

DISTRICT COURT OF QUEENSLAND

CITATION: *R v MMH* [2020] QDC 70

PARTIES: **The Queen**

v

MMH

FILE NO/S: 1795/2019

DIVISION: Criminal

PROCEEDING: Trial

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 29 April 2020

DELIVERED AT: Brisbane

HEARING DATE: 27 and 28 April 2020

JUDGE: Smith DCJA

ORDER: **I find the defendant not guilty.**

CATCHWORDS: CRIMINAL LAW – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – CONSENT – GENERALLY – whether the defendant is guilty or not guilty of rape – whether absence of consent proved beyond reasonable doubt

Criminal Code 1899 (Qld) ss 1, 348, 349, 615B, 615C
Evidence Act 1977 (Qld) ss 21AK, 21AW, 93A
Butera v DPP (1987) 164 CLR 180; [1987] HCA 58, applied
Fleming v R (1998) 197 CLR 250; [1998] HCA 68, applied
Nguyen v R [2012] ACTCA 24; (2012) 267 FLR 334, cited
Robinson v R (1999) 197 CLR 162; [1999] HCA 42, applied
R v Armstrong [2006] QCA 158, applied
R v Coss [2016] QCA 44, applied
R v E (1995) 89 A Crim R 325, applied
R v LSS [2000] 1 Qd R 546; [1998] QCA 303, applied
R v Mulcahy [2010] ACTSC 98, cited
R v RH [2005] 1 Qd R 180; [2005] QCA, applied
R v Rutherford [2004] QCA 481, applied

COUNSEL: Ms C Ahern for the crown

Mr M Bonasia for the defence

SOLICITORS: Office of the Director of Public Prosecutions for the crown

McMillan Criminal Lawyers for the defence

Introduction

- [1] This is a judge only trial.
- [2] The defendant is charged with the following count:
 “That on or about 16th day of December 2018, at Kuraby in the state of Queensland, the defendant raped SJ.”
- [3] The defendant has pleaded not guilty to the charge and it is my role to determine on the evidence whether the defendant is guilty or not guilty.
- [4] The offence of rape is set out in section 349 of the *Criminal Code*. The elements of the offence are carnal knowledge¹ without consent.
- [5] Consent is defined in section 348 of the *Criminal Code* as:

“ 348 Meaning of consent

- (1) In this chapter, **consent** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
- (2) Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained—
 - (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.”
- [6] The only issue in dispute in the trial is whether the complainant consented to sexual intercourse.

Principles to be applied

- [7] In a judge only trial, the judge must apply, so far as practicable, the same principles of law and procedure as would be applied in a trial before a jury.² Further, if an act or the common law requires a warning or instruction to be given to the jury or prohibits a warning being given to the jury, the judge must take into account the requirement or prohibition if the circumstances arise in the course of the trial.³
- [8] The judgment of the judge in a trial by a judge sitting without a jury, must include the principles of law that he or she has applied and the findings of fact on which he or she has relied.⁴
- [9] This section is in accordance with *Fleming v R*,⁵ where the High Court noted that a judge is required to explain the reasoning process linking those matters so as to

¹ Defined in section 1 of the *Criminal Code*.

² Section 615B(1) of the *Criminal Code*.

³ Section 615B(3) of the *Criminal Code*.

⁴ Section 615C(3) of the *Criminal Code*.

⁵ (1998) 197 CLR 250 at [28].

justify the verdict in which the judge comes. Also, it was noted at [33] that any warnings which must be given must be recorded, heeded and taken into account.

[10] In *R v Mulcahy*,⁶ Nield AJ set out the directions and considerations which should be given at a judge alone trial. I note the following from the judgment:

- A criminal trial is governed by rules. The fundamental rules are designed to ensure that an accused person receives a fair trial according to law. The fundamental rules that govern a criminal trial are these.
- The [prosecution] bears the onus to prove the guilt of the accused. The [prosecution] has asserted that the accused has committed a criminal offence, therefore the [prosecution] must prove that the accused committed that offence. The accused does not have to prove that he did not commit that offence.
- The level or standard of proof required in a criminal trial is proof beyond reasonable doubt. The accused cannot be found to be guilty of the offence unless the evidence, which I accept, satisfies me beyond reasonable doubt of his/her guilt.
- The accused is presumed by law to be innocent of the offence with which he or she stands charged unless and until the evidence which I accept satisfies me beyond reasonable doubt of his/her guilt.
- If the evidence which I accept satisfies me beyond reasonable doubt of his/her guilt, then he/she loses the presumption of innocence and the appropriate verdict is guilty. If, however, the evidence which I accept fails to satisfy me beyond reasonable doubt of his/her guilt, then he/she remains presumed to be innocent and the appropriate verdict is not guilty.
- In addition to the fundamental rules which govern a criminal trial, the following rules have been developed.
- As I am the judge of the facts, as well as the judge of the law, I must bring an open and unbiased mind to the evidentiary material. I must view that material coldly, clinically and dispassionately, and I must not let emotion enter into the decision-making process, because both the [prosecution] and the accused are entitled to my verdict free of partiality or prejudice, favour or ill will.
- I must determine whether each of the witnesses is a reliable witness. That is, whether the witness has an accurate memory of the event about which the witness has given evidence. I must determine the relevant facts according to the evidentiary material, considered logically and rationally, without acting capriciously or irrationally.
- I may use my common sense, my individual experience and wisdom, in assessing the evidence given by the witnesses.
- I am not required by any rule of law, logic or common sense to accept a witness wholly or reject a witness wholly. I can accept everything that a witness has said if I consider all of it worthy of acceptance, or I can reject everything that a witness has said if I consider none of it worthy of acceptance, or I can accept that part of what a witness said that I consider worthy of acceptance and reject the rest of what the witness has said if I consider it unworthy of acceptance.

⁶ [2010] ACTSC 98 at [13]-[24]. Applied in *Nguyen v R* [2012] ACTCA 24; (2012) 267 FLR 334.

- In a criminal trial the [prosecution] must prove the essential elements of the charge beyond reasonable doubt. The [prosecution] does not have to prove everything about which evidence has been given beyond reasonable doubt.⁷

- [11] As regards to the preliminary complaint evidence lead in this case, I specifically record that is not evidence of the fact that the alleged rape took place.⁸ The evidence may support or attenuate the credit of the complainant depending on whether it is consistent or inconsistent.⁹
- [12] There was also evidence given that the complainant was emotional when she made the complaint. This is lead as part of the narrative only. There may be other explanations as to why the complainant was upset at that time.¹⁰

Complainant's evidence

- [13] The complainant gave evidence by way of two section 93A *Evidence Act* interviews and by way of a section 21AK *Evidence Act* prerecording. I also note that the court was closed during the taking of the 21AK evidence and during the playing of the s93A statement and the 21AK recording, and there was a support person present during the pre-recording.
- [14] I specifically record that the measures for the taking of her evidence are a routine practice of the court and the court should not draw any inference as to the defendant's guilt from those measures. The probative value of the evidence is not increased or decreased because these measures were used and the evidence is not to be given any greater or lesser weight because of these measures.¹¹
- [15] My reference to the transcripts is for ready reference. I am aware of course that the actual evidence is contained in the recording and the transcripts are an aid to my understanding of the recording.¹²

First 93A statement

- [16] The complainant was 16 years old at the time of the first s93A of the *Evidence Act* first dated 19 December 2018.
- [17] She said that she was picked up by the defendant and taken to a house.¹³ She said that Vodka and Sprite was consumed. They drank and she blacked out for most of the night and she couldn't remember most of the things that happened, only a couple of things. She woke up at one point and the defendant and his friend were walking out of the room.
- [18] She woke up in the morning and went home with her back sore, her throat sore and a big carpet burn on her back. She saw her ex-boyfriend and told him what happened. She didn't really realise what happened and he said that she had been raped and it sort of clicked.¹⁴ She told her mum what happened and then came to the

⁷ Applied in *Nguyen v R* [2012] ACTCA 24; (2012) 267 FLR 334.

⁸ *R v LSS* [2000] 1 Qd R 546; [1998] QCA 303 at [1] and [19].

⁹ *R v RH* [2005] 1 Qd R 180 at [23].

¹⁰ *R v Rutherford* [2004] QCA 481.

¹¹ Section 21AW of the *Evidence Act 1977* (Qld).

¹² *Butera v DPP* (1987) 164 CLR 180 at p 188; [1987] HCA 58.

¹³ First s93A statement p 2.52.

¹⁴ First s93A statement p 3.30.

- police station. She said that she wasn't there long before she just blacked out and woke up on the bed and he was on top of her and she blacked out again.¹⁵ After that, both of them were walking out of the room and this was when she had a sore back, sore throat and the top of her back was sore.¹⁶
- [19] Her boyfriend suggested to her that she might have been raped, but she stayed with him for a couple of days and didn't really want to go home and tell her mother.¹⁷
- [20] She said that the defendant had messaged her after she had met him at a party and they hung out once before this.¹⁸ When she first met him, he told her he was horny and wanted to kiss and stuff.¹⁹ The party she met him at was about a month prior. She said the defendant's name was M, but he didn't have his last name on Facebook.²⁰
- [21] On the Sunday, the day of the alleged offence, the defendant picked her up. She walked to the McDonalds near her house and he and his friend picked her up in his friend's car.²¹ She went to McDonalds at about 7:30pm. They then drove to the Bottle-O next to the Glen Hotel and got a bottle of Vodka and then got Sprite from a shop in Kuraby.²² They then drove to a house in Kuraby. They started drinking there.²³ She put her phone on charge in the lounge room on the floor.²⁴ She became drunk.²⁵ She recalled sitting on the lounge room floor and the defendant came back and she started crying about her ex-boyfriend.²⁶ She recalled the defendant walking her to the bedroom, lying her on the bed and he laid next to her for a while and she blacked out. She woke up when he was on top of her.²⁷ He was on top of her and naked having sex with her.²⁸
- [22] When she was laid down on the bed she was wearing tracksuit pants and a crop top and underwear. When she woke up with the defendant on top of her, her pants were off, but she still had her crop top on.²⁹ The sex hurt.³⁰ He was only on top of her for about five seconds.³¹ She then blacked out again and woke up and saw the defendant and his friend walking out of the room.³² She woke up when the defendant woke her up about 7:00am and said that they had to go. She checked the time on her phone.³³ She grabbed her phone, went outside and hopped in the car and went home.

15 First s93A statement p 4.50.
 16 First s93A statement p 5.5.
 17 First s93A statement p 5.25.
 18 First s93A statement p 5.55.
 19 First s93A statement p 6.5.
 20 First s93A statement p 9.25.
 21 First s93A statement p 13.5.
 22 First s93A statement p 15.25.
 23 First s93A statement p 19.20.
 24 First s93A statement p 20.55.
 25 First s93A statement p 23.55.
 26 First s93A statement p 24.10.
 27 First s93A statement p 25.45.
 28 First s93A statement p 30.10.
 29 First s93A statement p 31.42.
 30 First s93A statement p 32.50.
 31 First s93A statement p 34.50.
 32 First s93A statement p 35.20.
 33 First s93A statement p 36.55.

- [23] When she got home she vomited, had a shower and went to sleep. She got home at about 7:30am.³⁴ She threw her clothes in the dirty washing basket, the clothes were in a bag in her car. She had a sleep and then her ex-boyfriend came to see her.³⁵
- [24] She went with him to his place and told him that she had gone to a guy's place the previous night and how she had blacked out.³⁶ AB told her to go to the police. She also told her mother what happened.³⁷ She said that after the incident, she wanted to ask the defendant exactly what happened and she tried to call him and asked if he and his friend took advantage of her, but he hung up.³⁸ He blocked her on Messenger.³⁹ He ignored her calls and only answered once and hung up straight away after she asked him.⁴⁰

Second 93A statement

- [25] The complainant underwent a second s93A statement on 9 July 2019. She was 17 years old then.
- [26] She told the police on this occasion that she met the defendant through a friend at a party. They started hanging out together. He wanted to date her and she thought he was genuine.⁴¹
- [27] As to the events of the alleged offence, he wanted to take her to a party and she said ok and he picked her up from McDonalds. They then went to the Glen Hotel and then went to a shop, got a bottle of Coke and drove to the house and drank there and she started blacking out.⁴² She started to cry about her ex-boyfriend and the defendant was telling her that he could take to the hospital. After this, he picked her up, took her to the bedroom and he laid next to her and she blacked out again.⁴³ She later opened her eyes and he and his friend were walking out of the room. She then fell asleep and then the defendant came in and woke her up.⁴⁴
- [28] When she first met the defendant she was dating AB.⁴⁵ After she and AB broke up, another friend Gerry, invited her to an apartment in the CBD where she met the defendant.⁴⁶ She and the defendant started to hang out together and communicated through Snapchat.⁴⁷ They hung out a few times together. The first time she went to the gym with him and his friend.⁴⁸ She agreed that she went into a room on another occasion and had sex with him and then they went to a park.⁴⁹ She claimed that he was angry and she didn't want it, but she agreed.⁵⁰ She said it was about September

³⁴ First s93A statement p 39.10.

³⁵ First s93A statement p 40.1.

³⁶ First s93A statement p 40.35.

³⁷ First s93A statement p 43.20.

³⁸ First s93A statement p 47.15.

³⁹ First s93A statement p 48.1.

⁴⁰ First s93A statement p 48.22.

⁴¹ Second s93A statement p 2.40.

⁴² Second s93A statement p 2.55.

⁴³ Second s93A statement p 3.20.

⁴⁴ Second s93A statement p 3.25.

⁴⁵ Second s93A statement p 3.55.

⁴⁶ Second s93A statement p 4.50.

⁴⁷ Second s93A statement p 5.40.

⁴⁸ Second s93A statement p 6.25.

⁴⁹ Second s93A statement p 6.50.

⁵⁰ Second s93A statement p 8.12.

or November then December.⁵¹ After the sex on that occasion he dropped her off at McDonalds.⁵² It was clear the defendant wanted to date her.⁵³ He called her beautiful and said that he loved her.⁵⁴ She said they had Coke and Tequila at the house at Kuraby on the Sunday night.⁵⁵ She confirmed that she was crying about her ex-boyfriend.⁵⁶ She was blacking out.⁵⁷ She said that the defendant offered to call her an ambulance or to take her to hospital because she was crying and he did not know what to do.⁵⁸ She confirmed the defendant picked her up and took her to the bedroom and he walked in and laid next to her and she just blacked out and then she woke up and he was on top of her.⁵⁹ He was wearing a shirt when he was on top of her.⁶⁰ She was only awake for a few seconds.⁶¹

21AK recording – 22 November 2019

[29] The complainant was in grade 11 at the time of the 21AK hearing. She said she had recently watched the recordings with the police and what she had told the police was true and correct.⁶² She said that she woke up in her bed and found the defendant on top of her.⁶³ His shirt was off. She said that she was wearing just her crop top. A few days after, she communicated with the defendant through the Messenger Facebook app.⁶⁴ She denied she was responsible for sending the messages, and that it was her boyfriend.⁶⁵ The second page of text messages was marked as Exhibit 4, and again she denied sending those messages but she was there when they were sent.⁶⁶ Exhibit 5 and 6 were messages from the same app as were Exhibit 7 and 8 but she never sent any of them.

[30] In cross-examination she agreed that she first met the defendant at a party.⁶⁷ The party was held by a mutual friend Gerry.⁶⁸ After the party, the defendant and she developed a friendship and he added her to Snapchat and she added him to Facebook.⁶⁹ She agreed that they were sending messages to each other which was happening nearly every day.⁷⁰ She agreed the two of them would spend time together and would go to places like the park, the gym, hanging out with his mates and going to their places.⁷¹ She denied hanging out with him in September but said that it was in November and December that they hung out.⁷² She said that when she

51 Second s93A statement p 8.40.
 52 Second s93A statement p 10.30.
 53 Second s93A statement p 10.40.
 54 Second s93A statement p 10.35.
 55 Second s93A statement p 13.30.
 56 Second s93A statement p 14.15.
 57 Second s93A statement p 15.15.
 58 Second s93A statement p 15.40.
 59 Second s93A statement p 16.50.
 60 Second s93A statement p 18.1.
 61 Second s93A statement p 19.10.
 62 Transcript of pre-recording p 1.
 63 Transcript of pre-recording p 2.22.
 64 Transcript of pre-recording p 2.45.
 65 Transcript of pre-recording p 3.25 – Exhibit 3.
 66 Transcript of pre-recording p 4.
 67 Transcript of pre-recording p 7.1.
 68 Transcript of pre-recording p 7.5.
 69 Transcript of pre-recording p 7.15.
 70 Transcript of pre-recording p 7.35.
 71 Transcript of pre-recording p 7.40.
 72 Transcript of pre-recording p 8.1.

spoke to the police she got her months mixed up.⁷³ She said that they only ever hung out three times between November and December and including Jerry's party four times.⁷⁴ She said that aside from the Sunday when the events of the case was said to have taken place, she went to the gym with him and his friend's place after and there was another day when they went to the park together.⁷⁵ She agreed that she saw the defendant the Friday before the Sunday when they went to the friend's place. She agreed that the police first interviewed her on 19 December 2018 and a second interview occurred on 9 July 2019.⁷⁶ She agreed that the police came and spoke with her a second time because they wanted to ask questions about a previous time when she had consensual sex with the defendant.⁷⁷ She admitted she had not mentioned that in her first interview.⁷⁸ She agreed that the first interview with the police was not actually correct because she did not mention the consensual sex.⁷⁹

- [31] With respect to the Sunday, she thought it was a prior arrangement that the two of them would hang out on Sunday.⁸⁰ She met him at McDonalds, his friend was there, some alcohol was bought, Tequila or Vodka and soft drink. She agreed in the first interview she told the police it was Vodka and in the second Tequila. She was not sure which one it was now.⁸¹ She told the police in the first interview that she had bought Sprite but in the second Coke. She agreed that on Monday 17 December 2018, there was a bit of a mad rush to get out of the house and the defendant was waking her up.⁸² She denied there was a mess left over from the night before. She agreed she had to grab her phone, it was in the lounge room and charging. She couldn't recall there be any messages on her phone when she picked it up but there were missed calls from her mum. She eventually got home at 7:30am.⁸³ She left the defendant's friend's house at 7:00am or just past 7:00am. She was dropped off at home, went inside, had a shower, and washed her hair. When she got home she said hi to her mum first and then walked upstairs and had a shower.⁸⁴ She went straight to bed and didn't check her phone, she just put it on the side table. She checked her phone after she had woken up.⁸⁵ She agreed her phone was not on silent.⁸⁶ She woke up at about 10:00am and saw there were 34 missed calls from her boyfriend between 7:34am and 7:35am and further 17 missed calls.⁸⁷ She did not see that he'd left 66 messages on her phone. She didn't remember seeing any text messages.⁸⁸ She thinks she read messages from AB accusing her of being with another person. She recalled receiving messages from AB telling her that her relationship with him was over and he was blocking her and that he knew that she was with another person.⁸⁹

⁷³ Transcript of pre-recording p 8.12.

⁷⁴ Transcript of pre-recording p 8.30.

⁷⁵ Transcript of pre-recording p 8.40.

⁷⁶ Transcript of pre-recording p 9.5.

⁷⁷ Transcript of pre-recording p 9.11.

⁷⁸ Transcript of pre-recording p 9.13.

⁷⁹ Transcript of pre-recording p 9.25.

⁸⁰ Transcript of pre-recording p 9.35.

⁸¹ Transcript of pre-recording p 10.1.

⁸² Transcript of pre-recording p 10.45.

⁸³ Transcript of pre-recording p 11.40.

⁸⁴ Transcript of pre-recording p 12.

⁸⁵ Transcript of pre-recording p 13.17.

⁸⁶ Transcript of pre-recording p 14.15.

⁸⁷ Transcript of pre-recording p 14.25.

⁸⁸ Transcript of pre-recording p 14.36.

⁸⁹ Transcript of pre-recording p 15.5.

- [32] AB turned up at the house that day and she recalled speaking to him. He was upset for her not answering his calls and not responding to his messages.⁹⁰ During these conversations he suggested that she was sleeping with another person.⁹¹ She told him she'd been home drinking vodka the whole night and smashed some vodka on her own which was a lie.⁹² She agreed she was too afraid to tell him she was with the defendant.⁹³ She agreed that she and AB had had an argument the night before or a couple of days before and that was why she was seeking comfort from the defendant.⁹⁴
- [33] That night she told AB she had spent the night with defendant. She agreed she didn't tell her mother earlier that day anything about what happened the night before. She later told AB and then later told her mother.⁹⁵ When she first spoke to her mother that day, she just simply said she was tired and didn't say anything about what happened the night before.⁹⁶
- [34] When she spoke to her mother about what happened, she told her mother about waking up with the defendant on top of her and that he was naked and that he was having sex with her and that she only had her crop top on and it was hurting.⁹⁷
- [35] She agreed that she and the defendant were driven by a friend by the name of KA.⁹⁸ They were picked up from McDonalds, alcohol was purchased, everyone went back to KA's house, everybody was drinking and she was even drinking straight vodka. She agreed that things started to become upsetting for her about her boyfriend. She began to cry and started talking about AB. She was concerned that AB was cheating on her.⁹⁹ She agreed that the defendant was consoling her and making sure she was ok. She didn't recall him taking her to the bathroom because she felt like vomiting but she did remember him offering to take her to the hospital and she said no.¹⁰⁰ She recalled the defendant taking her to bed and he laid her down on the bed and she immediately went to sleep. She said that the defendant laid next to her and she fell asleep. She denied that he slept on the floor.¹⁰¹ She did not remember waking up at about 4:30am or 5:00am saying she was cold. She didn't recall that he laid next to her and that they cuddled and fell asleep. She denied waking up at 6:00am and asking the defendant if he was awake. She did not remember telling the defendant that she was feeling better and had sobered up. She did not remember them having conversations at 6:00am or 7:00am in the morning. She did not remember telling the defendant she couldn't remember much of what happened the night before and the defendant reminding her that she was crying and upset about AB.¹⁰² She denied saying "I'm as horny as fuck" and "let's have sex".¹⁰³ She denied that the two of them engaged in consensual sex. She agreed that AB and she had an on/off type of

⁹⁰ Transcript of pre-recording p 15.25.

⁹¹ Transcript of pre-recording p 15.30.

⁹² Transcript of pre-recording p 15.35.

⁹³ Transcript of pre-recording p 15.42.

⁹⁴ Transcript of pre-recording p 16.1.

⁹⁵ Transcript of pre-recording p 16.25.

⁹⁶ Transcript of pre-recording p 16.20.

⁹⁷ Transcript of pre-recording p 16.42.

⁹⁸ Transcript of pre-recording p 17.22.

⁹⁹ Transcript of pre-recording p 18.5.

¹⁰⁰ Transcript of pre-recording p 18.20.

¹⁰¹ Transcript of pre-recording p 18.35.

¹⁰² Transcript of pre-recording p 19.10.

¹⁰³ Transcript of pre-recording p 19.25.

relationship and when they were off the defendant was there for her.¹⁰⁴ She agreed that she'd had sex with the defendant on more than one occasion – one more time before that.¹⁰⁵ She denied it was three or four more times. She denied that she would break up with AB and then have sex with the defendant.¹⁰⁶ She denied that after she found the missed calls from AB she realised she made a mistake.¹⁰⁷ She agreed that AB rocked up to her house upset with her because he thought she was with another guy and she spent the day with AB. She agreed AB said to her “I think you’ve been raped”.¹⁰⁸ She agreed she lied to AB about staying at home drinking vodka by herself.

[36] With respect to the defendant, she agreed that she told the police on the first occasion that the defendant was wearing nothing.¹⁰⁹ On the second occasion, she said he was wearing a shirt. She said she was nervous and got confused.¹¹⁰ She told the defendant she was on the pill.¹¹¹ The previous occasion when she'd had consensual sex with the defendant was on the Friday that is two days before the Sunday.¹¹²

[37] In re-examination, she said she didn't tell the police about the previous sex with the defendant because she was ashamed.¹¹³

Other crown witnesses

KA

[38] This witness gave evidence that he knew the defendant. They both went to the gym together. On 16 December 2018, he picked up the defendant and then picked up the complainant at McDonalds. He had previously seen her once with the defendant at the gym. After they picked her up, they bought some alcoholic drinks and then went back to his place. Someone was meant to pick them up but did not. They were drinking. The witness also had a drink. He was tired. He was not feeling well and decided to go to sleep and told them not to drink too much. At one point, the girl was not feeling well and she went to the bathroom with the defendant. He then went to sleep. The next morning, he initially thought they'd gone and he started tidying up but then he heard laughter from the bedroom. He told them to go. They said they would in 5 to 10 minutes but they didn't have transport and he had to drive them.

[39] In cross-examination, he said he did not know the name of the girl. He said he believed her to be the defendant's girlfriend and she'd been introduced to him as his girlfriend at the gym. The gym meeting occurred a couple of months before the Sunday.

[40] Turning to the Sunday, he admitted they were drinking in the lounge room. The defendant and the complainant were talking to each other speaking English. They

¹⁰⁴ Transcript of pre-recording p 20.4.

¹⁰⁵ Transcript of pre-recording p 20.20.

¹⁰⁶ Transcript of pre-recording p 20.25.

¹⁰⁷ Transcript of pre-recording p 20.45.

¹⁰⁸ Transcript of pre-recording p 21.12.

¹⁰⁹ Transcript of pre-recording p 21.45.

¹¹⁰ Transcript of pre-recording p 23.20.

¹¹¹ Transcript of pre-recording p 23.29.

¹¹² Transcript of pre-recording p 23.40.

¹¹³ Transcript of pre-recording p 24.15.

were drinking, laughing and chatting. She then became unwell and he took her to the bathroom. After this, she fell asleep. He agreed that the defendant took care of the complainant who said she was fine. He awoke the next morning thinking they'd left and started tidying the house. He heard laughter and talking from both of them in the bedroom. He told them to leave. He took the girl to McDonalds first. She seemed happy and said goodbye to the defendant. The sun was up at that point.

AB

- [41] In evidence-in-chief, AB said the complainant was his girlfriend and they had been dating for three years. In December 2018, he and the complainant had broken up. On Monday 17 December 2018, he went to see her and had a conversation with her. He'd found out that she did not simply have a drink at home. She told him she'd been out with the defendant. She told him that she had been picked up from McDonalds and went to a house where she started drinking. She had blacked out and had trouble remembering. She said she felt really drunk and had cried to the defendant. She recalled the defendant asking her if she wanted to go to a hospital. The defendant then took her to bed and jumped in next to her and went on top of her and she then blacked out. She said she then woke up and left the room.
- [42] In cross-examination, the witness conceded he had an on/off relationship with the complainant as at December 2018. On Monday 17 December 2018, he tried to call her but she didn't pick up the phone. He agreed he was upset, worried and uneasy. He wanted to see her. He agreed he was worried that she was with another man.
- [43] Before 17 December 2018, she didn't say she was going out with the defendant. The witness agreed he sent messages to the complainant about her being with someone else. He said he went to her house around lunchtime after he sent the messages. There was no response to his calls on the Sunday night or Monday morning.
- [44] He agreed that he sent some messages on her phone to the defendant and agreed that he encouraged her to go to the police. He accepted he may have called her 34 times between 7:34am and 7:35am and then made another 17 calls. He accepted he sent 66 text messages to her between 7:39am and 7:40am. In the texts he admitted to saying that he thought she was with somebody else.
- [45] He then went to her house. He denied they were wanting to confront her. He wanted to know why she didn't answer the calls. He denied being angry at her although I might say I did not accept his evidence on this point. He accepted that he went to her house after numerous calls went unanswered and numerous text messages were not answered. He agreed that at the house he asked her why she was not picking up and responding.
- [46] The complainant initially told him the night before she'd been drinking by herself and smashed a bottle of vodka by herself. They then discussed the prospect of getting back together. He admitted later that day at his place that he looked through her mobile phone and saw messages from the defendant. She then said that she had seen the defendant the night before. She said she couldn't remember what happened at the house where she was drinking.
- [47] The witness conceded that he was the one who asked her "do you think you got raped". She said "I might have". He admitted he was the first person to use the term "rape". She also admitted that afternoon she had sex with the defendant but did not

mention rape at that stage. The witness agreed that he was upset that she'd had sex with the defendant and that she had lied to him. It was him that felt uneasy about what had happened the previous night.

- [48] He agreed that that morning he had sent messages like “this fucking suss”, “fuck this don't call me”, “I'm done with you”, “fuck you don't ever call my phone”. He admitted having feelings of anger. He was shown Exhibits 3, 4 and 5 and conceded that it was the complainant who typed those messages. This of course, is contrary to the complainant's evidence.

Complainant's mother

- [49] The complainant's mother, EM, gave evidence that on 17 December 2018 (the Monday morning) she saw the complainant in her room. All that the complainant said to her at that stage was that she was tired. On Wednesday 19 December 2018, she had a conversation with the complainant. The complainant was emotional. There had been an argument with AB. The complainant said she thought she'd been raped. The mother asked her to explain what happened and she said she'd been to a party and nobody was there. She'd only had a couple of drinks but blacked out and then later saw people leaving her room. She then later woke up. The mother later took her to the police station.
- [50] In cross-examination, the witness agreed that she was aware on the Sunday that the complainant was going to a party. She thought this was a good idea as the complainant had had a fight with AB. On Monday 17 December 2018, she saw the complainant in her bedroom. All the complainant said at that stage was that she was tired. On Wednesday, the complainant came home. She said she didn't know but she thought she'd been raped. She also said she didn't remember and couldn't remember anything.

Defence evidence

- [51] The accused gave evidence in this case.
- [52] Importantly, in a criminal trial, it is not a question of my making a choice between the evidence and the submissions of the prosecution and the defence.¹¹⁴
- [53] I have directed myself that I do not have to believe that the accused is telling the truth before he is entitled to be found not guilty.
- [54] Importantly, if, however, after considering the evidence of the accused and the witnesses called on his behalf, if I was to find the accused's evidence should not be accepted, I would still be careful not to jump from that view to an automatic conclusion of guilt. As I have said before, the onus is not on the defence. If I find the accused's evidence unconvincing, I must set it to one side and go back to the rest of the evidence and ask myself whether, on the consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.¹¹⁵
- [55] The defendant gave evidence that he was born on 1 January 1999. He first met the complainant at an apartment. Before 16 December 2018, he'd seen her four times.

¹¹⁴ *R v E* (1995) 89 A Crim R 325 at p 330.

¹¹⁵ *R v Armstrong* [2006] QCA 158 at [34].

After he first met her he was added to her Facebook page. He first met her a few months before December 2018. She also sent him a snapchat message. They chatted over Messenger and also met in person.

- [56] Between first meeting her and 16 December 2018, the defendant saw her in person three or four more times. She went to the gym with him and he met her in the carpark.
- [57] On Sunday 16 December 2018, they arranged to get together on the Friday. She wanted to meet up. On the Sunday she sent him a message, she was picked up from the carpark, they bought alcohol and went back to the friend's place. They drank there. She drank too much and the defendant told her not to. She became drunk and vomited. She started crying about her ex-boyfriend, that he had cheated on her and she wanted to hurt herself. The defendant got scared and wanted to call an ambulance but she rejected this offer. The defendant picked her up and washed her face after she vomited but she vomited again. He then later picked her up and took her to the bed. He laid on the floor. This was about 2:00am to 3:00am. She got cold and she wanted him to hug her. He then got onto the bed, cuddled her and the blanket was placed over them. This was about 4:30am to 5:00am. They went to sleep and then woke up and she said she was fine and horny and wanted sex. They then had sex. He took his own clothes off and she took hers off and they had normal sex. He didn't use a condom. This was not the first time they'd had sex. They'd had sex two or three more times prior to this. She was awake during the sex. After this, they both went to sleep and the friend knocked on the door. He then dropped them off at home. He did not have sex with her when she was asleep or unconscious. The next communication with her was on Facebook.
- [58] In cross-examination, the defendant accepted they were both friends and communicated most days via Snapchat and Facebook. He wanted to spend more time with her. She was his girlfriend. He thought she was beautiful. They met three to four times in total including 16 December 2018. It was put to him that they'd only previously had consensual sex once and he denied this saying it was twice. He accepted he'd first met the complainant at the apartment in the city. It was put to the defendant that at the house at Kingston the complainant was not interested in having sex to start with but the defendant denied this saying that she'd agreed to it and she said "let's do it". He also denied that her attitude made him angry. He denied that this was the only time he had had sex with her. He agreed that he wanted to date her and told her that he loved her.
- [59] On 16 December 2018, he picked her up and they went to the friend's house and they were drinking. He agreed that she was drunk and was worried about her and cared about her. He agreed he took her to the bedroom. He denied immediately lying next to her on the bed and said he laid on the floor. He laid next to her when she was cold. She was able to walk when she was taken to the bedroom. He denied taking her pants off and denied having sex with her when she was asleep. He denied the sex was without her consent. He said that she did say she was horny and that they did have consensual sex.

Defence submissions

- [60] The defence submitted that the court would have difficulty accepting the complainant as truthful and accurate. Firstly, she was inconsistent as to the number

of occasions that she and the defendant spent time together. Secondly, she was untruthful with the police about the previous consensual sex. Her explanation for this should be rejected. Next she was inconsistent about the clothing that the defendant was wearing during the sexual intercourse. She was also inconsistent about the beverages she consumed. It was also admitted she told lies to her boyfriend AB about what had happened.

- [61] It was submitted that she had a motive to lie because she was getting back together with AB and she did not want him to think that she cheated on him. In this regard, I note that if even I rejected the motive put forward by the defence that does not mean the complainant is telling the truth. It is for the prosecution to satisfy the court the complainant is telling the truth.¹¹⁶
- [62] It is submitted that KA provides support to the defence case. As to the preliminary complaint evidence, it is submitted that AB's evidence should be treated with some circumspection and was inconsistent. Also, the preliminary complaint evidence of the mother was inconsistent with complainant's account.
- [63] It is submitted that the defence evidence was consistent and logical and the defendant was an honest and reliable witness.
- [64] Ultimately, it is submitted the court could not be satisfied beyond reasonable doubt that the sexual intercourse was without consent and the court could not exclude the scenario that the complainant engaged in consensual intercourse with the defendant but after reconciling with her partner had regret or fear of telling her partner the truth. The court would be left in a state of reasonable doubt.

Crown submissions

- [65] The prosecutor submitted that the complainant's evidence should be accepted. It was submitted she gave a logical and consistent account. Her accounts were consistent across the two s93A statements and the pre-recording. It was submitted that her accounts were consistent with the preliminary complaint evidence and any inconsistency was minor. Further, any inconsistency was explained by her intoxication.
- [66] It was submitted that a motive to lie was not established here. She satisfactorily explained why she didn't mention the previous consensual sex in the pre-recording.
- [67] Ultimately, the crown submits that the court would accept the complainant's evidence beyond reasonable doubt.

Findings

- [68] In this case I warn myself that I should approach the complainant's evidence with care before relying on it.¹¹⁷ There are a number of reasons for this.
- [69] Firstly, her allegations are not corroborated. Indeed KA gave contrary evidence.
- [70] Secondly, she said nothing to her mother when she first got home.

¹¹⁶ *R v Coss* [2016] QCA 44 at [22].

¹¹⁷ *Robinson v R* (1999) 197 CLR 162; [1997] HCA 42.

- [71] Thirdly, she lied to her boyfriend at the start about what she had been doing the previous night and she did not mention rape in the initial disclosure.
- [72] Fourthly, she failed to disclose to the police in the first statement that consensual sex had occurred with the defendant previously.
- [73] Fifthly, the complainant's memory was clearly affected by alcohol.
- [74] Applying this warning (and other legal directions) and carefully considering all of the evidence and submissions, I am not satisfied the crown has proved absence of consent beyond reasonable doubt.
- [75] I did not accept the complainant's evidence about what happened in the bedroom beyond reasonable doubt. I did not find AB to be convincing and found him to be a controlling individual. I accept KA's evidence.
- [76] As to the defendant, I did not find he was shaken in cross-examination and I cannot exclude his evidence beyond reasonable doubt.
- [77] I find on the evidence the complainant was in an on/off relationship with AB. I find that when it was "off" she would go out with the defendant.
- [78] I find that the complainant did have consensual sex with the defendant only a couple of days prior at the house in Woodridge. I did not accept the complainant's denials that there was no other sex. There was certainly a discussion between them at one point about contraception.¹¹⁸
- [79] On the Sunday, I find she was affected by alcohol but as she said she was used to it. There is no evidence of any drink spiking in this case.
- [80] I find her story that she remained awake for five seconds during the sex and then went back to sleep to be improbable. I think it more likely she would have been awake for longer. She would have sobered up by this time.
- [81] As I have said I have a reasonable doubt about her version that the sex was without consent. I do not accept her evidence as to this beyond reasonable doubt and cannot exclude the defendant's evidence.
- [82] I accept KA's evidence that he heard the complainant and the defendant were laughing together in the bedroom the next morning. This is far more consistent with consensual sex and with the defendant's account.
- [83] Also, I note the complainant saw her mother on the Monday and made no mention of rape. The mother did not appear to observe anything out of the ordinary.
- [84] I also accept the defence submission that a motive for false complaint has been established here. I find that AB texted and called her numerous times. The complainant went home. She said nothing to her mother. She lied to AB to start with about being home and drinking by herself. Her second disclosure was she had sex. It was AB who pressed her and was the one who suggested she had been raped. I find this was in the context of AB being angry and aggressive with her as he was mostly concerned about her being with another man. She then incorrectly agreed

¹¹⁸ Pre-recording page 23.25.

with his suggestions of rape and may have even persuaded herself of this (wrongly). She was concerned not to admit she had cheated on AB. I thought it relevant that the complainant conceded that AB was an aggressive person.¹¹⁹ She agreed in evidence that he left 66 messages and called her 55 times and he was upset.¹²⁰ The messages clearly showed he was angry at her including suggesting she was with someone else.

- [85] In my view, it is more a matter that the complainant has a vague memory about what happened.¹²¹ Indeed this is what the complainant told the mother as well.
- [86] I also consider that the defendant's consoling of the complainant and his offering to take her to the hospital is inconsistent with later raping her.¹²²
- [87] Also, I did find the preliminary complaint evidence to AB to not be consistent. First, there was no complaint by the complainant of rape at the start. Second, her version to AB was that the defendant took her into the bed, he got into the bed and then got on top of her. This is different to the complainant's account to police and to the court which had the alleged rape occurring quite some time after she went to bed.
- [88] The preliminary complaint to the mother after her ultimate disclosure to AB was she "thought" she had been raped.

Conclusion

- [89] In all of the circumstances I have a reasonable doubt as to the defendant's guilt and find him not guilty.

¹¹⁹ Second s93A interview page 14.

¹²⁰ Pre-recording pages 14-15.

¹²¹ Pre-recording page 21.25

¹²² Pre-recording page 18.