SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hyde* [2017] QCA 148
PARTIES:	**R** **v** **HYDE, Allan Charles** (appellant)
FILE NO/S:	CA No 110 of 2016 DC No 131 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 20 April 2016
DELIVERED ON:	Orders delivered ex tempore 30 June 2017 Reasons delivered 11 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2017
JUDGES:	Sofronoff P and McMurdo JA and Douglas J Separate reasons for judgment of each member of the Court, McMurdo JA and Douglas J concurring as to the orders made, Sofronoff P dissenting
ORDERS:	**Orders delivered ex tempore on 30 June 2017:** **1. Allow the appeal.** **2. Set aside the verdicts of guilty in the District Court.** **3. Order a new trial on those charges.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of 11 counts of sexual offending against two female complainants who were sisters, including maintaining a sexual relationship with each and specific counts of rape and sodomy – where both complainants gave evidence of frequent sexual offending – where there was some evidence that the appellant was living in Sydney during a period of the alleged frequent occurring in Brisbane and would only visit Brisbane occasionally – where each complainant gave evidence of a single specific instance in which both complainants were assaulted simultaneously which was largely consistent with the other but contained some discrepancies – where the appellant submitted that the evidence of each complainant was in some respects inconsistent with her preliminary complaint – where the events were said to have occurred more than 11 years before the initial complaints – whether it was open to the jury to

convict on each of the 11 charges

CRIMINAL LAW – EVIDENCE – MISCELLANEOUS MATTERS – OTHER CASES – where the prosecution's closing address relied upon the distressed condition of one of the complainants while she was giving evidence as corroborative of her account – where the appellant submitted that the prosecutor had misled the jury, in the absence of a warning by the judge, by inviting them to reason that the complainant's apparent distress made her account more likely to be true – where the distressed condition of the complainant was not the subject of evidence but was merely an observation of her demeanour while giving evidence – where the prosecution and defence closing addresses were clear about their respective arguments about the complainant's demeanour – whether a miscarriage of justice occurred

CRIMINAL LAW – PROCEDURE – SUMMING UP – where the defence case included specific claims of concoction by the complainants – where the trial judge, in summing-up, said that there was "no real suggestion or substantial suggestion" of the complainants concocting their evidence together – where the trial judge's direction, in context, was referring only to the incident in which both complainants alleged that they had been simultaneously assaulted – where the defence alleged fabrication in cross-examination of each complainant and the case must have been understood as an allegation that they had concocted the story together – where the trial judge's comments seriously misstated the defence case and had a real potential to undermine it – whether a miscarriage of justice occurred

Evidence Act 1977 (Qld), s 132A

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, considered
Azzopardi v The Queen (2001) 205 CLR 50; [2001] HCA 25, considered
Browne v Dunn (1893) 6 R 67 (HL), considered
Hoch v The Queen (1988) 165 CLR 292; [1988] HCA 50, distinguished
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, applied
Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, considered
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, cited
R v Luhan [2009] VSCA 30, cited
R v Rutherford [2004] QCA 481, distinguished
R v Sailor [1994] 2 Qd R 342; [1993] QCA 23, distinguished
R v Williams [2010] 1 Qd R 276; [2008] QCA 411, distinguished
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56,

considered

COUNSEL: B J Power for the appellant
J A Wooldridge for the respondent

SOLICITORS: Richard Gray & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** McMurdo JA has set out the facts of the case and this makes it unnecessary for me to recount the same matters. I respectfully agree with his Honour's reasons for rejecting the first and second grounds of appeal.

[2] I would also reject the third ground of appeal for the following reasons.

[3] During the course of the learned trial judge's summing up his Honour said:

> "You'll recall that I've told you you must consider the evidence in relation to each charge separately and reach a separate verdict in respect of each. That's subject to the following direction on how you may use the evidence of the complainants in combination but only in a limited way. The prosecution case here is that the evidence of each complainant does not stand alone. The prosecution case is that each complainant is supported by the evidence of the other complainant as to what they say happened on the joint occasion only, when they were both together on the bed. That's not a charge on the indictment, but it's part of the evidence in the trial.
>
> Before you can rely on the evidence of each of the complainants as to what her sister says, you need to be satisfied beyond reasonable doubt of a number of things, firstly that it's independent of each other. I direct you you can't use the evidence of the complainants in combination unless you were satisfied there is no real risk the evidence is untrue by reason of concoction, that is, them concocting it together. And I should say there's been no real suggestion or substantial suggestion of that in this trial. The value of any combination and likewise any strength in numbers is completely worthless if there were a real risk that what the complainant said is untrue by reason of concoction by them. So you must be satisfied there is no real risk of concoction. A real risk is one based on the evidence, not one that is fanciful or theoretical."

[4] The appellant argues that the sentence "I should say there's been no real suggestion or substantial suggestion of that in this trial" constitutes a miscarriage of justice because it did "not summaris[e] the defence case appropriately". The appellant's contention requires one to understand what was the defence case at trial. The appellant did not give evidence and, consequently, his case can only be appreciated from the content of his counsel's cross-examination and closing address.

[5] The cross-examination of the complainant A by the appellant's counsel consisted almost entirely, in terms of its length, of either putting to her what she had already said in evidence in chief or asking her to repeat what she had already said. This questioning covered the allegations of sexual abuse as well as the detail of how and when complaints were finally made by A. Otherwise, the attack upon the evidence

of A consisted of putting four propositions to her. First, it was put to A that some parts of her evidence were inconsistent with the statement that she had made to police. Some of these alleged inconsistencies overlap but there were about seven or eight instances of inconsistencies of this kind that were put. Second, in respect of some aspects of her evidence, it was put to A that she was unable to recall accurately what had happened. In some instances she agreed that that was so; in respect of other instances she said that she had a clear recollection. Third, it was put to her that her inability to recall certain matters and the inconsistencies between her evidence and her police statement were because her evidence was "not the truth" and because she was "making it up". Fourth, as to one part of her evidence, it was suggested that her account was improbable and that, as a consequence, "none of this happened" and that she had "made it up".

[6] The cross-examination of C was similar. As in the cross-examination of A, most of the cross-examination involved inviting C to restate her evidence in chief. In respect of evidence C gave about the appearance of the appellant's ejaculate, it was put to C that there was an inconsistency between her oral evidence and what she had told police. Her answers were inconclusive and it is impossible to tell from the transcript whether there was or was not such an inconsistency between the two occasions upon which C related the matter. Otherwise, it was put very succinctly to C that she had learned her police statement verbatim and had repeated it word for word in her evidence. It was put to her that none of the incidents alleged by her had happened.

[7] Defence counsel did not put or suggest to either of them that they had fabricated the allegations together. Nor was it put to A that she had made up her evidence in order to support her sister C.

[8] After the prosecution had closed its case the appellant elected neither to give nor to call evidence. Before counsel addressed the jury, the learned trial judge invited both counsel to make submissions about the content of his summing up. The appellant's counsel informed the learned trial judge that she and the prosecutor had agreed upon a list of directions by reference to the numbers in the Bench Book. This was the Bench Book that was current at the trial. The learned trial judge had made his own list and, by reference to that list, counsel were directed to particular sections of the Bench Book and were invited to make submissions about them. In the course of that process his Honour said, optimistically but, as has eventuated, wrongly:

> "And people might criticise the Bench Book, but I've yet to see a trial judge's summing up overturned where he or she followed the Bench Book. So I'm doing it. Okay?"

[9] In the course of those submissions the Crown Prosecutor directed the learned trial judge's attention to Direction 50C which states:

> "**Where the Crown have joined charges against a number of complainants**
>
> You will remember that I have told you that you must consider the evidence in relation to each charge separately and reach a separate verdict in respect of each. That direction is subject to the following directions on how you may use the evidence of the complainants in combination, but only in the limited way described in these directions.

The prosecution case here is that the evidence of each complainant does not stand alone. The prosecution case is that each complainant is supported by the evidence of the other complainants as to what they say happened to them.

The prosecution argues that the similarities of the defendant's alleged conduct towards each of the complainants means that the evidence of each complainant supports the others and makes it more likely that what each complainant says about the conduct relating to them is truthful and reliable.

In other words the prosecution says that there is such a similarity between the acts and the circumstances in which they occurred that it is highly improbable the events simply occurred by chance.

However before you can rely on a particular complainant's evidence as to the other complainants you need to be satisfied beyond reasonable doubt of a number of things.

First you must be satisfied that the evidence of each complainant is independent of each other.

I direct you that you cannot use the evidence of the complainants in combination unless you are satisfied that there is no real risk the evidence is untrue by the reason of concoction.

The value of any combination, and likewise any strength in numbers, is completely worthless if there is any real risk that what the complainants said is untrue by reason of concoction by them. You must be satisfied that there is no real risk of concoction; a real risk is one based on the evidence, not one that is fanciful or theoretical.

Secondly if you are satisfied there is no risk of concoction you must be satisfied that the evidence of the particular complainant under consideration is truthful and accurate as to the alleged similar conduct (you must also be satisfied that the evidence of the other complainant/s is truthful and accurate as to the alleged similar conduct).

Thirdly you must be satisfied that the facts proved with respect to the particular complainant under consideration are so similar to the allegations involving the other complainants that there is no reasonable view of the evidence of those other complainants, other than the defendant committed the acts as alleged by the other complainants.

The prosecution argues that the facts proved to you are so similar that when judged by common sense and experience that they must be true and that you can use the evidence of the complainants in combination. They argue that with the absence of collusion, it is objectively improbable that complainant 'A' would complain in such similar circumstances of offending against him/her by the defendant as to the alleged offending against the complainant 'B' unless the offending against complainant 'A' actually occurred. The defence argues that the allegation are not so similar that you can use the evidence of one complainant on the others. Further the defence

> argues that you would not be satisfied that a particular complainant is truthful and accurate as to the alleged similar conduct. Thus you could not use the evidence of any one complainant to support the others.
>
> In summary the evidence of any one complainant whom you accept as credible and reliable as to the alleged similarities can be used by you as a circumstance which might confirm, support, or strengthen the evidence of another complainant; but only if you are satisfied on all the evidence that you have heard that there is no reasonable view of it other than the defendant committed the other acts alleged by the other complainants, and that the possibility that the complainants are [all] lying can be rejected and that it may be the occurrence of the alleged similarities is a coincidence.
>
> If you do not accept that such similarities exist then you would reject the prosecution argument and look at the evidence of each complainant independently without having regard to the evidence of the others.
>
> I caution you that you cannot use that evidence to reason like "The evidence persuades us that he is the sort of person who could commit these sort of offences, or is of bad character, and therefore we will convict him of all the charges."
>
> You cannot say to yourselves that if you are satisfied beyond reasonable doubt that he committed offences against one complainant and that he therefore must have committed the offences alleged by the other complainants and so we will convict him of those.
>
> At the end of the day before you can convict on any count you must be satisfied that the prosecution has proved each element of the particular count beyond reasonable doubt.
>
> Ultimately in order to convict of a particular count you would need to be satisfied beyond reasonable doubt that the particular complainant you are considering is truthful and reliable in his/her allegation upon which the particular charge is based." (Footnotes omitted)

[10] It is desirable also to set out the course of submissions about this part of the proposed directions:

> "HIS HONOUR: So are you saying that – and you see, as I've indicated, I was thinking of going to it when I was dealing with 34 and *Markuleski*, but are you telling me that 50C might be better designed for this purpose?
>
> MR NARDONE: I think it – certainly the end of it, yes, your Honour.
>
> HIS HONOUR: Just bear with me.
>
> MR NARDONE: Well, maybe it's both [indistinct]

HIS HONOUR: See, the introduction of 50C is not very well designed for this kind of case, is it? Well, I suppose it's true to broadly state that there are separate charges in separate verdicts, but the – and just tell me this. I'm sure it's in your list, but the event where both girls are together.

MR NARDONE: Yes, your Honour.

HIS HONOUR: Is that a count?

MR NARDONE: No.

HIS HONOUR: So that means that that is appropriate in that introduction.

MR NARDONE: Yes.

HIS HONOUR: Yes. And that second paragraph of 50C, is that the Crown's position, that each complainant is supported by the other complainant, or is it only in respect of that joint event?

MR NARDONE: Your Honour, I'm going to speak frankly. I'm going to concede. It really is only – if there wasn't that joint event – I mean, while there are similarities, I'm not sure that there are enough for me to be going down that road.

HIS HONOUR: But the joint event is what makes this a joint trial, isn't it?

MR NARDONE: Yes. Yes.

HIS HONOUR: Right, I mean, the mere fact that C is a recent complainant witness for A doesn't of itself justify joinder.

MR NARDONE: Yes.

HIS HONOUR: It would be that joint event that justified the joinder.

MR NARDONE: Yes.

HIS HONOUR: So doesn't that mean the second paragraph does apply, but only to that event?

MR NARDONE: Yes.

HIS HONOUR: Right. Okay. And similarly, the next paragraph applies only in respect of that event, I would think, or do you argue that it goes further, and you can take that question on notice if you want it.

MR NARDONE: Your Honour, I'm not sure that there is enough to take it further.

HIS HONOUR: Yes. So those next couple of things from that direction – or the next paragraph does. You don't argue there's such a similarity that it's highly improbable the events occurred by chance. That's going down the *Pfennig* line, isn't it?

MR NARDONE: Yes. Yes.

HIS HONOUR: And this isn't a *Pfennig*-type case.

MR NARDONE: No.

HIS HONOUR. All right. So we would take up those two paragraphs. Well, **I don't think there's any evidence of concoction**, but the whole rest of that direction is really directed to a *Pfennig*-type case, isn't it, or it's describing it there as being a *Phillips*-type case.

MR NARDONE: But isn't that the – the last two paragraphs that are indented, isn't that ---

HIS HONOUR: On which page?

MR NARDONE: On 50.4.

HIS HONOUR: Okay. Sorry.

MR NARDONE: Perhaps I've got an old printout. Sorry.

HIN HONOUR: Just – how do they start the paragraph?

MR NARDONE: "You can't use that evidence to reason like this: the evidence persuades us that he is the sort of person that would commit these sort of offences or is of bad character and therefore" ---

MS WARDLE: That's the fourth-last one.

MR NARDONE: Sorry, I've got an old version. The second paragraph – sorry, the ---

HIS HONOUR: I see. "I caution you, you cannot use that evidence to reason." Is that right?

MR NARDONE: Yes. Yes.

MS WARDLE: Yes.

MR NARDONE: And the paragraph after it.

HIS HONOUR: That – see, that's predicated on the whole thing being a *Pfennig* case, but the pre-condition in the previous paragraphs arising, which is "If you don't accept that such similarities exist", you see? And you're not saying this is a *Pfennig* case.

MR NARDONE: No.

HIS HONOUR: So I think the whole thing falls away. I think what you're left with – this is what I think you might be left with. I think you are left with the first few paragraphs of 50C, confined to maybe the first three, confined to the joint event, right?

MR NARDONE: Yes.

HIS HONOUR: And then I think you're left with the general propensity warning in 66.3.

MS WARDLE: I'm just showing him. He's got an older version. I was just making sure he ---

HIS HONOUR: Okay.

MS WARDLE: --- had the right bit." (Emphasis added)

[11] A little later there was the following exchange:

"HIS HONOUR: And then – so does the direction in 50C, as I've heard Justice Heydon put it previously, "walk across the stage" [indistinct] I'm not sure it has much work to do, but the work that it does have to do is about that joint episode where they're both there ---

MS WARDLE: Yes.

HIS HONOUR: --- and their evidence about that episode is capable of supporting each other on that episode.

MR NARDONE: Yes.

MS WARDLE: Yes.

HIS HONOUR: Is that right?

MS WARDLE: Yes.

MR NARDONE: Yes.

HIS HONOUR: **So we'd be left with, would we not, the first three paragraphs of 50C dealing just with that episode?** You can take that question on notice, if you'd like to think about it.

MR NARDONE: Your Honour, can I come back to one more point in relation to propensity?

HIS HONOUR: Sure.

MR NARDONE: And maybe your Honour's already settled, but it's not clear in my head at the moment. I just – I'm worried that ---

HIS HONOUR: Yes.

MR NARDONE: Can we break this down. Again, if this was a trial that related to just one child ---

HIS HONOUR: Yes.

MR NARDONE: --- and evidence was given about what would fall into the category of discreditable conduct, then a propensity warning is given – sorry, I better make sure I'm right.

HIS HONOUR: It's the second half of that discreditable conduct direction.

MR NARDONE: Yes. But this situation – there's another level, because you want to guard against the jury using propensity reasoning of one witness's evidence to support the other.

HIS HONOUR: **Yes, but the way that one goes against that, I think, is to only give the first three paragraphs of 50C, because see, then after that it goes off into the *Pfennig* line, you see?** Whereas the first three I think it is what the Crown says. The Crown says they both describe that event happening ---

MR NARDONE: Yes.

HIS HONOUR: --- and for that reason, you can correctly use their evidence to support each other on that.

MR NARDONE: Yes.

HIS HONOUR: To use old language, they corroborate each other about that. We're not going to start talking corroboration, but that's the way, you know, lawyers of my vintage think about it, you know. So that's my safeguard for that, Mr Nardone. It only relates to the incident that they commonly describe.

MR NARDONE: And then the separate charge's direction covers – prevents them from then using their satisfaction on that joint count 2 to bolster the others.

HIS HONOUR: Yes. And the other side of the coin is that *Markuleski* assists the defence, because if they've got problems with their evidence about other things, that can be used against them.

MR NARDONE: Yes. Thank you, your Honour.

HIS HONOUR: Sorry, Ms Wardle. You wanted to say something?

MS WARDLE: Your Honour, I think we're all on exactly the same page. It will all turn on the way it's all put together by your Honour to make those connections clear, though, that they don't ---

HIS HONOUR: No pressure. No pressure, Ms Wardle.

MS WARDLE: No pressure, your Honour. Yeah." (Emphasis added)

[12] There were also submissions made about the appellant's case concerning the inconsistencies in the evidence of A and C. The following exchange occurred:

"MS WARDLE: Your Honour, I was thinking about a *Robinson*, but I'm just ---

HIS HONOUR: See, *Robinson* is something of a first resort, but ---

MS WARDLE: It's at 60 – yeah, no.

HIS HONOUR: --- sometimes it should be a last resort. See, you don't – and look, the categories in *Robinson* are not closed, but you are talking, I presume, mostly about A, are you?

MS WARDLE: Yes, your Honour.

GHIS HONOUR: And A doesn't readily fall into any of the categories exemplified in *Robinson*, but you would say that A is *Robinson* type witness because she gave evidence which is palpably different from her police statement, I suppose. Is that right?

MS WARDLE: Correct, your Honour. Yes.

HIS HONOUR: And do you submit that's enough of a reason to give a *Robinson* direction?

MS WARDLE: That is exactly my submission, your Honour.

HIS HONOUR: Mr Nardone, what do you say about that?

MR NARDONE: Your Honour, my submission simply is that the inconsistencies don't take it that far. In my submission, though, the inconsistencies that are raised are – and I'll be addressing the jury in this way – they're not so significant as to take it out of the norm.

HIS HONOUR: And just to enunciate this for the benefit of Ms Wardle, I must say my analysis of it really, of what the High Court was saying in *Robinson* is that there should be, to activate it, a special category or the witness falling into a special category which is outside the norm of witnesses to generate a warning, and just being inconsistent with your police statement is certainly relevant to your credit and as Ms Wardle points out, you actually get a direction that the proven inconsistent statement is admissible as evidence of the truth of contents thereof, but that doesn't of itself run into a *Robinson* category. Is that what you're arguing?

MR NARDONE: Yes, your Honour.

HIS HONOUR: So Ms Wardle, unless you want to persuade me otherwise ---

MS WARDLE: The only ---

HIS HONOUR: I don't think it goes far enough – I understand what you're saying about it, but I don't think it goes far enough to put her in a separate *Robinson* type category.

MS WARDLE: And the only other thing I can add to bolster that would be the delay that's occurred in coming forward ---

HIS HONOUR: But you're getting a *Longman* warning ---

MS WARDLE: --- and then – and – I know.

HIS HONOUR: You know? So look, I'm not inclined ---

MS WARDLE: It wasn't' on my immediate mind, but I think we should cover it, your Honour.

HIS HONOUR: Yes. I must say, I'm becoming a bit more robust about this and it doesn't really strike me as a *Robinson* type case.

MS WARDLE: Thank you, your Honour."

[13] At that point in the trial, therefore, the trial judge was not intending to direct the jury in terms of the seventh and eighth paragraphs of Direction 50C. The consensus between the learned trial judge and both counsel was that only the first, second and third paragraphs of Direction 50C were appropriate to be included in the summing up. This is not surprising because, as the learned trial judge had observed, there was no evidence of concoction in the sense of joint fabrication of evidence because that issue had not been made as an issue by the defence. As a result, they were all on the same page.

[14] The Court then adjourned for lunch. When the trial resumed the learned trial judge directed the jury to find the appellant not guilty in relation to count 8 in respect of which the prosecution had conceded there was no evidence. After the jury had returned that verdict, and after other administrative matters had been dealt with, the Crown prosecutor began to address the jury.

[15] He emphasised the importance of the witness's demeanour in assessing the credibility of their evidence. He made submissions about the significance of inconsistencies in the evidence. He made an argument concerning any possible defence submission about the implausibility of the accounts of the complainants.

[16] Although the issue had not been raised by the defence, he foreshadowed a possible submission that might be made that the complainants had got their heads together and that, together, they had invented these allegations. He submitted:

> "If it's to be suggested that these two women got together and invented this story you wouldn't expect them to have given an account about the only joint incident, and not make it marry in the way you think they would if it wasn't true.
>
> It doesn't marry because they haven't decided to get together, and create a story. It is simply a case that each remembers the incident of sexual offending taking place when they were both present, but each remembers perhaps different aspects of it in different ways. It might otherwise be argued that they didn't get together, but A at least made up lies, and had a foundation to make up lies consistent with C because A was present, and heard from a number of sources about the nature and content of C's complaint which A could then add to. I would suggest that you can reject that argument too."

[17] The appellant's counsel then addressed the jury. She submitted that "C and A are making this up". She submitted that the evidence, to which she would refer, would bear out that contention.

[18] First, she reminded the jury of the evidence that C's mother was having an affair with the appellant and that C needed others to know. She submitted that this furnished a motive for C to tell lies about the appellant and to fabricate the allegations of sexual abuse. She said:

> "Now, as I said, what's the motive? I can't tell you that. And it's a fact, as I've said, you don't have to decide. And I've suggested to you, it may well be that she found out about her mother having the affair because she says to W, 'I was molested. A was involved in it. And my mother was having an affair.' And there were a couple of words that were added after that: 'and the others need to know.' This all unfolds."

[19] The proposition that C had been motivated to fabricate these allegations because of her knowledge that her mother was having an affair with the appellant had not been put either to C or to her sister A. Nor was any submission made that A was motivated by the same thing. As a result, the prosecutor made no mention of it.

[20] Second, the appellant's counsel submitted that neither C nor A could be regarded as credible. She offered reasons for this submission. C lacked credibility because she

had "memorised her account" and it was "verbatim from her statement". A lacked credibility for the opposite reason, because she "couldn't remember her story". It was submitted that A was "so unreliable that it had to affect her credibility".

[21] Third, she submitted that C lacked credibility also because she had changed her story about the dates upon which she alleged events had occurred because she had "found out later" that at the time she alleged that the appellant had been abusing her sexually he had, in fact, been working in Sydney.

[22] This too had not been put to C and was raised for the first time in address.

[23] Fourth, the Crown prosecutor had relied upon the evidence that each of the complainants had described "the use of a specific dildo which is confirmed as being an object that was in fact part of the [appellant's] household at the time". The appellant's former wife had given evidence that the dildo belonged to her and that she had not revealed her possession of it to anybody. It was therefore an inference, which the prosecution invited the jury to draw, that the complainants must have seen the dildo when the appellant had used it on the occasion that he had assaulted them together and, as a consequence, this bolstered their credibility. The appellant's counsel submitted to the jury that the dildo had been kept in the bedroom ensuite toilet and that all of the children, including the complainants, commonly used that toilet. So, she submitted, they had an opportunity to see the dildo apart from its alleged use by the appellant.

[24] This too had not been put to the complainants as part of the appellant's case.

[25] Fifth, the appellant's counsel made submissions about the use that the jury could make of the complainants' demeanour while giving evidence.

[26] Sixth, she made submissions about the inconsistencies in the versions of events given at various times by them.

[27] Seventh, she made submissions about the inherent implausibility of some of the allegations.

[28] Finally, she made submissions to the effect that C could not have informed her husband, as he had related, about events concerning her sister A at a time before A had finally revealed her allegations for the first time. This anachronism was said to point to a lack of credibility in C.

[29] Court then adjourned until the following day when the appellant's counsel resumed her address. She summarised the "six criteria" which she had invited the jury to consider on the previous day. She said:

> "The first one was consistency with their own account and consistency with what they told other people. The second thing was plausibility, the third thing was the way they gave their evidence, the fourth thing was independent evidence, the fifth thing was about motive and the sixth thing was opportunity."

[30] Counsel then addressed the jury upon matters which, in her submission, raised the implausibility of the complainants' accounts. She said:

> "So, you have two witnesses now saying that C's saying information that she can't know at that time; that can't be right. W says another thing about what C told her about A. He remembers C telling him on that Friday night that A was being held in a ball on Mr Hyde's knee, with her knees to her chest and Mr Hyde was spinning her around, while he was having sex with her. That's another thing he says. She can't know that on Friday night either. And you might recall that A didn't say that in the witness box but A told the police that at least there was some swivel being spoke about. **You might start to think there's been some concoction going on here.** You see, ladies and gentlemen, when you're not telling the truth, timing is one of the things that can trip you up and that's a big problem for the Crown case, because C's telling people things she can't know at the time she's telling them. The people came in here; they had no clue that there was an issue with what they were saying and they innocently told you what they'd been told because they don't have the whole picture and that is where C's evidence is not plausible." (Emphasis added)

[31] This was the first and only time that defence counsel used the word "concoction".

[32] A "concoction" is simply something that has been made up. It does not denote a false story made up by two or more people together although the word can be used to mean that in context. A single person can concoct a story just as a single person can fabricate a story or evidence. It was clear that the learned trial judge used the word in the second sense when he used it in the course of counsel's submissions about Direction 50C. So too can two people fabricate or concoct a story together. Unlike "fabricate", the word "concoct" may connote an elaborate story has been fabricated for a particular purpose.

[33] Defence counsel's use of the word might, in isolation from everything else that happened at the trial, be taken to mean that two or more people, A and C, together concocted their allegation. But in my opinion in the context of this trial it could not be read in that way.

[34] First, that is so because no such submission was actually made. The passage quoted above did not involve a submission that A and C had fabricated their stories together. As the last sentence of the submission demonstrates, it was an argument about C's credit, not the credit of both sisters.

[35] Second, no such allegation ever was put to any witness.[1]

[36] Third, counsel's attention had expressly been directed to the content of Bench Book Direction 50C containing express reference to directions about concoction in this sense and yet she had not invited the learned trial judge to direct in terms of the seventh and eights paragraphs of that Direction. On the contrary, she agreed expressly with his Honour's appreciation of the case as one in which there was no "evidence of concoction" and what that relevantly required by way of direction – a direction without those paragraphs.

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1 Eg. *GAX v The Queen* [2017] HCA 25 at [27].

[37] The omission to put the issue distinctly to the witnesses or to raise it distinctly for the consideration of the jury has a consequence for the content of the learned trial judge's summing up.

[38] The rule in *Browne v Dunn*[2] has been expressed in a variety of ways having regard to the particular circumstances of the case in which it is raised. At its most fundamental level it concerns the obligation, as a matter of fairness, on the part of counsel to put matters to witnesses in respect of which it is intended to lead evidence in contradiction. It has also been said that the actual grounds upon which evidence is to be disbelieved should also be put to the witness so that the witness can have an opportunity to offer an explanation.[3]

[39] In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*[4] Hunt J said:

> "A challenge made to the evidence of a witness in the course of a final address may take place in various ways. The opposing party may ask the tribunal of fact simply to disbelieve that evidence; if he has led evidence in direct contradiction of the evidence of that witness, he may then ask the tribunal of fact to accept the evidence of his own witnesses in preference to that of the witness in question; or he may point to other evidence in the case, led by either party, which tends either to contradict the evidence of that witness or to destroy his credit. There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness *is* to be challenged but also *how* it is to be challenged. Firstly it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based …". (Emphasis in the original)

[40] Accordingly, defence counsel put directly to each of the complainants that they were telling untruths and that they had made up their allegations against the appellant. Their attention was drawn to inconsistencies in between their evidence and their respective police statements and they were given an opportunity to address such inconsistencies. Similarly they were afforded an opportunity to address the alleged implausibility of parts of their accounts. In short, the defence case on credit was put to each of them.

[41] But it was not put to either of them that they had, working together, fabricated their accounts. Nor was it put to A in the alternative that she had, for some reason, determined to fabricate her own allegations independently of C in order to support what she knew to be her sister's false allegations.

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2 (1893) 6 R 67 (HL).

3 *Cross on Evidence*, Australian Edition, at [17435].

4 [1983] 1 NSWLR 1 at 22-23.

[42] Whether they had prepared a story together depended, at least, upon whether they had had an opportunity to do so before speaking to the police. It is not known for how long they may have been alone together so that they had an opportunity to fabricate their allegations or even whether they were alone together, although that could be inferred. It also depended upon the nature of the relationship between them as adults. Were they close? Was their relationship so intimate that one sister would ruin a man's life by perjury to support the other sister? Was there any reason why both of them would do so? These matters were not explored at trial because the issue was never raised. Other issues that might affect the plausibility or implausibility of such a suggestion might have arisen.

[43] If this were a civil case, it would be too late on appeal to raise an argument that it was open to the jury to conclude that the evidence of the complainants should be rejected upon the footing that they may have concocted the stories together. But this is a criminal appeal. As Gleeson CJ and Heydon J said in *MWJ v The Queen*:[5]

> "The principle of fair conduct on the part of an advocate, stated in *Browne v Dunn*, is an important aspect of the adversarial system of justice. It has been held in England, New South Wales, South Australia, Queensland and New Zealand, to apply in the administration of criminal justice, which, as well as being accusatorial, is adversarial. Murphy J, in this Court, even applied it to the conduct of an unrepresented accused. However, for reasons explained, for example, in *R v Birks* and *R v Manunta*, it is a principle that may need to be applied with some care when considering the conduct of the defence at a criminal trial. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination. This requirement is accepted, and applied day by day, in criminal trials. However, the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings." (Citations omitted)

[44] Consequently, despite counsel's deliberate strategy at the trial, it remains necessary to consider the course of the trial to determine whether or not what the learned trial judge told the jury rendered the trial actually unfair.

[45] In *Alford v Magee*[6] the High Court, per Dixon, Williams, Webb, Fullagar and Kitto JJ said:

> "[Sir Leo Cussen] held that the only law which it was necessary for [the jury] to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case and (2) of telling the jury, in the light of the law, what those issues are."[7]

[46] In *Tully v The Queen*[8] Hayne J explained more fully what is meant in this context by the expression "the real issue or issues in the case". His Honour said that the ultimate issue in every criminal trial is the guilt of the accused person and although,

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5 (2005) 80 ALJR 329 at [18].
6 (1952) 85 CLR 437.
7 at 466.
8 (2006) 230 CLR 234.

when an accused has pleaded not guilty, every element of the offence or offences charged is in issue, it does not follow that there is a "real" issue about every one of those elements.[9] Some elements may not be put in issue by the parties, such as death or cause of death in a murder case. His Honour said:

> "Identifying the real issues in a case will not always be easy. In some jurisdictions, legislative provisions have been made for procedures evidently intended to reveal what are the real issues in a case before the trial begins. But even where there are procedures, and they are applied, it is inevitable that, at many criminal trials, no positive defence will be advanced and the accused will go to the jury on the basis only that the prosecution has failed to prove its case beyond reasonable doubt. It must be accepted, therefore, that there will be cases (including, but not only, those in which no positive defence is advanced) in which it may not be at all clear whether there is a real issue about some particular aspects of the matter. The trial judge must nonetheless decide what are the real issues, and must tell the jury what they are."[10]

[47] His Honour went on to explain that, in order to identify the real issues in the case, it is necessary to distinguish the most general of issues in the trial from more specific issues. Thus, if one of the issues at a trial is whether the complainant ought to be believed, in order for the jury to be assisted by the trial judge in coming to grips with that issue, it may be necessary to direct its attention to what his Honour described as the "factual premises" which underlie an issue of credit of that kind. In that respect his Honour said:

> "86. In the present case, the issue – "Do you believe the complainant?" –had a number of factual premises. They had been identified in the final addresses of counsel. The complainant had been aged between eight and ten years at the times of the alleged offences; she was aged fourteen years at the time of the trial. At the times the offences were alleged to have occurred, the appellant was in a relationship with the complainant's mother. The complainant had given more than one account of what she alleged had happened, and those accounts were not identical. Trial counsel for the appellant emphasised what she contended were inconsistencies in the complainant's accounts of what the appellant was alleged to have done. These accounts were said to be "so inherently improbable, unlikely, inconsistent within themselves, confusing, changing and presenting so many difficulties" as to require the jury to entertain a reasonable doubt about the complainant's testimony. Trial counsel illustrated her contention by reference to the complainant's evidence about incidents at Agnes Water and her account of an incident said to have occurred while the appellant was driving. More than once, trial counsel for the appellant dwelt upon the improbability of the complainant's suggestion that there had been as many as thirty incidents of penile penetration. Counsel

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9 at [76].

10 at [78].

for the prosecution accepted that the complainant had made some mistakes in giving her account of events, but sought to characterise other differences in the accounts she gave, as the complainant's adding details to her account as she became more confident.

87. The issues thus presented for the jury to decide were issues arising from the facts that (a) the complainant was very young at the time of the alleged offences, (b) the complainant was still a young person when she gave evidence, (c) about four to five years had elapsed between the time of the alleged offending and the complainant giving her evidence at trial, (d) because time had elapsed between the alleged offending and medical examination of the complainant, the medical evidence could neither support nor contradict the allegation that there had been sexual penetration and (e) the offences were alleged to have occurred in a family setting that had since broken up but was one in which the complainant alleged that she feared the appellant both during and after the relationship had ended.

88. Stated in abstract terms the factual issue for the jury was – do you accept the complainant's evidence as establishing the elements of each offence beyond reasonable doubt? Stated in more concrete terms, the issue was – do you accept the evidence of a young person about particular events of sexual misconduct, occurring in the family setting described, and said to have occurred, unwitnessed, some years ago, when she was aged between eight and ten and which medical examination can now neither verify nor falsify? (That statement of the issue is not proffered as a formula that could have been adopted in instructing the jury about the real issues in the trial of the appellant. It is too compressed to be used for that purpose, at least without a deal of amplification and explanation. It is put forward as no more than a convenient summary of the information that had to be given to the jury by the trial judge.)"

[48] His Honour concluded:

> "It is the nature of the issues that were to be decided by the jury in this case – the real issues in the case – that required a warning."

[49] Hayne J was in dissent in *Tully v The Queen* but not upon grounds that affected his Honour's dicta to which I have referred.

[50] The issues in a trial do not emerge spontaneously and unprompted. They are defined by the parties. In *Nudd v The Queen*[11] Gleeson CJ said:

> "9. Sometimes, however, a decision as to whether something that happened at, or in connection with a criminal trial involved a miscarriage of justice requires an understanding of the circumstances, and why it happened. A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation

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11 (2006) 80 ALJR 614.

> is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. Considerations of fairness often turn upon the choices made by counsel at a trial. In *TKWJ v The Queen*, the appellant complained that evidence of his good character was not led. This, it was said, was unfair. In rejecting that argument, this Court said that the failure to call the evidence was the result of a decision by counsel, and that, viewed objectively, it was a rational decision. That, in the circumstances of the case, was conclusive. It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct." (Footnotes omitted)

[51] No point is taken in this case about the conduct of counsel, and rightly so.

[52] However, the choice made by defence counsel to conduct the case upon the footing that the credibility of A and C turned upon factors other than a theory of mutual concoction by them or a theory of concoction by A in order to support her sister does have consequences for the trial.

[53] As Barwick CJ said in *Ratten v The Queen*:[12]

> "It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law."

[54] To the same effect, in *R v Luhan*[13] Neave J said:

> "[37] The vice inherent in all three grounds of appeal is that they were premised on a different trial having been conducted from

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12 (1974) 131 CLR 510 at 517.

13 [2009] VSCA 30 at [31]-[37].

> that which was actually conducted on Luhan's behalf. Those who seek to challenge the result of a trial will be treated as bound by the manner in which the trial was conducted, and confined to the matters actually put in issue by them or by their counsel (except where a matter, though not raised, can reasonably be seen to have emerged as a real question from the evidence actually adduced at the trial)."

[55] Such forensic decisions bind the parties because, as Neave J also observed, if a particular defence had been raised it might have been addressed by evidence. In this case, the issue of mutual concoction by the two sisters or a concoction by A from a motive to support her sister could have affected both the re-examination of each of them and the evidence in chief of the second one of them to be called. The theory now raised on appeal may have been able to be answered but the Crown was denied the opportunity to meet that issue. That is why the choice of issues by the parties provides the basis upon which a trial judge will fashion the summing up.

[56] The summing up in this case accordingly commenced with the parties having crystallized the issues and by the judge inviting both counsel to address him about the content of the summing up having regard to their respective forensic decisions.

[57] During an adjournment in the middle of the summing up, the learned trial judge again referred counsel to Bench Book Direction 50C:

> "HIS HONOUR: … The only other thing I wanted to tell you about was this: oh, well, sorry, both of you. Mr Nardone, the infamous direction 50C, can I just tell you how I'm going to deal with that, right? I think I discussed the first three paragraphs of it with you on Friday.
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> MR NARDONE: Yes, your Honour.
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> HIS HONOUR: But looking at it, that's not right, I don't think. I think I get to this position: because it goes off into the *Pfennig* reasoning ---
>
> MR NARDONE: Yes.
>
> HIS HONOUR: --- right? So I'm going to give them the first two paragraphs of it, and at the end of the second paragraph of the other complainants as to what they say happened to them on the joint occasion, right?
>
> MR NARDONE: Thank you, your Honour.
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> HIS HONOUR: So it's really a case of direct evidence about the joint occasion, right? Then on the rest of the direction – so the next two paragraphs go out, and then they're told before you can rely on a particular complainant's evidence as to the other complainants, you need to be satisfied, beyond reasonable doubt, of a number of things. That it's independent.
>
> Then because the direction goes into it, I think – is this right, I have to say there's no real risk the evidence is untrue by reason of concoction? That's what the direction says.

MR NARDONE: Of they'll have to be satisfied of that, yes.

HIS HONOUR: Yes. Yes. All right. Look, I think I've got that worked out. **But when I give that direction, just pay attention to it. See if I need to be corrected**."

[58] It was after this exchange that his Honour, in due course, came to the part of his summing up about which the appellant now complains. Consistently with the failure of the defence to raise this issue at the trial, the appellant does not complain about the directions which the learned trial judge actually gave. Nor was the judge's invitation to be corrected accepted.

[59] In any case, in my view, the sentence upon which this ground of appeal is based contained a comment and not a direction or an instruction. The distinction between a direction and a comment is important. In *RPS v The Queen*[14] Gaudron A-CJ, Gummow, Kirby and Hayne JJ said:

> "41. Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should not reason or about particular care that must be shown before accepting certain kinds of evidence.
>
> 42. But none of this must be permitted to obscure the division of functions between judge and jury. It is for the jury, and the jury alone, to decide the facts. As we have said, in some cases a judge must give the jury warnings about how they go about that task. And, of course, it has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge may comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel." (Footnotes omitted)

[60] One of the cases cited in support of the matters in those paragraphs is *Tsigos v The Queen*.[15] That is a case reported as a note about an application for special leave that was dismissed. In the course of summing up, the trial judge in that case had said to

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14 (2000) 199 CLR 620.

15 (1965) 39 ALJR 76.

the jury that "on the evidence before the court it is my duty to tell you that you will be flying in the face of the oath you took namely to return a verdict on the evidence, if you were to return a verdict of acquittal, because on the evidence I can see no escape from the verdict of murder or manslaughter". The note of the report states that Barwick CJ, Taylor, Windeyer and Owen JJ (Kitto J dissenting) held that, in the context of the summing up as a whole, the jury was not being told that, as a matter of law, they could not acquit. In *RPS*, Gaudron A-CJ, Gummow, Kirby and Hayne JJ observed that a trial judge may comment, even strongly, on factual issues, citing *Tsigos* as a case that supports that proposition.

[61] In *Azzopardi v The Queen*[16] Gaudron, Gummow, Kirby and Hayne JJ said:

> "The distinction between a matter for comment and a matter for judicial direction reflects the fundamental division of functions in a criminal trial between the judge and the jury. It is for the jury to decide the facts of the case. It is for the judge to explain to the jury so much of the law as they need to know in deciding the real issue or issues in the case. In the course of directing the jury, the judge must give the jury such warnings as may be called for by the particular case, not only against following impermissible paths of reasoning, but also about the care that is needed in assessing some types of evidence such as evidence of identification.
>
> It is, however, not the province of the judge to *direct* the jury about how they may (as opposed to may *not*) reason towards a conclusion of guilt. That is the province of the jury. The judge's task in relation to the facts ends at identifying the issues for the jury and giving whatever warnings may be appropriate about impermissible or dangerous paths of reasoning. That is not to say that the judge may not comment on the evidence that has been given and comment about the facts that the jury might find to be established. But the distinction between comment and direction is important. Telling a jury that they may attach particular significance to the fact that the accused did not give evidence is a comment by the judge. Because it is a comment, the jury may ignore it and they should be told they may ignore it. By contrast, warning a jury against drawing impermissible conclusions from that fact is a direction by the judge which the jury is required to follow."[17] (Footnotes omitted)

[62] In my respectful opinion, the learned trial judge correctly directed the jury about what were the real issues in the case. By reference to defence counsel's address to the jury, his Honour reiterated the points that had been made on the appellant's behalf. In this respect, contrary to the appellant's submissions, his Honour accurately and adequately informed the jury about the defence case. The appellant's case was that the complainants were making up the allegations, that C may have had a motive for doing so, that C's evidence was suspiciously consistent with her written statement while A's evidence was suspiciously inconsistent with hers, that C's evidence had changed in relation to the date that the appellant was working in Sydney and this affected her credit, that their demeanour when giving evidence affected their credit and that some of their evidence was implausible. In addition,

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16 (2001) 205 CLR 50.

17 *supra* at [49]-[50]; citations omitted; emphasis in the original.

his Honour correctly informed the jury that mutual concoction of evidence by the two complainants together was not a real issue. Nevertheless, he left the jury in no doubt that they had to be satisfied that there had been no such concoction before accepting their evidence.

[63] Acceptance of the appellant's submission would entirely negate the trial judge's obligation to identify the real issues in the trial. It would become a judge's duty not only to identify the real issues but also to refrain from assisting the jury by saying what are not real issues.

[64] Even in the case of the obligation of a trial judge to instruct a jury that a verdict of manslaughter is open in a murder case, there is no absolute rule that such a direction must always be given irrespective of how the defence is conducted.[18] While the guilt of the accused is always in issue, with the result that all elements that the Crown must prove are always, in that sense, in issue, the same cannot be said for distinct factual issues that do not themselves constitute elements of the offence or that do not constitute a defence - such as an accused's presence at the scene, an accused's motive or opportunity, and other peripheral but important matters of that kind. Such issues are entirely for the parties to formulate.

[65] That is so *a fortiori* with the factual premises that are advanced for the rejection of the credit of a witness. These can be infinite in their potential variety, from the most obvious to the most tenuous, and it is a matter entirely for the parties to decide upon the possibilities that they think are open and, as a matter of forensic judgement with knowledge of the content of the brief, which of these to advance and which to ignore. Neither a trial judge nor appellate judges can know what instructions might dictate the abandonment of a line of attack that, to a mind that is not appropriately informed, might seem to be an obvious and an effective one. That is one of the reasons why, as Barwick CJ said in *Ratten*, a judge "is to take no part in that contest".

[66] To accept the appellant's argument would, in my respectful opinion, mean that a trial judge would have to consider every single factual matter that might aid the defence and ensure that, even in the absence of a request that the judge do so, the jury was directed about every possible issue that had logically arisen. There would be a correlative obligation to refrain from telling the jury that anything was a non-issue so long as it was a logical possibility. Even in the case of a direction about an alternative verdict of manslaughter in murder cases the law has not gone so far and judges not uncommonly leave manslaughter as a possible verdict while informing the jury that, in the circumstances of the case, it is not really in issue.

[67] For these reasons, the inclusion of the sentence complained of in his Honour's summing up did not constitute an error on his Honour's part nor did it result in a miscarriage of justice in the conduct of the trial.

[68] I would dismiss the appeal.

[69] **McMURDO JA:** The appellant was charged with thirteen counts of sexual offending against two complainants who were sisters. There were charges of

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[18] *Gilbert v The Queen* (2000) 201 CLR 414; *Gillard v The Queen* (2003) 219 CLR 1. The rationale for the requirement to leave manslaughter open does not translate to the principles which inform a trial judge's obligation to identify the issues for a jury. As to the rationale in murder cases, see eg *James v The Queen* (2014) 253 CLR 475 at [31] to [35].

maintaining a sexual relationship with each girl as well as specific counts of rape and sodomy. The maintaining charges covered periods beginning in 2000 and ending in 2003. Due to the amendment of s 229B of the *Criminal Code (Qld)* in 2003, for each complainant there was a separate charge for the period up to 1 May 2003 and another charge for the following eight months period. He was tried by a jury in the District Court and on the eighth day of trial, he was found guilty on eleven of the counts. He was acquitted on one count of maintaining a sexual relationship. And as directed by the trial judge, the jury found him not guilty of one of the counts of rape. He was sentenced to various concurrent terms of imprisonment, the longest being terms of eleven years (with the necessary declaration of a serious violent offence) for the other counts of maintaining a sexual relationship.

[70] He appeals against his convictions on all counts. He argues that each of the verdicts was unreasonable, upon the basis that it was not open to the jury to be satisfied beyond reasonable doubt that he was guilty.[19] His second ground of appeal is that there was a miscarriage of justice occasioned by the jury being allowed to consider the "distressed condition" of one of the complainants when she was giving evidence, as supportive of her own testimony. In turn, it is said, this affected the jury's consideration of the evidence of the other complainant also. The third ground of appeal is that there was a miscarriage of justice by the judge telling the jury that there was "no substantial suggestion" of concoction between or by the complainants, when, it is said, that was argued by the defence counsel. For the reasons that follow, the appeal should be allowed on that third ground, and a retrial ordered.

The evidence at the trial

[71] I will refer to the complainants as A and C. A was born in July 1992. C was born in March 1991. They met the appellant when he was married to a friend of their mother. A and C, together with their family, would often visit the appellant's house. Sometimes the appellant's wife would look after them after school while their mother was at work.

[72] Although there were the specific charges of sodomy and rape, in each case the prosecution also relied upon other (uncharged) acts. In general the conduct relayed by one complainant was of the same kind as that relayed by the other, but in only one instance was it said that they were both present when it occurred.

[73] A said that the conduct occurred from when she was in grade 3 until she was in grade 6. She turned eight in the year that she was in grade 3, which was 2000. A said that the offending occurred "pretty much" every day that she was at the appellant's house. He touched her on the breast, both inside and outside her clothing and there were incidents of oral penetration, penile vaginal penetration and penile anal penetration. In respect of this complainant, there were three counts of rape and one of sodomy which were charged on the indictment.[20]

[74] Count one on the indictment charged an offence of maintaining an unlawful sexual relationship with A in the (earlier) period ending in May 2003. Count two was a charge of maintaining such a relationship in the later period, upon which the jury

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19 *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606; and *SKA v The Queen* (2011) 243 CLR 400.

20 Other than perhaps count eight, on which the jury was directed to acquit.

acquitted the appellant. Count five charged the appellant with sodomising A and counts six and seven charged him with raping A. Each of those offences was alleged to have occurred within the earlier period of maintaining. There was no specific offence against A which was alleged on the indictment to have occurred in the later period.

[75] A's evidence about count five was that it occurred at the appellant's house when she was in grade 3 or grade 4. She said that earlier that day she had been raped, by penile vaginal penetration, in the kitchen of the house. In cross-examination she accepted that she had not referred to that incident in her police statement but said that it was a true recollection. She also said that she had told the prosecutor of this incident in a conference the week before the trial, but whether she did so was not revealed by other evidence. For count five, she recalled that she was lying down on the couch in the lounge room when the appellant came and sat next to her. He pulled her skort down and, while sitting on the couch, put the complainant on to his knees where he lifted her up and penetrated her anus with his penis.

[76] Count six, A said, occurred in the laundry of the house. She was then in "around" grade 4 or 5. A said that he pulled her into the laundry and after pulling his jeans down, put his hands on her head and put his penis into her mouth. She said he ejaculated and described the ejaculate. In cross-examination, she accepted that she had not provided any such description in her statement to police.

[77] A said that the offence the subject of count seven occurred when she was in grade 4 or 5, in the ensuite to the appellant's bedroom. She was there because someone else was in the other toilet in the house. When she left the ensuite, the appellant, who had been in the bedroom, put her on his bed and took off her shorts. The appellant then penetrated her vagina with his penis. He told her that she could not tell anyone or her parents would go to prison.

[78] A also referred to occasions in which she was assaulted by the appellant when the two families were on holiday at Emu Creek in New South Wales.

[79] A gave evidence of an occasion of offending when her sister, C, was also present. This was not the subject of a separate charge. A said that it occurred at the end of grade 3 or in grade 4. She said that the appellant had been watching a pornographic movie on his computer. A went into the ensuite and when she left there, she saw that C was on the bed in the appellant's room. A went and sat next to her. The appellant then touched C's breast outside of her clothing before making A also touch C's breasts. The appellant put his penis in A's mouth. After he had ejaculated on C's hands, he put the ejaculate on C's face. The appellant also made A sit on a "pink sparkly"[21] dildo, which he placed between her vagina and her buttocks. In cross-examination she accepted that she had not referred to the dildo in her statement to police. She also accepted that in that statement, she had referred to the appellant forcing C's head onto his penis and to a digital penetration of both girls while the appellant was orally penetrating the other, although she had not referred to those things in her testimony.

[80] In discussing C's evidence, it is convenient to start with the incident in which the two complainants were said to have been present. C said this was the only occasion of sexual offending against her which also involved A. She recalled that she was in grade 5 or perhaps grade 4 at the time. The appellant called her into his bedroom

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21 AR 46.

and where she saw A sitting on the bed without any pants on. The appellant told C to take her pants off and sit next to A which she did. He told the girls to digitally penetrate the other which they did and he told C to kiss A like he kissed C. The appellant then took a dildo, which C thought was pink with silver sparkles, with which he "probed" A's vagina while kissing C. He also penetrated C with the vibrator for a short time.

[81] The appellant's argument emphasises the differences between the testimony of the two complainants about this incident. For the respondent, it is accepted that there were some differences, but it is submitted that in several respects their evidence coincided: the incident took place in the same room, it involved pornography on the computer, there were sexual acts on the appellant's bed, the use of a pink "sparkly" vibrator and the appellant requiring the two girls to commit sexual acts on one another (albeit with different recollections as to what those acts were). It may be noted at this point that the complainants' mother testified that she had bought such a vibrator as a gift for the appellant's then wife.

[82] Apart from that incident where A was present, C described a long course of frequent and persistent sexual offending by the appellant against her. She said that most of this occurred when she was in grades 5 and 6 (in 2001 and 2002). There were periods in which she had no contact with the appellant for weeks, or sometimes months, and then times when she would see him nearly every day. There were occasions when the appellant and his wife would mind the complainants while their mother was at work, as well as other occasions on weekends or holidays when the families socialised together.

[83] In addition to the two counts of maintaining an unlawful relationship with C (counts three and four on the indictment), there were some five counts of the rape of this complainant (counts nine through thirteen on the indictment).

[84] The offence the subject of count nine occurred, C said, when she was in grade 5 or grade 6. There were other people then in the appellant's house but she did not know exactly where at the time. He was watching a pornographic film on his computer in his bedroom. He grabbed her vagina and told her that he wanted her to be like the girls in the movie. He told her to watch the movie while he put his fingers in her vagina, before picking her up and having penile vaginal intercourse.

[85] Counts ten and eleven were said to have occurred on the one occasion, again in the appellant's bedroom. The appellant told C to take off her underwear and sit on his bed. He digitally penetrated and licked and penetrated her vagina with his tongue. The act of digital penetration was the subject of count ten. The penetration with the tongue was the subject of count eleven. In the same incident, he removed his penis and rubbed it against her vagina.

[86] The offence which was the subject of count twelve was related by C as follows. The appellant picked her up from her house and while they were travelling along a motorway, he grabbed her by the vagina and put her hand on his pants and thrust his penis. He then removed his penis from his pants and pulled her head down and told her suck his penis. He thrust his penis into her mouth and he ejaculated.

[87] Count thirteen was said to have occurred at the workshop owned by the appellant's brother, when C was in grade 7. C and her own brother were at the workshop. The appellant sent her brother up in the car hoist and took her into an office. The

appellant kissed her, digitally penetrated her and then penetrated her vagina with the top of his penis. The act of penile penetration was the subject of this count. C thought that this was one of the last times that he had offended against her. It was not long after she had commenced menstruating. In addition to these incidents the subject of specific charges, she recalled that there were many instances of kissing, digital penetration, fellatio and cunnilingus. He would frequently kiss her "fully with his tongue".

[88] C told no one of the offending against her until, "two Christmases ago", she told her husband. He gave evidence that in November 2014, she told him that she had been sexually assaulted by the appellant, as had A. C told him that the appellant had been having an affair with their mother "a long time ago". He provided some detail of what she had told him of the offending, including the fact that the appellant had taken both girls back to his "workshop" to make them "watch porn and get them to re-enact what was being seen". C told him that the appellant would "keep them in the office and make them do sexual things to each other like masturbate each other …" As the appellant's counsel submits, that was inconsistent with C's evidence that there had been only one incident of sexual abuse involving both complainants.

[89] Shortly after informing her husband, C told her mother of the offending. A said that she was present when C was telling her mother what had happened and C then said it had also happened to A. At that point, A denied that this had occurred to her. However on the following day, A told C that it was correct that she, A, had also been abused by the appellant. Their complaints were then made to the police.

[90] There was evidence in the prosecution case about the appellant's being in Sydney for parts of the period of the alleged offending. The complainants' mother thought that the appellant had been working in Sydney for a period of six to twelve months within the period of the alleged offending.[22] The complainants' father said that the appellant worked in Sydney for six to eight months although he would sometimes "be home for a week."[23] The appellant's former wife said that he had worked in Sydney for eighteen months to two years and, as "a rough estimate" from 2000 to 2001.[24] The appellant's son said that he had worked in Sydney for approximately eighteen months, returning normally on long weekends "or if he got time off."[25] And a former employer said that the appellant was working on a project in preparation for the Sydney Olympics, over a period of twelve to sixteen months. This body of evidence, considered together, ought to have demonstrated that he could not have been in Brisbane very much during a substantial period which may have extended into the alleged period of the offending. However, the most reliable of this evidence was probably that of the former employer, from which it was possible that the appellant had finished his work there by early 2000, if not earlier.

[91] The appellant did not give or call evidence.

The first ground of appeal: unreasonable verdicts

[92] The task of this Court is to consider the whole of the record and to decide whether it was open to the jury to be satisfied beyond reasonable doubt that the defendant was

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22 AR 148-149, 162.
23 AR 185 and 188.
24 AR 204 and 207.
25 AR 211-212.

guilty of the offences. In doing that, the Court must keep in mind the jury's advantage of seeing and hearing the evidence. However:

> "If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way 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 upon that evidence."[26]

[93] I go then to the matters in the evidence upon which the appellant relies.

[94] It is submitted that A's evidence about what happened to her, while camping at Emu Creek, was inconsistent with what she had said to police as recorded in her statement. In her evidence she said that these incidents occurred in a cabin, whereas in her police statement, they were said to have occurred in other parts of the camping area. There was also conduct referred to in her statement, as having occurred at Emu Creek, which she had not recalled in her evidence in chief. But the proof of the events at Emu Creek was not necessary for the proof of the maintaining charge. And the inconsistencies were not such as to necessarily destroy her evidence in other respects.

[95] There were internal inconsistencies within A's evidence of how she came to be aware of C's complaint. In examination in chief, A said that she first heard C say anything about the appellant's offending when C was telling their mother, after some family members had assembled at the house of their sister (whom I will call B.)[27] However in cross-examination, she seemed to confirm that which she had told police, which was that she had received a telephone call from the appellant's wife, who said that C's husband was making accusations against the appellant that he had offended against C. A agreed that it was after that call that the family had assembled at B's house.

[96] The appellant's argument relies on the inconsistency between A's evidence in chief and her police statement about an incident earlier in the day on which the rape alleged by count five occurred. I have discussed that inconsistency above at paragraph [75]. She said that she had recalled this incident only after giving her statement to the police. It was not a subject of a specific charge. The jury may have accepted her explanation that she had only recalled the incident more recently. She had only given the one statement to police.

[97] A's evidence was that she had opportunities to avoid being alone with the appellant but had not sought to do so,[28] which is said to make her account unlikely. That is a valid submission, as it was when made to the jury, about A's credibility or reliability. But the point did not require the jury to reject A's evidence.

[98] I have already detailed the evidence of the appellant's work in Sydney. It is argued that this was inconsistent with A's evidence which "place a part of the offending as having occurred with great frequency in 2000".[29] The evidence of his whereabouts

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26 *M v The Queen* (1994) 181 CLR 487 at 494 (footnote omitted).
27 AR 49-50.
28 AR 82-83.
29 Appellant's outline of submissions, paragraph 16.

is also relied upon, in the appellant's argument, in criticising C's evidence. In her statement to police, C described the offending as having commenced when she was eight or nine. But at the trial, she said that the offending began a year later, thereby describing a period of offending which began not in 1999, but perhaps not until 2001. It is suggested that C did so to avoid an inconsistency with the evidence which C anticipated about the appellant's work in Sydney.

[99] As already noted, the appellant relies upon the inconsistencies in the respective accounts of the occasion when each said that the other was present. As I have also noted, there were several respects in which the versions were the same.

[100] The appellant's former wife gave evidence that C told her that sex had occurred on a camping trip, although there was no evidence from C to that effect.[30] However the jury was not obliged to prefer the evidence of that witness to that of C.

[101] Another witness, who was C's sister-in-law, said that she was told about the offending when speaking to C in November 2014. She said that "just out of the blue", the appellant told her that she had been "abused … on many occasions by a man who her mother was having an affair with …"[31] The witness recalled a particular incident, as related to her by C, when the appellant said to C "what I just did to your mother, I'm going to do to you," and that he would be "in with her mother and he would come out and kiss or touch her and then go back in to her mother, and she said that her mother was unaware that this was happening."[32] As the appellant submits, that was not an event described by C in her evidence.

[102] C's husband said that she had told him that "it happened for a long time, she said from the age of six up to 11 or 12 years old …"[33] But any inconsistencies between his evidence of what he had been told by C and C's evidence could have been resolved, in the jury's view, by her evidence being more reliable.

[103] The appellant's argument also relies upon evidence that the appellant himself contacted the police, prior to being charged, to complain about the conduct of C's husband towards him (after C had told him what had occurred). It is submitted that the jury should have seen this as an unlikely response by a person who had committed the offences.

[104] The appellant's submissions must be considered for their combined effect, in assessing whether it was open to the jury to convict. The evidence of each complainant did contain inconsistencies, although there were relatively few in C's case. The events in question were said to have occurred more than eleven years before the initial complaints, and at least thirteen years before the trial.

[105] The evidence of each complainant could have been substantially true although, with the passage of time, there were some imperfections of memory. If the offending had occurred and with the frequency as each complainant testified, some confusion as to precisely what had occurred on a particular occasion would be understandable.

[106] The frequency of the offending alleged by each complainant, was remarkable. Each complainant referred to occasions of the most serious sexual offending, at times

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30 AR 210.
31 AR 142.
32 AR 143.
33 AR 138.

when other persons were present in the appellant's house. It was certainly necessary for the jury to carefully consider whether all of this could have happened so often, over a period of some years, and with no complaint by either girl to her mother or anyone else. It was also necessary for the jury to consider, as was argued by defence counsel, whether the complaints had been fabricated because of the complainants' resentment towards the appellant for having had an affair with their mother. However, he jury were given a *Longman* direction[34] as well as a *Markuleski* direction.[35]

[107] The various matters argued for the appellant were substantial arguments to the jury. But in my conclusion, they were not arguments which required the jury to acquit the appellant on these counts. In a case such as this, it is well recognised that the jury has advantages which are not enjoyed by the appellate court and it is not established here that the jury misused them. In my conclusion it was open to the jury to convict on each of these eleven charges and the first ground of appeal must be rejected.

The second ground of appeal

[108] According to this ground, there was a miscarriage of justice by the jury being allowed to consider the distressed condition of the complainant C, during her testimony, as evidence which corroborated her account, or alternatively, by the jury not being warned of the danger of relying upon this distressed condition as the prosecutor had urged in his address to the jury.

[109] The relevant passages from the prosecutor's address are as follows:

> "First of all look to their demeanour. That is look at the way that they both presented in court. What I'd suggest to you is that there is nothing about the way that either [A] or [C] presented that even remotely suggests anything but that they were saying – sorry, even remotely suggested anything like that their evidence was contrived or borne out of anything other than experience that they actually went through.
>
> Let me focus first on [C] … So with [C], from the outset, coming into the courtroom appeared not to be a necessarily very easy task for her to undertake. And then when it came to speaking about the sexual acts that form the basis of the charges, [C] couldn't do that without crying, and she continued to cry throughout the almost entirety of her evidence-in-chief on those aspects of her evidence.
>
> … Those emotions, and those tears came despite the passing of up to about 13 years for her since the offending took place. You might agree that the emotion that you saw her display was raw, and to some degree it was gut-wrenching. Emotion that is that deep, or that primal, and is that under-controlled can only come from one place, and that is that it has its roots in a very real, and for her a very painful reality.
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> There was nothing to suggest it was contrived. In fact you might agree that [C] was a very ordinary woman being asked to do a very

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34 *Longman v The Queen* (1989) 168 CLR 79.
35 *R v Markuleski* (2001) 52 NSWLR 82.

> out of the ordinary thing, and that is to talk about past events that happened, and unsurprisingly they are events that she would simply want to forget about. That led to what might logically be seen as a bubbling up of raw, and uncontrolled emotion. I would suggest to you that it could only have come from the one place, and that involves in the – to recount real experiences that she considers to have been taken place at a dark time in her life.
>
> That emotion came about because of what it was that she was required to talk about is something, as I said, that actually happened, and it has impacted significantly, and negatively on her life. Yes, you can't let any sympathies for [C] overtake your sense of good reason, but I would suggest to you that you cannot exercise good reason without taking into account how it was that she gave her evidence. So the emotion and demeanour that you saw from her, I would suggest is the strongest indicator of her honesty, and reliability."

[110] It is submitted that this argument by the prosecutor had the risk of misleading the jury, absent a warning by the judge, to reason that C's apparent distress made her account more likely to be true.

[111] No such warning or direction was given by the judge. He repeated this submission when summarising the competing arguments, noting that "[the prosecutor] argued to you that [C's] demeanour and upset in the witness box bespoke painful reality, is the way he put it to you." It is argued that this gave further force to the prosecutor's submission, which ought not to have been made.

[112] No direction was sought by the appellant's trial counsel about this submission of the prosecutor. But it is said that this is explained, in effect, by an error rather than any possible forensic advantage from the absence of such a direction.

[113] The appellant's argument cites *R v Sailor*,[36] *R v Rutherford*[37] and *R v Williams*.[38]

[114] In *Sailor*, the appellant was convicted of rape and attempted rape. The question was whether her distressed condition, first observed more than eight hours after the incident of rape which she alleged, was capable of being corroborative of her testimony. A majority of this Court (McPherson JA and Byrne J, Pincus JA dissenting) held that the jury should not have been directed that it was capable of being corroborative and allowed the appeal against conviction. McPherson JA described how evidence of the distressed state of a complainant could be corroboration in some cases:[39]

> "Although the judgments in reported cases do not directly identify the reason why distress may serve as corroboration in some cases, it can only be that it tends to be circumstantial evidence of the alleged incident. Like bruising, bleeding, and torn clothing, distress is an aspect of the appearance or physical condition of the complainant

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36 [1994] 2 Qd R 342 at 346-347.
37 [2004] QCA 481 at [22] to [37].
38 [2010] 1 Qd R 276 at 286.
39 [1994] 2 Qd R 342 at 346.

> that of itself is capable of providing independent confirmation of the complainant's account of what happened to her.
>
> The basic weakness of distress in this context is that, more than in the case of the other circumstances mentioned, its value or cogency as independent evidence diminishes rapidly with the passing of time. The longer the interval from the original event, the more difficult it is to be sure that a condition of distress not manifested or observed until well after that event is not due to some other intervening and unrelated cause."

[115] In *Rutherford*, this Court allowed an appeal against a conviction of rape because of the absence of a direction about the relevance, or otherwise, of the evidence of the complainant's distressed condition on the night of the alleged offence and on the following morning. The essential reasoning is in this passage from the judgment of Mackenzie J:[40]

> "The problem about the absence about a direction to the effect that it was necessary to be satisfied that the complainant's troubled mood was not attributable to some other emotion such as remorse over unfaithfulness, is that the jury may have simply assumed that her troubled mood was due to being raped without considering other possible reasons. The nature of her relationship with the appellant was a live issue because of his evidence that she was the initiator of sexual advances including on the two occasions when sexual intercourse admittedly occurred. If the jury started with the preconception that her troubled mood was due to rape, it is difficult to be confident that consideration of the other evidence may not have been influenced by it."

[116] In *Williams*, the appellant had been convicted of three counts of rape and one of attempted rape. His appeal was allowed and a retrial ordered, because the jury was allowed to consider evidence of the complainant's distressed condition at a time which was about one month after the most recent offence was said to have occurred. It was held that an inference was not reasonably open that the distress was causally related to the offences charged, so that it could not be corroboration of the complainant's testimony. Fraser JA summarised the effect of the authorities as follows:[41]

> "[E]vidence of a complainant's distressed condition may be left to the jury even if there are competing inferences as to its effect, but if the relationship between the distressed condition and the offence alleged is tenuous or remote a trial judge's duty is to withdraw the evidence of distress from the jury as a circumstance capable of being considered corroborative; the critical question is whether the inference is reasonably open that the distress was causally related to the offences charged."

[117] The present case is quite different: the distressed condition of the complainant is not the subject of evidence; rather it was the complainant's apparent condition as she was giving evidence, upon which the prosecutor relied. There was no evidence

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40 [2004] QCA 481 at [35].

41 [2010] 1 Qd R 276 at 286 [39] (footnote omitted).

which called for a decision by the judge as to whether it was relevant, or a direction as to how, as a piece of evidence, it might be relevant.

[118] The appellant's primary argument is that the jury should have been told that they were not to reason that C was truthful from her apparent distress in the witness box. It is said "as a marker of honesty and reliability, the use of her distress, some 15 years after the events in question, was so problematic that it should have been withdrawn from the jury." But the question here was whether, and if so what, use could be made of the complainant's demeanour in assessing her credibility. As the judge instructed the jury (without objection and in the usual way):[42]

> "It is for you to judge whether a witness is telling the truth or correctly recalls the facts about which he or she has testified and given evidence. In that task, many facts may be considered in deciding what evidence [it is] that you do accept. I will mention some general considerations that may assist you but, in particular, this whole exercise is largely a matter for you. You have seen how the witnesses presented in the witness box when answering questions. Bear that in mind …."

[119] The argument to the jury by defence counsel was that the emotion which they saw from C was contrived. The argument was as follows:

> "[C], I'd suggest to you, cried almost the entire time of the prosecution case. The entire time. My learned friend said that came from a primal place. Well, that might be so. But she told a lot of people about it over a period of time and there's no evidence that she was inconsolable during that period of time. And I'll ask you to note this: I stood up to cross-examine [C]. The waterworks stopped. You don't get to pick and choose. Either you're so distressed by talking about that you can't and you are crying all the time, or not.
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> They shut down and it wasn't until the last couple of minutes that there was even one more tear while I cross-examined her. … I'd suggest to you that was put on as well."

[120] Referring to that argument by defence counsel, the trial judge said, in summing up, that: "It was submitted to you that … [C] was unduly upset."

[121] The respective arguments of counsel, as to the use which they could or not could make of C's demeanour, were clear. They were reminded of those arguments in the summing up. They were directed that the demeanour of a witness might be relevant. They could not have *assumed* that C's apparent distress was genuine and that it provided a reason to accept her evidence. They must have understood that it was for them to assess whether the demeanour of C, like her evidence, was genuine. There was no miscarriage of justice from the absence of any direction, or further direction, by the judge on this question and the second ground of appeal must be rejected.

The third ground of appeal

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42 AR 259.

[122] The appellant's complaint is that the jury was misled by the judge's directions about the content of the defence case, when at one point in the summing up, the judge said:[43]

> "And I should say there's been no real suggestion or substantial suggestion of that [meaning the complainants concocting their evidence together] in this trial."

[123] The defence case was that each of the complainants had fabricated everything which she said about the offending against her. Defence counsel began her address with the statement that "[C] and [A] are making this up." She continued:

> "[M]y learned friend said to you, 'well, why would they do this?' My client doesn't have any idea. He doesn't know their minds. And it's not, in fact, a fact that you have to actually decide. However it is submitted to you … that you can find out the reason why they've done this from the evidence of [C]. [C] says her mother was having an affair with [the appellant], and [C] needed the others to know."

[124] Defence counsel argued that A was unpersuasive because she "couldn't remember her story" and that C was unpersuasive because she "on the other hand, had memorised her account …".

[125] Later in her address, defence counsel made a specific claim of concoction between the complainants. She was addressing the jury about evidence given by C's husband, and also by C's sister, about what C had said about relevant events before the complainants went to the police. C's husband, after being reminded of the content of his statement to police, said that on the night when he first learnt from C of what the appellant had done, he was told by C that the appellant had also "done things to [A] on camping trips," taking A into a cabin and having "sex with her vaginally and anally." He said that C had told him that A "vividly remembers being held in a ball, with her knees up to her chest, and him spinning her around while … he was having sex with her." On that evidence, C would have known of the offending against A (and in some detail), before the conversation in which A said that she had not been abused, and before A said (on the next day) that it had happened.

[126] In this argument to the jury, counsel sought to make the same point by reference to the evidence of the complainants' sister, who gave evidence that, again before A's statement that it had not happened to her, C said that A had been abused by the appellant on a camping trip.

[127] Defence counsel said to the jury:

> "So, you have two witnesses now saying that [C's] saying information that she can't know at that time; that can't be right. [C's husband] says another thing about what [C] told her about [A]. He remembers [C] telling him on that Friday night that [A] was being held in a ball on [the appellant's] knee, with her knees to her chest and [the appellant] was spinning her around, while he was having sex with her. That's another thing he says. She can't know that on Friday night either. And you might recall that [A] didn't say that in

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43 AR 307.

> the witness box, but [A] told the police that at least there was some swivel being spoken about. *You might start to think there's been some concoction going on here.*"

[128] It is necessary then to explain the context in which the judge made the statement which is the subject of this ground of appeal. After the evidence had closed and before counsel had addressed, the judge discussed with counsel what should be the content of his summing up. Their discussion was by reference to paragraph numbers from the Benchbook. The judge accepted the prosecutor's suggestion that there should be a direction or warning in the terms, or in some of the terms, of what was then paragraph 50C of the Benchbook. This occurred in the context of a discussion between them as to the limited use which could be made of the evidence of one complainant, in considering the evidence of the other complainant. The prosecutor said to the judge that it was only in respect of the event said to have taken place with both girls present, that the evidence of one was able to support that of the other.

[129] Discussing the content of paragraph 50C, the judge said that he proposed to use certain paragraphs, one of which referred to the possibility of "concoction". The judge said to the prosecutor "well, I don't think there's any evidence of concoction …" There was no comment by defence counsel as this discussion with the prosecutor continued.

[130] The Benchbook direction was then adapted by the judge to become this part of the summing up:[44]

> "You'll recall that I've told you you must consider the evidence in relation to each charge separately and reach a separate verdict in respect of each. That's subject to the following direction on how you may use the evidence of the complainants in combination but only in a limited way. The prosecution case here is that the evidence of each complainant does not stand alone. The prosecution case is that each complainant is supported by the evidence of the other complainant as to what they say happened on the joint occasion only, when they were both together on the bed. That's not a charge on the indictment, but it's part of the evidence in the trial.
>
> Before you can rely on the evidence of each of the complainants as to what her sister says, you need to be satisfied beyond reasonable doubt of a number of things, firstly that it's independent of each other. I direct you you can't use the evidence of the complainants in combination unless you were satisfied there is no real risk the evidence is untrue by reason of concoction, that is, them concocting it together. *And I should say there's been no real suggestion or substantial suggestion of that in this trial.* The value of any combination and likewise any strength in numbers is completely worthless if there were a real risk that what the complainant said is untrue by reason of concoction by them. So you must be satisfied there is no real risk of concoction. A real risk is one based on the evidence, not one that is fanciful or theoretical."

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44 AR 307.

[131] In fairness to the judge, this was a direction taken from the then terms of the Benchbook[45] and with the agreement, or without the objection, of counsel. In one sense, however, the direction was too favourable to the defence case. The reason is that the direction is apparently based upon the decision of the High Court in *Hoch v The Queen*,[46] which held that a "possibility of concoction" of complaints by victims of allegedly similar events was sufficient to make the evidence inadmissible as "similar fact" evidence. In Queensland, that doctrine has been abolished by s 132A of the *Evidence Act* 1977 (Qld), which provides that in a criminal proceeding, similar fact evidence must not be ruled inadmissible on the ground that it may be the result of "collusion or suggestion" and that "the weight of the evidence is a question for the jury…".[47]

[132] Further, the relevance of such a direction, limited, as it was intended, to the evidence of "the joint occasion only", was far from clear. The jury was not being instructed here about the relevance of one incident as proof of the occurrence of a similar incident. Rather there was the one incident, which was described by two witnesses.

[133] The complaint, however, is not about those things. The complaint is that in the course of giving this direction, the judge told the jury that there was no "real suggestion or substantial suggestion" of concoction. It may be accepted that the judge was referring to a concoction between the complainants about the "joint occasion". However if it was a part of the defence case that the complainants had concocted all of their evidence, the judge's comment was a serious misstatement of that case, with a real potential to undermine it.

[134] In cross-examining the complainants, the appellant's counsel clearly suggested that the evidence of each was all a fabrication. There was no specific suggestion, on cross-examination, that they got together and concocted their versions. But as appears from the passage which I have set out from the defence counsel's address to the jury, such a concoction was suggested, and upon a basis in the evidence.

[135] The complainants are sisters, born a year apart, who had grown up together and apparently remained close to each other. An argument that they had fabricated their stories carried with it the implication that they had concocted their stories together. In particular that is how the defence argument should have been understood in respect of the occasion on which they said that they had been abused by the appellant at the same time. As I have discussed, although there were some differences in their versions of what occurred on that occasion, there were many similarities. Most notably they gave the same evidence about the dildo. The argument that they had each fabricated their evidence should not have been understood that, quite independently of each other, they had fabricated very similar versions of this occasion. Yet that was the effect of what they were told by the judge, in the statement in question, about the defence case.

[136] Part of the argument of defence counsel was that C had made up her story about what had happened to her and A, and having done so, C influenced A to make a similar complaint. In support of that argument, counsel referred to an unusually good memory by C and a poor and vague memory by A. That was a particular process of concoction which the jury had to consider. The judge did remind the jury

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45 And the same direction, at present, appears in paragraph 52C of the Benchbook.

46 (1988) 165 CLR 292 at 296-297.

47 See the discussion of the effect of this provision in *Cross on Evidence* at [21257].

of the defence argument that "these two girls are making it up", but other than in the passage of which complaint is made, said nothing about concoction between them.

[137] Regrettably, I conclude that by this statement by the judge, the jury might have misunderstood the defence argument and that this could have affected the verdicts. The respondent does not argue that the proviso[48] should be applied in the event that this ground of appeal is established. In my conclusion there was a miscarriage of justice and the verdicts must be set aside.

Orders

[138] I would order as follows:

1. Allow the appeal.
2. Set aside the verdicts of guilty in the District Court.
3. Order a new trial on those charges.

[139] **DOUGLAS J:** I have had the benefit of reading the President's and McMurdo JA's reasons. Because their Honours' conclusions about the third ground of appeal differ and because this is a reasonably finely balanced case, I wish to say why I agree with McMurdo JA's reasons in respect of that ground.

[140] The issue is whether there has been a miscarriage of justice sufficient to require the Court to allow the appeal pursuant to s 668E(1) of the *Criminal Code*. In that context, the relevant matters to consider here are whether the learned trial judge put the defence case adequately, misdirected the jury or misstated the evidence. I accept that, when his Honour said there was no real suggestion or substantial suggestion of the complainant's "concocting it together", he was referring to a concoction between them about the event when they were both present together. The defendant's case was, however, that each of the complainants' evidence was concocted or false and their counsel's address to the jury in the passage extracted by McMurdo JA at [127] shows how she made an argument, based on the evidence, that they had, together, concocted evidence in respect of the "spinning" episode.

[141] So, contrary to his Honour's statement to the jury, there was a real and substantial suggestion by defence counsel that the complainants were concocting evidence and, in one instance at least, concocting it together. That is an available conclusion separate from the considerations raised by the fact that they were sisters close in age discussed also by McMurdo JA at [135]-[136].

[142] In those circumstances, although the summing up otherwise reminded the jury that the defence case was that the complainants were "making it up",[49] I am concerned that his statement that there was no real or substantial suggestion of the complainant's concocting their evidence together misstated the defence case. It is a requirement of the giving of judicial instructions in criminal trials that the defence case be put fairly to the jury.[50]

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48 *Criminal Code* s 668E(1A).

49 See R309/4.

50 See *RPS v The Queen* (2000) 199 CLR 620, 637 at [41]; *R v Lacey* [2009] QCA 275 at [7]; *R v KAP* [2016] QCA 349 at [46]; *R v Baden-Clay* (2016) 258 CLR 308, 328 at [62] fn 55 and cf *R v Tamatea* [2013] QCA 399 at [41]-[48].

[143] I do not believe that the consequence that there has been a miscarriage of justice can be avoided by characterising his Honour's statement merely as a comment on the evidence. I recognise the fact that the issue should have been drawn to his Honour's attention at the trial given the care he took to reveal his intentions to counsel but conclude that there has, nonetheless, been a miscarriage of justice.

[144] I agree with the orders proposed by McMurdo JA.