SUPREME COURT OF QUEENSLAND

CITATION:	*R v Simmons* [2015] QCA 194
PARTIES:	**R** **v** **SIMMONS, Iain Bruce** (appellant/applicant)
FILE NO/S:	CA No 22 of 2015 DC No 353 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Unreported, 27 January 2015 (Conviction); Unreported, 29 January 2015 (Sentence)
DELIVERED ON:	16 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2015
JUDGES:	Gotterson and Morrison JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – OTHER CASES – where at the conclusion of a trial over six days in the District Court at Brisbane the appellant was found guilty of the offence of rape (Count 2 on the indictment) – where the appellant was acquitted on Count 1 which alleged indecent assault of the same complainant – where a conviction was recorded and the appellant was sentenced to five years' imprisonment – where four days of pre-sentence custody were declared to be time served and no orders were made suspending the sentence or fixing a parole eligibility date – where the appellant was 30 years old at the time of the alleged offending – where the appellant attended the Stock Exchange Hotel to have some drinks with friends – where at the hotel bar, the appellant met the complainant, who was then 22 years old, and her female flat mate – where the appellant had never met them before and he and the flat mate flirted – where at closing time, the three of them left and travelled by taxi to the unit where the complainant and her flat mate resided – where upon arrival at the unit, the complainant went to her room and changed into her sleeping clothes – where the appellant entered her room,

asked her if she was "ok" and hugged her, which she reciprocated – where the appellant then tried to kiss the complainant and she pushed him away, telling him that she was "fine" and that he needed to leave the room – where the complainant went into the kitchen to make some toast and the appellant approached her from behind, placed his hands on her hips and pressed his hips against hers – where the complainant removed the appellant's hands – where the appellant pressed up against her again and tried to kiss her neck and the complainant pushed him away, telling him that he needed to leave her alone; that he was there for her flat mate; and that she had a boyfriend – where at that point, the flat mate came into view and the appellant desisted – where the conduct in the kitchen formed the basis of Count 1 – where the complainant returned to her bedroom and called her boyfriend, to whom she complained about the appellant's advances – where the complainant fell asleep on the phone – where the complainant said she fell asleep on her stomach with her left leg up, her head facing towards the left and the doona on top of her – where the complainant woke in the same position but with her pants pulled down from behind – where the complainant heard heavy breathing and felt someone inside her and behind her – where with apology to the court, the complainant described the person as "trying to fuck the shit out of me" – where the complainant turned around, saw the appellant and asked him what he was doing, asked him to get off her and then pushed him off her and told him to leave her alone – where the appellant got off her and left the room – where the appellant's penetrative conduct formed the basis of Count 2 – where the appellant testified that upon reaching the unit he told both the complainant and her flat mate that he would sleep on the couch in the lounge room – where the appellant kept awake, hoping for a chance to have sex with the complainant after noting that she earlier rebuffed his advances but said "we can't now" which he took as a signal of interest on her part in having sex with him so long as the flat mate did not know of it – where later, the flat mate emerged from her bedroom, approached the appellant and asked him to sleep with her – where at first, the appellant declined but then changed his mind and they went to the flat mate's room and had sex in her bed – where the flat mate was still quite drunk and the appellant, discouraged, stopped short of ejaculation and then left the room – where the complainant was not aware of the sexual encounter between the appellant and her flat mate – where the appellant said that, later on, he went to the complainant's room and knocked on the door and when there was no response he entered her bedroom – where the complainant was in a sitting position on her bed and looked as though she had fallen asleep while on the phone – where the appellant got into bed and the complainant stirred and appeared to wake up – where the complainant then rolled on to her side, facing away from him and the appellant followed her into a spooning position with his left arm across

her body – where the appellant's evidence noted that he then began caressing the complainant's fingers and she gave a reciprocating response with her fingers – where the appellant started to kiss her on the neck and ear and the complainant moved her hips around and backed them up against him – where the appellant kissed her on the cheek and the lips and she responded to the kissing – where the appellant fondled her breasts and moved his hand from that area towards her vaginal area – where the complainant's apparent receptiveness encouraged the appellant to remove his underwear and continue kissing her in the spooning position, then he began to move her shorts downwards – where the appellant moved onto his knees and was able to gain entry – where the appellant described the sexual intercourse which followed as lasting about two minutes and consisting of him thrusting into her with what he thought was "normal" vigour, and she thrusting back – where the appellant tried to resume kissing the complainant as he had before, but then a "strange reaction" occurred on her part: she immediately stopped her movements and began to tell him to get off her, he did, she grabbed her phone and started yelling at him and he put his underwear on and ran out of the room – where a s 590AA application to exclude the evidence of the sexual intercourse with the flat mate was initially granted but later overturned – whether the learned trial judge erred in overturning the s 590AA application

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the learned trial judge did not direct the jury as to the use that could be made of the first preliminary complainant by the complainant to her boyfriend on the telephone – whether the learned trial judge erred accordingly

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the learned trial judge did not direct the jury that the reasonable grounds for the appellant's belief must be assessed in his particular circumstances – whether the learned trial judge erred accordingly

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the jury returned a verdict of not guilty on Count 1 but guilty on Count 2 – whether the conviction was unreasonable

Criminal Code (Qld), s 24, s 349(1), s 590AA, s 590AA(3)
Penalties and Sentences Act 1992 (Qld), s 144(1)

Brimblecombe v Duncan, Ex parte Duncan [1958] St R Qd 8, cited

Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, considered
GJ Coles & Co Ltd v Goldsworthy [1985] WAR 183, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
Loveday v Ayre; Ex parte Ayre [1955] St R Qd 264, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
O'Leary v The King (1946) 73 CLR 566; [1946] HCA 44, cited
R v Dunning; Ex parte Attorney-General [2007] QCA 176, considered
R v Goulden [1993] 2 Qd R 534, cited
R v Mrzljak [2005] 1 Qd R 308; [2004] QCA 420, considered
R v Sheehy [2005] 1 Qd R 418; [2003] QCA 420, cited
R v Simmons [2014] QDC 303, considered
R v Wilson [2009] 1 Qd R 476; [2008] QCA 349, cited

COUNSEL: A Boe with P Morreau for the appellant/applicant
T A Fuller QC for the respondent

SOLICITORS: Nyst Legal for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** On 27 January 2015 and at the conclusion of a trial over six days in the District Court at Brisbane the appellant, Iain Bruce Simmons, was found guilty of the offence of rape. The count (Count 2 on the indictment) alleged that the rape occurred on 24 March 2013 at Brisbane. The appellant was acquitted on Count 1 which alleged indecent assault of the same woman on the same occasion.

[2] At a hearing on 29 January 2015, a conviction was recorded and the appellant was sentenced to five years' imprisonment. Four days of pre-sentence custody were declared to be time served. No orders were made suspending the sentence or fixing a parole eligibility date.

[3] On 25 February 2015, the appellant filed a Notice of Appeal in which he appealed against conviction and applied for leave to appeal against sentence.

The circumstances of the alleged offending

[4] The appellant was 30 years old at the time of the alleged offending. He was at that time a resident of Melbourne. He had been an accomplished athlete and had taken on a coaching role. He travelled to Brisbane to coach one of his athletes who was competing at the Brisbane Track Classic. He and a male colleague were staying at a hotel in George Street in the city. They returned there at about 9.30 on the evening of Saturday 23 March 2013. Later, they ventured out, first to the casino, and then to the Stock Exchange Hotel where they met up with other athletes. They all were drinking socially.

[5] At the hotel bar, the appellant met the complainant, who was then 22 years old, and her female flat mate. The appellant had never met them before. He and the flat mate flirted. At closing time, the three of them left and travelled by taxi to the unit where the complainant and her flat mate resided at Paddington.

[6] The complainant's evidence was that upon arrival at the unit, she went to her room and changed into shorts and an AFL, NRL or rugby jersey. The appellant entered, asked her if she was "ok" and hugged her. She reciprocated. He then tried to kiss her. She pushed him away, telling him that she was "fine" and that he needed to leave the room.

[7] The complainant then went into the kitchen to make some toast. When she was at the toaster, the appellant approached her from behind, placed his hands on her hips and pressed his hips against hers. She removed his hands. He pressed up again and tried to kiss her neck. She pushed him away, telling him that he needed to leave her alone; that he was there for her flat mate; and that she had a boyfriend. At that point, the flat mate came into view and the appellant desisted. This conduct formed the basis of Count 1.

[8] According to the complainant, she took her toast and a glass of milk to her bedroom, got into bed, tried to telephone her former boyfriend in Canada, texted with him and her father, and then spoke by phone to her current boyfriend who was interstate. The boyfriend testified that he spoke with the complainant in the early morning of Sunday 24 March 2013. The complainant was worried and upset. She told him of a male who had made advances to her at the unit and of his attempts to kiss her in her bedroom and then in the kitchen. She said to him that she had locked her bedroom door.[1] The conversation concluded when she fell asleep on the phone.[2]

[9] The complainant said in evidence that she fell asleep on her stomach with her left leg up, her head facing towards the left and the doona on top of her. Later, she woke in the same position but with her pants pulled down from behind. She heard heavy breathing and felt someone inside her and behind her. With apology to the court, she described the person as "trying to fuck the shit out of me".[3] She turned around, saw the appellant and said to him, "What the fuck are you doing?" She told him to "get the fuck off" her. She then pushed him off her and told him to leave her alone. He got off her and left the room.[4] The appellant's penetrative conduct formed the basis of Count 2.

[10] The complainant immediately phoned her boyfriend. She could not recall the detail of the conversation. It lasted at about half a minute. Her boyfriend described her as being "really panicked" and "hysterical".[5] He told her to ring the police. She phoned 000. Both the police and the ambulance responded to her call.

[11] The appellant had remained at the unit. He gave an account of events to the police which was generally consistent with the evidence that he gave at his trial. In his evidence-in-chief, he recounted meeting the complainant and her flat mate at the hotel and his sexual interest in the latter. As they walked to a taxi, the flat mate vomited. Her apparent drunkenness diminished his interest in her. He said that after they arrived at the unit and when the flat mate was in the shower, he did go into the complainant's bedroom and did make an advance towards her. Despite a mutual embrace, she resisted kissing. According to him, she moved away, saying words to

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1 In evidence-in-chief, the complainant said that her boyfriend had asked her if she had closed the door. It had a push and turn lock. The complainant said she was under the impression that she had locked it: AB160; Tr1-35 ll14-24.

2 AB267; Tr2-76 ll8-24.

3 AB159; Tr1-34 l25.

4 AB160; Tr1-35 ll14-26.

5 AB268; Tr2-77 ll4-15.

the effect of "we can't now". He took this as signalling an interest on her part in having sex with him so long as the flat mate did not know of it.

[12] According to the appellant, there was no physical interaction at all between the complainant and himself while she was in the kitchen. He did not see her make toast. He did not press his hips against her or try to kiss her.

[13] The appellant told the two women that he would sleep on the couch in the lounge room. He heard them talk in a lighthearted way and then go to their respective bedrooms. He kept awake, hoping for a chance to have sex with the complainant. Later, the flat mate emerged from her bedroom, approached him and asked him to sleep with her. At first, he declined but then changed his mind. They went to her room and had sex in her bed. She was still quite drunk. Discouraged, he stopped short of ejaculation and then left the room. He returned to retrieve his underwear. The complainant was not aware of the sexual encounter between the appellant and her flat mate.

[14] The appellant said that, later on, he went to the complainant's room and knocked on the door. There was no response. He entered her bedroom. The complainant was in a sitting position on her bed. She looked as though she had fallen asleep while on the phone[6]. He got into bed and placed her phone on a bedside table. She stirred and appeared to wake up. The complainant then rolled on to her side, facing away from him. He followed her into a spooning position with his left arm across her body.

[15] According to the appellant's evidence,[7] he then began caressing the complainant's fingers. She gave a reciprocating response with her fingers. He started to kiss her on the neck and ear. She moved her hips around and backed them up against him. He kissed her on the cheek and the lips. She responded to the kissing. Next, he fondled her breasts and moved his hand from that area towards her vaginal area.

[16] The complainant's apparent receptiveness encouraged him to remove his underwear and continue kissing her in the spooning position. Then he began to move her shorts downwards. She helped him move them from her underside by raising her hips slightly. He moved her pants to about halfway down her legs. He tried to penetrate the complainant's vagina with his penis while lying on his right side in the spooning position. He was unsuccessful in that endeavour. He moved onto his knees and from that position was able to gain entry. He described the sexual intercourse which followed as lasting about 2 minutes and consisting of him thrusting into her with what he thought was "normal" vigour, and she thrusting back.

[17] According to the appellant, he tried to resume kissing the complainant as he had before, but then a "strange reaction" occurred on her part. She immediately stopped her movements and began to tell him to get off her. He did. She grabbed her phone and started yelling at him. He put his underwear on and ran out of the room. In cross-examination, the appellant accepted, as he had in his interview with the police, that it was possible that the complainant had been asleep up until her "strange reaction" happened.[8]

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6 In cross-examination, the appellant accepted that once he walked into the bedroom, he realised the complainant was asleep: AB364; Tr3-73 l39.

7 AB344; Tr3-53 l35 – AB347; Tr3-56 l47.

8 AB378; Tr4-8 l43. On several occasions during the police interview, the appellant referred to the complainant as having woken up after he tried to resume kissing her: AB785, page 10; AB786 page 11; AB788 page 13.

The history of the matter

[18] The appellant's matter was listed for trial before a judge of the District Court to begin on 7 April 2014. However, it proceeded on that date as an application under s 590AA of the *Criminal Code* (Qld) for directions. One of the directions sought by the appellant was for the exclusion of "any evidence that touches on the question of (the appellant's) having had sexual intercourse" with the complainant's flat mate that evening. Evidence to that effect was contained in a number of sources, namely, the signed statement of the flat mate given to police,[9] the recorded conversation between the appellant and police at the unit, and DNA evidence. The judge who heard the application ruled on it that morning. He excluded evidence "relating to consensual sexual intercourse that took place" between the appellant and the flat mate.[10] The judge stated that the evidence was excluded because he thought that it did not have any probative value for the rape count but that, in any event, its prejudicial nature outweighed what probative value it might have had.[11]

[19] The matter went to trial on 11 August 2014. Evidence in that trial was heard over three days. The appellant testified in his defence. The jury were unable to reach a verdict and were discharged.

[20] On 27 October 2014, the Crown filed an application pursuant to s 590AA(3) of the *Code* for leave to re-open the pre-trial ruling to which I have referred. Argument on the application was heard on 18 November 2014. Orders granting the application and ruling that the excluded evidence was admissible together with reasons were published on 28 November 2014.[12]

[21] The judge who decided the Crown's application was the same judge who was to preside over the appellant's trial listed to commence on 9 January 2015. On 15 January 2015, his Honour heard an application filed on behalf of the appellant on 17 December 2014 to re-open the ruling that he had made on 28 November 2014. His Honour ruled against that application on the day that it was heard.[13] The appellant's trial commenced four days later on the scheduled date.

The consent issue at trial

[22] The appellant accepted at trial that he had had carnal knowledge with the complainant when he penetrated her vagina with his penis. At one level, his evidence was apt to put into dispute the complainant's evidence that the carnal knowledge was without her consent, thereby challenging proof of the consent element of the offence of rape for which s 349(1) of the *Code* provides.

[23] At another level, his evidence put in play s 24 of the *Code* which limits criminal responsibility for an act where it is done under an honest and reasonable, but mistaken, belief in the existence of a state of things, to the responsibility that would have prevailed if the state of things had, in reality, been that which was believed to exist. The provision was triggered by the conduct of the appellant's case, including

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9 Specifically, the exclusion from the second sentence in paragraph 26 to the end of paragraph 31 in the signed statement was sought: AB528; AB773-774.

10 The excluded evidence was later identified as being the evidence which the appellant had sought to have excluded: AB54; Tr1-36 ll22-24.

11 AB53; Tr1-35 ll24-31.

12 *R v Simmons* [2014] QDC 303.

13 AB115.

cross-examination and the testimony he gave, directed towards establishing that he honestly and reasonably believed that the complainant was consenting to the carnal knowledge, whether, in fact, she was doing so or not. The onus was then on the prosecution to negative such a belief on his part.[14]

The grounds of appeal

[24] The notice of appeal filed by the appellant lists six grounds of appeal against conviction. At the commencement of the hearing of the appeal, counsel for the appellant who was the counsel who appeared before him at trial, confirmed that Grounds 1 and 3 were abandoned.[15] The live grounds of appeal are:

> "…
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> 2. On 28 November 2014, Rafter DCJ erred in:
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> 2.1. Granting leave to the Crown under s 590AA(3) of the *Criminal Code*, to reopen the pre-trial ruling made by Horneman-Wren DCJ on 7 April 2014, that the evidence relating to the appellant having had sexual intercourse with the (flat mate) ('the (flat mate's) evidence') ought to be excluded from the appellant's trial.
>
> 2.2. Ruling that the (flat mate's) evidence was admissible and ought not be excluded. The evidence was not relevant and did not contain sufficient probity to outweigh the significant prejudice caused by it.
>
> …
>
> 4 On 23 January 2015, Rafter DCJ erred in failing to direct the jury as to the use that could be made of the first preliminary complaint to Beacroft.
>
> 5 On 27 January 2015, Rafter DCJ erred in the redirections given on s 24 of the *Criminal Code*. His Honour failed to direct the jury that the reasonable grounds for the appellant's belief must be assessed in his particular circumstances, that is, in the circumstances as he perceived them to be.
>
> 6. The conviction is unreasonable."[16]

[25] In oral submissions, counsel for the appellant addressed Grounds 5 and 2 in detail. It is convenient to consider them first and in that order.

Ground 5

[26] This ground challenges the sufficiency of redirections given by the learned trial judge to the jury on 27 January 2015 concerning the element of reasonable belief in s 24. In *R v Mrzljak*,[17] Holmes J observed that "this section directs attention to the actual belief of the accused in contrast to 'the reasonable man's putative belief'." Her Honour said:

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14 *Loveday v Ayre and Ayre* [1955] St R Qd 264 per Philp J at 267, 268; *Brimblecombe v Duncan* [1958] St R Qd 8 per Philp J at 14 (Matthews and Stanley JJ agreeing).

15 Tr1-2 ll18-19.

16 AB933.

17 [2005] 1 Qd R 308 at [81].

> "What must be considered, in my view, is the reasonableness of an accused's belief based on the circumstances as he perceived them to be".[18]

[27] Central to this ground of appeal is the contention that the redirections challenged failed to direct the jury that the relevant frame of reference for assessing the reasonableness of the appellant's asserted belief that the complainant consented to the sexual intercourse, were the facts as he perceived them to be. The insufficiency in the redirections in this respect constituted a miscarriage of justice.

[28] Analysis of this ground of appeal requires consideration of the directions given to the jury on the topic of reasonable belief including, of course, the redirections challenged and the context in which they were both sought and given. In the course of summing up, the learned trial judge gave the following direction concerning Count 1:

> "However, members of the jury, if you are satisfied beyond reasonable doubt that the complainant did not consent to what was done in the incident the subject of count 1, there is another matter to be considered. The law states that a person who does 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 to any greater extent than if the real state of things has been **such as the person believed to exist**. In the context of this case that means that you must consider even though the complainant wasn't consenting, if that is the conclusion you reach, did the defendant in the circumstances honestly and reasonably believe that the complainant was consenting? 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. In this regard a person's intoxication may be relevant to whether the belief was honestly held. To be reasonable, the belief must be **one held by the defendant in his particular circumstances, on reasonable grounds**. …"[19] (emphasis supplied)

[29] Turning to Count 2, his Honour said:

> "As I have already explained in dealing with count 1, if you are satisfied beyond reasonable doubt that the complainant did not consent, then you must consider whether the defendant had an honest but mistaken belief as to consent. The law states that a person who does an act under an honest and reasonable but mistaken belief in the existence of any state of facts 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**. As I have already explained in the context of this case, this means that you must consider, even though the complainant was not consenting, if that's the conclusion you reach, did the defendant in the circumstances honestly and reasonably believe that the complainant was consenting?"[20] (emphasis supplied)

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18 Her Honour regarded this formulation as consistent with the observation of Burt CJ in *GJ Coles & Co Ltd v Goldsworthy* [1985] WAR 183 at 187-8 that for the analogous provision in the Western Australian Criminal Code, a reasonable belief is one "that must be based on (the accused's) appreciation of primary objective fact which is in reason capable of sustaining the belief".

19 AB420; page 8 ll11-26.

20 AB424; page 12 ll8-17.

No objection is taken by the appellant to either of these directions.

[30] The learned trial judge next turned to the evidence and observed:

> "The defendant's evidence includes the facts that the complainant's bodily movements and so forth was such as to engender in him a belief that she was fully understanding of what was happening and was fully aware of consensual sex. That is the effect of the evidence that he gave when he was giving his evidence-in-chief."[21]

His Honour summarised the evidence in relation to Count 2 and the respective submissions of defence counsel and the prosecutor concerning the count.

[31] These directions were given during the morning of Friday, 23 January 2015.[22] The jury retired to consider their verdicts at about 10.40 am. During the afternoon, the jury sent a note enquiring whether events leading up to penetration could be taken into account in considering honest and reasonable, but mistaken belief. After discussion with counsel, his Honour answered the enquiry by a redirection to which no objection is taken.

[32] The jury retired a little after 9 pm that evening. They resumed their deliberations on Tuesday, 27 January 2015, after the Australia Day holiday. A further note enquired whether the jury could be given a copy of the learned trial judge's "instructions". His Honour told the jury that a request for a copy of the entire summing up could not be accommodated. Further enquiry of the jury established that they were concerned to hear again the directions with respect to honest and reasonable belief as it related to Count 2.

[33] In response to that enquiry, the learned trial judge summarised his directions on the element of the offence of rape. Moving to s 24, his Honour said:

> "In the event that you are satisfied beyond reasonable doubt that the complainant did not consent to sexual intercourse, then the mistake issue must be considered. The law provides that a person who does 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 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 that you must consider even though the complainant wasn't consenting – if that's the conclusion you reach – did the defendant in the circumstances honestly and reasonably believe that the complainant was consenting."[23] (emphasis supplied)

Continuing, his Honour added:

> " … To be reasonable, the belief must be one **held by the defendant on reasonable grounds**. As I explained, intoxication has no relevance to whether the belief was one – was reasonable. So to repeat, to be reasonable, the belief must be one **held by the defendant on reasonable grounds**. …"[24] (emphasis supplied)

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21 *Ibid*, ll19-22.

22 The court having reconvened at 9.38 am that day.

23 Transcript page 6 ll30-44.

24 Transcript page 6 ll45-49.

[34] The learned trial judge then dealt with some evidential matters. A juror asked a question as to whether the judge's reference to sexual intercourse was a reference to penetration only or to foreplay as well. He answered as follows:

> "All right. The act in support of the rape count is the intercourse. So the relevant time is the time of penetration, however, of course, you can have regard to the lead up and, of course, it is the defendant's case that **all of the body movements that he said the complainant displayed were relevant to his belief**. So, of course, you can have regard to that lead up in deciding the question that arises."[25] (emphasis supplied)

[35] A juror then sought clarification "around the reasonableness of an honest belief around the jury representing the public at large." His Honour responded:

> "Yes. Honesty is what's in the defendant's mind. Was his belief an honest one? When you come to consider whether the mistaken belief – if you believe there was a mistaken belief – was a reasonable one then, as I said, to be reasonable the belief must be one **held by him on reasonable grounds**. So to go back to that other question, it must have been honestly held by the defendant, but to be reasonable it must be one **held by him, but on reasonable grounds** and that's why the intoxication is not relevant to whether it's a reasonable belief. So there must be reasonable grounds for the mistaken belief."[26] (emphasis supplied)

[36] At that point, a juror asked a question which, though indistinct on the recording, appears to have asked the learned trial judge if there were reasonable grounds "given the evidence or given the general …". Before asking the jury to retire, his Honour said:

> "… But to go back to something that I said before that may not have been entirely right, in deciding whether a mistaken belief is reasonable **you are not deciding whether a hypothetical reasonable person would have held the belief.** The focus is on the reasonableness of the defendant's belief. So I've said that the belief must be an honest belief, it must, of course, be a mistaken belief but a mere mistake is not enough. The mistaken belief in consent must have been both honest and reasonable. As I have explained, an honest belief is one which is genuinely held by the defendant. As to reasonableness, to be reasonable the belief must be one **held by the defendant in the circumstances on reasonable grounds**. …"[27] (emphasis supplied)

[37] After some discussion with the prosecutor and defence counsel's instructing solicitor[28] had taken place and the jury had returned, the learned trial judge said:

> "Thank you. Members of the jury, there's not much that I can add to what I said before. But I did want to just emphasise that in examining

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25 Transcript page 7 ll38-42.

26 Transcript page 7 l46 – page 8 l4.

27 Transcript page 8 ll24-32.

28 In the course of discussions, his Honour referred to the statement of Holmes J in *Mrzljak* to which I have referred and also to the observations of McMurdo P at [21] in that case, that what s 24 requires is a consideration of whether there were reasonable grounds for the belief, not what a reasonable person would have believed.

> this question of reasonableness, you are not looking at the view of a hypothetical reasonable person, nor are you looking at the view of the general public or the public at large, or anything of that nature.
>
> As I have tried to emphasise, to be reasonable, the belief must be one **held by the defendant, in all of the circumstances of the case as you find them to be, on reasonable grounds**. All right. So does that assist? I know I've said that a couple of times."[29] (emphasis supplied)

[38] The jury retired at 11.17 am. They sent a note which sought clarification that for a defence under s 24, the belief must be both honest and reasonable. The jury returned at 2.02 pm. the learned trial judge gave an explanation to the jury which included that if they decided that the appellant's belief was not held on reasonable grounds, the defence would not be applicable.[30] No further redirection was sought. The jury retired and returned with the verdicts at 2.29 pm.

[39] Did the redirections on 27 January 2015 fail to direct that the reasonableness of the appellant's belief must be assessed in his particular circumstances, that is, in the circumstances as he perceived them to be? I have concluded that the answer to that question is in the negative for the following reasons.

[40] The jury had been given directions on 23 January 2015 which unambiguously identified the relevant frame of reference for assessment of reasonableness as to belief as being the state of things that the appellant believed existed. The redirections did not depart from this. They affirmed the frame of reference with the expression "if the real state of things had been such as the person believed to exist", the explanation that all of the body movements described by the appellant were relevant to his belief and the contrast with a hypothetical reasonable person. Against that background, his Honour's references to the belief as "one held by the defendant on reasonable grounds" would have been understood by the jury to mean a belief which was reasonable by reference to the state of affairs as the appellant understood them to be.

[41] It was correct for his Honour to remind the jury that it was for them to find what the appellant's perception of the state of affairs in which he participated was; and from the perception as found, to assess whether the appellant's belief was reasonable or not.[31] In making the finding they were not obliged to accept, to the letter, the appellant's account of events after he entered the complainant's bedroom for the second time and until her "strange reaction" notwithstanding that it was the only account given of events during that time. They were entitled to have regard to their assessment of the credibility of his account.

[42] That one or some of the jurors may have concluded that the appellant's belief that the complainant consented to the sexual intercourse was honest, would not imply that they had accepted his account to the letter. Moreover, it was rationally open to such a juror or jurors to conclude that, in the state of affairs as they found the appellant to have perceived them to have been, his belief was not reasonable. To have arrived at both conclusions would not bespeak a misunderstanding on their part as to how s 24 was to be applied.

[43] For these reasons, the appellant has not, in my view, established the miscarriage of justice for which this ground of appeal contends.

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29 Transcript page 15 ll18-26.

30 Transcript page 17 ll1-3.

31 *R v Wilson* [2008] QCA 349; [2009] 1 Qd R 476 per Fraser JA at [47]-[50].

Ground 2

[44] In his reasons published on 28 November 2014, the learned trial judge concluded that the excluded evidence was relevant and admissible as forming part of the narrative of events.[32] Stating that it was "an essential part of the narrative", his Honour added that the fact that the appellant did not ejaculate during intercourse with the complainant may have explained why he was seeking further sexual gratification.[33] He did not consider that the evidence should be excluded on discretionary grounds as he regarded the danger of jury misuse of it as slight given that the flat mate was flirtatious towards the appellant; that the appellant left his friends and accompanied the two women to their unit; and that the sexual intercourse with the flat mate was consensual.

[45] *Per force* of s 590AA(3), the direction to exclude made on 7 April 2014 was binding unless the trial judge, for special reason, gave leave to re-open it[34]. In his Honour's view, the conduct of the appellant's first trial[35] exposed difficulties and a limitation stemming from the ruling. The avoidance of such difficulties and limitation on the re-trial constituted a special reason for giving leave.[36]

[46] The learned trial judge explained the difficulties and limitation as he perceived them to be and illustrated them by reference to the transcript and exhibits at the first trial. This was done in the following passage from his Honour's reasons in which the flat mate is referred to as "Ms B" and the complainant as "Ms A":

> "[22] At the trial the parties seemed to assume that the exclusion of the evidence of sexual intercourse between the defendant and Ms B meant that no reference could be made to the defendant having been in her bedroom at all. This led to a distortion of the evidence.
>
> [23] For instance, when the defendant gave evidence he said that upon arrival at the unit Ms B went straight to the bathroom. He said that Ms A went to her bedroom. He said that he sat in the lounge room. He said he was not in the lounge room for very long. He was then asked:
>
> 'Can you be a bit more precise as to what you mean by 'not very long'? --- Approximately two minutes
>
> What did you do then? --- I then walked up the hallway to (Ms A's) room.'
>
> [24] That was an incorrect description of what had occurred because the defendant had gone from the lounge to Ms B's bedroom before going to Ms A's bedroom.
>
> [25] The ruling made by Judge Horneman-Wren SC did not justify the defendant reconstructing his movements within the unit. Mr Boe accepted that he had been responsible for the way in which the evidence was led, which was undoubtedly intended to avoid any reference to the evidence that had been ruled

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32 At [39].

33 At [37].

34 *R v Sheehy* [2003] QCA 420 per Williams JA at [5], Muir J at [39], Holmes J not deciding; *R v Dunning ex-parte Attorney-General* [2007] QCA 176 per Williams JA at [22] (McMurdo P and Fryberg J agreeing).

35 The trial which commenced on 11 August 2014.

36 At [31].

inadmissible. Nevertheless this point illustrates the difficulties that arose in the presentation of the case.

[26] Another issue that arose related to the removal of the defendant's clothing. In his evidence-in-chief the defendant said that when he entered Ms A's bedroom he was wearing only his underwear. Mr Boe then asked "so had you disrobed in the living room?". The defendant replied "Yes".

[27] The defendant's evidence conveyed the impression that he had removed his clothing in the lounge room and then gone to Ms A's bedroom. However when spoken to by the police the following exchange occurred:

'Police Officer: So when you jumped into the bed (with Ms A) did you have to take your clothes off ?

Defendant: I've jumped, well I was in my undies already.

Police Officer: Oh

Defendant: Because I, I put my undies on after being with the other girl.'

[28] The defendant's answer 'because I, I put my undies on after being with the other girl.' was edited from the recording tendered at the trial.

[29] There is an apparent conflict between what the defendant told the police about getting changed after sexual intercourse with Ms B and her evidence. Ms B said that the defendant "put his clothes on in my room before leaving".

[30] These features do not of themselves justify re-opening the ruling made on 7 April 2014; the defence may be conducted differently at the next trial. However these factors do serve to highlight some difficulties that arose from the ruling. In my view the defence erroneously believed that the ruling justified the defendant's evidence being tailored.

[31] Moreover the ruling apparently limited the Crown's ability to test aspects of the defendant's version of events relating to his movements within the unit and the removal of his clothing. The Crown could have applied to the trial judge for leave to re-open the ruling pursuant to s 590AA(3) *Criminal Code*. The conduct of the trial has exposed difficulties stemming from the ruling which in my view justify leave being granted to re-open it."[37] (footnotes omitted)

[47] The appellant challenges the conclusions reached by his Honour as to the admissibility of the excluded evidence and also his view that special circumstances existed to justify the re-opening. I propose to consider the admissibility aspect first because unless the evidence is admissible, the re-opening sought would have been futile.

[48] In *HML v The Queen*,[38] Gleeson CJ observed:

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37 AB587-589.

38 [2008] HCA 16; (2008) 235 CLR 334 at [5].

> "The basic principle of admissibility of evidence is that, unless there is some good reason for not receiving it, evidence that is relevant is admissible. Evidence that is not relevant is inadmissible; there is then no occasion to consider any more particular rule of exclusion. Reasons for not receiving relevant evidence may relate to its content, or to the form or circumstances in which it is tendered. Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings. That directs attention, in a criminal case, to the elements of the offence charged, the particulars of those elements, and any circumstances which bear upon the assessment of probability." (footnotes omitted)

[49] Here, mistaken belief as to the complainant's consent was clearly the live issue at trial. The jury were required to consider whether the prosecution had negatived an honest and reasonable belief as to consent. The events which occurred over the relatively short time in which the appellant interacted with both the complainant and her flat mate that evening were relevant to the jury's findings as to both honesty of the belief and the state of affairs as perceived by him on which they were to assess the reasonableness of the belief.

[50] Evidence of the sequence and interrelationships of all the significant events that occurred that evening was, to adopt the touchstone described in *O'Leary v The King*,[39] and *R v Goulden*[40] required to in order make them intelligible. To have omitted the excluded events would have given a distorted narrative of what occurred. The jury would have been left with the impression that whilst the flat mate had invited the appellant home with an apparent intention of having sex with him, after a period of time at the unit, he went and had sexual interaction, culminating in sexual intercourse with the flat mate's friend, without having anything further by way of sexual interaction with the flat mate. The excluded evidence was necessary to avoid such a distortion. It was relevant and *prima facie* admissible.

[51] As to prejudice, the appellant's counsel submits that the jury might have gained the impression that the appellant was a Lothario who had unprotected sex with two women on the one night.[41] The unprotected sex in the case of the flat mate was consensual on all accounts of it. In summing up, the learned trial judge gave a direction which was, in my view, adequate to minimise any prejudicial aspect to the impression. His Honour said:

> "In this case, members of the jury, the Crown led evidence of consensual sexual intercourse between the defendant and (the flat mate). I emphasise that that evidence has been placed before you as simply forming part of the narrative of events. You should not draw any adverse inference against the defendant simply because he had consensual sexual intercourse with (the flat mate)."[42]

[52] As Gleeson CJ explained in *Festa v The Queen*,[43] the requirement for exclusion is unfair prejudice. His Honour observed:

> "But prejudice does not arise simply from the tendency of admissible evidence to inculpate an accused. It is unfair prejudice that is in question.

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39 (1946) 73 CLR 566 per Dixon J at 577-578.
40 [1993] 2 Qd R 534 per Thomas J at 538 (Mackenzie and Byrne JJ agreeing).
41 Transcript 1-17 ll37-40.
42 AB418 ll14-18.
43 [2001] HCA 72; (2001) 208 CLR 593 at [22] (Hayne J agreeing).

> Where evidence is relevant and of some probative value, prejudice might arise because of a danger that a jury may use the evidence in some manner that goes beyond the probative value it may properly be given. If there is relevant prejudice of that kind, it lies in the risk of improper use of the evidence, not in the exculpatory consequences of its proper use. If it were otherwise, probative value would itself be prejudice. All admissible evidence which supports a prosecution case is prejudicial to an accused in a colloquial sense; but that is not the sense in which the term is used in the context of admissibility."[44] (footnote omitted)

[53] The evidence in question here was relevant. It was not of little or no significance. The prejudice in it of which the appellant complains was capable of being addressed by direction. In these circumstances, there was no unfair prejudice in the admission of the evidence and no reason to exclude it on that basis.

[54] Special reason for the purposes of s 590AA(3) falls to be determined in the circumstance of each case. Where a s 590AA(3) application is made before a retrial, the continuing correctness of the direction is to be considered in light of what transpired at the first trial.[45] Relevantly, in *Dunning*, Williams JA observed:

> "It would be contrary to all notions of justice and fairness to say that a pre-trial ruling remained binding even though in the light of circumstances which emerged during the first trial doubts were raised as to the correctness of the ruling."[46]

[55] It was correct for the learned trial judge to have regard to what happened at the first trial in considering the application before him. Further, in my view, his Honour correctly identified difficulties and a limitation which had manifested themselves during the first trial and which arose from the directed exclusion. Moreover, these difficulties and limitation rather graphically illustrated error on the part of the judge who had excluded the evidence in regarding that evidence as not having any probative value for the rape count. As I have sought to explain, the evidence was relevant to that count. It did have probative value. The error was one that warranted correction. Thus, his Honour's conclusion that a special reason existed which justified a re-opening of the direction, was not only open to him, but was also correct.

[56] At the hearing of the appeal, counsel for the appellant pressed that his Honour should have deferred ruling on the application to re-open until it was known whether the defendant was to testify at the trial. I am unpersuaded that that course was necessary. It may be accepted that when the learned trial judge re-opened the direction, it was unknown whether the appellant would testify or not. However, it was clear from the first trial that the cross-examination of the prosecution witnesses would be directed at impeding the prosecution's endeavour to negative honest and reasonable belief as to consent. It was appropriate for his Honour to rule on the application when he did because it bore directly upon the ambit of the evidence that the prosecution could lead in putting before the jury the narrative of all events relevant to that belief.

[57] Accordingly, I consider that this ground of appeal is not made out.

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44 *Ibid*.

45 *R v Dunning ex-parte Attorney-General* [2007] QCA 176 per Williams JA at [23] (McMurdo P and Fryberg J agreeing).

46 *Ibid*.

Ground 4

[58] The learned trial judge gave a standard direction with respect to preliminary complaint evidence, informing the jury that such evidence could be used only in relation to the complainant's credibility.[47] His Honour noted that consistency between the accounts of the preliminary complaint witnesses and the complainant's evidence at trial was something that they could take into account as possibly enhancing the likelihood that her evidence was true.

[59] His Honour identified the two phone calls that she had made to her boyfriend as preliminary complaint evidence. He did not, however, instruct that the first phone call could have been preliminary complaint evidence in respect of Count 1 only. The omission to tell the jury that it was not to be employed with respect to Count 2, the appellant submits, gave rise to prejudice in that the jury "could easily" have impermissibly used that call to support the rape count.

[60] How the jury might have so used the first call is not apparent. They had been instructed that the preliminary complaint evidence went only to the complainant's credibility. Evidently, the appellant's conduct of which the complainant spoke in the first phone call, took place before the alleged rape. No issue of consistency between the complainant's account of that conduct and her evidence as to the alleged rape, arose. There was no logical basis for the jury to have used the content of that call to assess the credibility of the complainant's evidence of rape.

[61] Having regard to these considerations, I am quite unpersuaded that the criticism on which this ground of appeal is based, occasioned a miscarriage of justice.

Ground 6

[62] This ground of appeal was not addressed in oral submissions. The matter is dealt with relatively briefly in the appellant's written submissions. The appellant contends that as the appellant's account of what occurred between his entry into the complainant's bedroom for the second time and her "strange reaction" was the only version of events during that period, and was uncontradicted, "it was not reasonable for a jury to reject the appellant's evidence on those events beyond reasonable doubt".[48]

[63] This contention is flawed both in law and in logic. It was, of course, open to the jury to decide whether they accepted all of the appellant's evidence, or some only of it, or none of it, based on their assessment of its credibility. It was not at all the case that the only reasonable course open to them was to accept the evidence as given by the appellant.

[64] The verdict on Court 2 will have been unreasonable if it was not open to the jury to have been satisfied of the appellant's guilt beyond reasonable doubt, acting as a reasonable jury and reaching their verdict on the whole of the evidence.[49] An independent assessment of the evidence by this Court is required.[50]

[65] There was evidence on trial on which it was open to the jury to find:

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47 AB418 ll20 – AB419 l2.

48 Written submissions paragraph 56.

49 *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 493; *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606 per McHugh, Gummow and Kirby JJ at 623-624.

50 *M* at 492.

(i) the majority of the interaction at the hotel was between the appellant and the complainant's flat mate;

(ii) the interaction evidenced a sexual attraction between them;

(iii) the flat mate invited the appellant back to the unit;

(iv) the appellant and the flat mate interacted with one another in the taxi on the trip home;

(v) the appellant's interest moved to the complainant after the flat mate had been ill;

(vi) the complainant had discouraged his advances in her bedroom and in the kitchen while her flat mate was in the shower;

(vii) the complainant had shown no interest in engaging in sexual activity with the appellant;

(viii) the appellant indicated that he was going to sleep on the couch;

(ix) the complainant had gone to bed and fallen asleep while talking to her boyfriend on the phone;

(x) the appellant had engaged in consensual sexual intercourse with the flat mate after the complainant had gone to bed;

(xi) the appellant was unsatisfied by the act of sexual intercourse with the flat mate;

(xii) the appellant, wearing only his underwear, entered the complainant's room uninvited;

(xiii) the complainant was unaware of the appellant's presence until after the act of penetration had occurred;

(xiv) once she became aware of the penetration, the complainant immediately reacted and told the appellant to leave.

[66] Significantly, it was open to the jury to reject all or some of the appellant's account of what occurred up until the act of penetration. They could then conclude, based upon the prosecution case, that even if the appellant held an honest belief as to consent, it was not a reasonable belief based on the state of affairs as perceived by the appellant, as the jury found them to be. It was reasonable for the jury then to have been satisfied beyond a reasonable doubt that the defence of honest and reasonable belief was excluded.

[67] In these circumstances, the verdict cannot be said to be unreasonable. This ground of appeal cannot succeed.

Disposition of the appeal against conviction

[68] As none of the grounds of appeal have succeeded, the appeal against conviction must be dismissed.

Sentence application

[69] There are two grounds stated in the document filed on 25 February 2015 on which the proposed appeal against sentence is based. They are that the learned trial judge erred in the determination of the material facts for sentence and that he erred in declining to make an order for suspension under s 144(1) of the *Penalties and Sentences Act* 1992 (Qld).

[70] The application was not addressed in oral submissions but was nevertheless pressed.[51] The appellant's written submissions focus upon his Honour's refusal to order suspension of the sentence after the appellant has served one half of it, rather than eligibility for parole after that time. The submission ventures that, in consequence, the sentence is manifestly excessive, hinting at a third ground of appeal.

[71] In favour of the application, it was submitted that the appellant had not previously been given the benefit of a suspended term and that he had no prior criminal history. He was not in need of supervision post-release from prison and certainty in his release date would only enhance his prospects of rehabilitation.[52] No material facts were identified as having been erroneously determined.

[72] In his sentencing remarks, his Honour stated that the mitigating factors were taken into account in determining the duration of the sentence of imprisonment of five years.[53] He had identified them as the absence of previous convictions and the fact that the appellant's sporting and tertiary achievements together with the support of his family and close friends indicated good prospects of rehabilitation.[54]

[73] It was open to his Honour to allow for the mitigating factors in that way. The proposed grounds of appeal do not assert error in doing so; nor do they assert that the sentence of five years, as a sentence which allowed for the mitigating factors, was manifestly excessive.

[74] His Honour expressly stated that having taken the mitigating factors into account in determining the length of the sentence, he did not intend to suspend it partially or to fix an early parole eligibility date. It was evidently not only open to his Honour to take that course, but also appropriate for him to take it. There was no justification for allowing for the mitigating factors twice.

[75] The proposed appeal against sentence has negligible prospects of success. The application for leave to appeal against sentence must therefore be refused.

Orders

[76] I would propose the following orders:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[77] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Gotterson JA. I agree that the appeal against conviction should be dismissed, and the application for leave to appeal against sentence refused, for those reasons.

[78] **DOUGLAS J:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

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51 Transcript 1-20 ll18-20.
52 Written submissions paragraph 60.
53 AB526; Sentence page 5 ll36-39.
54 *Ibid*, ll19-22.