrigerator first thing after he woke up and then had drunk through the morning session at a club. Following that he had gone to a hotel with his mates where he drank until she drove him home about 8pm.

[11] Counts 1 and 2 were based on the complainant's allegation that on two occasions when she visited a hotel at which the appellant worked, he asked her to bend over and pull her pants down, after which he photographed her buttocks and vaginal area on his mobile phone. The second photograph was taken after he told her that he had accidentally deleted the first. She was wearing a black dress at the time.

[12] He denied taking any indecent photographs of her. He said the only occasion when a photograph was taken was when she bent over while putting a DVD or

a video in a player and he jokingly took a photograph of her backside, saying she had a "nicer butt than Mum" and that he was going to tease her about it. He said that he thought that occasion "might have been at (her mother's) house."

Ground 4

[13] It is convenient to deal with this ground first. With respect to the conviction on count 1, the prosecution case was based on the complainant's account that the two indecent photographs were taken at the hotel where the appellant worked. The appellant's response to the allegation that he took indecent photographs tentatively suggested that the photograph he took was taken at the complainant's house and that it related to an occasion when she was bending over putting on a DVD or video and when she was clad in a skirt and top. The basis upon which the Crown case was conducted is confirmed by the Crown Prosecutor's intervention after the conclusion of defence counsel's address in which defence counsel had told the jury that, even if they did not accept the complainant's evidence, they could consider whether the photograph that the appellant admitted taking was indecent.

[14] The Crown Prosecutor said that his view was that, on the admission made, it could not be proved to be an indecent photograph. Notwithstanding this, the learned trial judge directed the jury that the appellant had admitted taking a photograph, although not in the way the complainant said, and that they would have to consider whether taking that photograph was indecent. To prove that it was indecent, they would have to be satisfied that it had a sexual connotation. She concluded that portion of her summing-up by telling the jury that, if they rejected the complainant's version and went on to consider the appellant's version, they had to remember that they were dealing only with one photograph, not two.

[15] Because of the way the Crown Prosecutor ran the prosecution case, which did not include reliance on the photograph admitted to by the appellant, the Crown did not seek to support the conviction. Since the jury appears not to have accepted the complainant's evidence that two photographs were taken, the single conviction raised a real prospect that the jury convicted on the basis of the appellant's admissions, or by a process of reasoning that may have involved acceptance of the fact that he had taken one photograph but rejection of his version as to the innocent character of the photograph. No direction was given that the appellant's admission did not accept that the photograph admitted to was taken at the hotel, or that highlighted the different factual context. While it is permissible, in general terms, for a jury to accept parts of a witness' evidence and reject others, this was not a case where the verdict related to a count in the indictment as formulated by the Crown. The conviction on count 1 therefore cannot stand.

Ground 1

[16] The jury was directed with regard to s 24 on the basis that it was a possible view of the evidence that the appellant was awake and honestly but mistakenly believed that the person lying beside him was the complainant's mother, not the

complainant. The issues with respect to s 23 and s 24, both of which the learned trial judge addressed in her summing-up, were not elaborated on by defence counsel. The defence address was directed towards inviting the jury to consider whether the complainant was a credible, reliable and truthful witness for reasons advanced at some length, principally related to the possibility that she may have made up the allegations in a situation where some of her peer group had mentioned similar matters when exchanging confidences.

[17] No complaint is made about the direction of s 23, which was founded on a scenario that the applicant's hand may, by an unwilled act, have rested on the complainant's genital area while he was asleep. This was based on a possible interpretation of the second passage quoted above in paragraph [8]. The direction with respect to s 24 seems to have been based on an interpretation of the appellant's record of interview to the effect that he was awake but thought he was beside the complainant's mother, not the complainant.

[18] When directing with regard to rape, the learned trial judge said that it was open to the jury to conclude that the appellant was awake but affected by alcohol rather than asleep. She read the passage quoted in paragraph [9] above and said:

> "Now it is a matter for you what you make of that evidence, but you might decide that he was awake, mistaken that it was (her mother) who would consent to the act because that's what he and (her mother) did. So that is how the mistake might bear on the rape charge."

[19] That was all that was said about s 24 in relation to rape. The summing-up moved on then to indecent dealing. Of course, if the jury had a reasonable doubt about whether the incident had happened at all, as the defence case had been advanced in defence counsel's address, it would not have been necessary to consider indecently dealing. It would only have been open if the complainant's account, but for the element of penetration, had been accepted. The oral direction that was given in that regard was not particularly clear but probably would have been sufficient to inform the jury of that; the written elements of the offences given to the jury were clearer.

[20] The learned trial judge told the jury that they must consider whether the applicant was mistaken about whom he was touching. The summing-up continues:

> "An element of that offence is that the touching was indecent and you're the ones, as I've said, who must determine that according to community standards.
>
> If you find the defendant was mistaken about the identity of the complainant then you must consider whether, if his mistaken belief had been correct and it was her mother he was touching, you would find that touching to be indecent.
>
> Now if it was her mother he was touching, even if you think it was not indecent, it may still be an offence of sexual assault,

> unless she was consenting. So as with the issue of rape, you would need also to consider whether the mistake was not just who he was touching but that he was touching the mother and that she would consent - she was consenting to that activity."

[21] The second sentence of that direction, on its face, is expressed in terms of finding that the appellant was mistaken as to the identity of the person beside him. If that was so, the next question was whether the touching was indecent. The next two sentences raise the issue of consent. It is the case that on an indictment for rape, s 578(1) allows an offence under s 352 to be considered as an alternative charge. However, the possibility that an indecent assault (s 352(1)(a)) had been committed was not relied on by the Crown or otherwise directed on by the trial judge. The introduction of a need to consider whether the person whom the appellant erroneously believed to be the person he was touching would consent to what was being done is an irrelevancy so far as an offence of indecently dealing is concerned.

[22] Firstly, a lack of consent is not an element of indecently dealing. Secondly, it is not an offence to indecently deal with a person over the age of 16. It follows that if a person were charged with indecently dealing with 'A' who was indisputably under 16, but it could not be excluded as a reasonable possibility that the person charged honestly and reasonably believed that the person was 'B' who was known by him to be over 16 years of age, he would be entitled to be acquitted of indecently dealing because that offence does not exist in relation to a person over 16.

[23] It cannot be said with any confidence that these directions may not have misled the jury as to the issues they had to consider. Therefore the conviction on count 3 must be set aside.

Ground 2

[24] It was submitted that the directions given on intoxication were inadequate and/or erroneous. None of the offences had an intention to cause a specific result as an element. It was common ground that the appellant's intoxication was voluntary. The direction given was as follows:

> "… I should just mention this question of intentional intoxication. You've heard evidence of the state of the defendant's intoxication, in relation to count 3, the count of rape.
>
> Now, the prosecutor's quite right when he says this, and certainly defence counsel didn't submit otherwise. Intoxication does not relieve a person of responsibility for committing a crime, but it may help you when you are considering the state of his memory of the events surrounding the incident, which has given rise to the charge. It may offer some explanation for his conduct, but it does not, of itself, entitle him to an acquittal."

[25] The references to intoxication in relation to the appellant's state of memory and that intoxication could be used as an explanation of his conduct are consistent

with *R v Kusu* [1981] Qd R 136. The appellant's submission was that there was nothing in the terms of s 24 or s 28 of the Code which required the jury to disregard intoxication in considering a mistake of fact.

[26] The direction given should not be divorced from the facts of the case. The s 24 defence was at best very tenuous, reading the appellant's record of interview as a whole. What he was really asserting was that he was asleep at all times until the complainant moved and he woke up to find that he had his hand on her genitals. He attributed his actions to the fact that he was dreaming of her mother as he slept. His statements that he "had a go" at her are, in context, a reference to waking up and remonstrating with the complainant for not waking him sooner when she realised that his hand was on her. This is a s 23 situation, not s 24.

[27] The proposition that the appellant may have been awake, notwithstanding the thrust of his explanation, but had an honest and reasonable but mistaken belief that the person next to him was the complainant's mother has its difficulties. The appellant did not clearly say that the incident happened on the floor rather than the couch, but did not deny that it did. Because of his emphasis on the fact that he was very drunk, and from the record of interview in other respects, it is apparent that he was claiming his memory of the evening was not good. If the jury accepted the complainant's evidence that the appellant persuaded her to go to sleep on the floor and got under the blanket with her, it would have been very difficult for him to maintain that a belief that the person next to him was the girl's mother was reasonable. If there was an honest belief to that effect, it could only have been, on the facts of the case, because intoxication had led him to forget the objective facts and form it. On any view of it, it would have been an unreasonable belief. Viewed in that way, what was said by the learned trial judge, in conjunction with the general direction as to s 24 that followed soon after, about which no complaint was made, was not erroneous on the facts of the case.

Ground 3

[28] It was conceded by the Crown that the conviction on count 4 had to be set aside. This was because the case had been conducted on the basis that the indecent dealing in count 3 was one of the acts that satisfied the requirement in s 229B(2) that there be proof of a relationship consisting of more than one unlawful sexual act. The case was not conducted on the basis that two or more of the acts referred to in general terms in the girl's evidence had occurred.

[29] Having said that, the ground was concerned with an alleged misdirection as to the requirement of proof of the offence of maintaining a sexual relationship under s 229B of the Code. The issue arose out of a question asked by the jury after they had been deliberating for several hours. The jury's question was:

> "Can we reach a decision on a belief that something has happened or occurred, referring to count 4? We all agree on one specific incident."

This was refined, when the jury returned to be re-directed, to the issue of whether the jury had to firmly believe a specific piece of evidence or whether the position could be taken that the jury had a belief that one or more of the incidents described in general terms occurred, without knowing specifically which one it was.

[30] In view of the jury's question and subsequent verdict, it can be inferred that they had decided to convict of indecently dealing in relation to count 3 but were concerned that the evidence concerning other offences of that general kind had been given only in general terms. The learned trial judge told the jury that if they were persuaded beyond reasonable doubt that another unlawful sexual act had taken place, they did not have to be able to say at which place or at which time it occurred. There was only evidence of a general kind about uncharged acts. They would not have a particular passage of evidence as such; it was the complainant's evidence as a whole that had to be considered. She concluded by saying that they must be satisfied beyond reasonable doubt that there was an unlawful sexual act on another occasion, based on the evidence that they had heard.

[31] That is not inconsistent with s 229B(3) and (4) in their present form. The verdict has to be set aside for another reason. The ground concerning alleged misdirection, standing alone, would have not have entitled the appellant to have the verdict set aside.

Sentence

[32] It is unnecessary to consider whether the sentences imposed were manifestly excessive since the three convictions must be set aside and retrials ordered in only two instances.

Orders

1. Allow the appeals on counts 1, 3 and 4.
2. Convictions set aside.
3. On count 1, acquittal entered.
4. On counts 3 and 4, new trial ordered.

[33] **ATKINSON J:** I agree with the reasons for judgment of Mackenzie J and the orders proposed.