SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rad* [2018] QCA 103
PARTIES:	**R** **v** **RAD, Mehdi Sharifi** (appellant)
FILE NO/S:	CA No 281 of 2017 DC No 1450 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 8 November 2017 (Devereaux SC DCJ)
DELIVERED ON:	1 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2018
JUDGES:	Gotterson and Morrison JJA and Davis J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted on jury's verdict of one count of rape – where the appellant alleged the trial judge erred by failing to make two directions – where those directions related to the appellant's English ability and to intoxication – whether the directions given were insufficent as to cause a miscarriage of justice *Criminal Code* (Qld), s 2, s 6, s 348, s 349, s 668E *Alford v Magee* (1952) 85 CLR 437; [1952] HCA 3, cited *Daniels v The Queen* (1989) 1 WAR 435, considered *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, applied *Director of Public Prosecutions v Merriman* [1973] AC 584, considered *Jones v The Queen* [1980] WAR 203; [1980] WASC 37, considered *Kaitamaki v The Queen* [1985] AC 147, cited *Lapthorne v The Queen* [1990] WAR 207; [1989] WASC 98, considered *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9, cited *R v Huston* [2017] QCA 121, cited *R v Knight* [2017] QCA 98, cited

R v Mayberry [1973] Qd R 211, cited
R v O'Loughlin [2011] QCA 123, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, considered
Vereker & Forsyth v Rodda (1987) 18 FCR 83; [1987] FCA 109, cited

COUNSEL: T Glynn QC for the appellant
J Wooldridge for the respondent

SOLICITORS: Havas & Dib Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Davis J and with the reasons given by his Honour.

[2] **MORRISON JA:** I agree with the reasons of Davis J and the order his Honour proposes.

[3] **DAVIS J:** The appellant was convicted of one count of rape on 8 November 2017 after a trial in the District Court. He was sentenced to five years imprisonment suspended after 18 months with an operational period of five years. He appealed against his conviction and sought leave to appeal against sentence. However, the application for leave to appeal against sentence was abandoned.

[4] By his Notice of Appeal the appellant challenged the jury's verdict on two of the bases identified in s 668E of the Criminal Code: that the verdict was not supported by the evidence, and that the verdict of the jury was unreasonable. Those grounds were abandoned and the Notice of Appeal was, by leave, amended to add the only two grounds of appeal pressed, namely:

> Ground 1: The learned trial judge erred by failing to direct the jury that the appellant's intoxication was a relevant circumstance when considering whether the appellant held an honest and reasonable belief that the complainant was consenting.
>
> Ground 2: The learned trial judge erred by failing to direct the jury that the appellant's limited English language ability was a relevant circumstance when considering whether the appellant held an honest and reasonable belief that the complainant was consenting.

[5] At the trial, the only issue was consent, it being conceded that the appellant had penetrated the complainant's vagina.[1] The appellant's case at trial was that the complainant consented to penetration or, if she did not consent, then he was honestly and reasonably mistaken that she did.[2] The exculpation provided by s 24 of the Code, mistake of fact, was left for the jury's consideration.

[6] While the learned trial judge directed the jury to consider the exculpation in s 24 of the Code, his Honour was not asked to give directions of the type mentioned in the two appeal grounds now sought to be advanced by the appellant.

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1 *Criminal Code* s 349(2)(b).
2 *Criminal Code* s 24.

[7] Section 668E(1) of the Code prescribes the grounds upon which this Court may set aside a jury's verdict. That subsection is in these terms:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

[8] In *Dhanhoa v The Queen*[3] McHugh and Gummow JJ observed that where, on appeal, the complaint is a failure of the trial judge to give directions which were not requested at trial, the relevant ground of appeal can only be that there was a miscarriage of justice[4] and an appellant must demonstrate "… that the direction should have been given and it is 'reasonably possible' that a failure to direct the jury 'may have affected the verdict.'"[5] *Dhanhoa v The Queen* was an appeal from the Court of Criminal Appeal of New South Wales. Section 6 of the *Criminal Appeal Act* 1912 (New South Wales) is in similar terms to s 668E(1) of the Code. This Court has consistently applied the principles from *Dhanhoa* that I have described above to appeals from Queensland Courts based on a failure of a trial judge to give a direction which was not requested at trial.[6]

The evidence

[9] The complainant's version as given in evidence-in-chief was as follows:

> "CROWN PROSECUTOR: So you were in the lounge room, watching videos?---Yes, we started making out a bit on the couch.
>
> When you say making out - - -?---Just having – kissing, a little bit of hands on the bum and whatnot.
>
> When you say hands on the bum, whose hands?---Mehdi's hands on my bum.
>
> And who was kissing who?---Both kissing each other.
>
> And what happened then?---He got up to get a drink, he got a Captain Morgan and a Sprite. He also got changed into a pair of black tracksuit pants, instead of the cream jeans. He came back to the couch to drink his drink and we watched the videos for a bit longer. He had a couple more drinks – maybe two or three more and before we started making out again, we were making out a second time and he asked me if I wanted to go to the bedroom. Before I could say anything, he'd picked me up off the couch and started walking towards the room.
>
> If I could stop you there? Can you recall what time this was?---Probably about 9 o'clock.

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3 (2003) 217 CLR 1.
4 *Dhanhoa* at [38].
5 *Dhanhoa* at [38].
6 *R v Huston* [2017] QCA 121 and *R v Knight* [2017] QCA 98.

So what happened after he picked you up?---Started walking towards the room. I got down, out of his grip and he grabbed some keys from the table, at the top of the stairs, walked down to the bedroom. He unlocked the door with these keys, we walked in and he closed the door behind him, started making out again. He pulled off my jumper and then got completely undressed himself. He then pulled my pants down.

What clothing were you wearing at that point?---The grey knit jumper, black singlet and a – black leggings.

And then what happened?---We were fully undressed. I told him to put a condom on. He told me he didn't. I told him, "No, seriously, you do" and he turned around and said, "No, I don't" bef – as he was pushing me on the bed and he put his penis in my vagina and started to thrust. I – he'd pinned me, with his hands, on my arms, sort of up near my shoulders, with his weight pushing up off me.

So you just indicated with your hand there, towards the top of your arm?---Yep.

Continue?---He then was using his weight in that area of my arm to hold me down. My arms were beside me. I put my arms up onto his stomach as I was telling him to get off me.

You indicated you put your arms on his stomach?---Yep.

Were you doing anything with your arms?---I was pushing up against him, on – like, on the sides of his stomach.

Were you saying anything at this point?---I was telling him to get off me.

Was he saying anything in response?---No.

What was he doing?---He was, eyes closed, thrusting, in his own world and then I was starting to wriggle a bit, trying to get out of his grips and he then flipped me.

And how did that happen?---Kept one arm where it was, on this side and put the other hand under this shoulder and just sort of flipped.

So you're indicating to your left shoulder, he kept his hand on that shoulder?---Yes.

What hand was that of his?---It would've been his right hand.

And what did he do with his other hand?---Put it underneath my right shoulder, on the bottom side of it and flipped.

Did you say anything at that point?---I don't remember saying anything.

And what happened after that?---After that, he put himself back in me. I was getting up on my hands and knees to try to crawl away and he put his hand in the back – middle of my back and pushed down against me with all his strength, pushing my hands and legs from out underneath me and continued to thrust for a bit. I told him again to stop and to get off me and he told me he wasn't finished yet. Well, yeah, he told me he wasn't finished yet, sorry and I told him that

I couldn't handle it and he said he wanted me to come before he did. I told him I already had. I hadn't really, I just wanted him off me and he wasn't listening to "No." And then he tri – pulled out and tried to put his penis in my arse. At this point, he started fumbling around released his press – the pressure from my back to the point that I was able to get my hand around behind me and grab hold of him.

And you say you grabbed hold of him? What are you referring to?---I grabbed his penis.

And which hand did you use to grab his penis?---My left hand.

And what did you do then?---I squeezed pretty hard. I only held for less than five seconds. Enough – when I heard he was in pain, I let go. I didn't want to injure him; I just wanted it stopped.

And where did you get that indication from?---Which indication, sorry?

That he was in pain?---I could just hear he was in pain. He made, sort of, a painful noise, almost like a groan.

And what did you do?---I was able to get myself up to the end of the bed, I rolled back over, onto my back, in sort of a seated position, pushed backwards, up the back of the bed.

And you indicated towards the end of the bed?---Yep.

Are you referring to the – which side of the bed are you referring to?---The bedhead, back towards the wall.

And then what happened?---And then he knelt one knee on the end of the bed, reached up and grabbed my legs and pulled me back down. I started grabbing for the sheets that were up the top, but nothing held as such. He pulled me back down; he put himself back in me.

You say he pulled you back down. How did he do that?---He grabbed my thighs and just – as he stepped his knee of the bed, pulled down with his hands.

And then what happened?---And then he put himself back in me, was thrusting a bit more, flipped me again and next minute, pulled out and ejaculated on my back.

You said he put himself in you. What do you - - -?---His penis in my vagina.

And you indicated he ejaculated on your back?---Yes, that is correct.

And what happened then?---He put his hand on my lower back and told me not to move. He went out of the room, wasn't very long at all, he came back with a box of tissues, quickly wiped my back, left the room again. I waited a little bit, till I knew he wasn't coming straight back and I got myself up. I got dressed, walked out to the loun – lounge room, as I was still pulling on my jumper, to go get my phone, which was still on the couch. I grabbed my phone, I text my friend GL, telling me that – get – asking her to send me a message

> telling me that I needed to come home early. She responded something saying, "Is that exactly what you want me to say?" I told her what I wanted her to say and she sent me a message back saying, "I'm so sorry to do this. I need to leave early. Can you please come home now." I showed that message to Eddie[7], who had joined me back on the couch.
>
> At what point did he return to the couch?---He returned to the couch just as I'd told GL what I wanted her to say and put my phone down.
>
> And where was he and where were you positioned on the couch?---He came back in. I was still standing when he came back in. He came back in, sort of sat down closest to the door, grabbed my hand and sort of directed me force – not so much forcefully, but with intent to pull me down to the couch, just to sit down and, yeah, I was on the left-hand side of him.
>
> What happened after you showed the message?---After I showed the message, I left. I walked out the door; he followed me out. He pulled me back towards him, gave me a hug, went to kiss me again, but I turned my head. He ended up kissing my cheek, told me to let him know when I get home and that we should do it again sometime and whatnot and I told him I would. I got in the car and I left.
>
> Did you consent to having sexual intercourse with Mr Sharifi Rad?---No, I didn't."[8]

[10] GL is the complainant's flatmate (referred to as "GL" in the passage above) who was asked to send the message to the complainant advising her to come home. After the message was received the complainant left the company of the appellant, travelled home and had a conversation with Ms GL. Ms GL's evidence of that conversation was as follows:

> "And what happened after that?---She got home about 9.30ish, 10ish and she came and she sat on the little chairs that I have out the front. And she just looked defeated. And I said, "So what happened?" And then she told me that - - -
>
> What did she say to you?---She said – she said that, "Well, we were making out and he got a boner. And then we got up and we went to his room. And he had to unlock the door, which freaked me out, because I didn't know if it was his room or not." And then she said that she asked him if he had a condom and he said, "No." And she said, "Well, you need to put one on." And then he said, "No. I don't have one" and just continued."[9]

[11] Under cross-examination Ms GL said that the complainant told her that she (the complainant) did not believe she had been raped.[10] Ms GL gave evidence that she then spoke to her boyfriend, Mr DK, and then in a further exchange:

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7 The appellant used the name "Eddie": Transcript at 1-19 l 45.
8 Transcript at 1-16 l 20 to 1-19 l 22.
9 Transcript at 1-66 ll 5 to 14.
10 Transcript at 1-68 ll 1 to 15.

> "Did you and your partner actively talk her around to going to the police?---Yes, because we believed that was the right- - -
>
> No?--- - - - thing for her to do.
>
> Okay. But the fact of the matter is, without you and your partner talking around, she wasn't going to make a complaint to anybody about anything?---No."[11]

[12] In re-examination it became apparent that the conversation with Mr DK may not have occurred until a couple of days after the day of the incident. Defence counsel was invited to further cross-examine. This exchange then occurred:

> "It's in that conversation that she said, "It's not rape, though, because we were making out and I got up and went to his room"?---Yes.
>
> It's after that conversation that you told her that she could say no and that it was rape and she ought to go to the police?---She had already told me that she had said no.
>
> No. No. Listen?---Well - - -
>
> It's at that point, 9.30 that night, that you told her that she was raped and she should go and make a complaint to the police?---Yes.
>
> You told her. Yes, you agree?---Yes."[12]

[13] The learned trial judge raised concerns as to whether the witness had been confused under the further cross-examination. Both counsel agreed that the witness should be recalled for short further cross-examination. She was recalled and this exchange occurred:

> "DEFENCE COUNSEL: Thank you, your Honour. I just want to go back to what was said?---Yes.
>
> Firstly, the night of the – well, the 17th - - -?---Yeah.
>
> - - - at after 9.30 when she comes home?---Yeah.
>
> And that's the one which starts off you two having a cigarette, that one?---Yes.
>
> Right. That's the one where she says, "Well, I had sex with him"?---Yes.
>
> Yes. "We started making out and he got a boner, so we went to his room" etcetera?---Yeah.
>
> She then went and had a shower. I remember you said - - -?---Yes.
>
> Right. So you didn't actually speak to her again until the next morning; is that right?---Yes.
>
> Because you thought that she would need time alone?---Yes.
>
> Okay. So she's had the night to reflect on everything?---Yes.

---

11 Transcript at 1-69 ll 31 to 37.

12 Transcript at 1-71 ll 1 to 12.

> Yeah. And it's the next morning that you say at this point – sorry. The next day – I'm just quoting your statement, you see:
>
> *The next day, I told FS she needed to go to the police.*
>
> ?---Yes.
>
> Continuing:
>
> *She responded, "It's not rape, though, because we were making out and I got up and went to his room".*
>
> And then you start to talk to her about, you know, it being rape and that she should go to police?---Yes.
>
> All right. So not necessarily that part of it the night before, but in the morning after she's had a night to reflect on everything?---Yes.
>
> Okay. So anyway, all of this was certainly before she'd gone to the police, because she wasn't going to go to the police?---Yes.
>
> Unless you convinced her otherwise?---No, she wasn't going to go to the police."[13]

[14] Two German tourists, BP and TP were holidaying in Australia in 2016 and at the time of the offence were staying with the appellant. Both were downstairs in the room they were occupying when they heard the television and went up to the living level which included both the kitchen and the lounge-room. Both saw the appellant and the complainant in the lounge-room watching television. Both witnesses said that the complainant appeared relaxed. Mr TP saw the complainant leave the unit, the inference being that what Mr BP and Mr TP observed was the complainant's calm demeanour after she had intercourse with the appellant.

[15] Mr DK, Ms GL's boyfriend, was called and gave evidence that he had spoken to the complainant on 21 July 2016, some four days after the event. His evidence was to this effect:

> "Okay. It's you who opened up the conversation, correct? On the 21st, later that day, you said something like this:
>
> *I asked FS about what had happened.*
>
> ?---Yes.
>
> So it was you – you - - -?---I initiated the conversation, yes, sir.
>
> Yeah, yeah, okay. All right. And the gist of it was that she'd gone on a date. And I think – did she indicate to you that, you know, it was all her fault and - - -?---Oh, that is correct, sir. She did.
>
> Well, anyway, when she said – I think she went on a bit further, "I went on a date. I'd originally said yes to hooking up with him, but I changed my mind. Am I a bad person for changing my mind," etcetera - - -?---That is - - -
>
> - - - that's - - -?--- - - - correct, sir.
>
> - - - the sort of thing?---Yep, something along those lines, sir.

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13 Transcript at 1-77 l 9 to 1-78 l 7.

> And you told her that no, no, she should make a complaint to the police; correct?---That is correct, sir, yes.
>
> Yeah, yeah. Because in fact at one point of the conversation – the conversation wasn't all about this, was it? It was - - -?---No, that's not – that is correct, sir.
>
> Yeah?---Because I'd seen that she was upset, I wanted to try and keep her off topic.
>
> Yeah?---Just to try and keep her in a decent [indistinct] my words – a decent headspace - - -
>
> Yep, yep. Okay?--- - - - to maintain that.
>
> All good:
>
> > *I asked her what she wanted to do about what had happened, and she said, "Nothing, it's my fault."*
>
> ?---Yes, that – she did say that, sir.
>
> All right. But you and GL convinced her otherwise?---Oh, it was not a matter of convincing, sir. I showed her a video that I'd seen - - -
>
> Yeah, yeah, just - - -?--- - - - earlier in the season - - -
>
> - - - listen to the question?---In the year.
>
> But for you talking to her, she wasn't going to go and make a complaint because she believed it was not rape?---No, that's not what I'm saying at all, sir.
>
> No, no, not what you're saying. That's what she said?---She wasn't aware of it being rape, sir. That's more to the point."[14]

[16] A complaint was made to police and Plainclothes Senior Constable Matheson arrived at the appellant's address on 22 July 2016. He conducted a search and seized various items. Importantly he spoke to the appellant and that conversation was recorded.[15] The recording was admitted into evidence and played to the jury. The appellant told PCSC Matheson that he did not know a lady by the name of FS[16] and did not meet a girl on Sunday, 16 July 2016. Those untruths were relied upon by the Crown as lies evidencing a consciousness of guilt[17] rather than just potentially impacting adversely on the appellant's credit.[18]

[17] The appellant gave evidence and his version was as follows:

> "And keep your voice up so everybody can hear you?---Okay. Sure. Yeah. That day we – we decide to meet up at – at the same day. We wanted to go to South Bank or the city, but then I remembered our – our conversation I told her that I – I can cook as well. Like, we can – like, we can make something and just have a – have something to

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14 Transcript at 1-97 l 32 to 1-98 l 36.
15 Exhibit 8.
16 The complainant's given name.
17 *Edwards v The Queen* (1993) 178 CLR 193 at 211.
18 *Zoneff v The Queen* (2000) 200 CLR 234 at 245.

eat. And she was okay with [indistinct] she came to my house 7 o'clock. I was waiting for her outside – waiting for her outside – just a cultural thing. When [indistinct] have a guest we just wait for her outside. She came - - -

Sorry. Did you say it's a culture thing, to wait - - -?---Yeah. It's, like, you know - - -

Yeah. To greet the guest?---Yeah. You just wait.

Yeah, yeah. Okay?---She came inside. I realised that I don't have – before she come I – I realised, like, I don't have much stuff to cook. Then I was, like, I'm just going to ask her, like, "We go get something to eat." We sat down – like, I ask her, like, you know, if she's, like, hungry, if she wanted a [indistinct] she was like, "Yeah, sort of." I was, like, "Let's go get some kebab." Like [indistinct] she was keen for [indistinct] I was like, "Okay. Let's go." We went to the kebab and – like, we were talking all the time. Like, you know, we were getting to know each other. So everything was fine. Like, you know, you could tell that she [indistinct] she likes you or no, like, as a – as a young guy. We got to the kebab shop. We had to wait for 10 minutes. We had to – for – for 10 minutes. In that 10 minutes we still were talking, like, what she likes. I was asking, like, wha – "What sort of things do you like?" or, "What do you do for fun?" – getting to know her. She was like, "Yeah, I drink, like, three or four times a week. I do this, that" – like [indistinct] like, yeah. I've got [indistinct] you know. And she asked me the same question. I was like, "Yeah. I – I like to go – like, camping, fishing, travelling, visiting, like, you know, friends, meeting new people, as I'm new in this country." And so while we were talking the – the kebab are ready. Like, I went – I got the kebab. We went back. We were – we were eating but it was too spicy and we started laughing about it. So we – kind of, like, that thing – it got us, like, very comfortable to each other [indistinct] we were just laughing about it, like, how spicy it is. And then after we were finished we went – we went for a walk for, like, 200 metres literally or something. Then she said, like, "I feel like cigarette." Obviously I don't smoke – like, I don't smoke. She said, "Okay." We – I told her that we can go – just come back to my house, "Your smoke is there." We went back. We were talking – still talking in the car, getting to know each other. We got to the – to my place, 19 V Street. I remember she – yeah. She got – she started smoking. It was raining. It was raining and I – I told her, "I'm not going to smoke. It's raining. No point." She was like, "Okay." And I tell her, "If you want, we go inside." She didn't finish her cigarette. We went inside. By then I felt very comfortable with her, like, you know, after all this talking and stuff. And we sat on the couch. I was, like, "Wha – what – what sort of thing do you like to watch?" She said, "Car racing and stuff like that." I remember she said something like that before. That's why, like, I told her if you want she can drive my car. And – because my car, it was like a Toyota Supra [indistinct] that's a sport car as well. And we were – yeah, we put the car racing. And I feel very comfortable. I was, like, "I'm just going to change my clothes and come back". Like [indistinct] we were just sitting,

like, you know, I put my hand like – kind of, like, you know, her shoulder – kissing each other a little bit. Like – and then I was, like, "I'm just going to go change my clothes and come back." I changed my clothes. I came back, sit next to her – like, you know, we start kissing each other again. And she sat top of me, like, in a way that, like – okay, I – I could tell that she – like, she – she wanted, like – she does – doesn't mind, like, to have sex with me.

Sorry. She doesn't mind - - -?---She doesn't mind to have sex with me. That's what I felt, like, you know, when she sat top of me. Because we were – like, we kiss each other only for a couple of minutes. And that was like something – like, when she sat top of me and started kissing me, I was, like, "Okay. Wow." That – that was my feeling at that time. And I - - -

Sorry. Your feeling was what? That she wanted to have sex then?---She want to have sex. Like, you know, the - - -

Yep, yep. Okay?---And then we were watching that car racing thing and because it's a – like, in a share house – we live in share house. So obviously people living downstairs and they usually come upstairs when they want to cook, they want to get something out of the fridge. I told her, like, "If you want to go to my room, like, we just go to my room so that we can feel more comfortable." She was all right. Like, she was – yeah – "Yes." Because she was sitting on top of me [indistinct] to go tomorrow [indistinct] we were kissing each other and when we went to – I had to grab my – my – my keys – my – for the room. We went inside. We got on the bed, started kissing each other again and took her jumper off, her pants off and then took my clothes off – like, except my underwear. We're still kissing each other and, like, licking each other and stuff – sorry about my language. It's just - - -

No. You tell us what happened?---And – and then – yeah. Like – so everything was, like, fine. It was just everything's happening naturally. It's not like I'm trying to do something. It's just like everything keeps happening naturally, like, from the beginning to the end. And we're kissing each other. Like, you know, I'm playing with her vagina and stuff like that then I was – I started asking her, like, you know – like, no. I don't want to have sex, right? Like, I don't have condom. And she's like – you know, because we feel very comfortable. Like, we go really long [indistinct] she looked at me in a way that, like, you know, so what? You don't have condom.

Can I just pause you there. This is the first date with this girl?---It's the first date. Yeah.

Yeah. I mean, you didn't anticipate at the beginning that there was going to be sex?---No. Like - - -

It's just developed that way?---Yeah. That – that's what I mean. Like - - -

Yeah?--- - - - you know, she looked me in the eye like, "So what? Let's do it." And I was like, "If you're sure about yourself, like, you don't have any problem, like, in a fun way. You know?"

Sorry. You asked her whether - - -?---Yeah. Like - - -

You didn't have any problem with going without a condom - - -?---Yeah. Like – yeah. I was like - - -

- - - if she was happy?---But in a fun way. I was like, "If you – if you make – if you're sure about yourself you're okay – I mean, no disease or anything – fine." And took her bra and her underwear – but before that we were – kissing and playing with her vagina and I [indistinct] underwear off, like, still kind of like had – had – had legs around my shoulder and, like, you know, started having sex. Kissing each other – that was, like, for a while then as I lay down on the bed she was on top of me again. Same thing – having sex. And then I said [indistinct] on the – on the bed. She sat top of me. Still kissing each other, licking my ears. I picked her up. We're still having sex but I wouldn't – I couldn't really, like, you know, do it for longer and I was like, "I'm just going to go" because before I had – like, I had to go to – I remember I had a drink with me before I [indistinct] I had, like – I had a [indistinct] I put on the – on the table [indistinct] I told her, "I'm just going to grab my drink and come back." I walked to the – to the living room to grab my drinks so it was enough time for her if she doesn't want it – like, she doesn't want sex. There was enough time, like, to dress – like, you know? I went back. I saw, like, I could see she was – like, she was playing with herself. I asked her, like, if, "Suck my penis". She did. I was playing with her vagina. She was, like, "That's enough. Just put it in." But, like – obviously in a sex way. We started having sex, like, in the position of doggy style. Then I asked her, like, if she'd come. She said that, "Not yet" but then I was, like, I want her to come before me. She came then I – then I came on her back. That's like, now we're finished. I – I cleaned her back and everything. But – yeah. I helped her, like, before I go wash myself. I washed myself then I came back to the room. Like, it was dark in my room. Like, I didn't turn on the light on. I just got to the living room [indistinct] the TV was there. We went back to the – like, it was, like, we were laughing, actually. We were laughing and watching the car racing for about 15, 20 minutes then TP came upstairs. I was like [indistinct] the people that I told you, like, that I live with. TP come upstairs, say hi to her and he started making – I don't know. I don't remember – noodles or something. And we were still, like, watching car racing and after he finished cooking or – I don't know what. He's – he had something ready. He sit on table. He was, like, talking to us. Then – yeah. It was like about 15 or 20 minutes or something. Like, we were watching the car racings together and he was like – he was talking about – about – about a car like it was a Porsche with a German plate number and then he – then he start talking to each other. Then he – she – she was like, "I have to – I have to go. Like, I've got these text messages." I was like, "Yes. No worries. Like, you know. Can we – like, we can see each other another time." And then she was like, "Well, let's have a cigarette before I go." Like, yeah. I was. We went outside. We had the cigarette. We were just talking, like, you know – like, "How was your night?" Like, "Hope you had" - - -

> Did you have a cigarette?---Yeah. Yeah. I had a cigarette with her but I didn't finish my cigarette.
>
> Yep?---Anyway, I – I think she didn't finish her cigarette. I don't remember that – that part. But I remember we had a cigarette. And then – like, I was asking, like, "How was – how was you night? Hope you had a good time." And she was like, "Yeah. Had a – had a – had a good time." And I was like, "It was really good. Like, amazing." Like, the best sex, she was talking. I was like, "Yeah. We should see each other another time as well." And then I – I told her, like, to message me when she get home but she – she didn't. Like – then I tried to call her too but I – I think she blocked me the same night - - -[19]

[18] The appellant explained the untruths he told to PCSC Matheson as follows:

> "Yep. Okay. All right. I want to take you to when the police came to your house. I think it was on the 22nd of July 2016. Do you remember the police coming?---Yep.
>
> Okay. And there was a – a number of police?---Yep.
>
> Yep?---I don't remember how many of them, though.
>
> What did you feel?---Well, that's the thing. Like, I never had these things in my life. Like, I'm 27, never had, like, police to come to my house for arresting me. And I came from Iran. In Iran it's a different situation, different thing. Like, police is not like here. Scary, honestly. And, like, when I saw the undercover police and the gun, waiting, and then they mentioned my name, I was panic. I was like, I do – what is going on? Like, what are they talking about? Honestly, what I've done? Then they are, like, "Yeah. You – these [indistinct] start talking about rape. And this is when my brain stopped. Like, I co – I couldn't – I couldn't think any more after that. Just saying – I kept saying, like, "No, I don't know her." Like – and I didn't really remember anything. Like, it was – like, it wasn't the same day or the day after. It was, like – that thing happened Sunday and they came, like, to my – like, Friday – after six days. And these six days, after so many thing happen to you, you can't really remember things like that. And she – I only met her once. It was obviously like – we – here they call it "one-night stand". So you don't keep thinking about one-night stand. It's happen and she obviously wanted to have sex with you but then she blocked you. So she – if she wanted you, you wouldn't block you. So why would you think about someone who blocked you before. And again she called and blocked you. And you message her she do – everything was weird, like, until the police came to my house. And I was like – like, honestly, the way I was talking, just – like, I don't know. It doesn't show, like, I was scared – I was shock. Like, I've been there for four or five years, living in share house, never had – like – and I was really, like, scared. Like, I was – never been in a watch-house [indistinct] and I could tell they come [indistinct] like, you know – like, in the way they're talking –

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19 Transcript at 2-11 l 29 to 2-14 l 39.

like, police behind me, the one next to me. They took my phone. They're talking to me. Okay. You were listening the voice, they – but it wasn't like that. Honestly, if you imagine yourself in that situation, it's hard. It's ha – it's really hard, to be, like, you know, next to police. And you – you just, like, panic – like, thinking, "Wha – what I've done? What I've done to deserve this? Like, all this – like, being stressed." And it was hard. Honestly, it was hard. Even now I'm thinking about it, it's hard. So this is what happened with the police. That's why I said, "No. I'm not [indistinct] what you think. No. It's" – like, "It's a lie." I say, "No." But – in my situation, honestly, I didn't remember anything – no name or no – like, didn't – I didn't know Sunday, Friday, which – I was just – I was, like – I – I told you, like, my brain stopped working after they said "rape". I was, like, "What are they talking about? [indistinct] me in this – in this house where I live." I came from Iran, like, as a refugee to make my future – to be a better person – not coming here to be in a jail. Sorry. I got family to support. No, it's not like that.

All right. And did you not really grasp at all until your neighbour – you spoke to your neighbour at the police station a bit later?---Yeah, yeah. B – I just wanted to understand what is going on. That's why I was, like, "Man, let me talk with someone." Like, just to explain the situation for me so I know why you taking me to the – like, I don't know – like Mount Gravatt watch-house or whatever you call it – like, somebody to explain this for me. I didn't understand the language they talked. You know, the police how they talk. They using these words. Like, you know, I – I couldn't understand. And – yeah. Like, and then TP – like, TP came and I remember he went to watch – went to the Mount Gravatt police station and then after that, like, I [indistinct] like, you know, after [indistinct] spoke with me, I was, like, "Relax. You didn't do anything. Just you don't have to talk." Like, you know [indistinct] I spoke with a lawyer and – "Just relax. It's all good." This is what happened."[20]

The framing of the Crown case

[19] Section 349 of the Code creates the offence of rape and relevantly provides as follows:

"**349 Rape**

(1) Any person who rapes another person is guilty of a crime.

Maximum penalty—life imprisonment.

(2) A person rapes another person if—

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a

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20 AB 123 line 6 to AB 124 line 16.

> part of the person's body that is not a penis without the other person consent; or
>
> (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent…"

[20] Particulars were provided by the Crown before the trial. They were, "The accused put his penis in FS's vagina without her free and voluntary consent". The particulars are clearly directed to s 349(2)(a).[21] The reference to the consent being "free and voluntary" picks up the definition of "consent" in s 348(1) of the Code. The offence of rape is complete upon penetration. In *R v Mayberry*,[22] the Court of Criminal Appeal held that the offence of rape continues to be committed until the withdrawal of the offender's penis from the complainant's vagina.

[21] It can be seen from the evidence of the complainant[23] that there were three distinct acts of penetration. The first occured immediately after the complainant asked the appellant to wear a condom. He later withdrew from her vagina, turned the complainant on to her stomach (or hands and knees) and penetrated her again. Again he withdrew, the complainant was then on her back and he entered her a third time.

[22] The count on the indictment is not duplicitous on its face. It alleged a single offence of rape. However, questions arise as to whether the charge suffers latent duplicity, namely that the case as presented to the jury discloses more than one act which could constitute the offence.[24] Where such an issue arises at trial, it is usually dealt with by requiring the Crown to elect one of the acts as constituting the charge.[25]

[23] In *Jones v The Queen*,[26] a conviction was set aside on the basis of latent duplicity in circumstances explained by Burt CJ, Lavan SPJ and Smith J as follows:

> "The appellant was charged upon an indictment containing one count of rape. The case as opened to the jury was that the appellant had entered the complainant's flat and 'had intercourse with her on one occasion then removed more of her clothing and had intercourse with her on another occasion. The Crown says that on neither occasion did she consent to have intercourse with the accused'. The circumstances surrounding each act of intercourse except that there was some violence amounting at least to an assault preceding the second act.
>
> At no time did the Crown identify the act of rape pleaded in the indictment. The trial proceeded and the appellant was found guilty and was convicted.

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21 See definition of "carnal knowledge' in s 6 of the Code.

22 [1973] Qd R 211 at 229 per Hanger CJ, with whom Hart J agreed at 286, applied in *Vereker & Forsyth v Rodda* (1987) 18 FCR 83; and see the decision of the Privy Council in *Kaitamaki v The Queen* [1985] AC 147.

23 Set out at [7] of these reasons.

24 *Johnson v Miller* (1937) 59 CLR 467; *Parker v Sutherland* (1917) 116 LT 820.

25 *S v The Queen* (1989) 168 CLR 266 at 269.

26 [1980] WAR 203.

> The question which arises from that is, guilty of what? The general answer to that, of course, is guilty of rape, but which act of intercourse?
>
> It may be that the jury found the appellant to be guilty of two acts of rape. It may be that some of them found the first act of intercourse to be rape and that others of them found the second act of intercourse to be rape. But there is no way of knowing. If the appellant were indicted again on an indictment in the same terms but specifying one or other of the two rapes, could he plead autrefois acquit?
>
> It was a case in which the Crown should have been 'required to identify the transaction upon which it relies': *Johnson v Miller* (1937) 59 CLR 467 per Dixon J at 489; *Parker v Sutherland* (1917) 116 LT 820 and more fully reported in 86 LJKB 1052, and *MacKay* (1977) 15 ALR 541 per Murphy J at 472 et seq. Not having done so, the conviction is uncertain and for this reason it should be quashed, and a new trial ordered."

[24] *Jones* was followed in *Lapthorne v The Queen*,[27] where a conviction was set aside on the basis of a failure of the Crown to identify which of two acts of penetration was relied upon to prove a single count of rape. The facts of the case were described by Malcom CJ as follows:

> "According to the evidence of the boys, they were at the park at about 8 pm when the appellant arrived and told them to come over to the empty house. It appears he went over with the girl and the two boys followed. They went into the house which was lit only by a street light shining in through the windows. There was no furniture. One of the boys gave evidence that when they got inside the house the appellant starting kissing the girl all over her body and took her clothes off. The appellant was seen to touch her with his hands. This boy then described an act of intercourse which took place in front of the fireplace with the girl on the floor and the accused on top of her. At some stage this boy went outside, but he looked back through the windows and saw the girl get up. She had no clothes on and the accused had his trousers down round his ankles. He said that as the girl got up and was bending over the accused appeared to be having intercourse with her again, a second time, from behind. The girl eventually got her clothes on and the appellant pulled his trousers up. According to the first boy the appellant gave him $5 indicating that it was for the complainant."[28]

[25] Latent ambiguity does not arise where the different acts which could constitute the offence can be said to constitute "one activity". In *Director of Public Prosecutions v Merriman*[29], following *Jemmison v Priddle*,[30] it was said:

> "The question arises – what is an offence? If A attacks B and, in doing so, stabs B five times with a knife, has A committed one

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27 [1990] WAR 207.
28 At 208–209.
29 [1973] AC 584-593.
30 [1972] 1 QB 489-495.

> offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is there in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery CJ in a case where it was being considered whether an information was bad for duplicity: see *Jemmison v Priddle* [1972] 1 QB 489, 495. I agree respectfully with Lord Widgery CJ that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course depend upon the circumstances. In the present case it was not at any time suggested, and in my view could not reasonably have been suggested, that count 1 was open to objection because evidence was to be tendered that the respondent stabbed a Mr Parry more than once."[31]

[26] *Director of Public Prosecutions v Merriman* has been followed in Queensland.[32]

[27] So, for example, where there is one charge of assault constituted by a "flurry of blows" no objection can usually be taken[33] unless the assaults were of different kinds, or different defences may have been available to the different acts,[34] or where there are co-offenders and their liability may be different for different acts.[35]

[28] After leading the complainant's evidence of the three acts of penetration, the Crown Prosecutor sought to prove the lack of consent. She asked the complainant whether she, the complainant, consented to "intercourse".[36] Presumably what was meant by the Prosecutor and understood by the complainant was that the reference to "intercourse" encompassed all the three acts of penetration. The question which should have been asked, consistently with s 349 of the Code was whether the complainant consented to each of the three acts of penetration. It is clear, though, that when she said in answer to that question that she did not consent, she meant that she consented to none of the three acts of penetration.

[29] No point was taken either at the trial or on appeal that latent duplicity caused any miscarriage. It was not suggested that the appellant was embarrassed in his defence by the apparent duplicity,[37] nor was it argued that any issue arose as to whether the verdict of the jury was unanimous in the sense that the jury convicted of the one offence.[38] It is well established that the rule against latent duplicity rests upon considerations of fairness.[39]

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31 *Director of Public Prosecutions v Merriman* [1973] AC 584 at 593 in the speech of Lord Morris.
32 *R v Morrow and Flynn* [1991] 2 Qd R 309; *R v Chen* [1997] QCA 355; see also *R v Sobey* [2001] QCA 367; *R v Trifyllis* [1998] QCA 416; *R v Fowler; R v Aplin* (2012) 225 A Crim R 226 at [27] and following; *R v RAX* [2017] QCA 133.
33 *R v Staker* (2011) 110 SASR 274 at 279.
34 *R v Chen* [1997] QCA 355.
35 *R v Morrow and Flynn* [1991] 2 Qd R 309.
36 Transcript at 1-19, reproduced here at [7].
37 As in *S v The Queen* (1989) 168 CLR 266.
38 *S v The Queen* (1989) 168 CLR 266 at 287; *R v McCarthy* (2015) 256 A Crim R 338 at 403 and following.
39 *S v The Queen* (1989) 168 CLR 266 at 284–285, followed in *R v Gargett-Bennett* [2010] QCA 231 at [55].

[30] Both the Crown and the appellant at the trial were content for the case to be contested on the basis that the single count was supported by the allegation of three separate acts of penetration so that the three acts of penetration were the one "activity". Therefore, if the jury found that any one act of penetration occurred, and found a lack of consent to that act, the count would have been proved. It is unsurprising then that the learned trial judge summed up the case without drawing a distinction between the three acts of penetration. His Honour defined the offence of rape in these terms:

> "All right. Members of the jury, I am going to move to another section, which is the charge of rape. For the purposes of this case, rape means carnal knowledge with another person without their consent. Carnal knowledge means penetration. For the purposes of this case, penis in the vagina to any extent. So it is sexual penetration, the penis in the vagina, without consent. Consent for the purposes of your considerations means consent freely and voluntarily given by a person with the cognitive capacity to give consent."[40]

[31] His Honour then referred to some of the evidence and then said this:

> "So, as is obviously very plain to you by this stage of the trial, members of the jury, the essence of the prosecution case seems to be that, or as the complainant was willing to have sexual activity with the accused, there was [no] consent to no – to sexual activity without a condom. Now if you accept the complainant's evidence beyond reasonable doubt that it may well be that you would be satisfied beyond reasonable doubt of the case. That seems to be the prosecution in a nutshell on that."[41]

[32] His Honour's reference to "sexual activity", given his Honour's earlier explanation of the elements of rape, would have been understood by the jury to mean penetration.

[33] His Honour then directed on the exculpation provided by s 24 of the Code in these terms:

> "If you are satisfied beyond reasonable doubt that the complainant did not consent, there is another matter for you to consider. The law provides that a person who does an act under an honest and reasonable mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist. In the context of this case, that means you must consider whether, even though the complainant was not consenting – and I put it that way, because you do not get to this point – to this consideration unless you have already decided the complainant was not consenting. So you must consider, even though the complainant was not consenting, did the defendant in the circumstances honestly and reasonably believe that the complainant was consenting?

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40 Summing up, 7 November 2017 at 6 ll 10–17.

41 Summing up, 7 November 2017 at 7 ll 9–15.

> A mere mistake is not enough. The mistaken belief in consent must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant. To be reasonable, the belief must be one held by the defendant in these particulars circumstances on reasonable grounds. So the complainant says that she did not consent, and made that clear to the defendant. If you accepted the complainant's evidence, like I have just referred you to the essential part, you might think the defendant could not have honestly and reasonably believed that she was consenting. But remember, the onus of proof is for – it is not for the accused to prove that he honestly and reasonably believed the complainant was consenting. It is for the prosecution to prove he was not. It is for the prosecution to prove beyond reasonable doubt the defendant did not honestly and reasonably believe the complainant was consenting.
>
> So if in fact the complainant was not consenting, you must ask yourself, 'Can I be satisfied beyond reasonable doubt the defendant did not have an honest and reasonable belief that she was consenting?' If the prosecution have satisfied you beyond reasonable doubt that the defendant did not have such a belief, you must find him guilty. If you are not so satisfied, then even though the complainant was not consenting, you must find him not guilty."[42]

[34] Then later his Honour summarised some of those directions to the jury. His Honour said:

> "So taking that all into account, the question seems to be, are you satisfied beyond reasonable doubt that the sexual penetration was without consent, the prosecution case being, that whereas the complainant was willing to have sexual intercourse with the man, she wasn't giving consent if there was no condom. On the other hand, the defendant who gave evidence said that he, in fact, raised the question of a condom. There seemed to be no objection to having sex without a condom and it proceeded that way, and not that the defendant by giving evidence bears an onus of proof. The question remains whether the prosecution has satisfied you beyond reasonable doubt that there was no consent, and secondly is the question of mistaken fact. The question is whether the prosecution has satisfied you beyond reasonable doubt that the accused did not act under an honest and reasonable mistaken belief, given all of the circumstances, that the complainant was consenting."[43]

[35] It can be seen in that last passage quoted above his Honour clearly identified the two elements of the offence of rape being "sexual penetration" (in context "penis in the vagina to any extent"[44]) and lack of consent. The jury must have understood the summing up to mean that if they found that any of the three acts of penetration occurred without consent then subject to consideration of any honest and reasonable mistake as to consent, the appellant would be guilty. It follows then that the jury could have convicted upon rape constituted by any of the three acts of penetration.

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42 Summing up, 7 November 2017 at 7 l 30 to 8 l 14.

43 Summing up, 8 November 2018 at 4 ll 20 to 39.

44 Summing up, 7 November 2017 at 6 ll 10 to 17, reproduced here at [28].

[36] As already observed, no point was taken at trial complaining of any latent duplicity. No ground of appeal raises consideration of that issue. The issue was raised by the Court during the hearing of the argument on the appeal. There was no application to add any ground based on latent duplicity. However, any latent duplicity does have a relevance to the consideration of the appeal, at least in relation to ground 2.

[37] Section 24 in these terms:

> "**24 Mistake of fact**
>
> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

[38] Section 24 focuses on a person doing an "act" or "omit[ting] to do an act" under "an honest and reasonable mistaken belief" of something. The reference to an "act" or an "omission" is understandable because s 2 of the Code defines "an offence" as:

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an 'offence'."

[39] Consequently, the way the case was presented, s 24 has to be considered for each of the three "acts" of penetration. The jury may of course only have found one and not more than one act of penetration. Therefore there will relevantly be a miscarriage of justice and the appeal ought to be allowed if the failure to give either of the directions identified in the grounds of appeal denied the appellant a reasonable possibility of the jury failing to be satisfied beyond reasonable doubt that s 24 was not available on any of the three acts of penetration.[45]

Ground 1: failure to direct on intoxication

[40] Section 24 introduces both a subjective element and an objective element. The mistake must be honest (the subjective element) and reasonable (the objective element).[46] Intoxication is relevant to the subjective, but not the objective element. As Kennedy J sitting in the Western Australian Court of Criminal Appeal in *Daniels v The Queen*[47] said:

> "Intoxication is, no doubt, relevant to the question of whether an accused person has an actual belief in the existence of the state of things in terms of s 24 of the *Criminal Code*; but, if he does have that belief by reason of his state of intoxication at the time, it does not avail him if a reasonable man would not have been mistaken. As his Honour observed, a reasonable man is a sober man …"[48]

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45 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38].

46 For an example of s 24 applying to the element of consent in the case of rape, see *R v O'Loughlin* [2011] QCA 123; in particular see [33].

47 (1989) 1 WAR 435.

48 At 445.

[41] *Daniels* was followed by this Court in *R v O'Loughlin*.[49] It is unknown, of course, whether the jury in the present case was satisfied beyond reasonable doubt that the appellant did not honestly hold the belief or was satisfied beyond reasonable doubt that the belief was not reasonably held, or both. If the failure to give the directions referred to in ground 1 or ground 2 lost the appellant a reasonable prospect of the jury not finding that there was a reasonable doubt as to mistake, then the appeal should be allowed.

[42] The complainant gave evidence that she and the appellant met at about 7.00 pm.[50] They then went to buy kebabs and after eating them returned back to the appellant's unit. They probably went into the bedroom at about 9.00 pm.[51] Before going into the bedroom they were kissing on the couch. The complainant gave evidence that the appellant prepared a drink of Captain Morgan rum and Sprite (a soft drink), drank that drink and had a couple more drinks.[52]

[43] In cross-examination of the complainant this exchange occurred:

> "All right. OK. Well, anyway, he goes and gets a drink. It was basically Sprite I think he was drinking, with a little bit of - - -?---It was Captain Morgan and Sprite mixed.
>
> Yeah, yeah. Pretty – weren't – it wasn't a lot of Captain Morgan?---There was a decent amount of Captain Morgan in them.
>
> Was there? How do you know?---Because I saw him pour them right in front of me.
>
> Did you? Did you?---Yes."[53]

[44] The appellant submits that an inference should be drawn that the appellant and the complainant arrived back at the unit at about 8.00 pm, and that the total of number of drinks were four, and that they could be considered double shot Captain Morgan rum drinks, with the conclusion that approximately eight standard drinks were consumed in the hour before 9 o'clock, when the incident occurred. There is no evidence from the complainant which could fairly support such a submission. She does not give evidence of the exact number of drinks and she gives only imprecise evidence as to how much rum was in each drink. The inference sought to be drawn is not open.

[45] Very little evidence on the topic came from the appellant. In his evidence-in-chief, there is a reference to him having a drink. Then in cross-examination the following exchange occurred:

> "So after some kissing you left the couch. Is that correct?---Yes.
>
> You made yourself a drink?---Yes.
>
> And that was Captain Morgan and some Sprite?---Yep. Yep.
>
> And you also changed out of your jeans - - -?---Yep.

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49 [2011] QCA 123 at [28].
50 Transcript at 1-14 ll 25 to 26.
51 Transcript at 1-16 ll 38 to 39.
52 That passage is reproduced here at [7].
53 Transcript at 1-26.

- - - into some track pants?---Yes.

And you had that drink didn't you?---I had a little bit of that drink."[54]

[46] Defence counsel at trial did not attempt to elicit evidence in support of a s 24 defence based on a consideration of intoxication. It can be seen that there is only a passing reference to the appellant consuming alcohol in his evidence-in-chief. There was no attempt to lead any evidence from the appellant that his understanding or lack thereof of the complainant was affected by intoxication. Similarly, there was no attempt in the cross-examination of the complainant to elicit evidence that the appellant appeared to the complainant to be intoxicated.

[47] After the close of the defence case both counsel were invited by his Honour to make submissions in relation to appropriate directions. Defence counsel did not raise the issue of intoxication. The Crown Prosecutor did. This exchange occurred:

"CROWN PROSECUTOR: Your Honour there was only some reference in the evidence as to him consuming some alcohol. I don't think it goes as far as … the jury needing a direction but it's just something else I noted.

HIS HONOUR: Sorry. What's the direction you say they should have?

CROWN PROSECUTOR: Maybe in relation to his intoxication but I don't think that's – that's required.

DEFENCE COUNSEL: On his account, he only had one, approximately two, drinks.

CROWN PROSECUTOR: Yes.

DEFENCE COUNSEL: That's his story.

HIS HONOUR: Yes. But do you mean – what – where might that be relevant?

CROWN PROSECUTOR: Your Honour, I was just going through all the relevant corrections that may apply but perhaps it's …

HIS HONOUR: Unless you mean it's got to do with honest and reasonable mistaken belief …

CROWN PROSECUTOR: I don't think it …

HIS HONOUR: No. I don't think there's enough evidence to really …

CROWN PROSECUTOR: No.

HIS HONOUR: … raise it with the jury.

CROWN PROSECUTOR: I have nothing further."[55]

[48] Defence counsel then addressed the jury. The theme of defence counsel's address was that the episode was not rape, but rather what he called "regretted sex". By that he meant that the complainant had in fact consented but had later regretted that she had consented and then made an allegation of rape. Central to his address was the

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54 Transcript at 2-21 ll 35 to 44.

55 Transcript at 2-34 l 2 to 2-35 l 5.

evidence of the two German backpackers who saw the complainant with the appellant on the couch appearing relaxed at a time which must have been after intercourse occurred. Also emphasised in the address were the circumstances in which the preliminary complaint had been made, in particular, the complainant's initial assertions to Ms GL to the effect that she was not raped.

[49] There was no mention by defence counsel throughout his address to intoxication. Indeed, there are only passing references to mistake of fact as a defence until the very end of the address when counsel turned to that topic. Even then, he did not devote much time to it. The totality of the address on s 24 was this:

> "Does it have all the hallmarks of regretted sex? There is that extra dimension that I mentioned earlier – this honest and reasonable mistaken belief. I might leave the explanation and all that to his Honour, the learned trial judge because, well, that's something – that's the law and he'll tell you all about that.
>
> But the concept of it is not that difficult. It just means that if there are things upon which it might be reasonable for someone to form the view that someone was consenting then if that's so, that may provide a defence. So there's two angles to it. You know, either she consented or you have a doubt, a reasonable doubt, about whether she did or didn't consent because you only have to have a doubt. You don't have to be satisfied – as long as you have a reasonable doubt about the question of consent, that would be enough.
>
> But the other dimension is if from the various facts, surrounding facts, things she did and said, leads you to believe that there were circumstances from which he might have had an honest and reasonable but mistaken belief that she was consenting, that would be a defence in itself. But I ask you to listen carefully to that when his Honour explains it to you."[56]

[50] It is easy to understand why defence counsel conducted the defence the way he did. The appellant was called in support of the primary case which was that the complainant consented. To give that defence the best chance, it was not in the interests of the appellant to emphasise that the appellant had been drinking. Intoxication may be a relevant factor for the purpose of s 24 of the Code, but it is a relevant adverse factor on the issue of the reliability of the appellant's account. Further, any hint of intoxication was likely to lead the prosecution to suggest that the natural inhibitions of the appellant had been lowered by alcohol, thus explaining why the appellant raped the complainant.

[51] It is also not surprising that defence counsel did not emphasis the mistake of fact defence in his address to the jury. Counsel had a basis upon which to invite the jury to have a reasonable doubt as to the element of lack of consent. The appellant had given an account consistent with the complainant having consented; there was help on that issue from the evidence of the German tourists and from some of the evidence concerning the way the complaint of rape had evolved from the initial conversation the complainant had with Ms GL. Defence counsel knew when he rose to address the jury that the judge would leave s 24 for the jury's consideration. Counsel then had the luxury to choose to concentrate on his client's main case (that

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56 Transcript of closing addresses at 1-14 l 46 to 1-15 l 3.

there was consent) and not dwell on the alternative case (mistake) so as to avoid having his submissions on the primary case compromised by the concession that there was a possibility that there was no consent. That possibility is, of course, inherent in the s 24 defence. Such an approach was adopted by defence counsel. It was an approach clearly reasonably open to him.[57]

[52] The Crown Prosecutor addressed the jury. Perhaps unsurprisingly she invited the jury to accept the evidence of the complainant. She developed that argument, pointed to lies told by the appellant and suggested to the jury that his evidence ought to be rejected. The only mention of the consumption of alcohol by the Crown Prosecutor was a passing reference during her summary of the complainant's evidence. At that point in her address, she mentioned to the jury that there was some consensual kissing on the couch and "that he got up, made himself a drink, changed and then came back and there was further consensual kissing and some touching".[58] Intoxication was not mentioned by the Crown Prosecutor in relation to s 24. That was understandable given the exchange that had occurred between his Honour and counsel prior to the commencement of addresses.

[53] The jury retired and there were applications for redirections which are not relevant to the grounds of appeal now pressed. The jury convicted on the single count of rape.

[54] It was obviously incumbent upon the learned trial judge to direct the jury on matters of law and to properly identify the real issues for their consideration.[59] However, intoxication was not a real issue. While there was some evidence of alcohol being consumed by the appellant, the evidence as to the quantity of alcohol consumed was very scant. There was no evidence that the appellant was showing any indicia of intoxication and no basis upon which an inference could be drawn that he was intoxicated to an extent relevant to a consideration of the subjective element of s 24 of the Code. That conclusion is fortified by the fact that no positive submission was made by either counsel that intoxication was an issue.

[55] On all three of the acts of penetration, intoxication was not an issue. No reasonable chance of acquittal was lost by virtue of the fact that the trial judge did not give the direction contemplated by ground 1.

Ground 2: no direction in relation to the appellant's command of English

[56] The appellant's submission is that given what was said to be language difficulties the appellant may have misunderstood what was said to him by the complainant and therefore acted under an honest and reasonable mistake as to her consent. In the appellant's written submissions, the point was described as follows:

> "29. Although the appellant did not require an interpreter, the limitations of his English comprehension are clear upon reading the transcript of his evidence at trial. For example:
>
> "And what English you speak you picked up here in Australia?- - - Sorry?

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57 *Nudd v The Queen* (2006) 80 ALJR 614 at [9].
58 Transcript of closing addresses at 1-16 ll 28 to 30.
59 *Alford v Magee* (1952) 85 CLR 437 at 466.

> What English you do speak you've picked up since homing here to Australia?- - -I – I don't understand that question, to be honest.
>
> … Did you not pick up English until you had come to Australia?- - -Yeah, yeah. Yeah."

30. The impact this may have had at trial is illustrated by comparing the appellant's version of events with that of the complainant, regarding the crucial discussion about the condom. The complainant's account varied as to the specific wording, but was to the same effect:

> "I told him to put a condom on. He told me he didn't. I told him, 'No, seriously, you do' and he turned around and said, 'No, I don't' …"
>
> "And you said to him – you tell us you said, 'Condom?'- - - Yes."
>
> "I asked him for a condom, and he did not put the condom on. … That is where it became unconsensual."

31. The appellant's evidence was:

> "I started asking her, like, you know – like, no. I don't want to have sex, right? Like, I don't have a condom. And she's like – you know because we feel very comfortable. … she looked at me in a way that, like, you know, so what? You don't have a condom.
>
> …
>
> Yeah?- - -you know, she looked me in the eye likes, "So what? Let's do it." And I was like, "If you're sure about yourself, like, you don't have any problem, like in a fun way. You know?"

32. Bearing the appellant's language difficulties in mind, it is plausible that he interpreted the complainant's statement to the effect of "you need to put a condom on" as a question to the effect of "*do* you need to put a condom on?", to which he then responded in the negative.

33. That possibility being open to the jury, they should have been directed that the appellant's language difficulties were relevant to their assessment of both the honesty and reasonableness of any mistake as to consent."[60]

[57] The oral submissions made on behalf of the appellant were consistent with the passages from the written outline set out above.

[58] This submission brings into sharp focus the relevance of any latent duplicity. The appellant's submission is focused upon the conversation which occurred immediately before the first act of penetration. However after the first act of penetration, but before the second the complainant struggled: "starting to wiggle a

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60 References omitted.

bit trying to get out of his grips".[61] Before the third penetration she grabbed and squeezed the appellant's penis to try to persuade him to desist.[62] Therefore, the evidence relevant to consent and mistake is different with respect to each of the three acts of penetration. It is only the first act of penetration which was proceeded by a conversation which the appellant says may have been misunderstood. However for the reasons I have already explained if a direction was necessary in relation to the first act of penetration then the appeal should be allowed.

[59] English is the appellant's third language, after Persian and Arabic. During the appellant's evidence there were signs that his English was limited in some respects. Certainly many of his answers were not grammatically correct. There were also several examples of him being unable to fully comprehend the questions. For example, in examination-in-chief:

> "Yep. OK. All right. I want you to cast your mind back to Sunday – I know it's a long time ago, but do your best – on Sunday the 17th of July 2016. On the afternoon of that day, had you contacted someone on a dating sight called PlentyOfFish?---So just explain how – how – what – how did I message and everything? Like you mean - - -
>
> OK?--- I – I didn't get it. Sorry.
>
> OK. Did you use a dating website - - -?---Yes, Yes."[63]

[60] And in cross-examination:

> "You became aroused. You had an erection?---What does that mean?
>
> Did your penis get hard?---After – after what?"[64]

[61] And later:

> "She said for you to get off her?---No.
>
> She attempted to wriggle out from under you, didn't she?---What does that mean? Sorry. I don't ---
>
> She attempted to move away from under you, didn't she?---No. No. No. No."[65]

[62] And later:

> "She, in fact, never said that she would have sexual intercourse with you without a condom?---Sorry. I don't understand the question.
>
> She never said – she didn't say she would have sexual intercourse with you without a condom?---She didn't say anything like that. She - - - "[66]

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61 Transcript at 1-17 l 25, reproduced here at [7].
62 Transcript at 1-18 ll 5 to 17.
63 Transcript at 2-10 ll 22 to 30.
64 Transcript at 2-22 ll 1 to 2.
65 Transcript at 2-24 ll 5 to 10.
66 Transcript at 2-24 ll 42 to 46.

[63] And later:

> "And she never performed oral sex on you?---I don't – I don't understand the question, to be honest.
>
> She never sucked your penis, did she?---She did."[67]

[64] And later:

> "And as you were having intercourse with her, you weren't kissing her?---Sorry. What was that?
>
> As you were having intercourse with her you weren't kissing her, were you?---What's intercourse mean?
>
> Sex?---Yeah. We were kissing each other all the time."[68]

[65] And later:

> "They[69] asked you whether you met a girl on Sunday night?---I said 'No', [because] – I didn't remember. I was panicked. I was scared. I was nervous. Honestly I didn't remember anything.
>
> That was a lie, though, wasn't it, Mr - - -?--- It wasn't a lie.
>
> - - - Sharifi Rad?--- No, I don't have to lie. I ---
>
> That was a - - -?--- don't have to lie.
>
> - - - lie?--- I don't have to lie. I don't have to lie. From the beginning to the ending of this whole case, if you – if you want to look at – you can see I'm not lying.
>
> That was a lie - - -?---Everything shows I'm not lying."[70]

[66] So it can be seen that the appellant simply did not understand some English words, such as the word "erection" and the term "sexual intercourse" for instance. He also had some difficulty in understanding that the Crown Prosecutor was putting to him that a specific statement that he had made to the police was a lie, thinking that she was putting to him that he was lying generally.

[67] The Crown Prosecutor obviously had some doubts herself about the appellant's command of English. She asked him:

> "Mr Sharifi Rad, if you don't understand any of my questions just let me know?---Yep."[71]

[68] However, during the appellant's cross-examination, this exchange occurred:

> "You chatted with her for a number of hours that afternoon?---We messaged each other but it's not like constantly [we're] messaging all the – like, from – from – since we started talking until 7. It's not – we messaged each other a few times, yeah.

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67 Transcript at 2-25 ll 1 to 2.
68 Transcript at 2-25 ll 7 to 12.
69 A reference to the police.
70 Transcript at 2-28 ll 5 to 20.
71 Transcript at 2-18 ll 29 to 30.

> And that was all in English?---Yes.
>
> Yep. So she would type things to you you would understand it and then you would re - - -?---Yeah. It was just a – just normal conversation. I'm – I'm – , I'm fine with a normal conversation."[72]

[69] There was nothing difficult about the conversation which the complainant said occurred before the first act of penetration. The complainant said to the appellant words to the effect that he needed to wear a condom if intercourse was to occur. If the conversation as the complainant swore was accepted by the jury then there was no reason to think that language difficulties contributed to a mistake in relation to consent. Indeed, on the appellant's evidence he raised the question of sexual intercourse without a condom and asked the complainant whether that was acceptable. It could hardly be said that he did not understand the relevant concepts or conversation.

[70] Further, I have listened to the recording of the appellant's conversation with police.[73] That confirms the accuracy of what the appellant said to the Crown Prosecutor during cross-examination; he has no difficulty in understanding normal conversation spoken in English.

[71] No reasonable chance of acquittal was lost by virtue of the fact that the trial judge did not give a direction as contemplated by ground 2.

[72] No miscarriage of justice occurred by the absence from the summing up of either of the proposed directions.

[73] I would dismiss the appeal.

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72 Transcript at 2-19 ll 20 to 30.

73 Exhibit 8.