

SUPREME COURT OF QUEENSLAND

CITATION: *R v Thompson* [2026] QCA 146

PARTIES: **R**
v
THOMPSON, Ivan Peter
(appellant)

FILE NO/S: CA No 93 of 2024
DC No 122 of 2022

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Mackay – Date of Conviction: 29 February 2024 (Rosengren DCJ)

DELIVERED ON: 7 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 2 June 2026

JUDGES: Boddice JA, Brown JA, Kelly J

ORDERS: **1. Leave to adduce further evidence be granted.**
2. Appeal against conviction be dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by jury of one count of rape – where the complainant identified the appellant by his voice – where the appellant seeks to adduce further evidence of an expert report on the reliability of voice recognition – where the appellant contends that reliable recognition by voice was not possible – where voice recognition was not the sole source of the complainant’s identification of the appellant – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where a conversation between the complainant and the police was admitted at trial where the complainant stated that it was only later on the day of the offending that she realised that the appellant had inserted his fingers into her vagina – where the appellant contends that the conversation with police was the only evidence of digital penetration that arose from a ‘recovered memory’ – where in that same

conversation the complainant provided further evidence of digital penetration based on physical sensations – whether it was open to the jury to be satisfied beyond reasonable doubt having regard to the evidence that the appellant digitally penetrated the complainant without her consent

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant departed the workplace the day after the offending despite being rostered for three further days – where the Crown relied upon the appellant’s departure from the workplace as evidence of a consciousness of guilt – where the trial judge directed the jury that the appellant’s departure could be used as evidence of a consciousness of guilt and amounted to flight – where the appellant contends the use of the word ‘flight’ was prejudicial and impermissibly connoted guilt – whether the trial judge erred by directing the jury that the appellant’s departure could be used as evidence of a consciousness of guilt rather than directing the jury in the form identified in *Zoneff v The Queen* (2000) 200 CLR 234 – alternatively, whether the direction given to the jury provided sufficient information to determine whether the appellant’s departure amounted to flight

Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, considered

COUNSEL: D M Wells, with M Thomas, for the appellant
M A Green for the respondent

SOLICITORS: Mackenzie Mitchell Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **BODDICE JA:** On 29 February 2024, a jury found the appellant guilty of one count of rape. The appellant was sentenced to imprisonment for 3 years, suspended after serving 18 months, for an operational period of 4 years. It was declared that 365 days spent in pre-sentence custody be deemed as time served under that sentence.
- [2] The appellant appeals his conviction.¹ The appellant also seeks leave to adduce further evidence on the appeal.
- [3] The appellant relies on three grounds of appeal.
- [4] First, that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty because in the circumstances, reliable recognition by voice was not possible.
- [5] Second, that it was not open to the jury to be satisfied beyond reasonable doubt that the sexual assault experienced by the complainant amounted to rape because the only

¹ An application for leave to appeal sentence was dismissed.

evidence of digital penetration was a recovered memory, articulated in circumstances in which there was no external evidence which might be used to assess the reliability of that claim.

- [6] Third, that the learned trial judge fell into error by:
- (a) allowing the appellant's departure from his workplace to be posited as evidence of consciousness of guilt and giving a flight direction rather than a *Zoneff*-type direction; or in the alternative
 - (b) not giving the jury all the information they needed to determine whether the appellant's departure from his workplace amounted to flight.

Indictment

- [7] The indictment alleged that on 25 January 2020, the appellant raped the complainant. The count of rape was particularised as penetrating the complainant's vagina with his fingers, without her consent.
- [8] At trial, there was no dispute that the complainant had been sexually assaulted at the time and place alleged on the indictment. The issue for determination by the jury was whether the appellant was the perpetrator.
- [9] The appellant elected to give evidence in his defence.

Evidence

Complainant

- [10] The complainant gave evidence that in January 2020, she was working at a mine site in Central Queensland. She had commenced working at the mine site about three months earlier. She operated as a fly in-fly out worker, residing at the mine site when she was rostered to work. Her work roster was seven days on, seven days off.
- [11] The complainant said that upon commencing work at the mine site, she met the appellant as a work colleague. They were constantly in communication as they were working in the same crew. The complainant worked as both a water cart operator and a truck operator. She was constantly using the two-way radio to advise the crew of her location. There were also other communications with the appellant, at lunch and whilst carpooling between the mine site and the closest regional city. The complainant estimated that she had had contact with the appellant pretty much every day that they worked together. Their conversations were largely via two-way radio. As such, they were limited to work matters.
- [12] The complainant described the appellant as average build, a shorter stature than her and having a Māori accent, as in an accent from New Zealand. There were others who had a Māori accent with whom she communicated at work, but they were older. The complainant described her relationship with the appellant as close. She felt she could trust him. She had never had a reason not to trust Māori people. She looked up to the appellant "like an uncle sort of figure". There was no romantic relationship; they were workmates. They did not have contact when they were not working together.
- [13] The complainant said on the afternoon of 24 January 2020, she had a number of drinks at dinner. She continued to drink after dinner, at the camp bar. Several colleagues

were present, including the appellant. When the camp bar closed, they went to a nearby hotel. Whilst there, she played pool. She was drinking full-strength beer. After about an hour, she walked back to camp with the appellant and two male work colleagues. It took about 10 to 15 minutes. One of the work colleagues said that he had a few beers in his room. They sat outside the adjoining rooms occupied by the complainant and the appellant. By that time, it was approaching midnight.

[14] Whilst sitting outside the rooms, the complainant had a conversation with the appellant. When the other two work colleagues left to go to bed, the complainant remained with the appellant, talking about New Zealand. The appellant told her that he admired the way she carried herself at work. He said something along the lines of Māori men were attracted to women like the complainant. The complainant could not remember how she responded at that time. The complainant described herself as being tipsy. She was careful about how much she drank because she knew that they were breath tested at work. The complainant said when the conversation ended, she went to her room to go to bed. The appellant put her chair back into the room. The complainant said to the appellant, “if you don’t hear me up ... just come and check – see if I’m awake”. The complainant said she had asked friends in the past to wake her up. She felt she could trust the appellant enough to wake her up.

[15] The complainant said she went to bed wearing a shirt and underpants. She set an alarm for 4.00 am. When she woke up to her alarm, somebody was beside her in bed. The person had their hands down and under her underpants. The person’s fingers were penetrating her vagina. It was more than one finger. The person was moving them in and out of her vagina. The complainant said that she was:

“... like half asleep, half awake, in the middle of waking up, coming to, sort of. You know, I didn’t really realise what was happening, and then I come to and realise what was happening, and I sort of – I didn’t just react and get up and jump out of bed and, you know, go off or anything. I froze in the moment, and I didn’t know what to do, so – yeah, I don’t know. It was time to go – I sort of looked at the time, and I’m like – was getting to get up and go to get ready for work, and I remember him saying, ‘Oh, what’s the time?’ like, as if we were both consensually just did something and we’ll be getting up for work now. So I just got out of bed and then out of the bed and went – went straight into the shower and closed the door behind me, and then I went for a shower, and I come out and he wasn’t in my room.”

At no time did she consent to this person putting their fingers in her vagina.

[16] When asked who that person was, the complainant said it was the appellant. She knew his voice, his figure and his shape. He was positioned beside the bed, like he was trying to move himself onto the bed. The bedroom main light was off, but there was a bathroom light on which illuminated the bedroom enough for her to make out the male’s shape. When asked if she recognised the figure as the appellant, the complainant said, “I – I just – I don’t know. I just knew it was him, because I – I see him at work every day. You know, half of my life with him at work, and I’m surrounded by – around this person, and then when I heard his voice, then that’s when I knew it was him.” When asked what she recognised about his voice, the complainant said, “It was just his voice, like, his accent, the tone, how he spoke.”

- [17] The complainant said she went to the shower. The person was still in her room, beside her bed. As she left, she did not look at the person properly. She just went into the bathroom. She did not believe she said anything at that time. The complainant may have told the person to stop, in the process. When she had finished in the shower, the person was gone. She proceeded to get ready for work. She undertook a breathalyser. She recalled blowing over a little bit. She knew she had time before her shift started, so she would be okay before work. She said she felt fine.
- [18] Later that morning, the complainant messaged a female friend, who also worked at the mine site, saying she needed to tell her something. The communication was conducted through Snapchat because her friend was in New Zealand at the time. When the friend asked what happened, the complainant said, “I woke up with a man’s hands down my pants”. The complainant said she did not tell the friend anything more in that conversation. She thought the conversation was around 10.00 am. It was after she had started her shift.
- [19] Later that day, the complainant told another female work colleague, who was working on the same crew, that they had all gone out for a drink and had come back to camp and when she woke up, the appellant had his hands down her pants. This work colleague encouraged the complainant to tell someone else about it.
- [20] The complainant spoke to her superintendent after lunch. She told the superintendent that a group had gone out for drinks and that the next morning she had woken up with the appellant in her room, with his hands down her pants. She wrote a note for the superintendent that same day. It stated:
- “[The complainant], [the appellant], after work on the 24th of January – Jan 2020. I had a few drinks with a few coworkers at the hub. After the night with my coworkers, we returned to our rooms. [The appellant] is staying in the room next to me. I asked [the appellant] to wake me up if he didn’t hear me at 4 am. I woke up to my alarm and [the appellant] in my room next to bed with his hand in my underwear. I told [the appellant] to stop it and I went to my shower. When I got out, [the appellant] was not in my room.”
- [21] The complainant said that the superintendent arranged for her to stay off site. The complainant spoke to police that night and made a complaint. On the following day she gave a written statement to police.
- [22] In cross-examination, the complainant agreed that she had previously described the appellant as in his 50s, 170 cm tall, Māori, with an average build and a big gut. She accepted that description would fit many men at a mine site. The complainant had carpooled with the appellant a few times. She did not accept it was only on one occasion. The complainant said that in her role driving trucks, she regularly communicated with other operators. The two-way radio was used to let others know what you are doing. When using the radio, she would speak with many men of Māori descent. She agreed that a person can sound differently on radio, but said, “You get pretty attuned to who you’re speaking to on the radio”.
- [23] The complainant accepted that it was possible that she consumed three glasses of red wine at the camp bar. She also had two schooners of heavy beer. Prior to going to the hotel, she went back to her room to change her clothes. She was unsure what time she arrived at the hotel. The walk did not take long. Whilst at the hotel, the

complainant played pool. She agreed she was affected by alcohol. She accepted that she had at least two schooners of beer at the hotel. She left probably around midnight. She did not recall it being as late as 2.00 am. The complainant accepted that when they walked back to their accommodation, one of the males went to his room to obtain alcohol and the appellant went to his room to obtain some food.

- [24] The complainant accepted that when she spoke to police at the hospital, she described her level of intoxication as drunk. She agreed that she was not sure what time she actually went to bed. The complainant did not recall saying, in the presence of the appellant and two other male work colleagues, “Who is going to wake me up?” She did not recall the appellant replying, “No. It’s not my responsibility to wake you up”, or the appellant telling her she should not drink so much and that she should self-test the next day or she would risk losing her job. The complainant could not recall waking up during the night and vomiting in her bathroom.
- [25] The complainant agreed that the person in the room was kneeling by the bed. She could not see the person’s face properly but was not particularly staring at his face. She accepted that she never described the person’s clothing or any distinguishing features. She denied that the person in the room was a different Māori man to the appellant. The complainant was certain who was in her room. She denied that she was confused because she was affected by alcohol. She accepted that she identified the person by voice when the person said, “What’s the time?” She could not recall having used different words on other occasions such as “It’s time to get up”.
- [26] The complainant accepted that when she spoke to her female work colleague that morning, she did not tell the work colleague how much she had had to drink or that she had blown over on the breathalyser. She did not recall telling the female work colleague about seeing an outline of the person in her room or about identifying the person by the voice. She denied that the reason she did not mention the voice was because she was unsure who was in her room. The complainant said she spoke to the female work colleague about what happened to her. She agreed she never told the female work colleague about any distinguishing features of the person or about the comment that Māori men would be interested in the complainant.
- [27] The complainant could not recall if she used the words, “I was sexually assaulted” when speaking to the superintendent. She agreed she did not tell the superintendent how much alcohol she had consumed or what number she had blown on the breathalyser. She also did not tell the superintendent about the lighting in the room and did not give a physical description of the person in the room. She did not tell the superintendent about the comment that Māori men would be interested in her. She denied she was trying to minimise the amount of alcohol she had consumed when she spoke to the superintendent. The complainant was focussed on what had happened.
- [28] The complainant agreed that she spoke to two police officers at the hospital on the same night, less than 24 hours after she had woken up with a person in her room. She agreed that her memory at that time would possibly be better than her memory at the time of giving evidence. She did not remember the content of the conversation she had with the officers at the hospital. She did not recall saying to the officers that when she woke up it took her a while to realise what was happening and that she could not see his face exactly 100 per cent and that she saw the person’s shape. She agreed she told police that she said “stop” and that it was not until she got up, that the person moved his hand away from her genitals. She did not recall telling police “It

wasn't until later today and after speaking to [her female work colleague] that I realised that it's – he actually had his fingers in my vagina." She also did not recall telling the officers that she was drunk and that there was no way the person could have just been waking her up in the morning, as she felt his fingers "trying to dig into my vagina." She did not agree that that statement implied that her vagina was not actually penetrated. The complainant said the person "was trying to get deeper in my vagina because that's what he was doing."

- [29] The complainant accepted that she had worked with the appellant for a period of months. She knew that he had tattoos. She was not sure whether the appellant had full sleeve tattoos on both arms and a tattoo on the top of his palm. She could not remember whether the appellant had pigmentation around his chin. She agreed that the appellant had a missing tooth. The complainant agreed that prior to trial, she told the prosecutor, when asked how much of the person's voice she was able to hear, that "...all he actually said was, 'What's the time?'" and maybe also that, 'We gotta go to work.' He definitely said, 'What's the time?'"

Preliminary complaint

- [30] The complainant's female friend gave evidence that she had known the complainant for many years, having grown up together. They remained close. She did not know the appellant. The female friend said on 25 January 2020, she was at a music festival in New Zealand when she received telephone contact from the complainant. The friend described herself as being pretty intoxicated at the time. Her recollection was that the complainant said that a Māori man had come into her room. At that point, the complainant terminated the call. There were later messages over Snapchat, but the friend could no longer recall their content.
- [31] The female work colleague gave evidence that in January 2020, she was working as a truck operator at the mine site. She knew both the appellant and the complainant as work colleagues. She described her relationship with the complainant as "not extremely close". At about 8.00 am on 25 January 2020, the complainant asked if she had seen the appellant that morning. When she told the complainant that the appellant was inside, the complainant said she wanted to get something off her chest. She said that they had gone to the local pub the previous evening and when they walked back to the camp, the complainant said to the appellant, whose room was beside hers, "if you don't hear me moving around, please come and knock on the door, because I don't want to be late ... or come in and wake me up." The complainant said that when she woke up the next morning, the appellant was beside her in bed with his hands in her underpants. The female work colleague encouraged the complainant to report it to the superintendent.
- [32] In cross-examination, the female work colleague said that she told the complainant to report the allegation to the superintendent and facilitated a conversation between the complainant and the superintendent. After that conversation, she went to a local hotel with the complainant. Another female work colleague may have joined them. That colleague certainly joined them at the hospital that night. The female work colleague agreed that on 25 January 2020, the complainant did not say anything to indicate whether her vagina was penetrated at that time. The complainant did not ever tell her that she was drunk or that she had recorded a positive alcohol test on the breathalyser. The complainant did not describe the lighting in the room or say anything about what the person in the room may have said to her, the clothing worn by that person, or as to the person having any distinguishing features.

- [33] The superintendent gave evidence that in January 2020, the appellant and the complainant were part of one of two crews he had supervision over. On the morning of 25 January 2020, a female worker told him that the complainant wished to report an incident. After 3.00 pm or 4.00 pm that day, he spoke to the complainant. She told him that she had been sexually assaulted in the camp, by the appellant. The complainant said that they had been out drinking the previous evening, the complainant had asked the appellant to wake her up and when she woke up that morning, the appellant had his hand in her underwear. The complainant said she asked him to leave. After she returned from having a shower, the appellant was no longer in the room. The superintendent asked the complainant to write down what happened, while it was still fresh in her mind. He also made arrangements for the complainant to stay off site. He tried to contact the appellant, but he had not shown up at work. When asked whether the appellant ever returned to work, the superintendent said, “Not to my knowledge, no.”
- [34] In cross-examination, the superintendent said he could not remember what words the complainant used when she said that she had told the person to get out of her room. He agreed he did not know whether the appellant was rostered to work on 26 January 2020. He agreed that the complainant never gave a physical description of the person in her room, or of any clothing the person was wearing, or of any distinguishing features. The complainant also did not mention that she blew numbers on the morning of 25 January 2020. That expression was a mining terminology for alcohol. The mine had a zero-tolerance policy on site.

Other

- [35] A male work colleague gave evidence that he was working at the mine site in January 2020, in the same crew as the appellant and the complainant. He described both the complainant and the appellant as “just workmates.” On the evening of 24 January 2020, he was drinking with the complainant, the appellant and other work colleagues at the camp bar. He then had some drinks with the complainant, the appellant and another male colleague, at a local hotel. The four of them returned back to camp at around midnight. He saw the complainant heading towards her room. He did not know where the appellant went.
- [36] In cross-examination, the male work colleague described his own level of intoxication as fairly mild. The complainant was a little bit more intoxicated, but not a lot. The appellant was happy. He agreed that when they were playing pool, the complainant was missing the balls. He accepted it was about a 20-minute walk back from the hotel to camp. He did not accept that when they arrived back at camp, he went to his room to get some more beers or that they drank near the complainant’s accommodation. He did recall the complainant asking for someone to wake her up the next day. That conversation occurred before they left the hotel. A female work colleague said she would wake her up the next day. He could not recall the appellant saying anything.
- [37] A second male work colleague gave evidence that in January 2020, he was working in the same crew as the appellant and the complainant. On the afternoon of 24 January 2020, they had a few drinks together. Also present was two female work colleagues and another male colleague. After four or so hours, they went to drink at a hotel in the local town. It was a short walk. They left the hotel at around 1.30 am or 2.00 am. He walked back to the camp with the appellant, the complainant and the male work colleague. When they arrived at the camp at around 2.00 am, they all went their separate ways, to go to bed.

- [38] In cross-examination, the second male work colleague said that a description “50s, male, Māori, bit of a gut” would fit many people at the mine site. Whilst he did not know about race, there were plenty of people who had that description. He had five or six drinks before they walked to the hotel. He did not agree that people went back to their rooms to get changed before going to the hotel. Everyone was already dressed in their normal clothes. He agreed that the appellant had tattoos. Both of his arms had a full tattoo. He could not recall whether the appellant had a tattoo on the back of one of his palms and whether he was missing his front teeth. He did not accept that the complainant was intoxicated when they were at that hotel. They were just having a good time. He described his own level of intoxication as probably tipsy or drunk. The appellant was happy. He could not recall a conversation in which the complainant asked people to wake her up the next morning. He did not agree that before leaving the hotel, there was a conversation between him, the appellant and the complainant about getting some takeaway drinks, prior to going back to camp. They walked straight from the hotel back to camp. He accepted it was possible that they did have another drink at camp, before going to bed.
- [39] A further female work colleague gave evidence that in January 2020, she worked with the appellant and the complainant, as part of the same crew. They would see a lot of each other during the day. They would eat together and bump into each other at nighttime. It was only a small camp. The further female work colleague said that on the evening of 24 January 2020, she had drinks with a number of colleagues, including the complainant and the appellant. When the camp bar was about to close, she went to bed. The others walked towards the hotel in town. She said goodbye to them at about 10.45 pm.
- [40] In cross-examination, the further female work colleague agreed that a description “50s, male, Māori, bit of a gut” would fit 50 per cent of the people in the work camp. Many of the male workforce were overweight and middle aged. She was not familiar with the appellant’s tattoos, or whether he was missing any of his front teeth. She agreed that on the evening of 24 January 2020, she was drinking red wine with the complainant. They had three glasses of red wine. The complainant also drank beer. She did not see anybody change their clothes before they left to go to the hotel in town. She agreed that the next day she met the complainant and a female colleague at the hotel. The complainant did not tell her anything about what had happened the previous day. The complainant wanted to go to hospital and the female colleague drove her to the hospital. She went with them. The complainant was very upset in the car. She did not find out what had happened until months later when she received a telephone call from a police officer.

Admissions

- [41] It was jointly admitted that no CCTV was available of the accommodation at the work camp and that on 25 January 2020, the complainant spoke to police officers at the hospital and that there was the following exchange:
- “1.1. [COMPLAINANT]: when I was waking up, yeah, then I’ve realised, you know, it took me a while to realise what was actually happening, that he was, you know, had his hand ...
- 1.2. OFFICER A: And then you felt—
- [COMPLAINANT]: I felt, yeah

OFFICER A: A hand and um, around your genitals?

[COMPLAINANT]: His hand. Yeah.

OFFICER A: And what did you see?

[COMPLAINANT]: Well, I couldn't see his face exactly, a hundred percent.

1.3. OFFICER A: You didn't see him there?

[COMPLAINANT]: No, I saw his shape.

1.4. [COMPLAINANT]: And then, I didn't say stop, when did I say stop it? Um, yeah, I said stop it, and then I was getting, then it wasn't until I got up and got away, that his hand moved away from me.

1.5. [COMPLAINANT]: It wasn't until later today, and after speaking to [a female work colleague] that I realised that it's, he actually had his fingers in my vagina, like, while I was as--

OFFICER A: Yeah.

[COMPLAINANT]: I was asleep.

1.6. OFFICER A: Um, what was your intoxication level, like, um, at the pub?

[COMPLAINANT]: I was drunk.

OFFICER A: You were drunk?

[COMPLAINANT]: Yeah.

1.7. OFFICER B: There's no way he could've been just waking you up that morning?

[COMPLAINANT]: No, I felt his fingers--

OFFICER B: Yeah.

[COMPLAINANT]: He was trying to dig into my vagina."

Appellant

[42] The appellant gave evidence that he frequently worked at this mine site from about 2012. He returned back to work at the mine site in 2019. Whilst he worked with the complainant, he had never carpooled with her to the mine site. He described his own physical appearance as having tattoos on both arms and on his left palm, some pigmentation around his chin, about the size of a thumb and missing a front tooth. The appellant said that in January 2020, a description "50s, male, Māori, bit of a gut" would have fitted a high number of the male workforce.

[43] The appellant said on 22 January 2020, he commenced a seven day shift cycle. He worked the same shift on 23, 24 and 25 January 2020. He was rostered to work on 26 January, but decided to go home. He had an earache and he wanted to spend some time with a friend and enjoy Australia Day. He sent a text to his supervisor to let him know that he had gone home. He told his supervisor that he had ear problems. Prior

to leaving the work site on 26 January 2020, he knew nothing of an allegation having been made against him by the complainant. He had not been contacted by any supervisors or managers.

- [44] On the morning of 27 January 2020, he sent an email to his employer stating:
- “... please pass this to daymo supervisor as I don’t have his phone or email... I’d appreciate this as our time sheets have to be in by 2 pm today... I drop my phone so had to use shit payphone to call [the superintendent] to leave message. I ring tomorrow to let know bout my ear and discharge when got new phone as screen blank can’t answer ring or text anyone. Sorry to be nuisance again & any inconvenience.”
- [45] The problems with his phone referred to it being smashed. The complainant sat on it outside his room. He said everything in the email to his employer was true.
- [46] The appellant said that after finishing work on the evening of 24 January 2020, he went to the camp bar. At that stage, he was wearing shorts and a t-shirt. He arrived there just before 7.00 pm and met up with a male colleague. After about 10 or 15 minutes, he started drinking with the complainant, a female work colleague and two other male colleagues. He described his own level of intoxication as not drunk. The complainant was drinking red wine with the female work colleague. At around 9.30 pm, they were told that the camp bar would be shutting early. He left with the complainant and the two male work colleagues to walk to a hotel in the town. Before going there, he went to his room to change his clothes. The complainant did not change her clothes. She was wearing the same clothes when she arrived at the hotel. It was a short walk, maybe four to six minutes.
- [47] At the hotel, they played pool. His observations of the complainant, whilst playing pool, “weren’t very good.” The complainant was missing the balls and then going for the wrong balls. She was giggly, chirpy and quite a chatterbox. At one point, the complainant said to the group, “Who’s waking me up in the morning?” The appellant said he replied, “No, not me. It’s not my responsibility to wake you up. This is a professional outfit.” Two male colleagues were present at the time he said those words. At about 11.45 pm, they left the hotel to walk back to the work camp. He described his level of intoxication as maybe four or five out of 10. The complainant was very drunk. The other male colleagues seemed relatively sober. They discussed getting takeaway alcohol but decided not to do so. The walk home took a little longer, maybe 10 or 15 minutes. They arrived back around midnight.
- [48] The appellant said one of the male work colleagues went to his room and grabbed some beers. They decided to have a drink in front of the appellant’s room. The complainant was drinking red wine. They began carrying on the conversation they had at the hotel. They learned a lot about each other’s backgrounds. The complainant again asked who was waking her up. He laughed and said, “No, not me.” He also explained to the complainant the consequences of a positive alcohol reading and suggested she self-test. At that point, he went into his room and obtained some food. He encouraged everybody to eat. The complainant seemed quite reluctant. He asked her to eat because of the problems with testing the next morning.
- [49] The appellant said shortly before 1.00 am, both male colleagues left to go to bed. It was just the complainant and the appellant sitting outside the room. The complainant

started talking about personal matters. He stopped her because it was none of his business. He denied saying to the complainant, “Maori men would be attracted to women like you.” The appellant said that he went to bed at about 1.15 am. He told the complainant she should go to bed. He also told her to set her alarm because no one was waking her up in the morning. He saw her lock her door. The appellant said that he woke up just before 3.30 am. He heard a noise coming from the complainant’s room next door. It sounded like vomiting. When he went to have a shower, he heard the same thing. He left his room at about 3.45 am. At that point, he heard the complainant having a shower in her room.

- [50] The appellant said that he commenced work at 5.30 am and finished work at about 6.00 pm that day. He went back to his accommodation, before going to the camp bar. He went to bed at about 8.30 pm or 8.45 pm that night. He woke up at about 6.30 am the next morning. He decided he was not going to go to work. He texted his supervisor, had breakfast and caught the bus home at about 7.30 am on 26 January 2020. Before leaving, he handed his keys back in and signed out. He spent the day in Rockhampton and then travelled to Biloela to see a friend. He remained there for a couple of days. He did receive an email from his employer about an incident that had happened on site. He thought it related to a tyre blowout. At no stage was he approached by his employer or a member of the police service to give an interview about the allegation made against him by the complainant.
- [51] The appellant said at no stage did he enter the complainant’s room on the morning of 25 January 2020, put his hand on the complainant’s vagina or penetrate her vagina with his fingers. The appellant said that on the mine site water trucks would do circuits between ramps. They would communicate to let all the trucks know that they were coming on to circuit. All truck drivers would be aware of it. The appellant said he had never spoken to the complainant over a radio whilst working.
- [52] In cross-examination, the appellant accepted that he had started back at the mine site on the same day as the complainant. They were in inductions together for three days. There were about seven people in the induction process. They were all in close contact, as part of the procedure was to get people to work as a team. The induction was about learning the rules and regulations. Being part of a crew was totally different. When a member of a crew, you are on the job and have specific tasks and responsibilities. The complainant was on the same crew. They would catch a bus on a daily basis to the mine site. If he saw her, he would say hello, but they never sat together. Work shifts were 12 hours. All would return back to camp for dinner. He did not ever have dinner with the complainant.
- [53] The appellant accepted that whilst working on the mine site, there would be positive communication with a water truck driver when it came on site. That would be the only contact he had with the complainant over the radio. The appellant said that he decided not to go to work when he woke up on the morning of 26 January 2020. He had an earache and wanted to celebrate Australia Day. He agreed that he was doing a seven-day shift and left with three days to go. He agreed he was rostered to work on 26, 27 and 28 January 2020. He did not work on any of those days. He accepted that there was a nurse on site. He made a choice not to see the nurse about his earache. His understanding was that if he missed the first two days or the last two days of the seven-day cycle, he needed a medical certificate. He did not ever get a medical certificate. He agreed he never returned back to the work site. The appellant said he was sacked. He denied that he had no intention of returning to the work camp after

he left to celebrate Australia Day. He denied that he made up an excuse to explain his absence. He denied that he left the camp because he had just raped the complainant. He said he spoke to the complainant in a polite way when saying he would not wake her up.

Consideration

Ground 1

- [54] Central to this ground is the contents of an expert report, the subject of the application for leave to adduce further evidence on appeal. In that report, Professor Helen Fraser expresses the opinion that voice recognition is error prone, rarely by voice alone and can be misled by context. Accordingly, trust in a witness's confidence in recognition by voice is misplaced with such evidence being substantially less reliable than eyewitness evidence.
- [55] Professor Fraser further opined that relevant factors in assessing the reliability of the complainant's voice recognition included that that recognition was based on voice alone, in respect of an utterance that was extremely short and against an expectation of being woken up that morning. The complainant's certainty as to the voice recognition was also misplaced, as there was no way to exclude the possibility that someone else might have been the speaker in her room.
- [56] In expressing that last opinion, Professor Fraser specifically noted that listeners are known to be very poor at describing voices with any accuracy and that accent recognition in particular, is just as error prone as speaker recognition. In describing accents, listeners often focus on stereotypical features which do not always correlate well with the accent overall. In the present case, the utterance, "What's the time?", contained none of the stereotypical New Zealand pronunciation-type words and New Zealanders were poor at identifying Māori speech from the voice alone.
- [57] Professor Fraser further opined that whilst recognition of familiar voices is statistically more reliable than recognition of unfamiliar voices, even persons very familiar with a speaker can be confident but wrong in their recognition, especially with short utterances. Finally, there was evidence of intoxication which would reduce the reliability of any speaker recognition.
- [58] Professor Fraser's overall conclusion was:
- "Earwitness testimony is inherently unreliable – considerably less reliable than eyewitness testimony, which, as discussed, is well known to be the cause of up to 70% of acknowledged wrongful convictions.
- It is simply not possible to recognise a speaker reliably in the conditions under which [the complainant] claimed to recognise [the appellant]. This does not mean she was necessarily wrong, simply that there is no way to determine whether she was right or wrong.
- The only way to be justifiably confident that an earwitness is correct in their recognition is through availability of reliable evidence from other sources.
- Nevertheless, confident earwitnesses are known to be very compelling to juries, even under instruction to be cautious.

In my opinion it is likely that a jury listening to [the complainant's] confident speaker recognition testimony would have placed more credence in it than it warranted on scientific grounds."

- [59] In relation to the identification of the appellant as the person in the complainant's room, the trial judge directed the jury:

"... The issue of identification is relevant to both of the offences of rape and sexual assault, and that is another thing for you to resolve as a question of fact. The defendant's case about this is that [the complainant] has got the wrong person, she is mistaken, it is not me. I do need to just warn you of the special need for caution before convicting in reliance on the correctness of that identification. The reason for it is a simple one, really, and it is just that it is quite possible for an honest witness to make a mistake, or a mistaken identification. Notorious miscarriages of justice have sometimes occurred in such situations. Also, of course, a mistaken witness may, nevertheless, be convincing. What you need to do is examine carefully the circumstances in which the identification by [the complainant] was made. How long did she have the person said to be [the appellant] under observation, what distance, in what light, was the observation impeded in any way, how often had she seen [the appellant] before – if only occasionally, had she any special reason for remembering him. The evidence of each individual witness, while important in itself, should not be regarded by you in isolation from the other evidence adduced at the trial. If there is other evidence which you think tends to implicate [the appellant], that may be highly relevant and may justify conviction while the evidence of identification, if it stood alone, would be insufficient. As I have said a few times now, you do need to be satisfied that [the complainant] was honest. You also need to be satisfied that she was accurate in identifying [the appellant].

What I thought I would do is just summarise for you the evidence that is capable of supporting the identification of [the appellant]. [The complainant] said that [the appellant] went to the same induction and they had worked together on the same crew for the previous three or so months. They had work seven days on, and when they worked, she had see him at work every day. They chatted to the extent that they had established that they knew people in common. There would be occasions when she would speak to him over the two-way radio, albeit those conversations might be brief. While she worked with him every day, when they were back at the camp, she did not see him a lot although she would see him on occasions in the crib room. They had carpooled together from the mine site to Rockhampton, or the camp to Rockhampton, on at least one occasion. She said that by the time of the alleged offending, she knew his voice and also his body shape. There is also the evidence that they had been out together the night before the offending. They had played pool together and they had otherwise spent time together. There is also the evidence that when she woke up and this person was by her bed, that the bathroom light was on and [the complainant] thought that the bathroom door was partially open. She said that there was enough light to see his shape,

and that he asked her a question about the time, and she said that when she heard the voice, that she knew it was [the appellant]. She said it was just his voice, his accent, the tone, and how he spoke.

I do need to remind you, though, of some specific weaknesses which appeared in that identification evidence. There was the evidence that there were many men on-site who fitted [the complainant's] description of [the appellant]; the light in [the complainant's] room was off; that she had been drinking the night before, and when she breathalysed herself the following morning, while she felt fine, she did blow over a little bit but she thought she had be okay by the time her shift started; and that when she got up to go to the shower, she did not look at him properly and she could not say that she had seen his face properly. That is a summary of the evidence about the identification."

- [60] As can be seen from those remarks, the jury were carefully directed as to the special need for caution before convicting in reliance on the correctness of the complainant's identification, including directing the jury as to the reasons for such caution and reminding the jury not only of the evidence capable of supporting the identification of the appellant, but as to the specific weaknesses in the identification evidence. Those weaknesses included the fact that the complainant had been drinking the night before.
- [61] Against that background, there is no basis to conclude that the admission of Professor Fraser's evidence could realistically have materially affected the jury's process of reasoning to guilt in the present case. Her evidence is no more than identifying weaknesses which were the very subject of directions by the trial judge.
- [62] Further, the premise for the complainant's evidence that the appellant was the person in her room, who penetrated her vagina with his fingers, was not solely dependent upon recognition by voice. The complainant's evidence was specifically that she knew his body shape, in circumstances where she gave evidence of a light source sufficient to see his shape. It is therefore not correct to characterise the jury's verdict as unreasonable, on the basis that it was not open to the jury to be satisfied beyond reasonable doubt, that the appellant was guilty, "because in the circumstances reliable recognition by voice was not possible." That was not the only basis for the jury's satisfaction, beyond reasonable doubt, that the appellant was the person who penetrated the complainant's vagina with his fingers, without her consent.

Ground 2

- [63] The appellant submits that the only evidence of digital penetration arose as a consequence of "a recovered memory", in circumstances where there was no external evidence that might be used to assess the reliability of that claim.
- [64] The contention that the complainant's evidence arose from "a recovered memory", relies on the contents of the complainant's conversation with police at the hospital, on the evening of 25 January 2020. It was admitted at trial that in the course of that conversation, the complainant said, "It wasn't until later today, and after speaking to [a friend] that I realised that it's, he actually had his fingers in my vagina ...".
- [65] Nothing in that exchange supports an assertion that the only evidence for digital penetration was a recovered memory. First, the complainant was indicating when she

realised that the person's fingers were in her vagina, rather than asserting that some process had been undertaken to recover a memory. Second, the complainant went on, in the same conversation, to specifically state that she felt the person's fingers "trying to dig into my vagina." That evidence was itself evidence of digital penetration and was based on a sensation, not a memory. An acceptance of the complainant's account as reliable and credible was open to the jury. Upon such satisfaction, that account supported the jury's verdict that the Crown had established beyond reasonable doubt that penetration of the complainant's vagina occurred without her consent.

Ground 3

- [66] The appellant submits that the trial judge erroneously directed the jury that the appellant's departure from the work camp was evidence of consciousness of guilt and amounted to flight, in circumstances where the jury ought to have been directed as to the available information necessary to determine whether the appellant's departure amounted to flight, and that the use of "flight" was prejudicial.
- [67] At trial, the trial judge gave the jury specific directions, both in writing and orally, as to the use which could be made as to the appellant's non-attendance at work on 26 January 2020 or thereafter.
- [68] In writing, the jury received the following direction:

"Flight"

The prosecution asks you to have regard to the fact that [the appellant] did not attend work on 26 January 2020 or thereafter. However, before you could use his departure as indicative of his guilt, you would first have to find that the defendant did not turn up to work on the day after the alleged offending because he knew he was guilty of the offence charged, and not for any other reason.

You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways - for example as the result of panic, fear or other reasons having nothing to do with the offence charged.

You must have regard to what has been said to you by [the appellant] as to other explanations for his departure. These are that he had an earache and therefore couldn't stick his ear plugs in to block out the loud machine noise and he wanted to enjoy Australia Day. He said that he went to go and spend time with a lady and he ended up going out to Biloela. All of these matters must be considered by you in deciding whether you can safely draw any inference from the fact of his departure.

Moreover, before the evidence of [the appellant's] departure can assist the prosecution, you would have to find not only that it was motivated by a consciousness of guilt on his part, but also that what was in his mind was guilt of the offence charged, not some other misconduct.

If, and only if, you reach the conclusion that there is no other explanation for his departure, and that it was *not* motivated by, for

example, matters like panic or fear of wrongful accusation or a consciousness of guilt of other misconduct, then you are entitled to use that finding as a circumstance pointing to the guilt of [the appellant], to be considered with all the other evidence in the case. Standing by itself it could not prove guilt.” (emphasis in original)

[69] Orally, the trial judge directed the jury:

“Another thing that you have heard in the course of addresses by counsel is some submissions about the fact that [the appellant] did not attend work on the 26th of January, which is the day after, or thereafter. The Crown asks you to use that departure as indicative of his guilt. But before you do that, you would first have to find that the reason why [the appellant] did not turn up to work on the 26th and thereafter is because he knew that he was guilty of the offence charged, and not for any other reason. Just remember, people do not always act rationally, and the conduct of this sort can often be explained in other ways. Examples might be panic, fear, or other reasons having nothing to do with the offence charged. You need to have regard to what [the appellant] has said as to why he left. These are that he had an earache and therefore could not stick his ear plugs in to block out the loud machine noise, and also that he just wanted to be able to enjoy Australia Day. He said that he went to go and spend time with a lady, and he ended up going out to Biloela. Now, all of these matters must be considered by you in deciding whether you can safely draw any inference of fact from his departure. Moreover, before the evidence of [the appellant’s] departure can assist the prosecution, you would have to find that not only that it was motivated by a consciousness of guilt on his part, but also what was in his mind was guilt of the offence charged, not some other misconduct. Only if you reach that conclusion that there is no other explanation for his departure and that it was motivated by example – by, for example, matters – I want to start that again because I have not made this clear.

If, and only if, you reach the conclusion that there is no other explanation for his departure and that it was not motivated by, for example, matters like panic or fear or wrongful accusation or consciousness of guilt of other misconduct, then at that point you are entitled to use that finding as a circumstance pointing to the guilt of [the appellant], to be considered with all the other evidence in this case. But standing by itself, it does not prove anything.”

[70] The appellant submits that the use of the expression “flight” was prejudicial because “merely leaving work and going home” does not amount to flight. However, the evidence was not that the appellant “merely” left work. The evidence was that he left work when he had three more days remaining on his shift and did so knowing that he was required to provide a medical certificate, but did not do so and did not return to work on any of the remaining days of that shift.

[71] Further, unlike in *Zoneff v The Queen*,² this issue was specifically relied upon by the Crown as evidence of consciousness of guilt. The trial judge’s direction therefore did

² (2000) 200 CLR 234.

not raise an issue about a matter which the parties had not joined as an issue and it was therefore not necessary to give a direction in the form identified in *Zoneff* at [23].

- [72] The appellant also submitted that the word “flight” impermissibly connoted guilt, in circumstances where there was no evidence that the appellant had taken active steps to hide his whereabouts, or to flee the jurisdiction. Whilst the word “flight” was used by the trial judge as a heading in the written document, the trial judge was careful, in both the written and oral directions, to refer to the appellant’s non-attendance at work and that the Crown was seeking to use that “departure” as indicative of guilt. In those circumstances, the word “flight” could not realistically have affected the jury’s reasoning to the verdict of guilty. The jury was properly directed that the issue was evidence of his departure from work, in circumstances where he was rostered for a further three days and where the jury was specifically reminded of the reasons for his departure from the work camp and of the need to exclude other explanations for that departure from work.
- [73] Finally, the appellant submitted that the direction given in relation to use of the evidence of the appellant’s departure from the work camp was itself inadequate, as the direction failed to address the particular circumstances and the jury was given no assistance as to how to determine whether his departure from work constituted leaving, rather than flight.
- [74] There is no merit in this contention. The directions given to the jury were specific as to the evidence of departure from the workplace, including the circumstances that the appellant was rostered to work in the ensuing days and did not attend work and the jury was specifically directed of the need to exclude other explanations, apart from a consciousness of guilt.
- [75] As the appellant has not established any ground of appeal, the appeal must be dismissed.

Order

- [76] I would order:
1. Leave to adduce further evidence be granted.
 2. Appeal against conviction be dismissed.
- [77] **BROWN JA:** I agree that the appeal should be dismissed for the reasons set out by Boddice JA.
- [78] **KELLY J:** I agree with Boddice JA.