***R v Kau* [2019] QCA 73 (3 May 2019) – Queensland Court of Appeal**

'Corroborative evidence' – 'Domestic violence offence' – 'Mistake direction' – 'Rape -sexual and reproductive abuse ,

Charges: 2 x rape (domestic violence offence)

Case type: Appeal against conviction

Facts: The appellant was charged with 4 counts of rape, and convicted on 2 counts as a domestic violence offence. He was sentenced to 5 years' imprisonment, suspended after 2 and a half years in custody. The complainant was the appellant's wife. Counts 1 and 3 (subjects of the guilty verdicts) were particularised as vaginal rapes, while Counts 2 and 4 (subjects of the not guilty verdicts) were alleged anal rapes ([4]).

Issue: The appellant appealed against his conviction on 2 grounds ([5]):

- 'The convictions should be set aside as unreasonable because the guilty verdicts were inconsistent with the not guilty verdicts on the other counts';
- 'There was a miscarriage of justice because the…trial judge ought to have directed the jury to consider whether they were satisfied beyond reasonable doubt that the appellant did not act under a mistake of fact as to the complainant's consent on the two counts the subject of the guilty verdicts'.

Held: To succeed on the first appeal ground, the appellant must prove the verdicts were inconsistent as a matter of logic and reasonableness. The test is that 'no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion' ([6]). There were 3 differences in the quality of the evidence considered by the jury ([9]), namely, the difference in what the complainant told her confidantes before she reported to the police ([10]), the difference in her report to the police ([11]), and a recording of a conversation between the complainant and appellant in which she made no mention to anal penetration ([12]). There was also evidence that might have corroborated Counts 1 and 3 ([15]), but there was no such evidence about Count 2 or 4 ([20]). The Court held that it was open for the jury to be satisfied beyond reasonable doubt of the appellant's guilt on Counts 1 and 3. The differences in the quality of the complainant's evidence and appellant's corroborative evidence provided a logical and reasonable basis for the jury to arrive at different conclusions and return different verdicts for Counts 1 and 3 and Counts 2 and 4 ([23]).

The second appeal ground argued that the jury ought to have been directed to consider whether the Crown had satisfied them beyond reasonable doubt that the appellant had not acted under an honest and reasonable, but mistaken, belief that the complainant had consented to the vaginal penetrations. To succeed on this proposed ground, the appellant must demonstrate that the trial judge should have given a mistake direction and that it is reasonably possible that the failure to do so may have affected the verdict ([24]). In light of the evidence, there was a negligible prospect of the jury, having accepted the occurrence of the vaginal penetrations, having a reasonable doubt whether the appellant acted under an honest and reasonable, but mistaken, belief as to the complainant's consent. In the circumstances, the trial judge was under no duty to give such a direction ([39]). The appellant was therefore not deprived of a real chance of an acquittal by the failure of the trial judge to give a mistake direction to the jury.

Consequently, the appeal was dismissed.