SUPREME COURT OF QUEENSLAND

CITATION:	*R v Makary* [2018] QCA 257
PARTIES:	**R** **v** **MAKARY, Ashraf Kamal** (appellant/applicant)
FILE NO/S:	CA No 157 of 2016 DC No 1097 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 June 2016; Date of Sentence: 3 June 2016 (Clare SC DCJ)
DELIVERED ON:	9 October 2018
DELIVERED AT:	Brisbane
HEARING DATES:	4 October 2017; 9 November 2017
JUDGES:	Sofronoff P and McMurdo JA and Bond J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted.** **3. Appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of three counts of administering a stupefying thing with intent to commit an indictable offence, two counts of rape and one count of attempted rape – where each of the three complainants were South Korean women who met the appellant on the internet –where the appellant met up with each complainant on a different occasion and spiked each complainant's drink with sleeping tablets – where the appellant took advantage of each complainant's compromised state as a result of the drugging to rape, or attempt to rape, each of them – where the appellant submits that the learned trial judge gave insufficient directions on the application of s 24 *Criminal Code* in respect of his offending against one of the complainants – where the appellant gave evidence that he did not have sexual intercourse with that complainant – where the matters raised by the appellant as matters going towards consideration of s 24 *Criminal Code*

are not capable of establishing that he held an honest and reasonable, but mistaken, belief that the complainant had given her consent to sexual intercourse – whether it was necessary for the learned trial judge to direct the jury to consider whether s 24 *Criminal Code* had been excluded and, if so, whether her Honour's directions on s 24 *Criminal Code* were insufficient

CRIMINAL LAW – EVIDENCE – HEARSAY – where the Crown called evidence at the appellant's trial that sought to establish that DNA extracted from the vagina of one of the complainants was highly likely to have been placed there by the appellant – where evidence was given by a forensic scientist as to the probability that the DNA present in the vaginal swab had not come from the appellant – where the appellant submits that the evidence given by the forensic scientist was inadmissible hearsay evidence because she herself had not performed any of the DNA tests upon which she reached her conclusion as to the probability of the sample not being from the appellant – where a certificate was tendered pursuant to s 95A *Evidence Act* at trial setting out the results of the relevant DNA testing in a way that was unintelligible to a lay reader – where the oral evidence of the forensic scientist was expert evidence that explained the meaning of the information contained in the certificate – whether the oral evidence of the forensic scientist amounted to inadmissible hearsay

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – where the learned trial judge directed the jury as to the alternative offence of attempted rape in respect of one of the complainants – where the appellant submits that the learned trial judge ought to have directed the jury that, in order to be satisfied of the appellant's guilt of attempted rape of one of the complainants, they must be satisfied that the appellant had not fulfilled his intention to rape her – whether the learned trial judge erred in failing to direct the jury in this way

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant submits that his counsel failed to put to one of the complainants that the appellant had not had sexual intercourse with her and had failed to ask the complainant whether she had ingested sedatives between the time she met the appellant and the time she gave a urine sample for testing – where the complainant had not said that she had sexual intercourse with the appellant – where the jury could not have been under a misapprehension that the appellant's case was that he had not had sexual intercourse with the relevant complainant – where the complainant had given evidence that she had never taken any

of the sedatives in question – where defence counsel made a forensic choice not to pursue the line of questioning now contended for by the appellant – whether the defence counsel's failure to question the complainant in the way now contended for by the appellant established incompetence in legal representation of such a character as to amount to a miscarriage of justice

CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – JOINDER OF PERSONS OR COUNTS – where the appellant submits that the counts involving the three complainants should not have been joined – where the offending in respect of each complainant was of a similar character to the offending in respect of the others – where the appellant nonetheless submits that he suffered prejudice by the joinder – where an application was made to the learned trial judge to re-open the ruling that the counts would be heard jointly – where it was submitted by the appellant's counsel below that the case concerning one of the complainants was a weak one and that the appellant was minded to give evidence in respect of it – where it was submitted by the appellant's counsel below that the appellant would be prejudiced because, in giving evidence in respect of the counts concerning one complainant, he would also be able to be cross-examined about the other counts – where, even if there had been separate trials, the evidence led in each trial would have been admissible in the other trials as similar fact evidence – whether the refusal to grant the appellant separate trials in relation to each complainant gave rise to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant submits that the verdicts on one count of administering a stupefying thing and the count of attempted rape were unreasonable – where drinks and snacks of the kind that the complainant said she shared with the appellant were found at the appellant's house and in his car – where the appellant's bedroom matched the complainant's description – where the appellant's car matched the complainant's description – where there was compelling evidence against the appellant on the complainant's evidence alone – where the evidence of the complainant as to these two counts was supported by the evidence of the other two complainants – whether it was open to the jury, upon the whole of the evidence, to be satisfied beyond reasonable doubt that the appellant was guilty

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant submits that his conviction on one of the counts of rape was unsafe and unsatisfactory – where the prosecution

case on this count was a strong one – whether the matters raised by the appellant in support of the submission that the verdict was unsafe and unsatisfactory were, taken singly or in combination, capable of rendering the jury's verdict unreasonable

CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – IRRELEVANT FACTORS – where the applicant was sentenced to 18 and a half years imprisonment for each of the offences of administering a stupefying thing and for each count of rape, as well as 10 years imprisonment for the offence of attempted rape – where the sentences were ordered to be served concurrently – where the applicant submits that the learned sentencing judge took into account, in sentencing him, other acts which had not been charged as offences but which, if those acts had been done, would have constituted offences – where the learned sentencing judge made reference to the applicant having subjected the two complainants whom he raped to "forceful or protracted violations and rough mistreatment" – where the reference to "protracted violations" cannot be read otherwise than as a reference to multiple rapes – where it was not permissible for the learned sentencing judge to take into account the possibility that the applicant had committed any other offences except those with which he was charged – where the learned sentencing judge's discretion miscarried because of consideration of an impermissible factor – where there were no mitigating factors in the applicant's favour – where the applicant's offending was calculated, methodical and sustained – whether a sentence less severe than that imposed on the applicant is warranted

Criminal Code (Qld), s 24, s 567, s 597A, s 668E
Evidence Act 1977 (Qld), s 95A

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54, cited
Loveday v Ayre and Ayre; Ex parte Ayre and Ayre [1955] St R Qd 264, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, distinguished
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
R v Barbeler [1977] Qd R 80, applied
R v Burley; Ex parte Attorney-General of Queensland [1998] QCA 98, cited
R v Colless [2011] 2 Qd R 421; [2010] QCA 26, cited
R v Cooksley [1982] Qd R 405, applied
R v Cutts [2005] QCA 306, cited
R v Hussein & Hussein [2006] QCA 411, distinguished
R v Millar [2000] 1 Qd R 437; [1998] QCA 276, considered
R v Robinson [2007] QCA 349, discussed
R v Simpson (2001) 53 NSWLR 704; [2001] NSWCCA 534,

cited
R v Turnbull [2013] QCA 374, distinguished
Sancoff v Holford; Ex parte Holford [1973] Qd R 25, cited

COUNSEL: The appellant appeared on his own behalf in the conviction appeal
M J Copley QC for the applicant in the sentence application
V A Loury QC, with J D Finch, for the respondent

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

[1] **SOFRONOFF P:** In the month of March of 2011 a young Korean woman, aged 19, arrived in Australia to study English and to work part time. I shall refer to her by the pseudonym "Emma".

[2] There is a website that serves the needs of Koreans who are in Brisbane. Shortly after her arrival in Brisbane Emma responded to an advertisement on this website offering English language lessons in return for Korean lessons. The next day, on 20 March 2011, she received the following reply from someone who called himself "Chuck":

> "Hi, thanks for your interest in swapping language and making friend. … about Australian culture and show you around new places.
>
> In return, I would appreciate if you could teach me some basic Korean …
>
> We can help each other and be great friends.
>
> Would you please tell me a bit more about yourself. Eg..age,…hobbies and…
>
> I look forward to meeting, learig [*sic*] and becoming friends with you.
>
> Have a splendid day!
>
> Cheers,
>
> Chuck."

[3] Emma responded to this message on the same day:

> "i was born in 1991
>
> how about you ~ ???? i interested how often you go in city ?? i often go.
>
> i also want to know about you tell me"

[4] Within an hour she received a reply:

> "Hi Emma, thanks for your email. You sound like a nice, friendly, kind ad [*sic*] easygoing girl. I am a 26 years old male. have a

> variety of inter[ests] clubbing, dancing and drinking. I enjoy swimming, surfing and diving, I […] BBQs, and bushwalking. I love camping, road trips and travelling. I listen [to] music. I love comedy, action and romance movies.
>
> Do you like dancing? what are your favourite food and drinks?
>
> Do you mind swapping numbers? Mine is XXXX XXX 493
>
> Have a splendid day!
>
> Cheers ^_^"

[5] Emma and Chuck began exchanging mobile phone text messages. On 20 March 2011 Chuck sent this message:

> "Hi [Emma], this is Chuck. Would you like to meet 4 dinner, long swap n chat at 7:30pm 2nite in City? I look 4ward to seeing you. Plz text me back on XXXXXXX493. From: +XXXXXXXX510 20/3/2011 18:52"

[6] That evening Chuck sent a further message:

> "Honey, Can you wait for me at South Bank Cinema OR on corner of Adelaide n Creek St in City? We'll have dinner, chat n study. Plz text me on XXXXXXX493 thanks. From: +XXXXXXXX510 20/03/11 19:04"

[7] Chuck then sent two messages in quick succession:

> "call :-) me :-) now :-) From: + XXXXXXX493 20/03/2011 19:41"

[8] Followed by:

> "call :-) me :-) now :-) From: + XXXXXXX493 20/03/2011 19:43"

[9] Followed again by:

> "call :-) me :-) now :-) From: + XXXXXXX493 20/03/2011 19:50"

[10] His final message on that night was sent three minutes later:

> "I'll be driving white car. wearing green t-shirt n blue jeans. What will you be wearing? Plz wait on corner of Adelaide n Creek St in City. Reply to XXXXXXX493 From: + XXXXXXXX 510 20/03/2011 19:53"

[11] Emma had only been in Brisbane for a few days and could not find her way to the rendezvous. A passer-by led her to the rendezvous. While she waited there with her guide she received a phone call from Chuck. He said words to the effect that because she was with "[her] friend" he could not meet her. He never turned up.

[12] Over the next two days Chuck sent further text messages to Emma attempting to arrange a further meeting but she ignored these. She then found another advertisement on the same website from someone also offering to teach English in return for being taught Korean. Emma received the following response on 23 March 2011 from someone calling himself "Andrew".

"Hi,

I would like to thank you for your reply.

My name is Andrew. As you know, I am seeking a Korean language … [s]uch as greetings. In addition, I am keen to know about Korean …

I am travelling to Korean and would love to know about beauti[ful]

In return, I am happy to assist you with English. For example, I … an food, drinks, music, art and history if you like.

We can help each other, have great time and be good friends.

I would like to know more about you. Would you kindly tell m[e] …

I look forward to hearing from you.

Enjoy the rest of your day!

Thanks again. :-)"

[13] Emma responded a couple of hours later:

"im a female maybe are you male?? i saw your name. i can guess how about you??? i almost interested everything becaues [*sic*] my pers[…]

my number is XXXXXXX807 i haven't work yet so I have a time all of rest …

have a good time ^^~"

[14] Andrew responded within 15 minutes:[1]

"Hi [Emma], thanks for your quick reply. Yes, I am a boy. I have a … diving. I like picnics, BBQs and bushwalking. I love camping, […]hanna, britney spears, beyonce, Usher, Black Eyed Peas, Pitbul

When it comes to Koean [*sic*] language and culture such as food and …

Korean language, food, drinks, and music. What do you like to do in your free time? Do you like dancing? Thanks :-)"

[15] That evening Emma responded:

"oh i mistake so New mail by the way anyway i also like dancing … My face is SSssssooooo red so i don't like drinking when my break time I just do internet surfing and shopping in Au… …. can i ask two Q?? how old are you?? and um why will you go in korea???"

[16] On 26 March he wrote:

"Hi,

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[1] The appellant had his computer set at a time that was Greenwich Meantime plus nine hours. Brisbane is Greenwich Meantime plus ten hours. Consequently the time shown on all of his emails appears one hour earlier than the time at which the email was actually sent in Brisbane.

> Would you like to meet for dinner, cocktails, language exchange. We will meet, eat, study and talk. I will show you new places …
>
> Thanks"

[17] Finally, Andrew sent the following text to Emma at lunch time on Friday, 1 April 2011:

> "Hi [Emma], this is Andrew. Are you still interested in having dinner, studying and talking at 7pm tonight? I look forward to meeting you.
>
> Thanks :-)"

[18] By text message they arranged to meet outside the South Bank Cinema. Andrew arrived in a car which Emma described as "a common sort of sedan, and it wasn't very recent model. It was quite old. It was white". She described the driver as having dark skin and black wavy hair. She thought he was South-East Asian. He drove through Chinatown and on to New Farm. They stopped in a grassy area and Andrew suggested that they have a snack. He produced some finger food, juice and alcoholic drinks. He gave Emma a glass and invited her to "taste a little bit of everything". He had brought three or four different kinds of alcoholic drinks. He mixed these alcoholic drinks with orange juice.

[19] They got out of the car. Emma recalls looking at pictures in a kind of gallery. She then began to feel dizzy. Her body was "sort of shaking from side to side". Andrew helped her back to the car and she lost consciousness. She recalls that she told him that she had to go home. She recalls that Andrew said, "Yeah, I will take you home so just have a good sleep."

[20] Emma recalls opening her eyes to find that she was lying on grass. She recalls later opening her eyes and finding herself inside the car. Andrew told her again to go back to sleep. She recalls walking towards an area "where there a lot of steps". She then became aware that she was lying on a bed. Andrew was on top of her about to kiss her. She suddenly opened her eyes and turned her head to the side. Her evidence was:

> "And I told him no. Immediately after that, I don't have any memory. I lost consciousness."

[21] When she opened her eyes again she saw Andrew standing at the end of the bed. He was naked apart from his T-shirt. She could see his penis. He pulled her legs towards himself "quite abruptly". He said:

> "… it's okay. I'm wearing a condom."

[22] He showed her a square shaped package and pointed at his penis. Emma found that she was unable to move her body. She could not see clearly. Her eyes were hazy. Andrew kept telling her "It's okay, it's okay. I will take you home."

[23] When she next regained consciousness she was inside his car with Andrew driving. She saw her mobile phone between the seats and picked it up. She tried to open the door. Andrew stopped the car and she got out. She was barely functioning:

> "I was walking towards the light, almost crawling.
>
> …

> I don't remember everything, but there was a male and female approaching me. And I remember they had a very surprised look on their faces."

[24] These two bystanders called her a taxi and Emma was able to give the driver directions to take her home.

[25] She told nobody about these events until she spoke to police on 17 April 2011. At the trial it emerged that it was the appellant who had posed as both Chuck and Andrew.

[26] Another young Korean woman, whom I shall refer to by the pseudonym "Amy", arrived in Australia in November 2010. She too had come here to study English. Like Emma, she had seen an advertisement on a website offering to teach English in exchange for learning Korean. The advertisement read as follows:

> "Hi,
>
> I am looking for a Korean language exchange friend. I am travelling to Korea in September to teach English and will stay there for six months. I bought a textbook on learning Korean. I am also planning to do a beginner course on Korean at the University of Queensland.
>
> Ideally, we will meet once a week. I will teach you English language skills (speaking, reading, writing or listening) for an hour, and you will teach me Korean for an hour. We can also go to a nice café or restaurant for coffee or meat [sic] so we can chat more and get to know each other and become great friends.
>
> If you wish to exchange language and make friends with me, I would love to hear from you. You can reach me at XXX@hotmail.com.au.
>
> Thank you for reading my post and I look forward to hearing from you."

[27] Amy responded to this advertisement and received an answer from "Johnny" on the same day:

> "Hi [Amy], thanks for your interest in swapping language and making friends. You really sound like a nice and friendly person. You also sound like an ideal language exchange friend as your major is Korean literature and language. As you may know, I need some help learning some basic Korean language. I have a textbook to use. I also downloaded some youtube videos on learning Korean.
>
> I will be more than happy to help you improve your English, show you around new places and tell you about Australian culture such as food and music.
>
> We can help each other, have great time and be best friends.
>
> Would you please tell me a bit more about yourself eg age, hobbies, interests and location?
>
> I look forward to hearing from you.
>
> Have a splendid day!
>
> Cheers,

Johnny"

[28] Amy responded to this message on the same evening and, in turn, received the following reply:

> "Hi [Amy], thanks for your reply. I am excited to know that you live in Carindale. I live in Cannon Hill which is about 5 minutes from Carindale. We are neighbours!
>
> I will be more than happy to edit your resume, train you on job interview skills and help you get a job.
>
> I love music. I go to music festivals, parties and clubs almost every week. You are more than welcome to join me if you like. We will have great time!
>
> A bit about myself: I am 28 years old male. I have a variety of interests. I like clubbing, dancing and drinking. I enjoy swimming, surfing and diving. I like picnics, BBQs, and bushwalking. I love camping, road trips and travelling. I listen to pop n RnB music. I love comedy, action and romance movies.
>
> Have you ever camped in Australia? Do you like dancing? what are your favourite food and drinks?
>
> My mobile number is XXXX XXX 493
>
> I look forward to hearing from you.
>
> Cheers :-)"

[29] "Johnny's" mobile number shown in the email is the same number that "Chuck" had used to communicate with Emma. There followed an exchange of emails during the course of which Johnny maintained his interest in meeting Amy. Finally, on Thursday, 30 March 2011 Johnny invited Amy to dinner:

> "Hi [Amy],
>
> I still want to exchange language, cutlure [*sic*] and be friends with you as you sound like a nice person. I really want to see you. Would you like to meet for dinner, language swap and chat at 7pm on Friday or Saturday?
>
> Please text me on XXXXXXX493 if you are interested to meet, eat, study and chat.
>
> Cheers"

[30] They then began to exchange text messages. On Thursday 31 March, Johnny sent Amy the following text message:

> "Hi [Amy], Would you please confrim [*sic*] that we are meeting for dinner, cocktails, language swap and chat at 7pm on Saturday? All the best with job hunting! :-)
>
> 31 Mar. 2011 11:22A
>
> From: Johnny"

[31] Amy sent a text agreeing to the meeting and within four minutes she received a reply:

> "Honey, can u w8 4 me at South Bank Cinema OR corner of Adelaide n Creek St in City at 7pm on Satur? We\"ll [*sic*] meet, eat, drink, study n chat. I cant w8 2 c u xoxo
>
> 31 Mar. 2011 01:30PM
>
> From: Johnny"

[32] Fifteen minutes later Amy sent a further message:

> "…the corner of Adelaide n Creek St would be better 4 me. I'll wait 4 u there. Finally we gonna meet! ☺ have a nice day, I can't wait then either. :)
>
> 31 Mar. 2011 01:45PM
>
> To: Johnny"

[33] Johnny reconfirmed this meeting on Saturday morning, 2 April 2011:

> "Gd morning [Amy], Are you still interested in meeting for dinner, cocktails, language swap and chat at 7pm tonight? Have a wonderful and flowerful day! :-)
>
> 2 Apr. 2011 08:44AM
>
> From: Johnny"

[34] Amy waited at the meeting place until a white car pulled up and she got in. The driver introduced himself as Johnny. Amy said that this man had dark skin and curly hair. Johnny drove out of the city. Amy remarked that she thought that they were going to have dinner in the city. Johnny said that he didn't have any place to park so they had to go somewhere else. They drove past the XXXX Brewery on Milton Road towards Mt Coot-tha and arrived at the Mt Coot-tha lookout. They got out and sat on a ledge next to a garden bed. Johnny had brought a glass and a bottle with him. He said that he had brought drinks called Mojito. He gave Amy a wine glass and poured drinks for her and for himself. She was hesitant. He said that if she trusted him she would drink. If she didn't drink then that meant that she did not trust him. She drank what he had given her.

[35] Amy has no memory of what happened after this until she awoke at home. Her breasts and the area of her genitals were sore. She was able to recall being in the back seat of a car feeling unable to move or to talk.

[36] She nevertheless got up that morning and went to work. She then rang a friend, KN, and told him that she was unable to remember anything that had happened to her after she had taken the drink with Johnny and believed that she might have been raped. Mr KN and another friend took her to hospital. Samples of Amy's blood and urine were taken as well as a vaginal swab.

[37] The vaginal swab showed the presence of spermatozoa. This swab was analysed and showed that the major contributor of the DNA in the sample was, not unexpectedly, consistent with DNA furnished by Amy. There was also a second contributor. That contributor's DNA was consistent with DNA later taken from the

appellant. The expert evidence was that the probability of this DNA having come from someone other than the appellant and unrelated to him was about 1 in 15,000. It is also possible, in the course of DNA analysis, to find factors in DNA which conclusively excludes a particular person. There were no such factors here.

[38] A third young Korean woman came to Australia at the end of 2010. I shall refer to her as "Linda". According to her evidence, while in Brisbane during March and April 2011 she too responded to an advertisement offering English language lessons and received the following response from "Chuck":

> "Hi [Linda]. Thanks for your interest in swapping language and making things. You sound like a nice and friendly person. I'm very interested in learning Korean, as I am travelling to Korea. I would like to do some basic Korean conversation, such as greeting and introducing myself. I'm also keen to know about Korean culture, such as popular food and drinks. In exchange I'm happy to help you improve your English and introduce you to Australian culture, such as famous food, drinks, festivals, singers and attractive places. We can help each other and be friends. Would you please tell me a bit about yourself, for example hobbies and interests. I look forward to meeting, learning and becoming friends with you. Have a wonderful day. Cheers, Chuck."

[39] Linda responded by an email in which she described herself and her ambition to learn English. Relevantly, she said:

> "… I used to study English education at my uni in Korea, so I should study English hard to become a good English teacher. That's why I decided to stay here for a year and everything's just wonderful to me. I love this huge country, and I love drinking. You know all Koreans are just keen on drinking. Have you ever tried soju? It's a kind of Korean drink and it will be awesome to drink soju with you. And I love to go somewhere to meet people, like the pub or club. I'm quite outgoing, so I don't like just staying home. Of course, sometimes I'd love to chill out at home, but usually I'm going out to have fun, and the most important thing in my life, eating. I'm just crazy at good food and always trying to find some good restaurants. But I'm living in the city so it's not easy to find some restaurants where I can try a real Australian one."

[40] She received the following response:

> "Hi. Would you like to meet for dinner drinks, language swap and chat at 7 pm on Thursday or Friday? I look forward to meeting, learning and becoming friends with you. Cheers."

[41] Linda responded:

> "Yes, it sounds cool. We can have a good time while having dinner or a cup of coffee. Thursday would be better, I think. But before we met up, I would like to know about you for a bit as well. So curious about you and want to catch up soon, but also afraid to meet someone that I've never met before. Can you understand me? I

> hope you can. So could you introduce a bit. Thanks. Have a good night."

[42] She received this response:

> "Hi. Thanks for your email. You sound like a nice and easy-going girl too. I'm a male. I have a variety of interests. I like clubbing, dancing and drinking. I enjoy travelling, camping, barbecues and road trips. I love water sports such as swimming, surfing and diving. I listen to pop, R'n'B, hip-hop songs, and watch comedy, romance and action movies. When it comes to Japanese language and culture I am an absolute beginner, so I would appreciate if you could teach me from scratch. What is your favourite food? Do you love beer, wine or cocktails? Would you mind swapping numbers? Mine is XXXX XXX 493. I look forward to meeting you. Have a splendid day. Cheers."

[43] The phone number was the same one that had been used by Emma's and Amy's assailant. Linda gave Chuck her mobile phone number. On 31 March 2011 she received the following text message:

> "Good morning, [Linda]. This is Chuck. Thanks for your emails regarding language swap and making friends. I look forward to meeting you. Have a wonderful and flowerful day."

[44] They arranged to meet at 7 pm on Sunday, 3 April 2011 on the corner of Adelaide and Creek Streets.

[45] Linda waited at the meeting place and received a phone call from Chuck telling her he would be late. Sometime later a small white car pulled up and the driver introduced himself as Chuck. Linda recalled that his skin colour was dark and he had dark hair. He drove her to the lookout at Mt Coot-tha. They sat together on the edge of a garden bed. Chuck had brought a bottle of orange juice and some vodka and he poured Linda a drink. He said that this was very special orange juice; it was very delicious. He also gave her a drink out of a bottle labelled Midori. He took this out of his bag. She said that she had three drinks in total, one of orange juice, one of Midori and one Vodka Mojito.

[46] They walked to the observation area overlooking the city. Linda recalled that she was describing to Chuck her parents and her brother. She has no recollection of events thereafter until she woke up to find herself naked on a bed in a strange bedroom. Her body felt heavy and she was confused. Chuck was touching her breast. He climbed on top of her and tried to push his penis into her vagina. Linda tried to recover her senses. She said that it was only after he had penetrated her a number of times that she suddenly realised what was happening to her. She told Chuck that she had to get home. He got off her. She recovered her clothes and left the house. She saw his car and got into it. Chuck began to drive. Linda found her bra in the car. She had been wearing purple underpants but could not find them.

[47] Chuck drove her home. She found it hard to walk and felt pain all over her body. As soon as she got home she took a shower. She found grazes and bruises on her body. There were some small grazes on her face. She felt a bump on the back of her head. She went to sleep and woke up that evening. She recalled that she had

taken her camera to the date but it was missing. She had started the evening with $80 in her purse and had spent none of it but the $80 was missing too.

[48] On the next day she went to language school and told her teacher about her experience. The teacher accompanied her to a police station where Linda made a complaint. She was medically examined and samples were taken.

[49] Police officers attended the appellant's home at Murarrie on 6 April 2011. There they found the appellant sitting in the driver's seat of a white Toyota Camry sedan which was parked outside the residence. Detective Sergeant Taylor found two mobile phones on the front passenger seat of the car and a box of Temazepam tablets, a box of condoms and a box of "Temtabs" in the glovebox. There was a wine glass in the boot of the car as well as a broken plastic cup and a round plastic container. The wine glass appeared to have some residue on it. The search of the car also yielded a pair of purple underpants and a white orange juice bottle with the brand name "Orange Grove".

[50] Police searched the appellant's bedroom. They found an empty box marked Temazepam, another empty box marked Mogodon and three boxes of Temtabs. They took a sample of the appellant's hair for DNA analysis.

[51] One of the phones found in the appellant's car had the phone number XXXX XXX 493. This was the number that "Chuck" and "Johnny" used to send text messages to Emma, Amy and Linda.

[52] Police examined the wine glass that had been found in the car boot and found traces of orange juice on the inside surface of the glass. There was also a trace amount of white powder visible on the outside of the glass. This was found to be Benzodiazepine Nitrazepam. Residue on the inside of the glass was also found to contain Benzodiazepine Temazepam as well as Nitrazepam. The broken plastic cup contained orange juice residue on the inside as well as traces of Temazepam and Nitrazepam. The round plastic container with a snap on lid similarly contained traces of Benzodiazepine, Nitrazepam, Temazepam as well as Benzodiazepine. The bottle of orange juice contained traces of Nitrazepam. A bottle of Mishka vodka found in a refrigerator at the appellant's home contained vodka but also Benzodiazepine Nitrazepam suspended within the liquid.

[53] There was expert evidence that when Temazepam is ingested a part of it metabolises into Oxazepam. When a person ingests Nitrazepam it is metabolised into Aminonitrazepam. Consequently, the presence of Aminonitrazepam in the blood or urine of a person demonstrates that the person has ingested Nitrazepam. The presence of Oxazepam in the same way demonstrates that the person has ingested Temazepam. Nitrazepam is sold under the brand name Mogodon. Temazepam is sold under its own name and also under the name Temtabs. Each of these are sedatives and cause people to relax their muscles and go to sleep. When taken in combination with alcohol these drugs have a more powerful effect. They begin to take effect within 15 or 20 minutes after ingestion and their peak effect is felt within about an hour. In the interim period between ingestion and falling asleep a person experiences drowsiness, difficulties in coordination, poor balance and slurring of speech. These drugs can cause memory loss. These effects are all consistent with the unchallenged evidence of the complainants' description of their symptoms.

[54] The underpants found by police in the appellant's car were purple and labelled Fidelia. This was the brand and colour of underwear that Linda could not find. A DNA sample taken from this garment matched the DNA profile of Linda. Police found hairs in the appellant's car and DNA in these hairs linked them to Linda. Linda's urine contained Oxazepam, Temazepam, Aminonitrazepam and Nitrazepam. So too did Amy's blood and urine.

[55] A laptop found in the appellant's bedroom contained Emma's, Amy's and Linda's email addresses and phone numbers.

[56] Because Emma, the first of the complainants, did not complain to police until she was contacted some days later after the events she described, there was no DNA evidence found linking the appellant to her and no evidence that she had ingested any of the sedatives. However, her description of events was clear and the mobile phone number she used to exchange messages with Chuck had been proved to be that of the appellant. His own laptop evidenced that he had had the communications with her.

[57] The appellant's counsel's cross-examination of Emma suggested that Chuck had phoned her at the first attempted rendezvous to cancel the meeting because he had "car troubles". Emma denied this.

[58] It was put to her that she had not met Andrew either. She denied this too.

[59] It was put to her that Andrew had kept her waiting for more than an hour outside South Bank Cinema and that she then left without seeing him. Emma denied this. Then, inconsistently, it was put to her that she had realised that Chuck and Andrew were the same person and, being angry at Chuck for failing to meet her, she "decided to make a plan to stand him up on the night that you were supposed to go to the South Bank Cinema". Emma denied this too and she said that she did not know that they were the same person until police informed her much later. It was not put to her, nor was it ever explained during the course of the trial, how Emma could have known that Chuck and Andrew were the same person if she had met neither of them. Nor was it explained how she could have identified the appellant on the photo board if she had never met him.

[60] As to Amy, it was accepted that Johnny had indeed collected her on the corner of Creek and Adelaide Street and had driven her to the lookout at Mt Coot-tha. It was put to her that she did not have a drink for the entire time that she was in his company. She denied this. Counsel put to her that she and Johnny had gone to the Pancake Manor Restaurant on Charlotte St at about 10.45 pm and that, afterwards, he had driven her home. She denied this. She had no memory of events between drinking the substance that she said that the appellant had given her and waking up at home.

[61] The cross-examination of Amy did not attempt to grapple with the evidence of the metabolites of the drugs found in the appellant's possession that were in her blood and urine. Nor did the cross-examination attempt to address Amy's evidence of her sense of disorientation and physical confusion when she woke up at home. The case that was put to her also failed to come to terms with Amy's evidence that her breasts and genital area were sore. It was not put to her that any of this evidence had been fabricated.

[62] The presence in Amy's vagina of spermatozoa which DNA analysis linked to the appellant was also left unexplained by the case theory put to Amy in cross-examination. However, that evidence was nevertheless challenged in a way I will explain later.

[63] The appellant's counsel's cross-examination of Linda also involved accepting that she had met the appellant, and that he had driven her to the look out at Mt Coot-tha. It was put to her that after spending some time there, during which both of them drank some alcohol from some small cups or wine glasses, including a Midori and a Vodka Mojito, the appellant drove her home. It was put to her that the appellant had not had sex with her. It was put to her that she had in fact told a police officer, Mr Rankin, that she had not had sex with Chuck. Rankin was later called to give evidence. Linda had told Rankin that she had awoken naked lying next to Chuck. In answer to Rankin's question whether she had sex with Chuck she answered in the negative. However, Rankin then asked her what she did after waking up naked on Chuck's bed. Rankin's evidence was:

> "She then told me that after she pushed Chuck from the top of her, she jumped out of the bed, still naked. I then asked her why was Chuck on top of her. She then said that Chuck had forced himself on top of her and put his penis inside her vagina. I asked her did she consent to this sexual act by Chuck to her, which she replied no."

[64] The cross-examination also failed to address the problem of how Linda's purple underpants came to be in the appellant's car if the appellant's version of events was true. On the version of events put to her, there was no explanation for this undisputed fact. Nor did the case put to her address the unchallenged fact of sedative drugs in her body of a kind kept by the appellant.

[65] Each of the three women denied knowingly taking any form of the sedatives and this evidence was not challenged in cross-examination.

[66] In relation to Amy, there was a further line of cross-examination concerning a draft resume which she had sent to "Johnny" so that he could settle it. There is no doubt that, at some stage, she had indeed sent him a draft resume. Then, on 6 April 2011, three days after the events that she described, he sent back the resume, revised by him. He also sent a text message to her phone that said:

> "Good morning, [Amy]. I've edited your co [*sic*]."

[67] It was put to Amy that she had sent the appellant her resume shortly after he had dropped her home. Amy denied this. No doubt this line of questions was put in order to raise the suggestion that her behaviour was inconsistent with her having been raped by the appellant.

[68] The appellant gave evidence.

[69] His evidence in relation to Emma was brief. He admitted using the pseudonym Andrew to communicate with her by email and mobile phone text message. He admitted making an arrangement to meet her on 1 April 2011 outside the South Bank Cinemas. However, he said that he was sick on that day and sent a text message to Emma to that effect but received no response. He did not go to meet her and never had sex with her. He said he had never met her. No such text message was identified at the trial.

[70] He gave no evidence about their earlier agreement to meet when he was using the pseudonym "Chuck". Consequently, he shed no light upon the basis for the defence theory according to which Emma had realised, before the meeting at South Bank Cinemas, that Chuck and Andrew were the same person and that both were the appellant. Although it had been put to Emma that Chuck had told her, while she was waiting on the corner of Adelaide and Creek Street, that he had had car troubles and could not come, the appellant gave no evidence about this either. Her evidence about her experiences at the hands of somebody had not been challenged in cross-examination by the appellant's counsel (although it was put that it had not been the appellant) so his case must have been that Emma had been drugged and raped by someone else.

[71] With respect to Amy, the appellant admitted that he had posed as "Johnny" in his communications with her. He admitted that he had picked her up in his car on 2 April 2011 at the corner of Creek and Adelaide Street and admitted driving her to the Mt Coot-tha lookout. He said that neither of them drank anything while they were there. Later they went to the Pancake Manor in the city and they both ate and drank. He then drove her to her home. He said that he could recall that, while driving her home, she was receiving text messages from her homestay mother asking about her whereabouts. Such messages were found on her phone. He denied administering any sedative drugs to her or having sex with her. On the contrary, a few minutes after arriving home he received an email from Amy to which she had attached a draft resume so that he could edit it.

[72] His evidence did not address the presence of his spermatozoa in Amy's vagina.

[73] Amy was not challenged in cross-examination about her evidence that she had not knowingly taken any of the sedative drugs found in her system. The appellant's evidence, and his case generally, ignored the presence of the drugs in her body.

[74] As to Linda, the appellant admitted that he had called himself "Chuck" and corresponded with her by email and mobile phone. He said that he drove Linda to the Mt Coot-tha lookout. He had brought orange juice and he made her a Mojito cocktail. He denied administering any sedatives. He said he disposed of the empty orange juice bottle in a rubbish bin before they left Mt Coot-tha. He then drove her home. On the way, he said, he stopped the car so that she could urinate. She did this on the road behind his car.

[75] On the following Monday he received a text message from Linda asking him to return her camera, which she had left behind.

[76] The appellant admitted in evidence that the sedatives found in his house and in his car belonged to him. He said that they had been prescribed for him by doctors to deal with symptoms of anxiety. He denied that the bottle of Mishka vodka containing a sedative drug, found in the refrigerator of his residence, belonged to him. He shared the house with others.

[77] He did not explain the vessels in his car's boot containing traces of orange juice and residue of the same sedative drugs found in the bodies of two of the three complainants and in his bedroom.

[78] In respect of each of Emma, Amy and Linda the appellant was charged with administering to each of them a stupefying thing with intent to commit an indictable offence. He was also charged with having raped each of them. A jury found the

appellant guilty of the offence of administering a stupefying thing with intent to Emma, Amy and Linda. The jury found the appellant not guilty of raping Emma but guilty of attempting to rape her. The jury found him guilty of raping Amy and Linda.

[79] The appellant now appeals against those convictions.

[80] It is convenient to deal first with the appellant's ground concerning s 24 of the *Criminal Code*. Section 24 provides:

> "**24 Mistake of fact**
>
> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

[81] The appellant submits that, in relation to Linda, Clare SC DCJ's directions concerning the application of s 24 to the case were neither sufficient nor balanced.

[82] As has already become evident, the appellant's case with respect to Linda was simple. He had corresponded with her by email and text message under the pseudonym "Chuck". He met her and had driven her to Mt Coot-tha where they each had a couple of drinks. She had emailed him saying that she enjoyed drinking a Korean alcoholic drink called "soju". She told him that she was outgoing. The appellant's emails had ended with "XOXO", which Linda knew meant kisses and hugs. A few photos taken on the night show Linda and the appellant with their heads close together, showing attitudes of humorous amity. According to the appellant, Linda touched him and kissed him while in his car. He drove her home.

[83] According to the appellant's sworn evidence, he did not have sexual intercourse with Linda. Consistently with that evidence he did not say that Linda had given her consent to having sexual intercourse with him or that he held any belief that she had given her consent to having sexual intercourse with him. On the other hand, Linda swore that she had not given consent and her evidence on that issue was not disputed at the trial.

[84] Nevertheless, his counsel asked Clare SC DCJ to direct that the Crown had to negative s 24 and her Honour did so as follows:

> "Now, the accused does not dispute [Linda's] claim that she didn't consent to sex. He does not allege that she consented to sex, but he did give that evidence of some flirting or familiar behaviour, which was denied by [Linda]. If there is some evidence that the accused may have been mistaken about consent, then the Prosecution must prove that the accused did not honestly and reasonably believe that the complainant was consenting to sex. So I need to explain what that is. You'll see that that is the third element for [Linda] on the elements of rape in the handout. There are two components to that. An honest belief is a belief that is genuinely held by the accused.

> Genuinely held. A reasonable belief means that the belief was held on reasonable grounds in the particular circumstances of the accused and what he knew – that it was reasonable for him to believe that. For this element, it is sufficient for the Prosecution to prove either of two things: to prove either that the accused did not genuinely believe that she was consenting, or for the Prosecution to prove that it was not reasonable for him to believe that she was consenting. And you can have regard to the circumstances.
>
> It is common ground that these two had only just met. The accused's account is the complainant was gregarious and outgoing. She wanted the photos of them, and at that time she touched his face, according to him, and she kissed him. The accused did not claim that she did anything more than that. He said there was no sex. He just took her home. So you might think that the accused's version does not give any reasonable or raise any reasonable grounds for believing that this woman would consent to sex with him. Furthermore, he does not say that he believed that she was consenting to sexual intercourse.
>
> If you don't believe the accused's account, then you put it away, and focus on the evidence that you do believe. What does that prove?
>
> Mr Fenton did not argue that you would be satisfied that the accused had an honest and reasonable mistake that [Linda] was consenting, but I have a duty to require you to consider this element because it is raised by that part of the evidence given by the accused that refers to this touching and so forth. The fact that I raise it does not mean that I have a view about it. It is for you to consider it, and if the Prosecution has not proved that he did not have an honest and reasonable mistaken belief then you would have to find him not guilty of rape. The only evidentiary basis, as I said, for considering it is that evidence from – the only direct evidence is that evidence of him in the car with the photographs. You might think that that would not be sufficient to raise any reasonable belief in anyone in those circumstances. There is then the evidence that she ended up somehow in his bed, and she can't say how. It might be that you are easily satisfied of this matter, but it [sic] something you need to consider. If, for example, you are satisfied that the accused had secretly drugged [Linda] to rape her, then you might readily be satisfied that he didn't have any honest and reasonable belief that she was consenting. Those two things seem to be so inconsistent."

[85] In my respectful opinion, it was unnecessary to direct the jury about the application of s 24. The section has no application unless there is some evidence of operative mistake, looking at the case as a whole.[2] To raise the defence it is necessary that there is evidence, whether direct evidence or by inference, that the defendant held an honest belief about a fact and that his belief was a reasonable one.[3] It may be

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2 *Loveday v Ayre and Ayre; Ex parte Ayre and Ayre* [1955] St R Qd 264 at 268 per Philp J, cited with approval by McMurdo P and Williams JA in *R v Cutts* [2005] QCA 306 at [4] and [35].

3 *Sancoff v Holford; Ex parte Holford* [1973] Qd R 25 at 33.

necessary to do no more than that, but that much must, at least, be done and it was not done in the present case.

[86] If a defendant does not give evidence directly that he or she believed the relevant fact then such a belief might be inferred from other evidence in the circumstances of a particular case.

[87] In this case the facts to which the appellant points are incapable of giving rise to any inference that he held a belief that the complainant had given her consent to sexual intercourse. His evidence that Linda was gregarious and flirtatious is incapable of giving rise to any inference about *his* state of mind on that question. Moreover, it would not be possible, by reference to the content of their email and text exchanges undertaken in the days before the relevant event, to infer that he held a belief when he did the act of penetration, that she had given her consent. Linda did not do a single thing that could, by any stretch of the imagination, prompt any rational man to think that she had given her consent to having sexual intercourse with him and so it was not possible to infer that he held such a belief.

[88] The logical difficulty is greater than that. This is a case in which the appellant contends that, if properly directed, the jury might have inferred that he held a reasonable and honest but mistaken belief that Linda had given her consent to having sexual intercourse with him. Yet this was a case in which the appellant gave evidence that he had not had sexual intercourse with the complainant. Accordingly, he did not say in evidence that he held any such belief. As Williams JA said in *Cutts*,[4] it is not a question of whether a reasonable man in the position of the appellant might have had a belief; the question is whether there was evidence that *the appellant* held the belief. It was only if an issue arose as to the appellant's own belief that the jury would have to consider the issues of the reasonableness and the honesty of the belief. Because the appellant never made his belief about his victims' consent an issue at the trial, he was not asked any questions about it. The prosecution did not have to anticipate, by cross-examination, a non-existent case and the case remains a non-existent one on appeal.

[89] It is possible, of course, for a case to arise in which there are inconsistent alternative answers to the prosecution case. It may be that, for tactical reasons, the alternative answer has not been at the forefront of an accused's case in order not to weaken the primary line of defence. In such a case the trial judge would have to direct accordingly.[5] However, in a case like this case, the evidence would have to be cogent to raise an alternative issue of a mistaken belief about the giving of consent in the face of a defendant's disavowal that sexual intercourse took place at all and his failure to say that he held the belief. In the circumstances of the present case, in which the defendant did give evidence and denied having sexual intercourse, his own case rendered any consideration of s 24 entirely speculative.[6] The facts to which he now points, that I have referred to, were incapable of raising the issue.

[90] Nevertheless, her Honour directed the jury to consider whether s 24 had been excluded. Her directions were, in my respectful opinion, wholly orthodox and

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4 *supra*, at [44].

5 *cf. Pemble v The Queen* (1971) 124 CLR 107 at 117-118; and see *CTM v The Queen* (2008) 82 ALJR 978 at [191] per Hayne J.

6 *Cutts*, *supra*, at [47] to [48] per Williams JA citing *Bonnick* (1977) 66 Cr App R 266 at 269-270.

correct but, for the reasons that I have given, were not required for the appellant to have a fair trial of the issues actually raised.

[91] The prosecution called evidence that sought to establish that DNA extracted from within Amy's vagina was highly likely to have been placed there by the appellant. A sample was taken from within Amy's vagina and a reference sample was taken from each of Amy and the appellant. Those three samples were compared and, according to the evidence of Ms Amanda Reeves, a senior reporting scientist in the Forensic DNA Analysis Unit of Queensland Health, whose expertise was not challenged, there was only a 1 in 15,000 chance that DNA present in the vaginal swab had not come from the appellant.

[92] The appellant contends that the evidence given by Ms Reeves was inadmissible hearsay evidence because she had not performed any of the actual tests that allowed her to reach her conclusion. That argument is misconceived. It overlooks exhibit 82 at the trial.

[93] Exhibit 82 was a certificate tendered pursuant to s 95A of the *Evidence Act* 1977 (Qld). Section 95A provides, relevantly:

> "(3) A certificate, in the approved form, purporting to be signed by a DNA analyst and stating any of the following matters is evidence of the matter—
>
> (a) that a stated thing was received at a stated laboratory on a stated day;
>
> (b) that the thing was tested at the laboratory on a stated day or between stated days;
>
> (c) that a stated DNA profile has been obtained from the thing;
>
> (d) that the DNA analyst—
>
> (i) examined the laboratory's records relating to the receipt, storage and testing of the thing, including any test process that was done by someone other than the DNA analyst; and
>
> (ii) confirms that the records indicate that all quality assurance procedures for the receipt, storage and testing of the thing that were in place in the laboratory at the time of the test were complied with."

[94] The certificate tendered pursuant to that provision established that:

(a) A particular sexual assault investigation kit concerning Amy had been delivered to the laboratory operated by Queensland Health Scientific Services;
(b) DNA reference samples contributed by Amy and by the appellant respectively had also been received;
(c) The laboratory employed particular testing procedures;
(d) That the sexual assault investigation kit has been tested by Ms Shannon Merrick and other staff;

(e) The records held at the laboratory show that all quality assurance procedures for the receipt, storage and testing of these things had been complied with;
(f) That such testing had resulted in the obtaining of a particular DNA profile.

[95] The DNA profile revealed by the samples was expressed in letters and numbers in a document in a way that was unintelligible to the lay reader. Consequently, Ms Reeves gave oral evidence that explained the meaning and significance of those letters and numbers. She gave expert opinion evidence to explain the "profile", itself a term of art, to the jury.

[96] Section 95A of the Act requires that any attack upon the content of a certificate tendered to prove a DNA profile be made on notice. An attack on testing involving the calling of a witness who conducted such testing may only be made with leave of the court. No such notice was given, no such leave was sought and no such attack was made.

[97] There is nothing in this ground and I would reject it.

[98] The appellant submits that the learned trial judge misdirected the jury about the offence of attempted rape of which he was convicted. The appellant had been charged with one count of raping Emma. The jury acquitted him of that charge but found him guilty of attempted rape. It will be recalled that Emma gave evidence that she regained consciousness and found herself naked on a bed, her arms and legs wide apart, with the appellant lying on top of her trying to kiss her. She then saw him standing at the foot of the bed, wearing a shirt but no pants, indicating his penis and telling her that he was wearing a condom. He pulled her towards him by her legs. She was severely affected by the sedative drugs and was unable to resist. She gave no evidence of actual penetration.

[99] Clare SC DCJ directed the jury on the subject of attempted rape in the following terms:

> "If you find the accused not guilty of rape because you are not satisfied that he penetrated [Emma], you must consider the alternative offence of attempted rape. The elements are back on your handout on page 2. There are three elements that must be proved for attempted rape. The first is that the accused intended to rape [Emma]; that is, that he intended to put his penis inside her body – whether inside her vagina or her anus – he intended to put his penis inside her body without her consent. The second element: that he began to put his element – sorry – that he began to put his intention to rape her into execution by means adapted to fulfilling that purpose; by means adapted to fulfilling the rape. I'll say that again: that he began to put his intention to commit the offence into execution by means adapted to the fulfilment of the rape. I'll talk about that in a moment. The third element that must be proved is that the accused did some overt act that manifested his intention.
>
> Now, going to the first element which is the intention to rape: that the accused intended to put his penis inside the body of [Emma] without her consent. When intention is an element of an offence, it has to be proved beyond reasonable doubt. The prosecution can only prove the intention of the accused to do anything through the circumstantial evidence. So you need to go to the test for proof based on

> circumstantial evidence. An intention to rape must be the only rational explanation on the evidence. If there is another reasonable explanation, if you think it's reasonably possible that he didn't intend to penetrate [Emma] without her consent, then he would be not guilty of attempted rape. On the other hand, if you are satisfied of this element, go on to then consider the next element. And that is: that the accused began to put his intention to rape [Emma] into execution by means adapted to its fulfilment. In other words, he must have begun to carry out his intention to rape in a way that was suitable to bring the rape about. For example, taking her into the bedroom and removing his pants. Those are things that might facilitate the rape. If you're satisfied that that's what the accused did, you might find then that he had started to put his intention to rape into execution.
>
> The last element is the requirement for an overt act. That the accused did some overt act which manifested his intention to rape. An overt act is an act that is capable of being seen. It doesn't mean someone was watching but if someone had been there, that they would be able to see what he was doing. And an overt act is an act that makes it clear that the accused intended to commit the rape. For example, getting a condom while he had no pants on and she was stricken on the bed, or pulling her legs towards him as he stood in front of her without his pants on, or without any pants on. Those are the things that could amount to overt acts for the purpose of this test.
>
> You could not convict of an attempted rape unless you are satisfied of all three elements. An intention to rape is not enough; just preparing to rape is not enough. The action of the accused must have gone further. He must have done some overt act that amounts to the beginning of rape and it must have had an immediate connection - not just a remote connection - to rape. As I said, when I took you through the description in relation to overt acts."

[100] The appellant contends that the offence of attempted rape has four elements, and not only three. He submits that her Honour should have directed that, in order to be satisfied that the appellant was guilty of attempting to rape Emma, they also had to be satisfied that he had not fulfilled his intention to rape her. The proposition advanced by the appellant was rejected in *R v Barbeler*.[7] Clare SC DCJ was, therefore, right to direct the jury in the way she did.

[101] This ground is without merit.

[102] The appellant contends that his counsel failed to put to Amy that he had not had sexual intercourse with her and that his counsel had failed to ask her whether she had ingested sedatives between the time she had met the appellant and the time when she gave a sample of urine for testing.

[103] It is true that counsel did not put to Amy directly that she had not had sexual intercourse with the appellant. But the whole substance and tenor of the cross examination was premised upon the untruth of her allegation that he had had sex with her or even attempted to do so. It was put to her that they had visited Mt Coot-tha but had not had anything to drink there. It was put to her that they had then

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7 [1977] Qd R 80.

travelled to Amy's home and, along the way, had had a late dinner at the Pancake Manor in the city and stopped briefly at a service station. It was put to her that the appellant had then dropped her off at her home. The jury could have been under no possible misapprehension that it was the appellant's case that he had not had sexual intercourse with Amy. Moreover, as the appellant's counsel candidly told Clare SC DCJ at the trial when this omission was raised, counsel had made a considered decision based upon his view that, because Amy had not said that she had had sexual intercourse with the appellant, it was not necessary to put the contrary to her. Of course, putting such a question would have carried the risk that the witness's evidence might have changed, or been amplified, for the worse.

[104] This ground should be rejected.

[105] As to whether Amy had ingested sedatives between the time she left the appellant's company and the time she gave a urine sample, her evidence in chief was that she had *never* taken the substances in question. Yet blood and urine samples taken from her showed traces of Oxazepam, Temazepam, Aminonitrazepam and Nitrazepam. A forensic choice had to be made whether or not to investigate her denial. Questions might well have led to adverse answers that would serve to reinforce this young woman's denial that she had ever ingested tranquillizers. Certainly, even if counsel's omission to pursue such a line could be characterised as a failure (and I do not think it can be) then it falls nowhere near what must be shown to establish incompetence in legal representation of a character as to amount to a miscarriage of justice.

[106] This ground should also be rejected.

[107] The appellant submits that the counts involving the three complainants should not have been joined. The issue of joinder was the subject of a pre-trial ruling by Farr SC DCJ.[8] His Honour said:

> "[60] Turning to this matter, it is immediately apparent that there is a striking similarity and underlying unity in the relevant facts regarding counts 3, 4, 5, 6, 7, 8, 10 and 11:
>
> (a) the complainants are all young Korean women;
>
> (b) the complainants all contacted the defendant in response to an advertisement he placed on a website seeking to meet someone for the purposes of exchanging language skills;
>
> (c) the same website was used on each occasion;
>
> (d) the defendant used a false name on each occasion;
>
> (e) email correspondence then occurred, culminating the arrangement of a meeting;
>
> (f) the defendant selected the meeting place and time;
>
> (g) the defendant arrived at the meeting in his car;
>
> (h) the defendant indicated on each occasion that the complainant should get in his car after which he drove off to a park or park-like location at night;

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8 *R v Makary* [2014] QDC 140.

(i) there had been no pre-arrangement in that regard;

(j) the defendant brought drinks with him in the car which he offered to each complainant;

(k) each complainant felt dizzy or suffered amnesia after consuming some drinks or was found to have sedative-type drugs in their urine; and

(l) sexual activity subsequently occurred with each complainant, with the exception of complainant 5 who due to her presence of mind was able to resist his advances."

[108] It should be pointed out that sub-paragraphs (a) to (i) had become common ground or, at least, not the subject of any challenge by the time of trial.

[109] Section 567(2) of the *Criminal Code* provides:

> "(2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

[110] The appellant submits that these similarities "are really no more than the stock in trade of that type of offender or offence". He submits that they "are in reality unremarkable circumstances that are common to drug facilitated sexual assaults". He submits that these are matters that have no more relevance than proof that the applicant wore jeans on each occasion.

[111] I would not accept that the facts identified by Farr SC DCJ are common to rapists but they were common to *this* rapist. This was a case in which, on the evidence of the complainants, after carefully inducing three young Korean women by means of false advertisements (containing strikingly similar language) about a willingness to teach English and by the use of an alias in each case (which was the same one in two of them), a man used a white car to take each complainant to a park-like environment (two of them to the same location) where he plied them to unconsciousness with drugged drinks (each involving orange juice and two of them involving the same sedatives) and then took them to his home to rape them on three successive nights. A more remarkably similar set of circumstances in which the same offences (or attempted offence) were committed would be difficult to imagine.

[112] The appellant also puts forward a long list of dissimilarities between the three sets of charges, such as "nickname; date of arrival in Australia; age; address; social status; email address; mobile phone number;" as well as "how drinking is said to have occurred; description of drinking vessel; number of drinks".

[113] This is beside the point. It does not matter for the purposes of s 567(2) whether the similarities pertaining to a particular series of offences are common or uncommon to the commission generally of the offence. Nor does it matter whether there are also some dissimilarities. What matters is whether the series of offences sought to be joined are "of the same or similar character". This particular series of offences concerned an offender who persuaded three young women on three successive

nights to imbibe drugged alcohol so that he could rape them while they were unconscious and did rape two of them while attempting to rape the third. The series thus satisfies the requirement of the section. That two different sets of offences are alleged, administering a stupefying thing and rape, does not alter this conclusion. Section 567(2) does not require, as a condition of joinder, that the offences be the same; it requires, relevantly, that the offences be a series of offences of the same or of similar character. The offences joined in the indictment in this case satisfy each of those requirements.

[114] In my respectful opinion, Farr SC DCJ's ruling declining to sever these counts was correct.

[115] Nevertheless, the appellant submits that he has suffered prejudice by the joinder. Section 597A(1) provides:

> "Separate trials where 2 or more charges against the same person
>
> (1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in the person's defence by reason of the person's being charged with more than 1 offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any 1 or more than 1 offence charged in an indictment the court may order a separate trial of any count or counts in the indictment."

[116] On 6 May 2016 an application was made to Clare SC DCJ to reopen Farr SC DCJ's ruling. There was no complaint that the evidence in relation to each complainant could not be used in relation to the other complainants if there were separate trials. Indeed, the appellant's counsel correctly disavowed such a contention. Rather, he submitted that the appellant thought that the case concerning the complainant Emma was a weak one and that in respect of the charges concerning her he would be minded to give evidence but that he was disinclined to give evidence in relation to the charges concerning Linda and Amy. Therefore, he submitted, the appellant would be prejudiced, if he chose to give evidence to answer the charges concerning Emma and was cross-examined about the other counts.

[117] There is no challenge in this appeal to the correctness of the learned trial judge's direction to the jury about the use of the evidence in relation to each count as similar fact evidence; nor could there have been any complaint having regard to the striking similarities in each of the three cases. Consequently, even if there had been separate trials, the evidence led in each trial would have been admissible in the other trials as similar fact evidence. It follows that the dilemma that the appellant perceives that he faced was not real. It would not have disappeared had there been separate trials. In fact, it is not uncommon, when several counts are joined, for one or more counts to raise cases that are weaker for the prosecution than the others. Absent some peculiar factor arising, in general no ground for severance can arise because of such a feature.

[118] This ground of appeal should be rejected.

[119] The appellant submits that the guilty verdict on count 1, administering a stupefying thing to Emma, and the verdict of guilty of attempted rape, which the jury returned

on count 2, were unreasonable. He points to some evidence given by the complainant to the effect that she thought that they were both drinking out of the same bottle. This would raise a possible inference that he could not have drugged her without drugging himself. He also points out that, although a trace of an ingested drug might be detected in a person's hair, there was no such evidence in this case. Nor was there any supporting evidence found in his house or car. He submits that Emma had admitted telling her boyfriend that she had been drinking with some friends rather than telling him truthfully that she had been with "Andrew". In addition, she was unable to identify the appellant from the photoboard offered to her by police. He also submits that Emma did not give evidence that the appellant had removed her clothes or that she had to put her clothes back on. He points out that she had not suffered any physical injury. He points to her lack of complaint to anyone until the police contacted her.

[120] 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.[9] I have no doubt that in this case it was.

[121] There was no challenge to Emma's evidence that she had been drugged and that she found herself naked in bed with a man on top of her, who was naked from the waist down, who had pulled her towards his penis and who had sought to reassure her by saying that he was wearing a condom. The appellant did not dispute that it was he who had used the pseudonyms "Andrew" and "Chuck" to communicate with Emma; he could hardly have done otherwise having regard to what police had found on Emma's phone, his phone and his laptop computer. She described her assailant's car as an old white car. The appellant owned such a car. The appellant had invited her to a picnic. She described the snacks, fruit juice, Mojito and wine that her assailant had offered her and the vessels that he had used. Such items were later found in the appellant's car and contained traces of stupefying drugs of a kind that he possessed. These drugs were capable of producing the physical effects described by Emma. She had described to police the bedroom in which she had found herself and this description tallied with the actual condition of the appellant's room. She had described a flight of steps that she had to climb, consistently with the presence of such steps at the appellant's dwelling.

[122] Emma's case had only come to the attention of police two and a half weeks after the events in question. This was too late for any blood or urine testing for drug traces. On the expert evidence that was led, the delay could also explain the absence of any traces of drug in samples of Emma's hair. The delay and the effect of the drugs upon her mind could also furnish an explanation for Emma's inability to correctly identify the appellant's photo on the photoboard given to her by police. Moreover, in this case the complainant's inability to identify the appellant lacked the forensic force it might otherwise have had because the appellant admitted that he had arranged to meet Emma and his phone number linked them together.

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9 *M v The Queen* (1994) 181 CLR 487 at 493 *per* Mason CJ, Deane, Dawson and Toohey JJ; *cf SKA v The Queen* (2011) 243 CLR 400 at [21]-[22] *per* French CJ, Gummow and Kiefel JJ.

[123] On the complainant's evidence alone, there was compelling evidence against the appellant; but there was more than this. There was also the evidence of the other complainants.

[124] The learned trial judge correctly directed the jury that before they could use the evidence of Amy or Linda as evidence to prove the commission of the offences alleged in counts 1 and 2 they had to be satisfied that there was no real risk of collusion, that they were satisfied that the evidence was truthful and that the accounts were so similar that there was no reasonable view open but that the evidence of Emma was also true.[10]

[125] The appellant accepted at trial that he had met each of Amy and Linda after an exchange of emails. According to them, each of them had been duped by a written advertisement placed on the same website that was used by Emma. The terms of the advertisements were similar. The terms of the ensuing messages were strikingly similar to those received by Emma. In short, the methods described by Amy and Linda that were used to get them into a situation in which they could be raped were strikingly similar to the method alleged by Emma. Each of Amy and Linda identified the appellant as the rapist and, if accepted by the jury as true, this was evidence against him in relation to counts 1 and 2.

[126] Against this evidence led by the Crown, the jury had the implausible story which the appellant gave in oral evidence. The appellant's case was that he became ill and, as a consequence, did not keep his appointment with Emma. There were no text communications, of the kind he said that he sent, to support this assertion which is based wholly upon the appellant's word. However, there are text messages that the jury may have regarded as conflicting with his story. He had sent a text message to Emma at 12.45 pm on 1 April asking her to meet him at 7 pm outside the South Bank Cinema. At 6.42 pm that evening she texted him to say that she would be wearing a white blouse and black skirt. At 6.50 pm the appellant replied:

> "Thanks. I'm wearing a yellow T-shirt and blue jeans. Please wait for me at South Bank Cinema. Can you also text me when you arrive there. See you soon."

[127] At 7.05 pm she texted that she had arrived. Emma gave evidence that the appellant arrived in due course and picked her up in his small white car. He was wearing a yellow T-shirt and blue jeans. The appellant did not explain the circumstances that led him to send his last message despite, on his evidence, having decided not to keep his appointment. It was, of course, utterly inconsistent with the story he was putting to the jury but consistent with the prosecution case. The jury, therefore, had a good basis upon which to reject his implausible evidence as false.

[128] In my opinion there was ample evidence upon which a jury could have been satisfied beyond a reasonable doubt that the appellant was guilty of count 1 and of the attempted rape.

[129] The appellant also claims that his conviction on count 6 was unsafe and unsatisfactory. Count 6 alleged that he had raped Linda.

[130] The appellant puts forward seven reasons to support this ground of appeal.

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[10] *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ; at 529-30 per McHugh J.

[131] First, he points to the fact that, when asked by Mr Rankin and Ms Johnson respectively whether there had been penetration, she had responded in the negative. Second, he points to the fact that a nurse, who saw Linda on the day she made her complaint, recorded that Linda had said that when she had awoken on the morning after the events she described she was "unsure of what happened". Third, he says that a physical examination of the complainant revealed no injuries to the genital area. Fourth, he points out that there was no DNA evidence found in the complainant's vagina that would implicate him. Fifth, he points to the absence of any corroborative "forensic evidence" found in his bedroom. Sixth, he says that the first complaint of drink spiking was only made when the complainant spoke to police. Finally, the appellant points to Linda's demeanour when she gave evidence; he said she was "smiling throughout her evidence". The appellant invites the members of the Court to examine the video recording of her evidence and I have done so.

[132] As in the case of Emma, so too in the case of Linda, the prosecution case was a strong one. Indeed it was a stronger case because Linda actually identified the appellant and gave direct evidence that he had raped her. She was able to identify the bottle of orange juice from which the appellant poured her a drink and in which traces of stupefying drugs were later discovered. Her underpants were later found in the appellant's car. On his evidence this discovery, otherwise supporting Linda's evidence, was not only unexplained but was inconsistent with his story. She had suffered grazes to her face and other superficial injuries to her neck and shoulders. Her evidence was supported by the similar fact evidence.

[133] Each of the points raised by the appellant, including Linda's demeanour when giving evidence, were points for the jury to consider when evaluating the evidence against the appellant but none of which, whether taken singly or in combination, was capable of rendering the jury's verdict unreasonable. In particular, Linda's statement to police that she had not been penetrated by the appellant was not unequivocal. She also told police that he had put his penis into her. This inconsistency was, undoubtedly, a point in the appellant's favour at the trial but it was entirely a matter for the jury to consider as part of the whole case. When considered as part of the entirety of the evidence, which so strongly pointed to the appellant's guilt, it was open for the jury rationally to put that statement to one side.

[134] None of the appellant's grounds have been made out and the appeal should be dismissed.

[135] The appellant has also applied for leave to appeal against the sentences imposed upon him for each of these offences.

[136] Clare SC DCJ sentenced the appellant to imprisonment for 18 and a half years for each of the offences of administering a stupefying thing and for each of the rapes. She sentenced him to 10 years imprisonment for the offence of attempted rape. Each sentence was to be served concurrently. The appellant submits that her Honour erred in taking into account other acts which had not been charged as offences but which, if those acts had been done, would have constituted offences. He also submits that error is shown by the sentences being manifestly excessive.

[137] As to the first ground, the appellant has referred the Court to the following passage from Clare SC DCJ's sentencing remarks:

> "The Prosecution has proved that you raped two women and came perilously close to raping the third. After weeks of scheming, the women were at your mercy to do with what you would. By that time, you had demonstrated that your only interest in them was malevolent. It defies credibility to consider that you did not exploit the opportunity you had created. In the absence of credible evidence to the contrary, this can only be viewed as protracted offending. [Amy] was with you for six hours. [Linda] had 12 hours unaccounted for. Both of those women bore indications of forceful or protracted violations and rough mistreatment. [Linda] had the additional injuries. For [Emma] who was not raped, there was extra danger in the way that you left her."

[138] The appellant submits that her Honour's reference to the appellant's exploitation of his opportunity and to the offending as protracted offending shows that her Honour impermissibly took into account offences with which the appellant had not been charged.

[139] A sentencing judge may not take into account other offences in respect of which the accused has not been convicted even if the evidence at trial discloses the commission of such offences.[11] That is not to say that the circumstances of the offence in question, if those circumstances point to the commission of other offences, may not be taken into account when it would be artificial to view the charged offence in isolation.[12] It would be unreal, in sentencing an offender for a violent rape, to ignore the violence that accompanied the commission of the charged offence merely because it could have been the subject of another charge. The distinction is between, on the one hand, sentencing a person having regard to all the circumstances surrounding the doing of the criminal act and, on the other hand, punishing a person not only for the criminal act the subject of the conviction but also for other criminal acts of which the offender has not been convicted and *a fortiori* for acts that have neither been charged nor proved.

[140] In this case the learned judge's references to indications of forceful violations and rough mistreatment were no more than her Honour's taking into account the evidence which showed the manner in which the rapes charged were carried out; this cannot be the subject of any criticism. However, in my respectful opinion, her Honour's reference to the appellant's offending as "protracted offending" involving "protracted violations" cannot be read otherwise than as a reference to multiple rapes, or the commission of some other unspecified and uncharged sexual offences, committed by the appellant against his unconscious victims. There is no doubt, of course, that the evidence to which her Honour referred raised an inference that, while the appellant had his two victims at his mercy, he committed numerous sexual offences. However, he was never charged with any such additional offences, they were never identified, he was given no notice that such offences would be alleged against him for any purpose and he had no occasion or opportunity to resist the drawing of any such inference. In the circumstances of this case, in sentencing the appellant it was not permissible to take into account the possibility, or even a finding, that he had committed any offences except those offences for which he had been convicted.

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11 *R v Cooksley* [1982] Qd R 405 at 418 per McPherson J.

12 *R v Cooksley*, *supra*, at 419 per McPherson J.

[141] The appellant may appeal to the Court against the sentence imposed upon him only with the Court's leave.[13] Because it appears that the learned judge, in sentencing the appellant, took into account an impermissible factor, it follows that the appellant's argument that her Honour's sentencing discretion miscarried must be accepted and leave to appeal should be granted.

[142] Section 668E(3) of the *Criminal Code* provides:

> "On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

[143] In *R v Simpson*,[14] the New South Wales Court of Appeal considered s 6(3) of the *Criminal Appeal Act* 1912 (NSW), which is identical to s 668E(3). Spigelman CJ[15] said:

> "Sentencing appeals in this Court frequently proceed as if the statutory trigger for the quashing of a sentence were expressed as follows: "If it is of the opinion that error has occurred in the sentencing process". That is not the statutory formulation. By s 6(3) this Court must form a positive opinion that "some other sentence ... is warranted in law and should have been passed". Unless such an opinion is formed, the essential pre-condition for the exercise of the power to "quash the sentence and pass such other sentence in substitution therefor" is not satisfied. As the judgments in *Dinsdale*[16] to which I have referred indicate, the exercise of the power in s 6(3) further requires the identification of error in the requisite sense."

[144] The identification of the error does not, on its own, justify a quashing of the sentence. The error that has been identified and established means only that the Court must now consider, in the exercise of its own discretion, whether some other sentence "is warranted in law and should have been passed".[17]

[145] I have already set out the facts concerning the commission of these offences. It remains to refer to the matters that are relevant only to penalty. I am indebted to Clare SC DCJ's exposition of these facts, from which I have drawn the following.

[146] The six offences of which the appellant was convicted were the culmination of some weeks of effort by him to put these three young women at his mercy. His efforts to that end were calculated, methodical and sustained. He set out to hunt down three women who, by reason of their youth, their presence in a foreign land and their lack of proficiency in English were particularly vulnerable to entrapment and violation. He pretended to be willing to assist them, he exploited their solitariness here and he abused their preparedness to trust him. He devised a rape kit consisting of alcoholic drinks, innocuous looking orange juice, wine glasses, drugs and a car in which to transport his unconscious victims to his bedroom. The

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13 Section 668D(1)(c) *Criminal Code*.
14 (2001) 53 NSWLR 704; [2001] NSWCCA 534 at [79].
15 with whom Mason P, Grove J, Sully J and Newman AJ agreed.
16 *Dinsdale v The Queen* (2000) 202 CLR 321.
17 Section 668E(3); *R v AB* (1999) 198 CLR 111 at [130] per Hayne J.

evidence showed that he roughly raped two of his victims and was ready to rape the third. He wanted to have them and he did have them at his mercy for hours. He drugged them by suspending the stupefying drug in an alcoholic drink which exacerbated the effect of the drugs. He was prepared to, and did, induce them into incoherence and illness. He had not the slightest concern for their safety or well-being. He let Emma out of his car in a drug-induced, inebriated state into an unfamiliar street, leaving her to crawl to some form of safety if she could, or into danger if that is what happened. He left his other two victims at their home careless of their ability to look after themselves and careless of their health. Linda was ill to the point of vomiting violently. All of them suffered unconsciousness, disorientation, inability to move and confusion. He drugged them not caring whether any of them had suffered from any condition that might have rendered her ingestion of the drugs he gave her particularly dangerous. He did these awful things to these women because he wanted to rape three different women on three successive nights. Indeed, as it happened, at the very time that Amy was being examined at the hospital, the appellant was undertaking the subjugation and rape of Linda.

[147] Each of these women has been affected by the crimes committed against them. Because they were each rendered unconscious before they were raped, or in the case of Emma, before the appellant attempted to rape her, they suffer from their lack of knowledge of what might have been done to them at the appellant's will. Each has suffered an enduring vulnerability. One of the complainants terminated a pregnancy for fear that the child might have been fathered by the appellant. Amy suffers from post-traumatic stress disorder. Linda has changed from being a bubbly and bright young woman into a person who is more guarded. Notwithstanding this ongoing suffering, each of them had the great moral courage to submit themselves to the distress of legal process in a foreign country.

[148] It could be said that this case is remarkable because there are no factors at all in mitigation of the appellant's guilt of these offences.

[149] He did not plead guilty and even now maintains his innocence of these crimes. He has evinced not the slightest remorse or even empathy. He put the Crown to strict proof at the trial, including proof of continuity of the handling of DNA samples. He is a man who has shown no cooperation with authorities. There is not the slightest suggestion that he is amenable to rehabilitating himself. Indeed, on the contrary, while on bail for these offences we now know that he committed yet another, almost identical, offence against yet another Korean victim for which he has since been convicted.

[150] The appellant is mature and well educated. He cannot absolve himself by pointing to the callowness of youth as a factor. He did not submit that he committed these offences by reason of the effect upon him of any disorder, illness or other explicable compulsion.

[151] Rehabilitation is always possible but there is no evidence of any hope for it here.

[152] Accordingly, the submissions made on the appellant's behalf in this Court did not suggest the existence of any factors in mitigation of sentence by way of sustaining the submission that the sentences imposed ought not have been imposed. Rather he points to two cases in order to show that the sentences were excessive.

[153] In the first of these, *Hussein*,[18] two offenders, aged 25 and 20 respectively, together raped two different women on two separate occasions. They were convicted after a trial concerning one of their victims and then pleaded guilty to an indictment charging them with the rape of the other. They had induced their first victim to get into their car. She was drunk. They took her to Mt Coot-tha where they repeatedly raped her. They then left her to run away and seek help as best she could. The oldest offender was sentenced to imprisonment for fifteen and a half years for the conviction after trial. On an application for leave to appeal, Jerrard JA held that that sentence was "high" but not excessive. The second woman was raped numerous times by the same offenders and another man. The rapes were accompanied by threats to kill the victim if she was not quiet. A sentence of eleven and a half years on this count imposed on the same offender was not disturbed on appeal.

[154] These were serious offences but otherwise there is no similarity between the circumstances in *Hussein* and the circumstances of this case. In *Hussein* there were two victims raped on separate occasions. In particular, those rapists did not also commit the separate and distinct offence of administering a stupefying thing in order to commit rape, an offence that itself carries with it a maximum penalty of life imprisonment.

[155] In *Turnbull*[19] the offender had pleaded guilty to the rape of two women as well as to other sexual offences and violent offences against the same victims. The rapes were accompanied by violent assaults, in one case breaking the victim's jaw. Sentences of 16 years and 20 years respectively were reduced to 10 years and 13 years on appeal. Applegarth J, with whom Gotterson and Morrison JJA agreed, was of the view that the sentences that had been imposed were manifestly excessive "if adequate allowance was made for the guilty pleas".[20] His Honour's conclusion that a range between 15 and 20 years imprisonment was appropriate to the case he was considering was based heavily upon the view to that effect expressed by Keane JA in *Robinson*.[21] *Robinson* was a case involving six counts of rape and associated offences of burglary and deprivation of liberty committed on a single occasion against one victim. The appellant had been sentenced to 16 years imprisonment for three of these offences and to other lesser terms for the remaining offences, to be served concurrently. He contended that the sentence of 16 years was excessive. Keane JA's statement about the appropriate range for the offence of rape was, therefore, expressed in that context. In stating his view, Keane JA relied upon the earlier case of *Edwards*,[22] another case involving a single incident.

[156] In *Turnbull* there were substantial mitigating circumstances. The applicant was young. The committal was a full hand-up accompanied by an indication of a likely guilty plea and the pleas of guilty, when made, were timely. The appellant showed some prospects of rehabilitation. The highest head sentence of 20 years was reduced to 13 years. There are no mitigating factors in the present case and so *Turnbull* gives no assistance.

[157] Neither of these cases is comparable. In this case three distinct offences of administering a stupefying thing were committed in a calculated way on three successive days against three women in order to render each victim unconscious so that the

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18 [2006] QCA 411.
19 [2013] QCA 374.
20 at [28].
21 [2007] QCA 349 at [27].
22 [2004] QCA 20.

appellant could rape her. Those offences on their own exposed the appellant to a maximum penalty of life imprisonment. The convictions for rape enabled by the commission of the offence of administering a stupefying thing also exposed the appellant to a potential maximum penalty of life imprisonment. The appellant was rightly charged with these distinct and different offences.

[158] In my respectful opinion Clare SC DCJ correctly emphasised, in the course of her comprehensive and detailed sentencing remarks, that one of the cruellest aspects for the appellant's victims was not to know what it was that he might have done to them while they were unconscious. Her Honour observed that the stupefaction not only aggravated the offences of rape but were their most serious aspect. I respectfully agree.

[159] In *Colless*[23] the appellant had raped and committed sexual offences against 11 women over two years. Each rape was a digital rape. Each of the offences had been accompanied by actual violence. He had been sentenced to 25 years imprisonment. After his arrest, and after being confronted with DNA evidence that incriminated him, the appellant admitted his guilt to police and even volunteered that he had committed another offence of which police were unaware. He was described in expert evidence as "an excellent candidate for a sexual offenders' treatment program, as well as individual psychotherapy to help [him] gain insight into … [his]… behaviour". Another expert said he was a "promising prospect of rehabilitation to avoid further sexual offending in the future". He had expressed remorse. Having regard to these features, the Court concluded that the sentence of 25 years was excessive because it indicated a substantially higher head sentence absent these features. A sentence of 16 years was imposed to take into account these matters in mitigation. *Colless* is, therefore, an example of a case involving a serial, predatory rapist who, but for his arrest, would likely have continued to offend and in respect of whom it could not be said that, absent factors in mitigation, the proper range was 15 to 20 years imprisonment. On the contrary, the decision suggests that in a case of that kind a sentence in excess of 20 years may be appropriate. This must be so, for the sentence of 16 years imposed in *Colless* reflected the evidence of contrition, his guilty pleas and a willingness to engage in rehabilitation. In a case like the present, where an offender has shown no contrition, no insight into the character of his thinking and actions and in respect of whom no prospect whatsoever has been held out of rehabilitation and who has not pleaded guilty but who continues to deny his obvious guilt, the need to protect the public from the offender and denunciation become very weighty factors in the exercise of discretion.

[160] The other case that is relevant is *Burley*.[24] The offender was a 20 year old man who committed rape or attempted rape upon four women. The offences involved violence or threats of violence accompanied by the use of a knife. Burley was sentenced to imprisonment of 16 years. On an Attorney-General's appeal the Court unanimously increased this to a sentence of imprisonment for 20 years. The Attorney-General had advocated for the imposition of imprisonment for life.

[161] Despite the offender's guilty pleas and his youth, each member of the Court, in separate judgements, considered that the continuing danger represented by the offender's evident lack of prospects for any rehabilitation justified the term of imprisonment of longer than the 16 years that had been imposed at first instance. In the course of his

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23 [2011] 2 Qd R 421; [2010] QCA 26.

24 [1998] QCA 98.

reasons Shepherdson J referred to a case in which life imprisonment had been imposed for rape.[25] Of course, it has been the settled practice when resentencing upon an Attorney-General's appeal to impose a sentence at the lower end of the appropriate range[26] and so *Burley* cannot be regarded as an authority that establishes some kind of high benchmark for sentencing rapists.

[162] What *Colless* and *Burley* show is that, absent any mitigating factors, the imposition of a sentence of imprisonment of more than 20 years for a case like the present is not outside the proper exercise of discretion. This being the linchpin of the appellant's argument, I am not satisfied that a sentence that is less severe is warranted and should have been passed. Accordingly, the appeal against sentence should be dismissed.

[163] **McMURDO JA:** I agree with the President that the appeal against these convictions should be dismissed. I do not agree that the sentences imposed should stand given the error in the judge's sentencing reasons which the President has identified.

[164] For the most part, I agree with the President's reasons for dismissing the appeal against conviction, but it is necessary for me to give my own reasons for rejecting some of the grounds.

Section 24

[165] I agree that it was unnecessary to direct the jury about the application of s 24. As I have said in the related appeal (in relation to an offence committed by the appellant in 2012),[27] the test of whether the operation of s 24 is raised by the evidence is better expressed as it was by McPherson JA in *R v Millar*,[28] namely that there should be evidence "on which the jury could legitimately have entertained a reasonable doubt about … whether the appellant honestly and reasonably believed the complainant had consented". There are other formulations which refer to a need for evidence upon which the jury could infer, or more generally, find that the defendant acted under an honest and reasonable mistake. I prefer that statement of McPherson JA because it recognises that the onus of proof is on the prosecution. A jury could entertain a reasonable doubt as to whether a defendant acted under an honest and reasonable mistake, without being able to find that to be the case.

[166] I agree that the direction which was given about s 24 was not unfair to the appellant.

Similar fact evidence and separate trials

[167] According to the appellant's outline of submissions, separate trials should have been ordered in relation to each of the three complaints and the failure to do so deprived the appellant of a fair trial. That ground was developed over some eight pages of the outline as well as orally. The submissions referred to s 597A of the Code as well as *Phillips v The Queen*,[29] *R v MAP*,[30] *Director of Public Prosecutions v Boardman*[31] and other authorities. The appellant presented detailed submissions

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25 *R v Jackson* (CA 376 of 1987).
26 *Dinsdale v The Queen*, *supra*, at [62] per Kirby J; *R v Peterson* [1984] WAR 329 at 330-331.
27 CA 257 of 2015; [2018] QCA 258.
28 [2000] 1 Qd R 437 at 439 [7]; [1998] QCA 276.
29 (2006) 225 CLR 303; [2006] HCA 4.
30 [2006] QCA 220.
31 [1975] AC 421.

which were to the effect that there were not similarities between the three complaints which were so remarkable that the evidence of one complainant had sufficient probative force to displace the exclusionary rule of the admission of similar fact evidence.[32] In that respect the argument challenged the correctness of a pre-trial ruling,[33] where the admissibility of the evidence on this basis was challenged. In my view the appellant's submissions to this Court did challenge the admissibility in the case involving one complainant of the evidence of the two other complainants. And that was the principal basis for his argument that there ought to have been three separate trials.

[168] The appellant made a further argument, which was that he was prejudiced by not having a separate trial for the complaints by Emma, in that he was minded to give evidence in respect of her complaints but would not have given evidence had he been tried only on the other complaints. I agree with what the President has said in rejecting that argument.

[169] The evidence of the other complainants was relied upon by the prosecution to prove the identification of the appellant as the man who met Emma. The evidence of other complainants was also said to support the reliability of the evidence of each of them and as proof that the appellant deliberately drugged each of them. The ways in which the evidence could be used by the jury were carefully explained in the summing up. The present question is whether the evidence was admissible as having a sufficiently strong degree of probative force, or as Mason CJ, Deane and Dawson JJ said in *Pfennig v The Queen*,[34] a high level or degree of cogency. On the prosecution case, that high level or degree of cogency was found in "the striking similarity, underlying unity or "signature" pattern common to the incidents" disclosed by the respective complainants.[35] The judge who heard the pre-trial application (Farr SC DCJ) held that it was "immediately apparent that there is a striking similarity and underlying unity in the relevant facts" which he listed in the passage set out in the judgment of the President.[36] Of course, as the appellant submits, there were also some dissimilarities. They were not to be ignored, because dissimilarities can preclude a conclusion that there was an underlying pattern of conduct of the requisite kind: see, for example, *R v MAP*, per Keane JA.[37] However overall the nature and extent of the similarities justified the admission of the evidence of other complainants in the proof of the offences against one of them. The modus operandi was identical in these three complaints. Moreover, they involved events which occurred on three successive nights. The evidence was properly admitted, and the charges were able to be joined in the same indictment.

Appeal against sentence

[170] The President has identified the error by the sentencing judge, by sentencing upon the premise that each complainant had been raped or otherwise assaulted several times, rather than by the single act which was the rape (or attempted rape) for which the appellant was convicted. Her Honour ought not to have sentenced him upon the basis that there had been "protracted offending" involving "protracted violations" over the night in question.

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32 Appellant's Outline at [61].
33 *R v Makary* [2014] QDC 140.
34 (1995) 182 CLR 461, 488; [1995] HCA 7.
35 Ibid.
36 See [107].
37 [2006] QCA 220 at [45].

[171] The question then is whether some other sentence is warranted and should have been passed.[38] The question is not whether there is a basis for disturbing the exercise of the sentencing discretion, because that basis has been established. Therefore it does not matter that the sentences may have been within a range which was open, if this Court concludes that some other sentence should have been passed.

[172] Upon any measure these were terrible crimes which warranted severe punishment. The sentences which were imposed were severe, as would be the sentences which I would impose in their place.

[173] The judge imposed concurrent sentences of 18.5 years on all offences, save for that of the attempted rape for which a sentence of 10 years was imposed. Because they were serious violent offences, the appellant was required to serve 80 per cent of that period of 18.5 years before being eligible for parole. However, the appellant had been on remand for four years until his trial in 2016, a period of incarceration which could not be declared as pre-sentence custody. In real terms therefore, these sentences required him to serve nearly 19 years in prison before being eligible for parole.[39] And if not granted parole, the sentences effectively required him to serve a total of 22.5 years.

[174] The judge recognised that an allowance would have to be made for that four years which could not be declared as time already served under the sentences. She said that this should reduce what would otherwise have been the sentence, which she described as "a sentence clearly in excess of 20 years". Evidently she considered that a sentence of the order of 22.5 years would have been appropriate. That does not accord with my view.

[175] Almost certainly her assessment of appropriate sentences was affected by her conclusion that the appellant had committed further offences against these young women than those of which he had been convicted. It may be inferred that the judge would have imposed lower sentences had she not made that error. That fortifies my opinion that the appropriate sentences for the five offences ought to have been 16 years, rather than 18.5 years. As I have said, the sentences I would impose are also, by any measure, severe, as they should be given the scale and seriousness of this offending, and the lack of any substantial mitigating circumstances.

[176] Under the sentences I would impose, the result would be that the total period of imprisonment to be served by the appellant for the offences involving these three complainants and the complainant the subject of the 2012 offence would be effectively 25 years.[40] The parole eligibility date under those sentences would be 8 September 2030 with the result that, at the earliest, he would be released after having served 18.8 years.[41]

[177] I would grant leave to appeal against sentence, allow the appeal, set aside the sentences imposed in the District Court for counts one, three, four, five and six on the indictment and substitute on each of those counts a sentence of 16 years

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38 s 668E(3) of the Code.

39 80 per cent of 18.5 years plus four years.

40 16 years plus four years on remand, plus the five year cumulative sentence imposed by Judge Richards for the 2012 offence.

41 80 per cent of 16 years (12.8 years) plus four years on remand, plus two years under the sentence for the 2012 offence.

imprisonment, declaring that the appellant served a period of pre-sentence custody for those offences from 6 April 2011 until 30 December 2011, a period of 269 days.

[178] **BOND J:** I agree with the reasons for judgment of Sofronoff P and the orders proposed by his Honour.