SUPREME COURT OF QUEENSLAND

CITATION:	*R v Clarke* [2017] QCA 226
PARTIES:	**R** **v** **CLARKE, Aaron David** (appellant/applicant)
FILE NO/S:	CA No 309 of 2016 DC No 113 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 18 July 2016, Date of Sentence: 11 November 2016 (Baulch SC DCJ)
DELIVERED ON:	10 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2017
JUDGES:	Morrison and Philippides JJA and Brown J
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against the sentence is refused.** **3. In relation to the offence of Rape on Indictment No 113 of 2015, the Registrar of the District Court is directed to amend the Verdict and Judgment Record to reflect that a total period of 326 days was declared as pre-sentence custody, being time already served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of rape – where the appellant appeals the conviction on three grounds: that there was a miscarriage of justice because the learned trial judge gave a direction based on an erroneous view of the evidence, that the appellant was denied a fair trial because he was cross-examined by the trial judge and that the learned trial judge misdirected the jury as to particular evidence – where there was evidence of consensual and non-consensual sexual activity – where the complainant suffered injuries consistent with sexual activity – where the bed on which the rape occurred had a stain – where the trial judge prompted the jury to consider what they thought of the stain – whether the trial judge directed the jury to consider that the stain was blood – where the trial judge

asked the appellant a number of direct questions – where the trial judge is not precluded from asking questions but must not do so where to ask questions would cause prejudicial effect – whether the questions had a legitimate basis – whether the trial judge's conduct has caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of rape – where the complainant sent a text message saying that the activity was consensual – where the complainant's evidence as a whole suggested that some activity was consensual, but not the digital penetration subject of the rape count – whether the text message rendered the complainant's evidence so unconvincing that the jury could not have been satisfied beyond reasonable doubt that the appellant was guilty of rape – whether it was open to the jury to convict the appellant of rape

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was sentenced for rape and three Commonwealth offences: one count of transmitting indecent communications to a person under 16, one count of possession of child exploitation material and one count of soliciting child exploitation material – where the applicant pleaded guilty to the Commonwealth offences – where the applicant was sentenced to five years imprisonment for the rape with no recommendation for parole – where periods of less than one year imprisonment were imposed for the Commonwealth offences, to be served concurrently with the sentence for rape – where the applicant challenged the sentence for rape only – where the applicant's submissions were that the sentence was manifestly excessive when compared to other rape cases and that a sentence of two to three years suspended immediately was appropriate – whether the sentence is manifestly excessive

Criminal Code (Qld), s 349
Criminal Code Act 1995 (Cth), s 228D, s 474.19(1)(A)(IV), s 474.19(AA), s 474.19(B), s 474.27A(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Baxter [2010] QCA 235, considered
R v Colless [2011] 2 Qd R 421; [2010] QCA 26, followed
R v Hennessy [2002] QCA 523, considered
R v HX [2005] QCA 91, distinguished
R v Johnson, unreported, District Court of Queensland, DC No 1646 of 2013, Kingham DCJ, 25 July 2014, considered
R v Keevers; R v Filewood [2004] QCA 207, distinguished

R v Postchild [2013] QCA 227, followed
R v Senior [2001] QCA 346, cited
R v Thompson (2002) 130 A Crim R 24; [2002] NSWCCA 149, applied
R v Viliafi [2005] QCA 12, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed

COUNSEL: S M Ryan QC for the appellant in the conviction appeal
The applicant appeared on his own behalf in the sentence application
J A Wooldridge for the respondent

SOLICITORS: Legal Aid Queensland for the appellant in the conviction appeal
The applicant appeared on his own behalf in the sentence application
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** The appellant (**Clarke**) met the complainant on a dating website. They communicated via instant messaging for about two weeks, then arranged to meet at Clarke's house on 25 October 2014. They watched television and then engaged in consensual sexual intercourse.

[2] Five days later the complainant sent a text asking if Clarke wanted a visitor. Evidently he did, as the complainant went to his house again. Having watched television they again engaged in consensual sexual intercourse. However, the complainant alleged that following the consensual intercourse she had been digitally raped, when Clarke refused to stop inserting all of his fingers, and then his fist, into her vagina.

[3] Arising out of those events Clarke was charged with rape. After a three day trial he was found guilty.

[4] He appeals that conviction on the following grounds:

(a) ground 1: there was a miscarriage of justice because the jury were directed on the basis of an erroneous view of the inferences available from the evidence of the complainant's genital injuries;

(b) ground 2: he was denied a fair trial because of the learned trial judge's cross-examination of him; in doing so, the judge adopted the role of prosecutor, cross-examined him in a way that reversed the onus of proof, and asked questions that he was not qualified to answer;

(c) ground 3: the learned trial judge erred in directing the jury on the assumption that the stain on the bed was blood, when there was no evidence about the stain's composition; and

(d) ground 4: the verdict was unreasonable or cannot be supported having regard to the evidence.

[5] On 11 November 2016, he was sentenced for the rape, and other offences to which he pleaded guilty. The sentences were:

(a) rape: five years' imprisonment without a recommendation for parole;

(b) possession of child exploitation material: 111 days' imprisonment;

(c) using a carriage service to solicit child exploitation material: 116 days' imprisonment; and

(d) using a carriage service to transmit indecent communication: 293 days' imprisonment.

[6] Clarke seeks leave to appeal against the sentence for the rape conviction on the grounds that it is manifestly excessive. He seeks that sentence be varied to two to three years' imprisonment. He also seeks that all terms of imprisonment be served concurrently and suspended after serving 40 per cent of the sentence imposed for the rape offence.

Evidence at the trial

[7] A total of five witnesses gave evidence at the trial, including Clarke. I shall review that evidence in light of the unreasonable verdict ground, though not all of it is necessary to resolve the other grounds.

Complainant's evidence

[8] In her evidence in chief the complainant gave this account of the events.

[9] She encountered Clarke on a dating website in October 2014. They exchanged messages via instant messaging for about two weeks, then arranged to meet at Clarke's house on 25 October 2014. She arrived in the evening. They watched television for a while and then, in her words, "we took it further into the bedroom". That meant consensual sexual intercourse, in Clarke's bedroom, for 20 or 30 minutes. She said everything was "fine and I had … said goodbye and left".

[10] She gave detailed evidence about the house, its layout and fittings, and identified photographs showing various parts of the exterior and interior.[1]

[11] They continued speaking by telephone after that, in a way describe by her: "I spoke to him as a friend, I guess".[2] She then sent a text on 29 October, asking if he wanted a visitor. They agreed to meet again at his house. She arrived about 8.30 pm. He was drinking beer and watching television. They both watched for a while then moved to the bedroom again where they engaged in consensual sexual intercourse. She said that the door was shut, the curtains closed and the lights were off.[3] The intercourse involved changing positions and lasted about 15 minutes, at which point "I got tired and decided to discontinue".[4]

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1 Exhibits 1-5.
2 Supplementary Appeal Book (**SAB**) 34 line 47.
3 SAB 36.
4 SAB 36 lines 1-15.

[12] At that point, as she was lying beside him, he said "he wanted to ruin my pussy". He then started inserting his fingers into her vagina. She described the events:[5]

> "It was okay at first. Then it was starting to get rough, a little bit too rough. … It was starting to hurt me. … And I told him he needed to calm down. … He said to me that he was going to go get lube. … He exited the bedroom while I remained in the bedroom and he got the lube. … But I was unsure of why we needed it. … He got the lube and put it on his hands. … The door was left ajar while he left. … And when he come back he closed it again. … After that he lubed up his hands and started going again. … He started inserting his fingers into my vagina again with lube. … And it got a little bit more rough. … Like, I could feel that there was more fingers being inserted and it was becoming really, really painful. … I told him that it was hurting me. … That he needed to stop. … He didn't stop. … it felt like it was getting worse. … It felt like he was putting more fingers in and at this stage I was still telling him to stop and he didn't want to stop. … I asked him to stop and he said, but, baby, you've come so many times and I haven't. … I said to him if he was to continue he'd have to be gentle. … And not be so rough. … It didn't go that way. He ended up getting more and more rough. At one stage I could feel that he had all his fingers inside me. … I kept asking him to stop, but no matter what I did he wouldn't stop. I was screaming. I was asking him for – asking for him to stop and he wouldn't. He continued to drive his fist into my vagina. … And I screamed in pain while climbing all over the bed to try and get away. … I was trying to grab his wrist, which I could feel at my vagina to try and pull it out. I didn't have the strength to pull it from that area. I ended up having to get strength to shove his shoulder so that his hand would come out of my vagina. …I could feel my vagina while I was grabbing his wrist."

[13] She retrieved her clothes and prepared to leave. He asked if she was going, and she answered yes, saying that he had hurt her. His response was to continue saying "but you've come so many times. I haven't and I'm so close".[6] She finished getting dressed and left. By then it was about 9.30 pm.

[14] She said she was in pain in her lower abdomen, and felt shocked. She rang her friend[7] asking what to do. She told her friend what had happened and the friend advised her to go to hospital. She did so, and was examined by a doctor and a nurse, and interviewed by police.

[15] The complainant said she did give permission for Clarke to put his fingers in her vagina but certainly not his whole hand or fist.

[16] She was shown a photograph of the bed, Exhibit 5, and asked whether it could be seen from that photograph where the incident happened. Her answer was yes and when asked where, she started to answer "The pool of possibly blood and other

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5 SAB 36 line 28 to SAB 38 line 11.
6 SAB 38 line 22.
7 She said she could place that call at about 9.38 pm: SAB 39 lines 43-46.

form of …". Objection to her "description of what it is"[8] was taken by trial Counsel for Clarke.[9] The result was that the prosecutor asked the complainant to call it a stain. She then said that the incident occurred in the area of the stain on Exhibit 5.[10]

[17] In cross-examination the complainant largely adhered to her evidence. Relevant points to arise in respect of the first time they had sex, on 25 October 2014, were as follows:

(a) some of the messaging between them in the days leading up to 25 October had been of a sexual nature;[11]

(b) the first time she and Clarke had met face to face was when she went to his house on 25 October;[12] she denied the proposition that they had sex within 10 minutes of arriving;[13] she agreed that her intention on that day was to engage in casual sex, and at that time she did not envisage any long term relationship with Clarke;[14] "To me it was just [indistinct] in fun. It wasn't meant to go anywhere. … I never intended it to go anywhere until I got there";[15]

(c) she was at Clarke's house from about 10 pm to 10.44 pm;[16] she said it was not her intention to engage in sex "but it happened";[17] "To begin with, I was just trying to have a bit of fun, but then I didn't think it'd go that far as to sexual-wise";[18]

(d) before she went to the house, in the course of discussing whether she would go there, Clarke texted her: "*I want to lick your pussy and make love to you all night.*";[19]

(e) they engaged in foreplay which include his inserting two fingers in her vagina; she denied that he inserted three fingers;[20]

(f) it was put to her, and she denied, that on 25 October a condom had not been used;[21]

(g) it was put to her, and she denied, that after the intercourse he inserted his fingers in her vagina, and that he used lubricant;[22] and

(h) she had been to the hospital on 26 October 2014, receiving pain relief for endometriosis;[23] while at hospital she texted him suggesting they see each other again;[24] she was at the hospital again on 26 and 27 October for the abdominal pain from her endometriosis.

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8 Which, in context, plainly meant her description of it as blood.
9 Not the Senior Counsel who appeared for him on the appeal.
10 SAB 40 lines 19-38.
11 SAB 42 lines 1-6.
12 SAB 41 line 35.
13 SAB 41 lines 42-45.
14 SAB lines 8-15.
15 SAB lines.
16 SAB 43 lines 3, 35-40.
17 SAB 45 line 12.
18 SAB 53 line 3.
19 SAB line 34.
20 SAB 53 lines 24-34.
21 SAB 53 line 39, SAB 54 line 30, SAB 55 lines 15-24.
22 SAB 55 lines 26-32.
23 SAB 41.
24 SAB 56.

[18] The cross–examination then turned to the events on 29 October. Relevant matters arising from that were:

(a) she texted him asking if he wanted a visitor; their text messages, some of which were sexually explicit, included Clarke suggesting sexual intercourse;[25]

(b) she went there intending to have a brief sexual encounter;[26] she was there just under an hour, between about 8.40 pm and 9.38 pm;[27]

(c) it was put to her, and she denied, that they did not watch television, but she agreed that she did not go there to watch television;[28] "There was some conversation, there was some TV watched and then we went into the bedroom. That lasted about 20 minutes."[29];

(d) once in the bedroom she agreed that she was undressed and they commenced kissing; but she denied that he inserted his fingers in her vagina;[30] when confronted with a previous account where she said his fingers had been inserted during foreplay, she said she could not remember saying so;[31]

(e) she did not know what he meant when he said he wanted to he wanted to "ruin my pussy";[32]

(f) Clarke said he was getting a condom before they started, and told her he had one on;[33] she denied the suggestion that no such thing was said;[34]

(g) it was put to her, and she denied it, that the sexual intercourse involved only the missionary position, saying that several positions were used;[35]

(h) when the intercourse was over she lay on the bed, on her back with her head against the headboard, beside Clarke;[36]

(i) he started using the fingers on his right hand, but she could not remember for how long;[37]

(j) it was put to her, and she agreed, that he put more and more fingers in her vagina;[38]

(k) he said he was going to get some lubricant; she said she told him that "if he was going to get the lube he'd better be gentle when he comes back because he was starting to get very rough and it was hurting";[39] it was put to her, and she denied it, that no such thing was said;[40]

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25 SAB 57.
26 SAB 34 line 34.
27 SAB 58 lines 8-16, 39-46, SAB 59 line 1, SAB 59 line 41 to SAB 60 line 14.
28 SAB 59 lines 11-24.
29 SAB 60 line 34.
30 SAB 61 lines 1-6.
31 SAB 61 line 32, SAB 62 line 45.
32 SAB 76 line 45.
33 SAB 67 lines 19, 29.
34 SAB 67 line 38.
35 SAB 65 lines 20-27, SAB 67 line 11.
36 SAB 65 lines 32-39.
37 SAB 66 lines 1-29, SAB 70 lines 23-26.
38 SAB lines 34-46.
39 SAB 67 lines 44-46.
40 SAB 68 lines 9-10.

(l) she did not see the lubricant container when he brought it into the room;[41] it was put to her, and she denied it, that Clarke did not leave the room to get the lubricant as it was on the bedside table;[42]

(m) she said she consented to the use of his fingers "when it wasn't hurting. I consented till I said stop. I consented till I started screaming"; she denied when it was put to her, that she never screamed;[43] she also denied that he stopped when she said "ouch";[44]

(n) she agreed that he did not threaten her or hold her down but she said: "But he hurt me. I said stop. He didn't stop. I tried to pull his arm out of inside of me. He wouldn't pull it out."[45];

(o) she described the events: "I'm screaming in pain, moving around the whole entire bed because I can't get it out of me. The only way I could get it out of me was if I pushed his arm. … And I pushed it with force enough for him to roll over for me to get back up to get to my clothes."[46];

(p) it was put to her that she lay in the one position "where the big stain is from the lubricant on the bed", to which she replied she was trying to move and "I don't know if I moved but I tried";[47]

(q) it was put to her that she was "there consensually to live your fantasies", which she denied: "No. That's not right. I was there for consensual sex. I wasn't there to be hurt, I wasn't there to be invaded, I wasn't there to feel like a piece of crap."[48] "I had a fist driven inside me."[49];

(r) she went to hospital because she was in pain and bleeding; she did not realise "there was blood until I seen the photos";[50] she denied being embarrassed about what had happened;[51]

(s) she said she put on her clothes at the bottom of the bed, at which point Clarke "got cranky", and said: "Oh but baby, I haven't cum yet. It's going to feel so good, just let me do it"; he tried to put his hands between her legs again, but she would not permit it;[52]

(t) she then left; she denied staying to talk or that he had a beer;[53] and

(u) she rang her friend and told her she was going to hospital, and that she had abdominal and vaginal pain.[54]

[19] In the course of cross-examination the complainant was taken through a number of text messages between herself and Clarke early in the morning of 25 October. They

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41 SAB 64 lines 1-10, SAB 68 line 18.
42 SAB 68 lines 1-4, SAB 68 line 12.
43 SAB 71 lines 1-4.
44 SAB 71 lines 6, 17, SAB 72 line 35, SAB 77 line 6.
45 SAB 71 lines 19-25.
46 SAB 71 lines 31-35.
47 SAB 71 lines 37-42.
48 SAB 72 lines 32-33.
49 SAB 73 line 12.
50 SAB 73 lines 1-10.
51 SAB 72 lines 43-46, SAB 73 lines 28-31.
52 SAB 74 lines 11-14.
53 SAB 74 lines 8-37.
54 SAB 74 line 44 to SAB 75 line 2.

were generally of a flirtatious nature though one from Clarke was sexually explicit.[55] Then this exchange occurred:[56]

> "He then said to you: Well, tell me what you like with sex or what's your fantasy?
>
> ?---He probably did.
>
> And you, at 2.01 am, text him and said: I want to be kissed up against a wall and handcuffed and taken advantage of and I can't give in.
>
> ?---That was in a good way. Not in a bad way where when I say "no", no means no.
>
> You sent him that text, didn't you?---Yes, I did. But when a person says "stop", you stop."

[20] The complainant was also confronted with the text she sent her friend from hospital, where she said: "*But it was consented. I'm okay. Just really sore. They're putting me in a private room. I started bawling in front of the nurse.*" She explained that "But by consensual I mean I consented to not being hurt. I didn't know I could do anything about anything. … at the time I wasn't aware of how the whole consensual and where I say stop actually meant stop and was classified as something a little bit more in depth."[57]

Evidence of the friend

[21] The complainant's friend spoke to her on the night of 29 October. She said she could not remember what time the call occurred or what it was about, but: "I know it was something to do with having sex with [Clarke] and some part of it wasn't consented, but I don't remember what actually was said".[58] The complainant was upset.

[22] In cross-examination the friend reiterated that she could not remember the phone call any more, nor any of the texts they exchanged.

Medical evidence

[23] The nurse who examined the complainant in the early hours of 30 October, said the complainant made a complaint of sexual assault. From her notes made at the time this account was given to her:[59]

> "… she'd mentioned that they'd had intercourse previously that night and that everything was normal, and that he started to get more rough with her during this intercourse, the second session, … it was starting to hurt her and she'd asked him to stop. And he told her that if she just relaxed it would not hurt her as much, and she still kept telling him to stop and that he kept continuing the sexual assault and it had

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55 SAB 47 line 42.
56 SAB 48 lines 29-43.
57 SAB 75 lines 14-28.
58 SAB 78 line 15.
59 SAB 84 lines 11-20.

> caused her some injuries. … he'd used his fingers to start with, and then had actually gone on to use his whole fist."

[24] The nurse conducted an examination of the complainant. By reference to a diagram of the vaginal area[60] she explained the injuries she noted. Her comments, including those from cross-examination are:

(a) multiple abrasions in a 10 cm by 7 cm area on the left labia majora,[61] usually from blunt force trauma;[62]

(b) a bruise, quite dark purple in colour, about 10 mm in diameter, on the left labia minora;[63] she could not say what caused it;[64]

(c) several abrasions on the posterior fourchette, which could be from pressure actually hitting the area during intercourse or sexual assault of any kind;[65]

(d) abrasions between the right labia minora and labia majora;[66] and

(e) an abrasion at the point of a laceration, 3 cm long by 1 cm wide, on the right labia; quite a significant injury;[67] and

(f) most of the grazing was quite superficial other than the 3 cm long one on her right labia.[68]

[25] The measurement of the injuries was done with little rulers like a sticky note with a ruler on them, which were placed on the person being examined.[69]

[26] In cross-examination she said that the complaint had told her that no condom was used on either night.[70]

Police evidence

[27] A police witness was called to identify photographs inside Clarke's house, including the bed, a tube of lubricant and the sites of DNA sampling. In cross-examination he said that there were no condoms, or associated material such as packaging, found.

Admissions

[28] Formal admissions were made of the results of DNA analysis and other matters.[71] In summary they were:

(a) no evidence of spermatozoa or seminal fluid in the complainant's vagina or on the complainant;

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60 Exhibit 6, SAB 168.
61 Right side on Exhibit 6.
62 SAB 86.
63 Lower right on Exhibit 6.
64 SAB 86-87.
65 SAB 87.
66 Left side on Exhibit 6.
67 Upper left on Exhibit 6.
68 SAB 92 line 32.
69 SAB 89 line 45 to SAB 90 line 3.
70 SAB 92.
71 Exhibit 15, SAB 169.

(b) there was blood in the high vagina, low vagina, vulval area and perineal areas on the complainant;

(c) the complainant's DNA was on Clarke's penis;

(d) the complainant's DNA was on the lounge seat;

(e) samples from the bed sheets did not show the complainant's DNA; and

(f) at about 10 pm the complainant was examined by Dr Porter at hospital and given analgesia for abdominal and vaginal pain.

Clarke's evidence

[29] Clarke's evidence was that he met the complainant on the dating website. Their messaging "went from general chit-chat to getting a bit flirty and dirty", and they exchanged explicit photographs.[72] He described the events of 25 October:[73]

> "It was fairly late, probably 9.30, 10. … She came in, sat down on the couch. … Chatted for five, 10 minutes. … And then we went into the [bedroom]. … I undressed myself and undressed her. … we were laying down. I was kissing her and I started playing with her vagina. … And then I started fingering her. Started with one finger, made my way up to three. … And then I got on top of her and we had sex. It lasted probably 10 minutes. … And then I got off. … And continued to insert my fingers into her vagina … [for] Probably five, 10 minutes. … [he was using] At the end, all up, four [fingers] … [the activities ended because] I was buggered…. I can only go so long and, yeah, just run out of steam, pretty much."

[30] They exchanged messages after that night and met again on 29 October. He said she arrived about 9 pm and they sat down for a minute or two. Then the complainant "grabbed my hand and pulled me up and said come on, going into the room". His description of the events was:[74]

> "… I said is that all you come here for. And she laughed and she goes, yep. … Well, that time, the curtains weren't fully shut. There was about that … much gap between them and, yeah, the bed was messy when we walked in, but I left the door just ajar so a bit of light could come in and, yeah, we went and laid on the bed after we'd got naked. [he undressed himself]… She removed her shirt and I removed her bra and pants and she got on to the bed…. I started to kiss her and feel her up again …. At that time, if you're looking from the bottom of the bed, I was on the right-hand side and she was on the left-hand side. … I started kissing her and inserting my fingers into her vagina. … I used my left hand…. [for] Five, 10 minutes maybe. … She was laying there enjoying it. … I was just inserting my fingers inside her vagina. … I had the air-con on. … I got on top of her, and we started having intercourse. … And that lasted for about five, 10 minutes. … And then I got back off. … [he did not ejaculate because] I'm on antidepressants, and it makes it really hard

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72 SAB 104 line 40 to SAB 105 line 2.

73 SAB 105 line 12 to SAB 106 line 10.

74 SAB 107 lines 11-47; SAB 116 line 15 to SAB 119 line 9.

> for me to ejaculate … I got off her and started inserting my fingers inside her vagina again. … [for] five or 10 minutes, all up. … I grabbed some lube off my bedside table. … Because she was starting to get dry [because] the air-con [was] facing straight on to her … Just put it on my fingers and then rubbed it around her vagina and then inserted my fingers. … I started fingering her – her vagina, two fingers, and I went three fingers and then four fingers. … She said ouch, and so I stopped … Because I thought I might've scratched her with my fingernail or with my hands. They were fairly rough at the time. … [he stopped immediately and] Asked her if she was okay. … She said … Hurt a little."

[31] His account was that he washed his hands, and came back to the bedroom. The complainant went to the toilet and then started to get dressed. He asked her "if there was any blood or anything" to which she replied "no, not really".[75] He got a beer and they sat down chatting for another five or 10 minutes. She said she was tired and had to be up early, so they walked to the front door, kissed and cuddled, and she left.

[32] In his evidence in chief Clarke said that the complainant never said to stop,[76] they never changed positions while having sex on 29 October,[77] and he never said anything like "I'm going to ruin your pussy".[78] He also said that the stain on the bed, shown in Exhibit 5, was not there before the night of 29 October, and it was where the complainant was lying.[79]

[33] Cross-examination of Clarke (which occupied only about four pages of transcript) produced these features of his evidence as to the events on 29 October:

(a) he denied that he told the complainant that he would put a condom on, or that they changed positions during sexual intercourse;[80]

(b) he was the one who stopped intercourse because he was "buggered, out of breath";[81] he denied that she had stopped because she was tired;[82]

(c) he said he was used to not having orgasms and had no interest in it happening;[83] and the insertion of his fingers in her vagina did not excite him sexually;[84]

(d) he denied that she told him to calm down and that if he was to continue he had to be gentle, and said she only said "ouch" the once;[85]

(e) he denied inserting his fingers roughly after lubricating them, saying he rubbed them around and then slowly inserted two fingers;[86]

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75 SAB 119 line 45 to SAB 120 line 1.
76 SAB 118 line 40, SAB 120 line 25.
77 SAB 118 line 38.
78 SAB 118 line 42.
79 SAB 115 lines 39-44.
80 SAB 122 lines 17-26, 41-47.
81 SAB 122 line 33.
82 SAB 123 line 3.
83 SAB 123 lines 6-10.
84 SAB 123 line 22.
85 SAB 123 lines 32-37.
86 SAB 123 line 44.

(f) he agreed that he ended up inserting four fingers, but denied that she ever said stop, or said "no";[87]

(g) he denied that he had told her she had come so many times but he had not;[88]

(h) he said "I was fingering her for her satisfaction, not my own";[89]

(i) he said that at no time did he thrust his entire fist into her vagina;[90]

(j) he denied that she left in a hurry, and denied that this occasion was different from that on 25 October, saying "It was pretty much exactly like the first occasion";[91] and

(k) he denied that he continued after she told him to stop.[92]

[34] Following his cross-examination by the prosecutor the learned trial judge asked some questions. As the questioning is the subject of a separate ground of appeal it is appropriate that the passage be set out in full:[93]

> "HIS HONOUR: You just said to Mr Moore that the second occasion was exactly like the first occasion?---Pretty much exactly, yeah.
>
> Was it? Yes?---She's come over, spent time together, had intercourse, and then gone back out into the lounge room.
>
> Do you think she was injured after the first occasion?---No.
>
> Right. And what do you think? Was there anything that passed between you that night that could have caused those injuries the nurse describes?---Well, as I say, I think I scratched her with my fingernail when I was fingering her.
>
> Just for a moment or - - -?---Sorry?
>
> Just for a moment?---Yeah, just for a moment. And she said ouch and so I stopped.
>
> All right?---I asked her if she was okay and she said, yeah, it just hurt a little.
>
> So that must have been what caused all the injuries - - -
>
> MR WALTERS: Well, I object to this, your Honour.
>
> HIS HONOUR: - - - the nurse saw.
>
> MR WALTERS: I object.
>
> HIS HONOUR: You object to - - -
>
> MR WALTERS: Yes. This witness can't be asked to comment on it.

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87 SAB 124 lines 1-15, 32.
88 SAB 124 line 14.
89 SAB 124 line 19.
90 SAB 124 lines 25-30.
91 SAB 124 line 46 to SAB 125 line 11.
92 SAB 125 line 13.
93 SAB 125 line 20 to SAB 126 line 40.

HIS HONOUR: Why not?

MR WALTERS: Because it's not - - -

HIS HONOUR: There isn't a dispute, is there, about the injuries? I'm just trying to explore what the – what he has to say about it.

MR WALTERS: With due respect, he cannot be asked to comment upon that. That's a matter for an expert and not for himself.

HIS HONOUR: Right. I note what you say and you'll have an opportunity to say it somewhere else probably. Do you understand what I'm saying to you?---About what part?

About these injuries?---Yeah.

Yes. There was nothing that happened - - -?---No.

- - - that you thought might have caused her an injury?---No.

Bar that incident where she said "ouch"?---Yeah. That's the only time.

Yes. All right. Now, there's another thing. Did I understand you correctly to say that the head of the bed was closest to the window?---There's two lots of windows.

Two lots of windows?---Yeah.

All right. Well, where the bedside table was, that's the – where your heads were on this night?---Yes.

Yes. And that's – and the stain that we're talking – well, we've heard evidence about is closer to the head of the bed than the foot of the bed; is that right?---Pretty much in the middle.

All right?---It's a big bed.

All right. Thank you. Do you want to have something arising out of that, Mr Walters?"

Discussion

[35] It is convenient to deal with the competing submissions as part of each ground of appeal.

Ground 1 – inferences from injuries

[36] This ground drew upon the fact that the complainant said in her evidence that on 29 October Clarke had been rough and she experienced pain, before she withdrew consent to sexual penetration. The complainant's evidence of the chronological sequence of events, taken from paragraphs [12] and [18] above, can be summarised as follows:

(a) when he began inserting his fingers, it was starting to get rough, a little bit too rough, and it was starting to hurt me … and I told him he needed to calm down;

(b) when he went to get lubricant, she said she told him that "if he was going to get the lube he'd better be gentle when he comes back because he was

starting to get very rough and it was hurting"; I said to him if he was to continue he'd have to be gentle. … and not be so rough. … it didn't go that way; he ended up getting more and more rough;

(c) after he obtained lubricant he started inserting his fingers into my vagina again with lube, … and it got a little bit more rough;

(d) I could feel that there was more fingers being inserted and it was becoming really, really painful. … I told him that it was hurting me. … that he needed to stop. … he didn't stop;

(e) it felt like it was getting worse. … it felt like he was putting more fingers in and at this stage I was still telling him to stop and he didn't want to stop;

(f) at one stage I could feel that he had all his fingers inside me. … I kept asking him to stop, but no matter what I did he wouldn't stop; and

(g) she said she consented to the use of his fingers "when it wasn't hurting. I consented till I said stop. I consented till I started screaming".

[37] Senior Counsel for Clarke submitted that the complainant's own evidence showed she suffered genital pain during the consensual activity on 29 October, and she asked Clarke to stop after he had been rough and after she had experienced significant pain. It was therefore impossible for the nurse examiner or the jury to say whether those injuries were sustained before or after the withdrawal of consent. Therefore the evidence of the injuries did not assist the jury in any way on the issue of consent. The jury should have been directed that it was not possible to tell, on the basis of the injuries, whether there had been non-consensual sexual penetration. Further, a direction should have been given that it was not possible to tell what caused the injuries, and whether the injuries had been caused on 29 October.[94]

[38] For the Crown it was submitted that the directions did not invite the jury to speculate that the injuries were caused consensually or non-consensually, or that they (collectively or individually) could be said to have been occasioned before or after the complainant withdrew consent. Rather the jury were told they could consider the evidence of the injuries in determining, as a question of fact, what occurred, which in turn might be of assistance in determining other facts in issue. The directions were adequate and no redirections were sought.

[39] The relevant directions were as follows:

> "I know that some people think that judges presiding at trials like this will give a hint as to what the proper result of the case should be. I want to make it clear to you that nothing I say is intended to be any sort of hint. You are sworn to decide the facts, and you are to do that without assistance from any other person. So if I make a comment about the facts, all I am doing is trying to highlight to you matters that you might think worth thinking about. I am not trying to tell you what you should think about them. Please keep that in mind as you deliberate about the matter.[95]
>
> …

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94 Appellant's outline paragraphs 52-57.

95 SAB 137 lines 28-34.

> It is for you to say whether you accept the whole of what a witness says or only part of it or none of it at all. You can accept and reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she testified.[96]
>
> …
>
> Well, then, how would you start to deliberate about this case? You might think that almost everything depends upon the evidence of the complainant. She says that although she consented to the earlier sexual activity, she did not consent to the later insertion of the accused's fingers and hand or fist in her vagina. So you might ask yourselves first, what use, if any, do you make of the injuries she sustained. Are you satisfied that she suffered the injuries described by the forensic nurse? If so, does that help you to resolve the question of what it was that took place on that bed in the accused's bedroom that night?"[97]

[40] In addition, after retiring to consider their verdict the jury asked to have the nurse's evidence read to them, and that was done.

[41] It is the third passage in paragraph [39] above that is the focus of the submissions for Clarke, which were that (i) the direction elevated the effect of the injuries in the reasoning process; (ii) the injuries did not bear the conclusion that his Honour suggested to the jury they might, because there was always that uncertainty about when it was during the sexual contact that the injuries were inflicted, particularly whether it was during rough but consensual penetration, or non-consensual penetration; (iii) the direction did not explain that the genital injuries were neutral for that reason; instead they were just presented in raw form.

[42] The context of the impugned passage must be considered. Shortly before the learned trial judge began to summarise the competing contentions, starting with those for Clarke. His Honour then moved to the Crown's contentions, which included that "it is a significant matter to look at the injuries because the injuries she sustained are simply inconsistent with the accused man's account of things".[98] The learned trial judge then said that "All of these questions are questions that we commonly leave to juries for your determination" and that meant the jury would "make a decision about what evidence you accept and what evidence you reject".

[43] The learned trial judge then posed the question in the first line of the passage, i.e. how to start deliberations. That was to assess the complainant's evidence because the jury "might think that almost everything depends on the evidence of the complainant". It was in that context that his Honour posed three questions: (i) what use do you make of the injuries, (ii) did the complainant suffer the injuries described by the nurse, and (iii) does that help to resolve the question of what occurred?

[44] The reference to the injuries was, then, merely part of directions about deciding whose evidence to accept. I do not consider that what was said conveyed to the jury that they were entitled to reason that the injuries proved that the complainant was

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96 SAB 140 lines 43-46.
97 SAB 145 lines 4-11.
98 SAB 144 lines 41-43.

telling the truth about the appellant inserting his fist without her consent. Consideration of the injuries was simply part of the process of deciding whether they accepted the complainant's evidence or that of Clarke. That is, in my view, an entirely unobjectionable approach. Two versions of the events had been given in evidence. The complainant described an episode culminating in an increasingly vigorous, if not violent, physical interaction. On the other hand, Clarke described something much more sedate, ending immediately the first utterance of discomfort was made. All the jury were being directed to do was to ask (i) did she suffer the injuries described, and (ii) if so, does that help to decide what happened. It was for the jury to decide what that evidence meant.

[45] The submissions for Clarke suffer somewhat from the fact that there was no cross-examination of the nurse examiner directed towards when the injuries, all or any of them, had occurred. Equally there was no challenge to the nurse's evidence that she discovered blood loss, and because she could not determine the source of it she sent the complainant back to the emergency department for further examination.[99]

[46] The jury therefore had the following evidence, quite apart from the complainant's evidence itself: (i) that there were injuries as described and drawn on Exhibit 6 by the nurse, (ii) there was blood loss, (iii) blood was found in the high vagina, low vagina, vulval area and perineal area; and (iv) no-one suggested that the complainant had been injured before she engaged in sexual intercourse on 29 October.

[47] It is true to say that an affirmative answer to the first question (did she suffer the injuries described) required the jury to conclude that at least some of the injuries were sustained at some point during the activities on 29 October. But that was not a misdirection, as neither the complainant nor Clarke suggested there was any sign of a pre-existing injury. The complainant did not suggest any, nor was it suggested to her. Clarke did not suggest any, and said that he did not notice any when they started having sexual intercourse.[100]

[48] An affirmative answer to the first question might also mean that the jury concluded that some of the injuries occurred in the non-consensual part of the proceedings. But that still does not mean, in my view, that there was a misdirection. When the complainant's evidence, and the evidence of the injuries themselves, is properly considered, it does not leave the injuries as intractably neutral.

[49] Up to the point when sexual intercourse ended, there was no suggestion of injury of any sort, from either the complainant or Clarke. When the finger penetration started, the complainant said it was **starting** to get rough and **starting** to hurt. At that point (when he went to get the lubricant) she told him that if he was going to continue he had to be gentle because it was hurting. Three things follow from that evidence. First, she did not say the pain was continuing after he stopped the penetration. What she said was more consistent with it hurting while it was being done. Secondly, the complainant was not then in such pain that she desisted. Thirdly, her consent to continuation was only on the basis that Clarke not be as rough as he had been to that point.

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99 SAB 89 line 20, SAB 91 lines 40-43.

100 SAB 127 line 1.

[50] Given those matters, the jury could well reason that it was unlikely that the complainant had at that time sustained at least some of the injuries, particularly the abrasion that was said by the nurse examiner to be at the point of a laceration. That abrasion was 3 cm long by 1 cm wide, on the right labia, and described as "quite a significant injury" by the nurse examiner. In my view, the jury could well reject the suggestion that the complainant might still be prepared to continue with digital penetration if she had already sustained that injury during the consensual sexual activity. Such an injury, the jury might think, belied the complainant's description that the penetration "was **starting** to hurt me".

[51] Further, whilst the complainant said that she withdrew consent when she said stop, the jury could conclude that her consent to resumed digital penetration after Clarke got the lubricant was conditional on him being gentler. The fact is that he was not gentle when he resumed, and got rougher and rougher, inserting more and more fingers, and eventually his fist.

[52] The context in which the passage in paragraph [39] above occurred is important. The jury were properly directed that they had to accept the complainant's evidence beyond reasonable doubt in order to convict, and that inferences could be drawn. They were also directed that their "conclusions about what actually happened will be an important step in deciding whether or not you take the view there was consent or whether it is shown that the accused man did not have an honest and reasonable but mistaken belief in consent".[101] The jury were reminded that Counsel for Clarke had referred to the absence of medical evidence, and they were told not to speculate in the absence of DNA evidence. They were also reminded that the prosecution contended that the injuries were inconsistent with Clarke's account.

[53] Then, having been told that they could bring their "vast experience of the world and its people" to bear in taking a common sense approach to what evidence they accepted or rejected,[102] a sequence of questions was suggested to the jury by the directions, as follows:

(a) what do they make of the injuries; did she suffer them, and if so, does that help to resolve the question of what took place;

(b) does the stain on the bed seem more consistent with one version than the other;

(c) were they satisfied that the hand or fist penetrated the vagina; if so, does that impact on the question of consent; and

(d) was consent withdrawn in the way the complainant described; was that made clear; is there room for an honest and reasonable but mistaken belief as to consent.

[54] In my view, seen in context the directions did not mislead the jury about the inferences available from the fact of the injuries. It was not appropriate nor desirable that the jury be directed that the evidence of the injuries was intractably neutral.

[55] This ground lacks merit.

Ground 2 - trial judge's "cross-examination"

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101 SAB 143 line 41 to SAB 145 line 2.

102 SAB 144 line 46.

[56] This ground concerns the passage referred to in paragraph [34] above. Senior Counsel for Clarke submitted[103] that the learned trial judge assumed the role of prosecutor, cross-examined about the very matter on which he later told the jury to concentrate (the complainant's genital injuries) and proceeded on the erroneous basis that the injuries were probative of lack of consent. Further, it was submitted that the questions reversed the onus of proof and implied that in the absence of an innocent explanation for the injuries, they were probative of rape. Finally, it was said that Clarke was not appropriately qualified to answer questions about the mechanisms for the injuries.

[57] For the Crown, it was submitted that a trial judge is not precluded from asking questions of a witness, including an accused, or to test evidence, where it might be perceived to be inconsistent with other evidence.[104] The relevant question is what prejudicial effect was occasioned. That requires consideration of the intervention and that intervention in the context of the directions more broadly.

[58] Here, the Crown submitted, the intervention was not substantial, occurring only once, and it cannot be shown that a miscarriage of justice resulted. The effect of the questions was to establish whether there were other circumstances which occurred, which might have caused the injuries. He was not asked for an expert opinion, but rather asked to give evidence of the events. The jury had to consider what had occurred, whether it happened with consent, and if they did not accept that Clarke had an honest and reasonable, though mistaken, belief that consent was given. Further, adequate directions were given as to the jury being satisfied to the requisite standard, and that nothing said by the learned trial judge should be accepted over the jury's own consideration of the evidence.

[59] The relevant principles are conveniently gathered in *Thompson*, where Ipp AJA said:[105]

> "[35] The relevant principles were enunciated by Kirby ACJ in *Galea v Galea* (1990) 19 NSWLR 263 at 281 to 282. In summary his Honour stated:
>
> '1. The test to be applied is whether the excessive judicial questioning ... [has] created a real danger that the trial was unfair. If so, the judgment must be set aside ...
>
> 2. [G]reater latitude in questioning and comment will be accepted where a judge is sitting alone ...
>
> 3. ... the appellate court must consider whether ... the judge has ... moved into counsel's shoes and 'into the perils of self-persuasion' ...
>
> 4. The decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions ...
>
> 5. It is also relevant to consider the point at which the judicial interventions complained of occur. ...

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103 Relying on *R v Thompson* (2002) 130 A Crim R 24; [2002] NSWCCA 149.

104 Relying on *R v Senior* [2001] QCA 346, itself citing *R v Gardner* [1981] Qd R 394.

105 *Thompson* at [35]-[44], Sully and Bell JJ concurring.

6. The general rules for conduct of a trial and the general expression of the respective functions of judge and advocate do not change ... The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements ...'

[36] There are other statements of principle in the authorities that are relevant to the circumstances of this case. The following are particularly pertinent:

(a) A miscarriage of justice may "involve an impairment of a party's opportunity of putting his defence fully and fairly to the jury" (*R v Mawson* [1967] VR 205 at 207 to 208).

(b) A miscarriage may "result from the jury being led to believe from the judge's intervention that he is himself convinced of the guilt of the accused person" (*R v Mawson* at 207 to 208). Trial judges should not create the impression by the way in which they question the accused that they have thrown their weight on the side of the prosecution: *Mercer* (1993) 67 A Crim R 91.

(c) It is for counsel to examine the witnesses "and not for the judge to take it on himself lest by so doing he appear to favour one side or the other" (per Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 at 63 to 65).

(d) A departure from the due and orderly processes of a fair trial may amount to a miscarriage of justice or may infringe the principle that criminal justice must not only be done but must also appear to be done: *R v Mawson* (at 207 to 208).

[37] In *R v Esposito* (1998) 45 NSWLR 442 Wood CJ at CL conducted a careful examination of relevant authorities dealing with judicial intervention in criminal trials and concluded (at 472):

> 'The line that a trial judge walks when asking questions of a witness is a narrow one. There is nothing wrong with questions designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself. However, once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of the ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions appear to be directed towards elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state, or directed towards establishing a point

> that is favourable or adverse to the interests of one or other of the parties.'
>
> As Hunt CJ at CL said in *R v E* (1995) 89 A Crim R 325 at 331:... "it is worth repeating what has been said by this Court on many other occasions. The task of restoring the credit of a Crown witness or of destroying the credit of the accused or witness should *always* be left by the judge to the Crown Prosecutor".

[38] Notwithstanding the many judicial comments that have been made in regard to the issue, the boundary between permissible judicial intervention in a criminal trial and intervention of a kind that results in an unfair trial is not capable of clear definition. While the line may be narrow and the ice may be thin, the line is not bright and it is not always easy to determine whether the ice will hold. There are, indeed, circumstances in which a trial judge may legitimately intervene in a criminal trial.

…

[40] It has long been accepted that a judge may intervene for the purpose of clarifying the evidence (see, for example, *Yuill v Yuill* [1945] 1 All ER 183). That is to say, clarifying it not only so that the judge understands it but so that the jury understands it as well.

[41] In the course of clarifying the evidence, the judge may, involuntarily, but inevitably, assist either the prosecution or the defence. But I do not accept that that makes such an intervention improper. It is not the law that a judge must allow the evidence to be left in a state of incomprehensibility. We have long since departed from the "game" or "sporting" theory of justice; see the remarks of Hope JA in *Bassett v Host* [1982] 1 NSWLR 206 at 207 and Mahoney JA in *GIO of NSW v Glasscock* (1991) 13 MVR 521 at 530.

[42] That having been said, it must be emphasised that intervention for the purpose of clarification does not necessarily require the judge to question the witness. The judge may readily achieve clarification by pointing out, at an appropriate time, usually in the absence of the jury, evidential ambiguities or obscurities to counsel. That is by far the most desirable course. It should be left to counsel, whenever possible, to deal with such matters. If the judge undertakes the task by questioning witnesses, there is the danger that he or she will assume, albeit temporarily, the role of counsel and become identified with the cause of one side or another. Unfairness can readily be the consequence.

[43] If a judge does question a witness, and goes beyond mere clarification, the trial is not automatically unfair. In *R v Hopper* [1915] 2 KB 431 Reading LCJ, in delivering the

judgment of the English Court of Criminal Appeal, said (at 435):

> 'Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself'.

In *Cain* (1936) 25 Cr App R204 Du Parcq J (in delivering the judgment of the English Court of Criminal Appeal) remarked:

> 'There is no reason why the judge should not from time to time interpose such questions as seem to him fair and proper'.

See also *Gilson and Cohen* (1944) 29 Cr App R 174 at 181.

[44] Whether the judge's questioning leads to a decision that the trial was unfair is a matter of balance, degree and judgment."

[60] The line between acceptable and unacceptable intervention by a trial judge, as *Thompson* acknowledges, is not capable of clear definition. However, the restraints on a trial judge's conduct of a trial do not prevent the judge from asking questions of a witness, not only to clarify his or her evidence, but also to test that evidence where the judge perceives that it may be inconsistent with other evidence.[106]

[61] In the course of oral submission Senior Counsel for Clarke put the case in this way: the cross-examination was not to clarify something Clarke had already said, nor was it to provide Clarke with an opportunity to elaborate; instead it was "a strategic cross-examination in the style of prosecutor, designed to trap [Clarke]"; no matter how deficient his Honour thought the prosecutor's cross-examination was, it was not for his Honour to make up the deficiency; the appropriateness or fairness or otherwise of his Honour's intervention is not to be determined by the fact that it was relatively short or limited to his intervention in the cross-examination of Clarke; that his intervention was limited to the cross-examination of Clarke, and that it prompted an objection by defence counsel, was likely to have rendered it particularly memorable as far as the jury were concerned; his Honour asked questions about injuries that Clarke was not qualified to answer; and in those questions, his Honour reversed the onus of proof and, in effect, challenged Clarke that unless he could provide an innocent explanation for the injuries suffered by the complainant, they provided evidence of her lack of consent; further, the questions were based on a flawed assumption about the evidence, namely his Honour failed to appreciate that the complainant complained of pain during the consensual part of her sexual contact with the appellant.[107]

[62] The passage of questions commenced with the learned trial judge asking whether the first occasion was the same as the second, as Clarke had said in evidence. The answer was "pretty much exactly". In his evidence Clarke also denied the suggestion that the complainant left unhappy because there was "something

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106 *R v Senior* [2001] QCA 346 at [36].

107 Appeal transcript page 3, lines 13-40.

different from that night", partly because he had hurt her.[108] But there was no injury at the first meeting, whereas the evidence was clear that some injury had occurred at the second. Clarke said that he did not think she was injured on the first occasion.[109] That led to the learned trial judge asking: "Was there anything that passed between you that night that could have caused those injuries the nurse describes?" There was no objection to that question.

[63] To that point I cannot see that the questions were objectionable or such as to depart for the entitlement of a trial judge to clarify evidence. Clarke had said that the second meeting was "pretty much exactly" the same as the first, yet one thing was different, namely the complainant was injured in the second but not the first. Moreover, on the second occasion whatever had happened was enough to make him ask the complainant "if there was there any blood".[110] In my view, the questions to that point legitimately sought to clarify what might have occurred to account for that. Clarke's answer was that he thought he had scratched the complainant with his fingernail, and she said ouch and that it "hurt a little".

[64] That answer was no more than Clarke had said in his evidence in chief,[111] and in his account he had mentioned no other occasion when there was a hint of pain or injury. Therefore to this point the questions and answers went no further than what Clarke had already said.

[65] The learned trial judge then sought to clarify the duration of the scratching with the fingernail, asking "Just for a moment?" Clarke answered "just for a moment … she said ouch and so I stopped".

[66] The learned trial judge's next question was: "So that must have been what caused all the injuries the nurse saw". Objection was taken on the basis that Clarke could not be asked to comment as it was a matter for an expert. In my view that objection was wrongly taken. In truth the question had already been answered when Clarke answered the question to which objection was not taken, "Was there anything that passed between you that night that could have caused those injuries the nurse describes", by nominating a scratch from his fingernail. It was the sole thing that Clarke said differentiated the first time from the second. Not being an expert he was not asked for an expert opinion, or to express an expert opinion on causation.

[67] However, even if that question had been in some way objectionable, the learned trial judge's next question contained a modification which made it plain that Clarke was being asked for a non-expert answer. The question was: "There was nothing that happened **that you thought** might have caused her an injury, bar that incident where she said 'ouch'?"[112] Clarke replied "No. … That's the only time." It is clear from the question itself that it did not seek to elicit an expert opinion. What was asked, from one of the two participants on the night, was whether anything occurred that could, in his estimation, account for the injuries.

[68] It is also notable that the question and answer, once again, took matters no further than the first question and answer, to which no objection was raised at the time.

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108 SAB 125 lines 9-16.
109 SAB 125 line 26.
110 SAB 119 line 45.
111 SAB 118 line 47 to SAB 119 line 2.
112 Emphasis added.

However, the question was relevant and unobjectionable for another reason. It went to the state of mind of Clarke, and specifically the issue whether he honestly and reasonably, but mistakenly, believed the complainant was consenting.

[69] What then followed were three different but related questions. They were as to: (i) the location of the head of the bed relative to windows; (ii) the location of the bedside table; and (iii) the location of the stain on the bed. None of those questions, of themselves, could be said to be objectionable. However, the submissions of Senior Counsel for Clarke included them as part of the "cross-examination" by the learned trial judge.

[70] The learned trial judge's questions occupied very little time, lasting only two minutes and 28 seconds, and came at the end of his evidence, both in chief and cross-examination. In the context of a three day trial they occupied no appreciable time at all. Having listened to the audio recording of that part of the trial, there is nothing in the way the questions were asked that would be likely to raise concerns on the part of the jury. When there was an objection to one question, it was rephrased. Ultimately all that was really asked was whether Clarke could recall anything that might account for the injuries. Beyond nominating a scratch from his fingernail he steadfastly said no.

[71] I do not consider that the questions reasonably attract the description of "a strategic cross-examination in the style of prosecutor, designed to trap" Clarke. Nor do I consider that they reversed the onus of proof. Clarke had elected to give evidence and his case was that there was no sign of discomfort or injury apart from when he may have scratched her with his fingernail, at which point she said ouch and he stopped. The learned trial judge's questions sought to clarify the duration of that scratching and whether there was anything that Clarke was aware of that might have caused the injuries seen by the nurse. None of that reverses the onus.

[72] It is true that the complainant's evidence was that during the consensual part she experienced some pain: "it was starting to get rough, a little bit too rough … It was starting to hurt me".[113] Senior Counsel for Clarke submitted that: "on the complainant's own evidence … it is just impossible to know whether the complainant's injuries were suffered during the consensual part of their contact or during what she said was the non-consensual part" and "that fact does not appear to have been recognised by anyone". By that it was submitted that the learned trial judge "proceeded on this incorrect assumption about the effect of the evidence of the complainant's injuries, and that was reflected in his Honour's cross-examination" of Clarke.[114]

[73] However, I do not consider that the questions asked by the learned trial judge betray any lack of appreciation of the fact that the complainant said she experienced pain during the consensual interaction, or that his Honour proceeded on the assumption that any injuries occurred during the non-consensual period of time. His Honour's questions were not limited in time but covered the whole period of the second occasion. The questions were seeking to know what Clarke's evidence was as to what could have caused the injuries seen by the nurse.

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113 SAB 36 line 28-31.

114 Appeal transcript page 6.

[74] It is pertinent to note that the jury received directions about the burden of proof and the onus of proof, both at the start of the trial and in the summing up.[115] The jury were also directed that the fact the Clarke had given evidence did not mean that he assumed any responsibility to prove his innocence or that the onus changed. They were told they had to accept the complainant's evidence as truthful and accurate, and do so beyond reasonable doubt, before they could convict.[116] And they were directed that they were the sole arbiters of fact and they should not accept anything the trial judge said about the evidence unless it coincided with their own independent view.[117]

[75] Assessed against the whole of the trial, I am unpersuaded that the learned trial judge's questioning was such as to create "a real danger that the trial was unfair",[118] or that there was "such a departure from the due and orderly processes of fair trial as to amount to a miscarriage of justice".[119] I do not consider that the jury would have been led to believe from the intervention that his Honour was, himself, convinced of the guilt of Clarke,[120] or that the intervention hampered the presentation of his defence.[121] In my view, the questions fell into that category where they appeared to be directed towards elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state, rather than directed towards establishing a point that was favourable or adverse to the interests of one or other of the parties.[122] The learned trial judge's questions fell, in my view, into the category referred to in *Senior*, clarifying evidence, and testing that evidence where the judge perceives that it may be inconsistent with other evidence.

[76] I consider that this ground lacks merit.

Ground 3 – direction as to the stain

[77] Senior Counsel for Clarke advanced the submission that there was no evidence identifying the stain shown on Exhibit 5 as blood. The circumstances of the case suggested it was lubricant, but the learned trial judge assumed it was blood and directed the jury accordingly. Whilst his Honour's directions focussed on the gaps in the evidence about the stain, the directions carried a risk of seeding into the jury's mind that Clarke callously ignored the complainant's bleeding, consistent with a rapist. It was said that the direction raised a false issue without evidential basis.

[78] For the Crown, it was submitted that the learned trial judge did not, at any time, expressly refer to the stain as a "blood stain". No reference was made to blood at all in the summing up. The learned trial judge said: "what do you think about the stain on the bed? Does it seem to you that the existence of the stain is more consistent with one account than the other? Does it enable you to reach a conclusion about the truthfulness or otherwise of the complainant's account?" That occasioned no prejudice.

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115 SAB 24, 139 lines 1-15 and 145 line 31.
116 SAB 139 lines 6-25.
117 SAB 137 lines 17-34.
118 To adopt the test in *Galea v Galea* (1990) 19 NSWLR 263.
119 To adopt the test in *R v Mawson* [1967] VR 205.
120 The risk identified in *Thompson* at [36].
121 A risk identified in *R v Cunningham* (1992) 61 A Crim R 412, *Mawson* and *Thompson*.
122 The differentiation between what is acceptable and what may not be, as identified in *R v Esposito* (1998) 45 NSWLR 442 at 472.

[79] The passage from the directions was in these terms:[123]

> "Well, then, how would you start to deliberate about this case? You might think that almost everything depends upon the evidence of the complainant. She says that although she consented to the earlier sexual activity, she did not consent to the later insertion of the accused's fingers and hand or fist in her vagina. So you might ask yourselves first, what use, if any, do you make of the injuries she sustained. Are you satisfied that she suffered the injuries described by the forensic nurse? If so, does that help you to resolve the question of what it was that took place on that bed in the accused's bedroom that night?
>
> Second, you might ask yourselves what do you think about that stain on the bed? Does it seem to you that the existence of the stain is more consistent with one account than the other? Does it enable you to reach a conclusion about the truthfulness or otherwise of the complainant's account?
>
> …
>
> I urge you to remember at all times that the onus is on the prosecution and that onus requires that the prosecution prove the charge beyond reasonable doubt. You will remember that the doctor was not called to give evidence. No explanation was offered for that and you might think that her evidence would have been of assistance to you. You will also remember that very little attention was paid to the stain on the bed during the evidence of the accused. Would it have been helpful to you to know whether he knew it was there, whether he – when he found out when it was there, whether he had any concern about it? These are all things that might usefully have been explored with him and they were simply not pursued. So when you consider all of the evidence, one of the things that you have to keep in mind is that there are significant gaps in it in this case, but there is also some evidence that you might find useful."

[80] The learned trial judge's direction raised two questions relevant to how the jury might decide whether they accepted the complainant's evidence. The first was whether they were satisfied that she suffered the injuries described by the nurse, and if so, did that assist in answering the question of what took place that night. The second was whether the existence of the stain was more consistent with one account than the other, therefore enabling the jury to reach a conclusion about the truthfulness or otherwise of the complainant's account.

[81] The question of the presence of blood was raised in several ways. First, the admissions included that blood was found in the complainant's high vagina, low vagina, vulval area and perineal area. Secondly, the medical evidence was that the complainant was bleeding. Thirdly, by Clarke, when he said he asked the complainant whether there was any blood.[124] Fourthly, by the complainant when she said that

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123 SAB 145 lines 4-42.

124 SAB 119 line 45.

Exhibit 5 showed the "pool of possibly blood",[125] and that she had not been scared as "I didn't realise there was blood until I seen the photos".[126]

[82] There is added significance to the last response in the preceding paragraph, in that it was put to her in cross-examination that "you became scared when you realised that there was some blood there". The only place that could have referred to was the stain on the bed. Her answer accepted that it was blood in the photograph of the stain, Exhibit 5. Having been put on the basis that it was blood, and accepted, the jury could have proceeded on the basis that the stain was, in fact, blood.

[83] As for the last paragraph in the passage referred to in paragraph [79] above, the focus of the submissions for Clarke was the link between the stain and the word "concern" in the sentence: "Would it have been helpful to you to know whether he knew it was there, whether he – when he found out when it was there, whether he had any concern about it?" It was said that the reference to "concern" only made sense if the stain was blood rather than lubricant. It was this connection that was said to ground the learned trial judge's erroneous assumption that the stain was blood.

[84] The true impact of the stain, whether made from lubricant or blood, was that its position on the bed might be something that the jury took into account in resolving which account was the one to believe. His Honour's view, expressed in the course of submissions but not to the jury, was that its position meant that if the complainant was lying as Clarke said she was, the stain could not have been in that position. As his Honour more colourfully put it, in the absence of the jury: "it's just in the wrong place, isn't it? If she was lying down next to him when whatever fluid … made that stain, then she'd have to be about three feet tall".[127]

[85] The thrust of the direction to the jury was concerned with the position of the stain rather than whether it was blood or lubricant. The learned trial judge did not use the word blood when summing up. I am quite unable to see that the learned trial judge assumed it was blood, or that anything he said to the jury could have been understood that way. In fact, the exchange immediately after that passage from the summing up shows the learned trial judge did not accept that there was evidence that it was blood. Trial Counsel for Clarke said that there "was no suggestion that this stain was blood or anything of that nature".[128] The learned trial judge agreed, saying: "It looks like blood in the photograph – or at least partly blood – doesn't it, but you're quite right. There wasn't evidence about that, but neither was there evidence that the lubricant was red."[129]

[86] The other aspect of what his Honour was saying to the jury, in the last paragraph of the passage quoted above, was that they were not to speculate about matters where evidence did not exist. That was plain from the last sentence of that passage where the learned trial judge drew the distinction between evidence which suffered because of the significant gaps in it, and evidence that the jury might find useful.

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125 SAB 40 line 19.
126 SAB 73 line 1.
127 SAB 147 lines 25-34.
128 SAB 146 line 42.
129 SAB 146 line 45 to SAB 147 line 3.

[87] Lastly it has to be noted that Counsel then appearing for Clarke did not seek a redirection such as is now suggested.

[88] I do not consider that this ground has merit.

Ground 4 – unreasonable verdict

[89] Apart from relying on the points raised above, Senior Counsel for Clarke submitted that the complainant's text message to her friend, saying "But it was consented. I am okay. Just a bit sore …" rendered her evidence so unconvincing that the jury could not have been satisfied that the sexual activity was, to any degree, non-consensual. Further, the injuries and the stain on the bed were not probative of Clarke's guilt.

[90] For the Crown it was submitted that the text message and the complainant's explanation for it were matters for the jury. If the complainant's evidence was accepted, then the penetration by the hand or fist was non-consensual, in that she did not consent and told him repeatedly to stop because he was hurting her. Further, on that evidence there was no room for an honest and reasonable, but mistaken, belief as to consent.

[91] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[130] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[92] In *M v The Queen* the High Court said:[131]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[93] *M v The Queen* also held that:[132]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is

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130 (2011) 243 CLR 400, at [20]-[22]; see also *M v The Queen* (1994) 181 CLR 487, 493, 494.
131 *M v The Queen* at 493. Internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.
132 *M v The Queen* at 494.

> to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. 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."

[94] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[133]

[95] This case is different from many in that it was accepted that sexual activity occurred, and of the type and duration stated by the complainant in her evidence. Further, it was accepted by the complainant that at least part of it was consensual. What was in issue was, principally, the question of lack of consent, and whether there was an honest and reasonable, but mistaken, belief as to consent.

[96] There were, in my view of the evidence, a number of reasons why it was open to the jury to accept the complainant's evidence as to what occurred, and to be satisfied to the requisite standard of Clarke's guilt. In reaching that conclusion I have borne in mind the pre-eminent position of the jury as they were able to see and hear the evidence of the complainant and Clarke, as well as other witnesses.

[97] First, there was nothing inherently unbelievable about the complainant's evidence. In many respects it was supported by the evidence of Clarke. She readily conceded the nature of the texts exchanged before the first and second encounter, and that she was meeting him for casual sex. Her memory of the house, bedroom, and associated details proved good. Her evidence of what occurred on 29 October, after the sexual intercourse finished, was balanced, in that she accepted that she was willing to continue provided he was not as rough, but gentle. Her evidence of what she said she felt, by way of pain, was supported by the evidence of the injuries. Her evidence was supported to an extent by the admission by Clarke that he did hurt her, he thought by scratching her with a fingernail, to the extent that he enquired whether there was any blood.

[98] Secondly, there was no doubt that the complainant suffered the injuries that were seen by a nurse that night. They included the 3 cm by 1 cm abrasion that was almost a laceration, shown in Exhibit 6, and bleeding which was evident in the high and low vagina, vulval and perineal areas. The fact of the injuries supported the complainant's account of what occurred. The jury could well have taken the view that the chance of her consensually continuing with digital penetration in the face of such injuries, was fanciful.

[99] Thirdly, there was unchallenged evidence of preliminary complaint. The complainant called her friend very soon after the events. That friend gave evidence that the complainant was upset and had told her of a sexual encounter and "some part of it wasn't consented". The examining nurse gave evidence that the complainant told

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133 [2016] HCA 35, at [65]-[66]. Internal citations omitted.

her that the sexual penetration was starting to hurt her, she asked him to stop but he did not, he used his fingers first then his whole fist, and it caused some injuries.[134]

[100] Fourthly, a review of the transcript of the complainant's evidence reveals nothing that would support the attack upon her, namely that she was lying about the non-consensual aspect. She was responsive in cross-examination, though steadfast in her denial that she consented once the digital penetration became painful, and her denial that the penetration did not include the hand or fist.

[101] Fifthly, it is true that one can point to inconsistencies in the complainant's evidence. At the end of the day it was for the jury to weigh what they thought of the inconsistencies and discrepancies in her evidence. None of them was so compelling that one could reach the point of saying that it meant the jury could not have accepted her evidence.

[102] During cross-examination the complainant was confronted with the text message which is at the heart of the submissions on this ground. She sent it to her friend from hospital, in response to her enquiry as to what happened. It said: "But it was consented. I'm okay. Just really sore. They're putting me in a private room. I started bawling in front of the nurse."

[103] The complainant explained that she spoke on the phone to her friend, where she told her what happened. It was put to her in cross-examination, and she agreed, that she said to the friend that she "had experienced something that had never happened to [her] before", and that she was going to hospital because she was in pain.[135]

[104] She explained the text: "But by consensual I mean I consented to not being hurt. I didn't know I could do anything about anything. … at the time I wasn't aware of how the whole consensual and where I say stop actually meant stop and was classified as something a little bit more in depth."[136]

[105] The jury may well have concluded that the text message, seen in light of the phone call, did not undermine her evidence that there was no consent to the penetration of which she complained, i.e. the increasingly rough and painful penetration which resulted in his hand or fist being inserted. The complainant's evidence was that on 25 October the foreplay included the insertion of two fingers in her vagina.[137] The same thing occurred as part of foreplay on 29 October.[138] What she said to her friend in the phone call was that she "had experienced something that had never happened to [her] before". She said what she told the friend was the truth. If the jury accepted that evidence then what occurred on 29 October was beyond the insertion of a couple of fingers by consent.

[106] Ultimately it was a matter for the jury to decide what they thought about the text and the explanation for it. In my view, it does not mean that the jury had to reject her evidence.

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134 SAB 84 lines 13-20.
135 SAB 74 line 41.
136 SAB 75 lines 14-28.
137 SAB 53 lines 26-30.
138 SAB 63 lines 27-31.

[107] I am unpersuaded that it was not open to the jury to accept the complainant's evidence and be satisfied, beyond reasonable doubt, of Clarke's guilt. I do not conclude that an innocent person has been convicted.

[108] This ground fails.

Application for leave to appeal against sentence

[109] Clarke was charged with four offences. One was the rape charge and the other three were:

(a) Indictment 412/13: using a carriage service to transmit indecent communications to a person under 16, on about 2 September 2010, pursuant to s 474.27A(1) of the *Criminal Code Act* 1995 (Cth);

(b) Indictment 74/15: possession of child exploitation material on 12 February 2012, pursuant to s 228D *Criminal Code* (Qld); and

(c) Indictment 74/15: using a carriage service to solicit child exploitation material on about 7 March 2013, pursuant to s 474.19(1)(A)(IV), (AA), (B) of the *Criminal Code Act* 1995 (Cth).

[110] The sentence on the rape conviction was five years' imprisonment, with no recommendation for parole. A period of 326 days of pre-sentence custody was declared as time served.[139]

[111] The period of pre-sentence custody declared in the sentencing remarks accords with the period stated on the updated pre-sentence custody certificate, tendered as Exhibit 25.[140] This is also recorded correctly on the Court Order Sheet.[141] However the Verdict and Judgment Record incorrectly refers only to a period of 232 days.

[112] The sentences imposed on the other offences were:

(a) using a carriage service to transmit indecent communication; 293 days' imprisonment;

(b) possession of child exploitation material: 111 days' imprisonment; and

(c) using a carriage service to solicit child exploitation material: 116 days' imprisonment.

[113] Clarke's application sought leave to challenge the sentence for the rape only. He appeared for himself on that application.

[114] The submissions by Clarke were that five years' imprisonment for the rape offence was manifestly excessive when regard is had to *R v Keevers*, *R v Filewood*[142] and *R v HX*.[143] He contended that a sentence of two to three years, suspended immediately, was appropriate. He did not contend that the sentences on other charges were challenged.

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139 AB 70 line 36.
140 AB 121.
141 AB 12.
142 [2004] QCA 207.
143 [2005] QCA 91.

[115] For the Crown it was submitted that the sentence for the rape conviction had to be viewed in light of the other offences, because it was open to impose cumulative terms and that was not done. Part of the reason for not making them cumulative was the need to structure the sentences for the Commonwealth offences. Reference was made to *R v Hennessy*,[144] *Keevers & Filewood*, *HX*, *R v Baxter*,[145] and *R v Postchild*,[146] in respect of the rape charge, and *R v Sykes*,[147] *R v Jones*[148] and *R v Wharley*[149] in respect of the other offences.

Factual background to the offences

[116] The circumstances of the rape offence are dealt with in detail above. To that can be added some information given to the learned sentencing judge, without objection, as to the examination by the doctor on the night the complainant was admitted to hospital.[150] The nurse conducted her examination after the doctor. The doctor noted suprapubic abdominal pain, a 3 cm by 0.3 cm superficial graze to the posterior vaginal wall, a 1 cm haematoma at the entrance of the vagina. She administered analgesic pain. The doctor said: "The likely long-term effects of the injuries are not likely long-term physical effects. The injuries suffered by the patient would have caused an interference with the patient's health and/or comfort as the patient required analgesia due to vaginal pain caused by the alleged sexual assault."

[117] On the other charges there was an agreed schedule of facts.[151] What follows draws from that schedule.

The possession charge

[118] On 12 February 2012, police searched Clarke's house. Computers were seized, along with associated equipment. Child exploitation material was found on the computer, including a number of movies and images which depicted children in sexual poses and situations. There were 22 movies and 1,596 images:

(a) four movies in category 1 (no sexual activity), which showed girls under 10 and between 10 and 14, naked or dressed in lingerie; in some close-ups of their vaginas; one girl inserting an object in her vagina; in others sexual or provocative poses;

(b) 18 movies in category 2 (child non penetrate); these included small girls, some under eight or 10, naked; close-ups of vaginas; some being digitally penetrated, some in showers or dancing naked;

(c) 1,398 images in category 1; mostly girls between the ages of four and 14;

(d) 78 images in category 2; naked of mostly female children between four and 14;

(e) 37 images in category 3 (adult non-penetrate); images of young girls (four to 14) touching or licking adult penises;

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144 [2002] QCA 523.
145 [2010] QCA 235.
146 [2013] QCA 227.
147 [2009] QCA 267.
148 [2011] QCA 147.
149 (2007) 175 A Crim R 253; [2007] QCA 295.
150 AB 57 lines 34-46. By agreement the doctor did not give evidence at the trial: AB 59 lines 10-17.
151 Appeal Book (**AB**) 108-114.

(f) 60 images in category 4 (child adult non-penetrate); young girls (four to 14) being penetrated anally and vaginally; also several images of newborn female babies being vaginally penetrated by adult penises;

(g) four images in category 5 (sadism and bestiality); young girls (four to 14) engaging in sexual acts with animals; and

(h) nine images in category 6 (animation); young girls (four to 14) in sexual acts with adolescent males, adult males and adult females.

[119] In addition there were 3,312 inaccessible videos on the computer.

The solicitation charge

[120] In February 2013, Clarke began communicating with a woman (**T**) on a dating website. She specified in her online profile that she had children. Clarke's profile said he had children, and he uploaded a picture of him and his son. T and Clarke exchanged messages via Facebook. T told Clarke that she had a five year old daughter. Communication continued via telephone, text and Facebook. Clarke told T that he was nudist, but it was not a sexual thing but just that he found appreciation and beauty in bodies.

[121] T and Clarke met. The next day Clarke asked T to send him a photograph of herself and her daughter. She did that. Clarke then asked for a full body shot of the daughter. T sent one of the daughter wearing a swimsuit. Later that night Clarke asked T to send a naked photograph of herself, which she did. He then asked for a photograph of the daughter wearing only underwear. T declined, and Clarke pressed for such a photo. He sent repeated texts asking for the photo, including one of the daughter "without her knickers", and saying "Half way is pics naked not naked at home". T declined to send any photographs of the daughter, but still communicated with Clarke. He texted again for a naked photograph, this time of T and her daughter.

[122] T reported Clarke to the police. When they searched his house on 3 March 2014, he denied knowing T, and declined to be interviewed.

The transmit charge

[123] The schedule for this offence[152] reveals that Clarke and a young girl of 10 (**G**) knew each other. On 2 September 2010 Clarke and G participated in online chat and video calls. During those calls Clarke engaged in sexually explicit conversations, including:

(a) asking G if she was wearing anything;

(b) telling her to take her clothes off and to get naked, and that he wanted to see her undress;

(c) telling her that he was naked in bed;

(d) asking if she had been kissed by a boy and shown a boy her body, then asking her to show him her body;

(e) telling her that sex is nice;

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152 AB 100.

(f) asking her if she had seen a penis before, and if she wanted to see one;

(g) asking if she had shown her "pussy" before and whether she had "hair down there yet";

(h) saying he was to see her "sexy body", and wanted to see a female naked;

(i) asked her age and when she said 13, said "no" and guessed 12;

(j) asked her to show him her "knickers', "ass" and "boobs";

(k) was told that she was only 10; and

(l) asked her to promise not to tell anyone.

[124] G told her sisters, who informed her mother and provided the mother with a copy of the conversation which was recorded on the computer. The mother reported it to police on 4 September 2010. Eventually, on 12 February 2012, Clarke was interviewed. He told them he did not remember the conversation as he was doing a lot of drugs and drinking at that time. He said had known G her whole life and thought of her as family. He would class the conversation as indecent, and as a result of the conversation with G he knew he could get into trouble with the police or G's father.

[125] G's victim impact statement was tendered.[153]

[126] Clarke was charged with the first Commonwealth offence on 12 February (transmit indecent communication) and released on bail. He was charged with the other Commonwealth offences on 3 March 2014. He was on bail for those offences when he committed the rape on 29 October 2014. When arrested for the rape offence on 30 October 2014, he was then remanded in custody until 27 May 2015.

Antecedents

[127] Clarke was 24 at the time of the first Commonwealth offence, 28 at the time of the rape offence, and 30 at the time of his appeal. He was the separated father of one son. His criminal history consisted of three breaches of domestic violence orders, which involved him breaking into his former partner's accommodation on three separate occasions.[154] For those offences he was fined on each occasion, and a conviction was recorded on only the last offence in 2013. There was also one offence of obstructing police, in 2004.

[128] A report of Dr Aboud was tendered at the sentencing.[155] It reported Clarke's parents separating when he was aged eight, and he witnessed domestic violence by his father to his mother. He was twice the victim of sexual abuse as a child, perpetrated by two different offenders, once when he was 11 (anal rape) and once when 12 (mutual masturbation with his father's female partner). His schooling was disrupted by his own conduct, as well as leaving to attempt an apprenticeship. He finished the apprenticeship by age 19, and worked as a mechanic and diesel fitter.

[129] Clarke reported one previous period of depression, including suicidal thoughts, in 2010/2011, concerned with financial problems, relationship issues and child custody

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153 Exhibit 20, AB 103.

154 On the first he demanded she return with him. On the second he then sent over 470 messages to her. On the third he telephone, making threats. AB 34 lines 8-14.

155 Exhibit 17, AB 75.

issues. At that time he was prescribed anti-depressants, which he continued to take. The history he provided suggested a level of excess alcohol consumption over a period of time, which he stated increased in the lead up to the offending.

[130] He reported having no sexual attraction to children, or sexual fantasies involving children, and denied any paraphilic sexual interests. He reported fantasies he had: fantasies about "my girlfriend or girls I've slept with in the past or celebrities like Charlize Theron ... and threesomes with two women ... always adults and consensual ... and chubby women, I like that, and squirting, I suppose that's the big one". He denied any fantasies involving rape or non-consensual sexual activity.

[131] As to the offences, he said he could not remember the conversation the subject of the transmitting charge. At that time he said he was taking excessive painkillers and drinking a lot. As to the child exploitation material, he said that he did not "agree with that type of stuff", and did not know why he was looking at them. He denied sexual arousal by them. As to the soliciting child pornography charge, he said that he wanted to see if the mother would trust him, but denied any sexual urge related to the photographs he was seeking.

[132] Dr Aboud's opinion was that there was insufficient evidence to formulate a diagnosis of personality disorder, but there was evidence that Clarke suffered from an alcohol abuse disorder and from a substance abuse disorder. However, Dr Aboud was reasonably confident in making a diagnosis of paedophilia and specifically that he is attracted to females of prepubescent and pubescent age. As to the impact of the rape offence, Dr Aboud said:[156]

> "With respect to his conviction for rape I am unable to draw any particular conclusions that he has any sadistic sexual interests or particular fantasies of committing rape. This latter offence does appear to represent a very different type of offence and pathway compared with the other three offences."

[133] Dr Aboud concluded, on the basis of various diagnostic tools, that Clarke's risk of sexual offending was above moderate and would most likely take the form of the viewing of child exploitation material. Risk factors relating to the risk of reoffending included his paedophile inclinations, his alcohol and painkiller consumption and his difficulty in coping with social stressors. The risk of reoffending against an adult female was considered to be relatively low.

[134] Dr Aboud recommended engagement in group sex-offender treatment programs, engagement with a psychologist for assessment and treatment, alcohol and substance abuse assistance and ongoing medication for depression. Such a treatment plan would, in Dr Aboud's opinion, significantly reduce the risk of sexual reoffending.

Approach of the learned sentencing judge

[135] Even though the trial concluded on 18 July 2016, the sentencing hearing was not until 7 November 2016, and the sentencing itself did not take place until 11 November 2016. The reason for that was that a pre-sentence report was ordered on 5 August 2016.

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156 AB 88.

[136] The learned sentencing judge reviewed the facts behind the offences. In respect of the rape the sentence proceeded on the basis that Clarke thrust his whole hand in her vagina.[157] His Honour also noted that during the period of the offending described, Clarke was also dealt with for the three domestic violence offences. For those offences he was charged with breach of domestic violence orders and fined on each of those occasions.

[137] The learned sentencing judge noted these features which his Honour took into account as part of the sentencing remarks:

(a) Clarke was in no doubt that the complainant was not consenting well before he thrust his whole hand into her vagina; "there was no room for any misunderstanding"; "Your behaviour was extraordinary and quite unlike the consensual sexual activity which had preceded it";[158] that was an important matter when it came to the comparable cases;

(b) the report from Dr Aboud dated 13 October 2016, which identified Clarke as a person with a moderate to high risk of re-offending in a sexual manner;

(c) there was a need to protect our community from persistent sexual offenders;

(d) the comparable case to which his Honour had been referred were "all different from your case because they deal with a continuation of like sexual behaviour to that which had previously been consented to after the consent had been withdrawn"; Clarke's case was different because "the act which results in your conviction for rape was quite different from the sexual acts which were consented to by your victim";

(e) the offending conduct was "appalling … quite unheralded and from your victim's point of view, quite unexpected"; she suffered an appalling invasion of her person, severe pain and huge emotional upset; notwithstanding that she declined to provide a victim impact statement the offending continued to affect her;

(f) the learned sentencing judge bore in mind that the consensual encounter started on a website which promoted promiscuous sexual activity; the complainant was not inveigled, persuaded or deceived about the nature of it, but what Clarke did was well outside the bounds of any anticipated behaviour;

(g) were it not for that background his Honour would have considered a sentence in the range of seven or eight years; "making allowance for the background" the appropriate sentence was five years;[159]

(h) the Commonwealth offences were serious but "obviously less serious" than the rape;

(i) the offences in indictment 74/15 are serious offences because, in relation to count 1 on that indictment, Clarke "encouraged and supported a disgraceful industry which causes great harm to children", and in respect of count 2, he "contacted a perfect stranger and attempted to persuade her to involve her child in indecent sexual behaviour";

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157 AB 67.
158 AB 68 lines 11-14.
159 AB 69.

(j) Clarke had been in prison for "a very significant time and I do not think it appropriate to impose further penalties"; and

(k) as to parole eligibility, his Honour was "not persuaded it is appropriate to make any eligibility recommendation, particularly having regard to the content of the report that was provided to me", and that Clarke "should have an opportunity to satisfy a parole board, without any indication from me as to what is appropriate, that you are ready to be released into the community".[160]

[138] The comparable cases to which the learned sentencing judge was referred included *R v Hennessy*,[161] and *R v Johnson*.[162]

[139] The learned sentencing judge made it clear that his intention was that Clarke would have served all sentences except that for the rape.[163]

[140] Clarke had, by sentencing, served a total of 322 days in pre-sentence custody for the rape charge.

[141] In respect of the time already served in pre-sentence custody the learned sentencing judge declared the following:[164]

> "… in respect of indictment 74 of 2015, I declare that the periods of 177 days between the 2nd of December 2014 and the 27th of May 2015, and 116 days between the 18th of July 2016 and yesterday, the 10th of November 2016, should be taken to be time served in respect of the sentence imposed on that indictment.
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> In respect of indictment number 113 of 2015, I declare that the period of 326 days, being 210 days between the 30th of October and the 27th of May 2015, and 116 days between the 18th of July 2016 and the 10th of November 2016, should be taken to be time served under the sentence."

Discussion

[142] As the challenge to the sentence concerned only the rape offence, it is convenient to restrict the consideration of the submissions to that sentence where possible.

[143] The utility of Dr Aboud's report is diminished somewhat because Clarke refused to discuss the rape offence with him. Nonetheless it identifies Clarke as a person for whom supervision is necessary on his release.

[144] At the sentencing hearing the Crown contended that an appropriate sentence for the rape, if dealt with alone, would be two and a-half years, and higher depending on the other offences and the structure of the sentences.[165] It was also submitted that the lack of remorse and other factors told against release any earlier than at the 50 per cent mark.[166]

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160 AB 69-70.
161 [2002] QCA 523.
162 Unreported, District Court of Queensland, DC No 1646 of 2013, Kingham DCJ, 25 July 2014.
163 AB 71-72.
164 AB 70 lines 31-39.
165 AB 52 line 44 to AB 53 line 3.
166 AB 53 line 7.

[145] At the heart of the sentence imposed was the learned sentencing judge's characterisation of the offending conduct in respect of the rape. His Honour viewed it was much more serious, and therefore distinguishable from, the comparable cases to which he was referred. The feature that set it apart from the comparable cases was because they dealt with a continuation of like sexual behaviour to that which had previously been consented to after the consent had been withdrawn, whereas this conduct was quite different from the sexual acts to which consent was given. The offending conduct was "appalling ... quite unheralded and from your victim's point of view, quite unexpected", constituting an appalling invasion of her person, severe pain and huge emotional upset, which was continuing.

[146] Because of the learned sentencing judge's concern that his characterisation of the conduct suggested that sentences of three years were too low, the hearing was adjourned from 7 November to 11 November.

[147] When considering the question of whether the sentences are manifestly excessive, the offences cannot be isolated from each other. Plainly the learned sentencing judge considered that the overall seriousness of the conduct warranted a higher sentence than that put forward in submissions. His Honour also had to confront the choice of making the sentences for the offences other than the rape cumulative or concurrent, particularly given that the rape was committed while Clarke was on bail for the other offences.[167] As well, the decision of the learned sentencing judge to impose concurrent terms, and structure the sentences as he did, may be seen to be a response to the combination of Queensland and Commonwealth sentencing orders required.

[148] The learned sentencing judge declared, as time served, the total period of time that Clarke had spent on remand for the offence of rape. The practical effect of the sentence structure, by imposing concurrent sentences for the three other offences and declaring time served for those offences, as well as the offence of rape, was that Clarke was not required to serve any further time in custody for the other offences, as it was subsumed in the five year sentence imposed for the rape.

[149] The consequence of the sentence being structured as it was, is that Clarke must demonstrate that the five year term is manifestly excessive as a penalty for the aggregate offending involved in all four offences for which he was sentenced. One of the difficulties that must be confronted in that exercise is that the other offences did not represent a course of offending against the one complainant, but was entirely distinct from the rape offence, and each was separated in time. Further, the rape was distinct, in that the conduct was quite remote from the conduct in the other offences, none of which involved physical contact with the victim, let alone violence.

[150] I agree with the Crown's submission that there is guidance to be drawn from what was said by this Court in *R v Colless*:[168]

> "While the *Criminal Code* establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that without additional aggravating features (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may generally be seen to be somewhat less grave than a

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167 That question was identified in the course of submissions on the sentence.

168 [2011] 2 Qd R 421; [2010] QCA 26 at [17].

> rape accomplished by penile penetration. That is because it may be less invasive, would not carry a risk of pregnancy, and would ordinarily carry substantially reduced risk of infection..."

[151] Further, it is, in my view, worth recalling what was said in *R v Postchild*[169] by de Jersey CJ, adopting what was said by Chesterman JA in *R v Jackson*:[170]

> "To succeed the applicant must demonstrate that the sentence imposed was beyond the permissible range, not that it was severe, or that a lesser punishment would have been appropriate, or even more appropriate than the one in fact imposed. There is no one "right" penalty in any case. There is always a range of permissible sentences. Different judges legitimately put weight on different circumstances and their opinions must be respected unless the sentence imposed is beyond the allowable range, or is otherwise affected by an error of fact or law."[171]

[152] Here the rape was accompanied by extra brutality and, probably, premeditation. Clarke left the room to get the lubricant having been told that he could continue only if he was less rough than he had been. He was escalating the number of fingers used, and the force, until his entire fist or hand was inserted, all the time with the complainant saying to stop and struggling, and eventually screaming in pain. That course of action is beyond what was being referred to in *Colless*, particularly when the Court there suggested that digital rape "may be less invasive". Whatever was proposed by Clarke and accepted by the complainant by way of consensual digital penetration, there was no hint whatever that he might progress until his entire fist was inserted. The force used fairly plainly caused the injuries that were revealed on examination, one of which was an abrasion tantamount to a full laceration of the labia, 3 cm by 1 cm in size. This case is quite distinct from what might be called the usual cases of digital rape, referred to in *Colless*, which only involve one or two fingers. In the particular circumstances of what took place I cannot see any reasonable basis to differentiate this rape, in terms of sentence at least, from penile rape, albeit that the risks identified in *Colless* (pregnancy and infection) were not present.

[153] In my view, there are several matters which lead to the conclusion that what took place was not only premeditated, but carried out both brutally and callously. First, Clarke gave a risible explanation for getting the lubricant, namely that the complainant was becoming dry because the air-conditioner was facing her. The complainant did not know why it was needed. It is not hard to infer that he wanted the lubricant because he intended to insert far more than fingers in her vagina. Secondly, whatever digital penetration had taken place up to the point of his getting the lubricant, none of it remotely approached putting his whole fist in the complainant's vagina. Clarke used the phrase "ruin your pussy" when saying what he intended. Thirdly, he said that the digital penetration was not something he was doing for any sexual gratification of his own, but for her: he said the insertion of his fingers in her vagina did not excite him sexually,[172] and "I was fingering her for her satisfaction,

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169 [2013] QCA 227.
170 [2011] QCA 103, at [25].
171 *Postchild* at [5], Gotterson JA concurring.
172 SAB 123 line 22.

not my own".[173] The risible notion that he was doing the complainant a favour by inserting his fist in her vagina says much of his real intentions that night. Fourthly, it is reasonable to infer that he gave the instructions that the complainant was "there consensually to live [her] fantasies". What he did was not a fantasy discussed at any time. Fifthly, even when the insertion of his fist caused the complainant to scream in pain, Clarke persisted, and it was only by fighting against him that she was able to finally extract his fist.

[154] Even apart from the fact that the case went to trial, Clarke has never expressed the slightest remorse, or insight into his offending. That applies to the rape as well as the other offending. Dr Aboud's report reveals nothing that would qualify as remorse, or an awareness of the impact on the victims.

[155] At the end of the day the question is whether the overall sentence imposed, not just that for the rape as though it were isolated from the other offences, is so "unreasonable or plainly unjust" as to reveal some undisclosed error on the part of the sentencing judge.[174]

[156] *Keevers & Filewood* involved the opportunistic exploitation of a sleeping woman. It was digital penetration of short duration and of a kind far removed from the present case, albeit that it caused injuries by way of three tears at the back of the vulva, a bruise and graze on the hymenal remnant. The complainant was woken from sleep by what she described as a punch to the vagina, but there was no evidence apart from the injuries to take the matter further. After a trial Filewood was convicted and sentenced to two and a-half years,[175] but it offers no yardstick for the present case.

[157] *HX* also involved digital rape, but again of a different order from this case. There the offender pushed the complainant down into a car, pulled her pants and underwear off, and inserted one, then two, fingers in her vagina. The fingers in the vagina were a method of holding her down. She struggled and managed to throw him off. The penetration caused injuries: a deep 2 cm scratch on the left inner labium; inflammation of the entrance to the vagina; an abrasion at the posterior fourchette; and a 1 cm bruise on the posterior medial thigh on the left. There were other injuries in the nature of bruises to her head and buttocks.

[158] The offender had no criminal history at all, was a settled family-man. However, unlike this case there was no suggestion of multiple offences or committing the rape while on bail. In my view, those differences, as well as the whole fist penetration in the present case, make the sentence of three years in *HX* (imposed after a trial) of little utility as a yardstick.

[159] *Baxter* involved a 24 year-old offender who, while on parole, digitally raped a young woman he chanced to pass on a pathway. After asking the victim for a cigarette and talking for a short while, the offender followed her to a convenience store. The victim offered to call the offender's ex-girlfriend but the call was unanswered. As she walked away he followed her again, stepped in front of her and blocked the path. He grabbed the victim and moved her to a nearby shelter where, after a struggle, he got her on the ground and put his hand down her pants onto her

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173 SAB 124 line 19.

174 *House v The King* (1936) 55 CLR 499 at 505; *Hili v The Queen* (2010) 242 CLR 520, at [58]-[60].

175 Even though described as moderate: *Keevers & Filewood* at [44].

vagina. She got up but while she was standing he put his hand down her pants again, and inserted his finger in her vagina. There were no residual injuries. Two counts arose out of that, one for sexual assault and one for rape.

[160] The same night he also effectively high-jacked a car driven by another young woman, telling her that he had a gun and to drive him to Ipswich. She stopped and told him to get out, which he did.

[161] His criminal history had no sexual offences but four prior offences for robbery with violence, and other offences, for which he had been imprisoned. His parole had been suspended twice for offending. He pleaded guilty and was sentenced for the rape to six years' imprisonment, the sentencing judge saying that was the bottom of the range. After reviewing *Keevers & Filewood*, *HX* and *R v Viliafi*[176] (and other cases), this Court reduced that to five years. The reduction was principally for totality considerations, but the Court also referred to the range for digital rape:[177]

> "The analysis of the cases does support the applicant's contention that the sentence of six years was not at the bottom of the range applicable to the applicant's offending and circumstances, but was at the top of the range. In any case, the effect of that sentence, even with the eligibility for parole date fixed after the applicant has served two years' imprisonment from the effective commencement date of the sentence of 14 February 2010 that immediately followed his imprisonment from 7 January 2009 did not sufficiently take into account the overall effect of the sentence for the applicant in a way that gave actual recognition to the totality principle."

[162] *Viliafi* involved a seven year sentence imposed on a 41 year old ex-partner of a woman, who digitally raped her after jumping on top of her, holding a knife to her throat and threatening to kill her. The victim had only recently taken out a domestic violence order against him. He pleaded guilty to burglary by breaking in the night-time with violence and while armed, and rape. This Court did not interfere with the sentence.

[163] Plainly *Keevers & Filewood* and *HX* involve considerably less serious circumstances. *Baxter* involved a rape considerably less serious in its direct physical aspects, but worse because of the attack on a stranger in public, and the offender's criminal history was worse. That said *Baxter* was a plea, not a trial. Its significance here is the statement that six years was at the top of the range. *Viliafi* was a more serious case of violence, involving threats to the victim's life.

[164] There are factors present here, that were not present, to one degree or another, in the cases referred to. First, Clarke was on bail for three offences, each with a sexual connotation. Each of them were quite serious in themselves, involving a substantial quantity of child exploitation material, soliciting child pornography and transmitting indecent communications to a 10 year old child. The five year sentence on the rape was designed to reflect the total criminality of all offences dealt with. Secondly, the learned trial judge had to decide whether to make the other sentences cumulative upon or concurrent with that for the rape. Making them cumulative would normally have called for a reduction in the head sentence, and conversely making them concurrent would call for the head sentence to be increased. Here the sentences

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176 [2005] QCA 12.

177 *Baxter* at [26].

were made concurrent. Thirdly, in this case Clarke went to trial, whereas *Baxter* was a plea. Therefore when the Court said six years was at the top of the range it was referring to sentences on a plea. Fourthly, the report from Dr Aboud highlighted the need for personal and general deterrence, and the need to ensure the community was protected upon Clarke's eventual release.

[165] *Baxter* lends some support to the sentences imposed here. That the sentence was much more than in *Keevers & Filewood* or *HX* is not enough to succeed on this application. Nor is it enough to demonstrate that it is high or that some other judge might have imposed a different sentence. It has to be demonstrated that the sentence imposed was beyond the permissible range. I am unpersuaded that it is.

Another matter – Verdict and Judgment Record

[166] Counsel for the Crown raised an additional matter. It concerned the fact that the Verdict and Judgment record wrongly records the pre-sentence custody declared as time served. In relation to the offence of rape on Indictment No 113/15 Clarke was sentenced to five years' imprisonment. No court ordered parole eligibility date was fixed. A period of 326 days was declared as time served under the sentence.[178] The period of pre-sentence custody declared in the sentencing remarks accords with the period stated on the updated pre-sentence custody certificate.[179] This is also recorded correctly on the Court Order Sheet.[180] However the Verdict and Judgment Record[181] incorrectly refers only to a period of 232 days.

[167] That submission appears to be correct and the verdict and Judgment Record should be corrected to reflect the correct period.

Disposition

[168] For the reasons above I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence. I propose the following orders:

1. The appeal against conviction is dismissed.
2. The application for leave to appeal against the sentence is refused.
3. In relation to the offence of Rape on Indictment No 113 of 2015, the Registrar of the District Court is directed to amend the Verdict and Judgment Record to reflect that a total period of 326 days was declared as pre-sentence custody, being time already served under the sentence.

[169] **PHILIPPIDES JA:** I agree with Morrison JA.

[170] **BROWN J**: I agree with the reasons given by Morrison JA, and the orders proposed by his Honour.

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178 AB 70 line 36.
179 Exhibit 25, AB 121.
180 AB 12, left column.
181 AB 13.