SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nibigira* [2018] QCA 115
PARTIES:	**R** **v** **NIBIGIRA, Shartiel** (appellant)
FILE NO/S:	CA No 139 of 2017 DC No 677 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Dates of Convictions: 6 June 2017; 7 June 2017 (Dearden DCJ)
DELIVERED ON:	8 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2018
JUDGES:	Holmes CJ and Gotterson and McMurdo JJA
ORDERS:	**1. The appeal is allowed.** **2. The convictions on all counts are quashed.** **3. The appellant is to be retried on all counts.** **4. The counts concerning complainants A and D are to be charged and tried separately from the counts concerning complainants B and C.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – JOINDER – JOINDER OF COUNTS AND DEFENDANTS – where the appellant was convicted of 21 counts of sexual offending against four complainants – where the complainants were members of a church's youth choir – where the appellant drove choir members to and from choir practice – where choir practice was often at the appellant's house – where the complainants alleged the appellant sexually abused them in his vehicle or at his home during choir practice – where the alleged abuse ranged from touching their thighs and vaginas to sexual intercourse – where the pre-trial hearing judge refused the defence application for separate trials – where evidence of each one of the offences was admissible in proof of every other offence on the indictment – where the appellant submitted he should have been tried on two separate indictments, with appropriate directions about the limits of admissibility – whether the pre-

trial hearing judge erred in refusing the defence application for separate trials

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL PERSONS AND COUNTS – where the appellant was convicted of 21 counts of sexual offending against four complainants – where the pre-trial hearing judge refused the defence application for separate trials – where evidence of each one of the offences was admissible in proof of every other offence on the indictment – where the jury was not directed that certain evidence of some complainants was not admissible in law in proof of certain alleged offending against other complainants – whether the pre-trial hearing judge erred in his directions to the jury about the way in which they might use the evidence of one offence in proof of another

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where a complainant gave evidence that the appellant raped her in the toilet at his house after choir practice – where the youth choir, the appellant's wife and other adults were in close physical proximity to the alleged offending – where the complainant and the appellant were allegedly standing with their pants pulled down to their knees while the intercourse occurred – where the appellant contended there was inherently incredible detail in this rape allegation – whether the verdict of guilty on this count was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted of 21 counts of sexual offending against four complainants – where defence counsel failed to cross-examine each of the complainants with respect to "pressure" put on them to make up their complaints – where defence counsel failed, in his address, to invite the jury to consider whether it was group talk that had pressured the complainants into making up their complaints – where the appellant submitted there was no objectively rational reason for defence counsel's failure to cross-examine and address on these matters – whether there was a miscarriage of justice because of the incompetence of counsel

Hoch v The Queen (1988) 165 CLR 292; [1988] HCA 50, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, followed
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, followed

R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v CBM [2015] 1 Qd R 165; [2014] QCA 212, cited
R v MAP [2006] QCA 220, approved

COUNSEL: S M Ryan QC for the appellant
V A Loury QC for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA and with the orders he proposes.

[2] **GOTTERSON JA:** In May 2017, the appellant, Shartiel Nibigira, was tried in the District Court at Brisbane on 21 counts of sexual offending. Some 17 counts (Counts 1 to 17) concerned the same complainant, A. Two counts (Counts 18 and 19) concerned the complainant, B. Counts 20 and 21 concerned the complainants, C and D, respectively.

[3] The offending was alleged to have occurred variously at Goodna, Redbank Plains or Brisbane. Each complainant was under 16 years of age at the time.

[4] Counts 1 to 17 alleged the following offences as having occurred on a date (or, in the case of Count 1, dates) unknown between 27 February 2011 and 15 June 2013:

Count 1	an offence of maintaining an unlawful sexual relationship with A[1]
Counts 2 and 3	offences of unlawfully and indecently dealing with A with the circumstance of aggravation that A was under 12 years[2]
Counts 4, 6, 7, 8, 9, 10 and 15	offences of unlawfully and indecently dealing with A with the circumstances of aggravation that A was under 12 years and that she was under the appellant's care for the time being[3]
Counts 5, 11, 13, 14, 16 and 17	offences of rape of A[4]
Count 12	an offence of procuring A to commit an indecent act with the circumstances of aggravation that A was under 12 years and that she was under the appellant's care for the time being.[5]

[5] The counts concerning B alleged an offence of rape committed between 27 February 2011 and 21 December 2013 (Count 18) and an offence of unlawful and

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1 *Criminal Code Act* 1899 (Qld) sch 1 ('*Criminal Code*') s 229B(1).
2 *Criminal Code* s 210(1)(a), (3).
3 Ibid s 210(1)(a), (3), (4).
4 Ibid s 349(1).
5 Ibid s 210(1)(b), (3), (4).

indecent dealing with the circumstance of aggravation that B was under 12 years (Count 19). Count 20 alleged an offence of unlawful and indecent dealing with C committed between 27 February 2011 and 27 June 2012; whereas Count 21 alleged an offence of unlawful and indecent dealing with D committed between 30 November 2011 and 27 November 2012 with the circumstances of aggravation that D was under 12 years and that she was under the appellant's care for the time being.

[6] The appellant's trial was conducted over 23 days. On the second last day, the jury delivered verdicts of guilty on all counts except Counts 15 and 18. On the last day of the trial, 7 June 2017, they delivered a verdict of guilty on those counts.[6]

[7] The appellant was sentenced on 8 June 2017. For the maintaining offence (Count 1), he was convicted and sentenced to 13 years imprisonment. A serious violent offence declaration was made in respect of the conviction. A period of one day pre-sentence custody was declared to be time served under the sentence. For the other offences concerning A, convictions were recorded but the appellant was not further punished.

[8] For the other offending, the appellant was convicted and sentenced to periods of imprisonment of eight years (Count 18) and one year (for each of Counts 19, 20 and 21). Like declarations as to pre-sentence custody were made. All prison sentences are to be served concurrently.

[9] On 28 June 2017, the appellant filed a Form 26 notice of appeal against conviction and application for leave to appeal against sentence.[7] At the hearing of the appeal on 21 February 2018, the sentence application was not pursued and was dismissed.[8]

Circumstances of the alleged offending

[10] The appellant, the complainants and their families were members of a church at Acacia Ridge. The congregation was comprised principally of persons of central-African origin. The complainants themselves were members of the youth choir which was established in July 2011 and comprised about 20 members.

[11] The appellant was an evangelist at the church. He was also the treasurer and a member of the executive board. In the period from July 2011 to December 2012, he drove choir members to and from choir practice in his mini-van. Choir practice was often at his house at Goodna.

[12] The complainants alleged that the appellant sexually abused them in his vehicle or at his home during choir practice. The abuse ranged from his touching their thighs or vaginas to sexual intercourse with A and B.

[13] The complainants spoke amongst themselves, to their friends at church and to their siblings about the appellant's sexual behaviour towards them.

[14] A's father confronted his daughter with respect to what he had overheard her and her friends discussing. Over a three week period in December 2012, he questioned A about whether, and if so, in what way, the appellant had sexually abused her.

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6 AB1488-1489. The verdict on Count 15 was by a majority: AB1489.
7 AB2505-2511.
8 Appeal Transcript ("AT") 1-2 ll16-20.

Under pressure from her father, A disclosed that the appellant had sexually abused her. Ultimately, she disclosed that the abuse included sexual intercourse.

[15] A's father also questioned other girls from the church, including C and D, but not B, about the appellant's sexual conduct with them. Several of them described pressure that he had placed upon them to complain of sexual abuse by the appellant or to complain of abuse more serious than they had alleged. The pressure was in the form of persistent questioning or calling them liars if they said that the appellant had not sexually abused them, or had not sexually abused them by way of sexual intercourse.

[16] On the Crown case, the appellant was called to a meeting with A's father and the senior pastor of the church on Christmas Day 2012. According to A's father, the appellant made admissions at the meeting of sexual intercourse with A and B. However, it was not until he gave oral evidence at the trial that he disclosed an admission to offending against B.[9] On the other hand, the pastor said that the appellant admitted to touching A but denied sexual intercourse with her; and that he said nothing about B or any of the other complainants.

[17] Also in the Crown case, the appellant made admissions to a friend outside the church hall of having touched A's vagina and to her having touched him until he ejaculated. However, the appellant denied to the friend that he had had sexual intercourse with A.

[18] The appellant denied making admissions to anyone. He gave evidence to the effect that the first he had heard of the allegations was on 8 February 2013. That was the day before the pastor told the congregation that the appellant had been removed from positions of responsibility in the church.

[19] Each of the complainants was interviewed by the police. The interviews were recorded and tendered under s 93A of the *Evidence Act* 1977 (Qld). The oral testimony of each complainant was pre-recorded in proceedings under s 21AK thereof. At trial, the jury viewed the recorded interviews and oral testimony of each complainant. The following is a brief summary of their evidence as it described the alleged offending.

[20] **Complainant A:** This complainant was first interviewed on 9 December 2013, and again on 17 January 2014. She was then about 12 ½ years old. Her evidence was pre-recorded over two days, 15 June and 26 August 2016.

[21] In the first interview, complainant A gave the following history. The first incident happened in 2012 in the appellant's white 7-seater mini-van. He was taking her home from choir practice one evening. She was in the back seat. He stopped near a mango tree and told her it would be better if she sat in the front. When she moved to the outside front passenger seat, he told her to move to the middle front seat. Next he told her to spread her legs apart. He began touching her thighs and then moved his hand under her underwear. He touched her vagina and circled around it with his fingers. He put a finger on the centre of her vagina, removed it, spat on it, and then put it back on her vagina.[10]

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9 He did not disclose it in statements he made to police on 14 June 2014, 29 August 2014, 27 May 2015 and 22 July 2016. Nor did he disclose it in a recorded interview on 9 December 2013: AB1052-1053.

10 AB1612-1616.

[22] A similar incident of touching on, but not in, the vagina by the appellant with fingers was described by A. It occurred on a trip in the appellant's vehicle to choir one Saturday morning. The appellant was wearing a long-sleeved summer shirt with a collar and cuffs. There was a palm tree print on the shirt.[11]

[23] Then, one Friday after school, the appellant stopped his vehicle near a bush. He was wearing black shorts with a white cord and a singlet with many holes in it. He touched her in a similar fashion but, on this occasion, he loosened the white cord and pulled out his penis. He made A hold it in her hand and "squish" it. He started the engine and began to drive. The squishing continued for about three minutes until "white stuff came out".[12]

[24] The next incident occurred one or two weeks after A's birthday. This time it took place in "a green mini Toyota car" that belonged to the vice president of the choir. The appellant was using it to drive A and others home from choir practice at D's residence. After the others had been dropped home, A was told to sit in the front seat. The appellant pushed his hand through the top of her shirt. He squeezed her breasts and told her "they were growing".[13]

[25] Complainant A then described an incident that occurred during a trip to Southbank for a religious event. During the day, she and the appellant went to his vehicle so that they could go shopping. She said that as he was driving, he put his left hand on her vagina. He then spat on his hand and "put it back in". The appellant put his finger inside A's vagina, but it "didn't pain a lot". She started to cry and he stopped.[14]

[26] The following Sunday, she told "the girls" at church what had happened and warned them not to go alone in a car with the appellant.[15] Two of the girls were the appellant's daughters. They said that they already knew and that he did it to everyone.[16] In September 2012, other girls complained to A about breast touching by the appellant.[17]

[27] Complainant A thought that there were "roughly" four other times that the appellant engaged in this kind of conduct towards her. However nothing had happened during 2013.[18]

[28] She explained that her father found out from a parent that "apparently he put his dick in my vagina". When her father put that to her, she denied it. She was asked the same question during the interview. She shook her head. Asked if the appellant had ever threatened her, she said that once when she was getting out of the car, he said to her that if she told anyone, she might die in bed.[19]

[29] In her second interview, Complainant A was asked by police whether "other things" had happened to her in a house. She replied that there had been an occasion when she was at choir practice in the garage of a house at Goodna (the appellant's residence).

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11 AB1624-1626.
12 AB1630-1636.
13 AB1641-1644.
14 AB1653-1661.
15 AB1662-1663.
16 AB1664.
17 AB1668.
18 AB1666.
19 AB1670-1671.

She went upstairs to get a drink. The appellant was there. He poured her a drink which she drank. Then he gave her a hug, "getting her butt", and squeezed her.[20]

[30] On another occasion, she went to look for a friend. It was after choir practice had finished and everyone was outside. She went to the kitchen and, as she was going downstairs, the appellant called her and asked her for a hug. He put his arms around her and squeezed her "butt cheeks". Afterwards, she went downstairs, found her friend and told her about the incident.[21]

[31] Complainant A was asked if there was anything else she wanted to tell police. She said that she had lied to them previously when she denied having "proper sex" with the appellant.[22] She gave the following account of events which she said happened in the green Toyota after choir practice at D's residence.

[32] She was in the middle seat in the back. The appellant was wearing jeans and a black belt. He pushed on her shoulder and slapped her on the thigh. She opened her legs. He made her lower her underpants and squish his penis. He put a finger inside her vagina for 20 seconds. The appellant told her to stop squishing him. He took out a "plastic thing" and put it on his penis. He told her to lie down. Then, he put his penis in her vagina. It hurt and she screamed. He rubbed her vagina with his hand and inserted his penis again. He repeated this four or five times. She said that "white watery stuff" came out of her vagina. The appellant wiped it up with tissues. Later, her mother asked her why she was not walking properly. She said that it was because she had fallen over.[23]

[33] In the pre-recorded cross-examination, complainant A acknowledged that, when asked by her parents, she told them that the appellant had touched her vagina, but did not tell them about any penetration.[24] She said that she told her father separately about the penile penetration and showed him the street location where it had happened.[25] Her father took her to see a medical practitioner on 24 December 2012 and eventually to see police on 9 December 2013.

[34] Complainant A was cross-examined in detail about each of the alleged offences. She was asked about her touching of the appellant's penis. She said that he told her to use both hands, wrapped around it.[26] On one occasion while she was doing that, "white stuff" came out and dripped down his penis. That happened only once while she was squishing him.[27] This event happened in the green car after choir practice at D's residence. A said that the appellant used tissues to wipe up. He took them from the same tissue box that she had seen in the appellant's white van.[28]

[35] In cross-examination, A said that once the appellant had ejaculated, he told her to get into the back seat.[29] Her head was against the passenger door and her feet were on the floor. He told her to open her legs. She did not do so. He pulled his penis

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20 AB1572-1573.
21 AB1578-1580.
22 AB1582.
23 AB1589-1598.
24 AB84-85.
25 AB281, 221.
26 AB130-131.
27 AB146-147.
28 AB150.
29 AB155-156.

out from the top of his pants and put a "plastic thing" around it. He lowered her underpants down to her knees. He rubbed outside her vagina with his fingers and then put "a little bit" of his penis into it. She screamed. He inserted his penis for a second time, "not very far"; and then for a third time, "a little further". She started to cry and a small amount of blood came out of her vagina. The appellant stopped. He then got into the front seat and drove her home.[30]

[36] Defence counsel put numerous propositions to A which she did not accept: that apart from the trip to Southbank, there were only two other occasions when she had been in the appellant's van and, on each occasion, her brother had been there and that he had never worn a singlet, black shorts with a white cord or a shirt with a palm tree print. Also put were negations, consistent with the appellant's version of events, of the separate details of her accounts, including that he never had a tissue box in the van; that he had never driven the green Toyota; and that he had never taken a condom from its packet in front of her. It was suggested to A that she had made up her allegations of sexual abuse; however, it was not suggested that she had fabricated or exaggerated them under pressure from her father.

[37] **Complainant B:** Police interviewed complainant B on 21 December 2013. Her oral testimony was pre-recorded on 29 August 2016. She was 10 years old at the time of the interview.

[38] Complainant B told police that after choir practice at the appellant's residence, she would go to the toilet. The appellant would always follow her around. On two occasions, he touched her and did "bad things" to her. When she tried to scream, he would cover her mouth and offer her $20. He would warn her that if she told anyone, she would not get any money. She did not tell her parents about those things.[31]

[39] Asked to describe the "bad things", B's response, as recorded in the transcript of the interview, was as follows:

> "…He put his thing to me. And then he'll go like this. [The transcriber noted that [B] performed a slight thrusting motion with her hips.] But he did not put his thing and go like this. [The transcriber noted that [B] performed a slight thrusting motion with her hips.]"[32]

[40] When asked what his "thing" was, she said that it was his "rude part" that he used for doing "this", where upon she performed a slight thrusting motion, and for "peeing".[33]

[41] The first of the two occasions was on a Friday. B was between nine and 10 years old. She asked for permission to go to the toilet. The appellant followed her to the toilet. He took off his pants and tried to stop her from pulling up hers. Then "he would put his dick inside me."[34]

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30 AB156-167.
31 AB1679.
32 AB1682-1683.
33 AB1683.
34 AB1687, 1699.

[42] Complainant B said that it was when she was about to sit down on the toilet that the appellant entered. He was grabbing at her stomach, requesting her not to tell anyone, and mentioning $20. According to B, at one point, the appellant's wife walked past the toilet door which was slightly ajar. She did not see B. Then B "slid" down and went out of the toilet. Sometime later, the appellant gave her $20 and told her not to tell anyone.[35]

[43] The second occasion occurred on a Saturday. B was in grade three at the time. She and the appellant were alone upstairs at the appellant's residence. B was going to get something from the refrigerator in the appellant's upstairs kitchen. He hugged her, touched her lower back and then started doing "this". In the interview, B stood up and performed a thrusting motion with her hips. The activity in the kitchen apparently ceased when a family member came upstairs.[36]

[44] In her pre-recorded cross-examination, B was asked to repeat the preliminary complaint that she had made to her mother. She said that she told her mother that she went to the toilet; that the appellant followed her and would not let her exit; that he would try to pull down her pants; and that twice, he "tried to do it to me" – once in the toilet and once in the kitchen. When questioned by defence counsel about this account, B explained that her use of the word "tried" was a mistake. She maintained that what she had told her mother was that the appellant had put his penis in her vagina.[37]

[45] Complainant B said that during the toilet incident, the appellant tried to hit her because he became angry with her for pulling up her pants after he had pulled them down. The appellant tapped her on the shoulder and said "don't get out". He covered her mouth so that she could not scream.[38]

[46] In further cross-examination about that incident, B said that she was wearing pants which the appellant pulled down to her knees. She saw the appellant's wife walk past but she did not shout out to her because the appellant would not let her pass him. He closed the toilet door fully and continued to pull her pants down. She tried to scream; he covered her mouth; and then, he put his penis inside her.[39] She said that intercourse occurred while both she and the appellant were standing on the floor and her pants were no lower than her knees. His penis was inside her vagina for a couple of seconds. He let her go. She pulled her pants up and quickly ran away. She was upset, but not crying.[40]

[47] It was put to B that the appellant never touched her in a sexual way. However, it was not put to her that she was influenced to make her complaint by knowledge that others had complained about sexualised conduct on the appellant's part.

[48] **Complainant C:** The police interview of complainant C took place on 12 December 2013. She was then 14 years old. The pre-recording of her oral testimony occurred on 29 August 2016.

[49] Complainant C spoke of two occasions on which the appellant touched her. Both happened when she was at his residence for choir practice. On the first occasion, she

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35 AB1688-1690.
36 AB1692-1694.
37 AB259-260.
38 AB260-261.
39 AB273.
40 AB274-276.

went upstairs to the toilet by herself. She exited and reached a little hallway upstairs. The appellant was there. He greeted her and then hugged her. She thought that that was normal.[41]

[50] On the second occasion, she was accompanied by her two year old sister. She had taken her upstairs for a drink of water. She took her sister to the toilet. Again, the appellant greeted her at the little hallway. He hugged her. She was wearing a skirt and was holding her little sister. The appellant then came really close to her and, according to C, he felt her vaginal area with his hand over her skirt. His hand was there for about three seconds. She pushed him off and went outside. She was very scared and was crying. She told the appellant's daughter what had happened. She also told one of her sisters who told her other sisters.[42]

[51] In due course, A's father came to hear of the incident. By then, he was asking all the girls in the choir whether the appellant had touched them. She denied to him a suggestion that he made to her that the appellant had had sex with her at her house.[43]

[52] Complainant C said that prior to the removal of the appellant from positions of responsibility in the church, she and her friends, including A, discussed what was happening. The talk was of the appellant having made a five year old girl touch his penis; that he had "done it" to two neighbours and to "this other girl" who had just married; and that he always touched people.[44] She was told by a friend that the appellant had taken a girl into his van, taken off his clothes and shown her his penis.[45] An elder sister told her that the appellant had asked her for her telephone number.[46]

[53] In cross-examination, C said that, when questioned by A's father, she told him that the appellant had touched her.[47] She agreed that A's father was pressing her to tell her more than what she had told him had happened with the appellant. She also agreed that she told other girls that the appellant had touched her on the "arse". She explained that, at that time, she had not wanted to say "vagina".[48]

[54] **Complainant D:** Police interviewed complainant D on 17 December 2013. She was 12 years old at the time. Her oral testimony was pre-recorded on 20 October 2016.

[55] In the interview, complainant D described to police events which occurred when she was "10 turning 11". She had joined the choir. One Saturday, the appellant called at her residence to take her to a youth party at his residence at Goodna. He was driving a white van. She sat in the back. At some point, he told her to sit in the front in the middle seat next to him. She did so. The appellant started touching her legs with his left hand. She indicated that the touching was in her thigh area. It lasted for about 10 seconds. She moved away from him. He continued to drive towards

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41 AB1710.
42 Ibid; AB1731-1732.
43 AB1711.
44 AB1712-1713.
45 AB1737.
46 AB1742.
47 AB294.
48 AB310.

his residence.[49] As they neared his house, he stopped the van. The appellant tried to kiss her. She said "no". He told her to kiss him. She refused.[50]

[56] Complainant D said that during the party, the appellant kept staring at her. After it finished, the appellant took her and others home. Once the others had been dropped off, the appellant told her to sit in the front. She refused. He then drove her home.[51]

[57] According to D, she told her mother what had happened about a week later. She did not speak to other girls about it although she did hear them talking about the appellant. When asked by A's father, she also told him about it. He questioned her whether she had been raped. When she denied that she had been raped, he repeatedly told her not to lie to him.[52]

[58] In cross-examination, D said that it was A's father whom she first told about the incident. He approached her in December 2012. His manner was forceful. She felt scared and intimidated.[53] It was when her parents asked her what she had been speaking to A's father about that she told them of the incident.[54]

[59] **Appellant's evidence:** The appellant gave evidence at his trial with the assistance of an interpreter. He denied any sexual misconduct with the complainants and denied making any admissions of it. He said that he drove A to or from choir practice on only two occasions and that on each occasion her brother was with them.[55] He did take her and others to Southbank but she and he did not leave together to go shopping.[56] He did not own a shirt with palm tree print or black shorts with a white cord.[57] He said that he had never driven the choir vice president's green Toyota.[58]

[60] With regard to his own sexual functioning, the appellant said that his penis would become flaccid immediately after ejaculation. Four or five hours would need to elapse before he could attain an erection. He said that family planning was not permitted by his church. He had never used a condom and had never seen one since his arrival in Australia.[59]

[61] The appellant denied meeting with the pastor and A's father on Christmas Day 2012. He also denied that a conversation about A had occurred with his friend outside the church hall.[60] He said that he did not use tissues. He used a small piece of cloth for blowing his nose.[61]

The pre-trial ruling

[62] The appellant applied for severance of the indictment. He sought an order pursuant s 597A of the *Criminal Code* (Qld) for four separate trials, one for the count or

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49 AB1758; 1764-1766.
50 AB1766-1767.
51 AB1768.
52 AB1777.
53 AB374-376.
54 AB377.
55 AB1241.
56 AB1203, 1242.
57 AB1219.
58 AB1242.
59 AB1222-1223.
60 AB1251-1252.
61 AB1253-1254.

counts concerning each complainant. The application was heard on 15 June 2016 by a judge who did not become the trial judge.

[63] The pre-trial hearing judge received written and oral submissions from the appellant and the Crown. He noted that the appellant did not challenge that the indictment contained a series of offences of the same or similar character. The appellant's point was that the test prescribed by the High Court in *Pfennig v The Queen*[62] was not satisfied so as to facilitate cross-admissibility of evidence of offending against one complainant in proof of offending against the other complainants. As a consequence justice required that separate trials be ordered.

[64] His Honour referred to the test in *Pfennig* and to the observations with respect to it made in *R v CBM*.[63] In that case, Henry J stated that the assessment required by the test in a multiple complainant case focuses on whether each complainant's evidence has a high degree of probative force in aiding to prove charges relating to another complainant or complainants.[64] He explained the rationale for admissibility as being that the degree of similarity or connection of features, by inference, so heightens the objective improbability of the alleged offending occurring other than as alleged, that there is no reasonable view of the evidence consistent with innocence of the accused.[65]

[65] The learned pre-trial hearing judge also referred to the parties' respective submissions. In dismissing the application, he said:

> "Accepting that a high degree of probative force is required, I am of the view that the indicia relied upon by the Crown satisfies the *Pfennig* test so as to have the requisite degree of probative force which outweighs any prejudice to the defendant and being features which, to my mind, are not allowable of an innocent explanation or any other reasonable view other than that the defendant is guilty of the offences charged. I agree with the Crown's submission that it shows a course of conduct for a sole single purpose of sexual satiation. I am satisfied that any prejudice which would attend any trial can be adequately addressed by appropriate directions from the trial judge."[66]

The grounds of appeal

[66] The appellant relies on the following grounds of appeal:[67]

1. The learned pre-trial hearing judge erred in refusing the defence application for separate trials ("the joinder ground").

2. The learned pre-trial hearing judge erred in his directions to the jury about the way in which they might use the evidence of one offence in proof of another ("the similar fact direction ground").

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62 (1995) 182 CLR 461; [1995] HCA 7 per Mason CJ, Deane and Dawson JJ at 481.
63 [2015] 1 Qd R 165; [2014] QCA 212.
64 At [41].
65 At [44].
66 AB57 ll28-36.
67 Amended notice of appeal filed 30 January 2018. Leave to amend granted 21 February 2018. The original Grounds 2 and 3 were abandoned. Additional Grounds 4, 5 and 6 were added. For convenience, they are numbered 2, 3 and 4 respectively above.

3. The verdict of guilty of Count 18 (penile rape of B) was unreasonable ("the unreasonable verdict ground").

4. There has been miscarriage of justice because of the incompetence of counsel ("the incompetence of counsel ground").

Ground 1 – the joinder ground

[67] Section 567(2) of the *Criminal Code* (Qld) permits joinder on the same indictment if, relevantly, the charges are, or form part of, a series of offences of the same or similar character ("the character limb") or a series of offences committed in the prosecution of a single purpose ("the purpose limb"). The learned pre-trial hearing judge held that the offending here was committed for the sole and single purpose of sexual satiation. Hence, it fell within the purpose limb.

[68] On appeal, the appellant submits that the offences charged on the indictment were not a **series** of offences and hence neither the character limb nor the purpose limb could apply to them. That is because there was an absence of sufficient nexus or connection between all of the 21 offences. The absence of a sufficient nexus or connection is the result, the appellant submits, of an insufficiency in the admissibility of the evidence of offending against each complainant in proof of the offending against the other complainants.

[69] The discretion in s 597A(1) to order separate trials may be exercised where charges have been joined conformably with s 567(2). It is enlivened if the court is of the opinion that an accused person may be prejudiced or embarrassed in their defence by reason of a joinder of charges or if for any other reason, it is desirable to direct separate trials of offences which have been joined.

[70] The appellant further submits that the learned pre-trial hearing judge erred in exercising this discretion. The error arose from a mistaken apprehension on his part that the evidence of each one of the offences was admissible in proof of every other offence on the indictment, as well as from a resultant failure to have regard to the degree of prejudice to the appellant that would result if all the offences were tried together. I now turn to the appellant's arguments in support of the submissions.

[71] **Appellant's submissions:** The appellant submits that the admissibility of similar fact evidence is to be determined in the context of the facts in issue. Here, in respect of all complainants, the issue was whether the sexual offending as alleged occurred at all. A particular aspect of that, as concerned A and B, was whether, if it occurred, it included sexual intercourse.[68] The appellant recounts that the Crown sought to use similar fact evidence in support of an argument that, absent collusion, it was improbable that each complainant would have told similar lies.[69] I note, at this point, that the appellant does not challenge the existence of certain similarities in the circumstances of and surrounding the alleged offending made by the respective complainants on which the Crown relied.[70]

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68 Appellant's Outline of Submissions ('AOS') at [24].

69 AB1404 ll34-40.

70 As summarised by the learned trial judge in his summing up: AB1403 l30 – AB1404 l9.

[72] Referring to observations made by the High Court in *Phillips v The Queen*,[71] the appellant submits that to be admissible, similar fact evidence must possess some particular probative quality. It must have a really material bearing on the issues to be decided which clearly transcends its prejudicial effect. Reference is also made to the statement by the plurality in *Hoch v The Queen*[72] that, being circumstantial evidence, similar fact evidence will have probative value if it bears no reasonable explanation other than the happening of the events in issue.[73]

[73] Drawing from these observations, the appellant submits that the relevant inquiry for the test of admissibility is into the probative force of the similar fact evidence. That enquiry, it is suggested, is not fulfilled merely by a comparison of similarities and dissimilarities between the similar putative fact evidence and the offence sought to be proved by it.[74]

[74] Critically, the appellant submits that in the context of this case, the features of the evidence of particular probative force are:

- in the case of the sexual offences said to have occurred in the appellant's van (involving A and D) – that they occurred on the journey to or from choir practice and that the appellant invited each complainant, the only child in the van, to sit in the middle front seat next to him in order to facilitate the sexual abuse;
- in the case of the non-penetrative sexual offences said to have occurred in the appellant's house (involving A, B and C) – that the offences occurred when a complainant had come upstairs during choir practice to get a drink of water and that a request for a hug preceded sexual contact.[75]

[75] The appellant contends that there was no admissible similar fact evidence in proof of B's allegation of rape.[76] Her and A's respective allegations of penile penetration did not bear strongly probative similarity with each other or to any of the other offences alleged by the other complainants.[77] There was no support for an argument that it was improbable that B would come up with a "similar lie" of rape because there was insufficient similarity between the allegations of touching made by C and D and the rape alleged by B, or between the circumstances of the rape by penile penetration alleged by A and those of the rape alleged by B.[78] For the latter, the first, and only, act by the appellant was to insert his penis into her vagina, whereas for A, the penile intercourse was a culmination of increasingly intimate sexual activity including masturbating him. Also, B was younger than the other complainants and, in her case, there were others in the vicinity of the upstairs toilet and thus a heightened risk that the appellant would be caught.[79] The available hypothesis consistent with innocence of rape of B was that while the appellant was prepared to rape an older child when he was alone with her away from her

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71 (2006) 225 CLR 303; [2006] HCA 4 per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ at [54].
72 (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 296.
73 AOS at [25].
74 Ibid at [26].
75 Ibid at [27].
76 Ibid at [28].
77 Ibid at [37].
78 Ibid at [38]-[40].
79 Ibid at [39], [41]-[42].

residence, he would not be prepared to rape a younger child in his own residence when others, including his wife, were around.[80]

[76] The appellant also contends that there was no admissible similar fact evidence in proof of A's allegations of the appellant's sexual mistreatment of her in the green Toyota.[81] The appellant concedes that D's evidence was admissible in respect of offending against A alleged to have been committed in the middle seat in the front of the appellant's van, but submits that it was not admissible in proof of A's allegations of events in the green Toyota: that she was required to masturbate the appellant to ejaculation; that he placed a condom on his penis; and that he then raped her until he again ejaculated.[82]

[77] Those features of the appellant's alleged offending are markedly different from those of his alleged offending in the front seat of vehicles, the appellant submits. Allowing for them, the appellant further submits that there is no scope for evidence of the latter to have particular probative value arising from an improbability of similar lies. D's evidence, it is argued, revealed no more than a propensity on the appellant's part to behave sexually with girls in the choir.[83] Here, the available hypothesis consistent with innocence is that while the appellant was guilty of indecently touching A and D after requesting them to move to the front of the vehicle, his offending did not go so far as having D masturbate him or having sexual intercourse with her.[84] In a reciprocal argument, the appellant submits that A's evidence of events in the back seat of the green Toyota were not admissible as similar fact evidence in respect of the charge concerning D.[85]

[78] In addition to his concession with respect to the cross-admissibility of evidence of the front seat offending against A and D, the appellant also concedes that in a trial of offences involving both of them, such directions could be given with respect to evidence that was not cross-admissible as would avoid unacceptable prejudice.[86]

[79] The appellant further concedes that the evidence of each of A, B and C about being hugged, and then indecently dealt with, by the appellant upstairs while at choir practice was admissible in proof of offences of the same type against the others.[87] However, the appellant submits, B's and C's evidence about that offending had no particular probative value for the alleged offences against A and D committed in vehicles.[88] Nor was A's and D's evidence about the alleged offending in the vehicles of sufficient probative value to warrant its admission in proof of the alleged offences against B and C committed upstairs.[89]

[80] In oral submissions, senior counsel for the appellant contended that "the critical risk of prejudice" that arose from the joinder of all counts was that evidence of the

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80 Ibid at [43].
81 Ibid at [28].
82 Ibid at [29]. This submission overlooks A's evidence in cross-examination which suggests that the masturbation occurred in the front seat: AB155-156.
83 AOS at [31].
84 Ibid at [30].
85 Ibid at [32].
86 Ibid at [33].
87 Ibid at [34].
88 Ibid at [35].
89 Ibid at [36].

appellant's less serious alleged offending was admitted in proof of the alleged rapes of A and B.[90]

[81] The appellant's ultimate submission on this ground was put in the following terms:

> "Thus, having regard to the limited cross-admissibility of the evidence and the need to ensure fairness to the appellant, but recognising –
>
> (a) the undesirability of multiple trials involving the same complainants; and
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> (b) the assumption that a jury will follow directions;
>
> and attempting to reduce the complexity of the directions required about the limits of admissibility,
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> the appellant submits that he should have been tried on two indictments:
>
> - one concerning the complaints of A and D, accompanied by appropriate directions about the limits of the admissibility of A's and D's evidence in the charges involving the other; and
> - the second concerning the complaints of C and B, accompanied by appropriate directions about the limits of admissibility of C's and B's evidence in the charges involving the other".[91]

[82] In making this submission, the appellant acknowledges that this is not the only combination of charges that would alleviate the risk of unfair prejudice to the appellant. There is a further acknowledgement that any of the complainants might be called to give admissible similar fact evidence in the trial of counts that did not relate to her.[92]

[83] **Respondent's submissions:** The respondent submits that, here, the probative force of the similar fact evidence lay in the common underlying pattern that, as a matter of common sense, increased the objective improbability of each event occurring other than as alleged. Notwithstanding differences in detail identified by the appellant, there is an underlying pattern to the appellant's alleged offending. It lies in the relationship that he had with each of these complainants, their similar ages and the general manner in which he took advantage of opportunities that arose for him to express, albeit in different ways, his sexual interest in them.[93]

[84] In elaborating upon the underlying pattern, the respondent instances the appellant's position of trust as a church leader; that the alleged offending occurred during choir practice at his residence, when he was transporting the complainants to or from the choir practice or at other church-related activities; that the complainants were away from the protection of their parents at the time; that the appellant would take advantage of opportunity, as it arose, to satisfy sexual interest in a complainant; and

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90 AT1-4 ll28-32.
91 AOS at [45].
92 Ibid at [46].
93 Respondent's Outline of Submissions ('ROS') at [8].

the temporal connection between the events constituting the alleged offending against all complainants.[94]

[85] The probative force of the evidence in this case lay, the respondent submits, in responding to the proposition that an individual complainant should be rejected as worthy of belief because her account was improbable having regard to ordinary human experience. Reference is made to cross-examination by defence counsel of A directed towards validating such a proposition.[95]

[86] By way of further illustration, the respondent ventures that, taken on its own, B's evidence was open to criticism that it was not credible given that the alleged rape of her occurred during choir practice at a residence where other church leaders were present. The respondent submits that proof that other girls in the very same choir had been sexually assaulted by the appellant during choir practice at the same residence when other church leaders were present was capable of allaying any reasonable doubt that the jury might have had. It was that feature of the evidence of the others and its significant connection to the factual issues that the jury had to determine with respect to the alleged offending against B that invested the evidence of the other girls with significant probative force.[96]

[87] For these reasons, the respondent submits that the evidence of each complainant was admissible in full as similar fact evidence in proof of alleged offences against the other complainants. The learned pre-trial hearing judge did not err in regarding it as so admissible.

[88] In developing an alternative argument, the respondent notes the appellant's concession concerning the admissibility of D's evidence of the offence committed against her in the appellant's van, in proof of the alleged offences against A. The respondent then refers to allegations of offending upstairs by the appellant – allegations by A, that he hugged her and squeezed her buttocks; by B, of sexual interaction with her in the toilet and the kitchen including hugging her and thrusting his hips towards her groin; and by C, that he hugged her and touched her in the vaginal area.[97] The respondent submits that the conduct as described by each of B and C is similar to that involving A in the upstairs area of the appellant's residence. Their evidence of such conduct had probative force in rebutting the proposition that sexual offending by the appellant in his own residence was inherently unlikely because either his wife, or other church leaders who were present, might catch the appellant out when he was engaging in such conduct.

[89] Accordingly, the respondent submits, the evidence of B and C would be admissible as similar fact evidence in the trial of alleged offences against A irrespective of whether those offences were tried with the alleged offences against B and C (and D) on the one indictment.[98] On the footing that the evidence of B and C, as well as D, was so admissible, it cannot be that by virtue of the joinder, the appellant lost a real chance of acquittal, at least so far as the alleged offences involving A are concerned.[99]

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94 Ibid at [9].
95 AB194, 197, 223.
96 ROS at [21].
97 Ibid at [14].
98 Ibid at [25].
99 Ibid at [16].

[90] **Discussion:** This ground of appeal challenges the refusal of the learned pre-trial hearing judge to exercise the discretion conferred by s 597A to order separate trials. Although the appellant questions the anterior administrative conduct in joining all the charges in the one indictment, that conduct is not, itself, a subject of appeal. Nonetheless, the cross-admissibility of evidence in proof of the charges in question is as much relevant to joinder in the first place as it is to exercise of the discretion.

[91] Whether the evidence relating to each complainant was wholly admissible in proof of the alleged offending against the other complainants is to be determined in accordance with the principles stated by the High Court in *Pfennig* and *Phillips*.

[92] In *Phillips*, the accused, a teenage youth, was tried on six counts of rape and one count each of assault with intent to rape and indecent assault arising from separate incidents involving six complainants. An application for separate trials was rejected. The trial judge directed the jury that the evidence of one complainant could be used in relation to the counts involving other complainants on the issue of the reliability of the evidence of each complainant that she did not consent to the accused's conduct. The High Court held that the evidence was inadmissible for that purpose.

[93] In the course of its reasons, the High Court considered a secondary argument advanced by the respondent that the evidence in question was admissible as similar fact evidence on issues other than consent. It was an argument that sought to draw upon a pattern or thread common to the versions given by each complainant and to advance that as a basis for cross-admissibility. The argument relied upon a perceived relaxation in *Pfennig*[100] of the test for admissibility of striking similarity or underlying unity in the similar fact evidence.

[94] In rejecting the argument, the High Court reaffirmed that similar fact evidence is, *prima facia*, inadmissible because of its prejudicial effect. Drawing from many decisions of high authority, their Honours collected various formulations of the stringency required for admission of similar fact evidence. They said:[101]

> "The 'admission of similar fact evidence … is exceptional and requires a strong degree of probative force' (*Director of Public Prosecutions (UK) v Boardman* [1975] AC 421 at 444 per Lord Wilberforce, approved in *Markby v The Queen* (1978) 140 CLR 108 at 117 per Gibbs A-CJ, Stephen, Jacobs and Aickin JJ concurring; *Perry v The Queen* (1982) 150 CLR 580 at 586, 589 per Gibbs CJ; *Sutton v The Queen* (1984) 152 CLR 528 at 533 per Gibbs CJ; *Pfennig v The Queen* (1995) 182 CLR 461 at 481 per Mason CJ, Deane and Dawson JJ). It must have 'a really material bearing on the issues to be decided' (*Director of Public Prosecutions (UK) v Boardman* [1975] AC 421 at 439 per Lord Morris of Borth-y-Gest, approved in *Markby v The Queen* (1978) 140 CLR 108 at 117 per Gibbs A-CJ, Stephen, Jacobs and Aickin JJ concurring). It is only admissible where its probative force 'clearly transcends its merely prejudicial effect' (*Perry v The Queen* (1982) 150 CLR 580 at 609 per Brennan J; *Sutton v The Queen* (1984) 152 CLR 528 at 548-549 per Brennan J; at 560 per Deane J; at 565 per Dawson J; *Harriman v The Queen* (1989) 167 CLR 590 at 633 per McHugh J; *Pfennig v The Queen* (1995) 182 CLR

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100 Per Mason CJ, Deane and Dawson JJ at 484.

101 At [54] (citations footnoted in original).

461 at 481 per Mason CJ, Deane and Dawson JJ). '[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind.' (*Sutton v The Queen* (1984) 152 CLR 528 at 534 per Gibbs CJ). The criterion of admissibility for similar fact evidence is 'the strength of its probative force' (*Hoch v The Queen* (1988) 165 CLR 292 at 294-5 per Mason CJ, Wilson and Gaudron JJ). It is necessary to find 'a sufficient nexus' between the primary evidence on a particular charge and the similar fact evidence (*Hoch v The Queen* (1988) 165 CLR 292 at 301 per Brennan and Dawson JJ, approving words of Lord Hailsham of St Marylebone LC in *Director of Public Prosecutions (UK) v Kilbourne* [1973] AC 729 at 749). The probative force must be 'sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused' (*Director of Public Prosecutions (UK) v P* [1991] 2 AC 447 at 460 per Lord Mackay of Clashfern LC). Admissible similar fact evidence must have 'some specific connection with or relation to the issues for decision in the subject case' (*Pfennig v The Queen* (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ). As explained in *Pfennig v The Queen* ((1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson JJ):

> '[T]he evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.'"

[95] In the view of the High Court, none of these criteria were met either on the issue of whether the accused committed the acts alleged or the on issue of honest and reasonable belief on his part as to consent. Their Honours' assessment of the similarities in the evidence for which the respondent contended, is instructive. They said:[102]

> "The similarities relied on were not merely not "striking", they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant's desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon."

[96] Equally instructive are the observations made by their Honours towards the end of their reasons. Under the heading "*Conclusion: a stringent rule*", they said:

> "[78] It can be appreciated that separate trials of the several complaints by different complainants adds to the cost of the prosecutions and the defence of the accused. However, the dangers, in the trial of the appellant, of admitting the evidence relevant to all of the several allegations against him, was very

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102 At [56].

> great. Despite the efforts of the trial judge to give the jury precise instructions on the separate admissibility and use of different evidence, in a case such as the present, such instructions were bound to be confusing and prone to error. The prejudice to the fair trial of the appellant was substantial.
>
> [79] Criminal trials in this country are ordinarily focused with high particularity upon specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided. That threshold was not met in this case. It was therefore necessary that the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. This is what *Pfennig* and other decisions of this Court require. To the extent that *O'Keefe* or other authority suggests otherwise, it does not represent the law. No other outcome would be compatible with the fair trial of the appellant."

All convictions were quashed and a formal order for a retrial on all counts was made.

[97] Not long after it was delivered, the decision in *Phillips* was applied by this Court in *R v MAP*.[103] The relevant issue for present purposes arises from the first ground of appeal in that case, namely, that the accused had been wrongly refused separate trials.

[98] In *MAP*, the accused had been tried on two counts of the digital rape of two 15 year old females who were known to him. He was convicted on one count and acquitted on the other. The offending was alleged to have occurred at the same beachside holiday house during school holidays about a year apart. On each occasion, the complainant was sleeping close by other friends. She was wakened to find the accused touching her. Digital penetration of the vagina followed.

[99] Keane JA (with whom McMurdo P and Jones J agreed) noted that the High Court had accepted that the exclusionary rule against similar fact evidence might be displaced by reason of the probative value of the improbability of similar lies by complainants where the evidence went to proof of the issue of whether the accused had done the acts of which the complainants complained. In doing so, the High Court had emphasised the continuing necessity for a "strong degree of probative force" if the exclusionary rule is to be displaced and the "striking similarity" that will usually be necessary if the evidence of similar facts is to have a sufficiently strong degree of probative force to displace the exclusionary rule.[104]

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103 [2006] QCA 220.

104 At [43].

[100] His Honour considered it significant that, in *Phillips*, the High Court had specifically regarded as insufficient, in this context, similar fact evidence indicative of an accused's "recklessness in persisting with the offending conduct near other people who might be attracted by vocal protests". His Honour continued:

> "[45] Furthermore, the dissimilarities in the present case are relevant to this assessment. Especially strong in this regard are the circumstances that Ms S and the appellant had been drinking heavily, the appellant's alleged misconduct with Ms S was associated with an invitation to "come outside" and that the appellant physically threatened the safety of Ms W. In these circumstances, it is not possible to sustain the conclusion that there was an underlying pattern to the appellant's alleged attack on each of Ms S and Ms W. In one case, there was an act of digital rape which involved an invitation to a further sexual encounter by one young person affected by alcohol to another young person who was also so affected. In the other case, there was a sober act of digital rape accompanied by physical threats.
>
> [46] For these reasons, I conclude that the appellant's first ground of appeal must be upheld."

The conviction was quashed and a retrial on that count ordered.

[101] Guided by these principles and the illustrations of their application in *Phillips* and *MAP*, I now turn to consider their application in this case. The most serious offending alleged against the appellant is that of penile rape of A and B. He denies that it occurred. Of course, admission of evidence that he committed a penile rape of one of them would be highly prejudicial to him in the prosecution of an offence of penile rape of the other in the one trial. Moreover, there is good reason to doubt that a direction to disregard the evidence of each of these complainants in the consideration by the jury of the charged penile rape offence of the other, would be effective in countering that degree of prejudice.

[102] Complainant A complained of non-consensual penile penetration of her vagina in the backseat of the green Toyota. It had been preceded by acts of increasing indecency towards her on the appellant's part. On earlier occasions, he had touched her thighs or the outside of her vagina in his van. On this occasion, she had first been required to masturbate him to ejaculation, apparently in the front seat, then been requested to move to the back seat. He placed a condom on his penis before he penetrated her vagina and engaged in intercourse until he ejaculated.

[103] In the case of complainant B, there was no allegation of physical interaction with the appellant before the incident in the toilet at his residence. There was no antecedent sexual conduct of any kind. The appellant covered B's mouth to stop her screaming. It is alleged that he inserted his penis into her vagina for a couple of seconds. He did not use a condom. B's account does not suggest that he ejaculated.

[104] There are then obvious and significant differences in the conduct alleged against the appellant in committing the penile rapes. In my view, the differences preclude the formulation of an underlying pattern in the mode in which the alleged penile rapes were committed. In this respect, the differences are comparable with those identified in *MAP*.[105] In the absence of such a pattern, it follows that the evidence

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105 At [45].

of the one complainant as to penile rape is not admissible in proof of penile rape of the other.

[105] More broadly, there is, in my view, force in the appellant's submission that the evidence of B and C about offending that occurred in the upstairs toilet, kitchen and hallway of the appellant's residence had no particular probative value for the alleged offences against A and D committed in vehicles. Their respective bodies of evidence lacked an underlying unity and hence a strong degree of probative force. There was also a reciprocal lack of strong probative force in the evidence of A and D of offences committed in vehicles with respect to offences alleged to have been committed in upstairs areas of the appellant's residence against B and C. Here, too, these respective bodies of evidence were not cross-admissible on account of the absence of strong probative force. Any direction to the jury with respect to that would necessarily be complex and arguably testing for them to apply in terms of keeping separate the various bodies of evidence in their deliberations.

[106] In drawing these conclusions with respect to cross-admissibility, I have not overlooked that overall similarities do exist in the alleged offending; the appellant was the choir master; each complainant was a choir member; they were of similar ages and all girls; the offending occurred at, or on the way to choir practice or at other church activities; except in one instance involving a two year old, it occurred when the appellant was alone with the complainant; and each complaint was of sexualised conduct by the appellant. These are, however, similarities at a rather generalised level. This level of generalisation does not invest the entirety of each complainant's account with the degree of cogency required for admissibility in proof of the entirety of the particular offending conduct alleged by every other complainant. That that is so does, however, leave room for acknowledgment, as the appellant properly concedes is the case, that in some instances, there are sufficient similarities in the modes in which the appellant is alleged to have offended to give to the accounts of these instances the degree of cogency required for evidential cross-admissibility.

[107] The instances to which I have referred sufficiently illustrate that important evidence of serious offending was not cross-admissible. The learned pre-trial hearing judge erred in reasoning that the whole of the evidence of each complainant was cross-admissible. That error materially influenced his consideration of the exercise of the discretion under s 597A. As a result, he erred in exercising it. Allowing for the important instances of lack of cross-admissibility and having regard to the prejudice arising from joinder which could not be adequately addressed by directions, his Honour should have ordered separate trials of the alleged offences against A and B at least.

[108] The respondent's alternative argument seeks to maintain the convictions on the counts involving A. It is dependent upon the proposition that the entirety of B's, C's and D's evidence was cross-admissible in proof of the alleged offences against A. That proposition is flawed particularly since B's evidence of penile rape of her was not admissible in proof of penile rape of A. It follows that this argument cannot be accepted.

[109] For these reasons, this ground of appeal has been made out. The appeal must therefore be allowed and all convictions quashed.

Ground 2 – the similar fact direction ground

[110] The jury were directed that they had to be satisfied that there was no real risk that the evidence of the complainants was untrue because it had been concocted;[106] that they had to be satisfied that the evidence of each complainant was truthful and accurate with respect to the alleged similar conduct;[107] and that the facts proved with respect to the particular complainant under consideration were so similar to the allegations involving other complainants that there was no reasonable view of the evidence other than that the appellant committed the acts as alleged.[108] They were further directed as to the similarities relied on by the Crown and as to the challenge by the defence to similarity.[109] The jury were told that if they did not think the similarities in fact existed, they had to consider the evidence of each complainant independently and without having regard to the evidence of others.[110] As well, they were warned against pure propensity reasoning.[111]

[111] However, the jury were never instructed at any stage that certain evidence of any of the complainants, if accepted by them as true, was not admissible in law in proof of particular alleged offending against other complainants. No direction was given to ignore particular evidence because of inadmissibility in proof.

[112] The respondent submits, correctly, that whether the directions that were given were sufficient depends upon whether there were limits to the cross-admissibility of evidence in relation to specific counts or specific complainants.[112] As I have explained, in my view, there were limits of that kind. The directions were deficient in failing to direct the jury as to such limits.

[113] Accordingly, this ground of appeal is also established. I would add that, in upholding it, I do not mean to imply that had the omitted directions been given, then prejudice to the appellant resulting from the joinder of all counts would have been adequately addressed. They would not have had that effect, in my view, for the reasons given in relation to Ground 1.

Ground 3 – the unreasonable verdict ground

[114] **Appellant's submissions:** In a brief written submission which was not elaborated in oral submissions[113], the appellant contends that "inherently incredible detail" in B's rape allegation ought to have caused the jury to have had reasonable doubt about the appellant's guilt on Count 18.[114] The following details are listed in support of the argument:

> "• the proximity of the appellant's wife who was said to have walked past the toilet door;
>
> • the boldness of the offending – not only was the appellant's wife present, but so was the whole of the youth choir and the adults involved with the choir, all of whom were permitted to use the toilet without asking;

106 AB1403 ll11-18.
107 Ibid ll20-24.
108 Ibid ll24-28.
109 Ibid l30 – AB1405 l7.
110 AB1405 ll9-11.
111 Ibid ll11-19.
112 ROS at [18].
113 AT1-14 ll23-25.
114 AOS at [66], [67].

- that the appellant entered the toilet and raped her immediately, without any preceding touching; and
- the way in which intercourse was said to have occurred, with them both standing on the floor with their pants pulled down to their knees while she tried to scream".[115]

In oral submissions with respect to Ground 4, senior counsel for the appellant referred also to the availability of an argument that having heard rumours from other girls, B drew upon them to make up the account of the penile rape in order "to go along with" the others.[116]

[115] **Respondent's submissions:** The respondent submits that determinations whether these details rendered B's account of the rape inherently improbable are informed by ordinary human experience and are properly within the province of a jury to determine. In particular, there is no reason why this Court's assessment of the probability of sexual activity occurring in the manner described by B, would prevail over that made by a jury.[117]

[116] The respondent notes that the jury were directed by the learned trial judge to scrutinise B's evidence with great care. They were instructed that the Crown had to prove that the appellant penetrated her genitalia with his penis and that any degree of penetration was sufficient.[118] His Honour reminded the jury of defence counsel's submission that, as described by B, the act of rape must have been almost physically impossible.[119]

[117] During their deliberations, the jury asked to review B's interview with police and her pre-recorded evidence.[120] When the evidence was replayed, they were reminded of the appellant's denial of committing any sexual offences and of evidence that his wife had given to the effect that there had been no opportunity for the rape offending involving B to have taken place.[121] Thus, the respondent submits, the jury at all times had the benefit of adequate and accurate directions on this count.

[118] **Discussion:** A complaint that a verdict is unreasonable or cannot be supported by the evidence will only succeed if "after making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted".[122] The complaint will fail if "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".[123]

[119] In *MFA v The Queen*,[124] McHugh, Gummow and Kirby JJ remarked, in effect, that it is "not uncommon in most trials" for "some aspects of the evidence [to be] less than wholly satisfactory". Their Honours said in that regard:

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115 Ibid.
116 AT1-9 ll39-41.
117 ROS at [35].
118 AB1420 ll19-21.
119 Ibid ll13-15.
120 AB1449 ll1-7.
121 AB1457 ll1-9.
122 *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63 per Mason CJ, Deane, Dawson and Toohey JJ at 494, cited by McHugh, Gummow and Kirby JJ in *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at [56].
123 *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 493 cited by Gleeson CJ, Hayne and Callinan JJ in *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at [25].
124 (2002) 213 CLR 606; [2002] HCA 53 at 634.

> "Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention."

[120] In *R v Baden-Clay*,[125] the High Court again emphasised the due regard to be given to the role of the jury in deciding an "unreasonable verdict" ground of appeal. The Court observed:

> "[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact."[126] Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect,[127] the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.[128] Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court 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."[129]

[121] It is unnecessary for present purposes to examine in detail the evidence given by B with respect to this count. The appellant does not complain of an absence or insufficiency of evidence of penile penetration in her evidence. In both her interview and pre-recorded evidence, she said that the appellant put his penis in her vagina.

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125 (2016) 258 CLR 308; [2016] HCA 35.

126 *Hocking v Bell* (1945) 71 CLR 430 at 440. See also *Brennan v The King* (1936) 55 CLR 253 at 266; *Sparre v The King* (1942) 66 CLR 149 at 154; *Keeley v Mr Justice Brooking* (1979) 143 CLR 162 at 188; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 601; *MacKenzie v The Queen* (1996) 190 CLR 348 at 365; *MFA v The Queen* (2002) 213 CLR 606 at 621 [48].

127 *Kingswell v The Queen* (1985) 159 CLR 264 at 301; *Brown v The Queen* (1986) 160 CLR 171 at 201; *Katsuno v The Queen* (1999) 199 CLR 40 at 63-64 [49]; *Cheng v The Queen* (2000) 203 CLR 248 at 277-278 [80]; *Alqudsi v The Queen* (2016) 258 CLR 203 at 208 [2], 213 [16], 273-274 [195].

128 *M v The Queen* (1994) 181 CLR 487 at 494; *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56].

129 *M v The Queen* (1994) 181 CLR 487 at 494-495. See also *R v Hillier* (2007) 228 CLR 618 at 630 [20] and the authorities cited.

[122] The appellant contends that B's evidence was inherently improbable having regard to certain factors. The contention is that, cumulatively, they rendered B's account inherently incredible.

[123] Whether that was so or not falls to be determined by an assessment of the degree to which, if at all, those factors so undermine the likelihood of B's account of penile penetration of her vagina being reliably accurate that it cannot be believed. For each factor, the assessment is necessarily informed by the ordinary human experience of the jurors. Here, it was also informed by the jury's observation of B as she gave her account to police and responded to cross-examination in the pre-recorded evidence. The conviction indicates that, in this case, the jury concluded that B's account was not inherently incredible.

[124] In my view, there is no basis at all for this Court to disregard the jury's finding in this respect. Accordingly, this ground of appeal is not established. It is appropriate that an order for retrial include retrial on Count 18.

Ground 4 – the incompetence of counsel ground

[125] In the course of oral submissions on this ground of appeal, senior counsel for the appellant identified as the miscarriage of justice relied upon for it, two failures on the part of defence counsel. The source of the first failure was not to cross-examine each of the complainants with respect to "pressure" on them, arising from questioning by A's father or group discussions with other girls, to make up their complaints. The latter was particularly relevant in the case of B to whom A's father had not spoken about the appellant.

[126] The second failure was, in his address, not to invite the jury to consider whether it was group talk, of which there was evidence from other girls who were not complainants, that had pressured the complainants into making up their complaints.[130]

[127] The appellant submits that there is no objectively rational reason for defence counsel's failure to cross-examine or to address on those matters. There is a significant possibility that the failures affected the outcome of the trial. Hence, there has been a miscarriage of justice. At the conclusion of oral submissions, counsel explained that the case on this ground was not one of a failure of process that departed from the essential requirements of a fair trial.[131]

[128] The respondent submits that defence counsel's conduct was objectively explicable on the basis that the argument that the complainants, particularly B, had gone along with what they had heard girls say, was a weak one given the differences in the accounts of what was said amongst them. There had been thoroughness in the cross-examination on inconsistencies within the evidence of each complainant and with accounts given by them to preliminary complaint witnesses. The respondent submits that the reliability and credibility of each complainant was "clearly challenged". Criticisms based on inconsistences were emphasised in defence counsel's address to the jury. There was no miscarriage of justice.

[129] This ground of appeal is focused upon two aspects of defence counsel's conduct with respect to a matter of potential significance for the credibility of the respective complainants. The degree of significance is one that would vary between the

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130 AT1-10 ll3-21.

131 Ibid ll12-13.

complainants. Further, it is not at all clear what each complainant would have said or how she would have reacted if cross-examination on the topic had occurred.

[130] In these circumstances, I would hesitate to conclude that this ground of appeal has been made out. It is unnecessary, however, to reach a conclusion on it in view of the success of Ground 1.

Disposition

[131] As I have already noted, the success of Ground 1 has the consequence that all convictions must be quashed. There should be an order for retrial on all counts. The counts concerning complainants A and D should be charged and tried separately from the counts concerning complainants B and C.

Orders

[132] I would propose the following orders:

1. The appeal is allowed.
2. The convictions on all counts are quashed.
3. The appellant is to be retried on all counts.
4. The counts concerning complainants A and D are to be charged and tried separately from the counts concerning complainants B and C.

[133] **McMURDO JA:** I agree with Gotterson JA.