Supreme Court of Queensland - Court of Appeal

R v KO [2006] QCA 34 (17 February 2006)

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SUPREME COURT OF QUEENSLAND

CITATION:	*R v KO* [2006] QCA 34
PARTIES:	**R** **v** **KO** (appellant)
FILE NO/S:	CA No 229 of 2005 DC No 357 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	Orders delivered ex tempore 3 February 2006 Reasons delivered 17 February 2006
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2006
JUDGES:	McPherson and Keane JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE – MISDIRECTION AND NON-DIRECTION – where appellant convicted of rape – where appellant appeals against conviction – where appellant complains of directions by learned trial judge in relation to consent – whether verdict unsafe and unsatisfactory *Criminal Code* 1899 (Qld), s 349(2), s 644, s 668A(1A), s

668E(1), s 668E(1A)
R v M [1994] QCA 3; CA No 413 of 1993, 7 February 1994, followed

COUNSEL: B W Farr 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] **McPHERSON JA:** For the reasons given by Keane JA and Muir J, I agree that the judge misdirected the jury on the element of absence of consent at the appellant's trial for rape. The point in issue here is covered by the authority of this Court in *R v M* [1994] QCA 3, a relevant extract from which is set out in the reasons of Keane JA. Indeed, the summing up at the trial in the present case is perhaps open in that respect to more serious complaint than that in *R v M*.

[2] There is another passage in the summing up here that gives rise to concern on my part. It is that, having told the jury that they "need not trouble yourself about the issue of consent", his Honour went on to say:

> "There is no evidence in this case at all to suggest that if [the appellant] had sexual intercourse with [the complainant], that it was with her consent".

In my view, this sentence was, in the context of the summing up here, capable of being understood as suggesting that it was for the appellant to show that sexual intercourse took place with the complainant's consent, rather than for the prosecution to prove that it did so without her consent.

[3] We have already ordered, and now confirm, that the appeal against conviction is allowed; and that the convictions are set aside. There must be a new trial. The matter of bail was determined by this Court at the hearing of the appeal.

[4] **KEANE JA:** I have had the advantage of reading the reasons of Muir J. I agree with his Honour's reasons for allowing the appeal, setting aside the conviction and ordering a new trial.

[5] The appellant submits that the learned trial judge effectively took the issue of consent away from the jury. That submission is plainly correct. For the respondent, it is submitted that the appellant's counsel at trial made no complaint of the terms of the learned trial judge's directions on this issue. But there was no formal admission by the appellant that, if intercourse occurred, it was non-consensual. The making of admissions is dealt with by s 644 of the *Criminal Code*. The issue of consent remained alive even though the appellant's counsel had not suggested to the complainant that she had consented to intercourse with the appellant, and did not seek a redirection from the learned trial judge. The onus remained on the Crown to establish that intercourse was non-consensual.[1]

[6] Mr Copley of Counsel, who appeared on the appeal for the respondent, struggled valiantly to argue that the "real issue was whether the complainant was truthful to the extent that the jury could be satisfied of the appellant's guilt beyond reasonable doubt. If the jury was so satisfied, it naturally followed that they were also satisfied of the fact that she did not consent". But to argue in this way is to put the cart before the horse. The appellant's guilt depended upon the prior resolution of the issue as to the absence of consent. The learned trial judge's direction to the jury was clear in its terms that there was no issue as to the absence of consent.

[7] In *R v M*,[2] this Court upheld an appeal against a conviction for rape in a case where the learned trial judge had directed the jury to the effect that the complainant's age meant that she "would not be in

a position to consent".[3] The issue of consent was thus effectively taken away from the jury. However, as the judgment of the Court in that case concluded:

> "While the substantive issue on the rape count concerned penetration, it cannot be said that consent was not in issue at all. It was put in issue by the appellant's plea of not guilty at the trial, and it was a matter as to which the prosecution bore the onus of proof. The complainant's general veracity was disputed. It was open to the jury not to be satisfied beyond reasonable doubt that the complainant had not consented to the activities which she described, even if it was persuaded that those activities had occurred. The jury might have considered the complainant less innocent than her evidence suggested and, while convinced that her testimony as to the sexual contact was true, been unsure whether she consented. To reason in that way would have been neither perverse nor unreasonable.
> The appellant's chance of acquittal of the count of rape on this basis, however slim, was denied to him by the misdirection. The trial judge did not merely omit discussion of the need for the prosecution to prove absence of consent or elaboration of what that involved in the circumstances. It might have been sufficient to do little more than tell the jury that an absence of consent was an element of the offence and draw attention to the complainant's evidence, emphasising the duty to acquit if that evidence was rejected or doubted. However, it was fundamentally wrong to give a positive direction to the effect that, consent was impossible in her case."[4]

[8] The statement of principle in this passage from the reasons in *R v M* is decisive of the present case. The appellant has been deprived of the chance of a favourable verdict from the jury on the issue of non-consent.

[9] In these circumstances, in my respectful opinion, it is not possible to be satisfied that there has not been a miscarriage of justice within the terms of s 668E(1) of the *Criminal Code*. It is simply not possible to say that the jury, properly instructed, may not have taken the view that the complainant consented, albeit grudgingly, to intercourse with the appellant having regard to the circumstances of their lengthy association. Of course, a jury might readily conclude that the complainant did not consent at all and that her compliance with the appellant's demands was due to her fear of the appellant and the circumstances of relative isolation in which she found herself at his mercy. But to say this is to recognise that there was an issue of fact for resolution by the jury, and that the appellant has been denied the fair chance of an acquittal because this issue was withdrawn from the jury.

[10] **MUIR J:** The appellant was convicted on 5 August 2005 in the Cairns District Court of four counts of rape and sentenced to imprisonment for eight years for each offence. The sentences were ordered to be served concurrently. He appealed and was given leave to replace the initial grounds of appeal with the following, which were the only grounds argued on the appeal:

> "(i) the learned trial judge misdirected the jury in relation to the issue of consent; and
> (ii) the learned trial judge misdirected the jury in relation to the use that can be made of the evidence regarding uncharged acts."

[11] The direction as to consent around which the appellant's argument centres is emphasised in the following passage from the summing up:

> "I'll give you some directions of law which relate to the offence of rape. Members of the jury, the offence of rape occurs when a person, so far as this case is concerned, where a male person inserts his penis into the vagina of a female person without the female's person consent and it is without consent because consent means – well, sorry, consent means consent freely and voluntarily given. Now, members of the jury, so therefore there are two elements to the offence of rape: once – (1) there must be carnal knowledge or sexual intercourse, as it's more usually called these days, (2) there must be the absence of consent.
> *Members of the jury, you need not trouble yourself about the issue of consent. There is no evidence in this case at all to suggest that if [the appellant] had sexual intercourse with [the complainant], that it was with her consent. The factual issue in this case that you have to consider is whether or not he raped her or he didn't have sexual intercourse with her at all. Don't trouble yourselves about consent. It is not an issue which arises on the evidence in this case.*
> So it follows, members of the jury, that in order to find [the appellant] guilty of any one or more counts of rape, you must be satisfied beyond reasonable doubt that [the complainant] was telling the truth in respect of each of the four occasions charged.

The complainant's personal circumstances

[12] The complainant is a citizen of the Philippines who came to Australia to work in the appellant's shop near Weipa. This was arranged through the appellant's wife, who was born and raised in the Philippines. The complainant married an Australian resident in January 2001 and managed to secure approval to reside and work in Australia. An earlier application by her for a working visa or permit had been rejected. The evidence does not reveal the complainant's age but does show that her family is in poor circumstances. Her mother had no job and was sickly. The complainant's seven-year-old son was also sick, at least at the time of trial. In cross-examination the appellant admitted that upon her arrival in Australia she "really couldn't speak English at all" but could only speak Tagalog. She also said, "I couldn't speak English much at the time."

The complainant's evidence as to Count 1

[13] Before considering the merits of the appellant's contentions it is desirable to set out the substance of the more pertinent parts of the evidence.

[14] When the complainant arrived in Cairns on 29 August 2002 she was met by the appellant, who drove her to a motel. On the way there the appellant touched her legs. The complainant told him "no", that it was not part of her job and she "came here to work". She pushed him away but he persisted. Upon their arrival at the motel the appellant showered. He invited the complainant into the shower but she declined, saying, "I'd like to have a rest. If I want to have a shower, I'll go by myself."

[15] The appellant, who was naked, took hold of the complainant, pulled her into the shower and took off her clothes. In the course of this activity the complainant said, "I don't want it. If I want to go shower I'll go by myself. I just want to have a rest first because I'm tired in the aeroplane."

[16] The appellant ignored these protests and rubbed soap all over the complainant's body. After he left the bathroom she dressed herself and went back into the main room. The appellant, who was naked on the bed, said that the complainant "should join him in the bed". She said "no", whereupon he pulled her to the bed, undressed her and requested or demanded that she lick his penis. She said "no" and he

then proceeded to have intercourse with her. Asked if she said anything to him at this stage she said, "no, I just let him what he wants to do because he don't want to listen."

[17] A little later, the appellant tried to have anal intercourse but desisted when the complainant complained of pain. He then placed her on her back, moved his penis in her vagina and eventually ejaculated on her stomach.

The complainant's evidence as to Count 2

[18] Subsequent to the events narrated above the applicant and the complainant went shopping. They then met at the motel another man and woman with whom the appellant was friendly and eventually went to that couple's residence. Upon the appellant's and complainant's return to the motel the complainant said, "I will sleep in the sofa." The appellant told her to sleep in the bed and said that he would not touch her. When she didn't go to the bed he "yelled" at her. She was "scared" and lay down on the bed with her back to him. The appellant started touching her on her thigh and she tried to stop him without success. He said, "from now on you will be my second wife", removed her clothes and had intercourse, again ejaculating on her stomach. She then went back to the sofa.

The complainant's evidence as to count 3

[19] The day after the complainant's arrival in Australia the appellant went out with a friend, leaving the complainant in the motel. In the evening when the appellant returned the complainant was sleeping on the sofa. The appellant again told her to sleep in the bed. She was afraid that "he might yell" at her again so she lay in the bed and pretended to be asleep. He touched her "all over [her body]" and undressed her again. She objected and said, "don't do that", but he wouldn't listen. He undressed her, had intercourse and again ejaculated on her stomach. Asked, "did you say or do anything to show that you did want sex with him?", the complainant answered, "I don't want to have sex with him, but I just let him do whatever he did to me, because there's nothing I could do."

[20] The following day the appellant and the complainant drove to Weipa.

The complainant's evidence as to Count 4

[21] One evening during which the complainant and the appellant were camping with three small children, the appellant dragged the complainant from a tent in which she was resting. The appellant took the complainant his tent where he had intercourse with her "very quickly". A five-year-old child was in the tent at the time.

[22] The following exchange took place in evidence-in-chief:

> "Did you say anything to him when that was happening?
> I wasn't saying anything. I – I just couldn't do anything.
> ...
> Now, after he had done that did you stay in that tent?
> I didn't stay in that tent. I went back to the tent where I – with the kids."

Other instances of sexual contact asserted by the complainant

[23] On two or three occasions in the early morning the appellant had anal or vaginal intercourse with the complainant at the shop before the arrival of another employee. The complainant said, "I just let him do with – whatever he wants or – because I can't do anything". The appellant would also have sex with her on Saturdays "most of the time" when his wife was absent. There is no evidence of any oral

protest or conduct on any of these occasions (apart from the complainant's position of disadvantage and vulnerability and the circumstances of counts 1, 2 and 3) from which unwilling participation may be implied. On some of these occasions the appellant gave her $20 or $50. The total of the payments was about $250.

Cross-examination and re-examination of the complainant

[24] The cross-examination in respect of the allegations of rape at the motel was on the basis of acceptance by the cross-examiner that, on the complainant's version of events, she had been raped twice on the first day. He then confronted her with her evidence on the committal hearing in which she had said that she didn't know if she had been touched on the second night because she went to sleep. At the conclusion of the cross-examination, counsel put to the complainant that she made up "the story about [the appellant] raping" her so that she could obtain money from the appellant's daughter and go to Cairns.

Other evidence of the complainant elicited in cross-examination

[25] The complainant said that she was "too scared to tell" the couple whose residence she had visited on her second day in Australia what had happened when she went to their house. She said that she may have been "laughing and smiling ... because we were talking about something funny." She admitted that on the second day in Cairns she had spent "a good part of the day" by herself in the motel room.

[26] In response to the assertion that the accused told her that they were leaving for Weipa at 12pm, that she had to go to bed early and that she did so without anything happening, she said, "before we left I can't really remember but – I don't remember how many times he touched me in the hotel – the motel – okay – but before we left to Weipa I don't remember him touching me." The appellant's counsel pressed the point and, without the complainant having reasserted that she had been raped on this occasion, queried, "so, you say he raped you?" The complainant said "yes". Counsel then took her through her evidence on committal in which she had said, in effect, that she didn't remember being touched by the appellant that night.

[27] In response to the question, "and you say you can't remember what happened on the second night now?", she said, "I can't really remember because I don't really want to tell."

Evidence of other witnesses

[28] Ms D, who was 19 years of age at the time of the trial, had lived with the appellant and his wife for most of her life. When the complainant first came to Weipa she shared a bed with Ms D in the appellant's house. At the time, the complainant told her that she liked the accused.

[29] CK, who was employed in the shop at relevant times, said that on one weekend the complainant came to her house and told her that the appellant had "kicked her out of the house". When they were returning from CK's house from an attempt to use a payphone, the appellant and his wife drove up to them. A discussion in the Tagalog language took place and the appellant's wife pushed the complainant into the car. The four of them drove back to CK's residence where the appellant's wife picked up the complainant's bag of possessions and the appellant, his wife and the complainant drove away. On a later occasion CK purchased an air ticket from Weipa to Cairns for the complainant with monies provided by the complainant and the appellant's daughter. The complainant told CK at this time that the appellant "was trying to get on to her" and that "she was going to come down and see the police about him."

[30] On an occasion after Christmas 2002 Ms F, the appellant's daughter, was requested by the

appellant's wife to drive the complainant to and from the shop whilst the appellant and his wife were visiting Cairns for some days. Ms F said that at this time the complainant initially appeared unhappy and was unwilling to talk, but on one occasion had said that she needed to leave Weipa before the appellant's return as he "is molesting her and raped her". The complainant also said that "she had no freedom, she couldn't go anywhere. She was just working all day this is on a [indistinct] after work doing the housework, the kids and whatever she have to do and she was just – yeah [indistinct]. She just want to leave."

[31] The complainant told Ms F that she would report the matter when she went to Cairns. Whilst saying this the complainant was crying. Ms F gave her money towards her airfare.

[32] The complainant's husband gave evidence that the complainant stayed with him in Cairns on leaving Weipa in 2003. Whilst staying with him at a time which was not more specifically identified, he said that the complainant had said that she was "raped in the shop and in the hotel rooms straight away when she arrived." He gave evidence in cross-examination of going to see the appellant and his wife at the Rainbow Motel after the complainant had come back to Cairns. On that occasion a discussion took place about the complainant's passport. It was not suggested by the complainant's husband that in the course of this conversation anything was said about the appellant's alleged sexual misconduct, although, on his evidence, he threatened to go to the police about the passport.

The prosecution's argument

[33] The learned crown prosecutor argued that:

(a) experienced defence counsel did not complain about the subject direction;

(b) the issue in "dispute" was whether penetration occurred at all, not whether consent was given or withheld; and

(c) given the evidence in the case it followed "as a matter of common sense" that if the jury accepted the complainant as telling the truth the appellant would be guilty.

[34] The final point was put slightly differently in the submission that "... the real issue was whether the complainant was truthful to the extent that the jury could be satisfied of the appellant's guilt beyond reasonable doubt. If the jury was so satisfied, it naturally followed that they were also satisfied of the fact that she did not consent."

Conclusion on the first ground of appeal

[35] The learned crown prosecutor conceded that the appellant's denial that intercourse had occurred did not mean that consent was no longer an issue. The concession is plainly right. Absence of consent is an element of the offence of rape. [5] It was put in issue by the appellant's plea of not guilty and the prosecution had the onus of proving it beyond reasonable doubt. The trial judge's direction was thus flawed in a critical respect.

[36] In the respondent's written outline of submission it was asserted that notwithstanding this defect in the summing up, the appeal should be dismissed on the basis that no substantial miscarriage of justice had actually occurred. [6] It was submitted also that the defect in the summing up had been remedied for practical purposes by the direction that to find the appellant guilty on any count the jury "must be satisfied beyond reasonable doubt that [the complainant] was telling the truth."

[37] The prosecution case in respect of counts 1 and 2 is strong, assuming acceptance of the

complainant as a credit-worthy witness. The prosecution case on the two remaining counts is far less strong. In the case of count 3, the complainant's evidence-in-chief of non-consensual intercourse on the second day in Cairns was not supported by her evidence on committal and is weakened substantially by concessions made in cross-examination.

[38] In the case of count 4, the evidence of the complainant's lack of consent is to be derived, substantially if not entirely, from her evidence of being "dragged" from one tent to the other. There was another adult in close proximity to the complainant and the appellant at the time who gave evidence to the effect that he saw and heard nothing untoward.

[39] The complainant gave evidence through an interpreter and there is the possibility of a lack of precision in the choice of language to describe the conduct which occurred on that occasion. Use of the word "dragged" implies the use of force by one party and reluctance or unwillingness on the part of the other, at least in these circumstances. But there was no verbal protest and the incident occurred against a background of uncharged frequent acts of sexual intercourse over a period of some months. It may well be that, properly examined, those acts could be established to be non-consensual, but that was not an issue litigated on the trial for obvious reasons.

[40] Returning to counts 1 and 2, whether the prosecution succeeds or fails is largely dependent on the resolution of the issue of credit between the complainant and the appellant. But it is rather too simplistic to pose the issue to be decided in terms of the jury's acceptance or otherwise of the truthfulness of the complainant. A witness may be entirely truthful but have an erroneous, incomplete or mistaken recollection. Also, the direction fails to allow for the possibility that a witness' evidence may not be accepted by the jury in its entirety. I do not regard these difficulties as being redressed by the words:

> "In relation to each of the four charges there is a single issue. Are you satisfied beyond reasonable doubt that he raped her in the way she described or do you have a reasonable doubt about it."

[41] The primary focus of these words is the physical activities of the appellant and the complainant. They do not address the question of consent, which was the subject of the direction challenged by the appellant.

[42] The following observations of the Court in *R v M* [1994] QCA 3 at 5-6 are generally applicable to the facts of this case:

> "While the substantive issue on the rape count concerned penetration, it cannot be said that consent was not in issue at all. It was put in issue by the appellant's plea of not guilty at the trial, and it was a matter as to which the prosecution bore the onus of proof. The complainant's general veracity was disputed. It was open to the jury not to be satisfied beyond reasonable doubt that the complainant had not consented to the activities which she described, even if it was persuaded that those activities had occurred. The jury might have considered the complainant less innocent than her evidence suggested and, while convinced that her testimony as to the sexual contact was true, been unsure whether she consented. To reason in that way would have been neither perverse nor unreasonable."

[43] The appellant has not had the charges against him determined by a jury on their merits. Having regard to the summing up it is difficult to know what weight to attribute to the jury's verdict in determining the issue of credit and, more importantly, it is probable that the question of consent was

not given due consideration. In the circumstances of this case, including the differing strengths of the prosecution's case in relation to the four charges, and the critical importance of the assessment of credit, there is no room for the application of s 668A(1A) of the *Criminal Code*.

[44] For these reasons it is unnecessary to consider the merits of the second ground of appeal. Accordingly, I would allow the appeal, set aside the convictions and order that the appellant be tried again on each count.

[1] See *R v Bradley* (1910) 4 Cr App R 225 at 228; *Holman v R* (1970) WAR 2 at 6; *R v B & P* [1998] QCA 45 at 25 - 26 per Muir J.

[2] [1994] QCA 3; CA No 413 of 1993, 7 February 1994.

[3] Ibid at 4.

[4] *R v M* [1994] QCA 3 at 5 - 6.

[5] *Criminal Code* s 349(2)

[6] *Criminal Code* s 668E(1A)
