

Arroyo v The Queen [2010] NTCCA 9

PARTIES: **ARROYO, Calixto**
v
THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF
THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE
SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: CA 12 of 2009 (20833997)

DELIVERED: 24 June 2010

HEARING DATE: 8 April 2010

JUDGMENT OF: MILDREN, SOUTHWOOD and KELLY JJ

APPEALED FROM: OLSSON AJ

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – unlawful sexual intercourse without consent – unreasonable verdict – unsatisfactory evidence – unreliable but honest complainant – leave to appeal granted – appeal dismissed – conviction set aside – verdict of attempted sexual intercourse without consent substituted for the verdict of the jury

Criminal Code s 192(3), s 411

Carr v The Queen 24 [1988] HCA 47;
Gipp v R (1998) 194 CLR 106;
Jones v The Queen [1997] HCA 12;
M v The Queen (1994) 181 CLR 487

REPRESENTATION:

Counsel:

Applicant: J C A Tippet QC
Respondent: N Rogers SC

Solicitors:

Applicant: Maley's Barrister & Solicitors
Respondent: Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Arroyo v The Queen [2010] NTCCA 9
No. CA 12 of 2009 (20833997)

BETWEEN:

CALIXTO ARROYO
Applicant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, SOUTHWOOD AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered 24 June 2010)

MILDREN and SOUTHWOOD JJ:

Introduction

- [1] The applicant seeks leave to appeal against his conviction for the crime of having unlawful sexual intercourse without consent¹ on 6 December 2008 at Yulara. The applicant was convicted on 22 May 2009 following a trial by a jury which delivered a verdict of guilty. The sole ground of appeal is: the jury's conclusion of fact, that the applicant inserted his penis into the complainant's vagina, was unreasonable and could not be supported by the evidence.

¹ s 192(3) of the *Criminal Code* (NT)

Unreasonable verdict not supported by the evidence

[2] Under s 411 of the *Criminal Code* (NT) the Court shall allow an appeal against a finding of guilt if the Court is of the opinion the verdict of the jury is unreasonable or cannot be supported having regard to the evidence. This ground of appeal requires the Court to examine whether, “upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty”². In so doing the Court must pay full regard to the jury’s advantage of seeing and hearing the evidence. However, “where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the Court is a doubt which a reasonable jury ought to have experienced”³.

[3] In *M v The Queen* Mason CJ, Deane, Dawson and Toohey JJ stated⁴:

If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such away as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based on that evidence.

The background facts

[4] The complainant is a female who comes from New South Wales. In September 2008 she started working as a receptionist at Sails in the Desert at Yulara. She resided in a shared unit on the first floor of a block of units at 38A Grevillea Grove at Yulara. The accommodation was provided by her

² *M v The Queen* (1994) 181 CLR 487 at 493.

³ *M v The Queen* (1994) 181 CLR 487 at 494.

⁴ *M v The Queen* (1994) 181 CLR 487 at 494.

employer. The unit was comprised of four separate bedrooms clustered around a common central kitchen/dining area, bathroom and toilet. The bedrooms were occupied by the complainant, Zerlinda Gorrington, Ms L and a lady called Lucy. All four women knew each other. The complainant's bedroom was next to Lucy's bedroom and on the opposite side of unit to Ms Gorrington's and Ms L's bedrooms. Lucy was not present at the unit on 6 December 2008.

- [5] The unit was accessed from an external balcony. There were two doors into the complainant's bedroom. One of the doors opened onto the balcony and the other door opened into the kitchen/dining area of the unit. The internal door to the complainant's bedroom was next to the internal door into Lucy's bedroom. The complainant's bedroom was diagonally opposite Ms L's bedroom.
- [6] The applicant is a 32 year old male who was born and grew up in a small village in Peru. He attended the university at Cusco and received training in tourism. He was also employed at Sails in the Desert. His first language is Spanish.
- [7] Before 6 December 2008, the complainant was acquainted with the applicant. She had met him as a customer while he was working at the Burger Bar and Gecko's restaurant at Sails in the Desert. However, there was no social relationship between the complainant and the applicant. She did not know him well. The applicant was also acquainted with Ms L. He

was a friend of Manuel Antonio Perez who was also employed at Sails in the Desert. Mr Perez was a friend of Ms Gorrington.

- [8] On the night of 5 – 6 December 2008, the complainant socialised with friends at various venues at Yulara. In the course of doing so, she attended the so-called ‘Residents’ Club’ which is a staff club. She arrived there at about 8.30 pm on 5 December 2008 and she remained there until about 1.30 am on 6 December 2008. Over that period of time she drank a considerable amount of alcohol. After she left the Residents Club, the complainant walked home to her unit.
- [9] When the complainant arrived at her unit she was tired, somewhat intoxicated and quite hungry. She cooked herself a meal then went to sleep on her bed in her bedroom. The complainant fell into a deep sleep. She was only wearing her costume bottom when she went to sleep. It was a hot time of the year.
- [10] Shortly before 4.00 am on 6 December 2008, Ms L invited the applicant back to her bedroom with a view to having consensual sexual intercourse with him. They were both intoxicated. Some consensual sexual intercourse took place between the applicant and Ms L, but at one point Ms L made it clear she did not want any further sexual activity with the applicant. Ms L left her bedroom and telephoned Ms Gorrington, who was out of the unit, and she asked her and Mr Perez, who was with Ms Gorrington, to assist her by removing the applicant from her bedroom. They agreed to do so. After he

arrived at the complainant's unit, Mr Perez went into Ms L's bedroom and insisted that the applicant leave the room.

[11] While Mr Perez was present, the applicant picked up his various items of clothing which were in Ms L's bedroom and he went to the toilet. At that point Mr Perez left the unit to speak to Ms L and Ms Gorrington who were outside the unit. When he went back inside he noticed the complainant's bedroom door was open slightly. He opened the door a little further and looked inside her bedroom. He saw the applicant on top of the complainant with a blanket over the two of them. He thought the applicant and the complainant were having normal sex and he did not want to invade their privacy. He quietly placed the applicant's shoes inside the room and locked the complainant's door.

[12] When Mr Perez went outside and reported the incident to Ms Gorrington and Ms L, Ms Gorrington realised something must be wrong and she immediately went upstairs to the unit. She attempted to open both of the doors leading into the complainant's bedroom and then she started banging on the door which led into the complainant's bedroom from the kitchen/dining area. Eventually the door opened and the applicant came out wearing track pants but no shirt.

The complainant's evidence about penetration

[13] The complainant gave the following evidence about the applicant's act of sexual intercourse with her.

[14] The complainant remembers she was having a dream and she felt someone jump into her bed with her. She didn't really think much of it at the time. There was no dispute between the parties that this person was the applicant. The complaint recalled that she was lying on her left side when the applicant got onto her bed. The applicant started touching her arm. He also touched her breasts. She then rolled over onto her back. There was kissing to which she responded. The applicant put his tongue in her mouth. She remembers it was cold but neither his hands nor any other part of his skin were cold. She was still asleep when she rolled onto her back and the applicant kissed her. She was slowly waking up. She did not really understand what was going on.

[15] The applicant got on top of her and he said to her, "Take these off". He was talking about her costume bottom. He took it off and she was squirming around and telling him in a loud voice, "Get the fuck out, get out of my house, get off me" but he did not. The applicant took the complainant's costume bottom off and he threw it on the side of the bed closest to the wall. He opened her legs and he thrust his penis into her vagina when she was awake. She felt a stinging pain and she was fully alert by then. She was telling the applicant to get off and she squirmed away.

[16] The next thing the complainant recalled was that Ms Gorrington was knocking at her bedroom door because she heard the complainant screaming. The door to the complainant's bedroom was locked. Ms Gorrington ended up breaking into the complainant's bedroom with a knife and she told the

applicant to get out. The applicant slowly got off the complainant and sat on the edge of her bed. He put two pairs of long pants on and he said: “Where’s my shirt?” and the complainant said, “I don’t give a fuck where your shirt is, just get out”. The applicant then casually got up and walked out. As he left her room he looked at her and he had a smirk on his face. The complainant saw the applicant’s face when he smirked and she recognised him. It was the applicant, who was from the Burger Bar. She does not know where the applicant went after he walked out of her room. She did not see him again that night.

[17] The complainant recalls that when the applicant pulled her costume bottom off, she was fully awake. She was also fully awake when the applicant pulled her legs apart and thrust his penis into her vagina causing her to feel pain. She was lying on her back when this occurred. The applicant was on his knees on the bed in front of her. She does not remember where his hands were. While there was contact with the applicant’s penis there was no contact between their chests or their legs. The applicant’s penis remained in the complainant’s vagina for about five seconds.

[18] After the applicant withdrew his penis from the complainant’s vagina she sat up and she folded her legs. She demonstrated to the jury that one leg was across and on top of the other. To some extent she had also drawn up her body towards where her pillows were. When she first got into this position the applicant was sitting on his knees at the edge of the bed.

- [19] After the applicant left the complainant's room, Ms Gorrington came into the room and went to where the complainant was. The complainant was in shock. She had a conversation with Ms Gorrington. She asked Ms Gorrington, who was the person who came into her room. Ms Gorrington asked her what happened. The complainant said she remembers telling Ms Gorrington that, "I just woke up with someone's dick in me". She cannot remember what else she and Ms Gorrington spoke about. The complainant knows she was crying. Only Ms Gorrington and she were in the room at the time.
- [20] She then went to Ms Gorrington's room via her bedroom door which led to the kitchen/dining area. She sat on Ms Gorrington's bed. Ms L then came into the room. Ms L said, "Oh my god, Donna, I'm so sorry, not you too". Mark Higley, the security guard, also came into Ms Gorrington's room at some stage. He arrived because Ms L rang security. Mr Higley spoke directly to the complainant. She does not remember what he said. She knows that he came close to her and touched her and she flinched. They waited for some time for the police to arrive. The complainant tried to go to sleep on the floor in Ms Gorrington's room but she could not. She went out and had a cigarette and then she had a shower. Someone told her she probably shouldn't shower but she wanted to shower because she felt disgusting.
- [21] When the police arrived she spoke to them briefly and arrangements were made for her to travel to Alice Springs. While she was in Alice Springs she was examined by a doctor. Detective Senior Constable Deanne Ward spoke to her next and later she took a statement from the complainant.

[22] Before the police came the complainant put on her costume bottom. The police ultimately took her costume bottom away with them. They also took her playboy doona cover, her sheet and a pair of men's underpants which was at the entrance of her room. The pair of men's underpants was not in her bedroom when she went to sleep. It is not in dispute that the pair of men's underpants belonged to the applicant.

[23] During her cross examination the complainant gave the following evidence. She recalls she was rather drunk when she went to sleep. She was not so drunk she could not walk home. She was tipsy or happy drunk. During the night and early morning before she went to sleep she consumed 11 or 12 alcoholic drinks.

[24] The first person the complainant spoke to after the applicant left her room was Ms Gorrington. She does not know what time this would have been. She accepted it would have been somewhere between 4.15 am and 4.25 am. The first thing she said to Ms Gorrington was, "I was asleep. Who was that?" The complainant remembers telling Ms Gorrington she was lying on her bed asleep and then somebody got into bed with her. She cannot remember a lot of the things she said to Ms Gorrington. She agrees she told Ms Gorrington, "I woke up to someone sticking their dick inside me". Ms Gorrington said it was the applicant.

[25] The next person the complainant spoke to was Ms L. Within a few minutes of the complainant speaking to Ms Gorrington, Ms L came into the room. She

cannot remember whether Ms L went into her room or Ms Gorrington's room. Ms L asked her what happened. The complainant answered by saying someone came into her room.

[26] While the complainant, Ms Gorrington and Ms L were in the police motor vehicle travelling to Alice Springs, the complainant had a conversation with Ms L. She asked Ms L what happened. Ms L did not go into any detail. Ms L just said she invited the applicant back to her place and then things got rough. The complainant told Ms L about what happened to her. She said, "Well, you know, he came into my room and the door was locked, like after, like when he was in my room. Like as if to say because I was still under the like I was under the assumption that he was the one that locked my door". Then the complainant told Ms L the same things she told the jury.

[27] The next person the complainant spoke to was the security guard, Mr Higley. It was about 4.40 am when he arrived. She was being truthful when she spoke to him. The complainant said it was possible she told Mr Higley that she was asleep in her bed and the male person came in and started removing her clothes. Mr Higley asked her, "Did he touch you with his hand" and the complainant said, "No" and shook her head. The complainant agreed that Mr Higley asked her, "Did [the applicant] penetrate you?" The complainant did not give a verbal reply but she nodded her head indicating she agreed she had been penetrated by the applicant. Ms Gorrington was present when this discussion occurred. The complainant agreed Mr Higley asked her if she wanted medical attention and she said no. He

asked her if she was hurt and she said no. She agreed it was possible Mr Higley asked her if she wanted the police and she said no, not at that stage. The complainant also agreed Mr Higley told her not to have a shower. She understood the security guard told her not to wash or shower because she could be washing away evidence.

[28] The next person the complainant spoke to was Senior Constable Ray Musgrave. He asked her what had happened as well. She told him the applicant had gone into her room while she was asleep. He had pulled down her underpants and he had got on top of her. She does not remember if she told Senior Constable Musgrave that the applicant had started a rocking motion or that the applicant had started to have sex with her. She agreed she told Senior Constable Musgrave that when she woke up it took a while for her to come around and realise what was happening. She told Senior Constable Musgrave that when she realised what was happening she initially thought she had been dreaming. She does not remember telling Senior Constable Musgrave that once she realised what was happening she told the applicant to leave and then he got off her and left.

[29] The complainant recalled when she arrived in Alice Springs she went to see Dr Barry. She does not remember what time she saw Dr Barry. She told Dr Barry the truth. She told Dr Barry the following. There had just been momentary vaginal penile penetration. By 'momentary' she meant the applicant's penis did not fully go into her vagina. The complainant also

said, when she said ‘momentary’ she meant something happened for a moment.

[30] She heard the door rattle and she realised it was locked. She didn’t hear knocking on the door. She heard rattling. She told the male to “get out of her house, to fuck off” and then he put his clothes back on. She was crying in the corner and she put her briefs back on. The applicant proceeded to hug her and kiss her on her lips and take her briefs off. Ms Gorrington and Mr Manuel Perez helped get the applicant out of the house.

[31] The complainant said after she saw Dr Barry, she had a two hour meeting with Senior Constable Ward and she made her statutory declaration. She told Senior Constable Ward the truth. She told Senior Constable Ward the following. She felt someone in her bed and she thought she was having a dream. When Mr Perez opened the door the applicant stopped the assault for a moment.

[32] The complainant agreed she did not tell either Dr Barry, Senior Constable Ward or Officer Gardiner that the man in her bed told her to “take these off”. That is, she did not tell them the man told her to take her costume bottom off. The first person she said that to was Mr Noble, the Crown prosecutor, shortly before trial.

[33] The complainant accepted that, in her statement to the police, she stated that from the time the applicant walked into her room until he left was about five minutes. Her estimate of five minutes was a true estimate. She also said in

her statement to the police that, after she realised it was not a dream and there really was a man in her bed, she started screaming out over and over again “get the fuck out of my house, fuck off”. She said it was true she had screamed out, “get the fuck out of my house, fuck off”, over and over again.

[34] In her statement to police she said that when the applicant’s penis came out of her vagina she screamed out again, “Get out. Get the fuck out”. She said that was a true statement of what happened. She yelled out as loud as she could. She also said in her statement to police that just at the moment when she screamed “get the fuck out”, Ms Gorrington burst into her room. That was also her evidence before the jury. She screamed out quite a few times. She probably could have screamed louder but it was pretty loud for her. She was screaming continuously from the time she started screaming until the applicant stopped.

[35] The complainant agreed that she gave evidence which made it clear that Ms Gorrington was in her bedroom for some time because she was the only person who came into her room as soon as the applicant stopped. Mr Perez was also in her room. She saw him around the same time that Ms Gorrington came in.

[36] The complainant said it was not possible she was screaming in her dream. She was also asked if it was possible she was only squirming and struggling in her dream. She answered no. She was asked if it was possible she was

only penetrated by a penis in her dream. She again answered no. She cannot remember her dream in any detail.

[37] She agreed she was partly asleep when she kissed the applicant. She agreed it was fair to say it was possible that she was dreaming about kissing somebody. She said it was something she just cannot remember but it could be possible. She agreed if she dreamt she was kissing somebody then it was a pleasant dream. She was asked if she remembered dreaming that she was doing anything besides kissing. She answered no. She agreed that so far as the applicant touching her arm and touching her breasts while she was lying on her left side was concerned, it is quite possible that, at that point, she was having a pleasant dream about somebody touching her sexually. She did not remember if she put her hands around the applicant's neck.

[38] The complainant was asked by counsel for the defence if it was possible that, in her dream, as well as kissing the applicant, putting her arms around his neck and turning over onto her back, she also moved her legs apart in a way which enabled the man to have sex with her. She gave no audible response. She was asked if, while still asleep or partly asleep, she could have dreamt all these things and she said the only thing she remembered doing was kissing him. She was again asked by counsel for the defence if it was possible those other things happened too before she woke up enough to realise this was all a nightmare. The complainant answered, "It is possible. Yes."

[39] The complainant was asked by counsel for the defence if, as she started to become consciously aware of what was actually happening, she fought to wake up out of her dream. She answered yes. She was then asked if, while she was breaking out of her dream, she was trying to scream but no words came out. She answered no. The complainant said she could remember hearing herself scream.

[40] The complainant gave evidence that, in her statement to the police, she stated the applicant grabbed her costume bottom before he had sex with her but after he got into bed with her. The applicant grabbed both sides of her costume bottom and ripped it right off. By that she meant the applicant vigorously pulled off her costume bottom. He then threw it on the left side of the bed. The complainant recalled that after the applicant left she put her costume bottom back on. She took it off when she had a shower, put it on after her shower and took it off again when the police asked where her costume bottom was. After she spoke to the police she took it off and threw it on the floor.

[41] The complainant recalled that she told Senior Constable Deanne Ward that Mr Perez opened the door to her room. However, she did not realise he put someone else's shoes in her room or that he left the room and locked the door behind him. She did not remember saying, "Who's there?" to Mr Perez. However, she agreed it was possible she said, "Who's there?" She does not remember the applicant asking her, "What did you say?" after she spoke to Mr Perez. However, she agreed that after the incident she told

Ms Gorrington she recognised the voice of the person who got into bed with her.

[42] The complainant was asked by counsel for the defence if it was possible the applicant never told her to take off her costume bottom. She answered the applicant did say those words. The complainant was then asked by counsel for the defence if, shortly after Mr Perez opened the door to her room, she asked the applicant, "Who are you?" and that was when he got up and stopped what he was doing to her sexually. She said she did not remember that. However, she agreed that at some point the applicant put on his tracksuit pants. She said he put on two tracksuit pants which she thought was pretty weird. The applicant may have picked up some clothes off the floor because she ended up missing two shirts. The applicant left almost exactly the same time that Ms Gorrington came into her room.

[43] The complainant recalled that before the applicant left her room he sat on the end of her bed and put his clothes back on. The applicant also asked her where his shirt was. The complainant agreed that during this period of time she and the applicant were the only two people in her room. After that he left the room and she never saw him again.

[44] The complainant denied it was possible that the applicant stopped and got dressed before Ms Gorrington and Mr Perez came into her room. There was then the following exchange between counsel for the defence and the complainant:

Counsel: Isn't it possible that [the applicant] stopped and got dressed before [Ms Gorrington] or [Mr Perez] or anybody came into the room?

Complainant: No.

Counsel: But you say the only two people in the room were you two, you and [the applicant]?

Complainant: Yes, yes.

Counsel: So it's your evidence that [Ms Gorrington] came into the room, sees [the applicant] and you, you're hysterical, and then walks out again, leaving the two of you alone in the room, is that what you say you think happened?

Complainant: No.

Counsel: Well, if [Ms Gorrington] came into the room and saw you hysterical with [the applicant] still there, what's your evidence about how come when [the applicant] was getting dressed, you and [the applicant] were the only people in the room?

Complainant: Oh, sorry, I must have gotten confused by what you were saying. No, yeah. He stopped when [Ms Gorrington] and [Mr Perez] opened the door.

Counsel: And [Ms Gorrington] came in?

Complainant: Yes.

Counsel: And then you are saying that, after that, [Ms Gorrington] went out and left you alone with [the applicant] while he got dressed?

Complainant: No. No, she stood at the kitchen door.

Counsel: She stood at the kitchen door while [the applicant] was getting dressed?

Complainant: Yes.

Counsel: In your statement to police made on the day of these events, didn't you say that [Ms Gorrington] came in, this is before [the applicant] got dressed, told [the applicant] to get out, "get the fuck out", in fact is what you say, and then went into Lucy's room?

Complainant: Yes, to wait.

Counsel: That is what you say in your statement?

Complainant: Yes.

Counsel: And that while she was in Lucy's room that is when [the applicant] was getting dressed?

Counsel: But now you are saying that [Ms Gorrington] was actually at the kitchen door, when [the applicant] was getting dressed?

Complainant: Sorry, I am just getting confused with what you are saying. So, she opened the door, and when she saw [the applicant], like positioned the way he was, then she stood at the kitchen door and told him to get the fuck out, then she went to Lucy's room to wait for him to get out. Like it wasn't actually in Lucy's room, but was at the kitchen door, so because the way our rooms are situated, she was like in Lucy's room, just like near the kitchen door.

Counsel: Just after [the applicant] left, [Ms Gorrington] and [Mr Perez] came back into your room again?

Complainant: Yes.

Counsel: Where did she come from?

Complainant: She came from like, in Lucy's room, near where the kitchen door is.

Counsel: Well what I'm suggesting to you is that you've just got that wrong, and in fact [the applicant]

stopped and got dressed before either [Ms Gorrington] or [Mr Perez] or anybody came into your room?

Complainant: No.

Counsel: Because you told Deanne Ward that when [Mr Perez] opened the door, [the applicant] stopped?

Complainant: Yes.

Counsel: And that was the truth?

Complainant: Yes.

Counsel: And isn't it entirely possible that [Mr Perez] opened the door, and then left, locking it behind him, and it was then that [the applicant] stopped, got dressed, walked over to the door, unlocked it, walked out so that [Ms Gorrington] could come in, which she immediately did?

Complainant: No.

[45] During her re-examination the complainant gave evidence that she was semi-awake but more a sleep than anything until the applicant's penis entered her vagina. It is at that moment she suddenly woke up and knew it was not a dream.

The applicant's argument

[46] Mr Tippett, who appeared on behalf of the applicant, submitted that the evidence supporting the fact of penetration of the complainant's vagina by the applicant's penis is entirely unsatisfactory. The complainant was an unreliable witness. Her evidence contains discrepancies and displays

inadequacies which lead to a conclusion that there is a significant possibility an innocent person has been convicted.

[47] He submitted that the complainant's unreliability arose because she had consumed a large amount of alcohol and she was in a deep sleep when the applicant went into her room. She consumed 11 or 12 alcoholic drinks including spirits, wine and beer before going to sleep and the complainant did not properly wake up until after she started talking to Ms Gorrington. The complainant reconstructed rather than remembered what happened to her and there was a real risk she subconsciously adopted Ms L's account of the events involving Ms L and the applicant. There was transference of part of Ms L's experience to the applicant. Mr Tippett developed the applicant's argument as follows.

[48] Ms Gorrington described her first contact with the complainant thus, "Like she did not know what was going on. She had obviously just woken up because she was like, 'Who was that?' like, she was just trying to kind of, I think, piece together what she - what had just happened." That is the description of a person who did not know what had happened.

[49] The complainant's evidence about the course of events while the applicant was in her room and immediately after he left her room is as clear to her as the act of penetration. However, a substantial part of her evidence is clearly contradicted by a number of other witnesses. This is consistent with the complainant having been asleep and reconstructing what occurred. The

complainant told the jury that while the applicant was in her room she loudly screamed, “Get the fuck out of my house. Fuck off.” over and over again. Her evidence about this is contradicted by Ms Gorrington and Mr Perez. Contrary to the complainant’s evidence: Ms Gorrington did not knock on the complainant’s door because she heard the complainant screaming; the complainant did not scream; Ms Gorrington did not break into the complainant’s bedroom with a knife; Ms Gorrington and Mr Perez did not open the door to the complainant’s bedroom, the applicant did; and Ms Gorrington did not tell the applicant to get out of the complainant’s room.

[50] The complainant’s evidence about what occurred cannot be accepted as to penetration but rejected where it is clearly rebutted by other evidence. On the complainant’s account of what took place: her screaming, Ms Gorrington bursting into her room and Ms Gorrington telling the applicant to get out are matters as clear to the complainant as the act of penetration. A reasonable assessment of the evidence is that the complainant’s account is unreliable and it raises a doubt as to her primary assertion that penetration did take place.

[51] The complainant’s evidence before the jury about the applicant’s penis penetrating her vagina rested on her assertion that she felt a “stinging pain” and the accused ‘thrust’ his penis into her vagina. Ms L also complained of similar pain following sexual intercourse with the applicant. The complainant’s prior statements about the act of penetration are inconsistent with her evidence. She did not give a history of stinging pain to anybody

else. She did not tell Dr Barry, who examined her later on the day, she experienced pain on penetration or that the applicant thrust his penis into her vagina. She told Dr Barry there was momentary penile vaginal penetration and she did not allow Dr Barry to medically examine her or take any vaginal swabs. By momentary, the complainant meant partial penetration. The complainant did not mention that she experienced pain on penetration to Ms Gorrington, Ms L or any of the police officers. She did not tell anyone else that the applicant thrust his penis into her vagina.

[52] Mr Tippett submitted that if the complainant had experienced stinging pain, one would expect the experience would be one of the most clearly and specifically remembered circumstances of that event. It is so closely associated with the occurrence of the event that it would be the first thing to come to mind in response to questions from a doctor about what happened. If pain had been experienced by the applicant it is reasonable that it would form part of the history she gave to Dr Barry. It did not. There was a discussion about pain between Dr Barry and the complainant and the complainant did not mention that she experienced pain during the alleged act of sexual intercourse. The purpose of Dr Barry obtaining the complainant's history was to elicit symptoms from her that may direct the doctor as to the course of her examination. Further, there is no medical evidence that could possibly support the complainant's evidence that she suffered stinging pain.

[53] The circumstances were ripe for a mistake to have been made by a complainant who proceeded on the assumption that penetration had taken

place and who subconsciously embellished her story to give life and support to that presumption. The complainant may have believed at the time she gave her evidence that penetration had taken place in the same way an eyewitness can come to believe he or she saw something that did not take place. The conclusion that the complainant was reconstructing her evidence about the applicant's act of penetration is supported by her reconstruction of the events surrounding the act of penetration. If the complainant is shown to have been reconstructing about those events, it is unreasonable to set aside that fact when considering her evidence about penetration.

[54] Evidence about DNA was led by the Crown from Denise Suzanne Grover who is a forensic scientist employed by the Northern Territory Police. Ms Grover gave evidence that none of the complainant's DNA was found on either the applicant or his clothing. Mr Tippett submitted that in considering whether a verdict based on penetration was reasonable or supported by the evidence it is appropriate to see if there is evidence independent of the complainant which supported her version of the act of sexual intercourse. The absence of DNA connecting the applicant to the act of sexual intercourse with the complainant also underscores the inadequacy of the Crown case. There was no proven circumstance which permitted the jury to reconcile the discrepancy between the allegations of the complainant that penetration took place and the DNA evidence that did not support her claim.

[55] It is correct to say, as did the witness Ms Grover, that the transfer of DNA is subject to a number of variables. However, if the Crown is to rely on one of those variables to limit the application to which an expected finding of DNA can be made, the Crown must produce not merely a hypothesis for the missing finding but evidence that explains the missing finding. For example, there must be evidence that the complainant was not a good shedder or that the applicant actually washed his penis before the lack of finding of the applicant's DNA can be explained by reasons other than it does not support the prosecution case. If the failure to achieve a positive DNA result in a case where that would be expected is to be dismissed as irrelevant, then an explanation for why that is so must be capable of being found in the evidence. If there is no evidence capable of excluding the negative DNA finding as a relevant consideration, then the negative finding constitutes circumstantial evidence which can be taken into account in determining whether the act of penetration occurred.

[56] The complainant's unreliability is also demonstrated by the fact that she continued to embellish her account. She told the Crown prosecutor that the applicant told her to "take these [her costume bottom] off" for the first time shortly before the trial. She did not mention this evidence to anybody else who she spoke to about what occurred.

[57] Mr Tippett accepted that the applicant was guilty of attempted unlawful sexual intercourse without consent.

The Crown's argument

[58] Dr Rogers, who appeared on behalf of the Crown, argued that the complainant was a reliable witness who gave honest evidence. The jury was entitled to accept her evidence about penetration. The complainant was firm in her evidence that there was penile vaginal penetration. Just because she was asleep to the point of the applicant's offending does not mean she reconstructed her evidence. Evidence of recent complaint was given by the complainant to Ms Gorring, Mr Higley and Dr Barry. Her complaint to Ms Gorring was 'I just woke up with someone's dick in me'. 'Momentary' penile vaginal penetration is not inconsistent with penetration. The evidence of complaint went positively to the credibility of the complainant. Showering after a sexual assault is not unusual. It is not itself indicative that the complainant was not a person on whom the jury could rely to find the applicant guilty.

[59] A stinging pain on penile penetration of the vagina with no lubricant is not unexpected. It is not indicative that there will be enduring pain and discomfort. The assertion of counsel for the applicant that a recoverable deposit of DNA would be expected on the penis of the applicant was an incorrect elevation of the evidence of Ms Grover. Ms Grover made it plain that a transfer of DNA was a potential event which was subject to a number of variables.

[60] The learned trial judge gave full and accurate directions to the jury. He drew the jury's attention to the inconsistencies now relied upon by the

applicant and he reminded the jury of the primary submissions of counsel. It is necessary to give weight to the position of the jury in seeing and hearing the complainant's evidence. Whether the complainant was a credible witness was a matter for the jury. The jury's advantage of seeing and hearing the complaint should not be underestimated.

Consideration

[61] In our opinion, the submissions of senior counsel for the applicant should be accepted. Leave to appeal should be granted. We find, on the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the crime of unlawful sexual intercourse without consent.

[62] The evidence of Ms Gorring and Mr Perez establishes that at some stage during the early hours of 6 December 2008, while they were in each others company, Ms Gorring received a telephone call from Ms L asking for help. They then went to Ms L's room. When they arrived, Ms L asked them if they could help take the applicant from her room. Mr Perez then went into Ms L's room. He found the applicant was asleep on Ms L's bed. Mr Perez woke up the applicant and the applicant got his shirt and a few things and went to the toilet which was in the common area in the middle of the shared unit. While the applicant was in the toilet Mr Perez went outside and he told Ms Gorring and Ms L the applicant had left Ms L's room.

[63] Mr Perez then waited for the applicant to come outside. However, he did not come outside and Mr Perez went to look for him. He could not find the applicant either in the toilet or the shower or the kitchen of the shared unit. He noticed the complainant's bedroom door which led into the kitchen/dining area of the unit was ajar a few centimetres and he opened her door. He saw the complainant and the applicant were under a doona. He could see the silhouette of a girl and he saw the applicant's face. The applicant was on top of the complainant. Mr Perez could hear a girl's voice say, "Who is there?" He went back to Ms L's room and got the applicant's shoes and pants and placed them in the complainant's room and he locked the door to her room. Then he went back to Ms Gorrington and Ms L and told them where the applicant was.

[64] Upon being told where the applicant was, Ms Gorrington rushed to the complainant's room. When she arrived at the room she tried to open the door which led into the room from the common area of the unit but it was locked. Ms Gorrington started yelling out to the complainant and knocking on her door. The complainant did not answer the door despite the fact Ms Gorrington was banging on her door quite hard. She also tried the screen door which led into the complainant's bedroom from the external balcony without success and then she tried the complainant's internal door again. She did not knock on the complainant's door for very long before the applicant opened the door and departed from the complainant's room. Ms Gorrington moved out of the way to let the applicant pass and then she went

into the room. The complainant was sitting on her bed with her doona wrapped around her.

[65] According to Ms Gorrington's evidence, at no stage did the complainant respond to Ms Gorrington's calls to her or to Ms Gorrington's knocking.

Ms Gorrington did not hear any sounds coming from inside the room while she was knocking. When Ms Gorrington went into the room, she asked the complainant if she was okay and what had happened. Ms Gorrington gave the following description of the complainant:

She was waking up and she wasn't sure – she was still trying to piece together what had just happened herself. She was – she wasn't – I used the word 'hysterical', not quite 'hysterical', but she was really kind of – she was crying and really kind of confused and just kept saying, "Who was that?" Like, "What just happened? Who was that?"

She was just disoriented and confused as to like what had just happened. And obviously like, you know, she looked like she had just woken up. Her hair was kind of messed up and she had a doona wrapped round her and she looked like she had just woken up. You know how people look like when they have just woken up. She didn't have any make up on, she hadn't done her hair.

She was saying, "Who was that?" etcetera.

[66] Ms Gorrington told the complainant that it was the applicant who had been in her room. She said they had been trying to get him out of the shared unit but in the end they got him into her room. The complainant responded by saying she knew who the applicant was. Ms Gorrington said in her evidence that: "I think she was like, "Is that the guy who works at Gecko's – like the bar at Gecko's?" and it was like "Yes, that's [the applicant]."

[67] The evidence of Mr Perez and Ms Gorrington raises the possibility that the applicant's attempt to have sexual intercourse with the complainant was interrupted when Mr Perez opened the complainant's door and continued to be interrupted by Ms Gorrington knocking on the complainant's bedroom doors; and the applicant got dressed and left the complainant's room after Ms Gorrington started knocking on the doors to the room. The evidence of Mr Gorrington and Mr Perez creates a serious conundrum for the Crown. If the complainant was awake, one would have expected her to have responded to Ms Gorrington's calls and knocking which occurred shortly after Mr Perez had opened the complainant's door and lasted for about five minutes. If the complainant was asleep throughout Ms Gorrington's knocking and calling out then her evidence about penetration is likely to be just as unreliable as her evidence about her screaming at the applicant to leave her room and Ms Gorrington opening her door with a knife. Given the amount of alcohol the complainant had consumed it is very likely she would have fallen into a very deep sleep, it would have taken her a considerable amount of time and effort to wake up and she may well have been severely disoriented when she eventually woke up.

[68] For the complainant's evidence to be credible there has to be an explanation as to why she did not respond to Ms Gorrington. There is none. Instead, the complainant simply maintains she was calling out over and over again and it was Ms Gorrington who responded to her. The conclusion must be that the complainant was reconstructing these events.

[69] The complainant's evidence about the events surrounding the applicant's departure from her room is demonstrably unreliable and this unreliability creates a reasonable doubt about the reliability of her evidence about penetration. It is significant that: the complainant did not respond to Ms Gorrington's calls or knocking, yet she gave evidence she was screaming at the applicant to fuck off and get out of her room; the applicant unlocked and opened the complainant's bedroom door and left the premises and yet the complainant gave evidence that Ms Gorrington opened her door and told the applicant to get out; the complainant asked Ms Gorrington who the applicant was and yet the complainant gave evidence she recognised the applicant, she said she recognised both his voice and his face; the complainant did not complain to Ms Gorrington about any stinging pain when she described the act of sexual intercourse; the complainant told Ms Gorrington she woke up "with someone sticking their dick inside of me" yet she gave evidence that she was awake when the applicant removed her costume bottom and the applicant spread her legs before he inserted his penis into her vagina.

[70] The nub of the complainant's evidence about the act of sexual intercourse was as follows. When the applicant got onto the bed she was on her side and he touched her arm and her breasts. She then rolled over onto her back and they kissed each other. The applicant got on top of her and he told her to take off her costume bottom. He then vigorously took off her costume bottom and threw it on the side of the bed. He opened her legs and thrust his penis into her vagina. This caused her stinging pain. His penis

remained in her vagina for about five seconds. He was on his knees and only his penis was in contact with her body. The complainant's prior statements to Ms Gorrington, Mr Higley, Senior Constable Musgrave and Dr Barry about the act of sexual intercourse are quite inconsistent with her evidence. The inconsistency between the complainant's evidence and her prior statements is such that it detracts from her credibility.

[71] Ms Gorrington's evidence about the complainant's complaint to her was:

Once she started waking up and I told her who it was and that we were looking for him and that I didn't – like I just kept apologising and not realising that he had gone into her room and I just kept saying, 'Are you okay?' and she just – she like "No, I woke up with some one sticking their dick inside of me."

[72] The complainant made no complaint of pain to Ms Gorrington. She simply nodded when Mr Higley asked her if she had been penetrated and she told him that she did not want to see a doctor and she was not hurt.

[73] The complainant told Senior Constable Musgrave:

I can remember her telling me that [the applicant] had gone into her room while she was asleep and he'd pulled down her underpants and he got on top of her and started to – you know – rocking motion – started to – you know have sex with her. And then she woke up and it took a while for her to come around and realise what was happening – I think she initially said that she thought she was dreaming and once she realised what was happening, she told – I believe she told him to leave and then he got off her and left.

Her complaint to Senior Constable Musgrave makes no mention of any pain or penile thrust. Nor does it make any mention of Ms Gorrington opening the

complainant's door and telling the applicant to leave. Nobody heard the complainant telling the applicant to leave her room.

[74] The complainant told Dr Barry there was only momentary penile vaginal intercourse. By momentary the complainant said she meant the applicant's penis did not fully go in. It only happened for a moment. This is not entirely consistent with the applicant thrusting his penis into the complainant's vagina and his penis remaining in her vagina for five seconds. The complainant told Dr Barry the applicant got off her and got dressed after he had finished having sex. The complainant also told Dr Barry that she told the male to get out of her house and to fuck off and that he then put his clothes back on. The complainant did not tell Dr Barry the applicant had thrust his penis into her vagina or that this had caused her stinging pain or that his penis had remained in her vagina for about five seconds or that Ms Gorrington broke into her room and told the applicant to leave. At the time of the examination the complainant told Dr Barry there was no pain, no discomfort and there was no difficulty passing urine or defecating.

[75] The complainant's unreliability is further demonstrated by her inconsistent evidence about when she woke up. At one point she is adamant she was awake when the applicant is said to have removed her costume bottom. While during her re-examination she stated she was semi-awake but more a sleep than anything until the applicant's penis entered her vagina. It is at that moment she suddenly woke up and knew it was not a dream. Further,

the complainant's evidence about what Ms Gorrington did after the applicant entered her room is intrinsically inconsistent.

[76] As to the issue of the lack of the complainant's DNA on the applicant and his clothing, Ms Grover gave the following evidence during cross examination:

Counsel: Now, similarly, if this same sexually aroused woman had unprotected penile vaginal sex with that same man, in other words the man inserts his penis without a condom into the woman's vagina, you'd expect that some of her DNA would be transferred onto his penis, again as a result of her vaginal fluid, containing skin cells, sticking to his penis?

Ms Grover: Potentially, yes.

Counsel: That's what you'd expect?

Ms Grover: Yes.

[77] During re-examination Ms Grover gave the following evidence:

Counsel: You were also asked that if someone had unprotected vaginal sex, that potentially the female DNA would be on the man's penis?

Ms Grover: Potentially, it could be, yes.

Counsel: Is it just because there has been unprotected penile vaginal sex, does it have to be the female's DNA on the man's penis?

Ms Grover: You wouldn't say there'd have to be if he is putting on clothing afterwards, you would expect any DNA on the outside of his penis to be transferred to that part of clothing. There are a lot of variables.

Counsel: So anything that rubbed against the penis could take that DNA away?

Ms Grover: Could do, yes.

Counsel: Or washing?

Ms Grover: Yes, absolutely.

Counsel: Could the passage of time, in any way, remove the DNA – taking seven, 12, 15 hours – could the passage of time have anything to do with it?

Ms Grover: Yes, especially then you would expect that there is going to be fabric rubbing up against the penis during that time. I wouldn't have expect – if it's open, maybe not, but if there is touching onto another surface, you would expect there to be some transfer.

Counsel: Again in relation to the expectation of DNA on the site of some clothing that another person has touched, to pull off, again is there any explanation for why the person who has pulled it off may not have their DNA on that fabric?

Ms Grover: Whether or not they have washed their hands recently, does depict whether there are lots there's lots of skin cells that are flaking off on the surface, or whether or not they have rubbed them hard together, or used them against a ridged surface. It comes back to the transfer amount of when their skin cells were actually shedding from your skin. Some people shed them quite easily, and some people don't.

His Honour: It depends on the fabric surface?

Ms Grover: Absolutely, yes, in this instance they were bikini bottom, I believe.

[78] The complainant took her own low vaginal swab test. It was submitted for analysis. The complainant's low vaginal swab tested negative to the presumptive test for semen. Spermatozoa were not seen when the smear

prepared from this swab was examined microscopically. The low vaginal swab was also submitted for DNA analysis. The partial DNA profile obtained from the low vaginal swab matched the DNA profile attributed to the complainant. None of the applicant's DNA was detected. Wet and dry urethral meatus and wet and dry penile shafts swabs were taken from the applicant. They were pooled and submitted for DNA analysis. The DNA profile identified from these swabs matched the DNA profile attributed to the applicant. None of the complainant's DNA was detected. The complainant's costume bottom was tested for DNA and none of the applicant's DNA was detected. In fact no male DNA was detected. The applicant's underwear was tested for DNA. A minor DNA component was detected. An attempt was made to get Ms Grover to say that the DNA results from the swab taken from inside the crotch of the underpants excluded the complainant, but she was not able to say that because one of the alleles found in the minor component was a 13 and the complainant's DNA included a 13. However, the evidence about where the applicant's underwear was found excludes the complainant. The applicant's underwear was found in the complainant's room. Therefore, it can be inferred that he did not put his underwear back on before he left the complainant's room. The applicant's tracksuit pants were not examined for DNA. The evidence also establishes that the applicant did not shower prior to the penile shaft swabs being obtained. There is no evidence that the complainant was a poor

shedder of DNA. Nor is there any evidence that DNA was transferred from the applicant's penis to his tracksuit pants.

[79] In the circumstances the negative DNA results are not neutral. While the results do not of themselves prove the applicant did not insert his penis into the complainant's vagina, they nonetheless constitute some circumstantial evidence which may be taken into account when assessing the complainant's reliability.

[80] The jury had the opportunity to see and hear the complainant give her evidence. However, in a case like the present, where there is a real possibility that the complainant may honestly but mistakenly have believed that penetration occurred, little weight can be given to that factor. An honest, but mistaken witness can be very convincing, but nevertheless wrong. Having given due regard to the advantage enjoyed by the jury, we are of the view that the discrepancies and inadequacies in the complainant's evidence are such that her evidence about penetration lacks probative force and there is a significant possibility an innocent person has been convicted of the crime of unlawful sexual intercourse without consent.

[81] Although the applicant was not and could not be properly found guilty of the crime of sexual intercourse without consent, the evidence given at his trial was such that a reasonable jury correctly instructed must find him guilty of the offence of attempted sexual intercourse without consent contrary to s 192(5) and s 277(1) of the *Criminal Code*. Under s 412(1) of the *Criminal*

Code we would, therefore, dismiss the appeal but substitute for the verdict of the jury a verdict of guilty of attempted sexual intercourse without consent. We would hear the parties further before we pass sentence in substitution for the sentence passed at the applicant's trial.

KELLY J:

Introduction

[82] On 15 May 2008, the appellant, Calixto Arroyo, was found guilty by a jury of having sexual intercourse with the complainant without her consent. He had been charged on the same indictment with attempting to have sexual intercourse with another woman, Ms L, without her consent. The jury found him not guilty of that charge. He seeks an extension of time and leave to appeal against his conviction on the charge of having intercourse with the complainant without her consent.

[83] The appellant makes no complaint about the adequacy of the summing up, the admission of any of the evidence, or any other aspect of the conduct of the trial. The only ground of appeal is that the jury verdict of guilty was unreasonable and cannot be supported by the evidence. His sole complaint in relation to the jury verdict concerns the issue of penetration. The appellant says that on the state of the evidence, the jury was bound to have a reasonable doubt about whether the appellant's penis penetrated the complainant's vagina.

Principles

- [84] The question which the Court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.⁵ If, upon the whole of the evidence, a jury, acting reasonably, was bound to have a reasonable doubt, then the verdict of guilty must be set aside.
- [85] In answering that question the Court must keep in mind that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and that the jury has had the benefit of having seen and heard the witnesses.⁶
- [86] “An appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict, but the appellate court does not substitute its assessment of the significance and weight of the evidence for the assessment which the jury, properly appreciating its function, was entitled to make.”⁷
- [87] “The appellate court's function is to make its own assessment of the evidence not for the purpose of concluding whether that court entertains a doubt about the guilt of the person convicted but for the purpose of

⁵ *Gipp v R* (1998) 194 CLR 106 per McHugh and Hayne JJ at p 123, par [49] re-affirming the test laid down in *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at p 493 par [7] and affirmed in *Jones v The Queen* [1997] HCA 12.

⁶ *M v The Queen* per Mason CJ, Deane, Dawson and Toohey JJ at [7].

⁷ *Carr v The Queen* (1988) 165 CLR 314 per Brennan J at t 330 - 334, applied by Gaudron J in *Gipp v R* at p 114 par [18].

determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused.”⁸

[88] In my opinion, this appeal should be dismissed.

The evidence

[89] The facts and the evidence of the various witnesses are set out in some detail in the reasons for judgment of Mildren and Southwood JJ.

[90] There is no real dispute about the broad, general facts of what happened that night.

[91] The complainant and Ms L were both residents of the Yulara staff complex. They had both been drinking earlier in the evening on which the relevant events occurred, as had Mr Arroyo. Ms L invited the applicant, Mr Arroyo, back to her room. They intended to have sex and some consensual sex occurred. However, Ms L eventually refused to have sex with Mr Arroyo (she says because he persisted in trying to have sex with her without a condom). Ms L then went to get Ms Gorrington and Mr Perez to help her get Mr Arroyo out of her room.

[92] In the meantime, Mr Arroyo left Ms L’s room and entered the complainant’s room where the complainant was asleep on her bed. It is not disputed by the applicant that, while there, he attempted to have sexual intercourse with the complainant without her consent.

⁸ *M v The Queen* per Brennan J at [3] citing *Knight v The Queen* (1992) 175 CLR 495.

[93] The complainant's evidence is that he succeeded, albeit momentarily.

[94] The only question on this appeal is whether the jury's conclusion of fact that Mr Arroyo succeeded in inserting his penis into the complainant's vagina was unreasonable and could not be supported by the evidence. In my view, it was not unreasonable.

The appellant's contentions

[95] Counsel for the applicant submitted that the DNA evidence raised doubt about the complainant's evidence. I do not agree. There was no DNA found on the applicant's penis other than his own. One explanation was that it might have come off when he put on his underpants. An attempt was made in cross examination to have the forensic biologist, Miss Grover, say that the DNA results from the swab taken from the inside crotch of the underpants excluded the complainant, but she was not able to say that. All that can be said about the DNA evidence is that it is equivocal.

[96] In a related submission to that concerning the DNA evidence, counsel for the applicant was highly critical of the complainant for showering after the assault, when she knew she may be washing away evidence. In written submissions, counsel for the applicant contended:

“[T]he showering indicated a significant degree of irresponsibility that is another yardstick by which the complainant's evidence regarding penetration can, and should be measured.”

[97] This submission, made on behalf of the applicant who does not dispute that he assaulted and at least attempted to rape the complainant while she slept, combines spectacular insensitivity with breathtaking impertinence. The complainant placed priority on wanting to clean herself after the assault. That is hardly surprising and, as the prosecutor pointed out, not uncommon. Nor is it at all surprising that the jury did not consider that this reflected badly on her credit.

[98] Counsel for the applicant submitted that the complainant's evidence about the incident as a whole was so confused, contained such discrepancies, and was, as a consequence, so unreliable, that the jury ought to have had reasonable doubt about whether penetration occurred.

[99] Counsel pointed to discrepancies between the evidence of the complainant and the evidence of Ms Gorrington and Mr Perez. The complainant gave evidence that when she realised what was happening she screamed, "Get the fuck out of my house," and, "Fuck off," repeatedly which caused Ms Gorrington to burst into her room. Ms Gorrington and Mr Perez did not hear her scream when they were at the door trying to get in. Moreover, Ms Gorrington gave evidence that she and Mr Perez were knocking quite frantically at the door when the door opened, Mr Arroyo came out, and she and Mr Perez entered the room. Mr Perez's evidence was to the same effect.

[100] I do not agree with the contention of the applicant that these discrepancies, such as they are, ought to have caused a jury to entertain a reasonable doubt

about whether penetration took place. As counsel for the respondent pointed out, the complainant was asleep when the assault by Mr Arroyo began. It is quite possible that in her sleeping or half waking state, she thought she was screaming but that no sound, or little sound, emerged. The complainant herself rejected this suggestion and said she heard herself scream, but it is quite possible (and the jury could reasonably have believed) that she was mistaken on that point.

[101] Moreover, the complainant's evidence is broadly consistent with the evidence of Ms Gorrington and Mr Perez about how they disturbed Mr Arroyo. The complainant may have been confused about the exact mechanics – that is about whether they burst in and caused him to leave, or whether they knocked loudly causing him to leave as they came in - but she was not mistaken about the central fact that was of importance to her, namely that it was the loud and frantic interruption by Gorrington and Perez that caused her assailant to desist and leave.

[102] Counsel for the applicant pointed to evidence that when Arroyo left her room, the complainant was confused about what had occurred asking, "Who was that?" and, "What happened?" and trying to piece together what had occurred. That is understandable in the circumstances, but one thing the complainant was clear about from the very beginning: when Ms Gorrington came into her room and asked her, "Are you OK?" she answered, "No, I woke up with someone's dick in me." There has been no inconsistency in the complainant's story about that central fact.

[103] Each person she spoke to, she told them or replied to their questions to the effect that penetration had occurred.

- (a) Her first complaint was to Ms Gorrington, immediately after Mr Arroyo had been interrupted by Ms Gorrington and Mr Perez and left the complainant's room. She said, "I woke up with someone's dick in me." This is confirmed by Ms Gorrington.
- (b) Her second complaint was to the security officer, Mr Higley shortly thereafter. He asked her if she had been penetrated and she said, "Yes." This is confirmed by Mr Higley.
- (c) Her third complaint was to Senior Constable Musgrave about an hour and a half after the event. She said that he'd got on top of her and started to have sex with her. He did not ask for any further details. This is confirmed by Senior Constable Musgrave.
- (d) Her fourth complaint was to Ms L in the car on the way to Alice Springs. Ms L confirms that the complainant told her about what had happened at some time.
- (e) Her fifth complaint was to Dr Amanda Barry. She told Dr Barry there had been momentary penile vaginal penetration. She explained in cross examination that she meant his penis didn't go fully in and was only in there for a moment. This was confirmed by Dr Barry.

[104] Counsel for the applicant submitted that the complainant had displayed a tendency to reconstruct in evidence and that the jury could not therefore be sure she had not reconstructed the evidence about penetration. Given that the complainant was asleep when Mr Arroyo began his assault upon her, and awoke in a confused state, it would be surprising in the extreme if she had not had to reconstruct surrounding events to some extent. However, her evidence that Mr Arroyo's penis penetrated her vagina was clear and consistent. She says she was awake at the time – indeed that that is what made her finally wake up and realise it was not a dream – and the jury may not unreasonably have taken the view that that is not something a person is likely to be mistaken about.

[105] Counsel for the applicant submitted that the complainant's complaint to Ms Gorrington, "I woke up with someone's dick in me," is inconsistent with her later evidence that Mr Arroyo "thrust" his penis into her and that she felt a stinging pain as he did so. These statements are not inconsistent. Being brought fully awake by the stinging sensation of a person thrusting his penis into her vagina is not inconsistent with the statement to Ms Gorrington immediately after the assault, "I woke up with someone's dick in me."

[106] There was some misleading cross examination of the doctor by counsel for the defence at the trial. He asked the doctor to agree that the complainant did not tell him "there was any thrusting in and out". However, nowhere in her evidence did the complainant say that had occurred. She said he thrust

his penis **in** which is synonymous with penetration. There is no inconsistency at all between those two statements.

[107] Counsel for the applicant submitted that the complainant had not told the doctor about the stinging pain on penetration. In fact, the doctor's evidence is that she asked the complainant about then existing pain (ie at the time of the examination). The doctor was not cross examined about whether the complainant told her about the stinging pain or about whether the doctor had even asked the complainant whether she experienced pain at the time when penetration occurred. Again, there is no evidence of any inconsistency.

[108] It was submitted, also, that the complainant gave inconsistent evidence about when she woke up. Given that she was assaulted while she was asleep and woke in confusion while the assault was occurring, it does not seem to me to be adverse to her credit if she had difficulty saying at just what moment she awoke. Waking is a process, not a split second on/off switch – but her evidence about coming **fully** awake when she was penetrated is understandable, and it is understandable if the jury found it credible – even compelling.

[109] It must be borne in mind that the issue on this appeal is not whether this court would have been convinced beyond reasonable doubt of the applicant's guilt; it is whether it was open on the evidence for **the jury** to be satisfied beyond reasonable doubt that the accused was guilty. Given the complainant's strong testimony on the central fact (ie penetration); the

understandable reasons why she might have been hazy on the detail leading up to the central fact; the lack of any material conflict of evidence on the main events (as distinct from the detail); and the consistency of the complainant's story in relation to that central fact from within minutes of the assault, in my view it is not possible to say that a reasonable jury must have had a reasonable doubt about the fact of penetration.

[110] In my view, a jury acting reasonably was entitled to be satisfied beyond reasonable doubt that the complainant's evidence that there had been penetration of her vagina by Mr Arroyo's penis was true. I would extend time and grant leave to appeal, but dismiss the appeal.
