SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hinchey* [2019] QCA 3
PARTIES:	**R** **v** **HINCHEY, Shannon John** (appellant)
FILE NO/S:	CA No 30 of 2017 DC No 184 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction: 14 December 2016 (Burnett DCJ)
DELIVERED ON:	1 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2018
JUDGES:	Gotterson and Philippides and McMurdo JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of four counts of rape – where the alleged offending occurred at the Capricornia Correctional Centre – where there was evidence in the complainant's recorded police interview, which was played for the jury, about the appellant and the complainant standing watch while another inmate was sexually assaulted in a toilet – where the prosecution sought to exclude that part of the evidence – where defence counsel insisted that that part of the evidence be led – whether there was a miscarriage of justice occasioned by the admission of the impugned evidence *Craig v The Queen* (2018) 92 ALJR 390; (2018) 353 ALR 177; [2018] HCA 13, followed *Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29, considered *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, considered
COUNSEL:	A Hoare, with N Boyd, for the appellant (pro bono) M Whitbread for the respondent
SOLICITORS:	No appearance for the appellant Director of Public Prosecutions (Queensland) for the

respondent

[1] **GOTTERSON JA:** At the conclusion of a trial over five days in the District Court at Rockhampton, the appellant, Shannon John Hinchey, was found guilty on 14 December 2016 of four counts of rape.[1] All counts alleged offending against the same complainant, a fellow prisoner.[2] The counts alleged that the offending occurred at Etna Creek in Queensland on or about 17, 19, 22 and 23 February 2014, respectively.[3]

[2] The offending occurred at the Capricornia Correctional Centre. Both the appellant and the complainant were in custody at the facility at the time.

[3] The appellant was then serving a two year sentence which had been imposed on 29 February 2016 and a five month sentence which had been imposed on 7 November 2016.[4] In relation to the former sentence, his parole release date had been fixed at 17 September 2016 allowing for some 43 days in pre-sentence custody declared as time served. He was not released on that date, however, because he was at that time on remand for the rape charges that are the subject of this appeal. His full-time release date was 17 January 2018. In respect of the latter sentence, his parole release date had been fixed at 6 April 2017.[5]

[4] On 15 February 2017, the appellant was sentenced for the subject offending. By operation of s 156A of the *Penalties and Sentences Act* 1992, the sentence the learned sentencing judge was to impose had to be cumulative upon the sentences that the appellant was currently serving. In respect of each count, convictions were recorded and the appellant was sentenced to six years imprisonment. Those sentences are to be served concurrently with each other but cumulatively on the sentence imposed on 29 February 2016.[6] A parole eligibility date was fixed at 5 April 2019, being the one-third point of the rape sentences for which the parole release date of 6 April 2017 was adopted as the starting point.[7]

[5] The sentence was reopened on 25 May 2017 following the discovery of a material factual error; namely, that the appellant was a carrier, and knew that he was a carrier, of Hepatitis C at the time of the offending.[8] The original parole eligibility date was extended by three months and re-fixed at 5 July 2019.[9]

[6] On 3 March 2017, the appellant filed a Form 26 notice of appeal against conviction and an application for leave to appeal against sentence.[10] Twelve days later, on 15 March 2017, he filed a Form 28 application for an extension of time within which to file his notice of appeal against conviction.[11] The application for an extension of time was granted by way of *ex tempore* orders made on 18 August 2017.[12]

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1 *Criminal Code Act* 1899 (Qld) sch 1 ("*Criminal Code*") s 349.
2 Appeal Book ("AB") 2.
3 Ibid.
4 AB216-217, 218-225: Exhibit 4.
5 Ibid.
6 AB9; AB194 ll1-8. The learned sentencing judge noted that the sentence imposed on 7 November 2016 will expire before the sentence imposed on 29 February 2016 expires.
7 AB194 ll20-25.
8 AB273: Exhibit 5.
9 AB8; AB208 ll35-36.
10 AB360-361.
11 AB354-356.
12 AB357.

[7] An amended Form 26 notice of appeal against conviction and application for leave to appeal against sentence was filed on 1 June 2017.[13] On 9 October 2018, a further amended Form 26 notice of appeal against conviction was filed. It sought to abandon the application for leave to appeal against sentence and to delete the stated grounds of appeal and substitute a different one.[14] At the hearing of the appeal on 11 October 2018, leave to amend the notice of appeal was not opposed and was given.[15] The sentence application was not pursued.

The circumstances of the alleged offending

[8] The offending occurred at the Capricornia Correctional Centre. The complainant had been housed in Secure Unit 4 and was assaulted.[16] He was transferred, after a brief stay in the Medical Unit, to Secure Unit 2.[17] The appellant and another inmate, Raymond Garland, resided in that unit.[18]

[9] On the day of his arrival at Secure Unit 2, the complainant had an altercation with Mr Garland in the exercise yard. Garland punched him in the jaw.[19] Later that afternoon, the complainant was using a communal toilet. Garland unlocked the cubicle door and struck the complainant on the left-hand side of his jaw, knocking him unconscious. When the complainant regained consciousness, he felt Garland withdraw his penis from his anus. Garland put his hand in the toilet bowl and flicked water at the complainant's face and told him to "clean [himself] up and shut [his] mouth". Garland then exited the cubicle.[20] Upon returning to his cell that evening, the complainant attempted to take his own life.[21]

[10] A couple of weeks later, Garland spoke to the complainant in the presence of the appellant. He told the complainant that the assault that had occurred in Secure Unit 4 was at the request of another prisoner, and that he was aware of a lot of people around the jail that "wanted" the complainant. He said that "he runs the jail". He directed the complainant to ask the officers whether he (the complainant) could share a cell with the appellant "for moral support", so that he could tattoo the appellant. The complainant had become known within the prison as a tattoo artist.[22]

[11] The complainant did as he was told.[23] He was moved into a shared cell with the appellant and he tattooed him.[24] On the evening of 17 February 2014, the complainant and the appellant watched a movie on the television screen in their cell.[25] When the movie finished, the appellant began to play pornography.[26] He told the complainant to "come down and talk" to him.[27] The complainant sat on the

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13 AB358-359.
14 Earlier, at a callover on 26 July 2018, the appellant's legal representative had indicated to the Court that the application for leave to appeal against sentence was to be abandoned.
15 Appeal Transcript ("AT") 1-2 ll20-33.
16 AB36 ll17-33.
17 Ibid.
18 AB36 l44 – AB37 l20.
19 AB36 l46 – AB37 l37.
20 AB37 l39 – AB39 l9.
21 AB39 ll22-34.
22 AB40 ll20-43.
23 AB41 ll1-28.
24 AB41 l30 – AB43 l37.
25 AB44 ll4-27.
26 AB44 ll29-30.
27 AB45 ll1-2.

chair beside their bunk bed. The appellant told him that there was a deal that he would "make his life comfortable" and in return the appellant would "make [his] life safe". He said the complainant would be "sucking his dick", otherwise he would fabricate a story that the complainant had "made derogatory comments towards Ray Garland".[28] The complainant said that, out of fear of Garland, he performed oral sex on the appellant (Count 1).[29] The appellant did not ejaculate.[30]

[12] Two days later (Count 2), and three days after that (Count 3), the same conduct occurred. The complainant and the appellant had been watching movies and afterwards, the appellant began to watch pornography. He directed the complainant to perform oral sex on him and the complainant did so.[31] On both occasions, the appellant referred to the complainant as "champ", which the complainant described as "jail lingo for cocksucker".[32] The appellant did not ejaculate on either occasion.[33]

[13] The next day, on 23 February 2014, the same type of conduct occurred again (Count 4).[34] On this occasion, the appellant told the complainant he "wasn't happy with [his] services". He threatened to tell Garland that the complainant had called him "a paedophile scum" and was going to "throw hot water over" him. The appellant pulled his penis out and told the complainant, "you're going to start and you're going to finish".[35] The complainant performed fellatio on him until the appellant ejaculated into his mouth.[36]

[14] The complainant said that, on each of those four occasions, he performed oral sex on the appellant because "[he] was scared if [he] didn't, then [he'd] be bashed and raped by Ray again".[37] He also said that he had already made a complaint about "needing to leave the unit once" and that it "did not happen", and that he felt he had "no choice" but to oblige.[38]

The "Tim Burrows" incident

[15] On 1 March 2014, the complainant was interviewed by the police at the Capricornia Correctional Centre.[39] During that interview, he made a preliminary complaint about the appellant having raped him on the four occasions described above.[40] Prior to doing so, and significantly for the purposes of this appeal, he also reported an incident involving another inmate, "Timmy Burrows". He alleged that the appellant and the complainant had stood "cockatoo" (that is to say, stood "lookout")[41] while Garland sexually assaulted Burrows in a toilet. He described the incident in the following terms:[42]

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28 AB45 ll2-17.
29 AB45 ll17-22.
30 AB45 l24.
31 AB46 l3 – AB47 l31.
32 AB46 ll31-37.
33 AB46 l41; AB47 l31.
34 AB47 ll33-36.
35 AB48 ll3-23.
36 AB48 ll30-33.
37 AB48 ll42-46.
38 Ibid.
39 AB316 – AB 353.
40 AB328 l19 – AB352 l28.
41 AB62 l5.
42 AB320 l52 – AB326 l24.

"… there is a one person in particular I'm sure of, um, Timmy Burrows, like he come back. Come over to our yard. Um, we were told to sit on the stairs and go cocky. Me and another guy, Hinchey, who's this person in particular's offsider, obviously you know I'm talking about Ray Garland.

SCON JONES: Yeah.

COMPLAINANT: Um, they went into the toilet. I sat there on the stairs cocky. I've heard bang, bang, bang. Like punches being thrown and then pretty much Timmy moaning. Distraught.

SCON JONES: Yeah.

COMPLAINANT: He was getting scotched,[43] you know?

SCON JONES: Yeah.

…

SCON JONES: So when Tim Burrows went into the toilet.

COMPLAINANT: Mmm.

SCON JONES: What, was there any sort of diversionary to get him into the toilet or did you just get told to get in there? What, what--

COMPLAINANT: He got told that--

SCON JONES: [INDISTINCT] --

COMPLAINANT: He got told that fucking his word was his word. And then--

SCON JONES: Yeah--

COMPLAINANT: Go and clean himself out. They were the exact words said. "Go clean yourself out." That was what Ray had said to Timmy.

SCON JONES: Yeah.

COMPLAINANT: "Your word's your word cunt. Go clean yourself out."

…

SCON JONES: Alright.

COMPLAINANT: So I sat on the stairs with [Hinchey]. He said, "What are you doing mate? How you going?" Rah, rah, rah. I said, "I'm fuckin' shit." You know?

SCON JONES: Yeah.

COMPLAINANT: And he's there laughing and the only reason I was even g'ed on to what was going on is 'cause I said, "Fuckin',

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[43] During his examination-in-chief, the complainant explained that term "scotched" is prison slang for "raped": AB110 ll1-6.

> what are you laughing at?" And he's gone, "Can't you hear that?" And I'm like, "No. What are you on about?" And he's like, "Look." And then I started listening and then yeah, I'd realised that what was said before about go clean yourself out, it all fuckin' clicked into place because I could hear Timmy squirming in the fucking [INDISTINCT] toilet.
>
> SCON JONES: Yeah. So how long you reckon Tim was in there cleaning himself as you told?
>
> COMPLAINANT: Five minutes and, probably five minutes Ray in there. Maybe ten, fifteen minutes the whole episode.
>
> …
>
> SCON JONES: So who's come out first?
>
> COMPLAINANT: Ray.
>
> SCON JONES: Okay. Did he say anything when he came out?
>
> COMPLAINANT: Just smiled and winked at Hinchey then him and Hinchey went and walked laps.
>
> SCON JONES: He smiled and winked at Hinchey hey?
>
> COMPLAINANT: Yeah. And then him and Hinchey went and walked laps. They do this thing in the unit--
>
> SCON JONES: Yeah--
>
> COMPLAINANT: They walk fucking laps together.
>
> SCON JONES: What'd you do?
>
> COMPLAINANT: I sat there and freaked out.
>
> SCON JONES: Yeah.
>
> COMPLAINANT: I sat there and planned on … knocking myself that night.
>
> SCON JONES: What about ah Tim? Did you see him come out of the toilet?
>
> COMPLAINANT: Nuh. Didn't stick around. Yeah, I sat on the stairs for about two or three more minutes and then I went out to the yard …"

[16] At the commencement of the trial, the Crown prosecutor flagged his desire to exclude all references to this incident from the recorded police interview and the transcript of it;[44] however, defence counsel insisted that those references remain in.[45] The following exchange occurred between the learned trial judge and counsel for both sides:[46]

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44 AB27 l26 – AB30 l6.

45 Ibid.

46 AB28 l45 – AB29 l6.

> "MR PHILLIPS: The passage contains material which will alert the jury to at least the complainant's attitude as to the criminal past of the defendant, which is really quite irrelevant and highly prejudicial. But I had identified to Mr Polley earlier in the week that I intended to remove it and he has asked me to keep it in.
>
> HIS HONOUR: Okay.
>
> MR POLLEY: That's it."

[17] The trial was adjourned, briefly, for counsel to discuss the matter.[47] When it resumed, the parties indicated that the matter had been resolved, with the Crown prosecutor agreeing to keep the evidence in.[48] The trial judge was not required to make a ruling on the issue.

The evidence at trial

[18] During cross-examination, the complainant was asked about his recorded police interview on 1 March 2014. He gave the following evidence about that interview and, in particular, his account of the incident involving Tim Burrows:[49]

> "Do you agree it was the 1st of March 2014 when you spoke to two police officers, and they recorded the conversation?---Yeah.
>
> That sounds about right?---That sounds about right.
>
> You told us before that when you were speaking to the Corrective Service staff, the prison staff, you were making stuff up to sort of hide the truth; is that the case?---Well, that's correct. Yes. I just wanted to get out of there, and I just wanted to be safe.
>
> You were worried about the outcome of telling them the truth?---That's exactly right.
>
> Okay?---I was worried about being a target.
>
> Okay. But when you spoke to the police in March 2014, you had made the decision you're not going back, and you were telling them the whole truth; is that the case?---No, I told them some of what had happened, that it was me that it occurred to, that I never mentioned anything about Ray until I was released from custody and felt safe.
>
> Sorry. You told them it was you that it'd happened to?---That the incident I was referring to that I'd reported to the psychs and I said was Tim that it was actually me. I gave them a rough idea of what had happened, and I never mentioned Ray Garland until the 15th of October 2014 when I was interviewed by CSIU[50] after I was released from custody.
>
> All right. Well, let's get back to the Tim incident. You've told authorities that you witnessed Tim being raped by Ray Garland; is

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47 AB31 l12.
48 AB31 ll15-26.
49 AB61 l20 – AB62 l18.
50 That is, the Corrective Services Investigation Unit: AB85 ll5-9.

> that what you're referring to?---No, I never said I witnessed Tim at all.
>
> Well, that you stood cockatoo. You stood lookout whilst it occurred; is that correct?---Yes.
>
> Okay?--- [indistinct] while I was sitting with Hinchey while he was being raped.
>
> Now, are you telling us now – are you telling the court that, in fact, what you told the police March was that – you said to police, look, the story about Tim wasn't true. That was me?---That's right.
>
> And that you had told correctional facility staff prior to that this story about Tim being the subject of the rape?---That's correct.
>
> That's simply not the truth either, is it? You didn't tell the police that. Do you agree or disagree?---I disagree."

[19] Upon conclusion of the cross-examination, after the jury had been excused, the Crown prosecutor informed the Court that the complainant's assertion that it was he who had been sexually assaulted by Garland, not Tim Burrows, was contrary to what the complainant had said during a conference with the DPP's office that morning. He noted that the complainant's answer had given rise to a prior inconsistent statement.[51] Defence counsel sought leave to further cross-examine the complainant on that statement, which was not opposed and was granted.[52] The following evidence was elicited:[53]

> "Now, do you recall I asked you some questions previously about this video that you – sorry. "The video." The tape-recorded interview, audio recorded interview with the police on the 1st of March 2014?---Yes.
>
> Is it the case that you had a conference with the Director's Office this morning, a video-link conference with the prosecutor? Do you recall that?---Yes.
>
> And you were asked specifically about that video. I'm going to call it the Tim Burrows interview if you – you'll know what I'm talking about?---That's correct.
>
> You were asked specifically about this video and what you told the police about Tim Burrows. Do you recall that?---Yes.
>
> And I – when I'm asking you these questions now I'm talking about the conference this morning with the DPP?---Yep.
>
> You told Mr Phillips from the DPP this morning that what you told the police was truthful about Tim Burrows, didn't you?---Yes, it was.
>
> Because you told the police the truth, didn't you?---Well, about Tim I did, yeah. I told two psychs, an intel officer and another person about Tim, because I – I wanted Ray to get done [indistinct] as well.

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51 AB76 l21 – AB77 l5.
52 AB77 ll5-42.
53 AB81 l43 – AB83 l6.

> Okay. Tim was never actually raped, though, on this occasion that you've described, was he?---Well, yeah. To my knowledge he was.
>
> Haven't you just told us in court earlier this morning and this afternoon that you've later gone back and told correctional staff that – "No. No. That didn't happen to Tim. That happened to me on my first day in the unit."?---No. No. No. I said it had also happened. I was referring to me, but I used Tim's name because I was still in jail and I was too scared to say it was me.
>
> A few more questions. On your first day in S2, Tim Burrows wasn't raped, was he?---On my first day in S2 - - -
>
> Yes?--- - - - I was raped.
>
> Tim Burrows wasn't, was he?---No.
>
> You've told the police that he was on your first day in S2 - - -?---I - - -
>
> - - - during the audio recorded interview?---Yes. Yes.
>
> Okay. And you told the Director's Office this morning that when you were talking about that point you were telling the truth, didn't you?---Yeah.
>
> Thank you, your Honour.
>
> WITNESS: But it wasn't – the only difference was it wasn't that day.
>
> MR POLLEY: Thank you, your Honour.
>
> HIS HONOUR: Yes. Thank you.
>
> MR POLLEY: Well – sorry.
>
> You didn't go on to tell the Director's Office this morning that it wasn't that day, did you?---He didn't ask. He just asked if it was true Tim was raped as well."

[20] The recorded police interview was subsequently played to the jury during the evidence of Sergeant Aaron Noel Bates of the Corrective Services Investigation Unit.[54] A transcript of the recording was provided to each of the jury members.[55] Upon Mr Bates being excused, there was a discussion, in the jury's absence, about the prejudicial effect of certain aspects of the recording. The discussion proceeded as follows:[56]

> "MR PHILLIPS: Your Honour, the matter I wanted to raise in the absence of the jury was to do with the content of the tape they've just heard. As your Honour indicated, there [ought] to be some perhaps concern about its content. I should put on the record some of the background to it. There was a lot of material, and perhaps this is a mis-step on my part, that it should have been raised so as not to surprise your Honour during the hearing of the tape, and I apologise for that.

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54 AB96 l41 – AB97 l16; Exhibit 3.
55 AB87 ll27-40; Marked for Identification ("MFI") B.
56 AB102 l25 – AB107 l5.

But whilst a large portion of it was originally intended to be excised by me, because I didn't regard it as meeting the threshold for admissibility as preliminary complaint, much of that material was asked – much of the material was the subject of a request by my learned friend that it remain in the material. There is perhaps not a bright line as to precisely where his complaint about Mr Hinchey starts and ends, and that was part of the reason why I agreed to the request, with the exception of a small passage which concerned the nature of Mr Hinchey's then incarceration, the charges he was either facing or sentenced on. But that might go some way to dealing with your Honour's concern about some of the content of it.

…

HIS HONOUR: … So far as the other matters are concerned, I was concerned – particularly concerned yesterday about what was sought to be included in the material, because I thought it was highly prejudicial, even though the defence wanted it in, and I was concerned that it was so prejudicial that even a properly instructed jury would misuse that information, and accordingly, it was not, in my view, not appropriate to go in before the jury.

Most of that material has been taken out, but there is some material in there that might suggest propensity, and obviously that will have to be addressed carefully to ensure the jury don't seek, as I apprehend the reference to the Timmy Burrows event, as it's expressed, to be misused by the jury in the manner in which I was concerned the other material might be misused.

…

MR PHILLIPS: Otherwise, the content of the material which might, on the face of it, be objectionable, should be regarded, in my respectful submission, as being the subject – or the consequence of a tactical decision at trial by my learned friend not to object - - -

HIS HONOUR: Yes.

…

HIS HONOUR: Mr Polley, did you want to raise any matters in response to any matters raised by Mr Phillips?

MR POLLEY: No, your Honour. Other than – I think Mr Phillips was the one that stated I've taken instructions, obviously, with respect to leaving passages in.

HIS HONOUR: Yes.

MR POLLEY: And that was done so with my client's knowledge and consent.

HIS HONOUR: Yes, that's – I've got no – I have no difficulty with any of that, but I'm just thinking in terms of what I've got to – what I have to say to the jury to make sure they don't misuse some of that information. As I say, the matter concerning Timothy Burrows was

> a matter that concerned me, because I hadn't heard the evidence of the complainant yesterday, and so it was one of those things where I was concerned that it might lead to the prospect of the jury engaging in propensity reasoning. Of course, they need to be disabused of any such approach to that evidence, but, of course, it's open for them to find that they reject his evidence-in-chief. That he – this was code for him. And that, in fact, he did say these things – sorry, what he said in his record of interview was correct, and in which event there is a real risk of propensity reasoning."

[21] The use that could be made of that propensity evidence was the subject of specific remarks by the learned trail judge in the summing up.[57] They are not the subject of appeal.

Ground of appeal

[22] The sole ground of appeal is that "[t]here was a miscarriage of justice occasioned by the admission of impermissibly prejudicial propensity evidence", namely, the evidence in the complainant's recorded police interview about the appellant and the complainant standing "cockatoo" while Raymond Garland sexually assaulted Tim Burrows in a toilet.

[23] **Appellant's submissions:**[58] The appellant submits that the propensity evidence had "limited relevance" and was "highly prejudicial".[59] In particular, he complains about the complainant's allegation that the appellant was laughing at Tim Burrows while he was being raped.[60] He concedes it was his own counsel who insisted that, despite the reservations of the prosecution, those portions of the record of interview be kept in.[61] He relies upon the recent decision of this Court in *R v Brock*,[62] in which Morrison JA, referring to evidence that "was not capable of constituting an admission of guilt", said, "[t]hat no objection was taken to its admission does not alter its status as inadmissible evidence".[63] Nevertheless, he submits, the issue is whether there was a rational forensic reason for requesting that the evidence be adduced and be before the jury for its consideration.[64]

[24] As to that issue, the appellant accepts that it was forensically sound for defence counsel to cross-examine the complainant about his inconsistent accounts of Tim Burrows incident.[65] However, he contends that once the complainant had given evidence that it was he, and not Tim Burrows, who had been raped, his differing accounts about the incident were already in evidence and hence there was no need to adduce the record of interview.[66] That was particularly so after it emerged that the complainant's sworn testimony was contrary to what he had told the prosecutor at a conference that very morning.[67] He notes that although the complainant's conflicting accounts were the subject of "significant and numerous mentions" by defence

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57 AB138 l34 – AB139 l14.

58 The appellant was represented at the hearing of the appeal by Andrew Hoare and Nathan Boyd of counsel, who appeared *pro bono*. On behalf of the Court, I thank them for their assistance.

59 Appellant's Outline of Arguments ("AOA") at [15].

60 AT1-5 ll23-30.

61 AOA at [12]; AT1-3 ll3-5.

62 [2018] QCA 185.

63 At [69], [75]; Sofronoff P and Brown J agreeing.

64 AOA at [17] citing *Craig v The Queen* (2018) 353 ALR 177; [2018] HCA 13 at [23].

65 AT1-3 ll39-42.

66 AT1-4 ll28-32.

67 AT1-4 ll23-24.

counsel during his closing address, the evidence that the appellant stood watch while Burrows was raped was not, because it simply was not capable of assisting the defence.[68]

[25] For these reasons, the appellant submits there was no rational forensic basis for leaving the impugned parts of the record of interview to the jury. The evidence in those parts so "profoundly prejudicial", he says, that its admission was incapable of being cured by the careful directions of the learned trial judge.[69] Accordingly, a miscarriage of justice has been occasioned and the appropriate order is for a retrial.[70]

[26] **Respondent's submissions:** The respondent observes that the complainant's credibility was attacked in detail during the trial. It submits that this was because, in contrast to a "run-of-the-mill" sexual offence case, the complainant and the appellant were both prisoners and their credibility was in issue from the very outset. For that reason, defence counsel engaged in a "significant attack" upon the complainant's credibility that went beyond what would be undertaken in "the average citizen against citizen case". The playing of the record of interview was part of that attack; it added substance and detail to the inconsistencies that had emerged during the complainant's cross-examination.[71] Moreover, the conflict between the record of interview and the complainant's sworn evidence was specifically addressed by defence counsel during his closing address.[72]

[27] The respondent submits that the above factors evidence a clear and rational forensic purpose for the approach taken by defence counsel.[73] Further, it suggests that there may have been other reasons, not known to the Court and based on confidential information and tactical considerations, for leading it.[74] It submits that, unlike cases in which prejudicial evidence emerges unexpectedly, here, defence counsel had the record of interview and must have "fully appreciated and considered" the prejudicial effect of what was contained in it.[75] It notes that defence counsel acted on "instructions" and with the appellant's "knowledge and consent".[76] It submits that any prejudicial effect of leading the evidence must have been accepted by defence counsel and assessed as not outweighing the benefits.[77]

[28] **Discussion:** Although the ground of appeal as formulated is focused upon the consequence for the trial of the admission of the prejudicial evidence in question, it need be steadily borne in mind that that evidence was admitted at the behest of defence counsel. As the authorities establish, the conduct of defence counsel in that regard is relevant to determining whether there could have been a miscarriage of justice.

[29] In *TKWJ v The Queen*,[78] Gaudron J said that, in cases about whether a person was competently represented at trial, "[t]he question of whether there has been a miscarriage

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68 AT1-5 ll5-16.
69 AT1-5 ll28-32.
70 Ibid; AOA at [19].
71 AT1-6 l36 – AT1-7 l3; AT1-7 ll35-38; AT1-8 ll13-17.
72 AT1-6 ll2-3.
73 AT1-5 l46.
74 Respondent's Outline of Arguments ("ROA") at [36] citing *Crampton v The Queen* (2000) 206 CLR 161 at [17]-[18].
75 AT1-6 ll16-23.
76 AT1-6 ll12-16; ROA at [34].
77 ROA at [39].
78 (2002) 212 CLR 124; [2002] HCA 46.

of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'."[79] Her Honour noted that the word "fairly" should not be overlooked: "[a] decision to take or refrain from taking a particular course which is explicable on the basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open."[80]

[30] Her Honour observed that, in some cases, the fact that counsel's conduct resulted in a forensic advantage is "not necessarily determinative of the question whether there has been a miscarriage of justice". Nevertheless, she went on to say:[81]

> "An accused will not ordinarily be deprived of a chance of acquittal that is fairly open if that chance is foreclosed by an informed and deliberate decision to pursue or not to pursue a particular course at trial. … Where it is claimed that a miscarriage of justice was the result of a course taken at the trial, it is for the appellant to establish that the course was not the result of an informed and deliberate decision. This he or she will fail to do if the course taken is explicable on the basis that it could have resulted in a forensic advantage unless, in the circumstances, the advantage is slight in comparison with the disadvantage resulting from the course in question."

[31] Similarly, in *Patel v The Queen*, French CJ and Hayne, Kiefel and Bell JJ said:[82]

> "Certainly there must be exceptional circumstances for the Court to grant special leave to appeal where an applicant did not object at trial to the tender of evidence which is subsequently found to have been improperly admitted.[83] Although the law recognises the possibility that justice may demand exceptions, it is a cardinal principle of litigation, including criminal litigation, that parties are bound by the conduct of their counsel.[84] The correctness of their counsel's decision for the most part will not be relevant, for it is the fairness of the process which is in question. Where it can be seen that a failure to object was a rational, tactical decision, the Court is entitled to conclude that no unfairness attended the process.[85]"

[32] Most recently, in *Craig v The Queen*, a Full Bench of the High Court observed:[86]

> "… *TKWJ* is concerned with challenges to forensic judgments that are within counsel's remit. The objective test that *TKWJ* holds is to be applied to the determination of challenges of that kind takes into

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79 At [26].
80 Ibid.
81 At [32]-[33].
82 (2012) 247 CLR 531; [2012] HCA 29 at [114] per French CJ and Hayne, Kiefel and Bell JJ.
83 *HML v The Queen* (2008) 235 CLR 334 at 361 [36], 408 [207], 459 [360], 491 [481].
84 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]; 225 ALR 161 at 164.
85 *Suresh v The Queen* (1998) 72 ALJR 769 at 772 [13], 773-774 [22]-[23], 780 [55]-[56]; 153 ALR 145 at 149, 151, 160; [1998] HCA 23; *Ali v The Queen* (2005) 79 ALJR 662 at 664 [7], 677 [98]-[99]; 214 ALR 1 at 4, 21-22; [2005] HCA 8; *Tully v The Queen* (2006) 230 CLR 234 at 280 [149]; [2006] HCA 56; *Nudd v The Queen* (2006) 80 ALJR 614 at 618-619 [9]; 225 ALR 161 at 164-165.
86 (2018) 353 ALR 177; [2018] HCA 13 at [23].

> account the wide discretion conferred on counsel under our adversarial system of criminal justice.[87] A necessary consequence of that discretion is that the accused will generally be bound by counsel's forensic choices. It is only where the appellate court is persuaded that no rational forensic justification can be discerned for a challenged decision that consideration will turn to whether its making constituted a miscarriage of justice."

[33] The appropriate starting point, therefore, is a determination of whether there was a rational forensic justification for leaving the impugned evidence to the jury. The clear sequence of events, outlined above, indicates that the record of interview went in as a result of a forensic decision by defence counsel. That decision was a rational one, in my view, because, as the respondent observed, this was not a normal sexual offence case; it involved offending by one prisoner on another, and the credibility of both the complainant and the appellant was very much in issue. The impugned evidence was quite capable of being used, and indeed was used, to demonstrate inconsistency in the complainant's accounts for the purpose of undermining his credibility. As the appellant concedes, the inconsistencies were the subject of "significant and numerous mentions" during defence counsel's closing address.

[34] The apparent objective of defence counsel was either to have the complainant concede, that the Tim Burrows event did not occur at all, or to have him provide yet another version of it, either of which would undermine his credibility. Given that counsel had the record of interview, he would have been conscious of the risk that the complainant might be prejudiced, one way or other, by evidence that the appellant stood cockatoo and laughed while Garland was violating another inmate. Nevertheless, the question is not "whether the course taken by counsel was, in fact, taken for the purpose of obtaining a forensic advantage, but only whether it is capable of explanation on that basis".[88] The strategy identified above indicates that it was capable of obtaining such an advantage.

[35] Since defence counsel's insistence that the record of interview be tendered is explicable as a rational forensic choice, this is not a case where there is no rational forensic justification for defence counsel's conduct. Thus, consistently with the decision in *Craig*,[89] the occasion does not arise for this Court to consider whether the conduct constituted a miscarriage of justice. For these reasons, the ground of appeal has not been made out.

Disposition

[36] The sole ground of appeal has not succeeded. It follows that this appeal must be dismissed.

Order

[37] I would propose the following order:

1. Appeal dismissed.

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87 *TKWJ v The Queen* (2002) 212 CLR 124 at 128 [8].
88 *TKWJ* per Gaudron J at [27].
89 At [23].

[38] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Gotterson JA.

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