

WORLD

Gold Coast mum's rape case dropped by police after man uses mistake of fact defence

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12 minutes to read

Temuera Morrison speaks on Jake The Muss's influence in domestic violence for Women's Refuge.

news.com.au

By: Natalie Wolfe

WARNING: Distressing content.

A Gold Coast woman, left with fractured bones, ripped clothes and a broken bra, did "everything police told me to do" when she alleges she was raped in December 2017.

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But despite spending hours at hospital, allowing detectives to rummage through her home late at night and enduring months of agonising investigation, police were forced to drop the case.



The mum was attacked on the Gold Coast.

Police sympathised with her, said they were sorry but admitted Queensland's "mistake of fact" law had left them with their hands tied.

Mistake of fact is a defence that allows men accused of rape to say they had an honest and reasonable — but mistaken — belief a woman had consented to sex.

"After living with this for six months, in the end, they took me into a meeting room at the station and said, 'Sorry, we just don't have enough evidence. We've done everything we can'," the 31-year-old mum, who asked to remain anonymous, told news.com.au.

The Gold Coast woman's ordeal started on a night out in the suburb of Nerang a few weeks before Christmas 2017.

The then 30-year-old had been having a social drink with some friends at a local sports bar and as she walked inside to go to the bathroom, a man walked up to her.

She'd been approached by a Welsh man, who had been talking to the women through the night, who said her friends had gone outside and he'd "walk me out when I was ready", she recounted.

"He didn't look like a creep. He just looked like a standard guy. I wouldn't have left the bar alone with him if I thought he was creepy," she told news.com.au.

CCTV caught the man leading her outside and even captured snippets of the mum stopping and looking for her friends.

But the man led her around a dark corner — away from the entrance to the club and its CCTV — and allegedly attacked.

"He pushed me over, pulled my hair. I tried to get away but when I fell, my arm got broken," she said. "Think about trying to get up and fight with a broken arm and wrist. I wanted to get up and fight but I was helpless. I couldn't do anything in the end."

In her terrified state, he took advantage of her sexually.

"I remember just freezing. I heard a car and started screaming in hopes someone would help me. He got off me and stood up leaving me face down with broken bones," she said.

When the car left, the man came back and raped her again.

From the mum's statement, police told her they would charge the man with three counts of rape and additional charges for her physical injuries.

The attack left both her arms in casts for weeks and after six weeks of hell, police finally managed to track the man down using phone towers and his bank card.

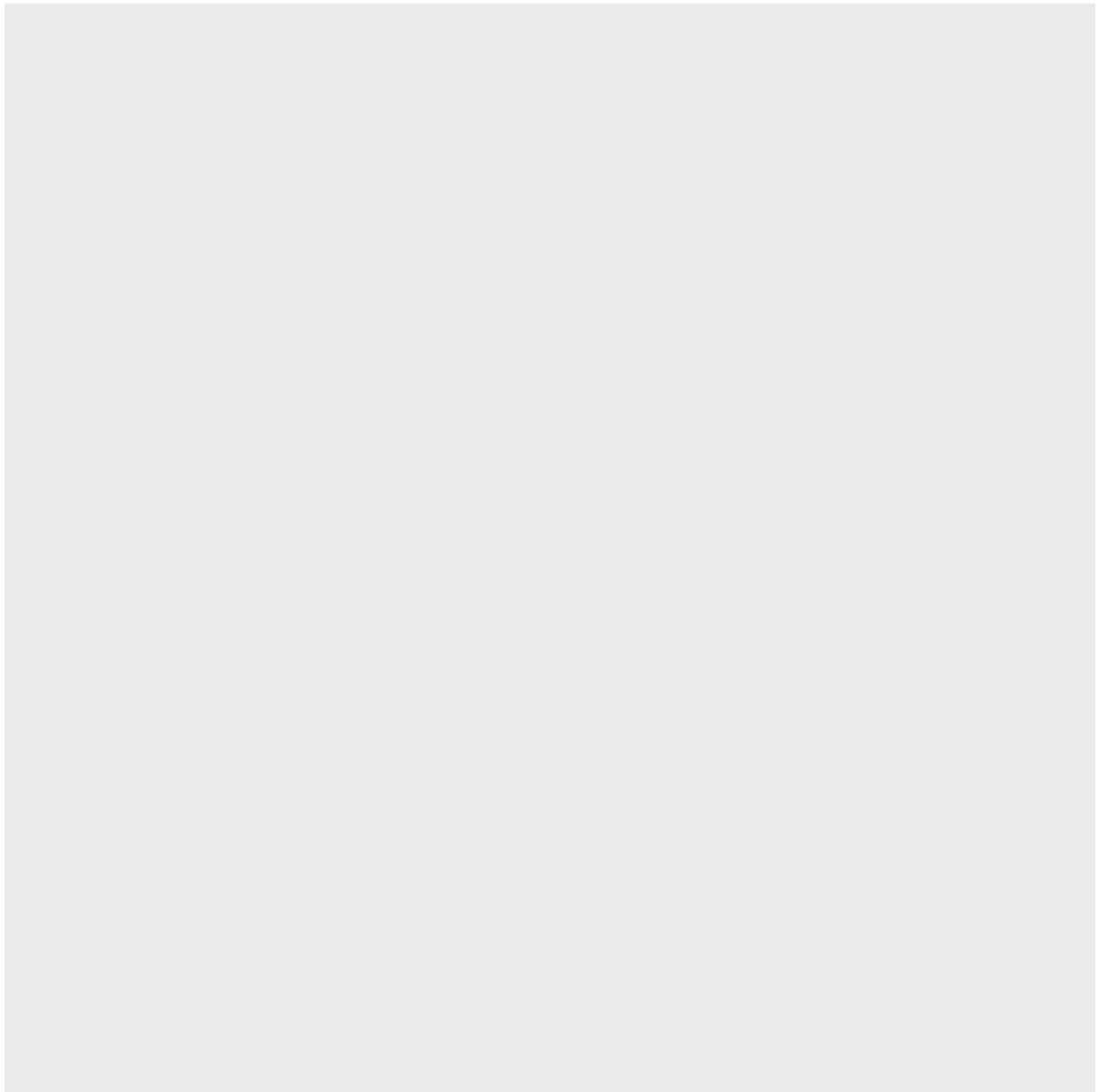
She also had bruises on her neck where the man strangled her to keep her quiet.

Police told the mum they were sure, given her injuries, the man would deny it completely.

But he didn't. Instead, the man told police he had mistakenly believed she'd consented.

"Police said so casually over the phone that he was claiming I'd consented — and that made things harder. They said they'd need to keep investigating because they had to be 100 per cent sure," she said.

But for the broken, bruised mum, her case was pretty black and white.



The injuries the man left her with.

"He said he had an honest and reasonable belief I had consented but I've always stood by that you stop believing in that consent when there's broken bones, bruises, scratches and you're attacking a woman in the dark," she said.

The mum will see an orthopaedic surgeon later this month — to fix ongoing pain she has in her wrist from the assault. She also was diagnosed with severe PTSD.

"I live in fear," she said.

"There was no Christmas for me after it happened. Detectives were messaging me on Christmas Eve telling me they'd identified him and told me to 'enjoy your family time, we'll take care of it.' But how could I with him still on the streets?"

The Gold Coast mum said she hopes — if the Queensland Government decides to change the mistake of fact law next year — things will be different.

"I had a lot anger with the police and I tried to tell myself they were just doing their job but I always think if the law was different would something have changed?" she said.

"I went to the police, I did everything they told me to do, DNA, forensic everything. In the end they finally found the person who raped me, he gave his statement and in that he put that he believed I consented," she said.

"Police dropped all charges because of what he said and said that, if it went to court, he would be acquitted because of that defence.

"I ended up with broken bones but they weren't able to prove that he did any of it because of his defence. My arm was broken in two places, I was covered in bruises and scratches and my bra was broken. They could not prove that he had done any of that.

"He was free to go. No protection orders, no AVO, nothing."

The Gold Coast mum's case is still open — pending further evidence.

"I just couldn't wrap my head around it," she said. "In his statement he said I consented.

"But I did not consent to anything. I did not consent to those injuries. They couldn't match the injuries back to him and the DNA didn't matter because he had admitted to sexual intercourse."

The Gold Coast woman said she remembers vividly when she was pulled into a meeting room with a detective senior sergeant with the Queensland Police.

Her case had travelled right up through the ranks of the state police but after weeks of investigating, the mistake of fact defence had left both the woman and the officers at a stalemate.

"I was distraught," she said.

"When they told me, I said to them 'What if this was your daughter?' They just said, 'These are the current laws and we have to follow them'."

Despite the way her case ended, the Gold Coast mum said police always stuck with her

and the detectives working on her case felt just as much as despair as she did.

"They told me it's his word against mine and that lying isn't illegal. 'He's made up a bulls**t story but what can we do?'" police told her.

The mum, now 31 and still living on the Gold Coast, said if she had her time over again — and knowing the outcome — she would've avoided the entire investigation.

"I did everything they told me. The forensic medical officer examined my body from head to toe but it was extremely uncomfortable and intrusive — I was bleeding from what had been done to me — but the cops said, 'We really urge you to do it because it'll add to your case,'" she said.

"The mistake of fact defence is being used — and even though it wasn't used in court for me it was the reason why police couldn't press charges because they told me it would get thrown out straight away because he would be acquitted as soon as he said he was mistakenly believing I was consenting.

"Obviously my counter statement to that was that I was screaming, I was trying to get away and that he hurt me, broke me, but that didn't count at all."

THE LAW LETTING RAPISTS GO FREE

The mistake-of-fact defence that left police and the Gold Coast woman at a dead end is something legal experts say is an "outdated and confusing" defence grounded in the way society behaved in the 19th century.

Sexual assault advocates take it one step further and say the law is the best and easiest way rapists can keep themselves out of jail and conviction-free.

For decades, Queenslanders accused of rape have relied on the defence.

MORE: Hair touch that let a 'rapist' go free

There are documented cases in Queensland's courts where a man successfully argued he believed the woman had consented even though her evidence was that she:

- Was too drunk to say no;
- Was asleep at the time they had sex;
- Was not proficient enough in English to say no;
- Had mental disabilities that stopped her from forming the words to say no or fight off

advances;

- Was threatened or beaten until she submitted to sex to save her own life.

After months of campaigning, Queensland Attorney-General Yvette D'Ath finally announced a review into consent and mistake of fact rape cases this week.

The government has referred the issue to the state's Law Reform Commission.

But with a report due back to the government early next year, law reform advocates say there's still a long way to go before mistake of fact is wiped from Queensland's criminal code.



Yvette D'Ath MP

@YvetteDAth

The [@AnnastaciaMP](#) Govt has a proud record of law reform in the area of sexual violence and supporting victims.

The Qld Law Reform Commission will be tasked with reviewing the matter of consent and mistake of fact in rape cases and report back to govt early next year. [#qldpol](#)

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[See Yvette D'Ath MP's other Tweets](#)

All of Australia's states and territories — with the exception of Queensland and Western Australia — have amended or are in the process of amending how people can consent to sex.

Statistically, it is hard to pinpoint how many times mistake of fact has been successfully and unsuccessfully argued in Queensland's courts, legal experts say.

Dr Jonathan Crowe, a law professor at Bond University and one of Australia's leading researchers on mistake of fact, has studied the defence for more than a decade and is still unable to distil it down to an exact number.

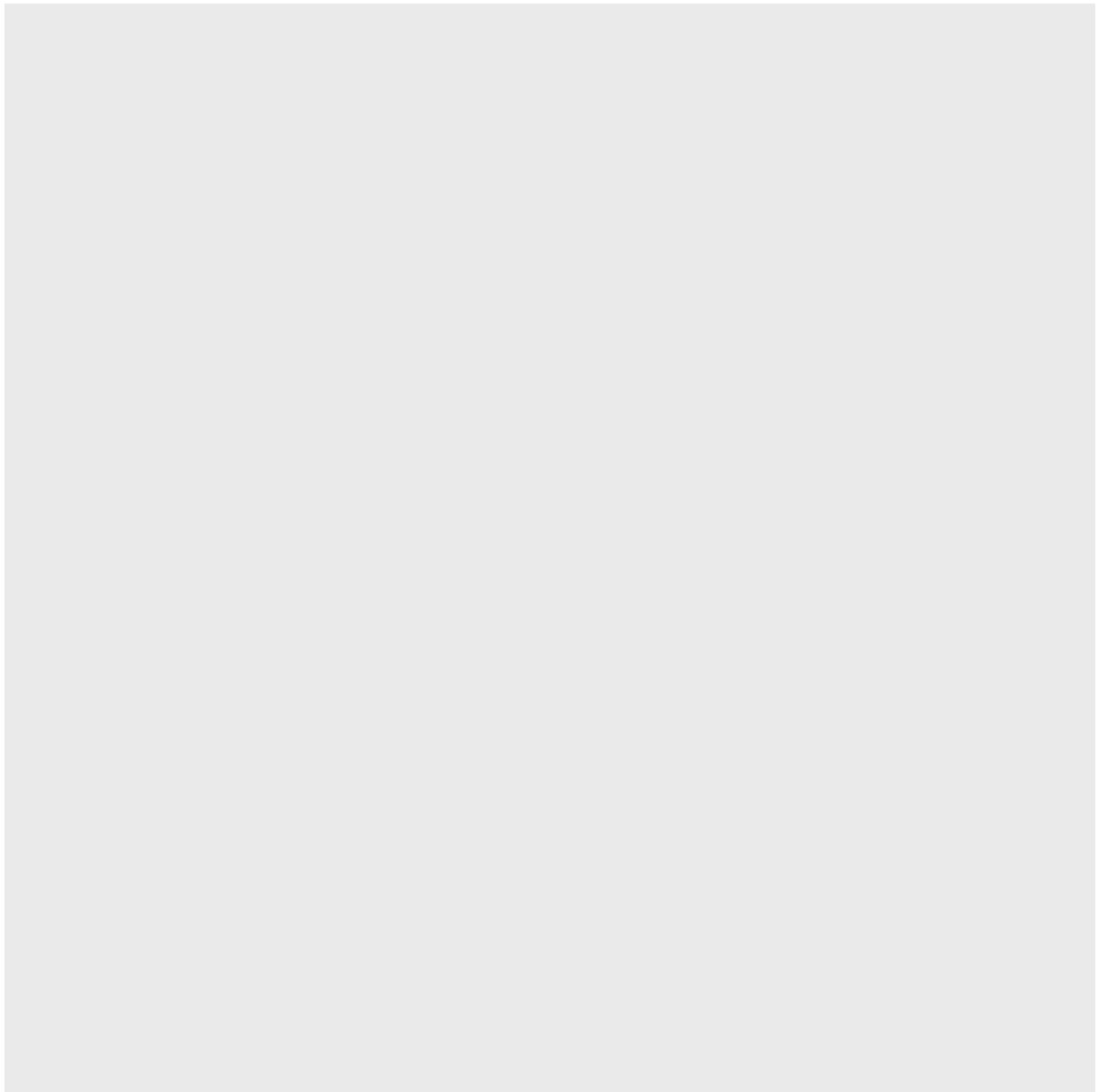
"Anecdotally, we can say it is a very common line of defence," Professor Crowe told news.com.au.

The vast majority of criminal cases are unreported and decisions are only published if a defendant is convicted of rape but then takes it to the Court of Appeal.

In total, Professor Crowe and his research partner, author Bri Lee, found more than 30 Queensland cases where mistake of fact was used as a defence to rape or sexual assault charges.

But those few dozen are like finding needles in a haystack.

Most sexual assault cases don't even make it to court. Only 15 per cent of rape survivors complain to police and from that small figure, only 3 per cent see their accused rapist convicted.



Bri Lee and Jonathan Crowe spent years fighting for consent law reform in Queensland. Photo / NewsCorp Australia

Rosie Quinlan, from Brisbane's Zig Zag Young Women's Resource Centre, regularly counsels women who are told their case won't stand up in court — often due to the chance the mistake of fact defence will be raised.

"We would see it often at the beginning of investigations where women have reported the crime and the investigation does not proceed due to lack of evidence," Ms Quinlan, a senior practitioner at the centre, told news.com.au.

"This can be devastating for women because for them it is clear they were asleep and not able to give consent, or intoxicated and not able to give consent or they might report they froze out of fear and confusion at what was happening but were not giving any consent to the act.

"When the investigation doesn't proceed it can add to women's feelings of self-blame and means that avenues of justice are limited."

'IF THEY DON'T ARGUE IT, THEY JUST HAVEN'T GOTTEN LEGAL ADVICE'

A number of advocacy groups — including the Queensland Women's Legal Service, Professor Crowe and Bri Lee — have spent years fighting for consent laws to be modernised.

QWLS's Julie Sarkozy has heard the defence so often in court she now knows, if an accused rapist hasn't tried to invoke mistake of fact, they just haven't received legal advice yet.

Last July, QWLS sent case studies specifically relating to the mistake of defence to Ms D'Ath.

They also sent more than 700 emails to the Premier and the Attorney-General.

"Other states have functioned quite OK, people are still getting charged with rape, even though they've had for years this higher responsibility or legal test in relation to asking the court to determine how the accused determined consent," Ms Sarkozy said.

"In NSW, the courts say, 'OK, you said she was really consenting, you believed she was, but we can show that you had reckless indifference to her.' We don't have that in Queensland.

"Look at how this drills down to how it relates in court, if someone for example says when the person is raping them, if they say nothing, then that is used to great legal effect and to show juries, that he did have an honest, but mistaken belief she was consenting."

Via Twitter this week, Ms D'Ath announced the Queensland government was reviewing the defence.

"Referring this issue to the Queensland Law Reform Commission gives an opportunity for all voices to be heard as there are many views on this matter and it takes the politics out of this important matter," Ms D'Ath wrote.

"Any potential change should be based on evidence after expert advice."

If you're in danger NOW:

- Phone the police on 111 or ask neighbours or friends to ring for you.
- Run outside and head for where there are other people.
- Scream for help so that your neighbours can hear you.
- If you are being abused, remember it's not your fault.

Where to go for help or more information:

- NZ Police
- Help Auckland 24/7 helpline 09 623 1700
- Rape Prevention Education
- Wellington Help 24/7 crisisline 04 801 6655, push 0
- Male Survivors of Sexual Abuse
- Women's Refuge: Free national crisis line operates 24/7 - 0800 REFUGE or 0800 733 843
www.womensrefuge.org.nz
- Shine, free national helpline 9am- 11pm every day - 0508 744 633 www.2shine.org.nz
- Shakti: Providing specialist cultural services for African, Asian and Middle Eastern women and their children. Crisis line 24/7 0800 742 584
- White Ribbon: Aiming to eliminate men's violence towards women, focusing this year on sexual violence and the issue of consent. www.whiteribbon.org.nz

Herald recommends