# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Cannell* [2009] QCA 94 |
| PARTIES: | **R**<br>**v**<br>**CANNELL, Peter Tasman**<br>(appellant) |
| FILE NO/S: | CA No 290 of 2008<br>CA No 59 of 2009<br>DC No 1627 of 2008 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction<br>Application for Extension (Sentence) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 21 April 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 April 2009 |
| JUDGES: | McMurdo P, Fraser JA and Applegarth J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDERS: | **1. Appeal against conviction allowed; the verdict of guilty is set aside and a retrial is ordered**<br>**2. The application for an extension of time to apply for leave to appeal against sentence is struck out** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION OR NON-DIRECTION – appellant pleaded not guilty to rape and guilty to assault occasioning bodily harm – judge's direction to the jury forward focused on the complainant's cognitive capacity to give consent – prosecution's case was that the appellant assaulted the complainant forcing her to submit to sexual intercourse – whether the trial judge erred in directions to the jury which enabled them to return a verdict of guilty of rape which was not based on the prosecution's case<br><br>*Criminal Code* 1899 (Qld), s 348, s 668E(1)<br><br>*Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, cited<br>*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited<br>*R v SAX* [2006] QCA 397, cited<br>*Stevens v The Queen* (2005) 227 CLR 319; HCA 65, cited |

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| COUNSEL: | S Ryan for the appellant<br>P F Rutledge for the respondent |
| SOLICITORS: | Legal Aid Queensland for the appellant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **McMURDO P**: The appellant, Peter Tasman Cannell, was charged with one count of rape and one count of assault occasioning bodily harm. Both charges concerned the same complainant and were charged as occurring at Caboolture on or about 6 April 2007. The appellant was arraigned in the presence of the jury on 3 November 2008. He pleaded not guilty to rape but guilty to assault occasioning bodily harm. He was convicted of rape after a four day trial. He was sentenced to eight years imprisonment for rape and to a concurrent term of three years imprisonment for assault occasioning bodily harm. The appellant appeals against his conviction of rape and seeks an extension of time to apply for leave to appeal against his sentence.

**The evidence at trial**

[2] Before turning to the grounds of appeal against conviction, it is useful to summarise the relevant evidence at trial. The prosecution case was that the appellant had sex with the complainant against her will in unit 4, 40 Edward Street, Caboolture, late on 5 April or early on 6 April 2007. The defence case put to the complainant in cross-examination was that the appellant and the complainant had consensual sex under a tree near a Caltex service station located in Caboolture, somewhere between the tavern where they had been drinking together and Edward Street; they then had a fight resulting in the appellant committing the offence of assault occasioning bodily harm to which he pleaded guilty. She then ran off in a half-naked state.

*(a) The complainant's evidence in chief*

[3] The complainant, a 42 year old Indigenous woman, met the appellant, an Indigenous man, on the afternoon of 5 April 2007 in a tavern at Caboolture where she was drinking and playing poker machines. She remembered "feeling a bit intoxicated" by around 11.00 pm. She did not remember leaving the tavern. Her next memory was waking up in a dark room. She was wearing nothing but underpants. The appellant had his hands around her throat. He kept pushing his fingers into her throat as if to stop her from breathing. He said, "Why did you look at me in the eyes? You're nothing but a tease. This is what people that tease get." She recalled being on the carpeted floor of the unit. The appellant punched her in the face with his fist a couple of times and pulled her hair. Her neck hurt. She was lying on her back and he was on top of her, still holding her by the hair and the neck. He put his penis inside her vagina for a couple of minutes. He whispered into her ear that he was going to shoot her. She said she "kind of clicked to what was happening then". She pulled her underpants up and ran to a sliding door, unclipped it, slid it open and straight away touched grass.

[4] She could not see anything because it was dark. She slipped down a cliff into water and mud. She was in fear of her life. She called on the spirits of her deceased mother and brother to help her. She stood under a tree. The water was up past her knees. She stayed very still and breathed very lightly for about half an hour. She drank a little water to quench her thirst. She passed out for a couple of hours and

woke up to the sound of a train. Dawn was breaking. It took her a little while to get her bearings. She was wearing nothing but her underpants and did not have her handbag.

[5] She saw a house and ran to it. She tapped on the window until a woman came. She said, "Can you please help me? I have been raped and bashed". The woman gave her a sarong and a jumper. She drove the complainant to the Caboolture police station at about 6.30 am. The complainant told a police officer what had happened to her. Police took her to the Royal Brisbane Sexual Assault Clinic where she was photographed and examined. Police then took her back to the house where she had sought assistance. She knew the unit where the appellant attacked her was a "couple of houses down from there".

*(b) Cross-examination of the complainant*

[6] In cross-examination, she agreed she had been drinking at the Twisted Arm Irish Tavern, Caboolture, from about 2.30 pm on 5 April 2007. Her last memory was someone, a bouncer she thought, talking to the appellant not long before midnight. She then had a memory blackout. Her next memory was waking up inside a unit which she thought was number 4, 40 Edward Street, Caboolture. She agreed she had shown personal interest in the appellant off and on throughout the evening. She considered him an attractive man. She struck up a conversation with him at the bar. She denied that she wanted him for herself or that she found him sexually attractive. At one point, he spoke to her in an Aboriginal language which he interpreted for her as meaning, "You are a beautiful woman". She responded by saying, "All women are beautiful". She denied arguing with her sister at the tavern about the appellant. She denied touching his leg and thigh at the tavern. She denied kissing him after leaving the tavern.

[7] The appellant's counsel put the appellant's case to the complainant in this way. She had consensual sexual intercourse with the appellant under a tree near the back of a Caltex service station between the unit in Edward Street and the tavern. She was on her hands and knees and the appellant penetrated her from behind. She then acted strangely and called the appellant "Dad". She said that the appellant was the only person to have had sex with her from behind other than her own father. The complainant denied all those suggestions.

[8] She also denied on a number of occasions that she had told the appellant that her father molested her when she was a child. She agreed, however, that she was sexually molested by her father as a child. In some confusing cross-examination she once agreed that she had told the appellant her father was in jail for molesting her, but it seems she may not have understood the question. She said that she had not spoken to the appellant since the alleged offence. She claimed to remember everything that happened from when the appellant grabbed her around the throat. She maintained that she was raped inside the unit by the appellant.

[9] She could not remember whether the appellant told her that he was a guest at the unit where he was staying and that he would have to check with the occupier if she could come back for the night. She denied that she told the appellant that she wanted to go for a swim and that he warned her against this because of bull sharks in the Caboolture River. She denied arguing with the appellant in this way. She denied striking him in the mouth, causing him to retaliate by striking her around the face and body and asking her, "Why are you doing this to me?" She denied that she suffered the injuries inflicted by the appellant in this way.

*(c) Admissions*

[10] The appellant, through his counsel, made the following admissions under s 644 *Criminal Code*. The time depicted in the video footage at the Twisted Arm Tavern on 5 April 2007 was accurate. The various forensic samples were handled appropriately. The analysis of the complainant's blood sample taken at 12 noon on Friday, 6 April 2007 showed a blood alcohol concentration of .082 and no other drugs were detected. The appellant had sexual intercourse with the complainant at Caboolture in the early hours of the morning of Friday, 6 April 2007. The appellant's DNA profile was found in sperm located in the high vaginal, low vaginal, vulval and anal smears taken from the complainant and this indicated that he had carnal knowledge of the complainant with his penis.

*(d) Other prosecution evidence*

[11] Lois Randall gave evidence that on 6 April 2007 she was living at 36 Edward Street, Caboolture. At about 5.00 or 5.15 am, she was woken by a knock at the front door. She saw the complainant who said, "Help me, please. Help me. I've been raped." The complainant was wearing only a top. Ms Randall gave her a jumper and a sarong. She saw that the complainant was extremely agitated, nervous and frightened. The complainant said that she had gone with a person to a block of units for a drink. As soon as they went to his unit, he grabbed her, threatened her, grabbed her around the neck and raped her. She fled in a hurry, leaving behind her bag, clothes and shoes. She ran down to the river where she remained for four or five hours. She did not want to go to the police station but Ms Randall insisted. Ms Randall and her husband drove the complainant to the police station.

[12] Mr Colin Bruce Randall gave a similar account to that of his wife. He added that the complainant had indicated that the attack on her had occurred in premises in Edward Street. The complainant said that she thought she had been down by the river for about four hours. She was frightened because her attacker had threatened to kill her.

[13] The police officers who first saw the complainant at the Caboolture police station noticed that she was upset, tearful, sobbing and would not say much at all. She identified unit 4, 40 Edward Street to one police officer as the scene of the rape. A later search of that unit did not result in finding any of her property.

[14] Dr Karen Wright examined the complainant on 6 April 2007. The complainant's upper and lower lips were bruised and she had an abrasion to her lower lip, consistent with a moderate blunt force trauma such as a punch. She had bruising to the tongue, consistent with the complainant biting it. She had multiple small bruises and several abrasions and red markings around the neck. The pattern and shape of some of these bruises was consistent with being caused by fingers. She had petechial bruising on her eyelids consistent with a strangulation-type injury. She had a bruise to her right breast. A number of other abrasions and bruising to the body, particularly her buttock and some on her leg, were consistent with her having gone through heavy scrub or bush.

[15] Rachael Xerri gave evidence that the appellant was staying in her unit, number 4, 40 Edward Street, on 5 April 2007. They had commenced a brief intimate relationship. She went to bed at about 9.30 pm on 5 April 2007. She took a sleeping tablet as she always did. It seems for this reason she was a "Heavy, very heavy sleeper". She was sure she locked the unit before retiring. The appellant was

out and did not have a key. She did not hear any screaming or see the complainant in her unit. The appellant woke her some time after she went to sleep by knocking on the bedroom sliding door and the lounge room sliding door. He was asking to be let in. He told her he had been in a fight at the pub and had stabbed someone. He appeared panicky. He said the police would be there soon. He had a shower. He trimmed his already shaven head and his goatee beard, changed his clothes and took off his necklace. This was consistent with the appellant grooming himself rather than significantly altering his appearance. She told him he had to leave. He asked her to go to "Ron's place". Ron lived in the front unit. She could not rouse Ron. She and the appellant remained quietly in her unit when the police drove around the outside of her block of units. The appellant was sitting next to her so that she could not move to the door. She went back to sleep. She saw the appellant again at about 6.00 am. He took his belongings and left. She did not see any of the complainant's belongings in the unit. She was meticulously tidy but noticed nothing out of order.

[16] Krystal Hapgood lived in the unit above Ms Xerri's. At about midnight on 5 April 2007 she and her husband returned to their unit to collect some of their belongings as they were staying at her mother's place that night. She heard "a little bit of screaming". About ten minutes later, she heard screaming and crying. She knew Ms Xerri had nightmares and initially was not worried. At first, she thought from the noise coming from Ms Xerri's unit that people were engaging in sexual intercourse there. When she heard a woman say, "Why are you doing this to me?", she became concerned. She heard Ms Xerri's front door bang and looked out the window of her unit. She saw a man inoffensively hugging or cuddling a woman outside Ms Xerri's unit. But she then heard crying and screaming which got progressively louder and sounded like a scream of fear. She was unsure whether the screaming was coming from inside or outside the unit. This screaming worried her. She and her husband left for her mother's place where they telephoned police. In cross-examination, she agreed the screaming could have come from the back of the units. In re-examination, she said the noise came from very close to Ms Xerri's unit.

[17] Ms Hapgood's husband, Johnathon Hapgood's evidence included that he heard a woman scream like someone was getting hurt. The scream came from the back of the units.

[18] John Moore lived in unit 5, 40 Edward Street on 5 April 2007. He was awakened that night by a girl screaming "Help me. Help me". He thought the screaming came from the bottom flat. He could not discount the possibility that the scream had come from the side of the units.

[19] Ronald Hanrahan lived in unit 2, 40 Edward Street. On the evening of 5 April he went to sleep using medication and ear plugs. He was awakened between 3.00 and 4.00 am on 6 April by the appellant calling his name. The appellant told him that he had been in a fight and that the police were looking for him. He asked if he could stay at Mr Hanrahan's unit for a couple of hours. The appellant said that five men had followed him home and he stabbed one in the neck with a beer bottle. Mr Hanrahan’s recollection was confused. He finally agreed that the appellant told him "I also just had a blue with that bitch out the back", "he'd woken her up" and "she'd been going off" after the appellant had showered. Mr Hanrahan allowed the appellant to come inside but told him that he would have to leave at 5.00 am. At about 5.30 am they walked together to the Caltex service station. The appellant was carrying a large striped carry bag.

[20] Carmel Peisker lived next door to the units at number 40, Edward Street. She was woken during the evening of the alleged offence by piercing, blood-curdling screams. She heard a girl sobbing. She thought the sobs were coming from next to the fence. She agreed the screams and sobs may have come from back towards the river.

[21] Dr Mahoney estimated the complainant's blood alcohol concentration at midnight on 5 April 2007 from the blood alcohol analysis of the sample taken at 12 noon on 6 April 2007. In his view, it would have been between .202 and .442 per cent. A person who had consumed this amount of alcohol could suffer amnesia for a period. At the median point of the estimated range of blood alcohol concentration (.322 per cent), the complainant may have become confused about a sequence of events, mixed up her sense of time and place, suffered from scattered memory, or islands of memory, and her comprehension of her circumstances may have been adversely affected. It was possible that she may have believed something had happened to her when it had not. A blood alcohol level of more than .2 per cent would be likely to cause confusion. Even an experienced drinker would be significantly affected by that amount of alcohol. Some experienced drinkers could mask the effects of excessive alcohol consumption so that it was not obvious to those who did not know them. Someone with a blood alcohol level of .442 per cent was at risk of death.

[22] Police gave evidence that no other serious assaults were reported in the Caboolture area on the evening of 5 and the early morning of 6 April 2007. Police enquiries at the Caboolture Hospital revealed no reports of patients with any sort of serious knife-type injuries.

[23] Police located the appellant almost two weeks later on 19 April 2007 in Mount Isa. He was not found to be in possession of any of the complainant's property.

*(e) The defence case*

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

**The grounds of appeal**

[25] The appellant's grounds of appeal are as follows:

> "(1) The learned trial judge erred in law in his directions to the jury which enabled them to return a verdict of guilty of rape which was not based the evidence.
>
> (2) The jury's verdict was unreasonable and against the weight of the evidence.
>
> (3) The trial judge's warning to the jury about the evidence of the complainant was inadequate.
>
> (4) The trial judge erred in directing the jury that the appellant's lies could be used in proof of his guilt. Alternatively, the trial judge erred in his direction to the jury about lies."

**Was the jury's guilty verdict unreasonable?**

[26] As I have just reviewed the evidence at trial, it is convenient to first deal with the appellant's contention in ground 2 that the jury's guilty verdict was unreasonable and against the weight of the evidence.[1]

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1 *Criminal Code* 1899 (Qld), s 668E(1).

[27] The appellant emphasises the complainant's admitting intoxication and Dr Mahoney's evidence of the effect of the likely level of intoxication, or potential effect, on the complainant's memory and other aspects of cognition. The appellant also places weight on Ms Xerri's evidence that she heard and found nothing to support the complainant's account and that Ms Xerri's unit, where the complainant claimed the rape occurred, was locked and the appellant did not have a key to it. The appellant submits that a properly instructed jury should have considered the complainant so unreliable that they could not be satisfied beyond reasonable doubt that the rape occurred as she claimed.

*Discussion of and conclusion on this ground of appeal*

[28] The complainant consistently maintained her account that the appellant had sex with her against her will on the floor of Ms Xerri's unit. There was no evidence directly contradicting the complainant's account and a considerable amount of evidence to support it. The complainant had injuries, including marks around her neck and petechial bruising on her eyelids, consistent with her claim that the appellant attempted to strangle her immediately prior to having sex with her. Many of the neighbours heard screaming coming from the direction of Ms Xerri's unit at about the time the complainant swore that the appellant raped her. The complainant's complaint to the Randalls and her appearance early on 6 April 2007 were also consistent with her account. The appellant avoided police and left the area where the alleged offence was committed early on 6 April 2007. From the account put to Ms Xerri and Mr Hanrahan in cross-examination by the appellant's barrister, it seems that the appellant conceded that he gave them a false account about how he received his injuries and about why he was avoiding police and wanting to leave the Caboolture area.

[29] It is true that Ms Xerri gave evidence that she did not hear anything untoward in her unit at the time the complainant says she was raped. Nor did she later find anything to suggest that a woman had been treated roughly and raped in her unit in the early hours of 6 April 2007. But Ms Xerri also gave evidence that she had taken a sleeping tablet that night, as she did every night, and as a result she slept heavily. In the absence of any competing evidence, the only rational inference from this aspect of Ms Xerri's evidence was that the appellant, who was then living with Ms Xerri in an intimate relationship, was aware of Ms Xerri's sleeping habits. The jury were entitled to infer that Ms Xerri slept through the complainant's protestations to the appellant before he forced her to have sex with him. Certainly, a number of other residents in Ms Xerri's block of units heard screams from the vicinity of Ms Xerri's unit at about midnight. Ms Xerri gave evidence that after the appellant first woke her in the early hours of 6 April 2007, she went back to sleep for about five hours. The appellant was carrying a large bag when he left the units with Mr Hanrahan early on 6 April 2007. The jury were entitled to infer that the appellant disposed of the complainant's belongings and covered any signs of disturbance within the unit before Ms Xerri woke on 6 April 2007.

[30] It is true, as the appellant contends, that there was no evidence that the appellant had a key to Ms Xerri's unit. But the jury were entitled to accept from the complainant's evidence and evidence from Ms Xerri's neighbours that by some method not established on the evidence, the appellant gained access to Ms Xerri's unit and raped the complainant on the carpet. It was not impossible for him to have done so. For example, a sliding door may have come undone, a window may have been open or he may have had a key cut. It is unhelpful and unnecessary to speculate about this

as it was not an element of the offence of rape to show how the appellant entered the unit.

[31] On her own evidence, the complainant was certainly very intoxicated at the time of the offence. Dr Mahoney's evidence raised the possibility that she was confused and unreliable because of her intoxication. But the complainant was definite and consistent in her evidence that she remembered the appellant forcing her to have sex with him in the unit. The jury were not required to reject this aspect of her evidence, which was supported by other independent evidence, because of Dr Mahoney's evidence as to the possible effect on her of a possible blood alcohol reading at about the time of the offence.

[32] After reviewing the whole of the evidence, I am satisfied that, despite the weaknesses in the prosecution case validly pointed out by the appellant, there was ample evidence to persuade the jury beyond reasonable doubt of the appellant's guilt: *MFA v The Queen*.[2] This ground of appeal fails.

**Were the judge's directions flawed because they enabled the jury to return a guilty verdict not based on the particularised prosecution case?**

[33] As I have explained, the prosecution case was that the appellant had sex with the complainant, against her will, in Ms Xerri's unit. Although the complainant was very intoxicated at the time, the prosecution did not allege that she "lacked the cognitive capacity to give the consent" referred to in s 348(1) *Criminal Code* 1899 (Qld). As I have also explained, the defence case was that the appellant and complainant had consensual sex under a tree near a Caltex service station at Caboolture before having an argument and then a physical altercation resulting in the appellant assaulting the complainant and causing her bodily harm.

[34] The appellant contends that the judge's directions wrongly allowed the jury to convict on a basis other than the prosecution case at trial. Before discussing this contention, it is necessary to set out the relevant portions of the judge's jury directions relied on by the parties in their competing submissions on this ground of appeal.

*(a) The relevant portions of the judge's summing-up*

[35] The judge commenced his directions to the jury at 3.17 pm on the third day of the trial by explaining the charge and briefly discussing the elements of the offence of rape. He observed that, because of the appellant's admission, the only issue was consent:

> "The question then comes down to consent. Consent is defined in the Criminal Code in the following manner: consent means consent freely and voluntarily given by a person with *cognitive capacity to give consent.* What that means is that [the complainant] must have consented freely and voluntarily *and she must have had the cognitive capacity to give consent. Cognitive comes from the word cognition. That is defined in the dictionary in the following terms: the action or faculty of knowing, knowledge or consciousness. So, it is a decision a person makes knowing what they are doing.*
>
> *When you look in terms of the cases presented to you, [the complainant] says that she was heavily intoxicated and has suffered*

[2] (2002) 213 CLR 606 at [25], [59].

*an alcoholic blackout and she doesn't know what was happening up until a particular point in time when she says she was in the unit number 4, 40 Edwards Street, Caboolture, she woke with a hand around her throat choking her and that she was raped after that.*

*Now, that is her evidence. Insofar as the cognitive capacity is concerned, cognitive capacity in the context of this case means that at the time the offence is alleged to have occurred [the complainant] had sufficient understanding to know what was occurring in order to be able to give consent to it. She says that she had been drinking. Now, you will all know, and it will come as no surprise to you, that there are degrees of intoxication. There are cases where the intoxication is so gross that the complainant in a case such as this is unable to consent and there are cases where the complainant is not so severely intoxicated and she consents to sexual intercourse either because inhibitions are reduced or because of some other reason.*

*So, in terms of what the prosecution have to satisfy you of, they have to satisfy you that there was no consent, either that [the complainant] did not, in fact, consent to the sexual intercourse that took place or was not capable of giving cognitive consent*." (errors as in the original) *(my emphasis)*

[36] After explaining the differing roles of judge and jury in a criminal trial, his Honour continued:

"… In the present case there are really two scenarios placed before you. One is the prosecution case. That is, that sexual intercourse happened inside the unit, number 4 Edward Street, Caboolture, and that it was without the consent of [the complainant]. The other version is that sexual intercourse took place under a tree at the rear of the Caltex service station, that [the complainant] got down on all fours and that she was entered from behind and that was completely consensual.

Now, insofar as those two scenarios are concerned there is no evidence to support the second scenario. There is no sworn evidence. You will remember when [the complainant] answered questions in relation to that she said she had no recollection, no recollection of being in that area and certainly did not confirm those things occurred.

… but you must bear in mind the fact that the scenario concerning the Caltex service station is not supported by any sworn evidence. The other scenario is supported by sworn evidence. It is up to you as to whether you accept that evidence or not, whether you have a doubt about the veracity or truthfulness of that evidence, whether you have a doubt about the accuracy of that evidence. But, it is a different situation in that *you do have two separate scenarios which are really completely different scenarios which you have to determine*.

*Bear in mind it is for you to work out and determine what the facts of the case are and for you then to apply the law as I have directed you. So, before you would direct your minds to the law as I direct you*

> *upon it, you would have to be satisfied of a factual basis and you would all have to agree upon it, upon which you are to apply that law, okay?*" (errors as in the original) *(my emphasis)*

[37] The judge then gave directions about the onus and standard of proof, concluding:

> "In other words, in order to find the accused man guilty you must be left with no reasonable doubt as to his guilt. Anything less than that and you are obliged to find him not guilty. Anything less than being satisfied beyond reasonable doubt of his guilt. That is, that [the complainant] either did not consent *or she was incapable of consenting* to the carnal knowledge the subject of the rape charge." *(my emphasis)*

[38] The judge gave further directions about which there was no complaint, before stating:

> "You will recall that earlier on when I was addressing you I did tell you that the scenario which the defence has put forward by way of questions that were asked of [the complainant] are not supported by any sworn evidence. That is, the scenario concerning the Caltex service station and the sexual intercourse that happened on that scenario behind it.
>
> Now, members of the jury, in the present case the contentions are completely different. What the prosecution says is that [the complainant] was at The Twisted Arm Tavern through most of the afternoon. She went into what I will call an alcoholic blackout, that is she cannot remember anything from before she left the tavern until she woke up, on her version, inside unit 4 at 40 Edward Street, Caboolture. That when she came to, the accused man's hand was around her throat and that is choking her. That he told her to be quiet. He said words to her, 'Why were you looking me in the eye? This is what happens to a tease.' and he inserted his penis into her and had sexual intercourse with her; that he struck her and that she escaped, left and ran from the unit, disrobed, into the Caboolture River.
>
> *Now, that is the version which she has given and that is the version which the prosecution relies upon to prove its case against the accused man.*
>
> Now, the accused man, on the other hand, admits that sexual intercourse did take place but not in the way in which [the complainant] says it did. He says, and these are the questions that were asked, these were the instructions, that it happened at another place. That it happened at the Caltex service station or an area behind the Caltex service station. So, in terms of looking at the evidence you have, on one hand the version of [the complainant] and on the other hand you have the fact that version is the subject of contest.
>
> Now, members of the jury, you will need to scrutinise the evidence of [the complainant] with great care before you arrive at a conclusion of guilt. That is because [the complainant], on her own admission, says that she was heavily intoxicated. That is supported by medical evidence by way of a count back which indicates that at the time of

> the incidents alleged to have happened, she had an extremely high blood alcohol reading. She has no memory of a significant period of the evening and the fact is that clearly she was highly distressed the next morning when she was seen by the people who lived down the road. You should only act upon her evidence if, after considering it and the warning I am giving you now and all the other evidence, that you are convinced of its truthfulness and accuracy." (errors as in the original) *(my emphasis)*

[39] The judge next dealt with aspects of the prosecution case which were capable of supporting the complainant's evidence, adding:

> "Countervailing that, of course, is you have to worry – perhaps not worry, but be concerned with the fact that the loss of memory and the heavy degree of intoxication she has suffered and also the evidence as to what affect the alcoholic consumption could, indeed, have upon her."

[40] The judge's directions continued on aspects of the case which do not concern this ground of appeal: lies, flight and fresh complaint. Relevantly, the judge then said:

> "His version, the version which was put to [the complainant] which she rejected, was that she had said she wanted to go for a swim. That he had said, 'Don't go for a swim there, there are bull sharks in the river.' and she punched him in the face and as a consequence to that he hit her back and then grabbed her around the throat.
>
> Now, when you look at the version which he has given, then have a look at the facts and circumstances of the case, including what [the complainant] has to say. Now, if at the end of the day you accept that the issue of flight and the issue of lies are, in fact, capable of supporting an inferences, in fact, guilty, then you can use that to support [the complainant's] version, all right? Doesn't work the other way around, okay? You have to work your way through these things logically.
>
> *If, for example, you reach the stage where you say you can't be satisfied beyond reasonable doubt that the sexual intercourse happened inside the unit, and bearing in mind that the prosecution have brought this case upon the basis that the rape occurred inside the unit, well, then realistically you wouldn't need to go through the rest of the processes that were involved. It is a matter entirely for you to work out the processes*." (errors as in the original) *(my emphasis)*

[41] The court adjourned at 4.06 pm and the summing-up recommenced at about 9.30 am the next day. The judge explained that it was his duty to direct on all possible defences and that the jury might consider the potential defence of accident. It seems his Honour mistakenly used the term "accident" instead of "mistake of fact". He stated:

> "… What that really arises out of, is out of the evidence from [the complainant] that she was so intoxicated that she blacked out, that she didn't remember what was happening. Also, the medical evidence which tends to support at the level of her blood alcohol reading, as it was read back at that time, the potential for her to not

> be able to remember things that had or had not happened, right. So, the fact that the defence don't rely upon this doesn't diminish it. It is there and you need to know about. That is the reason why I am addressing you upon it. It is not going to make a lot of sense until I go through the evidence and I will come back and give you formal directions upon that."

[42] The judge then spent a significant portion of his summing-up referring to the evidence in what had been a short trial with less than three days of evidence. The judge's summation of the evidence covered about 32 pages of the 75 pages of his Honour's transcribed jury directions. The judge then returned to the issue of mistake of fact and read the provisions of s 24 *Criminal Code* to the jury, adding:

> "In the consent of this case, that means that you must consider even though the complainant wasn't consenting that the accused in the circumstances honestly and reasonably believed that the complainant was consenting.
>
> *Now, this would arise out of the fact that [the complainant] was heavily intoxicated. On her own version she cannot remember any of the things which were said to have happened prior to her waking with the hand around her throat.*
>
> *The fact that Dr Mahoney said that it's possible for people to have practice concealment. That's, that one person who doesn't know another may not be able to determine if that other person is as intoxicated as, in fact, they are.*
>
> *So, realistically, what we are looking at is that sort of scenario. If you're of the view that [the complainant] was so intoxicated that she didn't really know what was going on, and she was incapable of consenting or that she couldn't remember pertinent facts which had happened before.*
>
> The complainant says that she did not consent to the sexual intercourse which occurred with the accused and she said that it happened and she woke up with the hand around her throat and she was raped after that and she can remember the rape occurred.
>
> If you accept her evidence, you might think that the accused man could not possibly have honestly and reasonably believed that she was consenting under those facts.
>
> However, remember that the onus of proof is on the prosecution. It's not for the accused to prove that he honestly and reasonably believed that the complainant was consenting, but it's for the prosecution to prove beyond a reasonable doubt that the accused did not honestly and reasonably believe the complainant was consenting.
>
> Accordingly, if the - if [the complainant] wasn't, in fact, consenting you must ask yourself this, can I be satisfied beyond a reasonable doubt that the accused did not have an honest and reasonable belief that she was consenting? If the prosecution have satisfied you beyond reasonable doubt that the accused didn't have such a belief, then you must find the accused guilty. If you are not so satisfied even

> though the complainant wasn't consenting, you must find the accused not guilty." (errors as in the original) *(my emphasis)*

[43] The judge next summarised the competing submissions of both counsel. He pointed out that the prosecutor's contention that the appellant must have had a key to Ms Xerri's unit was not based on evidence, adding:

> "The reality of the matter is that nobody knows if [the appellant] got into the unit with [the complainant] how that happened. [The complainant] doesn't know. She has no recollection, and Miss [X]erri was certainly asleep.
>
> *The issue*, members of the jury, is not fundamentally how they got into the unit but *whether they were, in fact, in the unit or not. That's the issue*." *(my emphasis)*

[44] His Honour stated:

> "*Fundamentally the case which the prosecution brings is this, that [the complainant] was raped inside unit 4.*
>
> *Members of the jury, it will be critical to your consideration of the facts as to whether or not you are satisfied beyond a reasonable doubt that the rape took place inside the unit. If you are left with any doubt about that fact, in itself, that will have a significant flow-on effect in terms of the credibility of the complainant generally.*
>
> *The prosecution have brought the case upon that basis and that is the basis that you must find the accused guilty or not guilty*." *(my emphasis)*

[45] The jury first retired to consider their verdict at 10.48 am on the fourth day of the trial. The prosecutor asked the judge to clarify to the jury that the complainant's evidence was that her loss of memory was before she felt the appellant's hand on her throat and that that the appellant put his penis into her vagina after he put his hands on her throat. Defence counsel requested factual redirections not relevant to this ground of appeal. The judge had the jury return to the court room and gave this further direction:

> "Insofar as the possession defence of accident is concerned, the mistake of fact has to be that [the complainant] was consenting to sexual intercourse when it happened. Now, it's not whether he might have thought that she was interested in sex earlier on or it's not upon that basis; it has to be on the basis that there was a mistake that she was consenting as to the act of sexual intercourse when it occurred … ." (errors as in the original)

[46] The judge also gave the factual redirections requested by defence counsel. The jury retired again at 10.54 am.

[47] At 12.37 pm, the court reconvened because the jury asked for "clarification of the legal definition of consent". The judge responded:

> "… Consent means, 'Consent freely and voluntarily given by a person *with the cognitive capacity to give consen*t.' Without limiting that subsection, 'A person's consent to an act is not freely and

voluntarily given if it is obtained either by force or by threats or intimidation or by fear of bodily harm or by excessive exercise of authority or by false and fraudulent representations about the nature or the purpose of the act, or by any mistaken belief induced by an accused person that the accused person was the person's sexual partner.'

So *when you look at the legal definition, and this appears* in section 348 of the Criminal Code, *it's really got two limbs to it*. First and foremost, the consent must be freely and voluntarily given.

What I will do is I will read through it again because there are the two parts. Freely and voluntarily given, *and then by a person with the cognitive capacity to give consent.*

So, consent is defined in section 348 of the Criminal Code subsection 1, 'In this chapter, consent means consent freely and voluntarily given by a person *with the cognitive capacity to give consent*.' Subsection 2, 'Without limiting subsection 1, a person's consent to an act is not freely and voluntarily given if it is obtained by (a) by force, (b) by threats or intimidation, or (c) by fear of bodily harm or (d) by exercise of authority, or (e) by false and fraudulent representation about the nature and purpose of the act, or (c) if a mistaken belief induced by a person that the accused person was the person's sexual partner.'

So when you look at that, we've got the first part. That is that the consent must be freely and voluntarily given. Subsection 2 defines, without limiting the definition, circumstances where it would not be a free and voluntary consent, and when you think about that, if, say, a person is threatened by force, they might agree to have sexual intercourse but it could hardly be called to be freely given.

A person might, by way of threats or intimidation or fear of bodily harm, would that be a freely given - a freely and voluntarily given consent?

So when you go through all of those things, those are examples of what would not amount to free and voluntarily given consent.

Now, the other side of it is that *the person has to have a cognitive capacity to be able to consent*. So you could have a circumstance *where a person might give free and voluntary consent but if they don't have the cognitive capacity to properly consent then it wouldn't be consent within the meaning of the law.*

Now a classic example of that might be someone who has an intellectual disability. A person who is intellectually impaired might very well say, 'Yes, I'm prepared to engage in sexual intercourse.', but lack the cognitive capacity to understand what they are doing.

By way of assistance, I'll read to you the dictionary definition of consent. That is, 'Voluntary agreement to, or acquiescence in what another proposes or desires. Compliance, concurrence, permission.

> Agreement to a course of action.' So that's the dictionary definition of consent.
>
> *I want to take you to the dictionary definition of cognition, of cognitive. Cognitive is defined as, 'The action or faculty of knowing, knowledge, consciousness.' All right, so it's got to do with knowing or knowledge*.
>
> Now this could be of some assistance. Under our Criminal Code, in relation to consent, the law provides that consent means consent freely and voluntarily *given by a person with the cognitive capacity to give the consent. Cognitive capacity in that context means that at the time that the offence is alleged to have occurred, the complainant, … had sufficient understanding to know what was occurring in order to be able to give consent to it.*
>
> *If a complainant such as [the complainant] was unconscious, blacked, asleep or so affected by alcohol or drugs that she did not know what was occurring when the act of intercourse took place, then she does not have the cognitive capacity to consent to intercourse*.
>
> *Now, it's very important that you remember, particularly when you are dealing with intoxication that there is a distinction between the cases where the intoxication is so gross that the complainant is unable to consent, and those cases where a complainant is not so severely intoxicated that she consents to sexual intercourse either because her inhibitions are reduced or for any other reason.*
>
> *So you have got that category of intoxication where the person is so grossly affected that they can't understand the consequences of what is happening, and those where they mightn't have done it were it not for the alcohol but they decide to go ahead and consent because of a lack of inhibition or something else.*
>
> *Really, members of the jury, it comes down to this: the ultimate question is whether [the complainant] consented freely and voluntarily knowing what was to happen, understanding the significance of it and agreeing to participate in it. That's what you've really got determine in terms of consent*." (errors as in the original) *(my emphasis)*

[48] The jury retired again to consider their verdict at 12.50 pm. Defence counsel, understandably, expressed his concern about the redirection:

> "DEFENCE COUNSEL: I'm just concerned about the question from the jury in this regard, that it would seem to me to be extraordinary that they would be wondering about the scenario of the alleged rape having happened in the house with her being choked and bashed at the same time.
>
> If they were of a mind that they are considering the tree at Caltex scenario I'd ask your Honour to consider this, that there is no evidence of lady's cognitive capacity either way during that scenario,

> nor any evidence either way as to her consent. The jury should not speculate in the absence of evidence.
>
> HIS HONOUR: [Defence counsel], the real problem there is there is no evidence at all of anything that happened at the -----
>
> DEFENCE COUNSEL: That's right.
>
> HIS HONOUR: There is a consequence of the way in which - that's a consequence of the way in which the trial has been run, and there is no criticism involved in that, but that, I think, is a point for another place, not here. I've been asked to give a direction on consent. I can't go behind and ask why they are making the direction for that and then go behind that and make further directions.
>
> All I can do now having asked the jury to adjourn to consider their verdict is to answer whatever questions they give me to the best of my ability, and not go beyond the question.
>
> I can see what your point is but I don't see that there is anything I can rationally or reasonably do at this stage."

[49] The judge indicated that he would not take a verdict before 2.30 pm and the court adjourned at 12.52 pm. The court reconvened at 2.32 pm and the jury returned at 2.34 pm with their guilty verdict.

*(b) Discussion of and conclusion on this ground of appeal*

[50] I am concerned about some aspects of these passages in the judge's summing-up.

[51] The prosecution case relied essentially on the complainant's evidence. This was that the appellant forced her to have sex with him in unit 4, 40 Edward Street; she had been drinking heavily and had a memory blackout before leaving the tavern; but she recalled him with his hands around her throat throttling her, punching her to the face and pulling her hair before he forced his penis inside her vagina on the carpeted floor of the unit; her submission to sex was only because of his violence towards her. The prosecution case was not that sexual intercourse occurred when she was so intoxicated that she lacked cognitive capacity. Any lack of cognitive capacity on the part of the complainant at the time of sexual intercourse was simply not an issue at trial, although her intoxication and its effect on the reliability of her account was a central issue.

[52] It is impossible to know the reason for the jury's request for a "clarification of the legal definition of consent". They may have been troubled about the complainant's cognitive capacity to consent because of her intoxication but, if they were in doubt as to her account that she did not consent, they should have acquitted. They may have been confused about how the evidence of intoxication applied to the three separate issues left for their consideration: the complainant's reliability as a witness; the appellant's honest and reasonable belief that the complainant was consenting; and whether the complainant had "cognitive capacity to give consent". Unfortunately, the judge's resulting redirection would not have alleviated that confusion.

[53] There is a danger that the judge's directions and redirections to which I have referred led the jury to convict the appellant, not on the basis of the prosecution case based on the complainant's evidence, but on another basis: that the appellant had sex with the complainant, perhaps somewhere other than in the unit, when she was so intoxicated that she lacked cognitive capacity to consent. Defence counsel alerted

the judge to this concern after the final redirection, but the judge considered he could do nothing but give the jury the redirection they sought as to "clarification of the legal definition of consent".[3] The judge was wrong to take that approach. The judge in his ultimate redirection could and should have told the jury that they could only convict the appellant if they were satisfied beyond reasonable doubt that the appellant had sex with the complainant in Ms Xerri's unit after forcing the complainant into submission, essentially in the way she described in her evidence. His Honour could and should have told the jury that it was not the prosecution case that the complainant was too drunk to have the cognitive capacity to give consent. This follows from a trial judge's obligations to identify the real issues in the case for the jury: *Fingleton v The Queen*.[4]

[54] There is a persuasive body of authority recognising that a jury in a criminal trial may work out for themselves a view of the case they are considering which does not exactly represent the contentions of either the prosecution or defence so that all defences raised on the evidence, even if not relied on by the defence, must be left to the jury. See, for example *Stevens v The Queen*[5] and *R v SAX*.[6] For that reason, I apprehend why the judge considered it prudent to leave s 24 for the jury's consideration in this case. Those cases, however, do not gainsay the fundamental proposition that the prosecution in a criminal trial is bound by the conduct of its case. A criminal trial is not a moving feast for the prosecution. Minor and inconsequential changes to the prosecution case will often be of no moment. But people accused of criminal offences must know the essence of the case brought against them by the prosecution so that they can conduct their defence accordingly. In this case, it was always common ground that the prosecution succeeded or failed on the strength of the complainant's evidence that the appellant physically forced her to have sex with him against her will in Ms Xerri's unit. This was not made clear in the summing-up.

[55] The judge's directions and redirections to the jury mean that the jury, in convicting the appellant of rape, may not have accepted unanimously that the appellant physically forced the complainant into sexual submission inside Ms Xerri's unit as the complainant said in her evidence. Some members of the jury may not have accepted the complainant's evidence beyond reasonable doubt. They may have considered instead that she and the appellant had sexual intercourse (whether in Ms Xerri's unit, somewhere nearby, or outside the Caltex service station) but that the complainant lacked cognitive capacity to consent because of her intoxication. This was not the case the appellant had to meet at trial. The real possibility that he may have been convicted on this basis amounts to a miscarriage of justice. The judge's directions and redirections failed to identify the real issue in the trial and to relate it to the relevant law and facts: *Fingleton v The Queen*.[7]

[56] The respondent correctly points out that the judge did at times in his summing-up seem to correctly direct the jury that they could only convict if they accepted beyond reasonable doubt the complainant's evidence that forced sexual intercourse occurred in Ms Xerri's unit.[8] These portions of his Honour's directions, however,

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3 See these reasons at [48].
4 (2005) 227 CLR 166 at [77]-[80].
5 (2005) 227 CLR 319.
6 [2006] QCA 397.
7 (2005) 227 CLR 166 at [77]-[80].
8 See, for example, the italicised portions of the summing-up set out in these reasons at [38], [40], [43] and [44].

lacked clarity and were at times contradicted by other directions.[9] Importantly, his Honour's ultimate redirection left open for the jury to convict on the basis that the complainant was so intoxicated that she lacked cognitive capacity to consent. There is a very real danger that the jury, or some of them, may have convicted the appellant on this basis, a basis inconsistent with the prosecution case. This ground of appeal is made out.

[57] The respondent rightly concedes that once the appellant is successful on this ground of appeal, the appeal against conviction could not be dismissed on the basis that no substantial miscarriage of justice has actually occurred under s 668E(1A) *Criminal Code*. It follows that the appeal against conviction must be allowed on this ground.

**5. Another matter**

[58] There is another concerning matter arising from a portion of the judge's summing-up set out in these reasons. The judge invited the jury to compare the complainant's evidence with the evidence put to the complainant by the appellant's counsel but rejected by the complainant and to decide which version they accepted.[10]

[59] Although not argued as a separate ground of appeal, the appellant rightly expressed concern about this aspect of the summing-up. The judge, in instructing the jury to decide whether they accepted the complainant's version or the appellant's version, effectively invited them to reverse the onus of proof. The judge should have directed the jury that, even if they were satisfied beyond reasonable doubt that the allegations put to the complainant in cross-examination and rejected by her were false, they could only convict the appellant if they were satisfied beyond reasonable doubt of the accuracy of the complainant's evidence as to the elements of the offence of rape. This additional error in the judge's directions to the jury was alone sufficient to require allowing this appeal against conviction.

**6. Conclusion**

[60] The appeal against conviction must be allowed and the conviction set aside on ground 1. It then becomes unnecessary to consider grounds 3 and 4. As the appellant was unsuccessful in his contention that the jury verdict was unreasonable and against the weight of the evidence (ground 2), a retrial must be ordered. It follows from the setting aside of the conviction that the sentence is also set aside, so that the application for an extension of time to apply for leave to appeal against sentence is otiose. It should be struck out.

ORDERS:

1. Appeal against conviction allowed; the verdict of guilty is set aside and a retrial is ordered.
2. The application for an extension of time to apply for leave to appeal against sentence is struck out.

[61] **FRASER JA:** I have had the advantage of reading McMurdo P's reasons. The orders proposed by her Honour should be made for those reasons.

[62] **APPLEGARTH J:** I agree with the reasons of McMurdo P and the orders proposed by Her Honour.

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9 See, for example, the italicised portions of the summing-up set out in these reasons at [35], [37] and [47].

10 Set out at [36] of these reasons.