

SUPREME COURT OF QUEENSLAND

CITATION: *R v Sun* [2018] QCA 24

PARTIES: **R**
v
SUN, Yu-Feng
(appellant)

FILE NO/S: CA No 121 of 2017
DC No 1179 of 2016

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 24 May 2017 (Durward SC DCJ)

DELIVERED ON: 6 March 2018

DELIVERED AT: Brisbane

HEARING DATE: 10 October 2017

JUDGES: Fraser and McMurdo JJA and Boddice J

ORDER: **The appeal be dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of one count of causing a person to take a drug with intent to stupefy the person to enable a sexual act to be engaged in with the person and one count of unlawful and indecent assault – where the complainant lived in a house with the appellant and the appellant’s wife – where the appellant gave the complainant a drink after a celebration at the house – where the complainant described experiencing symptoms consistent with ingesting Rohypnol in text messages to a friend – where the complainant took a urine sample before going to bed – where the complainant awoke in bed to find a man on her bed and her underwear and pants removed – where the appellant was the only man in the house – where the appellant’s sleeping wife was not disturbed by sounds from the complainant – where the complainant’s urine and hair samples contained traces of Rohypnol – where DNA taken from the complainant’s pillow case and pyjama top was likely to have included that of the appellant – where the complainant reported experiencing similar symptoms at the house on two prior occasions – where the appellant’s ground of appeal was that the verdicts were unreasonable – whether

it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each offence

Hocking v Bell (1945) 71 CLR 430; [1945] HCA 16, cited *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, applied *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: J R Hunter QC for the appellant
T A Fuller QC for the respondent

SOLICITORS: Dante Chen Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the order proposed by his Honour.
- [2] **McMURDO JA:** After an eight day trial before a jury in the District Court, the appellant was convicted of one count of causing a woman to take a drug with intent to stupefy her to enable a sexual act to occur with her, and one count of unlawfully and indecently assaulting her. The offences were said to have been committed in the course of one night at the appellant's home in February 2015. He appeals against those convictions upon the ground that the verdicts were unreasonable.

The prosecution evidence

- [3] The complainant was a young Chinese woman who came to Australia in September 2012 as a student. She completed her studies at the end of 2014 and by the time of the alleged offences, she was in full time employment. In early 2013 she began to live in the house in which the appellant and his wife resided, renting a room from them. She moved with them to the house which the appellant purchased in early 2014. It was here that she said that the offences were committed. The complainant occupied a bedroom upstairs in the house, opposite the room in which the appellant and his wife slept.
- [4] The events in question were said to have been preceded by two occasions on which the complainant experienced sudden episodes of extreme tiredness and disorientation. The complainant recalled an occasion in October 2014, at a time when she was studying but also working at a bakery. After a day's work, she planned to stay up to complete an essay and she consumed two energy drinks. At about 10.30 pm that night, the appellant offered her some green tea jelly which she ate. Within an hour, she said that she started to feel very tired and decided to lie down and rest. She quickly fell asleep and did not wake until late on the morning of the next day.
- [5] The second of those events occurred in January 2015. She was at home late one night when the appellant texted her, saying that he had made some black sesame milk and inviting her downstairs to try it. She drank some of the milk and then went back to her bedroom where she began to watch a movie. At the same time she was

texting a young man who then asked her out for a drink, to which she agreed. She said that she recalled that as she was getting dressed to go out, she became disorientated before passing out. After a short time she woke up and saw text messages from the young man saying that he was waiting at her front door. On the way to the door she fell, but then left the house with him. Not long afterwards he dropped her home where she went to bed and fell asleep.

- [6] The offences were alleged to have occurred on 18 February 2015, which was Chinese New Year's Eve. The appellant hosted a small celebration for the occasion, at which the complainant consumed, she said, half a glass of wine. Later in the evening, when the guest had left the house and the appellant's wife, who was then pregnant, had gone to bed, the appellant offered the complainant more wine, which she declined. The appellant then went upstairs for a shower. When he returned, he offered the complainant some Calpis, a Japanese soft drink. Earlier that day the appellant and the complainant had gone to a nearby grocery store where they had purchased some Calpis. The complainant told him that she would be able to get her own drink, but the appellant insisted upon pouring it for her. She said that she did not see him pour it before she drank the Calpis at an hour which was shortly before midnight. She recalled that after about 10 to 20 minutes, she began to feel very dizzy and decided to go upstairs to bed.
- [7] Once in her room, the complainant was texting a friend in Sydney. Those text messages, which were tendered in the prosecution case, provided a contemporaneous record of her symptoms. She texted that she felt dazed and was knocking into walls and cabinets on her way to the bathroom. Her friend suggested that she keep a urine sample, which she did. At one point the complainant texted: "I'm too scared to sleep ... He was asking me to drink from the beginning. I didn't want to ... Then he said just soft drinks and insisted to pour it into my glass and asked for toast with me."
- [8] The complainant said that after texting her friend she fell asleep under her blanket. Some time later she awoke to find that the blanket had been thrown over to one side, her pyjama pants had been removed, her underwear was only on one leg and her legs were "in the air". She was asked to describe again the position of her legs and, through an interpreter, said that her "two legs were stretched open, apart ...". She said that "in the middle of my legs" was a male person, whom she was unable to identify in the darkness. She said that "he was quite close to me". She could describe him only by saying that he was "a man and quite strong". She was not feeling any sensation except that "my vagina, my vulva, that place was quite wet."
- [9] She said that she summoned all of her energy and screamed at the man words such as "Who are you? What do you want to do to me?" The man then fled the room, leaving by the door to the hallway. There was also a door from her room to a balcony, but the complainant believed that it was locked because every day she checked it.
- [10] After the man had left the room, the complainant did not follow him because, she said, she did not have the energy to do so. She then noticed that her pyjama pants and her "underwears" had been removed. She put her underpants back on and then fell asleep very quickly.
- [11] The next morning, the complainant woke to find that her pyjama pants were on a chair. She texted the same friend, telling him that she was scared and that she "nearly got raped". She texted that it was "absolutely not a dream" and that "when

- [she] was a little bit conscious, [she] found [her] clothes have been taken off". She asked her friend whether he thought it "would be a ghost?" She expressed concern that she may need to take the "after morning pills".
- [12] On the next day she moved out of the house and went to doctors and then police on the following day. She went to a general practitioner, who referred her to pathologists for a urine screen. She did not tell that doctor all of the details of what had happened to her. After providing the sample, she saw another doctor to whom she gave a full account.
- [13] The (second) doctor whom the complainant consulted testified that he was told by her that she had been pressed to take the drink the night before and suspected that it had contained a sedative. She told the doctor that she may have been sexually assaulted and that she had experienced some vaginal wetness. The doctor prescribed a morning-after pill and an antibiotic.
- [14] The prosecution called Dr Robinson, a forensic medical officer, who gave evidence that the analysis of the complainant's urine revealed that it had contained aminoflunitrazepam, which she said was a breakdown product of flunitrazepam, which was commercially sold as Rohypnol. In June 2015, the complainant provided samples of her hair to another doctor. Dr Robinson said that the same substance had been found in those samples, which was also indicative of an exposure to Rohypnol. For testing, the hair samples had been broken into segments, each representing about one month's growth of hair. The segments of the preceding three months' of growth did not show any sign of exposure to Rohypnol, but the older segments, dating from early March 2015 back to November 2014, did so.
- [15] Dr Robinson said that Rohypnol was a drug which had powerful hypnotic effects which made people sleepy, and could also cause a loss of muscle control and memory loss. She said that a person consuming Rohypnol would start to feel its effects within about 20 minutes, but the peak effect usually occurs after two to three hours. She said that Rohypnol was sold commercially, but with a colouring and bittering agent in order to make it "as obvious as it could be" to someone who was consuming it.
- [16] When cross-examined, the complainant agreed that it was not uncommon for the appellant and his wife to make jellies and "exotic" drinks for her and that the appellant had also offered the green tea jelly to another tenant. She said that when she ate the jelly, it tasted normal and not bitter. Similarly, the Calpis smelt and tasted normal. She agreed that the appellant and his wife would often bring in her washing from the clothesline, and on some occasions fold it and put it on her bed. That evidence was relevant to the weight of the evidence of the appellant's DNA being found on her bed linen and clothing.
- [17] Tapelifts from the complainant's bedding and clothing were subjected to forensic DNA analysis. The middle to bottom area of the sheet revealed the presence of semen, however no DNA was extracted from the spermatozoa fraction of the sample. A mixed DNA profile was identified on the sheet, consisting of the complainant's DNA and that of someone else which, it is common ground, was not demonstrated to be that of the appellant. A DNA sample taken from the pillow case showed a mixed result with three contributors, of which the appellant was very likely to have been one. Even more likely was the contribution of the appellant to

the mixed DNA found on the outside chest and lower front of the complainant's pyjama top. The same applied to a sample taken from the complainant's bra. Less conclusive was a sample taken from her pyjama shorts.

- [18] The appearance of the appellant's DNA on at least some of these items was attributed, in the appellant's argument, to the possibility that in the circumstances of this household, his DNA could have been there without having been deposited by him, but instead by a transfer from something else where his DNA had been present. Those possibilities made relevant the evidence about the complainant's washing.
- [19] Defence counsel did not put to the complainant that the man in her bedroom was not the appellant, nor that the incident which she related in the bedroom had been merely imagined by her.
- [20] The prosecution called the appellant's wife. She said at the time, only she, the appellant and the complainant lived at the house. She said that she was ill with her pregnancy and retired early, watching television in her bedroom. She did not see the appellant again until he came to the bedroom at about 1 am, when he inquired how she was feeling before leaving. She then fell asleep and did not awaken until about 6 or 7 am, when the appellant was asleep beside her.
- [21] She said that the appellant would sometimes be with her in the complainant's room when they were returning her washing. She said that she was a light sleeper but had heard no one calling out during the night. She had offered the complainant and another tenant the green tea jelly which she had made on the earlier occasion, in October 2014. She said that no one had suffered any adverse effects from it. She also said that she had made the black sesame milk the subject of the second incident related by the complainant, and said that it was she who had poured the milk into the complainant's glass.
- [22] The appellant was interviewed by police on 7 March 2015. He denied that he had drugged or sexually assaulted the complainant. He said that all of the keys to his house had been accounted for and that he had checked the house was secure before going to bed in the early hours of that morning.

The defence evidence

- [23] The appellant gave evidence denying the offences. He also called a former occupant of the house, who had attended the Chinese New Year's Eve celebration on the evening in question. The witness said that shortly after dinner, the complainant had said that she felt unwell and went to her room, returning at about 9.30 pm to say goodnight to her as she left.

The appellant's submissions

- [24] For the appellant, it is submitted that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt, having regard particularly to these matters:
 - there was no evidence that the appellant had ever had possession of or access to Rohypnol;
 - although when Rohypnol is sold commercially, it is supplied with colouring and bittering agents, the complainant said that the Calpis had a normal taste;

- the complainant's comment in a text to her friend on the morning after the event, about the intruder being possibly a "ghost", which suggested that she had suffered a drug-induced hallucination;
- the appellant's wife, a light sleeper, was not disturbed by scream or shout by the complainant;
- the evidence of the other guest at the dinner, that before being offered the Calpis, the complainant was unwell, suggesting that any drug was ingested other than at the hands of the appellant;
- the DNA evidence was unremarkable, given the appellant's presence in the household and the possibilities of a transfer of his DNA other than by the incident in her bedroom.

The respondent's submissions

- [25] For the respondent, it is said that the jury was presented with a strong circumstantial case. The scientific evidence supported the timeline of the complainant's testimony, that she had ingested Rohypnol at some time between November 2014 and February 2015, but not after that date.
- [26] It is submitted that the presence of Rohypnol with a bittering agent might not have been discerned in Calpis which was described¹ as a beverage tasting like sour milk or yoghurt. Similarly, it is said that black sesame milk or green tea jelly might have a distinctive flavour which would disguise the bitter flavour of Rohypnol.
- [27] As to the appellant's wife not hearing the complainant calling out, it is submitted that this could be explained by some imprecision, as a result of the complainant's evidence being given through an interpreter, in the description of her response to the intruder.
- [28] It is submitted that the comment about a "ghost" was of little moment, coupled as it was with her expressed concern about pregnancy and disease. Further, it is pointed out that the complainant moved out of the house on the following day and promptly sought medical attention, which demonstrated her belief that she had been drugged and assaulted.
- [29] As to the DNA evidence, it is submitted for the respondent that its presence in intimate areas strengthened a circumstantial case, and that it did not need to have a particular probative force standing alone.
- [30] The respondent's argument also points to the lack of any evidence suggesting the presence of any other male in the house and that the evidence was that the house had been checked as secure and that there were no missing keys nor signs of a forced entry. It is submitted that it was therefore the appellant who was the only male with the opportunity to have been in the complainant's room and to have given her Rohypnol.

Consideration

¹ By the guest who gave evidence in the defence case.

- [31] The question is whether, on this Court's independent assessment of the evidence at the trial, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each offence.² In *R v Baden-Clay*,³ the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",⁴ in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."⁵
- [32] The evidence presented a strong case that on the night in question, the complainant suffered from the effects of Rohypnol. The substance was detected in a sample of urine. It was also found in testing samples of her hair. The credibility of the complainant's own account of her symptoms was supported by her contemporaneous description of her condition in her text messages. The symptoms of which she complained were those to be expected from Rohypnol.
- [33] It was open to the jury to conclude that there had been a man in her room, as she described in her evidence. Indeed, she was not challenged in cross-examination in that respect, although it was later argued to the jury that she might have imagined the incident, under the influence of a drug. That was a possibility that required consideration, although it had not been put in cross-examination. But it was open to the jury to reject it and to accept her evidence. As the respondent submits, her actions over the following few days showed a certainty in her mind that she had been drugged and assaulted. The evidence from the appellant's wife that she heard no shout or scream was not irreconcilable with the complainant's evidence of the incident in her room.
- [34] If the jury concluded that she had been affected by Rohypnol and that she had been assaulted by a man in her room as she described, the case against the appellant was strong. There was no other male living or visiting the house. On the appellant's own evidence, the house was secure. The ingestion of Rohypnol and the presence of the male were unlikely to have been coincidental: the strong likelihood was that she was assaulted by the person who had caused her to take the Rohypnol. There was evidence of the notoriety of Rohypnol as a "date rape drug".
- [35] The jury had to consider how the Rohypnol may have been consumed by her. The prosecution case was that it was mixed in the Calpis. On her evidence, the appellant poured that drink for her, but not in her presence and he had seemed to be insistent on doing so. There was evidence about the colouring and bittering agents used in Rohypnol, which provided the basis for the argument to the jury, and in this Court, that the Rohypnol could not have been present in the Calpis for otherwise the complainant would have noticed it. Although that is a fair submission, the use of the colouring and bittering agent did not require the jury to be left in doubt about whether the drink contained the drug. Dr Robinson did not say that these agents used in Rohypnol, as it is commercially supplied, would make it obvious, to every person and in every context, that it was present.

² *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14]; [2011] HCA 13.

³ (2016) 258 CLR 308 at 329 [65]; [2016] HCA 35.

⁴ *Ibid*, citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.

⁵ *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65]; [2016] HCA 35; citing *M v The Queen* (1994) 181 CLR 487 at 494; [1994] HCA 63; and *MFA v The Queen* (2002) 213 CLR 606 at 621 - 622 [49]-[51], 623 [56]; [2002] HCA 53.

- [36] The absence of evidence that the appellant had been in possession of the drug was of little significance. The prosecution case would have been yet stronger had there been that evidence. But its absence did not mean that a case which could otherwise be accepted by the jury was to be rejected.
- [37] The jury had the advantage of seeing the witnesses and assessing the credibility and reliability of, in particular, the complainant, the appellant, the appellant's wife and the woman who gave evidence in the defence case.
- [38] In my conclusion, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on each charge. I would order that the appeal be dismissed.
- [39] **BODDICE J:** I agree with McMurdo JA that it was open to the jury to be satisfied of the appellant's guilt on each charge, beyond reasonable doubt.
- [40] I agree with the order proposed by McMurdo JA.