SUPREME COURT OF QUEENSLAND

CITATION:	*R v Butterworth* [2019] QCA 94
PARTIES:	**R** **v** **BUTTERWORTH, Edward Charles** (appellant)
FILE NO/S:	CA No 214 of 2018 DC No 20 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Mount Isa – Date of Conviction: 2 August 2018 (Dearden DCJ)
DELIVERED ON:	24 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2019
JUDGES:	Fraser and Morrison and Philippides JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – CONSENT – PRESUMPTION OF – where the appellant was convicted after trial of three counts of sexual assault and one count of rape – where the appellant had performed acts of a sexual nature on the complainant without consent – where the appellant contends that the conduct had been with the complainant's consent – whether the responses of the complainant while the offences were being committed bring into question the issue of non-consent CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant contends there has been a miscarriage of justice because of the way the trial was conducted – where it is submitted that the appellant's counsel failed to adduce evidence of a text message that was sent to the appellant by the complainant after the sexual assaults – where the appellant contends that their counsel failed to address the actions and responses of the complainant while the offences were being committed – where the appellant's counsel failed to adduce evidence of the appellant's state of mind – whether the failure of the appellant's counsel to adduce evidence resulted in there being

a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where it is contended that the jury was misdirected as to the use which might be made of the pretext calls between the appellant and the complainant – where it is contended that the pretext calls warranted more fulsome directions that were given about the use to which the jury could put that evidence – where it is submitted that there has been a miscarriage of justice resultant from the misdirection – where there was no complaint during the trial about this aspect of the directions – where the crown prosecutor invited the jury to consider the complainant's experience in the giving of evidence in the trial as a basis to accept the truthfulness of the complainant's evidence – where it is contended that the trial judge failed to adequately instruct the jury that they should not focus unduly on the court process in considering the truthfulness of the complainant's account – whether directions to the jury by the trial judge resulted in a miscarriage of justice

Criminal Code (Qld), s 24, s 349

Ali v The Queen (2005) 79 ALJR 662; [2005] HCA 8, cited
Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, cited
R v Ali [2017] QCA 300, followed
R v BBQ (2009) 196 A Crim R 173; [2009] QCA 166, mentioned
R v E [1997] QCA 99, cited
R v TN (2005) 153 A Crim R 129; [2005] QCA 160, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: P J Callaghan SC for the appellant
J A Geary for the respondent

SOLICITORS: Anderson Telford Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[2] **MORRISON JA:** On 8 July 2015 the complainant and the appellant were staying overnight at the appellant's house in Karumba. She was a 25 year old veterinary science student and he was her 43 year old veterinary surgeon supervisor. It was one night in the course of a two week work experience placement during which time the complainant and appellant travelled to various cattle stations in the area of Mt Isa and Cloncurry.

[3] They had dinner, watched the State of Origin and some YouTube videos, during the course of which they each drank some beer or rum.

[4] At one point the appellant told the complainant that he wanted to show her a trick. It consisted of his betting her $20 that he could get her breasts to move without touching them. He then touched her breasts with both hands, and said he now owed her $20.

[5] Later that night, after the complainant had gone to bed, the appellant entered the complainant's room. He was naked. He undressed the complainant, touched her breasts and engaged in oral sex during the course of which his tongue penetrated the complainant's vagina. Arising out of those events the appellant was charged on four counts. Counts 1-3 were of sexual assault and count 4, rape. He was convicted after a trial.

[6] The appellant seeks to challenge his convictions on five grounds, each contending that a miscarriage of justice occurred because of the way the trial was conducted:

(a) Ground 1 – the appellant's counsel failed to adduce evidence of a text message sent to the appellant by the complainant subsequent to the sexual assaults;

(b) Ground 2 – the appellant's counsel failed to:

(i) address issues about the positioning of the complainant's arms while the alleged offences were being committed;

(ii) address issues about words which were spoken while the alleged offences were committed; and

(iii) adduce evidence to address issues arising out of the complainant's description of the way in which she was responding to the appellant's actions, while the offences were being committed;

(c) Ground 3 – in respect of count 1, the appellant's counsel failed to adduce evidence as to the appellant's state of mind, with the consequence that the jury received no direction in respect of s 24 of the *Criminal Code* 1899 (Qld);

(d) Ground 4 – the jury were misdirected as to the use which might be made of the pretext calls;[1] and

(e) Ground 5 – the trial judge failed to adequately instruct the jury that they should not focus unduly on the court process in considering the truthfulness of the complainant's account.

Evidence as to the offences

[7] Whilst no ground was raised that the verdicts are unsafe or unsatisfactory, or cannot be supported by the whole of the evidence, in light of the way the appeal was conducted it is nonetheless necessary to review a substantial amount of the evidence.

Evidence of the complainant

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1 Exhibits 1 and 2.

[8] The complainant was about 26 years of age at the time of the offence, which occurred on 8 July 2015. She had qualified as a mining engineer in 2010, and then decided to pursue a qualification in veterinary science, commencing in 2014.

[9] The complainant had met the appellant in his professional capacity in 2011, when she took her dog in to be examined. Subsequently she had some contact with the appellant during the course of her veterinary science course, when he contacted her to enquire how her studies were going. She also had some contact with him in 2013 when she applied to the North West Vet Clinic, where the appellant worked, to secure some work experience.

[10] A period of work experience was arranged for December 2014, but postponed until July 2015. At that time the complainant drove to Cloncurry where she met the appellant and commenced two weeks work experience. They travelled to various cattle stations north of Mt Isa and Cloncurry. For that purpose the appellant's vehicle was used and they would stay in the workers' quarters on the various cattle stations. They also stayed at the appellant's house at Karumba. There were two bedrooms in that house and they used separate bedrooms.

[11] The complainant said she could recall the appellant asking some personal questions, which left her feeling uncomfortable.[2] That occurred a few days before the events the subject of the five counts.

[12] As to those events the complainant said that they were staying at the appellant's house in Karumba and watched the State of Origin football match. They had dinner and some beers and when the game was over the complainant watched some YouTube videos.

Evidence on Count 1

[13] For various reasons which will become apparent, Count 1 sits in a different position from the other counts. It is therefore convenient to collect the evidence on that count separately.

[14] The complainant said that the appellant told her, while they were sitting at the dining table in front of the TV, that he wanted to show her a trick. He told her that the trick was that he could get her breasts to move without touching them. She continued:[3]

> "So he made me face him. He was sitting in his chair. I was sitting in mine. And he held my hands in front of my chest … about 30 centimetres away from my chest and said if he could get them to move without touching them, he owed me – or I owed him $20. And I thought he was going to startle me … to make me jump and make my breasts move, but instead he grabbed them … and then he laughed and said he guessed he owed me $20.
>
> How long did he touch your boobs for?---About – I don't know, about four seconds.
>
> How many hands did he use?---He used one on each breast.

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2 AB 100 line 28.

3 AB 101 line 36 to AB 102 line 4.

> You mentioned before that he made you face him?---Yes.
>
> What – how did that happen?---He just told me I should face him. So I swivelled in my chair to face him. We were sitting side by side."

[15] The complainant said she reacted by laughing awkwardly, putting on another YouTube clip, and trying to change the topic.[4] The complainant said she had not given any permission to touch her, and the touching made her feel awful.

[16] Later in her evidence, when dealing with photographs of the appellant's house, the complainant said that when the appellant asked to show the trick, "He turned his chair to face me, and then I turned in my chair to face him".[5]

[17] In cross-examination counsel for the appellant turned to Count 1. The exchange is as follows:[6]

> "Yes. And you, in fact, turned to face him and you were in close proximity to him when you turned?---Yes.
>
> He didn't force you. He didn't grab you. He didn't turn your chair. You in fact turned and faced him?---Yes.
>
> I take it – and I'm not being critical. You didn't know what trick he was going to do, did you?---No.
>
> No. And the trick he did was, in fact – and I'm going to demonstrate. He put his hands put and put them towards your breasts in fact made contact with your breasts?---Yes.
>
> Yeah. And I'm going to suggest to you his hands were open, and his hands were on your breasts for about a second and that was about it, and he removed his hands. So there's---?---I remember him – sorry.
>
> Sorry?---I remember him squeezing them, and I thought it was a little longer than a second."

[18] It was put to the complainant that when the appellant said he owed her $20 that her response was: "I'm a uni student. 20 bucks is 20 bucks". The complainant said she did not recall saying that. It was put to her that she took the joke in good humour. The complainant responded "No. I was disgusted".[7]

Appellant's evidence on count 1

[19] The appellant accepted that he "did something sexual on the 8th of July".[8] He gave a description of what occurred, which involved eating together and watching the State of Origin. He continued:[9]

> "And during the night for reasons I don't recall, I played a joke on [the complainant], purely as a joke. I said to her 'Bet you 20 bucks I

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4 AB 102 line 9.
5 AB 110 line 39.
6 AB 119 line 45 to AB 120 line 16.
7 AB 120 line 35.
8 AB 165 line 10.
9 AB 165 line 17 to AB 166 line 3.

> could make your breasts move without touching them', purely as a joke, with no intention of her to participate in it. She then turned to me and faced me with her chest. I guess I carried on the joke … I touched her breasts. I said to her 'I guess I owe you 20 bucks' … [the] response she gave to me – 'I'm a student. Twenty bucks is 20 bucks'.
>
> Can I just get a little bit more detail about how you touched her breast. Can you just demonstrate with your hands so the jury can see?---Yes. So [the complainant] was facing me. I've put my hands out in front of her. I've gone over, touched her breasts.
>
> So your hands … are open, but the fingers are facing forward, and you've touched her breasts on what? The front of the breasts or on the side of the breasts?---Side of the breasts.
>
> Okay. And how long were your hands in that position for?---Momentarily. I say a second.
>
> Okay. And how did that contact cease?---I touched her breasts and moved my hands straight back again.
>
> Okay … she didn't move when you touched her breasts?---No. No. She didn't.
>
> You had your hands there for about a second, and then you've removed them?---Correct.
>
> At any stage did you squeeze her breasts?---No.
>
> When she made that statement about the 20 bucks being 20 bucks, what was her demeanour like?---She said all in good humour. She portrayed to me that she had received the joke in good humour."

[20] In cross-examination the appellant said that it was a joke and he said "I bet I can make your boobs move without touching them", but then he did touch them.[10] He did not accept that the complainant was taken by surprise at being touched on her breasts.[11] However, he agreed that he was suggesting to the complainant that he was not going to touch her breasts, and then in fact touched them.[12] Then followed this question and response:[13]

> "So you would accept, then, that [the complainant] didn't give you permission to touch her boobs, did she?---No. Except for that she did present herself and faced me."

[21] The appellant agreed, however, that the complainant's presenting herself and facing him was after he had told her that he could make her breasts move without touching them.[14]

Complainant's evidence about remaining counts

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10 AB 172.
11 AB 172 line 20.
12 AB 172 lines 36-39.
13 AB 172 lines 41-42.
14 AB 172 line 44 to AB 173 line 6.

[22] The complainant said that after the "joke" they watched some more YouTube clips "before he tried to change the subject to a sexual matter again".[15] The appellant said "I had a pull over you last night".[16] She said she "got awkward", and was not even sure if she said anything. She "sort of grunted" then put on another YouTube clip, and while it was playing she went to the bathroom to brush her teeth, and then went to bed.[17]

[23] She said she laid down in her bed, fully clothed. She was listening to what the appellant was doing outside the bedroom door. After he turned off the TV he knocked on her door and asked if she was going to sleep already, and she responded, "Yes". He also asked if she brushed her teeth and she responded, "Yes". He then walked away from the door.

[24] The complainant said at that point that her "heart rate was racing" and she heard him walk back towards her door, and he opened it "and asked if I wanted company". She told him "No", and when she looked at the door "he was standing there totally naked". She said he came into the bedroom anyway. She said to him, "What the hell are you doing? You have a wife and three kids".[18] She said he did not acknowledge the comment, but walked up to her bed, climbed onto the bed and "said he wanted to see what I was hiding under my clothes".[19] She "just froze". She said she had her arms "crossed over my chest and I was just lying really still, and I was trying to hold the doona over the top of myself".[20]

[25] She said to him again that he had a wife and three children, by which, she explained in evidence, she was "trying to remind him, to make him stop".[21] She then said that he pulled her jumper off and then her pants down to her calf, including her underpants. At that point she said she was feeling terrified, and "I kept telling him I wasn't interested, and that he had a wife and three kids, but it didn't stop him".[22]

[26] She then described the sequence of the following events:[23]

(a) he started touching her inside her labia majora and "started rubbing it, and told me he wanted me to come";[24] this was the subject of Count 2;

(b) though she could not recall the exact order of events, the complainant thought at that point that he was lying in bed next to her; he got up and said "that he wanted to see this", so he turned on the lights;

(c) he said that he "wanted to see what I was hiding under my bra", so he unclipped it but couldn't take it off "because I had my arms crossed still", so he put his hands under her bra and grabbed both of her breasts;[25] this was the subject of Count 3;

(d) the complainant said she "froze again … I didn't know what to do";

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15 AB 102 line 17.
16 At the trial "had a pull" was understood as meaning he masturbated.
17 AB 102 lines 21-23.
18 AB 102 line 40.
19 AB 102 line 47. She described her clothing as consisting of shorts, a hoodie jumper and a bra.
20 AB 103 lines 1-2.
21 AB 103 line 8.
22 AB 103 line 14.
23 AB 103-104.
24 AB 103 line 17.
25 AB 103 lines 31-34.

(e) she then said that "… he went back down on me and commenced oral sex … [h]e put his tongue inside of my vagina[26] and he use either a finger or a thumb – I'm not sure – and he was rubbing my clitoris with it. … [it went on for] [a] couple of minutes. I was kind of squirming the whole time and I didn't want it to happen and I asked him to leave. … I was kind of moving my legs around trying [to] get him away from there";[27]

(f) she said that during the period of oral sex her legs were touching his shoulders; the appellant "still kept going for a bit, but then he eventually stopped … [h]e told me he really wanted me to finish,[28] and I told him it wasn't going to happen";[29] and

(g) the complainant said he eventually stopped and she asked him to leave because she was tired and wanted to go to sleep; the appellant closed his eyes as if he was going to sleep and she asked him to leave her room, which he did.

[27] The complainant said that she got dressed and texted her partner.[30] She gave evidence that she did not consent to any of the sexual activity in the bedroom.

[28] She said that on the day after the incident:

(a) the appellant mentioned that he was "sorry for his atrocious behaviour";[31]

(b) the complainant felt "pretty terrible and quite isolated"; she had no way of leaving so she had to stay there and keep working with him over the next couple of days;[32] and

(c) she texted a friend, in which she said, "Something happened last night. I feel so nauseous thinking about it and can't wait to come home".[33]

[29] Over the following days she said that the appellant acted as if nothing had happened. When the work experience had finished she drove back from Cloncurry.

[30] Having returned from the work experience the complainant said, in response to a question about whether she had any further contact with the appellant, "I sent him a text message, … I can't remember how much longer, maybe a week or so later".[34]

[31] Subsequently, on 5 August 2015, she made her complaint to the police. Later again she made two pretext calls to the appellant, the transcripts of which went into evidence. The first was on 14 August 2015, Exhibit 1. The second was on 27 February 2016, Exhibit 2.

[32] In cross-examination it was put to the complainant, and accepted by her, that she had told her boyfriend that the appellant "tried to have sex with [me], but [I] fought

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26 This was the subject of Count 4.
27 AB 103 line 43 to AB 104 line 11.
28 At the trial this was accepted as meaning he wanted her to reach orgasm.
29 AB 104 line 18.
30 AB 104 line 36.
31 AB 106 line 5.
32 AB 104-105.
33 AB 105 line 11.
34 AB 106 line 19.

him off by kicking him". The complainant also accepted that at no stage did she kick the appellant off her.[35]

[33] The complainant also accepted that she told one of her friends that during the episode in the bedroom she had been saying "no forcefully, and said it a few times".[36] It was put to her that she did not, on a number of occasions, say "No" forcefully. The complainant said that she did tell the appellant "No", and "I reminded him he had a wife and three kids". She explained "I was reminding him he had a wife and three kids so he would realise himself what he was doing was wrong".[37] The complainant accepted that she did not "yell at [the appellant] … to get off".[38]

[34] It was put to the complainant, and accepted by her, that the appellant had, by the time of the first pretext call, "already apologised in person for his conduct after the event".[39] She accepted that in the first pretext call she raised concerns as to whether the event would "ruin [her] career prospects up there", but she could not recall raising similar concerns with him in person after the events.[40]

[35] The complainant agreed that she had a conversation with the appellant, in the days prior to 8 July 2015, in which the topic was raised that the complainant's boyfriend could not bring her to orgasm. However, the complainant denied that it was she who raised that topic and said that the appellant "directed the conversation that way", and that "he said it was important that I had a boyfriend that kept me satisfied".[41]

[36] The complainant denied that on the night of the offences she had made a comment to the appellant that she had not brought her vibrator as it was too noisy.[42] However, she accepted that she had discussed with the appellant the fact that she used a vibrator.[43]

[37] A series of propositions was put to the complainant in cross-examination as to the events which followed her going to bed. The propositions were expressly said to be the appellant's recollection.[44] Those propositions, and the complainant's response to each is as follows:

(a) the appellant knocked on the door and then opened the door, entering while the light was off; the complainant agreed;[45]

(b) the appellant was naked when he entered the room; the complainant agreed;[46]

(c) the complainant said words to the effect of "what about your wife and kids", but the appellant did not respond; the complainant agreed;[47]

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35 AB 115 lines 39-45.
36 AB 116 line 5.
37 AB 116 lines 8-16.
38 AB 116 line 26.
39 AB 117 line 10.
40 AB 117 lines 19-27.
41 AB 119 lines 10-20.
42 AB 121 lines 4-8.
43 AB 121 line 10.
44 AB 122 lines 3 and 22.
45 AB 122.
46 AB 122 line 13.
47 AB 122 line 15.

(d) the appellant then went over and laid down next to the complainant on the bed, and started to take her clothes off; the complainant agreed;[48]

(e) the complainant assisted the appellant to take her clothes off; the complainant denied that proposition;[49]

(f) the appellant then "goes down between your legs and starts performing oral sex"; the complainant responded that the appellant "started with his hand";[50]

(g) when removing her pants the appellant's hands "might have slid down there first before his mouth and tongue was performing oral sex"; the complainant remembered him "starting to rub with his hands before he used his mouth";[51]

(h) after performing oral sex for "about a minute" the appellant got up and turned on the light; the complainant could not say how long the appellant performed oral sex, but agreed that he got up and turned on the light;[52]

(i) after that the appellant returned and continued to perform oral sex on the complainant; the complainant agreed, but said that he made a comment first about her having a navel piercing;[53]

(j) when the appellant returned to the bed the complainant was in the same position; the complainant agreed but said that she "tried to pull the doona over the top of me, and he pulled it back off"; the complainant denied the suggestion that there was "no pulling the doona up";[54] she said that she pulled the doona up over her top half;[55]

(k) at that time the complainant's legs were slightly apart and her knees were up; the complainant disagreed, saying that she "had my legs straight", and she "was frozen";[56]

(l) the appellant performed oral sex again for about a minute; the complainant agreed, but said she could not recall the exact time, and that it "felt like way too long";[57]

(m) the appellant then stopped, got up, and said something along the lines that "he was hoping to make you come"; the complainant agreed he said something to that effect, but said that the appellant was still on the bed and had not gotten up;[58] it was then clarified that the proposition was not that the appellant had got up to physically leave, but that he had moved up from where he was between the complainant's legs, to be closer to her head; the complainant agreed;[59]

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48 AB 122 lines 22-26.
49 AB 122 line 28.
50 AB 122 line 30.
51 AB 122 lines 33-36.
52 AB 122 lines 38-46.
53 AB 123 lines 1-7.
54 AB 123 lines 9-15.
55 AB 123 lines 24-27.
56 AB 123 lines 17-20.
57 AB 123 lines 29-36.
58 AB 123 lines 38-42.
59 AB 123 line 44.

(n) in response to that statement by the appellant, the complainant said something to the effect of "good luck with that"; the complainant disagreed, saying that she had said "I'm not going to, or something";[60]

(o) the complainant then said that the appellant should go back to his room; the complainant agreed, but said that the appellant first tried to lie down and go to sleep next to her;[61]

(p) the following day (9 July 2015), the appellant apologised at the clinic at Kurumba; the complainant agreed that the appellant had apologised "when we pulled up at the cattle station on the Friday",[62] she did not recall an apology at the clinic;[63]

(q) when the appellant apologised he said words to the effect that he was sorry for what had happened last night, and that he had a wife and three kids; the complainant said that she did not recall him saying that, and denied that he mentioned his wife and children during the apology;[64]

(r) the complainant's response to that apology was to the effect to of "It's not going to affect my career, is it"; the complainant said "I don't recall saying that at all";[65] and

(s) all the activities on 8 July had been with the complainant's consent; the complainant denied that, saying "Absolutely not".[66]

[38] In re-examination the complainant was asked whether the oral sex was continuous or broken by the appellant getting up to switch on the light. She said that the appellant used his hand first, then he got up and turned on the light, and then performed oral sex.[67] She also reiterated that during the oral sex the appellant used his tongue in her vagina saying "It was one lot with his tongue, and the rest was just with his hand".[68]

[39] The complainant was asked about the fact that she had not yelled at the appellant to get off. She said she was too scared, and she could not remember telling her friend that she was yelling at the appellant.[69] She was then asked about her statements concerning her career, and she responded the following:[70]

> "At the time, I didn't know anyone else who worked in the industry, and I was really afraid … of it looking bad on me, even though it wasn't my fault … and … I didn't know how I was going to get a job in the vet field, even though … he was the one at fault."

Preliminary complaint evidence

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60 AB 124 lines 1-3.
61 AB 124 lines 5-9.
62 That would place the date as 10 July 2015.
63 AB 124 lines 14-21.
64 AB 124 lines 23-29.
65 AB 124 line 31.
66 AB 124 lines 34-37.
67 AB 125 line 5.
68 AB 104 lines 1-5, and AB 125 lines 9-10.
69 AB 125 line 20.
70 AB 125 lines 24-28.

[40] A number of the complainant's friends gave evidence as to what they were told when she returned to Brisbane.

Evidence of Cook

[41] Cook said she'd been friends with the complainant since 2013. She remained a friend at the time of the trial.

[42] The complainant picked her up at the airport on about 27 July 2015. As they exchanged comments about their respective holidays the complainant told her: "Well my holiday was shit because I was sexually assaulted by the vet I did placement with in Mount Isa".[71] She said the complainant did not give a lot of detail but said that "they were drinking together, and that he had forced himself onto her".[72] The complainant appeared quiet, shaken and upset.[73] She urged the complainant to go to the police. A few days later the complainant told her some more:[74]

> "She said that her and the vet were drinking together, and just out of nowhere, he had said that he thought about her while he masturbated the night before, and she said that she found that really inappropriate. So she … just left and went and had a shower and took herself from the room to remove herself from the situation, and then she said that he was knocking on her door and trying to come into her room, or whatever, and I'm not sure about anything really specific, but somehow, he ended up in her room, and when he came into her room, he had forced … himself on her and pulled her pants down and was, like, giving her oral, and she said – I'm pretty sure that's when I said, like, 'Why didn't … you hit him, or kick him, or, like, do something to get him off?' And she said that she was really scared that if she made him angry that he would turn violent. So she was just trying to push him off with her hands, and she ended up getting him off with her feet, and that's about all I can remember. … [the complainant appeared] [s]haken, upset, quiet, teary eyed".

[43] In cross-examination Cook accepted that she did not make any notes of the conversations. She affirmed that the complainant's demeanour on both occasions was that she was quiet, upset and seemed shaken.[75] She reiterated that aspect of the account which she had been told by the complainant, which involved the complainant saying "I kicked him off".[76]

[44] Cook also agreed that the complainant had not said that the incident occurred in a house at Karumba, and she understood that the complainant was on some type of cattle property.[77]

Evidence of Elms

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71 AB 133 line 1.
72 AB 133 line 5.
73 AB 133 line 23.
74 AB 134 line 42 to AB 135 line 10.
75 AB 137 lines 18-26.
76 AB 137 line 40 and AB 138 lines 12-23.
77 AB 139.

[45] Elms knew the complainant as a fellow veterinary science student. The complainant picked her up at the airport on 26 July 2015. The complainant told her that she did not have the best placement during the holiday, because "she was sexually assaulted while she was on placement".[78]

[46] The complainant did not give her any more information at that time, but appeared "not well", "like she hadn't slept for days", and she appeared "quite pale and there [were] bags under her eyes".[79]

[47] In cross-examination Elms was asked whether what she had said was the extent of what she could recall the complainant saying, and Elms agreed that it was "the gist of it".[80]

Evidence of Mepham

[48] Mepham was also a veterinary science student who knew the complainant. She said that on about 25 or 27 July 2015 the complainant came to her house to have dinner. She then confided in Mepham what had happened on the placement. Mepham said that the complainant had a very solemn voice and she was really upset. She said she had been sexually assaulted by the appellant, and Mepham believed the words were "While I was on placement, I was sexually assaulted by the vet".[81]

[49] In cross-examination she agreed that at a later point the complainant told her that the appellant had broken into her room, and attacked her, ripping her clothes off.[82] She also agreed that the complainant had just broken up with her boyfriend, and said "[T]hat was one of the reasons she kind of had a sad aura about her … and I just assumed that it was because of the boyfriend".[83]

Evidence of McGrath

[50] McGrath was a veterinary nurse who had attended university with the complainant. She said she received a text message on 9 July 2015 from the complainant which said:[84]

> "Can't wait to see you next week. Something happened last night. I feel so nauseous thinking about it and can't wait to come home."

[51] She said the complainant returned on about 12 July 2015 when they spoke about the complainant's placement with the appellant. Her account of what the complainant told her was as follows:[85]

> "So at the time … it was herself and [the appellant] alone in the residence together having a few beers. They were chatting together and she told me that he became quite suggestive … in his chat, meaning he was using sexual innuendo, saying he wanted to sleep with her. At that point, she told me she nervously laughed it off, and … they continued to have maybe another drink, which is when [the

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78 AB 141 line 12.
79 AB 141 line 30.
80 AB 144 lines 44-47.
81 AB 147 lines 1-6.
82 AB 147 lines 34-40.
83 AB 147 line 45.
84 AB 151 line 29.
85 AB 152 line 25 to AB 153 line 4.

> complainant] became a bit uncomfortable with his level of intoxication and excused herself to go to bed.
>
> She told me that … they both had separate rooms, and … that the door didn't lock very well, or it either didn't have a lock or it didn't lock very well, and she was concerned that [the appellant] would try and follow her into her room. She closed the door and went to bed, and a short period of time later, [the appellant] entered the room. … I can't remember … whether he was wearing clothes or whether he came in naked. However, after entering the room, he became naked, whether he took his clothes of there or entered naked. She told him to please go back to his room, that she had no intention – meaning that she had no intention to continue drinking with him or to pursue any sexual interaction with him. He proceeded to get into bed with her, and take off her clothes. She repeatedly told him no, and to stop, yet he took her pants off. … during this time, he played [sic] his mouth over her vulva and penetrated her despite her saying that … she was uncomfortable and that he needed to leave. … [A]fter penetrating her, he did eventually leave the room and returned to his bedroom where he remained for the rest of the night. From my recollection, they were on a very remote property. So [the complainant] had no reception to call anyone, and she didn't have her own car with her. So she was unable to leave."

[52] McGrath clarified that the complainant had not used the word "penetrate", but rather used the words "he performed oral sex on her".[86] She also said that the complainant had not used the phrase "sexual innuendo" but had used the word "suggestive" which she [McGrath] had clarified as meaning sexual innuendo.[87] McGrath said that when the complainant was telling her these things she appeared to be very upset.

[53] In cross-examination McGrath agreed that her recollection of the complainant's account was that she had told the appellant "no" on a number of occasions, and used that word forcefully, and also that she yelled at him to get off.[88]

Admissions at the trial – Exhibit G

[54] Formal admissions were made that the complainant's boyfriend had provided a police statement detailing his account of what the complainant had told him on 13 July 2015. The relevant admissions were in these terms:[89]

(a) the complainant said, "when I was up North, the vet and owner of the clinic sexually assaulted me";

(b) the boyfriend did not recall the exact conversation after that, but could recall that the complainant said that, "one night on prac work, either a previous night before, or the same night at the State of Origin, she was having dinner with this bloke, and he made some sexual comments to her"; the boyfriend could not remember the words, but it was a comment of a sexual nature;

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86 AB 153 lines 33-36.
87 AB 153 lines 40-43.
88 AB 154 lines 12-23.
89 AB 155-156.

(c) the complainant also said later that night, she went to bed and he came into her room without clothes on and tried to have sex with her, but she fought him off by kicking him;

(d) the complainant was upset when she told her boyfriend; and

(e) the boyfriend asked why the complainant had not told him sooner, and the complainant said she wanted to speak to her friend first and didn't want the boyfriend to worry about her.

[55] The formal admissions also encompassed what had been told by the complainant to a sexual misconduct co-ordinator at the University of Queensland, on 31 July 2015. The relevant admissions were in these terms:[90]

(a) on 31 July 2015, the co-ordinator had a 90 minute direct consultation with the complainant;

(b) during that consultation, the complainant told her that three weeks ago, she was on placement in Karumba and was sexually assaulted by the supervisor vet she was working with and housed with;

(c) the complainant said she was on placement for two weeks, and it was towards the end of the placement that the incident occurred; the complainant said she stayed on after the event;

(d) the complainant said that the sexual assault occurred the night of the State of Origin game which they were watching on TV; the complainant stayed in his house all alone, that he was married with kids, but his family lived in Mt Isa;

(e) the complainant said that night, they were having fun until he said to her that he bet her $20 that he could touch her boobs without making her move; he grabbed her breasts and stated, "I owe you $20"; the complainant said that [the appellant] had told her that he masturbated over her … the night before; the complainant felt unsafe; so she went to bed; and

(f) the complainant stated that he knocked on her door asking if she wanted company and wanted to come in; she said to him, "No. You have a wife and kids"; the complainant said that he kept knocking then came into her room forcefully, naked and hopped into bed; he forcibly took her clothes off and went down on her and told her he wanted her to finish; the complainant said she was scared.

Evidence of the appellant

[56] The appellant not only gave evidence, but called evidence as well. He said that he was the proprietor of the North West Veterinary Clinic[91], which he had acquired in 2001. Typically four veterinarians practiced at that clinic, in addition to veterinarian nurses. Generally there were eight people in the practice.[92] He gave a general description of the clinic, the area of practice, the properties visited, and the number of students taken in by way of placement.

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90 AB 156.

91 Sometimes referred to by the acronym NWVC.

92 AB 159 lines 39-41.

[57] He also said that he owned a house in Karumba.

[58] Turning to the events concerning the complainant, the appellant said that because of the percentages of male to female students in universities, most of the students taken on placement were female. Prior to 8 July he said he had never had any sexual contact with any of his placements. However, he accepted that he "did something sexual on the 8th of July".[93]

[59] The appellant's account of what occurred in connection with Count 1 is set out in paragraphs [19] to [21] above. He then dealt with the subsequent events.

[60] The appellant said that at some stage of the evening the complainant "made discussion about her vibrator" and that "she hadn't brought it with her because it's too noisy".[94] In response he "made a comment that I'd masturbated".[95]

[61] However, he said that he had not, in fact, masturbated. He gave a reason for saying it, which was "I think I was a bit embarrassed with the conversation, but, really, I do not know".[96] He said that there was some sexual conversation prior to the comment about the vibrator. According to the appellant, a few days previously the complainant had made a comment about her inability to orgasm. He described it as a "very left-field comment",[97] and said she was talking about her boyfriend at the time.

[62] He said the complainant went to her room and he went for a shower. He then gave his own account of what happened:[98]

> "After the shower, I left the bathroom … heading towards my door which is directly opposite. [The complainant's] door was on the left. I knocked on that door and … entered her room.
>
> Did you say anything when you knocked on the door?---No.
>
> Did you say anything when you entered the room?---No.
>
> Did [the complainant] say anything when you entered the room?---She did. She said, 'Ed, what about your wife and children?'
>
> Did you respond to that?---No, I did not.
>
> Was the light on, or off?---Off.
>
> And what was your state of dress?---I…was unclothed. I left the bathroom. I … left the bathroom. Yep.
>
> And what did you do?---I laid on the bed beside her … and then with her help [INDISTINCT]
>
> When you say 'with her help', can you explain what you mean by that?---As I … was moving her clothes, … she assisted me in removing them … from her body.

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93 AB 165 line 10.
94 AB 166 line 15.
95 AB 166 line 18.
96 AB 166 line 23.
97 AB 166 line 28.
98 AB 166 line 44 to AB 168 line 12.

> What happened after … the clothes were removed? …I … move [sic] down the bed and … performed oral sex.
>
> And when you say oral sex, that's licking her vagina?---Correct. Well, her vulva. Yes.
>
> Yes. I take it that you don't dispute that her [sic] tongue may have went into the entrance of her---?---Quite possibly, yes.
>
> Yeah. How long did you do that for?---A minute.
>
> And what happened after that?---I hopped up, went over to the door side … and turned the bedroom light on. Then I returned to that same position again.
>
> And what did you do when you returned to that position?---I continued to perform oral sex.
>
> And just … understand. When you left [the complainant] to go turn the light on, and when you returned, had [her] position changed?---No.
>
> Was she still, effectively, naked?---Yes.
>
> And what – what about a doona?---I don't … recall a doona. No.
>
> And you returned to performing oral sex?---Correct.
>
> How long did you do that for?---Maybe another minute.
>
> And what made you stop?---Guilt that … I was in bed with a woman who wasn't my wife.
>
> And what did you do?---I moved back up the bed again beside her.
>
> Was there any words spoken?---[The complainant] suggested I should go to my room.
>
> And did you say anything to her?---No.
>
> And what did you do?---I … went back to my room."

[63] The appellant said he believed that the complainant was consenting, and that the complainant did not do anything to cause him to think that she was not consenting.[99]

[64] The appellant said that on the following day he approached the complainant to apologise for his behaviour "because … as a married person, it was just totally inappropriate for me to be in that bedroom with her".[100] He was asked if he remembered what the complainant said in relation to the apology, and his response was:

> "Her main concern was ... that what happened the night before was not going to impact on her ability to get a position in our practice".[101]

[65] He said she appeared to accept the apology and did not accuse him of anything at that stage.

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99 AB 168 lines 14-17.
100 AB 168 line 22.
101 AB 168 line 25.

[66] The appellant said he could recall the telephone conversations which were the pretext calls. Prior to the first one and after the complainant had left the placement, the appellant said he sent her a text message "to check that she was travelling okay on her way back down to Brisbane".[102] He was then asked about any other contact which he had had with the complainant, and he answered:[103]

> "[The complainant] sent a text message a couple of weeks later to the effect of saying thank you very much for the opportunity to come and undertake practical experience with me and that she enjoyed her time.
>
> So she didn't raise with you any concerns about your conduct?--- No."

[67] He was asked about the first pretext call, and agreed that in that call he had apologised for his conduct. When asked what he was apologising for he answered: "I was apologising for being in a position with another lady when … I was married … when I'm married".[104]

[68] In relation to the second pretext call he agreed that he had apologised for his conduct, and explained that he was "apologising for being with another woman when I was married".[105]

[69] The appellant was asked whether he accepted that the complainant had tried to make it clear on 8 July 2015 that she was not interested, and he said "No".[106] He denied that he raped the complainant or sexually assaulted her.[107]

[70] In cross-examination the appellant admitted that he had told the complainant that he had masturbated over her the night before,[108] but maintained that she had mentioned the vibrator in conversation.

[71] In relation to the recorded telephone calls, the appellant again characterised his apology as being for his behaviour, "My behaviour … being with a woman when I am … already married, yes".[109] He denied that the apologies were because he had forced himself upon the complainant.

[72] A series of direct propositions were put to the appellant.[110] Those propositions and his responses are summarised below:

(a) the complainant did not consent to any sexual conduct on that night; the appellant said "I don't see it that way at all, no";

(b) the complainant went to her bedroom and the appellant saw that she closed the door behind her; the appellant said he did not know if he had watched her go to the bedroom, but her door was closed;

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102 AB 169 line 16.
103 AB 169 lines 19-24.
104 AB 169 lines 40-43.
105 AB 171 line 5.
106 AB 171 lines 8-11.
107 AB 171 lines 35-37.
108 AB 173 line 8.
109 AB 173 line 38.
110 AB 174-175.

(c) the complainant did not give him any indication that she wanted him to touch her sexually; his answer: "I guess I – I didn't – No. I guess no is the answer to that question. No.";

(d) the complainant did not want him to go into her bedroom; his answer: "Well, she didn't indicate otherwise";

(e) when asked why he went into her bedroom naked he answered: "I don't know";

(f) the complainant did not invite him to come into her bedroom, to which he responded: "No";

(g) the complainant said to him that she did not want company in her bedroom; he responded: "No, she did not say that";

(h) when he went into the bedroom naked the complainant not only said she did not want company, but made it clear that she did not want to be touched sexually; he answered: "No, she did not"; and

(i) the complainant made it quite clear to him that she was not interested in any sexual contact; he responded: "No, she did not".

The pretext calls

[73] Transcripts of the two pretext calls were prepared. In respect of the first, the relevant exchange is as follows:[111]

> "COMPLAINANT: Um, yeah. I guess like, the only thing I'm concerned about is um, 'cause of what happened in Karumba.
>
> APPELLANT: Um –
>
> COMPLAINANT: Um, when, yeah, when you kind of barged in my room like that.
>
> APPELLANT: … yeah, look, and that's, that's, I apologise. That's just totally unacceptable and I, yeah, very, um, you know, very apologetic, very embarrassed and um, yeah, um I guess it's something to be [INDISTINCT]. If you could ah change it you would but [indistinct] you know, what's done is done I guess, so –
>
> COMPLAINANT: Yeah.
>
> APPELLANT: Yeah, very um, very um, yeah, very unacceptable anyway.
>
> COMPLAINANT: Yeah. Well, I just, yeah, I just hope it doesn't ruin my career prospects up there 'cause yeah - -
>
> APPELLANT: No, like I said, you know, [INDISTINCT]. I'm the one needs it, that, I am the one that takes full responsibility and then obviously I'm very bloody, yeah, very disappointed in myself so [indistinct] you know, I guess, I again, I apologise again but, yeah, I um, yeah, I um, yeah, not, not something I um pride myself on, that's for sure."

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111 AB 237; amended after listening to the recording.

[74] In relation to second, the relevant passage is as follows:[112]

> "COMPLAINANT: Yeah, yeah. Yeah. I just um, you know I guess I just don't feel yeah comfortable coming up there –
>
> APPELLANT: No.
>
> COMPLAINANT: Yeah. I just haven't been doing well since, since you sort of came into my bed that night without me wanting you to –
>
> APPELLANT: No, and s - , that's something that um, yeah, I've been, been the same, it's sort of just been, it's really just, yeah, you know, it makes me so, so um, I guess so disappointed … in myself, I guess. So it's um, yeah look, I, I really don't know how to um, yeah, I, I guess I just can't apologise enough really but I, but I know that's, apologies are great but its, you know, when something's done something's done, so I guess that's, that's [INDISTINCT]. I really wish I could, I could change it, but I know I can't, unfortunately. Um, but I, yeah, really, you know, just can't emphasise the um, um, yeah, I can't apologise enough I guess, is all I can say.
>
> COMPLAINANT: Yeah. I know. I did try to, try to make it obvious that I wasn't interested by reminding you had a wife and three kids and –
>
> APPELLANT: Oh look, absolutely. Like I said, and there's, there's just no excuse, really is no excuse, mate. Yeah, I guess, I guess, I really can't, really can't um explain just how disappointed I am in myself. It's just, it's totally unacceptable and um, yeah, I wish I could, if I could, if I could, if I could reverse it, I definitely would.
>
> COMPLAINANT: Mm.
>
> APPELLANT: Something that I obviously carry a lot of guilt with and um yeah, I wish there was a way, a way to um, yeah I wish there was a way to, reverse it I guess.
>
> COMPLAINANT: Yeah. Well yeah, I just wanted to tell you why, yeah why I didn't come up so –
>
> APPELLANT: And I, again I, I fully appreciate that and again I, yeah, I, I, carry the full responsibility for it."

Discussion of the appeal grounds

[75] The appellant relied upon an affidavit of his, sworn on 14 December 2018, about four months after the trial. It deposed that prior to the trial he drafted a document "detailing my version of events", which was provided to his then lawyers to use to conduct the trial.[113] He said he had "limited conferences with my lawyers in relation to my version of events" with them prior to the trial, but two conferences with his counsel.[114] He deposed that "I feel as though I did not have the opportunity

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112 AB 247-248; amended after listening to the recording.
113 Appellant's affidavit para 7.
114 Appellant's affidavit para 8.

to tell my full version of events to my lawyers and at my trial", and the affidavit was "to put forth my full version of events about the allegations".[115]

[76] Exhibit ECB001 to that affidavit is the statement done by the appellant for his lawyers prior to the trial. Relevant aspects as to Counts 2-4 are:

(a) the complainant "retired to her room"; there is no suggestion of anything by way of the complainant inviting or encouraging his presence; she had gone to bed;

(b) having had a shower he "passed [her] room, knocked, then entered her room"; this implicitly accepts that the door was closed, and there is no suggestion of any response by the complainant to the knocking;

(c) when he entered the room the complainant said "what about your wife and kids";

(d) once on the bed the complainant assisted in removing her clothes; he then performed oral sex; and

(e) he said "At no point did [the complainant] object verbally or physically" … "I believed at all times that she was consenting [to] this act", and when he had turned on the light and gone back to the bed, "She readily reaccepted my presence".

[77] The affidavit was put forward as part of a submission that it reflected the evidence that the appellant could **and would** have given, if asked. In my view, there is reason to doubt that. First, the appellant does not say that in the affidavit. True it is that he says it is his "full version of events", but that is the state of affairs four months after the trial. He does not say that was his state of recollection at the time of the trial.

[78] Secondly, there are various parts where the appellant expresses his escalating sexual interest in the complainant, and his belief that she was sexually interested in him.[116] His sexual attraction to the complainant, and his belief in her sexual attraction to him, started from about five days before the events at Karumba.[117] That included suggestions that she flirted with him (for example, by wearing revealing clothing,[118] and waving at him as he went past[119]) "throughout the placement".[120] There is not the slightest suggestion of any of that in Ex ECB001.

[79] Thirdly, he deposes that he was "taken through the statements and exhibits prior to my trial".[121] Since he did not give a statement to the police that can only be a reference to the statements of the complainant and others such as the preliminary complaint witnesses. Even though he says he was not taken through Ex ECB001, there was more than ample opportunity to reveal what he says in the affidavit, if it truly reflected his state of recollection.

[80] Fourthly, the affidavit plainly responds (in part) to the complainant's police statement, which he was taken through prior to the trial. Parts respond to things

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115 Appellant's affidavit para 11.
116 Paragraphs 23, 33, 35, 37
117 Paragraphs 35, 37 and 109(b).
118 Paragraph 38.
119 Paragraph 41.
120 Paragraph 109(a).
121 Paragraph 115.

said in the complainant's statement but not in her trial evidence.[122] Other parts now seek to add a different recollection to that he plainly had at the time of trial when he was taken through the complainant's statement. A prime example of that is in paragraph 77, where the appellant refers to her movements during the oral sex, saying "I could feel her moving and it appeared she was enjoying it". The complainant's statement described her movements and that they were an effort to push him off.[123] Had paragraph 77 truly reflected a state of recollection at the trial, it seems impossible that he would not have raised it when taken through the complainant's statement.

[81] Fifthly, the affidavit says that when the complainant suggested he go to his own bed he was "relieved … because I wanted to leave. I felt guilty about being unfaithful".[124] Whilst he referred to feeling guilt at the trial,[125] he did not say he felt relief. Nor did he say anything to the effect that he had assumed **at the time** that the complainant's suggestion that he go to bed was because she felt the change in his mood.[126] Yet the circumstances of his leaving her room were squarely raised in her statement, which he had and which he had been taken through.

[82] Sixthly, the cross-examination by the appellant's counsel reveals various matters put to the complainant as part of the defence case , but which were not in Ex ECB001, which suggests that counsel did seek to find the true basis of the case to put:

(a) the circumstances surrounding Ms Roobiny and the reference to her in the pre-text call;[127]

(b) the conversations about not bringing the vibrator because it was too noisy;[128]

(c) that the appellant said he masturbated over her;[129]

(d) the appellant doing the dishes and tidying up on 8 July;[130]

(e) that the first period of oral sex went on for a minute;[131]

(f) that the light the appellant turned on was near the door;[132]

(g) that the complainant did not pull the doona up;[133]

(h) that the second period of oral sex went on for a minute;[134] and

(i) that on 9 July when the appellant apologised he mentioned it in the context of his having a wife and three children.[135]

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122 For example, paragraphs 66, 67, 70, 72, and 74, which respond to things not said by the complainant in evidence, but in her statement at pages 7-8, AB 227-228.
123 Page 8, AB 228.
124 Paragraph 82.
125 AB 168 line 3.
126 Paragraph 82, last sentence.
127 AB 114-115.
128 AB 121 line 4.
129 AB 121 line 14.
130 AB 121 line 34.
131 AB 122 line 40.
132 AB 122 line 41.
133 AB 123 line 14.
134 AB 123 line 29.
135 AB 124 lines 23-27.

[83] Finally, the affidavit seeks to change the evidence the appellant gave at the trial, under the description of "Clarification".[136] The prime example is that in paragraph 124 where the appellant seeks to qualify the context of his evidence. In evidence in chief he was asked if oral sex meant he was licking the complainant's vagina and he said "Correct. Well, her vulva."[137] He was then asked "I take it you don't dispute that [your] tongue may have went into the entrance of her …", to which he responded "Quite possibly, yes".[138] The question and answer were plainly directed at the opening of the vagina, yet the appellant now seeks to he meant the entrance to the vulva/labia.

[84] Equally significant is paragraph 126, where the appellant seeks to qualify his answer at the trial, as to whether the complainant gave "any indication that she wanted you to touch her sexually". He answered "No", but now seeks to limit that answer to "No, not verbal". Given that EX ECB001 addressed the question of both verbal and physical objection by the complainant, this attempt to qualify the evidence smacks of remorse for the appellant's own performance rather than anything else.

[85] I do not accept that the affidavit reflects the appellant's genuine state of recollection as at the trial. Rather, it appears to be an ex post facto rationalisation of events.

Legal principles

[86] As the first four grounds of appeal involve the contention that counsel for the appellant conducted the trial incompetently, it is worth noting the principles that apply to such a contention.

[87] Whether a miscarriage of justice resulted from the mistake of counsel is to be determined by applying the principles derived from *TKWJ v The Queen*[139] and *Nudd v The Queen*.[140] In *Nudd* Gleeson CJ said:[141]

> "Sometimes, however, a decision as to whether something that happened at, or in connection with, a criminal trial involved a miscarriage of justice requires an understanding of the circumstances, and such an understanding might involve knowledge of why it happened. A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. Considerations of fairness often turn upon the choices made by counsel at a trial. In *TKWJ v The Queen*, the appellant complained that evidence of his good character was not led. This, it was said, was unfair. In rejecting that argument, this

136 For example, paragraphs 124 and 128.
137 AB 167 line 25.
138 AB 167 line 28.
139 [2002] HCA 46; (2002) 212 CLR 124.
140 [2006] HCA 9; 80 ALJR 614; 225 ALR 161.
141 *Nudd* at [9]; internal citations omitted.

Court said that the failure to call the evidence was the result of a decision by counsel, and that, viewed objectively, it was a rational decision. That, in the circumstances of the case, was conclusive. It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct."

[88] In *R v TN*[142] this Court said, referring to *TKWJ v The Queen*:[143]

"[38] It is now taken to be clearly established that a claim of incompetence on the part of those who conducted the trial on behalf of an appellant cannot set in train an inquiry into "the subjective thought processes of those who appeared for, or advised, the accused at trial". It is not part of the proper function of an appellate court to inquire whether the trial and the preparation for it could have been conducted better, or "to examine whether, on all the material **available**, a jury would have been likely to entertain a doubt" if all the available evidence had been adduced.

[39] This strict approach is a necessary acknowledgment that a criminal trial is not merely a preliminary or provisional step in an elaborate litigious progression towards an appeal and retrial; and that the verdict of the jury is not a preliminary or provisional ruling on guilt or innocence. It is also important in this regard that a criminal trial is an adversarial procedure. It is for these very reasons that the role played by counsel for an accused person is so important and the duties associated with it so onerous. If an appellate court were to assume a role of general supervision of the conduct of criminal trials, counsel and solicitors might be dispensed with; but the system of criminal justice which would then be in operation would be radically different from that which is presently in operation. As Hayne J said in *TKWJ v The Queen*:

"[109] To hold that the inquiry is not an objective inquiry of the kind I have described would require an appellate court to apply inquisitorial methods and standards in determining an appeal from what, at trial, has been an accusatorial and adversarial process. It would require the appellate court to examine whether, on *all* the material available, a jury would have been likely to entertain a doubt. That is a very different process from the process undertaken at trial which is predicated upon the

142 [2005] QCA 160.

143 *R v TN* at [38]-[40]; internal citations omitted.

> parties choosing the field for debate and (subject to the obligations of the prosecution) the evidence that is to be led. The principles which inform the two processes are so radically different that they cannot be applied at successive stages of the judicial process. If they are to be merged in some way, that must occur throughout the system, not by applying one set of principles at trial and another, contrary, set of principles on appeal."

[40] To test whether a miscarriage of justice has occurred by reason of the incompetence of those who represent an accused person at trial, an appellate Court must ask, whether, viewed objectively, there could be a reasonable explanation for the conduct complained of. Thus, in *Ali v The Queen* Hayne J, with whom McHugh J agreed, said:

> "An appellate court does not and may not know what information trial counsel had when deciding whether or not to object to evidence. That is why, in *TKWJ*, I concluded that the question of miscarriage does not turn on a factual inquiry into why trial counsel acted or did not act in a particular way ((2002) 212 CLR 124 at 159 [110]). That kind of inquiry cannot be made. Rather, the question is whether there *could* be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process (*Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34], 65 [38] per Gaudron, Gummow, Kirby and Hayne JJ) that no miscarriage of justice is shown to have occurred."

In the same case, Callinan and Heydon JJ, with whom Gleeson CJ agreed, said:

> "[99] … As Gaudron J in *TKWJ v The Queen* said:
> '[W]hether there has been a miscarriage 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'. 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.

> One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test.'"

[89] The test to be applied is that set out in *Ali v The Queen*:[144]

> "… the question is whether there *could* be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred."

Ground 1 - text message 26 July 2015

[90] The substance of this ground was that counsel for the appellant had not cross-examined the complainant, nor led evidence from the appellant himself, about a text message which was sent by the complainant to the appellant on 26 July 2015. The text message was contained in the police statement by the complainant,[145] in a paragraph which read as follows:

> "At 5:24pm on the 26th July 2015 I sent [the appellant] a text message on his mobile phone number … . 'Hi Ed! Thanks again for putting up with me for two weeks and sharing some knowledge with me. I'm writing up my diary now; I really did learn a lot. Uni kicks off again tomorrow! Hope to get up to NWVC another time soon."

[91] It was contended that the text message contained a potentially vital piece of evidence, specifically in respect of the last sentence which expressed her hope to get up to the clinic on another occasion. The contention was that had the alleged attacks occurred as the complainant described them, it might be thought unlikely that the complainant would express, under any circumstances, a desire to renew her acquaintance with the appellant. It was contended that this was a piece of incontrovertible evidence which would have caused the jury to engage in a complete re-appraisal of all that had been asserted by the complainant. Its significance as a forensic weapon was potentially powerful and there was no rational basis, given that it was a case turning on issues of credibility, to refrain from cross-examining about and, if necessary, proving and tendering it.

[92] The respondent contended that the jury had other evidence of the same type as the text message reflected. The appellant had been asked in his own evidence-in-chief about other contact with the complainant after the alleged offending and prior to the pretext phone call. His evidence was that her concern was that what had happened was not going to impact on her ability to get a position at his practice. The complainant's own evidence was that she could not recall raising those concerns at the time, but she accepted she had done so in the pretext phone call. There was other evidence from the appellant that a text message had been sent a couple of weeks after the event, with the complainant thanking him for the opportunity to undertake work experience. There was also evidence from the re-examination of the complainant where she explained her comments after the event, about not

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144 [2005] HCA 8; (2005) 79 ALJR 332; at [25]; internal citations omitted.

145 AB 232.

wanting it to affect her career. In those circumstances the text message did not add anything significant.

Discussion – Ground 1

[93] There is no doubt that defence counsel had the complainant's statement in his possession and therefore was well aware that the text message was sent on 26 July 2015. Was there an objective reason why that evidence might not have been adduced, whether by cross-examination or evidence-in-chief from the appellant?[146]

[94] When considering this ground, it must be remembered what the scope of the case before the jury was. Essentially almost all of the sexual contact was admitted[147] and what was really at issue was whether whatever sexual contact had occurred, did so consensually. As it was put to the complainant at the end of her cross-examination, "the activities on the 8th of July was with your consent". Further, the defence case was one which proceeded on the basis that the appellant apologised on more than one occasion for having engaged in sexual contact with the complainant.

[95] Bearing that in mind, the jury had this evidence before them about contact between the complainant and the appellant after the events on 8 July 2015:

(a) the complainant said she sent the appellant a text message "maybe a week or so later;[148]

(b) in the first pretext call the complainant accepted that she had raised concerns about whether the events would ruin her career prospects "up there";[149]

(c) the complainant's explanation, given in re-examination, as to why she had made statements about not wanting the events to affect her career;[150]

(d) the appellant's evidence that when he apologised the following day, the complainant's main concern was that what had happened was not going to impact on her ability "to get a position **in our practice**";[151] and

(e) the appellant's evidence that a couple of weeks after her return the complainant had sent him "a text message … to the effect of saying thank you very much for the opportunity to come and undertake practical experience with me and that she enjoyed her time".[152]

[96] In the face of that evidence the only extra element that the text message would have added was in the expression "hope to get up to NWVC another time soon". However, I do not accept the contention that such a statement evinced a willingness to be with the appellant himself. The appellant's own evidence established the size

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146 *R v TN* [2005] QCA 160 at [38]-[40]; *TKWJ v The Queen* [2002] HCA 46; (2002) 212 CLR 124, 158 [107], [109].

147 Specifically, the touching of the breasts the subject of Count 1, and as for Counts 2-4, the removal of all of the complainant's clothes including her bra, that his hands might have touched her genital area, that oral sex had occurred during which it was quite possible that the appellant's tongue penetrated the complainant (being the conduct the subject of count 4).

148 AB 106 line 19.

149 AB 117 lines 19-21 and AB 237 line 45.

150 AB 125 lines 23-28.

151 AB 168 lines 25-27; emphasis added.

152 AB 169 lines 19-22.

and nature of the North West Veterinary Clinic. Typically there were four veterinarians practising there, and in addition, four veterinarian nurses. The practice serviced an 800 kilometre radius from Mt Isa and involved working on remote cattle stations.[153] When students went on placement they would not necessarily be with the appellant all of the time, but with the other veterinarians as well.[154] Further, it was put to the complainant, and accepted by her, that she had worked with one of the other vets at the clinic, Ms Roobiny.[155]

[97] Given the size of the clinic, the nature of its work, the number of veterinarians and the appellant's knowledge of the complainant's concern that the events not harm her future prospects at that practice, the expression of hope in the text was relatively innocuous. It hardly bore the character of demanding a complete reappraisal of what had been asserted by the complainant in her evidence. To the contrary, it was consistent with the evidence otherwise.

[98] Understanding the proper scope of the evidence as set out above, objectively there were reasons why the text did not become part of the evidence: (i) it added very little to the evidence otherwise; (ii) its introduction would inevitably lead to the complainant being given a chance to explain why she said it; (iii) that would also lead to more being said on that topic in address and summing up, serving to reinforce the complainant's explanation.

[99] I am unable to conclude that a miscarriage of justice followed from the failure to adduce evidence of that text. This ground fails.

Ground 2 – failures in the conduct of the appellant's case

[100] On this ground the first of the three complaints made about the way in which the appellant's case was conducted concerned the evidence given by the complainant about the positioning of her arms before and during the alleged assault. Her evidence was that she had her arms crossed over her chest, and was trying to hold the doona.[156] The contention was that she was not challenged about that evidence during cross-examination, nor was contradictory evidence adduced from the appellant. The contention was that such evidence could and should have been adduced, particularly as the image conveyed to the jury by the complainant's evidence was compelling, invoking frailty, helplessness and a rejection of the appellant's advances.

[101] In aid of that submission reference was made to the affidavit of the appellant, and in particular paragraph 69. It reads:

> "I started to undress her and she helped me take off her clothes. She did not say anything. I thought by her helping me undress her that she was consenting. She did not appear to be distressed or uncomfortable. She did not appear to be stiff or frozen. She was moving. She did not have her arms crossed."

[102] It is only the last sentence of that passage that has any relevance.

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153 AB 159-160.
154 AB 161 line 20.
155 AB 114 lines 25-31.
156 AB 103 line 1.

[103] I do not accept the contention on this aspect of ground 2. There are a number of reasons for that. First, the evidence was challenged. The cross-examination on the events of 8 July 2015 commenced with the appellant's counsel stating to the complainant that he was "going to give you an opportunity to comment on [the appellant's] recollection.[157] The jury would then have understood that the propositions which followed were, in fact, the appellant's account of what occurred. That was reinforced by the repeated reference to what was being put as the appellant's "recollection".[158] A part of what was put to the complainant, specifically as the appellant's recollection, was that the complainant assisted him to take her clothes off.[159] Further, when cross-examination touched upon the point where the appellant had turned the light on and moved back to the bed the complainant agreed she was in the same position as before, but said "I tried to pull the doona over the top of me, and he pulled it back off". The complainant was then challenged by the following question: "I'm suggesting that you were in the same position and there was no pulling the doona up".[160] Finally, it was put to the complainant that all of the activities that night were with her consent.[161]

[104] Further, the jury did hear the appellant's case, which was wholly inconsistent with any suggestion of crossed arms on her part. It was that as he was removing her clothing, she assisted him.[162] Next, there was no change in the complainant's position from that before he got up to turn the bedroom light on, to that afterwards.[163] Further, the appellant said that he could not recall there being a doona.[164] Finally, the appellant said that the complainant did not do anything which caused him to think that she was not consenting.[165]

[105] In the circumstances there was a direct challenge confronting the complainant's evidence that she had her arms crossed. The contrary case was put quite plainly, and the jury would have fully understood that the appellant's account rejected that suggestion.

[106] I am unable to conclude that there was any miscarriage of justice by the cross-examiner not having dealt specifically with the proposition that the complainant had her arms crossed. In circumstances where the defence case, and the defence evidence, was that she assisted in the removal of the clothing, the contention cannot be sustained. To have embarked on this one extra aspect, i.e. that her arms were not crossed, would have been to give the complainant yet another chance to reinforce that she tried to resist by crossing her arms and pulling up the doona, and provide yet another chance to address that fact. Objectively speaking there was a reason not to go there.

[107] The second area under Ground 2 concerned evidence of words spoken. The complainant's evidence was that she not only told but "kept telling" the appellant that she was not interested, and "that he had a wife and three kids".[166] It was

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157 AB 119 line 24.
158 AB 122 line 3 and line 22.
159 AB 122 lines 26-28.
160 AB 123 line 14.
161 AB 124 line 34.
162 AB 167 lines 15-20.
163 AB 167 lines 33-40.
164 AB 167 line 44.
165 AB 168 line 17.
166 AB 103 lines 7-15.

submitted that the appellant could have contradicted the repeated reference to the wife and children, and the vocalisation of the fact that she was not interested, and he should have done so. In aid of that reference was made to paragraph 65 of the appellant's affidavit. It reads:

> "She only said that comment[167] once that evening. She did not say anything else at that stage. She did not say to me or portray through body language that she was not interested. I took her comment as her understanding that I was coming into her room to engage in sexual acts but at the same time a question of whether I was sure I wanted to go down the path of being unfaithful to my wife."

[108] I pause to note that the instructions given to the appellant's lawyers at the time of the trial recorded the complainant only referring to the wife and children on the one occasion.[168]

[109] In my respectful view, it is incorrect to say that the complainant was not challenged about her assertion that there was insistent reference to the wife and children, and to her vocalisation of the fact that she was not interested. Bearing in mind that the relevant part of the cross-examination was put on the basis that it represented the appellant's recollection, and therefore his case, one can then examine the sequence put to her as representing the true events. It was that the appellant opened the complainant's door, at which time no words were exchanged.[169] However, the cross-examination acknowledged that what was being put was contrary to the complainant's evidence. That was an undoubted reference to the evidence of the complainant that she questioned what the appellant was doing as he entered the room, referring to his wife and three children.[170] The cross-examination then acknowledges the complainant's contrary evidence.[171]

[110] The cross-examination then turned to the point where the appellant had entered the room and then moved to the bed, the complainant being reminded (as the jury would have been also) that what was being put was the appellant's recollection in sequence.[172] In what followed it was made quite plain that the appellant's version of events was that nothing further was said until the appellant said something to the complainant about "he was hoping to make you come".[173] The cross-examination expressly put to the complainant that there was no conversation in the interim[174] and the only conversation, apart from one reference to wife and children, occurred right at the end.

[111] That was also what the appellant said in his own evidence. He said that nothing was said by himself when he knocked on the door or entered the room, and that all the complainant had said was to refer to his wife and children.[175] His evidence was that nothing was said from that point until he stopped performing oral sex and moved back up the bed beside her. It was only at that point, according to his evidence, that the complainant suggested he should leave to go to his room.[176] Finally, it was his

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167 Referring to "what about your wife and kids".
168 Exhibit ECB001, affidavit of the appellant.
169 AB 122 line 4.
170 AB 102 line 40.
171 AB 122 line 15.
172 AB 122 line 22.
173 AB 123 line 39.
174 AB 123 line 4.
175 AB 167 lines 1-6.
176 AB 168 lines 6-10.

evidence that the complainant did nothing to cause him to think that she wasn't consenting.[177] That was reinforced in his evidence in chief when he expressly rejected the suggestion that the complainant "tried to make it clear to you she wasn't interested".[178]

[112] In those circumstances the appellant gave evidence that directly contradicted what the complainant had said about her own comments. It was put to the complainant in cross-examination, and said by the appellant himself in his own evidence, that there was only one thing said by the complainant, that being a reference to his having a wife and three children, and that was said at the point where he had entered the room and that nothing was thereafter said until he stopped performing oral sex. The complainant was plainly challenged about her evidence and the appellant gave his account of the limited nature of what was said. No vital evidence was withheld, nor was there any gap in the quality of the defence case, or the quality of the appellant's own evidence in terms of challenging that of the complainant. Objectively there were reasons not to go this extra step as it adds nothing and gives another chance to reject it, and address upon it, and have the summing up refer to it.

[113] This ground lacks merit.

[114] The third area of complaint under Ground 2 related to the complainant's evidence about her movements, specifically she said that she was squirming and she did not want it to happen.[179] Her evidence on this, given in the context of answering details about the oral sex, was as follows:[180]

> "How did you know his tongue was in your vagina?---I could feel it.
>
> How long did that go on for?---A couple of minutes. I was kind of squirming the whole time and I didn't want it to happen and I asked him to leave.
>
> How were you squirming?---I was kind of moving my legs around to try and get him away from there.
>
> Were your legs touching any part of his body?---Yeah. His shoulders."

[115] In aid of the contentions on this aspect reference was made to paragraph 77 of the applicant's affidavit which reads: "Whilst I was giving the complainant oral sex, I could feel her moving and it appeared she was enjoying it". It was contended that the appellant did not give evidence that it appeared to him that the complainant was enjoying the act of oral sex, but could have. The complaint made was that the extent of cross-examination about physical movement was limited to the fact that the appellant had performed oral sex and the complainant's legs were apart. It was said that it was not put to the complainant that she did anything that might have given the appearance that she was enjoying the act of oral sex.

[116] Reference to the appellant's written instructions at the time[181] includes his account that "at no point did [the complainant] object verbally or physically", and "I

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177 AB 168 line 17.
178 AB 171 lines 8-11.
179 AB 104 line 7.
180 AB 104 lines 5-13.
181 Exhibit ECB001 to the appellant's affidavit.

believed at all times that she was consenting to this act" and "she readily accepted my presence".

[117] Reference to the cross-examination of the complainant reveals these matters which are relevant to this issue:

(a) that at no stage did the complainant kick the appellant off;[182]

(b) that she did not yell at the appellant to get him off;[183]

(c) that the only words spoken by the complainant were when the appellant first entered the room;[184]

(d) that the complainant assisted in taking her own clothes off;[185]

(e) that having performed oral sex for about a minute, the appellant got up and turned the light on, and then returned to performing oral sex; in the meantime nothing had been said by the complainant and she had not changed positions;[186]

(f) that even though the complainant said that her legs were straight, nonetheless her legs were apart;[187]

(g) when the appellant stopped performing oral sex he said something to the effect that he was hoping to make the complainant reach orgasm; the complainant accepted that he said such a thing.[188]

[118] At the centre of this contention is the proposition that the cross-examination and the appellant's own evidence should have extended to his belief that the complainant appeared to be enjoying herself, because he could feel her moving. Such a proposition could only go to two things, one being actual consent, and the other honest and reasonable belief in consent. It could not be the first option, as the movement referred to occurred after the oral sex had commenced. The appellant's case, both in cross-examination and in his own evidence was that the consent was indicated by a number of things up to that time, but particularly the fact that there was no objection to his presence in the room and the complainant assisted to remove her own clothing. It could not assist with the second option either, because, once again, the relevant act (movement) occurred after the oral sex commenced.

[119] In those circumstances the absence of the appellant's own direct evidence about his state of mind, (if it be the case that it reflects his true state of mind, which I doubt: see paragraphs [77] to [85] above) or the fact that he was aware that she was moving, adds nothing material. The complainant was not challenged as to the fact that she was "squirming", and therefore the jury had evidence before it that the complainant was in fact moving during the act of oral sex. Having not challenged that fact, it added nothing for the appellant to say he felt it. As mentioned, his evidence about what it might have signified in his mind, was irrelevant. By then the conduct establishing the elements of the events were complete, even on the appellant's own evidence. Notably in that respect the appellant's evidence was that there had been conversation before he entered the room, no objection when he

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182 AB 115 line 44.
183 AB 116 line 26.
184 AB 122 lines 9-15.
185 AB 122 lines 26-28.
186 AB 122 line 40 to AB 123 line 15.
187 AB 123 line 22.
188 AB 123 lines 38-40; AB 104 line 18.

entered the room, no objection when he moved onto the bed, assistance from the complainant to remove her own clothing, no objection to the act or oral sex, no change of position when he got up to turn the light on, no objection to the resumption of oral sex, and nothing that she did to cause him to think that she was not consenting. Further, in his evidence in chief, he did not dispute that his tongue may well have gone into the entrance of the complainant's vagina.[189] It appears that is an admission that the appellant would seek to withdraw or qualify so it admits only penetration of the vulva.[190]

[120] In address, counsel for the appellant made forensic use of the absence of evidence from the appellant that there was conduct on the part of the complainant which indicated she seemed to enjoy the sexual conduct. The jury were told this:[191]

> "If he was lying about his recollection, why wouldn't he make it sound better for himself? Why wouldn't he say [the complainant] encouraged him, kissed him, or she's moaned, seeming to enjoy it, or that she was touching him on the thigh or the penis, or something? If he was going to lie about his recollection, that's what you'd expect. But, no, he's told you his honest recollection of what occurred."

[121] In my view there was no miscarriage of justice by the failure to put to the complainant that her movement signified enjoyment. To do so would inevitably lead to another chance for her to reject that and reinforce her rejection. And assuming, contrary to what I have concluded above, the appellant did hold the belief that her movements signified enjoyment that could only go to consent, or belief in consent. The appellant gave evidence that she consented and he believed that to be so.

[122] This ground lacks merit.

Ground 3 – s 24 for the purposes of count 1

[123] Count 1 concerned the conduct when the appellant played what he called a joke on the complainant, by pretending that he would not touch her breasts, which he then did. The contention is that notwithstanding the fact that the appellant did not expect the complainant's participation when he first proposed the "bet", the situation changed when the complainant turned her body towards him. Against the background of the events which had previously occurred[192] it was contended that the complainant's action in turning her body towards the appellant "gave rise to a particular belief". However, as is submitted, the appellant was not asked about his state of mind and that should have occurred. The consequence would have been, it was contended, that the jury would have received instructions about the applicability of s 24 of the *Criminal Code*. It was said the failure to adduce evidence in that respect was inexplicable on any rational basis.

[124] There are a number of reasons why, in my respectful view, these contentions should be rejected.

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189 AB 167 lines 25-29.

190 Paragraph 75 of his affidavit. The qualification is curious as penetration of the vulva is sufficient for s 349 of the *Criminal Code* 1899 (Qld).

191 AB Vol 1 27 lines 23-28.

192 Being the conversations on the topics of the complainant's ability to orgasm, her ownership or use of a vibrator, and the appellant's masturbation.

[125] First, the fact that the complainant might have altered her position to face the appellant does not change the situation initiated by his proposal of the joke or bet. The appellant's own evidence concerning the episode was as follows:

(a) what he planned to do was a joke, signified by his proposal that he would bet her $20 that he could make her breasts move without touching them; that very statement of what was intended indicates the lie that he was perpetrating on the complainant; the joke proceeded on the basis that whatever happened it would be without touching her breasts, whereas the reality was that he intended to do that very thing;

(b) the appellant himself accepted that the proposed joke included the suggestion that he was not going to touch the complainant's breasts;[193]

(c) the appellant's evidence was that he agreed that the complainant did not give permission to touch her breasts, but he qualified it by saying "except for that she did present herself and face me";[194] and

(d) the appellant also accepted that the complainant only changed her position **after** he told her that he would bet her $20 that he could make her breasts move without touching them.[195]

[126] The whole "joke" was based upon a falsehood told by the appellant to the complainant, namely that he would not touch her breasts. Any change in position in response to that suggestion is one brought about by the falsehood. It could not possibly bring s 24 of the *Criminal Code* into play.

[127] Secondly, accepting that the appellant's evidence was that he did not have permission to touch the complainant's breasts, counsel for the appellant expressly rejected the necessity for a direction on s 24 in respect of Count 1.[196] Whilst that decision by the appellant's counsel does not determine the issue, it places a considerable obstacle in the way of a conclusion of miscarriage of justice.

[128] Thirdly, insofar as it is now suggested that the appellant could have said that he believed she consented by reason of her altering her position, that was already said in the appellant's trial evidence. Before the appellant got in the witness box the complainant had been cross-examined about the fact that she had altered her position to turn and face the appellant and in close proximity, each of which she accepted. She also accepted that the alteration of position was not as a consequence of anything the appellant forced her to do by grabbing her or turning her chair. When the appellant gave evidence he said that when he proposed the joke it was "with no intention of her to participate in it".[197] But, the complainant "then turned to me and faced me with her chest".[198] In cross-examination he said that the sexual contact on that day was "all consensual", and disagreed with the proposition that the complainant was taken by surprise.[199] Further, he said in evidence that the complainant did not give him permission to touch her breasts, "except for that she

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193 AB 172 line 36.
194 AB 172 line 42.
195 AB 172 line 44 to AB 173 line 6.
196 AB 190 lines 25-47.
197 AB 165 line 19.
198 AB 165 line 20.
199 AB 172 lines 5 and 20.

did present herself and faced me".[200] Further, he denied the suggestion that the complainant did not consent to any sexual contact, saying "I don't see it that way at all, no".[201]

[129] In my view, the so-called "joke" or "bet" proceeded from the outset upon a falsehood perpetrated by the appellant upon the complainant, namely that he would not touch her breasts. Of course, he always intended to do so. Any change in position brought about by that falsehood could not ground an honest and reasonable belief for the purposes of s 24 of the *Criminal Code*.

[130] This ground should be rejected.

Ground 4 – inadequate directions about the pretext calls

[131] The appellant contends that the crown prosecutor's description of the apologies made by the appellant in the two pretext phone calls warranted more fulsome directions that were given about the use to which the jury could put that evidence. The consequence, it is said, is that a miscarriage of justice has occurred, notwithstanding the fact that no complaint was made at the time about this aspect of the directions.

[132] The first passage relied upon occurred in the opening of the case when the Crown Prosecutor said:[202]

> "The Crown says, ladies and gentlemen, that's an admission to the offending and the defendant even goes so far as to apologise for his behaviour that night and what he did to [the complainant]."

[133] The focus in that passage is upon the phrase "an admission to the offending".

[134] The second passage occurs in the closing address by the crown prosecutor where the prosecutor turned to the evidence of the pretext calls, describing it as "one of the most important pieces of evidence in this trial". The prosecutor then recited parts of the calls and turned to what use they could be put:[203]

> "So in those calls we say – so the prosecution says that he's accepted that [the complainant] wasn't sexually interested in him, and he went into her room without permission. And his apology to her, you would accept, is for his unlawful and unwanted sexual contact with her that night. They are clear unreserved apologies for his unlawful sexual conduct that night."

[135] The relevant part of the learned trial judge's directions, about which complaint is made by the appellant, is contained in the following passage:[204]

> "Now, the pretext phone calls. You heard during the trial tape recordings of phone conversations between the complainant and the defendant on 14 August 2015, its exhibit 1, and 27 February 2016, it's exhibit 2. The prosecution relies on what the defendant said to the complainant in these two phone calls as supporting the case

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200 AB 172 line 42.
201 AB 174 line 2.
202 AB Vol 1 19 lines 10-12.
203 AB Vol 1 38 lines 15-20.
204 AB Vol 1 43 line 36 to AB Vol 1 44 line 6.

> against him. The recordings of these two interviews are exhibits which will go with you into the jury room. You can listen to them as often as you wish. You must consider whether those parts of the conversations that the prosecution rely on as supporting guilt with respect to the charged offences are true and accurate. It's up to you, the jury, to decide what weight you give to what the defendant says in the taped conversations and what you think those conversations prove.
>
> The defence submits that what the defendant said to the complainant indicates his innocence. You are entitled to have regard to the defendant's responses to what the complainant said to him and to give those answers whatever weight you think appropriate. It's accepted by the prosecution and defence, however, that at no time in either phone call does the defendant make a specific admission to a non-consensual sexual contact with the complainant."

[136] The appellant contends that whilst it might have been accepted that there were no "specific admissions", the calls were relied upon for more than merely supporting the prosecution case. Rather, they were relied upon as admissions of unlawful sexual conduct, which, in context, necessarily meant sexual contact that was non-consensual. Therefore, it is contended, the evidence was presented to the jury for their use as direct proof of guilt. The contention continued that before the exhibits of the pretext calls could be used to convict the appellant, his explanation in evidence had to be rejected as being not reasonably open. The jury had to be told that, and directed to consider whether they were satisfied that the statements constituted admission of guilt of the offences charged, rather than some other moral wrong, before using them in support of guilt. Further, it was said that there should have been an explanation, reference to the issues at trial, as to how such evidence might legitimately be used.[205] In the absence of such directions, it was said that there was a grave danger that the pretext calls would be used to support verdicts of guilt in a general and impermissible way.

[137] In my view, consideration of this ground requires, once again, the true scope of the trial to be borne in mind. In truth there was only one issue, which was whether any of the alleged acts of sexual contact occurred with consent. The appellant's case effectively admitted that conduct of a sexual nature, and of the type alleged, had occurred. That included, on the appellant's own evidence, the count of rape.

[138] In this discussion Count 1 can be discounted. The pretext calls were concerned with the conduct that occurred in the complainant's bedroom, and not before that time.

[139] In that prism one can examine the content of the pretext calls. A number of features of the calls become immediately apparent. First, no specific conduct was referred to, either by the complainant or by the appellant. Secondly, in the first pretext call the proposition put by the complainant did not really go to a lack of consent to the sexual conduct, as all she said was that she was concerned about what happened "when you kind of barged in my room like that".[206] After that there were expressions by the appellant of whether that was "totally unacceptable", that he was

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205 In that respect, reliance was placed on *R v BBQ* [2009] QCA 166 at 57, referring to *HML v The Queen* (2008) CLR 334 at 121.

206 AB 237 line 30.

"very apologetic, very embarrassed", and that he would take responsibility for that. No doubt that is why the police investigators prompted the second pretext call.

[140] Thirdly, in the second pretext call the complainant introduced two statements consistent with a lack of consent: (i) "You sort of came into my bed that night without me wanting you to", and (ii) "I did try … to make it obvious that I wasn't interested by reminding you that you had a wife and three kids …".

[141] Not only did those two statements serve to focus the responses as applying only to Counts 2-4, but it made the responses relevant to the sole issue in the case, namely whether there was consent or not. In that respect, the appellant's expressions of disappointment with himself, and apologies, can be seen to be directed at the issue of whether the complainant consented to what happened.

[142] Fourthly, the quality of the appellant's response was most intensely focused on the issue of consent when he responded to the complainant's comment "I did try … to make it obvious that I wasn't interested by reminding you that you had a wife and three kids". His response was: "Oh look, absolutely. Like I said, there's, there's just no excuse". That response, on its face, accepted that the complainant had signified her lack of interest by what she had said to him. More specifically, when one listens to the second call, as the jury did, that response assumes greater significance. The appellant's response, "Oh look, absolutely", was given in a way that is quite emphatic and clearly accepting that the complainant did try to make it obvious that she was not interested.[207]

[143] Properly understood, then, the pretext calls contain evidence which, if accepted, constituted admissions of a lack of consent. That was their relevance in the trial, and the potential use to which the jury might put them. In that context one can examine what was said in the directions, and whether more needed to be said in order to prevent the jury from making impermissible use of that evidence.

[144] The jury were told a number of things in the directions set out at paragraph [135] above:

(a) the prosecution relied upon what the appellant said, "as supporting the case against him";

(b) the jury had to consider whether the appellant's responses in the pretext calls were "true and accurate";

(c) it was up to the jury to decide what weight was given to what the appellant had said;

(d) it was up to the jury to decide what was proven by what was said in the pretext calls; but

(e) it was accepted that at no time in the pretext calls was a specific admission made to non-consensual sexual contact.

[145] Given that the only issue in the trial was the question of consent, it is difficult to understand how the directions which were given fell short of what was required in the circumstances. True it is that the appellant had given his own explanations for why he apologised, namely he was apologising "for being a position with another lady when [he] was married". That amounted to a denial that the apologies he

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207 The jury asked to hear this call again, and it can be inferred from what the trial judge told them that they did so during deliberations: AB 183, Ex H.

expressed in the pretext calls were a recognition of a lack of consent. However, the jury were told expressly that they had to consider whether what was said in the pretext calls was "true and accurate", and "what … those conversations prove". In the context where the jury had been otherwise directed (without criticism) that the prosecution had to establish guilt beyond reasonable doubt and for that purpose satisfy every element of every count beyond reasonable doubt, that even if they rejected defence evidence that did not lead to an automatic conclusion of guilt and that they must reach their verdict only on the evidence, and that they could accept or reject parts of a witnesses evidence as they thought fit, the prospect of them misusing the responses in the pretext calls becomes even smaller.

[146] The case revolved, in this respect, solely around Counts 2-4, all of which occurred in one continuous course of events on one night and in one place. There was, in my view, no scope that the jury might have impermissibly strayed into a consideration that the admissions of guilt were as to some other moral wrong. The conduct was admitted, and the only real issue was consent.

[147] Further, the evidence in the pretext calls did not require a direction of a standard of proof before they could be used by the jury.[208] In *R v Ali*[209] this Court considered whether particular directions were needed in respect of a pretext call. The contentions there were of a failure to instruct as to the standard of proof which must be met before the jury could be satisfied that they could treat the statements as an admission to a particular count, and that they were given no direction as to how the statements could constitute evidence supporting the complainant's evidence about that particular count. At issue was whether the trial judge should have identified those parts of the pretext call which were capable of supporting the complainant's evidence on that count. As to that, this Court said:

> "The trial judge gave the standard direction to the effect that, in order to rely on the evidence of [a] pretext call, the jury needed to be satisfied that the appellant's answers relied upon as indicating guilt were true. The pretext call evidence in the circumstances of this case did not require a direction on the standard of proof before it could be used by the jury. Importantly, as the respondent argued, there being no uncharged acts of non-consensual sex to which the appellant's apology in the pretext call could attach, the present case was materially different from *IE*, *R v BBQ and BCQ* where a danger existed that an admission could not have been understood by the jury as admissions of general sexual interest or uncharged acts which in turn provided support for specific offences. The principles derived from those cases are of no assistance to the appellant in the circumstances of this case."

[148] In *Ali* the factual circumstances were that the appellant and complainant had engaged in sexual intercourse on multiple occasions, both before and after the evening on which count 2 occurred. The contention was that the responses in the pretext call was susceptible to multiple interpretations and the appellant testified that his apologies were referrable to arguments that had occurred otherwise than in

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208 *R v Ali* [2017] QCA 300 at [62].

209 [2017] QCA 300 at [62].

respect of count 2. In explaining why the evidence was rightly admitted this Court said:[210]

> "There was no error in the admission of the pretext call at trial. The words spoken by the appellant in the context of the pretext call were admissible, in relation to count 2, as they were reasonably capable of being construed as an admission by the accused to count 2. As the respondent submitted, that this was not a case where there was any allegation of uncharged acts of a sexual nature to which the appellant's apology could attach. Nor was there any allegation of generalised sexual offending or of potentially prejudicial evidence of sexual interest. The complainant's evidence concerned two specific occasions of sexual misconduct by the appellant. The pretext call contains specific statements and comments which were capable of being understood as references to forced penile penetration and capable of being construed as an admission to penile rape alleged in count 2. …"

[149] The circumstances in *R v Ali* were close to those in the present case. Here there was one occasion only on which the relevant acts occurred, and all of Counts 2-4 occurred in the one short period of time. There was no chance, in my respectful view, that the jury might have misused them in the way in which the appellant contends.

[150] This ground should be rejected.

Ground 5 – prosecutor's method of reasoning

[151] This ground focused on comments by the prosecutor made in her closing address. The contention was that the crown prosecutor invited the jury to consider the experience of giving evidence in the trial as a basis to accept truthfulness of the complainant's evidence. To do that, it was submitted, the prosecutor evoked, in some detail, the difficulties faced, and asked the jury to imagine if it was them. She then took them through an imagined scenario where they were the victim of a sexual assault, had to speak to the police, give evidence in court, and then be challenged about their truthfulness and reliability.

[152] The contention referred to the fact that counsel for the appellant objected to what had been said on two basis, (i) the invitation to sympathise with the complainant, and (ii) the risk that the jury might reason impermissibly that the complainant would not have put herself through that process unless she was telling the truth. Whilst the trial judge agreed to address the matter, and reminded the jury that they were not to allow their considerations to be affected by sympathy or prejudice, those remarks did not address the danger that the jury would be left with the impression that the complainant's having made and persisted in the difficult process of making and going to trial over the allegations was, itself, a reason to accept them as true.[211]

[153] The contention was that there was a real risk that the prosecutor's comments would distract the jury from the task of considering whether the prosecution had proven its case on the evidence.

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210 *R v Ali* at [56].

211 Reliance in this respect was placed on *R v G* [1994] 1 Qd R 540 at 542 and 544, and *R v A* [1997] QSC 291.

Discussion

[154] The passages referred to in the prosecutor's address occurred in the following way. Initially, the real issue was highlighted as being whether the sexual contact on 8 July 2015 was or was not consensual. The prosecutor then said "I'm about to give you a number of reasons why you would accept [the complainant's] evidence, but first I want to talk to you briefly about the law and the elements".[212] The various counts were then referred to, with the jury being reminded that on Count 4 (the rape) there was no issue regarding penetration, and the question was that of consent. The prosecutor then turned to the question of consent, raising the question for the jury as "So how did she make it known to the defendant that she wasn't consenting for these acts in the bedroom?".[213]

[155] Then, having run through the evidence of lack of consent, that section of the address closed with the prosecutor saying "that's how the prosecution says the elements of the charges have been met, and you can return verdicts of guilty to all four counts".[214] The prosecutor then turned to a different topic which was opened as: "I want to talk a bit now about [the complainant], why you would accept her version of events – or her evidence as to what happened that night".[215] The followed this passage, which is at the heart of the contentions on this ground:[216]

> "She was young, obviously intelligent, engineering degree, veterinary science degree being completed, attractive young woman who had to come to court and tell all of us about something awful that happened to her. And who are we to her? We're complete strangers. So she's got to come to court, sit in front of a room full of strangers and tell us about the time she was sexually assaulted and raped by her prac supervisor. You would accept that this would have been a nerve racking and uncomfortable experience for her, to say the least. She had to speak about intimate and very unwanted sexual interaction.
>
> And then the truthfulness of her account has been questioned, put under the spotlight. I want you to imagine this. This is just to give you a tiny bit of insight into how it might have been that [the complainant] was feeling when she was there when she gave evidence in this court. Without wishing to make you feel uncomfortable, I want you to think of your most recent consensual sexual experience. Now, imagine yourself turning to the person next to you, noting of course that you've now spent two days as members of this jury panel sitting next to the people either side of you on those two days. Now, imagine turning to them and telling them all about that consensual experience that you had.
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> Now, I want you to imagine if that last sexual encounter was not consensual. You didn't want it, but it happened anyway. Imagine telling the person next to you about that. Now, imagine yourself having to go to the police station, tell the police about that particular

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212 AB Vol 1 30 line 5.
213 AB Vol 1 30 line 43.
214 AB Vol 1 31 line 25.
215 AB Vol 1 31 line 26.
216 AB Vol 1 31 line 32 to AB Vol 1 32 line 18.

> occasion. No doubt strangers again. Now imagine yourself sitting where [the complainant] sat when she gave her evidence on Tuesday, in front of everyone, a room full of strangers, and telling us your story. Not only that, imagine that what you're talking about happened three years ago. Then picture yourself being challenged about the truth and the accuracy of what you experienced – what you say happened.
>
> Well, ladies and gentlemen, [the complainant] didn't have to imagine large parts of that scenario that I've just posed to you. She's lived it. She's been through it. My point is this, this was a challenging and difficult situation for [her] to sit here and tell us about this unwanted sexual contact she had with, effectively, her boss three years ago. You would forgive any memory difficulties that [she] expressed to you because of the passing of time. And you would accept that what [she] did was her best. She did her best in those circumstances to answer the questions, and she did her best to remember."

[156] At the end of the prosecutor's address counsel for the appellant raised the issue with the trial judge.[217] The complaint raised was that to ask the jury to put themselves in the shoes of the victim, having to tell strangers and go to court, was "clearly inviting the jury to feel sympathy for the victim". The request made of the trial judge was that his Honour "should direct the jury that that part of the learned crown prosecutor's address has no place in this court room". The prosecutor then responded, submitting that what was said was not to enliven sympathy but to explain and ask the jury to accept that the complainant was in a foreign environment and therefore that might explain "the manner in which she gave her evidence and any difficulties she might have had in remembering things".

[157] The learned trial judge said that he was "content to make a parenthetical comment to the effect that it was precisely for that reason", and that the issue was about remembering, but in considering that the jury should set aside any feelings of sympathy or prejudice. Counsel for the defence then said that he wanted it reinforced that it was impermissible for the jury to reason that the complainant would not have come here and gone through the entire process unless she was telling the truth. The learned trial judge said that he did not think it had been put that way but he was prepared to make a comment about setting aside sympathy or prejudice. The matter was left there. In the summing up the learned trial judge directed the jury that they should "dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the defendant, or anyone else.[218] Then, having given directions that the jury might accept all or part of a witnesses evidence and examine various matters that might be taken into account in deciding what to accept, the learned trial judge then told the jury "I will, however, be mentioning some special warnings that you must take into account in assessing particular parts of the evidence".[219] Later in the summing up, in the course of summarising the addresses, the learned trial judge turned expressly to the passage to which complaint was taken by defence counsel, and which is at the heart of this

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217 AB 195-196.
218 AB Vol 1 42 line 7.
219 AB Vol 1 42 line 43.

ground of appeal. Having given a summary of that passage the learned trial judge said:[220]

> "Now, I need to remind you that [in] the context in which [the prosecutor] was making those submissions was the context of that process and the time gap of three years and how that would affect the giving of the evidence. But I need to indicate to you that in giving you that example you must not allow sympathy or prejudice to affect your consideration of this matter in any way. So it needs to be very clear the context in which the submission was made to you by the prosecutor, but your task is to set sympathy and prejudice aside, and approach [this] dispassionately, and I've given you a direction about that."

[158] The risk to which counsel for the appellant points is one referred to by the decision in *R v E*:[221]

> "The fundamental vice inherent in the direction adopted in those cases and in this is that, particularly where the task of assessing credibility is not necessarily an easy task, it presents the jury with a facile method of reaching a verdict but one that is fraught with the risk of serious injustice to the accused. In substance, it constitutes an invitation to the jury to conclude that the allegations would not have been made if they were not true. In a criminal case, such reasoning has a real potential to reverse the onus of proof, and to do so in a way that is open to much the same objection as a direction that the credibility of an accused person is to be assessed according to his obvious interest in the outcome of the proceedings against him."

[159] At issue in *R v E* was not a statement in the course of address by a prosecutor but a direction by the judge which, in terms, invited the jury to ask why would the complainant come to court and put herself through this ordeal. That, the court held, was similar to a direction in relation to the accused person if that direction might have led the jury to think that unless they were satisfied that the complainant was a liar, they should convict.[222] The court referred to *R v G*[223] where a direction was given by the trial judge in these terms: "You have heard submissions on why would the complainant make this up against his own father and put himself through this?"

[160] In *R v G* the court held that a direction in those terms "[M]ight be taken as implying that a young complainant in a sexual abuse case was unlikely to invent and adhere to allegations of the kind made by him against his father, and that such a direction, which was erroneous, might have influenced the jury in arriving at their verdict of guilty".[224]

[161] Importantly in *R v E* the court said this:[225]

> "It ought perhaps to be mentioned that in the passage quoted from the summing up in the present case, the trial judge was evidently

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220 AB Vol 1 51 lines 19-26.
221 [1997] QCA 99.
222 *R v E* at p 3.
223 [1994] 1 Qd R 540 at 544.
224 *R v E* at p 4.
225 *R v E* at p 5.

> repeating the effect of a submission made by counsel for the Crown in the course of his address to the jury. However, by doing so without criticising or correcting it, his Honour conferred on it a degree of legitimacy to which it was not entitled and which it might not otherwise have enjoyed. The same is true of what had been said by the judge in the summing up in *R. v G.*; but, as Pincus JA there observed, the passage in question was, in consequence, capable of being considered as a direction by the judge that the argument presented by counsel was one that might properly be accepted by the jury."

[162] There are several reasons why I consider that what the prosecutor said did not infringe in the way referred to in *R v E*.

[163] First, the prosecutor placed the context in which those comments were made early in that passage, when the jury were told that the prosecutor was now going to talk about why they might accept her evidence. Then the general context was amplified by saying that the complainant had to come to court and endure a nerve racking and uncomfortable experience. Again, when the jury were invited to use their imagination about how they might feel, the context was again set by the prosecutor saying that this was to give them an insight into how the complainant may have been feeling when she gave evidence. Then, having gone through the invitation to imagine, the prosecutor then told the jury what her point was, and it was that it was a challenging and difficult situation for the complainant to give evidence about those matters, and that had an impact upon how the jury might assess memory difficulties which the complainant had.

[164] In context, what was said did not bear the connotation of saying why would the complainant say these things unless they were true.

[165] Secondly, it is evident from the learned trial judge's response[226] that his Honour's assessment was that it was not put that way to the jury.

[166] Thirdly, in the course of the summing up the jury were given a general direction to dismiss all feelings of sympathy or prejudice, but then were told that they would be receiving "some special warnings that you must take into account in assessing particular parts of the evidence". One such warning was then delivered in relation to that passage of the address to which objection is taken. Having given an accurate summary of it, the jury were told that the context in which that submission was made was the trial process and the time gap of three years "and how that would affect the giving of the evidence". The jury were told that they had to be very clear about the context in which that submission was made, but their task was to set aside sympathy and prejudice and approach the consideration of the evidence dispassionately. In other words, the jury were told that they were to understand that submission by the prosecutor as being confined to its impact upon memory, and the giving of evidence generally.

[167] Fourthly, the part to which objection is taken was never elevated beyond the status as part of the prosecutor's address. The jury were told that the addresses did not constitute evidence. No additional legitimacy was conferred on it by turning it into a quasi-direction, as was the case in *R v E* and *R v G*. In fact, the contrary is the

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226 AB 195.

case with the judge delivering a special warning about it, telling the jury that the context of what was said was the time gap of three years and how that would affect the giving of evidence, and also that it was not to engender any sympathy or prejudice.

[168] Finally, having heard what the trial judge had to say in the course of his summing up, no further redirection was sought by counsel for the appellant.

[169] In my respectful view, there was little or no risk that the jury would reason impermissibly that the allegations would not have been made if they were not true. in that context one must bear in mind the scope of the case. The acts themselves were not in issue. That the appellant did not have permission to touch the complainant in respect of count 1 was not in issue. In his address counsel for the appellant expressly told the jury that he did not have that permission.[227] The real issue in the case was whether there was consent to the acts constituting Counts 2-4, and whether the appellant might have held an honest and reasonable but mistaken belief as to consent. Whilst that does not eliminate the potential risk, it serves to confine it.

[170] In my view, this ground should be rejected.

Conclusion

[171] The grounds of appeal having failed, I propose that the appeal be dismissed.

[172] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and the order proposed by his Honour.

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227 AB Vol 1 28 line 26.