SUPREME COURT OF QUEENSLAND

CITATION:	*R v Downing* [2018] QCA 343
PARTIES:	**R** **v** **DOWNING, Simon Ronald** (appellant)
FILE NO/S:	CA No 85 of 2018 DC No 468 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 14 March 2018 (Lynham DCJ)
DELIVERED ON:	7 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2018
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was charged with rape – where the complainant alleged that the appellant penetrated her vagina with his fingers while she slept in a hotel room – where DNA samples taken from the complainant's underwear revealed a DNA profile matching the appellant's – where the appellant denied any penetration of the complainant's vagina but gave evidence that he touched the outside of the complainant's underwear – where an alternative offence of indecent assault was left to the jury upon the suggestion of the trial judge – where the jury acquitted the appellant of rape but convicted him of indecent assault – whether the alternative verdict of indecent assault was rationally open to the jury – whether it was unfair to permit the jury to convict the appellant of the alternative offence in reliance upon the appellant's own account, where that evidence was given in defence of the different charge on the indictment – whether the jury being directed to consider the alternative verdict caused a miscarriage of justice *Criminal Code* (Qld), s 245, s 352(1), s 578(1) *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, cited

R v Cooling [1990] 1 Qd R 376, cited
R v Coutts [2006] 4 All ER 353; [2006] 1 WLR 2154; [2006] UKHL 39, cited
R v Holzinger [2016] QCA 160, cited
R v King (2004) 59 NSWLR 515; [2004] NSWCCA 20, cited
R v Nous (2010) 26 VR 96; [2010] VSCA 42, cited

COUNSEL: J A Greggery QC for the appellant
C Marco for the respondent

SOLICITORS: Purcell Taylor 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] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[3] **McMURDO JA:** The appellant was tried for the rape of a young woman by penetrating her vagina with his fingers while she slept in a hotel room. The jury acquitted him of that charge, but convicted him of an offence of indecently assaulting the complainant. He appeals against that conviction on the ground that there was a miscarriage of justice by the jury being directed to consider this alternative verdict.

The prosecution evidence

[4] The complainant and another young woman were university students completing field work in cane fields near Ingham. The two women shared a room at a hotel outside the town and it was there that the alleged offence occurred. They were drinking in the bar area before dinner when the appellant and another man, his work colleague, introduced themselves. They were also staying at the hotel. There was some friendly conversation between them but nothing more before the women went upstairs to have dinner on the verandah outside their room.

[5] The hotel rooms each opened onto that same common verandah and there were some further conversations with the men during which, the complainant agreed, she drank wine and smoked cannabis.

[6] At about 9.00 or 9.30 pm, the two women went to bed. It was a hot night and the complainant did not like sleeping in an air conditioned bedroom, so the women left the french doors open from their room to the verandah. They slept on top of the bed clothes and wearing only their underwear.

[7] After a while, the complainant awoke to the sensation of a person performing oral sex on her. The other woman was still asleep. The complainant froze with fear and, at the same time, experienced the sensation of fingers being removed from her vagina. It was dark but she was able to see the man moving his arm as though he was masturbating. She kicked out at him and the man walked quickly from the room onto the verandah. She adjusted her underwear to its proper position before the man returned at the doorway. She yelled "fuck off or I'll call the police" to which

the man replied "sorry, sorry, my apologies". At this point the other woman awoke and the complainant told her what had happened. A short time later she made another complaint of the incident by a text message sent to a friend. In cross-examination she denied suggestions that she had invited the appellant into the room and consented to him touching her in any way.

[8] The complainant's friend gave evidence which was relevantly consistent with that of the complainant. She had not been awake when the man was in the room but there was her evidence of the preliminary complaint.

[9] The man who was travelling with the appellant gave evidence in the prosecution case. He recalled a conversation with the appellant on the following day when the appellant said that the two women "must be a pair of lesbians if they don't want a good bit of cock".

[10] The complainant went to the police on the following day. She gave to police the underpants she had been wearing during the incident and they were later examined for the presence of DNA. Her complaint to police was consistent with her testimony.

[11] The results of the DNA analysis appeared from the formal admissions made on behalf of the appellant at the trial. Samples were taken from the front left hand and front right hand crotch seam areas of the underpants. A DNA profile matching that of the appellant was found on those samples. The possibility that the other man had contributed to the samples was excluded.

An alternative verdict suggested by the trial judge

[12] After the prosecution case had closed and the appellant had elected to give evidence, but before that evidence had been opened, the judge asked counsel (in the absence of the jury) whether an alternative offence of sexual assault should be left to the jury. The prosecutor said that although that had not occurred at the previous trials on this charge,[1] she would be asking that this charge be left to the jury. Counsel for the appellant then volunteered "[i]t's a natural alternative in any way".

[13] The court then adjourned for the day and on the following morning, again in the absence of the jury, the appellant's counsel said:

> "I've been thinking about that overnight and, whilst it is a natural alternative, the starting point in this trial is that the offence is one of rape particularised by the penetration of her vagina, obviously without consent.
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> …
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> Now, to get to sexual assault they must be satisfied beyond a reasonable doubt with respect to a lack of consent but the issue of, then, penetration becomes problematic. They could probably – they would have to be then not so satisfied that there was penetration but some other form of touching."

[14] The judge responded that he had then been looking at the transcript and considering the matters which had been put to the complainant when cross-examined. His

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1 When in each case the jury had been unable to agree.

Honour said that on the assumption that the appellant would give evidence which corresponded with what had been put to the complainant, the appellant would admit to "some sexualised touching" in that he "rubbed her vagina on the outside of her underwear" but that this was the "limit of the sexual interactions between them". The judge said that if the jury accepted the appellant's version in that respect, but they were satisfied the touching occurred without the consent of the complainant, then the alternative verdict would arise for their consideration.

[15] The appellant's counsel then appeared to agree with what the judge had said, as did the prosecutor. The judge added that whilst there was evidence of the defendant performing oral sex on the complainant, the alternative offence of a sexual assault "must arise out of the rape charge, in the sense that it's the touching with the hand". Again each counsel agreed.

The appellant's evidence

[16] The appellant testified that he had smoked cannabis that evening and was "a bit stoned" and not thinking like a sober person. He'd gone to the television room of the hotel where he had stayed for about an hour before falling asleep. At about 11.00 pm, he walked onto the verandah to smoke a cigarette when he saw the doors to the verandah from the complainant's bedroom were open. He said he "walked down to have a look" and saw both women on the bed wearing only underpants. He said that he asked if he could come into the room and the complainant said "mmm". He went into the room and stood beside the bed, he said, saying to the complainant that she looked lovely and asking whether he could touch her to which she again responded "mmm". He said he put his hand on her breast, spat on his other hand and started to rub it on the outside of her underwear. After a few seconds, the complainant moved her leg, which gave him a fright and he left the room. He said he returned to the door soon afterwards saying "sorry, I apologise" when the complainant told him "fuck off or I'll call the police". He said that there was no penetration of the complainant's vagina and no masturbation.

The directions to the jury

[17] The trial judge explained to the jury that they would consider the alternative count of sexual assault if "for example, [they] were satisfied that the defendant touched the complainant on her underwear in the manner he described, that is, on the outside of her underwear, but he did not penetrate her vagina with his fingers." The judge then described the elements of this offence of sexual assault in terms of which there is and could be no criticism. He referred to the relevance of the appellant's own evidence in the proof of this alternative, by saying:

> "You would have no difficulties, members of the jury, accepting … that a man touching a woman on the vagina in the manner described by the defendant would be an assault."

The appellant's argument

[18] Counsel for the appellant, who did not appear at the trial, advanced in effect two arguments. Firstly, he submitted that the alternative verdict was not rationally open to the jury. It is said that the proof of this alternative offence required the jury to:

- accept the complainant's evidence that she gave no consent to any sexual contact and was asleep at the time at which it occurred;
- not accept her evidence that her vagina had been penetrated;
- accept the appellant's evidence that he touched the outside of her underwear; and
- not accept the appellant's evidence that she consented, or apparently consented, to that conduct.

Because that reasoning was illogical and not open to the jury, the alternative verdict should not have been left and what resulted was a compromise verdict.

[19] Secondly, it is argued that it was unfair to permit the jury to convict in reliance upon the appellant's account, where that evidence was given by him in defence of the different charge on the indictment. That submission relied upon what is said to be the effect of the judgment of the Victorian Court of Appeal in *R v Nous*,[2] where the court said that whether the interests of justice will favour a lesser alternative offence being left to the jury could depend upon, amongst other things, whether there is "reliance by a party upon [evidence which raises the alternative offence] as evidence which is inconsistent with proof of one or more of the elements of the more serious offence".[3]

Consideration

[20] The alternative offence was under s 352(1) of the *Criminal Code* (Qld) which provides, by sub-section (1)(a), that a person who unlawfully and indecently assaults another person is guilty of a crime. Section 245 defines what constitutes an assault. It includes touching of another person without that person's consent. In the present case, on the appellant's own evidence, he touched the complainant so that absent her consent there was an unlawful and indecent assault by him.

[21] Section 578(1) of the *Code* provides that upon an indictment charging a person with the crime of rape, a person may be convicted of an offence, if established by the evidence, under (amongst others) s 352. As Derrington J said in *R v Cooling*,[4] the provisions of s 578 are facultative and designed to avoid the necessity of including multiple alternative charges in the indictment. The section did not require this alternative offence to be left by the trial judge for the jury's consideration. Instead whether the judge had to do so depended upon whether that was necessary to secure the fair trial of the appellant, according to the facts and circumstances of this particular case.[5] In this context, the fairness of the trial must be considered more broadly than only by reference to the interests of the accused, because there is also the public interest that "defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed", as Lord Bingham of Cornhill said in *R v Coutts*.[6]

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2 (2010) 26 VR 96; [2010] VSCA 42.
3 Ibid at 106 [48].
4 [1990] 1 Qd R 376 at 381; [1989] QSCCCA 219.
5 James *v The Queen* (2014) 253 CLR 475 at 491 [38]; [2014] HCA 6.
6 [2006] 4 All ER 353 at 359 [12]; [2006] 1 WLR 2154 at 2159 [12]; [2006] UKHL 39; with which the plurality agreed in *James v The Queen* (2014) 253 CLR 475 at 487 [27]; and applied in this Court in *R v Holzinger* [2016] QCA 160 at [30].

[22] More commonly, there is a challenge to a conviction upon the basis that a lesser offence was not left to the jury. Here the complaint is that there was an injustice because it was left. Undoubtedly there will be cases where it would be unfair to an accused to allow the jury to consider another possible offence, such as where the accused may have been deprived by assumptions made in the course of the trial of a fair opportunity of meeting that offence. Referring to a case of that kind, in *James v The Queen* Gageler J explained that this is part of the principle that the accused should not in any case be taken by surprise but should have a fair opportunity of meeting the case against him.[7] It was the potential for an unfairness of that kind that Smart AJ had in mind in *R v King*,[8] in saying that "[i]f the Crown wants the jury to consider an alternative charge it should open that to the jury [and it] should not be left to its closing speech or later". Nevertheless, the fact that the alternative offence has not been opened by the prosecutor is not determinative. The question of whether to allow the alternative in each case will remain one for the trial judge, and it will be answered by reference to the particular facts and circumstances of the case, to the end of ensuring a fair trial in the public interest.

[23] The appellant's arguments contain the premise that the appellant could not have been convicted of the alternative offence solely by reference to the evidence in the prosecution case. It was submitted that his version of events was rejected in all relevant respects in the course of the cross-examination of the complainant, so that it was only by his own evidence that he could have been convicted. In my opinion, that premise is not established.

[24] The appellant's argument overlooked the formal admissions as to the presence of the appellant's DNA on particular places of the complainant's underpants. That evidence proved that it was the appellant who was the man in the complainant's bedroom and provided a basis by which the jury could conclude that he touched the complainant in a way which, absent her consent, constituted an unlawful and indecent assault. In my opinion, it was open to the jury to convict him of this lesser offence even without reference to his own evidence.

[25] The first argument, that it was irrational for the jury to act on some of the complainant's evidence and some of the appellant's evidence, cannot be accepted. The complainant's evidence that she did not consent to any sexual conduct had substantial support from other evidence. Undoubtedly she had consumed many drinks and also smoked cannabis. There had been no indication of any prospect of sexual activity by the time she went to bed. Further, there was common ground between the versions of the complainant and the appellant that the appellant returned to the room and apologised before being told by an angry complainant to leave. There was no challenge to that part of the complainant's evidence. Moreover, the appellant's own evidence was inconsistent with her having consented or done something which would provide a reasonable basis for believing that she had consented. The prosecution case as to the absence of consent was compelling. The jury could have been satisfied of that element without finding the complainant to be a particularly reliable witness.

[26] From the verdict on the lesser offence, it should not be inferred that the jury was persuaded that the sexual conduct was as limited as the appellant had testified.

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7 (2014) 253 CLR 475 at 502 [75] citing *Pantorno v The Queen* (1989) 166 CLR 466 at 473; [1989] HCA 18.

8 (2004) 59 NSWLR 515 at 532 [97]; [2004] NSWCCA 20.

Rather, the jury may have been simply in doubt about whether there had been penetration as the complainant had said. The verdict of guilty does not demonstrate that the jury accepted the appellant's account of what did and did not happen in the nature of any sexual act.

[27] Consequently, the jury's reasoning towards the guilty verdict on the alternative offence need not have been irrational. Nor was there an unfairness in this case from the possibility of the alternative offence being raised when it was in the course of the trial. There has been no suggestion of any way in which the appellant's case would have been conducted differently had the alternative verdict been raised by the prosecution or the judge at the outset of the trial. It is relevant, although not determinative, that the appellant's trial counsel complained of no unfairness from the alternative being left to the jury.

Conclusion and order

[28] The appellant's complaint that there was a miscarriage of justice by this offence being left to the jury cannot be accepted. I would order that the appeal be dismissed.