# Supreme Court of Queensland - Court of Appeal



# R v. Kovacs [2007] QCA 143 (27 April 2007)

Last Updated: 13 September 2007

**SUPREME COURT OF QUEENSLAND**

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| CITATION: | *R v Kovacs* [2007] QCA 143 |
| PARTIES: | **R**<br><br>**v**<br><br>**KOVACS, Zoltan John**<br><br>(appellant) |
| FILE NO/S: | CA No 300 of 2006<br><br>DC No 357 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction and Sentence |
| ORIGINATING COURT: | District Court at Cairns |
| DELIVERED ON: | 27 April 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 22 March 2007 |
| JUDGES: | McMurdo P, Holmes JA and Jones J<br><br>Joint reasons for judgment of McMurdo P and Holmes JA; separate reasons of Jones J dissenting |
| ORDER: | **1. Appeal allowed**<br><br>**2. Conviction set aside**<br><br>**3. Re-trial ordered** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND ENQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION |

AND NON-DIRECTION – GENERAL MATTERS – where appellant was convicted after trial of four counts of rape – whether learned trial judge misdirected the jury as to the excuse of mistake of fact under s 24 of the *Criminal Code 1899* (Qld) – whether learned trial judge erred in failing to direct the jury to take into account language differences when considering mistake of fact
CRIMINAL LAW – APPEAL AND NEW TRIAL AND ENQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – whether learned trial judge misstated the position in respect of certain evidence relevant to consent – whether learned trial judge erred in instructing the jury on the possibility of innocent explanation for a lie told by the appellant – whether this constituted a miscarriage of justice
*Criminal Code 1899* (Qld), s 24
*R v Mrzljak [2004] QCA 420;* [2005] 1 Qd R 308, considered

*R v Soloman* [2006] QCA 244; CA No 1 of 2006, 23 June 2006, considered

*Weiss v The Queen [2005] HCA 81;* (2005) 224 CLR 300, considered

COUNSEL: A W Collins for the appellant

M J Copley for the respondent

SOLICITORS: Legal Aid Queensland for the appellant

Director of Public Prosecutions (Queensland) for the respondent

[1] McMURDO P AND HOLMES JA: The appellant was convicted, after a trial, of four counts of rape. He appeals both conviction and sentence. The grounds of the appeal against conviction argued orally were that the learned trial judge misdirected the jury as to the excuse of mistake of fact under s 24 of the Criminal Code, both as to its content and as to its application to the evidence; that he failed to direct as to the significance of language differences to mistake; that he misstated the position in respect of certain evidence relevant to consent; and that he erred in instructing the jury on the possibility of innocent explanation for a lie told by the appellant. Another ground of appeal, dealt with in written submissions, was that the jury, acting reasonably, could not have been satisfied on the complainant's evidence of the appellant's guilt on the final rape count. The appeal against sentence is on the ground that the sentence imposed, eight years imprisonment, was manifestly excessive.

The Crown case

[2] The appellant is Hungarian and is married to a Philippine national. At the times relevant to the charges, he and his wife operated a takeaway food shop at Napranum, near Weipa. The Crown case was that in December 2000 they travelled to the Philippines to begin arrangements for the complainant, L, also a Philippine national, to travel to Weipa to live with them, look after their children and work in the shop. L's evidence was that during their visit, there was an occasion when she

went shopping with the appellant and he took her to a hotel, where he raped her. It was put to her by defence counsel, and denied by her, that in fact she went willingly with him to the hotel three times and on each occasion was paid 500 pesos to have sex with him. L said that she continued with the arrangement to travel to Australia because her family expected it of her, she having been too ashamed to tell them of the rape, and because she thought there would be no repetition of it when she was living with the appellant and his wife.

[3] Eventually, after going through a sham marriage with an Australian citizen to enable her to enter Australia, L arrived, in August 2002, in Cairns. The appellant met her at the airport and took her in his car to a motel. L gave evidence that while they were in the car, the appellant, despite her protestations, started touching her thighs. When they were in the motel room he made her have a shower, in the course of which he touched her breasts and genitals. She put her clothes back on after it, but he started to undress her. She told him it was not part of the agreement for her coming to Australia; she told him to stop; but he persisted. He started to put his penis into her mouth but she pulled away. Instead he had vaginal intercourse with her (Count 1) and then attempted anal intercourse, but when she resisted, he resumed vaginal intercourse. After that he took her out to the shops; later they spent some time with some of his acquaintances. That night they returned to the motel where he made her sleep in the bed with him and started to kiss her. L said she did not like it, and told him to stop, but he proceeded to undress her and to have intercourse with her again (Count 2). The following day they stayed once more at the motel. That night the appellant again made L sleep with him and again raped her (Count 3). L said that she tried to pull away, but there was nothing she could do.

[4] The next morning they travelled to Weipa, and after a week or so L began working at the takeaway shop. Each morning the appellant drove her there at about 6 am and they prepared food for cooking and sale. L said that while they were there alone the appellant would regularly - two or three times a week - pull her into the stock room and have sex with her. Another woman who worked at the shop, Ms Kris, gave evidence that she arrived at the shop each day at about 7 am. The appellant and L were always there before her and would let her in when she called out to them.

[5] As well as the uncharged rapes at the shop, there were, on L's evidence, other uncharged acts of rape at the appellant's house. Count 4, the final charged act of rape, occurred during a camping trip that L took with the appellant, his two young children and another man. L said that the appellant had sex with her at night in a tent while the children were asleep.

The defence case

[6] The appellant was interviewed by the police about the allegations in July 2003. He denied ever having sexual intercourse with L and insisted that he was never alone with her. At the trial, however, the defence case, as it emerged from the questioning of L, was that consensual acts of sexual intercourse had occurred.

[7] It was put to L that on each occasion when she had sex with the appellant she agreed to do so for payment:

"All right. See, I suggest that the only times you had sex with the accused, he paid you and you agreed to do it?

-- For me he wasn't giving the - he wasn't giving me the money often, but I accepted the money so I could save the money so I could run away from them because I couldn't do anything - I couldn't tell her - his wife.

So he did pay you money for sex?

-- He is paying me but he's not paying me all the time.

Are you saying he didn't pay you enough?

-- He only giving – he was only giving me $10, $15. He puts it in my pocket.

Right. Did you think you should get more money?"

At that point the prosecutor took objection and defence counsel withdrew the question. That was not the end of the matter; the learned trial judge demanded that in addition defence counsel apologise for it. He did so.

[8] In his address to the jury, defence counsel returned, in the context of making submissions on the record of interview, to the theme of a commercial arrangement:

"Many people lie to the police. And it's not always because they think that the truth will hurt them. I mean, obviously the accused could easily have said, 'Yes. I had sex with her. I've had sex with her in the Philippines. I paid for her, I paid for it here' and so forth. And in that regard the truth wouldn't necessarily have hurt him, but people – very often I suggest – will deny things when they're first put to them."

The appellant's contentions

The s 24 direction

[9] It was plain that not only was consent in issue, but that it was necessary for the prosecution to establish that the appellant had not acted under an honest and reasonable, but mistaken, belief in the complainant's consent to intercourse. The judge discussed with counsel the direction which should be given under s 24 of the Criminal Code and advised them that he intended to give a direction which he regarded as more favourable to the appellant than the conventional direction contained in the Bench Book; instead directing in terms of the need for the Crown to prove the appellant's knowledge of the lack of consent. Counsel took no objection to that course and the learned trial judge duly directed the jury in these terms:

"In order to find Mr Kovacs guilty you must be satisfied beyond reasonable doubt that he knew she was not consenting to the act of carnal knowledge or sexual intercourse relied upon by the prosecution; that he knew that she was not consenting freely and voluntarily."

Despite the lack of objection at trial, counsel for the appellant contended that the direction as given was contrary to law, with adverse consequences for the appellant. It distracted the jury from what should have been distinct steps of first considering whether it was satisfied of a lack of consent, and only then considering whether it was satisfied that the appellant held no honest and reasonable belief in consent.

The directions on how the jury should apply the direction to the evidence

[10] Counsel also complained of the manner in which the learned judge put the direction into the context of the evidence. After setting out the complainant's evidence in respect of count 1, his Honour directed in these terms:

"Members of the jury, it's for you to decide whether you accept her evidence. If you do accept her evidence, if you are satisfied beyond reasonable doubt that she was telling you the truth when she

described that incident, you might think you can be satisfied beyond reasonable doubt that there was carnal knowledge.

You might feel, and it's up to you, I emphasise it's a matter for you whether you believe her or not and whether you're so satisfied, you might think secondly you can be satisfied beyond reasonable doubt that she wasn't consenting and you might think thirdly that you can be satisfied beyond reasonable doubt that John Kovacs knew she wasn't consenting.

So don't forget, bear in mind the whole of the evidence, and you might see that really your decision as to your verdict in relation to count 1 will ultimately depend on whether you are satisfied beyond reasonable doubt that [L] was telling you the truth when she described that incident."

He gave similar directions in relation to the second and third count.

[11] In relation to the fourth count the judge pointed out that L had given no evidence that she said "No" or offered any resistance, in contrast to her evidence in relation to the other three counts. He directed the jury that it could not find the appellant guilty of count 4 unless it was satisfied beyond reasonable doubt that the only rational inference it could draw was that he must have known she was not consenting. He then went on to suggest a "reasoning process" by which it could conclude "that he must have known she was not consenting to the sexual intercourse which took place in the tent on that camping trip". The jury might take the view, he said, that the complainant felt trapped: she was in the country as an illegal immigrant, owing the appellant and his wife money, and was trying to earn money to send back to her disadvantaged family; she had been raped on a regular basis, on her account, over a number of months; and if her evidence was accepted, she had got to the stage where resistance was futile. He continued:

"If you are satisfied, though, that Mr Kovacs had been raping her on a regular basis over the previous months, if you are satisfied beyond reasonable doubt that he must have always known that she was not consenting to what he was doing to her, then if you are satisfied beyond reasonable doubt of that, it would seem unlikely that, even though on this particular occasion she did not offer any resistance, he might think, 'Oh, well, she's up for it this night'. So that is the reasoning process you may employ. I am not suggesting that you should or that you must - you might decide that it is not very good reasoning at all."

His Honour emphasised that the jury could find the appellant guilty only if it was satisfied beyond reasonable doubt that sexual intercourse had taken place, that L had not consented to it, and that the only reasonable conclusion was that the appellant must have known that she was not consenting. Defence counsel at the trial sought a redirection in relation to the "reasoning process" for count 4, arguing that the trial judge should restore balance by outlining some of the inconsistencies and uncertainties in L's evidence on that count. That redirection was refused. The effect of his Honour's directions was, counsel for the appellant contended, to destroy the force of any defence submission that the appellant mistakenly believed in L's consent.

Lack of direction on language as a relevant consideration in mistake

[12] Counsel for the appellant mounted a further argument, that the learned judge at first instance had erred in failing to direct the jury that they ought to take into account the language barrier between L and the appellant in considering mistake. L had given evidence that when she arrived in Australia her English was very limited. The appellant did not understand Tagalog (the language in which L gave her evidence at trial). Although no direction was sought of this nature, the jury ought to have been invited to consider whether the Crown had excluded the existence of an honest and reasonable but mistaken belief arising from the lack of communication between the two. It had been recognised in R v

Mrzljak[1] that evidence of an accused's language difficulties was relevant to possible excuse from criminal responsibility under s 24.[2]

Error as to evidence relevant to consent

[13] Counsel for the appellant complained of what was said to be a factual error in the directions. The relevant passage from the summing up actually occurred in the course of his Honour's directions on a lie in the record of interview: the appellant's denial of ever having sex with the complainant. The judge directed the jury that it was reasonable to conclude that statement was a lie from the way in which the case had been run:

"And from the way Mr Harrison conducted this case, it is clear that the proposition advanced by Mr Kovacs is that on a number of occasions, both in the Philippines and in Australia, on a number of occasions he had sex with [L], sexual intercourse with her, she consented to it, and she consented to it because he was paying her for it. Now, as I've said, there's no evidence to support such a scenario but that was the case advanced on Mr Kovacs' behalf."

No redirection was sought. Counsel for the appellant said that the assertion that there was no evidence to support a scenario of consent in return for payment was contrary to the evidence of the complainant. She had, in the passage set out at [7] above, agreed that she had accepted money from the appellant, and the question and answer, "So he did pay you money for sex? -- He is paying me but he is not paying me all the time" was at least capable of being construed as confirming the defence position.

[14] The failure to remind the jury of that evidence and the positive assertion that nothing supported the defence scenario was made all the worse, counsel said, because the evidence had finished on a Thursday and the summing up did not occur until the following Monday, so that there was a significant gap between the jury's having heard the evidence and the trial judge's instructions. It was also exacerbated by the learned judge's having told the jury at another stage of his summing-up that

"...the evidence that you have heard during the prosecution case is uncontested, uncontradicted and unexplained by any sworn evidence from Mr Kovacs."

That statement, counsel contended, overlooked the fact that the prosecution's case was contradicted; by L's apparent concession in cross-examination that she was paid for sex.

The lie direction

[15] The apparent lie told by the appellant in his record of interview – that he had never had sexual intercourse with L – required an Edwards[3] direction. Before the summing up, the judge had some discussion with counsel about the proposed direction, and in particular what should be said in relation to innocent explanation. Defence counsel had asked that he direct the jury in the more general terms used in the Bench Book example, which gives the possibilities that a lie may reflect –

"...an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal embarrassing or disgraceful behaviour ... panic, or confusion, or [an attempt] to escape an unjust accusation; to protect some other person or to avoid a consequence extraneous to the offence."

[16] His Honour seems to have taken the view, however, that he ought to confine himself to possibilities raised on the evidence in the case. He directed the jury in the terms already outlined at [12] above, to the effect that they might think the only reasonable conclusion that could be drawn from the way the defence had been conducted was that the statement must have been a lie. He told the jury that it would also follow that it was a deliberate lie, since the appellant could hardly have forgotten that

he had had sexual intercourse with the complainant. Then, turning to the issue of innocent explanation, he said:

"You may only use the evidence of his lie as evidence in proof of the charges of rape if you are satisfied that the reason he told the lie was because he knew that to tell the truth would amount to implicating himself - in this case, virtually confessing to rape.

In order to reach that conclusion, members of the jury, you must consider possible innocent explanations for him having told a lie. Consider the possibility that he told a lie because he feared of being wrongly convicted of rape. You may consider that he told the lie because he didn't want his wife to find out that he was having a sexual relationship with [L]. You may also consider that he told a lie because he knew that he had been repeatedly raping [L].

So you consider these possibilities, but you may only use the evidence against him as proof of rape if you are satisfied that he lied because he knew that he had been repeatedly raping [L] over the preceding months."

The reference to the possible explanation of guilt of rape had the effect, counsel said, of negating any benefit from the direction; it was, instead, a formula to convict.

Unreasonable verdict on count 4

[17] L was asked whether she had done anything during the events which constituted the rape charged in count 4 and answered:

"For me, I couldn't really do anything so – I didn't know what to do, I was so confused. Sometimes I feel like I was going crazy, so I just let him do what he wanted to do".

On the strength of that statement, the appellant asserted in written submissions that the conviction on count 4 should be set aside. The basis of that contention was not articulated, but it may have been either or both of these possibilities: that the jury could not be satisfied that L was not assenting to sexual intercourse, or alternatively, that given the lack of resistance, the Crown could not negative the possibility that the appellant believed she was consenting.

Conclusions

[18] The direction on s 24 was, as counsel for the Crown conceded, a misdirection; it did not put to the jury the requirements of s 24. However, he contended, correctly in our view, that while it ought not to have been given in that form, it was more favourable to the appellant than a direction in terms of s 24. The latter would have required the jury to be told that the Crown could exclude the defence by satisfying it that any belief in consent was not held on reasonable grounds. The direction, as given, meant that the Crown was obliged to negate a purely subjective belief. While such a departure from the requirements of s 24 is not to be encouraged, we do not think it produced any miscarriage of justice.

[19] The question of any language difficulty as contributing to mistake simply did not arise at the trial. It is clear from the evidence that there was some level of communication in English between the appellant and L. At no stage during the evidence, in the course of addresses, or in any application for directions or redirections was there any hint by defence counsel that the difficulties of either L or the appellant with English had any bearing on the case. The case is unlike Mrzljak; here there was no evidence that the difference in language was productive of any relevant difficulty in comprehension. In the absence of any such evidence or suggestion to that effect in any form, it was not incumbent on the learned trial judge to embark on the instructions contended for here.

[20] The directions as to what followed from an acceptance of L's evidence on counts 1, 2 and 3 were correct as far as they went, and it was made clear that the conclusions suggested depended on that acceptance of her evidence. In relation to count 4, the proposed "reasoning process" was uncomfortably close in tone to advocacy, but it did not pass the bounds of permissible comment, particularly given the rider that the jury was free to reject it. And it was open to the jury to find, given the history of the matter, that, although the complainant had made no overt sign of resistance in respect of the events giving rise to count 4, she was not consenting and the appellant could not have believed that she was.

[21] But the judge's directions are flawed by a failure to put the defence case to the jury. The statement that there was no evidence to support a scenario of consent to sex in exchange for payment was too sweeping. It did not necessarily follow from the complainant's apparent concession that the appellant had paid her for sex that she had therefore agreed to it; but that concession was capable, depending on what the jury made of it, of supporting the defence case.

[22] It was argued for the Crown that the complainant's answers were unrelated to the incidents of sexual intercourse but were rather concerned with her receipt of money for working in the shop. Hence, it was suggested, the absence of any request for a redirection; defence counsel had himself not perceived the answers as telling. But we do not think that construction of the passage is open; and the reaction of the prosecutor in objecting and the even more remarkable reaction of the trial judge in requiring an apology, do not suggest that they perceived the questioning as concerned with wages for work in the store.

[23] Indeed it is difficult to fathom why the last question "did you think you should get more money?" was not permissible, let alone why it should have required an apology. It may have been an unattractive line of questioning, but it did accord with what seems (at least to that point) to have been the defence case: that the complainant had had consensual sex with the appellant as part of a commercial arrangement. Defence counsel's failure to seek a redirection and to have the jury reminded of the evidence is more likely to have stemmed from his having had to apologise for the question which brought it to an end than from any view that the questioning was not relevant to the issue of consent. At any rate, it seems to us that the appellant's contention that the trial judge did not properly put the defence case in this regard, and indeed misdirected the jury as to the effect of the evidence, must be accepted. It was a significant misdirection: the evidence was relevant both to actual consent and to the possibility that the appellant mistakenly believed that because L accepted money from him she was consenting.

[24] The unfairness flowing from the failure to identify that evidence as supporting a defence case of consent is compounded by the way in which the lies direction was given. While we do not think it was necessary for the learned trial judge to adhere rigidly to the terms of the Bench Book direction, it was unfortunate that the issue of innocent explanation was put to the jury as if it were limited to three possibilities, two of innocence and one of guilt, from which it was necessary for them to choose. The jury ought to have been told generally that if they considered there was an innocent explanation for the lie it could not be used as evidence; and the alternative explanation of a guilty motivation ought not to have intruded upon that direction.

[25] This case turned on the complainant's evidence which was unsupported other than, possibly, by the appellant's lie to police. The judge misdirected the jury as to how to deal with the evidence of the lie. The judge also wrongly stated that there was no evidence to support the defence proposition that the complainant consented to sex for payment. This misstatement of evidence directly concerned a limb of the defence case (that the complainant may have had, or the appellant may have honestly and reasonably believed she was having, consensual sex with the appellant for payment). It meant the

judge did not fairly put the defence case before the jury. The combination of these errors has denied the appellant procedural fairness at his trial so that it is impossible to conclude that no substantial miscarriage of justice has occurred as a result: Weiss v The Queen.[4] We would allow the appeal, set aside the conviction and order a re-trial.

[26] JONES J: On 2 October 2006 the appellant was found guilty by a jury of four counts of rape after a trial in the District Court at Cairns. He was sentenced to eight years imprisonment in respect of each conviction. Each sentence was to be served concurrently and 183 days of pre-sentence custody was declared to be part service of the term of imprisonment.

[27] The appellant appeals against both the convictions and the sentence. The Notice of Appeal against the conviction raises six grounds, four of which identified specific complaints against the summing up by the learned primary judge. Particular emphasis was placed upon a direction which the appellant contends stated an error of fact. That error, it is submitted, resulted in the defence case not being properly put to the jury in the direct sense, but also adding to the adverse effect of the failure to give directions on mistake of fact in the standard form. Submissions were made also about the lack of directions as to the impact of language differences between the appellant and the complainant and the incomplete directions on the use to be made of lies told by the appellant to police.

Background facts

[28] The circumstances in which the complainant and the appellant came to be together at the times relevant to these alleged offences are not the subject of controversy. The appellant was married to a Filipino national who was a friend of an aunt of the complainant. The complainant had met her while she was still at school and working part-time in the factory where the aunt also worked. The complainant is now 31 years of age. The complainant first met the appellant in the Philippines in the year 2000. Later the appellant had arranged for the complainant to migrate from the Philippines to Australia to work in the shop which he and his wife operated at Napranum, an Aboriginal community outside Weipa. On her arrival in Australia, the appellant picked up the complainant at the Cairns airport on 29 August 2002. They stayed for two days at a motel in Cairns before continuing the journey to Weipa. The complainant could not then converse in the English language and the appellant could not speak her language, Tagalog. At the hearing, the Court required the services of an interpreter when taking the complainant's evidence. The appellant's first language is Hungarian but it is apparent from the police record of interview that he has some facility with the English language.

[29] Counts 1, 2 and 3 are based on the complainant's allegations that she was raped by the appellant on three separate occasions whilst at the motel during those two days. The first occasion is said to have occurred soon after their arrival at the motel. As to this, it was put to the complainant that there was no sexual intercourse at that time. As to the other two allegations, it was put to the complainant that consensual intercourse did occur in return for payment. The defence assertions were put in the following terms:-

"Okay. I suggest that when you first arrived at the Rainbow Inn that you – had no sex with John at all? -- That is not true.

But you later went to see Les and Robbie, right? And you had some – some drinks? -- They took me there.

Right. And you had some drinks? You had some bourbon and coke? -- (Witness) Yes.

And a beer? -- (Witness) Yes.

And you also had a smoke of some cannabis? -- (Witness) No.

And I suggest that after that you went back to the motel and you had sex with John back at the motel, that you agreed to it? -- I never – I never give permission, but I couldn't do anything.

Well, I suggest that you did give permission? -- No.

And I suggest that he paid you $50 afterwards? -- That is not true. He didn't give me any money.

Mmm. In fact, I suggest that you did have sex with him three times in the motel, that each time he gave you some money? -- That is not true.

And you agreed to do it? -- I didn't – I didn't give him permission to do that but because I couldn't do anything."[5]

[30] Count 4 is based on the complainant's allegation that she was raped by the appellant whilst on a camping trip to a beach, near Weipa. The incident is said to have occurred in a tent alongside the appellant's five year old son who was sleeping in the tent. This incident was said to have occurred against a background of frequent prior non-consensual intercourse between the appellant and the complainant at the take-away food store which the appellant operated and at the appellant's house. The complainant said this happened with a frequency of twice or three times a week.[6] The complainant's evidence was:-

"MR CONNELLY: Just tell us did anything happen when you were on that camp? -- I just get a surprise when all of a sudden someone touched me and then I saw John, then he started raping me again.

That was inside the tent? -- (Witness) Yes.

And the children were inside the tent? -- (Witness) Yes.

What did you do when he was raping you? -- For me, I couldn't really do anything so – I didn't know what to do, I was so confused. Sometimes I feel like I was going crazy, so I just let him do what he wanted to do.

Did you kiss him or -----? -- (Witness) No.

----- hug him or anything like that? -- (Witness) No.

Did you want to have sex? -- (Witness) No, I don't want.

And where did this happen? Did it happen in the tent with the two children? -- (Witness) Yes."[7]

[31] The defence assertion was that not only did the complainant consent on that occasion but that consensual intercourse had occurred on about three occasions in the appellant's house while his wife was absent in Cairns prior to the camping trip.[8] As to the camping trip, defence counsel put the following questions to the complainant:-

"Right. How far away were the sleeping children? -- Just close by.

But they didn't wake up? -- (Witness) No.

So were you very quiet? -- (Witness) Yes.

So you didn't call out? -- No. I wasn't yelling out, I didn't call out.

Right. Now, you're quite sure it happened in your tent are you? -- Yes. I – I – I – I can't – it's hard to remember but it was on that tent.

In your tent? -- (Witness) Yes.

See, I suggest to you that at the preliminary hearing of this matter you said that it happened in the tent where John Kovacs and – his son were? -- I just don't understand, but there's something happened in the tent. Because when we went camping all he – all he did was to tell me off that I was so upset I was crying. He always tells me off that when we went camping.

...

Now, I suggest to you that at the preliminary hearing in October 2004 you said, 'He came to our tent with the kids sleeping – with the kids sleeping – and he asked me to go to the tent where Solly – where Solly is'? -- I don't remember but – but what I remember something happened in the tent. He was – I was so confused.

...

Yes, on the camping trip, you had to be very quiet so as not to wake the sleeping child? -- I don't know but what I can remember I was so confused at that time but he had sex with me at the tent.

I suggest that you came to his tent asking for cigarettes? -- No, that's not true.

And then you had sex with him very quietly so as not to wake sleeping Zoltan? -- I – I don't make noise, I was scared. I don't know what he'll do to me."[9]

[32] In the course of cross-examination it was suggested to the complainant that there was a variation between the evidence she gave at the committal proceedings and at trial as to the tent in which the sexual intercourse took place and which child was present. But it was not put directly to the complainant that she consented to the act of intercourse in the tent, nor was there any suggestion that she was paid for intercourse on that occasion.

[33] The cross-examination at this point went on to the topic of the complainant's departure from the appellant's residence, her complaint to the appellant's daughter, Eva, and her purchase of an airline ticket to Cairns. These events occurred in January/February 2003.

[34] In between the questions on this topic and questions about the opportunities she had to complain to other people, the cross-examination included the following exchange:-

"All right. See, I suggest that the only times you had sex with the accused, he paid you and you agreed to do it? -- For me he wasn't giving the – he wasn't giving me the money often, but I accepted the money so I could save the money so I could run away from them because I couldn't do anything – I couldn't tell her – his wife.

So he did pay you money for sex? -- He is paying me but he's not paying me all the time.

Are you saying he didn't pay you enough? -- He only giving – he was only giving me $10, $15. He

puts it in my pocket.

Right. Did you think you should get more money?

MR CONNOLLY: I object to that, your Honour.

MR HARRISON: All right. I won't pursue that, I'll withdraw that.

HIS HONOUR: And apologise for it."[10]

[35] On their face the questions raise a legitimate issue. By their terms they are confusing, or perhaps even unfair. The complainant had earlier denied suggestions of specific payments for sexual favours. There remained a conflict between the complainant and the defence suggestions as to the frequency of sexual intercourse. The complainant had earlier acknowledged that from time to time the appellant gave her money she said in total it was less than $300.[11] When she acknowledged receiving these payments it was not then suggested to her that these were payments for consensual sex. Why did the prosecution object? Why did his Honour demand an apology? Because defence counsel withdrew the question, the basis of the objection was never explored. A possible basis for the prosecutor's objection was that the final question was in the nature of a comment and one, in the context, that might have been seen to be offensive. A further possible basis could be that the original question was objectionable because it compounded different issues. The complainant's answer was responsive to one part only – that she was paid. At all events, the answer suggests some confusion which no one sought to clarify. The second answer, the one which is now elevated to some importance on appeal, may have been a continuation of that confusion because the next question goes to the quantum of payments. What is lacking is any clear question about an agreement – its terms, when where and how made – about consensual sexual intercourse for payment.

[36] That the learned trial judge sought an apology may or may not have been justified. Such a step is usually taken only if there has been offensive behaviour. Whether that occurred cannot be assessed on appeal in the absence of other evidence. The fact that defence counsel was prepared to withdraw rather than to persist with these questions suggests that he considered it to have been either improper or not beneficial to pursue. But it cannot be said that this single exchange undermined a potential defence. This becomes obvious when one reviews the conduct of the trial on both sides. In his address, defence counsel made no suggestion that the complainant was ever paid for having sexual intercourse with the appellant. The address themes he followed were:

(a) that the complainant's evidence as to the lack of consent should not be believed because –

(i) She did not make any resistance to the appellant's overtures for sexual intercourse as evidenced by the lack of physical signs;

(ii) There was no complaint to persons with whom she had contact, including, soon after the first incident, a person who spoke her language;

(iii) There was no complaint to her relatives or boyfriend in the Philippines despite the fact that she from time to time both wrote and telephoned those people;

(iv) The lack of complaint continued from 21 August 2002 until February 2003 despite her claims that she had been frequently violated;

(b) the complaint occurred only when the complainant had acquired enough money to leave Weipa and she needed to justify her departure having regard to her family's dependence upon her income;

(c) the inconsistencies between her evidence at committal and at trial threw doubt, not only on the camping incident to which it related, but also all other allegations of rape;

(d) although she claimed the appellant had raped her in an hotel in the Philippines in year 2000, she made no complaint to anyone then and despite this violation she agreed to come to Australia to live with the perpetrator;

(e) there was no confirmation of her evidence about the alleged rapes.

What does not appear as a theme at any stage is that sexual intercourse was consensual because the appellant paid for it. It is noteworthy also that the crown prosecutor did not see the need to refer to these questions and answers when he addressed the jury in advance of the defence address.

[37] Ultimately the jury was left with the complainant's specific denial of any payment in respect of the charged acts. In cross-examination she denied being paid for sex in either the Philippines[12] or in Cairns.[13] As to the four occasions the defence suggested sexual intercourse occurred at Weipa, it was never suggested that any specific payment was associated with her consenting to those sexual acts. Whatever impact might sensibly arise from her response to the questions which were not pursued when objection was taken, that impact was negligible in the context of the conduct of the trial. In the atmosphere of the trial, the responses, for whatever reason, were not seen as significant.

[38] The question whether the learned primary judge's direction about payment for sex contained a factual error as the appellant contends, requires a consideration not only of its terms but also the context in which it was said. The context concerned the identification of a lie by a comparison between what an accused person has said and the manner in which the case was conducted on his behalf. His Honour drew attention to the suggestions put to the complainant that the appellant paid her for sex in the Philippines and in Australia. To the extent that his Honour was referring to the specific assertions which attracted the complainant's denial, he was correct in directing that there was no evidence to support the scenario of sex for payment and that that would be a basis for finding a lie. Such a finding was left for the jury's decision in the very next sentence. To have qualified that instructive direction with a reference to the above passage of evidence which had not been remarked upon by either counsel in addresses would more likely have confused the jury. In the context of the trial failure to mention the above passage of evidence does not in my view constitute, or contribute to, an error in the direction on lies.

[39] If the questions and answers referred to above were of the weight which the appellant would now attach to them, the evidence would go to the very essence of whether the complainant consented to sexual intercourse. Its importance could not have been missed. No such submissions were made with respect to this passage of evidence during addresses and no redirection was sought after the summing up. Plainly the questions and answers were not perceived to be of any weight at trial and no reason is shown why they should be assessed differently on appeal. They do not, in my view, form a basis for suggesting a misdirection in the summing up, either in putting the defence case or in relation to lies or to mistake.

Directions in lieu of mistake of fact

[40] In relation to counts 1, 2 and 3 there is ample evidence from the complainant that she resisted the appellant's advances but because of his size, or by reason of his superior strength or persistence, her resistance was overborne. In relation to count 4 the complainant said, though not consenting to sexual intercourse, she did not offer resistance. Counsel at trial agreed that the circumstances gave rise to a need for the jury to consider whether, in respect of all counts, the appellant had an honest and reasonable belief that the complainant was consenting.[14] The learned primary judge intimated that he

intended to give a direction more favourable to the accused than the direction which follows the concepts of s 24. By that section, the prosecution must prove beyond reasonable doubt that the defendant did not honestly hold a belief that the complainant was consenting or that a reasonable person in the defendant's position would not have held such a belief. The learned primary judge proposed that the complexity for the jury of the subjective/objective nature of the concepts could be avoided by calling on the prosecution to prove positively, and beyond reasonable doubt that the appellant knew the complainant was not consenting. Neither counsel objected to that course.[15]

[41] In his summing up the learned primary judge stated:-

"Thirdly, members of the jury, in order to find Mr Kovacs guilty you must be satisfied beyond reasonable doubt that he knew she was not consenting to the act of carnal knowledge or sexual intercourse relied upon by the prosecution; that he knew that she was not consenting freely and voluntarily. Everyone of those three things has to be proved beyond reasonable doubt for you to convict Mr Kovacs of the offence of rape: carnal knowledge, the absence of consent and that Mr Kovacs knew she was not freely and voluntarily consenting."[16]

[42] His Honour repeated the requirement of proof beyond reasonable doubt of this subjective state of knowledge in respect of each of the offences. In relation to count 4, after directions about relationship evidence arising from uncharged acts, his Honour said:-

"I direct you that you cannot find him guilty of count 4 unless you are satisfied beyond reasonable doubt that the only rational inference to draw, the only reasonable conclusion that you could draw is that he must have known that she was not consenting. And the reasoning process you may adopt is this, members of the jury – and I emphasise may, it is for you to decide whether it is a valid reasoning process and it is for you to decide whether, importantly, you are satisfied beyond reasonable doubt that is the only rational inference to draw – that he must have known that she was not consenting to the sexual intercourse which took place in the tent on that camping trip."[17]

[43] The appellant's counsel (who was not the trial counsel) argued that these directions were prejudicial to the defence because at the core of s 24 is the realisation that minds don't always meet. But the direction given by the learned primary judge had the effect of "morphing" the matters to be proven – carnal knowledge, no consent and defendant's knowledge that there was no consent – into one concept. He submitted that the jury's deliberation ought to have been a separate issue after they had concluded that the sexual intercourse was non-consensual.

[44] The respondent argued that such a direction imposed an additional obligation on the prosecution. Under the standard s 24 direction the Crown only had to negative one element – either the honest belief of the defendant or that a reasonable person would hold such a belief. The guilty verdicts following that direction clearly rejected there being any honest belief in the mind of the appellant. The positive nature of the finding carried with it, or subsumed within it, the finding that the appellant could not have been honestly mistaken about whether the complainant was consenting or not.

[45] In a technical sense, the direction to the jury did not put the requirements of s 24 for the jury's determination. In that sense it might be seen to be, as the respondent conceded, a misdirection. Its effect was to focus the jury's attention on one aspect, the state of the appellant's belief, and by that decision to allow or exclude the exculpatory effect of the section. Such a process may not be appropriate in all cases where the mistake of fact defence arises. In R v Soloman[18] Jerrard JA made the point in the following terms:-

"[34] But there is still a problem with those directions. They did not apply the law, which required the

jurors to consider whether the prosecution had excluded the possibility of an honest and reasonable, but mistaken, belief that S was consenting. Mr Rafter referred the Court to the statement by McHugh J in *Stevens v R* (2005) 80 ALRJ 91 at [29], where his Honour wrote that a jury is entitled to refuse to accept the cases of the parties and to "work out for themselves a view of the case which did not exactly represent what either party said", referring to the unanimous judgment in *Williams v Smith [1960] HCA 22*; (1960) 103 CLR 539 at 545. On the assumption the jurors might have favoured some intermediate version of events – as it was open to them to do – the directions that were given (being limited to the evidence given) could not assist the jury on the issue of mistake, in the way that directions actually in the terms of s 24 would have."

[46] In the circumstances of this case there does not appear to have been any prospect of some intermediate view of the facts which the jury could form. The complainant and the appellant were obviously aware of what was happening on each occasion sexual intercourse occurred. The question of whether the complainant was consenting or not was a factual question which was to be resolved simply on credibility. The question of the appellant's belief was left to be determined upon those same circumstances. The obligation imposed on the Crown was to negative beyond reasonable doubt that the appellant subjectively held an honest belief as to the complainant's consent. I agree with the conclusions of McMurdo P and Holmes JA on this point that whilst the use of this approach is not to be encouraged it did not result in any miscarriage of justice in this case. If it were necessary to do so it would be an appropriate case for the application of the proviso.

Reduced communication because of language

[47] Another matter raised by the appellant touching on the issue of honest and reasonable belief was the fact that no reference was made by the learned primary judge as to the language difficulties of each of the parties. That there was a language difficulty was obvious at trial and it was obvious from the complainant's evidence about her not understanding why she was not being abused. But, in this case, differently to the situation in R v Mrzljak[19] there was no evidence and no suggestion that the appellant was confused or disadvantaged by any communication deficit. There was a comment made during defence counsel's address querying whether the complainant communicated her lack of consent to the appellant but there was no request for redirection. The complainant gave evidence of her physical resistance in connection with the earlier incidents. This evidence, if believed, would provide more effective communication than language. The fact that the complainant was employed in the appellant's retail business indicates that there was some basic level of communication between them. Any difficulty in communication affecting the appellant's understanding was a matter for consideration at trial. Raising the topic for the first time in argument on appeal may give rise to speculation but does not allow due consideration of the issue. There is nothing in the evidence which suggests there was any misdirection based upon the appellant's limitation with language.

Lies direction

[48] The complaint made about the direction which the learned primary judge gave on the topic of lies is that he did not follow the standard directions used in the Bench Book with the result that he did not identify more possible innocent explanations why a person in the position of the applicant might lie to police. The directions in fact given by his Honour were foreshadowed in discussion with counsel during which defence counsel agreed with the terms proposed.

[49] After identifying the lie as being the discrepancy between the appellant telling the police that he had never had sexual intercourse with the complainant and what was put to the complainant in cross-examination, his Honour said:-

"In order to reach that conclusion, members of the jury, you must consider possible innocent

explanations for him having told a lie. Consider the possibility that he told a lie because he feared of being wrongly convicted of rape. You may consider that he told the lie because he didn't want his wife to find out that he was having a sexual relationship with [the complainant]. You may consider that he told a lie because he knew that he had been repeatedly raping [the complainant].

So you consider these possibilities, but you may only use the evidence against him as proof of rape if you are satisfied that he lied because he knew that he had been repeatedly raping [the complainant] over the preceding months."

[50] Issue is taken with the fact that his Honour identified only two possible innocent explanations for telling a lie. Other explanations were open and the importance of giving a range of explanations is that a conviction can only be returned if the jury rejects those explanations. Counsel for the appellant submitted that left with only these two innocent explanations and the starkly stated alternative "because he knew he had been repeatedly raping the complainant" was a formula to convict.

[51] The Bench Book makes suggestions as to likely innocent explanations – to escape an unjust accusation, out of shame, out of a wish to conceal embarrassing or disgusting behaviour, to protect another person etc. These examples are obviously not exhaustive and it is expected that a trial judge would choose as examples those most fitting the circumstances. The learned primary judge has chosen two of the most significant innocent reasons why a person in the position of the appellant would tell a lie. This appears from the earlier discussions. More examples could have been mentioned but it is unlikely that they would have been of any more significance than the two mentioned. The task of finding innocent explanations is really to provide a comparison such as will demonstrate the inevitability of the conclusion if a lie is to be used as indicating a consciousness in a person that the truth would convict him. His Honour expressed this last concept in terms that "he knew he was raping her". The language was perhaps more dramatic than may have been necessary but it identified the direct alternative to the innocent explanations offered. In my view the expression of the alternatives in these terms has not disadvantaged the appellant in the circumstances of this case.

Conclusion

[52] The thrust of the appeal as argued was that the learned primary judge made a factual error in directing that there was no evidence to support a defence that sexual intercourse was consensual because of payment and further that that error permeated other directions and ultimately resulted in the defence case not being put. In the context of the trial, the passage of evidence said to give rise to the error was not given any weight by the parties at trial. An examination of the questions and answers suggests to me that they were undeserving of any weight. On appeal the impact of this passage of evidence has been elevated to a level which clearly did not bear at trial. I am satisfied that the learned trial judge's disregard of the evidence - a course adopted by both counsel at trial - does not result in any misdirection on his part. I would dismiss the appeal against conviction.

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[1] [2004] QCA 420; [2005] 1 Qd R 308.

[2] At p 330.

[3] *Edwards v The Queen [1993] HCA 63;* (1993) 178 CLR 193.

[4] [2005] HCA 81; (2005) 224 CLR 300, 317, para [45].

[5] Appeal record 86/1

[6] Appeal record 37/5

[7] Appeal record 44/42-45/7

[8] Appeal record 87/15

[9] Appeal record 87/20-39

[10] Appeal record 92/20-42

[11] Appeal record 70/50

[12] Appeal record 83/55-84/30

[13] Appeal record 86/22

[14] Appeal record 167/25

[15] Appeal record 168/20-40

[16] Appeal record 221/20-40

[17] Appeal record 240/31

[18] [2006] QCA 244

[19] [2004] QCA 420; [2005] 1 QdR 308

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