SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davidson* [2019] QCA 120
PARTIES:	**R** **v** **DAVIDSON, Charles William** (appellant/applicant)
FILE NO/S:	CA No 56 of 2018 DC No 1736 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 28 February 2018; Date of Sentence – 2 March 2018 (Farr SC DCJ)
DELIVERED ON:	18 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2018
JUDGE:	Gotterson and McMurdo JJA and Boddice J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION – CONTROL OF PROCEEDINGS – SEPARATE TRIALS AND ELECTIONS – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – JOINDER OF COUNTS AND DEFENDANTS – JOINT TRIAL – where the appellant was convicted at trial of 18 counts of sexual assault and one count of rape against nine separate female complainants – where the jury was unable to reach a verdict on two other counts of rape against one female complainant – where each complainant attended on the appellant in his professional capacity as a masseur – where each complainant alleged the appellant applied his fingers to a private part of their body during their massage – where the pre-trial hearing judge refused a defence application for severing the counts – whether the counts involving the various complainants formed part of a series of offences of the same or similar character – whether there was a sufficient link between the rape offences and the sexual assault offences as to make them admissible in the proof of the other CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where

the appellant was convicted at trial of 18 counts of sexual assault and one count of rape against nine separate female complainants – where the jury was unable to reach a verdict on two other counts of rape against one female complainant – where the complainants attended on the appellant in his professional capacity as a masseur – where the complainants alleged the appellant applied his fingers to a private part of each complainant's body during their massage – where each complainant gave direct evidence of the appellant having committed each of the charged acts – where the appellant denied having undertaken the conduct the subject of each count – whether it was open to the jury to reject the appellant's denials of having undertaken the conduct the subject of each count – whether it was open to the jury to accept that the evidence of each complainant was sufficiently reliable to satisfy the jury beyond reasonable doubt of the appellant's guilt on each of the counts – whether the verdicts of the jury were unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted at trial of 18 counts of sexual assault and one count of rape against nine separate female complainants – where the applicant was sentenced to five years and six months' imprisonment for the count of rape and two years' imprisonment for each count of sexual assault with a parole eligibility date after two years and six months' imprisonment – where each complainant attended on the applicant in his professional capacity as a masseur – where each complainant alleged the applicant applied his fingers to a private part of their body during their massage – where the offending was non-violent but was the result of a breach of trust and the exploitation of vulnerability – whether the sentences were manifestly excessive

Criminal Code (Qld), s 567, s 597A

Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, applied
R v Bauer (2018) 92 ALJR 846; [2018] HCA 40, cited
R v MAP [2006] QCA 220, considered
R v Nibigira [2018] QCA 115, cited

COUNSEL: J Cremin for the appellant/applicant (pro bono)
P J McCarthy for the respondent

SOLICITORS: No appearance for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the reasons given by Boddice J for his conclusion that the verdicts of guilty were not unreasonable. As to the other grounds of appeal against conviction, I concur with McMurdo JA that, for the reasons given by his Honour, they are not made out.

[2] With respect to Grounds 2 and 3, I would add that this case is clearly distinguishable from *Nibigira*,[1] on which the appellant sought to rely. In that case, this Court held that the evidence of penile rape against one complainant was not admissible in proof of the penile rape of a second complainant. Both complainants were female members of a choir of which the offender was the choir master. The evidence was held not to be cross-admissible on the rape counts because of very significant differences in the evidence concerning the rapes and conduct antecedent to them.

[3] Those differences are summarised in the following paragraphs from the judgment in that case:[2]

> "[102] Complainant A complained of non-consensual penile penetration of her vagina in the backseat of the green Toyota. It had been preceded by acts of increasing indecency towards her on the appellant's part. On earlier occasions, he had touched her thighs or the outside of her vagina in his van. On this occasion, she had first been required to masturbate him to ejaculation, apparently in the front seat, then been requested to move to the back seat. He placed a condom on his penis before he penetrated her vagina and engaged in intercourse until he ejaculated.
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> [103] In the case of complainant B, there was no allegation of physical interaction with the appellant before the incident in the toilet at his residence. There was no antecedent sexual conduct of any kind. The appellant covered B's mouth to stop her screaming. It is alleged that he inserted his penis into her vagina for a couple of seconds. He did not use a condom. B's account does not suggest that he ejaculated.
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> [104] There are then obvious and significant differences in the conduct alleged against the appellant in committing the penile rapes. In my view, the differences preclude the formulation of an underlying pattern in the mode in which the alleged penile rapes were committed. In this respect, the differences are comparable with those identified in *MAP*.[3] In the absence of such a pattern, it follows that the evidence of the one complainant as to penile rape is not admissible in proof of penile rape of the other."

[4] This Court set aside all convictions and ordered that the two penile rape charges be tried separately. Significantly, one of the penile rape charges was ordered to be tried with charges of non-rape sexual offending involving a third complainant and the other with charges of non-rape sexual offending involving a fourth complainant.

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1 *R v Nibigira* [2018] QCA 115.
2 Per Gotterson JA (Holmes CJ and McMurdo JA agreeing).
3 *R v MAP* [2006] QCA 220 at [45].

[5] Finally, I also agree that for the reasons given by McMurdo JA, the application for leave to appeal against sentence should be refused.

[6] **McMURDO JA:** I have had the advantage of reading the draft reasons for judgment of Boddice J and agree with his Honour's conclusion that the verdicts of guilty were not unreasonable.

[7] In my view, however, none of the grounds for this appeal against conviction is made out. In particular, the charges were not improperly joined, because the evidence for one was admissible in the proof of another.

[8] Section 567(2) of the *Criminal Code* (Qld) ("the *Code*") relevantly provides as follows:

> "Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character …"

[9] Section 597A(1) of the *Code* relevantly provides:

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

[10] Ground two of the appeal against conviction is that the judge conducting a pre-trial hearing wrongly refused an application for separate trials. Ground three is that the trial miscarried because "the joinder of the rape and sexual assault charges were not probative of each other and in breach of the joinder rules in s. 567(2) …"

[11] In this case, those two grounds involve essentially the one question, which is whether the evidence of each complainant on a charge of sexual assault was admissible for each of the charges of rape, and vice versa, because the rules for the reception of "similar fact" evidence were satisfied. If the evidence of an offence was admissible on the other charges, then there was a sufficient connection to make all of the charges a series of alleged offences within the meaning of s 567. However, if the evidence was not admissible, then there was not such a series, and there was unacceptable prejudice within the meaning of s 597A.[4]

[12] In the cases of the two complainants of rape, there were also charges that they were sexually assaulted by the appellant. In those cases, the evidence by the relevant complainant in support of one count was probative of the other counts including her, because of the "ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity

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[4] *Phillips v The Queen* [2006] HCA 4 at [7]; (2006) 225 CLR 303 at 307 [7]. *De Jesus v The Queen* [1986] HCA 65 at [4] and [8]; (1986) 61 ALJR 1 at 2-3, [4] and [8]; *Sutton v The Queen* [1984] HCA 5; (1984) 152 CLR 528 at 531 (Gibbs CJ) and 541-542 (Brennan J).

presents itself to do again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person."[5]

[13] There was a different basis for the admissibility of the evidence of other complainants for the rape charges, and vice versa. That basis has recently been stated by the High Court as follows:[6]

> "In a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true."[7]

[14] To be admissible on this basis, there had to be such a link between the facts and circumstances of one offence and the others that the evidence had a degree of probative force which warranted its admission, notwithstanding its potential prejudicial effect. That degree of probative force was described in the joint judgment of the High Court in *Phillips* as follows:[8]

> "…The "admission of similar fact evidence … is exceptional and requires a strong degree of probative force". It must have "a really material bearing on the issues to be decided". It is only admissible where its probative force "clearly transcends its merely prejudicial effect". "[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind". The criterion of admissibility for similar fact evidence is "the strength of its probative force". It is necessary to find "a sufficient nexus" between the primary evidence on a particular charge and the similar fact evidence. The probative force must be "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused". Admissible similar fact evidence must have "some specific connection with or

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5 *R v Bauer* [2018] HCA 40 at [51]; (2018) 92 ALJR 846 at 861 [51] referencing *HML v The Queen* [2008] HCA 16 at [272]; (2008) 235 CLR 334 at 423 [272] per Heydon J.

6 *R v Bauer* at 863 [58] (footnotes omitted).

7 See also *McPhillamy v The Queen* [2018] HCA 52 at [31], [33]; (2018) 92 ALJR 1045 at 1051 [31] and [33].

8 [2006] HCA 4 at [54]; (2006) 225 CLR 303 at 320-321 [54].

relation to the issues for decision in the subject case". As explained in *Pfennig v The Queen*:

> "[T]he evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.""

(Footnotes omitted.)

[15] In his summing up, the trial judge summarised the prosecution case on this question as follows:

> "[T]he alleged offending conduct occurred during a massage under the guise of having some therapeutic benefit, … each of the complainants were female, … on all occasions the alleged offending conduct occurred in a room on a table, … when it occurred there was no one else in the room apart from the complainant and defendant, … for each complainant the breasts were exposed with little or no warning, … the offending conduct was frequently accompanied by suggestive or inappropriate comments or statements by the defendant, … there was some behaviour for a number of them regarding the removal or wearing of certain types of underwear, that five of the 10 women had their vaginal, or genital area, touched in one way or another, … each of the complainants were in a position of vulnerability because of their state of undress and the location and lack of other people, [and] no written consent was obtained in circumstances where it might be expected.
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> And in respect of counts 6 and 20, that's Ms EB and Ms HL, that relating to those two particulars – those two charges in particular but may also be relevant to the others – that there was the – for want of a better word – tweaking of nipples followed by the comment that their reactions were good, or words to that effect.
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> Now, the prosecution argues that the facts proved to you are so similar that when judged by common sense and experience that they must be true, and that you can use the evidence of the complainants in combination. They argued that with the absence of collusion it is objectively improbable that complainant A would complain in such similar circumstances of offending against the defendant as to the alleged offending against complainant B, unless the offending against complainant A actually occurred."

[16] It must be acknowledged that the offences of rape were more serious than the other offences. In my view, however, there was a sufficient link between the rape offences and the other offences as to make the evidence of one offence strongly probative in the proof of another. The common features, as argued by the prosecution and set out in the above passage, demonstrated a sufficient link between the offences. All were committed in relevantly identical circumstances, against an unsuspecting and vulnerable complainant, and with the apparent belief by the appellant that the victim would find the experience to be agreeable, or at least would not complain.

[17] The summing up well explained to the jury what had to be established by the prosecution for the evidence on one count to be used by them when considering another count. There was no miscarriage of justice from the joinder of all charges and the jury being allowed to use the evidence of conduct the subject of one charge as being probative of whether the conduct on another charge occurred. Grounds two and three are not established.

[18] Ground four, according to the amended outline of argument for the appellant, complains that the trial judge failed to reference the elements of each offence to the individual facts of each complainant in his summing up, thereby unduly complicating the elements and the facts. This complaint cannot be accepted. The trial judge explained the elements of an offence of sexual assault and an offence of rape. As the judge explained to the jury, the elements for the 18 charges of sexual assault were "of course all the same." Those elements were clearly explained to the jury after his Honour had ably summarised the evidence, count by count. There were some counts (counts seven and 12) for which his Honour gave particular directions about the elements of the offence by reference to the evidence. The judge then summarised the relevant elements of the rape offences, describing the facts which the prosecution had to prove in each case. Again, with the benefit of the extensive summary of the evidence which the jury had received from the judge, it was unnecessary for his Honour to go back to that evidence and correlate it with the elements which he was explaining.

[19] The next ground, again according to the amended outline of argument, is that "[t]he jury suffered an "overload" as a result of the number of charges and the number of facts and number of complainants." It must acknowledged that this was a demanding trial (or trials) for the jury. There were ten complainants and 21 charges. However the facts of each case were uncomplicated and, as I have said, the jury was assisted by an able summary of the evidence, count by count. It cannot be accepted that this case was beyond the capacity of a properly instructed jury. Notably, the jury did not convict on all counts: they were unable to agree on two of the counts of rape, involving a complainant who was also the subject of three counts of sexual assault. That indicates that the jury did not resort to something of an "all or nothing" approach, because of the burden of their task, as counsel for the appellant suggested.

[20] A further ground is that the conduct of the prosecutor may have caused the trial to miscarry. However the only suggested basis for that assertion is that the prosecutor argued to the jury that they could use the evidence of each complainant as supporting the evidence of the others. What I have said in relation to grounds two and three is sufficient to dispose of this point.

[21] Lastly, there is a suggested ground of appeal, expressed as being: "a combination of errors has resulted in a substantial miscarriage of justice." As the outline says about this ground, it "speaks for itself if the above set out grounds are successful in full or part." As I have said, none of those grounds should succeed and, therefore, neither should this ground.

[22] For these reasons, and for the reasons given by Boddice J on ground one, the appeals against conviction should be dismissed.

[23] There is an application for leave to appeal against sentence. The appellant was sentenced to a term of five years and six months for the rape offence and terms of two years' imprisonment on each other count, all of those terms to be served concurrently. One day of pre-sentence custody was declared. His parole eligibility date was set at 1 September 2020, which will be when two years and six months has been served.

[24] It is submitted that the sentence of five years and six months was excessive, because there was no violence involved in the offence and the act of penetration lasted only for a moment or, as the complainant described it, "[j]ust a couple of seconds. Long enough for it to register what was happening." It is argued that the terms of two years on the other charges were excessive, again having regard to the lack of any violence. In no respect does the appellant's argument suggest a specific error in the sentencing process. The argument is that the sentences are manifestly excessive, so that some error, although unidentified, must have occurred.

[25] As the judge explained, there were serious circumstances of the offending, notwithstanding the absence of any violence. The judge referred to the significant effect upon the victims, to what he described as a heinous breach of trust and the exploitation of their vulnerability, as well as the appellant continuing to commit these offences against other women despite early complaints about his conduct. The judge acknowledged the mitigating factors of the lack of any prior criminal conviction, an otherwise good work history and the likelihood of deportation upon release from prison. Those factors, in his Honour's view, warranted an earlier parole eligibility date than at the halfway mark of the period of imprisonment.

[26] In *R v BAS*,[9] the appellant, who was said to be a practitioner of alternative medicine, was found guilty after a trial of nine counts of indecent dealing, twelve of sexual assault and three of rape, occurring over a period of six months and consisting of "acts of touching of breasts by hand and by machines, blowing air on to a breast, touching an area between the anus and the vagina with a machine and digital penetration of vaginas."[10] The apparent consent of the complainants had been obtained by fraud, because the appellant's conduct had been represented as therapeutic. He was sentenced to terms of five years for the three counts of rape, and two years' imprisonment on each of the other counts, suspended after 18 months. The Attorney-General unsuccessfully appealed against those sentences, but that is not to say that they were at the top of the range.

[27] The sentences in the present case are somewhat heavier than those in *BAS*. I am not persuaded that they were beyond the permissible range in this case, such that they are manifestly excessive, either for the length of the terms or the parole eligibility date which was fixed. The application for leave to appeal against sentence should be refused.

Orders

[28] I would order as follows:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

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9 [2005] QCA 97.

10 At [12].

[29] **BODDICE J:** On 19 February 2018, a jury found the appellant guilty of 18 counts of sexual assault and one count of rape. The jury was unable to reach a verdict on two other counts of rape.

[30] On 2 March 2018, the appellant was sentenced to an effective head sentence of five years, six months imprisonment. His parole eligibility date was set after he had served two years and six months of that sentence.

[31] The appellant appeals those convictions. His grounds of appeal are:

1. The verdicts were unreasonable and cannot be supported having regard to the evidence and the inadmissible cross referencing of the evidence;
2. The pre-trial hearing judge erred in refusing the defence application for separate trials;
3. The trial miscarried in the premise that the joinder of the rape and sexual assault charges were not probative of each other and in breach of the joinder rules in section 567(2) *Criminal Code* 1899 (Qld);
4. The learned trial judge failed to reference the elements of each offence to the individual facts of each complainant in his summing up, thereby complicating the elements and the facts;
5. The jury suffered an "overload" as a result of the number of charges and the number of facts and the number of complainants;
6. Whether the Crown prosecutor's conduct, including his presentation of inferences to the jury, may have caused the trial to miscarry; and,
7. A combination of errors has resulted in a substantial miscarriage of justice.

[32] The appellant also seeks leave to appeal his sentence on the ground that the sentence imposed was, in all the circumstances, manifestly excessive.

Background

[33] The appellant, who was born on 4 February 1950, is a qualified remedial massage therapist. The nine separate female complainants were clients who attended on the appellant in his profession. Seven complainants attended the appellant for massages at a clinic in Algester. Two complainants attended the appellant for massages at a clinic in Boondall.

[34] Counts 1 and 2 were committed on 22 February 2014, against MQ. Count 1 was particularised as involving touching the outer lips of her genitals without her consent. Count 2 was particularised as touching her breasts by sweeping his hands over her breasts without consent.

[35] Count 3 was committed on 24 February 2014 against LN. It was particularised as an unlawful and indecent assault constituted by the defendant touching/massaging her breasts, including her nipples, without consent.

[36] Counts 4 and 5 were committed on 5 March 2014. Each involved unlawfully and indecently assaulting FE. Count 4 was particularised as touching her genitals – the outer labia – without her consent. Count 5 was particularised as touching/massaging her breasts, including the nipples, without consent.

[37] Count 6 was committed on 28 July 2014. It involved unlawfully and indecently assaulting EB by tweaking her nipples, without consent.

[38] Count 7 was committed on 30 August 2014. It involved unlawfully and indecently assaulting CA, by touching/massaging her breasts without consent or with consent which was obtained by fraud.

[39] Count 8 was committed against CA, on 4 October 2014. It involved unlawfully and indecently assaulting CA by touching/massaging her breasts, including over the nipples, without consent.

[40] Counts 9 and 10 were both committed on 22 October 2014. Each involved unlawfully and indecently assaulting KA. Count 9 was particularised as touching the bottom of her breasts and pubic hair without consent. Count 10 was particularised as touching her genitals, near the vaginal area without consent.

[41] Count 11 was committed on 4 November 2014. It involved unlawfully and indecently assaulting RJ by touching/massaging her buttocks without consent.

[42] Count 12 was committed on 10 November 2014. It involved unlawfully and indecently assaulting WH, by touching/massaging her breasts, without consent.

[43] Counts 13, 14 and 15 were each committed on 17 November 2014, against the same female complainant as in count 6. Count 13 and 14 involved unlawfully and indecently assaulting EB. Count 13 was particularised as touching near her vagina, along her genital area without her consent. Count 14 was particularised as cupping her breast, touching it and placing his mouth on her breast, all without consent. Count 15 involved raping EB by penetrating her vagina with his fingers without consent.

[44] Counts 16, 17, 18, 19 and 20 were all committed on 4 September 2015 against HL. Counts 16 and 17 alleged rape. Count 16 was particularised as penetrating her vagina with his fingers without consent while massaging from one side of her body. Count 17 was particularised as penetrating her vagina with his fingers without consent whilst massaging from the other side of her body. The jury were unable to reach verdicts in respect of each of these counts.

[45] Counts 18, 19 and 20 each involved unlawfully and indecently assaulting HL. Count 18 was particularised as touching near her vagina without consent while massaging from one side of her body. Count 19 was particularised as touching near her vagina without consent while massaging from the other side of her body. Count 20 was particularised as touching/massaging her breasts, including the nipples, without consent.

[46] Count 21 was committed on 14 September 2015. It involved unlawfully and indecently assaulting KM by touching/massaging her breasts without consent.

Evidence

[47] MQ received two massage treatments from the defendant in February 2014. Each was given in a chiropractic clinic at Algester. She had been seeing the owner, Mark Whitfield, for chiropractic adjustments to her back for a long time. She had not previously received massage treatments at that clinic.

[48] MQ had her first massage with the appellant one week day. The appellant enquired as to her particular problem. She replied back pain. The first treatment lasted for about an hour. It was a full body massage involving her arms, shoulders, back and feet.

[49] MQ returned for a second massage on 22 February 2014, approximately two weeks later. There was no discussion about the form of treatment. MQ lay on her stomach on the massage table. She had a towel on her back. The appellant started the massage from her shoulder. When he approached her bottom, he pulled down her underwear without asking permission. MQ was shocked. MQ had had massages previously, including from male masseurs. She had never experienced such an event. MQ said something like, "I didn't know that I needed to take off my undies". The appellant told her he did, so that he could get into her groin. The appellant touched her once in between the thigh, close to the vulva and the vagina. It was a gentle touch for a very short time.[11]

[50] At one point, the appellant had MQ lie down on her back. The appellant pulled the towel down. He started massaging MQ's stomach. He then massaged down to her breasts, with one sweep over both breasts with two hands, touching most of her breasts on the front. At the conclusion of the massage, the appellant touched the tip of her nose and said something like, "did you enjoy that". There were no conversations with MQ before the appellant touched her vaginal area or her breasts. The appellant did not seek permission at all.

[51] After the massage, MQ could not find her underwear. She looked at herself naked. She felt, "I was raped". MQ paid for her massage and for the massage her husband was to receive next. She returned an hour later to pick up her husband. Later that day, MQ told her husband what had happened in the massage.

[52] In cross examination, MQ agreed in her first massage with the appellant, she had been talkative. They interacted well. She told the appellant she had back pain and the massage had been recommended by her chiropractor. She had complained of shoulder pain as well. If the appellant had asked about her medication she would have given the details.

[53] On the second massage, there was no conversation with the appellant. MQ denied she had complained of a sore back, sore hip and sore leg. MQ denied the appellant had given her a G-string, which she had put over the top of her underpants. She denied the appellant asked if he could remove her underpants and she had replied she would pull down her own underpants. When the appellant pulled down the towel so it exposed her breasts, she did not pull the towel back up to cover her breasts. She was in shock.

[54] MQ agreed she made a complaint to police after being contacted by a police officer in December 2015. Prior to that she had "totally forgot" and "already moved on".[12] The police officer told her she was ringing because she had had a massage with a chiropractor. MQ said, "I'm a victim". She asked how the police officer knew.

[55] MQ's husband attended the Algester clinic on 22 February 2014 with his wife. On the way home, he noticed his wife was quiet, not normal. She told him she had been molested by the therapist. He touched her private parts, making her very uncomfortable. The therapist had removed her underwear without saying anything.

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11 AB45/15.
12 AB59/25.

His wife did not know where he had put her underpants. She could feel some part of her body exposed, like the towel was not being used properly. When she was asked to turn on her back, there was no towel under after the flip. The therapist tried to touch her bare breasts.

[56] In cross examination, MQ's husband accepted that in the police statement provided on 4 August 2016, he could not even remember the appellant's name. He called the chiropractor straight away to tell him what had happened to his wife. His recollection was that his wife said the towel that had been on her whilst she was lying on her stomach was not on her during the time she flipped to lying on her back.[13]

[57] LN, attended the Algester clinic on 24 February 2014. She had been seeing the owner for chiropractic services since 2009. LN had been unable to obtain an appointment with her usual masseuse, so she decided to try this clinic. She had a chiropractic appointment, followed by the massage. She explained to the appellant she carried a lot of tension in her shoulders. There was no discussion about parts of the body to be the subject of the massage. She thought it would be a normal back, legs, shoulders type massage.

[58] The appellant told her to take her clothes off, including her bra and to leave her underwear on or use the disposable underwear on offer. She thought that weird and decided to keep on her own underwear. The appellant left the room whilst she undressed. The appellant massaged her back. When she turned over, he placed a towel over her breasts. The appellant started massaging her stomach. He then pulled the towel off and started massaging her breasts quite firmly, using both his hands.

[59] The appellant started roughly from the arms and worked his way around towards the front, touching her whole breast. He then went to the other breast. At that point he massaged the nipple. She considered it weird but did not say anything until she opened her eyes and asked if it was part of the massage. The appellant quickly stopped, said, "okay, get dressed" and left the room. She did not give permission for the appellant to massage her breasts.

[60] When leaving, LN told the receptionist, "I don't know if it is part of the massage, but he did touch my breasts and my nipples". The receptionist said she would tell the chiropractor. LN had previously had a breast massage. It was mainly around the breasts, nothing on the breast itself. It did not involve the nipples. That masseuse explained the massage would go around the breast, but would not touch the breast. It was discreet. She signed a form consenting to that course.

[61] In cross examination, LN accepted she did not say anything during the massage of her first breast and the appellant immediately stopped when he started to touch the nipple on her second breast. She did not pull up that towel when her breasts were exposed by the appellant because she said something and he immediately left the room. She first made a statement to police in 2016.

[62] FE attended the Algester clinic on 5 March 2014. She had seen the chiropractor that morning but was still in significant pain. She decided to book a massage at the same clinic. FE discussed with the appellant receiving a remedial massage. She had back pain and needed a hard massage. The appellant indicated he would

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13 AB65/20.

massage the back, legs, neck – a normal sports massage. The appointment was to be for one hour.

[63] FE returned to the practice that afternoon. FE arranged to pay for the massage with the receptionist before going in for the massage. The appellant showed her a chair that had a towel sitting on it and a disposable G-string. The appellant told her to change into that G-string. FE questioned whether she should wear the G-string. The appellant indicated that was what most people would wear usually. FE took a towel and covered herself, after lying down on her stomach. She was wearing nothing but the G-string.

[64] When the appellant came into the massage room he spoke a lot about his experience and the elite athletes he worked on, particularly cyclists. The appellant made a specific comment that he did not massage feet. The appellant started massaging her left side. He moved the towel so that her left side was exposed from behind. The towel was still covering most of her bottom. The appellant made comments about how nice it was to work on someone's body with some muscle definition and tone and how he enjoyed working on athletes. She found the comments uncomfortable. He was using quite firm pressure on her leg.

[65] The appellant then moved closer to her vagina. He put his thumbs on either side on the outside of her vagina, her outer labia and in circular motions massaged the sides, working his way to the inside of the outer labia. Every time he did the circling motion with his thumbs, he opened her vagina. She was in shock. She froze. She did not know what to do. She felt scared as she was alone, wearing a G-string. There were maybe 10 circular motions. The pressure was quite firm. The appellant then massaged her bottom a lot. It was a very hard massage, working his way from her bottom up her back to her neck.

[66] When the appellant had finished, he held the towel up and looked away whilst FE rolled over onto her back. The appellant stood over her, looking down, whilst he did a neck massage. He lifted up the towel covering her breasts before rubbing her shoulders all the way with an open palm, complete hands over her shoulders, down her breasts, over her nipples, down her rib cage in a circular motion and back up and over again and again. FE did not know how to make it stop. The appellant had not discussed this being part of the massage. She did not consent to the appellant touching her breasts or her labia.

[67] FE estimated the appellant rubbed over her breasts maybe 10 down and up motions. His whole hands covered her breasts, the nipple and everything. After the appellant finished rubbing her breast area, he undertook a really hard massage to either side of her belly button and hip bone. It was really painful. During the massage the appellant talked about being a qualified beautician and he would love to offer her his waxing services, specifically Brazilian. He said he could undertake a Brazilian wax in 14 seconds.

[68] At the conclusion of the massage, the appellant left the room. FE changed and the appellant gave her a beautician's card for his mobile services. The next day FE received a text message from the appellant asking how she was feeling after the treatment. She had not given him her number. She responded, "it was fine, thanks". Not long after, she spoke with a friend, WM, about her experience.

[69] In cross examination, FE said most of the conversations during the massage were one way conversations. She provided minimal responses. FE accepted the appellant massaged her hamstring all the way up to the buttocks, but said he separately massaged her labia. When the appellant was massaging her labia, he had moved the towel so that it was exposed.[14] The massage he undertook when she was lying on her back was quite painful and uncomfortable. The appellant told her it was normal. The appellant worked on her neck and her shoulders, between the shoulder blades. He massaged across her nipples. He also massaged through the shoulder area into the sternum. She described it as massaging from her shoulder down to her belly button, over her pectoral muscles and her nipples, "sideways, longways, left ways, all over my nipple, circular motions".[15]

[70] FE could have said that it hurt and slapped his hand away. She did not because she was scared. There were "a million things going through my head, that if I moved and pissed him off – that he would have me locked, basically naked alone in a building".[16] She felt physically threatened by the appellant. It was not her place to tell a professional what the professional position should be. FE came forward to police because her conscience got the better of her. She did not want young girls to go through a similar experience.

[71] WM was spoken to by FE at home, within two weeks of receiving the massage from the appellant. FE said the masseur sexually assaulted her. She knew what had happened was not the right thing, but she did not know how to feel about it. FE said it was a regular full body massage that started off "fairly standard", until the masseur removed her towel and put his hands lower over her 'bum' and touched her on the vagina. FE said she went into shock. She was naked, locked in a room and could not get out. In a later conversation, WM discussed with FE the options of going to police to make sure it did not happen again.

[72] In cross examination, WM accepted that in her statement to police on 26 January 2018, she said FE told her the masseur put his hands lower and lower down her back, over her 'bum' and in between her legs. He then used his hands to touch her vagina. FE had a towel over her back and her bottom.

[73] EB also attended the Algester clinic for chiropractic treatment. She had, for approximately a 12 month period in around 2013, received full body massages from a masseuse called "Liz". That masseuse massaged from the neck and shoulders, back of the arms, down the back and the back of the legs. EB would then roll over on the front and the masseuse would massage the front of her legs and arms. That masseuse did not massage EB' genital area or breasts.

[74] EB received four massages from the appellant. The first was around August 2014. The last was on 17 November 2014. At the time of the first appointment, the appellant discussed with EB her general health and her wish to have monthly massages to assist her fitness program, which mostly involved yoga. There was also a discussion about general physiology and how massage can help. The appellant then left the room whilst EB undressed to her underwear.

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14 AB77/5.
15 AB78/15.
16 AB82/10.

[75] The appellant returned to the room, he massaged her back and shoulders, down the back of her legs, before she turned over onto her back. The appellant asked if she had ever had a stomach massage. She agreed to a stomach massage. At the conclusion of the massage, the appellant gave each of her nipples a tweak by putting the nipple between his thumb and forefinger. The appellant said the responses "are good".[17] At no point in any massage had EB' breasts come into the conversation or been exposed until that occasion. The appellant did not seek her permission to touch her breasts.

[76] EB was taken slightly a back, but having always been told she overreacted thought, "no, it was a good massage. That is fine." She made her second appointment. That massage was a good strong massage, with no inappropriate touching. There was just general talk during that massage. EB was always able to talk to the appellant about anatomy.

[77] EB returned for a third massage. On that occasion, the appellant mentioned a 'glute' massage. EB agreed to a 'glute' massage. EB expected the appellant would pull the briefs down below her buttocks. Instead, he removed them. The appellant said it was better to be able to massage the 'glutes'. EB had not previously had this happen when she had a 'glute' massage.

[78] After the 'glute' massage, the appellant decided to test EB' hip rotation. The appellant brought her knee up under her arm. There was a towel covering her lower body, but in checking the right and then the left, the appellant walked around the bottom of the bed. EB was unsure how much he could see under the towel but the position made her uncomfortable. The appellant then left the room.

[79] EB returned for a fourth and final massage. She removed her underwear herself on that occasion. EB had a stomach and 'glute' massage. After the appellant completed massaging the front of her body, EB took the towel, sat up and asked why her left knee hurt when she did yoga, on the opposite side to which she had injured that knee. During this conversation, the appellant was saying the muscles attached to the knee, came up towards the groin and went across the vagina and down to the left knee. He did a u-type movement, covering where the muscles went and where they were attached. At that point, EB had her left knee up, her right leg was straight out. Her legs were slightly apart.

[80] When the appellant did the u-shape, he did one sweep with the back of his fingers, up the right and down the left. He touched EB' vagina with the back of his fingers as they came past. The appellant did not ask if it was "okay" for him to touch EB in that way. She did not consent to that touching. EB lay down expecting the appellant would leave the room. Instead, the appellant inserted two or three fingers into her vagina, most of the finger length. He said, "That's the G-spot".[18] EB let the towel go in shock. The appellant then put both hands around EB' breast and put his mouth over the nipple for two or three seconds. The appellant did not seek her permission. The appellant did not say anything, and did not describe its purpose.

[81] The appellant walked around the head of the table and headed for her left breast. EB moved her hands across her chest. EB asked "what next?" The appellant

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17 AB181/45.
18 AB187/20.

replied, "You've covered them up". Her reply was to distinctly spit at him, "Yes".[19] The appellant walked out into the waiting room. EB dressed and went outside. She decided to leave and then telephone to cancel any future appointments. The appellant gave her his usual smile and said, "keep up the yoga".

[82] EB said there was no discussion about how the massage would proceed on that last occasion. On one of the occasions, there had been a discussion about pelvic exercises to help a slight bladder weakness. EB had heard there was a machine that could help. The appellant did not know anything about it. The appellant said, "get yourself a toy".[20] EB was subsequently contacted by the chiropractic centre and told the appellant was no longer working at that centre. EB did not tell them at that point what had happened to her during the last massage. EB was contacted by police in December 2015.

[83] In cross examination, EB agreed there was no consent form signed when attending the particular chiropractic clinic, either with the appellant or the previous masseuse. As a general proposition, her body would be covered with a towel which was moved as the appellant worked on that part of the body. The towel was large, but not big enough to cover her entire body.

[84] EB accepted she provided two statements to police. In the first, dated 19 February 2016, she said the appellant did not penetrate her vagina. In the second, dated 1 April 2016, she provided additional information, following what she described as a memory recall. In that statement, she spoke of the appellant's fingers going into her vagina. EB walked out of the massage room, determined she had not been physically injured. She blocked everything out of her mind. When contacted by police, she had determined not to recall any of those events. She signed the first statement believing she had recalled everything. A few weeks later she reviewed her statement. She realised she had left out the most damning piece because, "I had chosen to forget that I had been raped. I'd buried that so deep".[21] She immediately contacted police to rectify that matter.

[85] CA first received a massage through the Algester Clinic on 1 July 2014. Prior to that date, she had attended with her partner for chiropractic therapy. She had seen an offer for discounted massages. They both decided to book a massage on 1 July 2014. CA's partner had a full body massage. Before her massage, CA went over her issues with the appellant. CA was pregnant at the time. She had sciatic nerve pain and lower back pain.

[86] CA left her underpants on but took off her top and bra. She lay on the massage table, faced down, with a towel over her. The massage involved firm pressure. There was general conversation. At one point, it moved to it being healthy for women to not wear underwear for two days a week to let the vagina area breathe. The appellant made reference to his wife not wearing underwear two days a week. Throughout the entire massage, her partner remained in the room. When CA turned over, the towel was held up in front of her, then laid back across her. At no point were CA's breasts touched by the appellant.

[87] CA had a second massage with the appellant on 30 August 2014. There was a discussion about CA's lower back pain and sciatic nerve problems. Time was going

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19 AB184/30.
20 AB185/5.
21 AB206/26.

to be spent in the full body massage on those areas. The one difference on this occasion was that the appellant, at the end of the massage, asked, "would you like your breasts done today?" There was a comment made that it is good to have a massage of the breasts whilst pregnant, because they are heavier. CA did not think anything of it. She said, "Sure". The appellant started rubbing her breasts like a figure eight with an open hand for approximately five minutes. The rubbing was just around the soft tissue area. Both breasts were massaged at the same time.

[88] CA returned for a final massage on 4 October 2014. She was in the final stages of her pregnancy. On this occasion, the appellant took the towel from her breasts before putting his hands together, opening them up, looking at her breasts and saying, "so are we doing your breasts again?" The appellant did not say anything to CA before he exposed her breasts. CA replied, "Sure".

[89] The appellant commenced massaging CA's breasts by rubbing in a figure eight motion. However, the process was different. The rubbing was the whole breast for approximately five minutes. The appellant applied the sort of rubbing a partner would undertake. When his hand went over CA's breast, her nipple would run through his fingers.

[90] At the end of that massage, the appellant pinched her nipples. The appellant made a comment, "I can see you like it". CA replied, "actually, since I breast fed with my first child, my nipples have become harder". The appellant lifted the towel back up, said, "we are done", and left the room. CA dressed and paid for the massage. She agreed to the massage of her breasts because she assumed it was included in a full body massage and was going to benefit her because she was pregnant and that muscle would be sore because of the weight of her breasts. CA did not remember anything being in writing or signing anything about a consent to that massage.

[91] In cross examination, CA agreed that after the first massage she had told her employer the appellant had done a wonderful job. The Monday after the second massage, CA told a colleague at work, MN, that her masseur had rubbed her breasts. MN said, "I don't think they are supposed to do that". On the Monday following the third massage, she told MN it was very strange having someone pinch your nipples when they finished a massage. MN said it was wrong and she should tell someone. CA thought she was being dramatic and sensitive as she was very pregnant at the time. Around Christmas 2015, CA was contacted by police. She ended up making a complaint against the appellant.

[92] MN recalled having one conversation with CA at their work place in late 2014. CA asked whether it was appropriate or normal for someone to massage your breasts whilst getting a full body massage. CA told her she had had a full body massage before, but no one had ever massaged her breasts.

[93] KA had been receiving chiropractic treatment from the Algester clinic since 2008. She was suffering from fibromyalgia and her specialist recommended chiropractic treatment. In 2014, KA received three massage treatments from the appellant. At that stage, her fibromyalgia was compounded by thyroid issues and cancer. KA was advised massage would release toxins within her muscles which would help the pain.

[94] At the first treatment in January 2014, KA discussed with the appellant her issues. The appellant told her he knew of fibromyalgia and understood well the impact of cancer on the autoimmune systems. During this conversation, KA indicated very

clearly it was the right side of her body that suffered continuously. The first massage proceeded immediately after the discussion. It did not take very long. The focus was on KA's shoulders, neck and head and the right side of her body. KA wore a bra and underpants. The massage was a whole body massage. At no stage did the appellant ask if KA wanted her breasts massaged.

[95] KA had a second whole body massage in September 2014. KA also saw the appellant outside the clinic. In the September consultation the appellant had said a publicist friend was going to help him publish his journey and experiences as a sufferer of cancer. The appellant asked if KA would like to meet her. KA thought it may be part of her journey. The appellant approached KA via text and asked if she would like to go for coffee. When she arrived, the publicist was not there. KA asked whether the publicist was coming to coffee. The appellant laughed and said she had gone to Byron Bay. The appellant told KA the person was a prostitute, writing about her experiences.

[96] KA's final massage took place on 22 October 2014. When KA walked into the massage room, it looked different; really dark and there were a lot of candles. The appellant said KA could wear the disposable underwear on the bench, if she wanted to do so. KA did not put on that disposable underwear. She stripped down to her bra and underwear whilst standing behind the partition. When KA emerged from behind the partition, she thought, "there ... [are] not enough towels".[22] There had always been two towels. KA laid face down on the table, putting a towel over her.

[97] The appellant came into the room. There was a lot of chatter. KA indicated she had acute pain on the right side. There was a lot of discussion about KA's bowel movements. The appellant focussed on her 'glutes' and buttock. He then asked her to roll over. There was only one towel. KA felt really exposed. She asked for another towel. She placed it over her breasts. The first towel was on the lower part of her body. The appellant separated the two towels and massaged the stomach area. He then went on to the lower part of the body. At that stage she was wearing her bra and a G-string.

[98] When the appellant started on her left side, he was pushing his hands on her breasts, right down to her pubic line. Her bra was up because she could feel his skin. It was one stroke, which ended on her pubic line. The appellant was touching her pubic hair, going lower than he should. This movement happened a couple of times. He undertook the same manoeuvre on the other side. It was forceful. She could feel him touching her breasts. At one point, the appellant said, "you do realise men don't like prickly bushes". KA froze. The appellant mentioned he was a qualified waxist. He could do her waxing for her. She replied, "it's a girl thing".

[99] Before the appellant touched her breasts, he had asked if KA wanted a breast massage. She said, "No". The appellant said the hairdresser next door always gets one and "goes the full monty". The appellant described her as being very comfortable with her body. The appellant never asked KA if he could touch her pubic area. During the last massage the appellant also started talking sexually. He said, "that's how I knew I had cancer: because I had dysfunctional erections". He made this comment soon after the reference to prickly bushes.

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22 AB127/12.

[100] When the appellant was focussing on KA's 'glute', he said she had a lot of lactose build-up in her buttock. The appellant said the best way to relieve the lactose in the 'glute' was through pressure in the groin. The appellant said, "it's better if I do an internal massage".[23] The appellant said he had done it for another athlete but he had to get permission. As that conversation was taking place, KA's leg was up. The towel had been moved so she was completely exposed. Her knickers had been moved over her vagina. The appellant was pushing in her groin, in between her vagina and the inside of her thigh. She could feel his hands on her vagina. It felt like his whole hand was cupped inside her groin. It felt like half her vagina was exposed. The touching of that area "felt like forever".[24] The appellant did not ask if it was "okay" to touch around that area. KA did not say anything to indicate consent.

[101] KA said, "No. that's it. I'm done, I'm just, I'm done, I can't, I, don't do anymore". She jumped off the table and ran to the partition. The appellant said, "Okay. It's too much, we'll stop. I will let you get changed." As KA left the appellant started talking about how she should go to his house and get waxings done there. He said he could do it cheaper and give massages at his home. He wrote his address on a card. KA remembers thinking, "keep calm, get out".

[102] A couple of weeks after the last massage, KA told her mother she went to a massage person at the chiropractic centre and felt like she had just dodged being raped. The masseur had made comments about her prickly bush. KA also told her hairdresser girlfriend a couple of weeks after the last massage. KA later rang the clinic. She told the receptionist she needed to tell them something. The receptionist said, "Before you even start, is it about [the appellant]?" KA broke down. The receptionist said they had had many complaints. KA told the appellant's employer, Mark Whitfield, what she had experienced that day. She told him the receptionist had said there had been a lot of complaints. KA said everything was "okay" for her first and second appointments. On the last massage, the appellant had inappropriately touched her body. He was also making comments. She felt deceived when she met the appellant for coffee, talking about a book.

[103] In cross examination, KA denied it was during her conversation over coffee the appellant brought up his history of cancer. She denied she hugged the appellant at the end of the coffee meeting. She may have patted him on the back. KA denied that after the third massage she continued a platonic relationship with the appellant. The appellant texted her twice. KA did not respond to either text message.

[104] KA did not know whether disposable G-strings were available at her first two massages. On the third massage, she complained about stomach pain, legs, back, shoulders and neck. She spoke to the appellant about toxic build up from her fibromyalgia in the muscles and lactose build up that comes from the loss of muscle mass. They never discussed lymphatic drainage. KA raised awareness about irritable bowel syndrome. The appellant did ask her about massaging her breasts on that day.

[105] KA's mother, JT, said KA told her she was inappropriately touched on certain parts of her body when she went for a massage. KA broke down at that point. JT suggested KA go to the police.

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23 AB133/45.
24 AB134/45.

[106] RJ had been a client of the Algester clinic for 10 years prior to her attendance for a massage on 1 December 2014. She had not previously met the appellant. She told him she needed a foot massage. She was finding it difficult to walk with her sore feet. The appellant asked if she had any other issues. She told him she had a problem with her left hand side median 'glute'. She had been getting physiotherapy for that problem. The appellant suggested that rather than a foot massage, she have a whole body massage. It would be the same price and he could massage her 'glute', as well as her feet.

[107] RJ lay down on her front with a towel over herself. She was wearing her bra and underpants. When the appellant returned to the room, he took the towel half way down. The appellant said he would need to remove her bra so he could massage her neck and shoulders. RJ unclipped it so the appellant could massage her shoulders. The appellant told her she would need to completely remove it because he was going to massage her back as well. The appellant put her bra on a chair.

[108] The appellant proceeded to massage RJ's neck, shoulders and back, chatting all the time. When he got down to her waist, he removed the towel a little bit more. He was massaging her bottom cheeks, paying a little bit of attention to where the 'glute' sits "at the top of your bottom". He was massaging her cheeks. The appellant then moved further down the back of her legs to her left foot. The appellant then moved to the other side and up the body. The appellant then asked her to roll over. The appellant was looking and talking at her as she was trying to roll over. When she eventually rolled over there was nothing covering her. She caught the appellant looking at her breasts. She quickly grabbed the towel to cover herself again.

[109] The appellant proceeded to massage the front of her body. He said he would not do her breasts this time because it was her first massage with him, but next time he would do her breasts. RJ said, "I don't think so".[25] After the massage, there was a discussion about RJ going overseas the following week. The appellant suggested she have another massage. RJ agreed to an appointment the following week. RJ did not attend that subsequent appointment. RJ went home and told her husband, "It's really weird, I ended up going for a foot massage, and ended up with a body massage". The next day RJ told a work colleague the massage did not feel right. Her work colleague, MH, said she did not think it was a normal thing. RJ rang Whitfield on the following day. Whitfield replied, "Look, I'm going to have to have another conversation with him." That devastated her because she was hoping he would fix it.

[110] In cross examination, RJ agreed she became aware of a Facebook post or Queensland Police Service media release, encouraging her to make a complaint to the police. RJ had an "attack of the guilt's", thinking she had not reported it. She rang Police Link and had a conversation with police.

[111] MH recalled a conversation with RJ about an experience with a massage therapist in 2014. RJ thought the massage might have been inappropriate. RJ said she felt uncomfortable when she was asked to roll over, because she was not offered anything to protect her modesty. RJ felt it was bordering on being unprofessional. MH agreed it was unprofessional.

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[25] AB152/30.

[112] WH had attended the Algester clinic for a couple of years prior to receiving massages from the appellant. She had approximately three massages by the appellant prior to 10 November 2014. Those massages included all parts of the body, legs, neck, shoulders, back and arms. They did not include her breasts or genitals. Nothing of note happened in the massages performed by the appellant before 10 November 2014.

[113] They had conversations different to what she would normally have with a massage therapist during those massages. The appellant would say it was "okay" not to wear briefs. Lots of his clients and friends would not wear briefs. WH chose to wear her briefs. She did not think it was appropriate not to have anything on at all. There was another conversation where the appellant asked if she wore pyjamas. She answered she wore pyjamas to bed. The appellant replied, "It's good not to wear anything, because it would help her sexual relations with her husband". WH did not understand why they were having those types of conversations. They were not appropriate.

[114] The last occasion WH had a massage with the appellant was 10 November 2014. She had gone to the chiropractor first and had a massage afterwards. There was a brief exchange of words. WH was aware the appellant used to provide a G-string that clients could wear. She asked if he had the G-strings. The appellant said he was not ordering them anymore. The appellant stayed in one corner of the room, whilst WH went to the opposite corner to get undressed behind the divider. When WH came out from behind the divider, she was just wearing briefs.

[115] The massage proceeded in a normal way. However, when WH had to turn over onto her back, the appellant put the towel on her waist so that the top part of her body was exposed. He then put the palm of his hands down, one hand on each breast. He commenced massaging her breasts. He moved to the right breast, cupping both hands on it, like he was undertaking a breast examination. The appellant asked if WH did regular breast examinations. She replied, "well, actually I do".[26] The appellant said his friends and some clients allow him to do those breast examinations. WH pulled up the towel at which point the appellant stopped. The appellant used a light massage to press on to each breast. He may have touched her nipples because the palms of his hands were over her entire breast. The appellant did not seek permission to touch her breasts.

[116] At the end of the consultation, WH dressed, thanked him and went outside. She did not tell anybody. She went away giving him the benefit of the doubt. She made another appointment for about six weeks' time. A week before that appointment, she was telephoned to say the appellant was no longer at the clinic. She did not, at that stage, say what had happened to her. At a later stage she told the receptionist, Christie, something did happen in one of her sessions. She did not tell her the details.

[117] In cross examination, WH agreed she was contacted by police in late 2015. They encouraged her to make a statement. WH denied the conversation about the pyjamas arose because she had attended an early morning appointment wearing pyjama bottoms. WH did not accept the conversation about the breast examination occurred because she had asked the appellant about pain in her breast. She denied the appellant mentioned the name of a doctor who had online tutorials about how to

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26 AB166/45.

do a breast examination. She denied the appellant demonstrated how a breast examination takes place. WH did not say anything about her breasts being massaged because she had "a few emotions going through my body at the time. I – what I felt he was doing was inappropriate and wrong."[27]

[118] HL, obtained massage treatments at the Boondall clinic in 2015. Her first two treatments, performed by a female therapist, involved deep tissue massages. HL had been receiving deep tissue massages for 20 years. At just about every massage place, she had filled out a questionnaire indicating the areas to be massaged by the therapist. On no prior occasion had she ever had her genital area touched by the massage therapist.

[119] On 4 September 2015, HL had a massage performed by the appellant at the Boondall clinic. When she attempted to book that treatment, HL was advised by a text message that the female therapist was no longer working at the clinic. The text said that the appellant was available and gave a very good massage, having worked at a physiotherapy centre or that there was a female therapist who could provide a relaxing massage. HL did not want a relaxing massage.

[120] When HL arrived, the appellant introduced himself. HL filled out a questionnaire with her name, address, injuries and other information. The appellant asked what parts were to be massaged by him. HL replied her back, arms, legs, front, both front and back feet, but no face or scalp. There was no discussion about her genitals. HL did not at any stage sign a written consent about a massage for the genital area.

[121] When the appellant started massaging her back lightly, HL told him he could go deeper. However, the appellant proceeded to say something like "am I embarrassed". He said he was going to move down to her bottom. HL said "no". The appellant pulled down her underpants and proceeded to massage the sides of her thigh. He then moved to the other side. At that point the appellant pulled her pants right down, almost to the back of her knee. HL had never had that happen before. The appellant used his left hand straight down the 'crack' between her cheeks, over her anus and through into her vagina, around to her hip area. The appellant kept doing that over and over. It was hurting HL. She did not know what to do. At no point did the appellant actually massage the muscles of her buttocks. HL could feel his hands going into her vagina. During this time, the appellant kept speaking about all his experience with massages and how he had learnt this tribal kahuna massage in Sydney and how "Queenslanders are … prudent".

[122] HL felt the appellant's fingers going almost into her anus and then it hurt when his fingers went into her vagina. He did that for about eight to ten strokes. It felt like all four fingers went into her vagina. The appellant just rubbed through, in a constant movement. She did not consent to the penetration of her vagina. When the appellant went around to the other side of her body, his right hand went down past her 'crack', almost into her anus and four fingers brushed past into her vagina. The penetration of the fingers into her vagina was "deep". That was the only part of the massage that was hard and deep. The rest was very, very, very light.

[123] When HL rolled over, the appellant brought her left leg out. He said he was going to tuck the towel into her pants. He pulled the towel right across to the other side of her leg. She knew she was exposed because she could feel cold on her vagina. The

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27 AB175/5.

appellant proceeded to do a few light strokes on the upper leg and then he was into her crutch again. It was uncomfortable. She could feel him touching the outer edges of her vagina. The appellant did the same thing on the other side. He did not touch the rest of her legs.

[124] When the appellant was massaging around her bottom, he made a comment about the trimness of her body. Whilst the appellant was in the crutch area, his hands seemed to be doing something like his knuckles were touching the outer edge of her vagina, the outer lips. He touched that area for a couple of minutes, skin on skin. At one point, the appellant went to get some more oil. She quickly pulled her underwear across a little bit.

[125] At that point, the appellant pulled the towel down over her breasts and was massaging around her breasts. At the last minute, what felt like his thumb and forefinger were around her nipples. The appellant said, "you've got a good response". That was the end of the massage. He left the room. HL lay there for a moment thinking, "what the hell just happened", before wiping everything out of her vagina and bottom.

[126] When HL went home she told her husband, over a cup of tea, "I just had a strange and weird massage". She told him what had happened. She complained to the clinic and emailed the relevant association telling them she had, "just had a disgusting massage with this guy, his name, he should be de-registered". They replied sometime later.[28]

[127] In cross examination, HL accepted that one of the areas she wanted the appellant to massage was her bottom. HL did not accept the appellant massaged her 'glutes'. She denied he rubbed from the shoulders into the middle and out to the shoulder. He massaged her breast, not her minor muscle. HL had some communications with the clinic owner, Lisa, after the massage, in which she requested a refund. She denied making a request for additional monies. She spoke to Lisa to get the appellant's details so she could complain to his association. Much later she spoke to Lisa to try and get a refund. HL did not threaten to go to the police if she did not receive the refund. HL contacted the police on 12 October 2015. She provided a statement at that time.

[128] HL's husband, HN, spoke to HL after she returned from a massage in 2015. She had had "the strangest and weirdest massage". She described the massage as starting off "normal", but after a time the male therapist pulled her underpants down so that his hands were going into the inside of her thighs. The therapist then had her roll over, at which point the therapist pushed her leg to the side, so her legs were right apart, and began massaging the top part of the inside of her thighs, very close to her private area. After that, he moved to the chest area, which he uncovered, not doing anything else, just the breasts. He played with the nipples a little bit. Later, his wife said the male therapist actually rubbed his hands over her vagina, touching with his fingers. Sometime later, his wife decided to ring the clinic.

[129] In cross examination, HN accepted his wife did not explain to him that the male therapist went in deep, just that his hands were wandering. The male therapist swept his hands over and onto her vagina.

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28 AB220/45.

[130] KM obtained a remedial massage from the appellant at the Boondall clinic on 14 September 2015. She had previously received remedial massage treatment at that clinic from a female therapist as well as the female owner. Usually, it was the whole body but concentrated on her shoulders, particularly the right shoulder at hips. She had never received a breast massage.

[131] When she arrived on 14 September 2015, KM had a discussion with the appellant about the areas of concern, which were her shoulders and hip. They spoke about her employment as a police officer. There was no discussion of any massage of breasts or other areas. The appellant explained what he was going to do. He seemed quite knowledgeable. It was a good massage, initially. When the appellant asked her to turn over, he held up the towel and looked away, saying, "I'll look away for your dignity". However, in the last 20-25 minutes of the massage, the appellant proceeded to roll the towel down from her collarbone, all the way to the bikini line, leaving her breasts exposed. The appellant covered her breasts with a small tea towel type towel.

[132] The appellant proceeded to massage her stomach, massaging her colon for digestive purposes. When he finished, he removed the tea towel from her breasts. It was an intentional action. With an open palm, starting at the shoulders, the appellant went down her body, down the side of her breasts and then back up over her breasts. He did this about eight to ten times, touching "pretty much all" of her breasts.[29] He went over the top of them, touching her breasts and nipples. The pressure was medium, less firm than that applied to other parts of the body. The appellant did not saying anything about doing that manoeuvre before he removed the towel, or after the removal of the towel.

[133] Whilst he was doing this, the appellant asked KM about scars on her breasts. She said, "breast reduction". He said, "Hmm, nice job, nice job". He told KM his mother had had a breast augmentation, and that he massaged her breasts to relieve pressure. After the appellant completed that motion, he continued to massage the rest of KM's body, leaving her breasts exposed. She did not consent to the massage of her breasts. Once the appellant had completed massaging her legs, he covered KM up, said they were "done" and went out to reception. She quickly dressed, paid him and left the centre. She told a work colleague, RY, a few days later.

[134] In cross examination, KM accepted she indicated to the appellant the areas where she was experiencing pain. She did not accept the area she indicated was above her breast cup. The touching of her breasts commenced with touching the sides of her ribs. She did not accept the towel across her breasts might have fallen off. The appellant removed it intentionally. KM accepted a massage could involve touching breast tissue, but that would involve the upper breast tissue as opposed to the side or the nipples.

[135] RY, a police officer friend of KM, was telephoned on 20 September 2015. KM was upset and distressed. KM told RY she had gone for a massage. After the male therapist had conducted a massage of her back, he asked her to roll over. He turned away to give her some privacy, but then removed the towel, exposing her breasts. He asked what the scars were, to which KM replied they were from a breast reduction. He said "nice job, very nice job". At that point, KM began nodding her head, like she was mimicking an action of the therapist. The therapist then began to

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[29] AB26/40.

massage her breasts. KM did not detail how long the massage of the breasts took place.

[136] In cross examination, RY agreed from the description and KM's actions, she understood the therapist's actions were as though he said the words, "hmm nice job, very nice job", nodding his head at the same time. KM told her the therapist was nodding his head at the same time. He massaged her breasts after that time.

[137] Anna Rososzczuk, an associate chiropractor at the Algester clinic between 2013 and 2014, was spoken to by a female client who said she needed to speak to her in private. The patient had a massage with the appellant, which was a very bad experience. She was asked peculiar questions and he touched her inappropriately. His hands went high up in between her legs. The patient's name was FE. She could not recall her surname. She was 20 or 21 years of age. Rososzczuk said she was very sorry for her experience. She told FE she would tell Mark Whitfield. She did pass that information on to Whitfield. The conversation occurred in early 2014, some months before she finished at that clinic.

[138] In cross examination, Rososzczuk accepted that in a statement to police on 18 July 2016, she indicated the patient came back for other appointments but ensured her future chiropractic bookings were when the appellant was not working. The patient made particular reference to an upper thigh massage, where the appellant went way too high up in between her legs.

[139] Lachlan McGraa, the police investigator of the complaints from the Boondall clinic, conducted a recorded interview with the appellant. The appellant was charged in relation to the complaints of HL and KM at the conclusion of that recorded interview. McGraa was not responsible for any of the charges in respect of the remaining complainants, other than FE, from whom he took a statement dated 10 November 2015. That complaint arose after the KM and HL complaints. There was no interview with the appellant in respect of FE's allegations, as he did not want to participate in an interview based on legal advice.

[140] In the recorded interview, conducted on 13 October 2015, the appellant was told police were investigating two complaints by patients of the Boondall clinic. The first complaint was from KM. The appellant said KM was a police officer who complained about the weight of a pack she had to wear at times. He thought he provided, "a great massage".[30] The appellant said he unfortunately was careless with the draping of the front of her body. When KM turned over, he exposed too much of her chest area. KM had every right to be embarrassed, but said nothing. At that stage, he was massaging the trigger point of the pec minor muscle, which stretched from the sternum, across the top of the breast area. He did not actually touch breast tissue during the massage.

[141] The appellant said he tried to side step having exposed too much of the chest area, by asking KM what the scars were, to which she replied, she had a breast reduction. He said "good job", before proceeding to massage the other side as well as her neck and scalp. The appellant said he did not touch any part of KM's body in an unprofessional manner. He did not massage her 'glutes'. The appellant would not touch the actual breast itself, unless he was doing a breast flushing massage, to remove lumps and create lymphatic drainage. Lymphatic drainage massage is

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30 AB658/52.

a practice a lot of relaxation therapists concentrate on, particularly the breast and groin, to move the lymph fluid that cleanses the body though the tissues.

[142] The appellant told KM there was a British doctor who ran a website which had video clips to demonstrate to ladies how to flush their breasts. The appellant had training in that procedure. The appellant generally mentions the doctor from the UK to women who are fairly large breasted and who may have problems with lumps in their breasts and swelling and pressure because of lymphatic drainage problems.

[143] The appellant said his professional association's guidelines in relation to massaging breasts necessitated it always occur with the client's permission. If there was any question about what he was doing, he would always look the client in the eye and say, "with your permission, I will now do the pec and the deltoid muscles". If the client had any problem, he would not do that massage. Verbal permission during the massage was sufficient, unless the client came with a specific problem, in which case he would note it down on the record card and have them sign it for "informed consent".

[144] The appellant did not obtain KM's written consent to touch her breasts. He was not performing a full breast flushing massage on KM. It was just a 'pec minor' deltoid stretch as part of a normal massage. That procedure meant he touched half way down the breasts towards the nipple. He never touches the nipple in undertaking that procedure. If he was undertaking a genuine breast flushing massage, he would hold the nipple with one hand and strip away from the nipple, to the outer perimeter of the breast with the other hand. That was a recognised procedure.

[145] KM presented for a full body massage. It was remedial, not a relaxation massage. The purpose of massaging the top of her breast was to lengthen and relax the 'pec minor' muscle. Whilst undertaking this procedure, KM did not have a towel over her chest. The towel had fallen off. He did not attempt to replace the towel. He did not recall any objection to that procedure. KM did not say "yes". The appellant offered to look at KM, "face to face, eyeball to eyeball" and say he slipped up, the towel should not have fallen off. He should not have been engrossed in conversation. If KM was offended, he was extremely apologetic. The appellant wanted KM to come back and there was every indication she was going to return.

[146] When police outlined that the second complaint was from HL, the appellant said he recalled HL. He had "his doubts" straight away, as people were normally pleasant. She was not, on their first meeting.[31] HL said she wanted a relaxation massage, focussing on her feet, legs and 'glutes'. The appellant replied he did not do feet. HL said she needed her 'hammies' and 'glutes' done. The appellant agreed to look at her hamstring and the 'glutes'. The only thing HL did not want to be touched was her face, neck and hair.

[147] The appellant left the room whilst HL changed and lay on the table. When he returned, HL was face down with one towel on the upper body, and one towel on the lower body. They were placed incorrectly. HL kept her socks on. He commented "cold feet", and she said "yes, I have cold feet". He offered to place an extra towel around her feet to keep them warm. They had a discussion during the massage about HL being a runner and undertaking gym work to build up her bottom. They discussed the worth of gym work. During the conversation, HL asked the appellant how her legs were looking, to which he replied, "they look pretty good".

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31 AB676/55.

[148] The appellant asked HL what she wanted him to do with the 'glutes'. She replied they were sore. The appellant lifted the leg of her underpants up, but found they were too tight. He went to the waistband and pulled the waistband down. He realised it would be too hard to get in there. He told HL if she wanted him to massage the 'glutes' next time, wear a G-string, or ask for a G-string or leave off your underpants. HL replied, "fair enough". That was the end of that aspect of the massage.

[149] When HL went to turn over, the towel over her chest area ended up on the floor. The appellant made no attempt to pick the towel up. He did not think she made a very good attempt at holding the towel as she turned over. He asked HL what she wanted to be undertaken and she said the 'abs' were pretty sore. She asked how her 'abs' were looking. He thought she was there for compliments. The appellant did not have a good feeling about her. He thought she was pretty strange.

[150] The appellant accepted it was possible HL was genuinely asking how aspects of her body looked from his professional opinion, but she made one comment about herself while he was making an attempt to massage the 'glutes'. HL asked how they were looking, and he responded he could not really comment while a person was lying down, because everyone looks the same. HL said she had been working on her 'glutes'. He replied, if she wanted to work on giving herself a "bubble butt", that was up to her, but said he could not comment further.

[151] The appellant did not do a 'glute' massage on HL because of her underwear and because he had liniment on his hands, which would sting. Sometimes, when undertaking a 'glute' massage, the appellant would lift the leg so as to expose the bottom half of the 'glute'. In her case, he did not push the fact because he had liniment on his hands and it was not going to work because of the tightness of her underwear.

[152] The appellant denied ever running his hand firmly through HL's bottom 'crack' over the top of her anus and into her vagina. The appellant may have folded HL's knee out to the side, but denied doing that manoeuvre when HL's underpants were down around her knees and her vagina was exposed. He denied touching the outer part of her vagina whilst she was in that position. He denied massaging her breasts before rubbing the nipple with his fingers. He denied saying she had good responses. There would be no valid reason for massaging the inside of a patient's bottom 'crack' or touching their anal or vaginal areas.

[153] The appellant massaged HL's stomach and 'abs' whilst her breasts were exposed. He then massaged the 'pec minor' and deltoid muscle band at the top of the breast tissue. He tried as far as possible to avoid the nipples. If part of his hand came into contact with her nipples, there was no intention to deliberately touch any nipple tissue. HL was not booked in for any type of breast flushing technique.

[154] When HL emerged from the room, she had a big grin on her face. He remembered commenting to another staff member, Oriana, "look at the smile!" HL gave him cash and asked what days he was working, which he saw as a good sign that she would rebook for another massage.

[155] Tara Inch, investigated the complaints against the appellant from the Algester clinic. She initially received a complaint from KA in December 2014. KA withdrew that complaint for personal reasons. KA was not emotionally stable at the time. KA provided a signed statement on 9 December 2015. In November/December 2015,

Inch became aware McGraa was investigating KM's complaint. Inch investigated other complainants following the execution of a search warrant on the clinic in order to obtain the client database. A lot of patients were contacted by police, including EB, LN, CA, KA, WH and MQ.

[156] Graham Schodde, a remedial massage therapist and member of the Australian Association of Massage Therapists, gave evidence that all therapists who wished to be able to have their clients claim the cost of a massage on health funds need to be registered with that association. Membership required adherence to a code of conduct. The code of conduct required, for any form of massage, that a client be appropriately draped. A massage of more private areas of the body required a signed consent form. Private areas requiring specific consent included breasts in women and the groin or glutoneals. There was no reason for a massage anywhere along the glutoneals crease between the two buttocks.

[157] A massage of the breast area would not include the nipple area. A massage of the breast usually related to lymphatic drainage. On occasions, it may be necessary to expose the breast. You would only do so if you had consent and only one breast at a time. It is unprofessional to expose both breasts at the same time.[32] He had never seen or heard of anyone needing to work on a pregnant woman's breasts. They were very, very tender.

[158] All massages would normally be performed in a treatment room. Patients would be advised to undress to their underwear. There was no need to go any further than that for a normal remedial massage. The body was covered, with the area you were working on only exposed at the time. For most people, there would be no need to work areas such as the groin. An elite athlete will be different because they are exercising their muscles at a greater strength and rapidity. If work needed to be done on the gluteal, underwear is only pulled down to the top of the gluteal crease. If the stretching of a leg was required, it would be undertaken so the draping of the towel did not expose anything.

[159] There was no therapeutic purpose for inserting fingers inside a vagina. Touching anywhere in relation to the labia was contrary to any training. There was no physical value in a massage involving a sweep, using two hands, over a woman's breast. Anything that might excite the nipple was contrary to remedial massage, including tweaking of the nipples.[33] Cupping of a breast, or placing both hands on the whole of the breast as part of a remedial massage, was totally contrary to what is done by massage therapists. No genitals, male or female, should be exposed at any time. Any comments about the type of underwear was totally inappropriate and considered by the guidelines as sexual conduct.

[160] In cross examination, Schodde agreed he was describing ideal conduct and standards. There were approximately 82 different forms of massage around the world. Each involved different techniques. Whilst there was a consent form to be signed, it was not expected a therapist would stop in the middle of a massage to have a consent form signed by a client. Verbal approval given at the time should be noted at the end. Schodde accepted there were differing views about the benefit of massaging of breasts of pregnant women. However, the Australian Guidelines for Therapists were that you did not work through the breasts. Therapists were not trained to work through that part of the body, to relieve that pressure. He was not

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32 AB245/40.

33 AB248/45.

aware of any massage technique that taught that a hand needed to be placed over the top of the nipple for lymphatic drainage.

[161] Schodde agreed there was a lymphatic drainage point in the groin area, about where the underpants line would be. Whilst it was possible a therapist could have accidental slippage when massaging that area, a trained therapist would control what they were doing to ensure that did not happen. In order to apply pressure to the trigger points of the abductor muscle, it may be necessary to place the fingers quite close to the groin.[34] One technique for stretching muscles attached to the hip area is to raise the leg, put pressure on it and slowly lower the leg. That is often used when people have a lot of back pain. If you are undertaking manoeuvres, such as hip rotation, there would be no reason why you would be going to the central parts of the body, rubbing the buttocks and vaginal area. There are no muscle tissues around the vaginal area.

[162] Kristy Nikolakopoulos was employed as a chiropractor's assistant at the Algester clinic between June 2011 and January 2015. The appellant started at the clinic as a therapist around November 2013. He finished around November 2014. There was another massage therapist, Liz Peterson. Nikolakopoulos' role was to help Whitfield and to take telephone calls, making appointments for both chiropractic services and massages.

[163] MB spoke to her when she was speaking with Whitfield in the office. His wife was not present. LN spoke to her in reception for approximately 10 minutes, immediately after she had completed a massage with the appellant. LN said she felt very uncomfortable about the massage. The appellant had removed her towel and inappropriately touched her around the breast area. KA spoke to her prior to speaking to Whitfield. KA was very distraught. KA told her the appellant was massaging inappropriate areas, getting too close to her groin area and she was going to go to the police.

[164] In cross examination, Nikolakopoulos said in the time the appellant was employed by Whitfield, there was no requirement for a consent form for massage patients. She had no involvement in buying candles, aroma burners or incense for the massage room, or in the purchase of oils or liniments used for the massage. To her knowledge, Whitfield did not look after those matters. He only looked after the laundry. Each massage therapist would bring their own oils. The appellant mentioned he did waxing as well.

[165] Mark Whitfield employed the appellant from 7 December 2013 until 21 November 2014. Another massage therapist, Elizabeth Peterson, worked at the clinic from around the same starting time, but finished in mid-2014. The appellant provided proof of membership of a professional association. It certified the appellant had been admitted as a member of the Massage Association of Australia, that he was bound by its Constitution and Code of Conduct and that he was entitled to practise remedial massage.

[166] The massage therapist supplied any oils for their particular massages. Any additional things, like candles were paid for by the therapists. Whitfield did not supply disposable G-strings. Whitfield was responsible for supplying towels. Sometimes, existing patients of the chiropractor would request a massage. The chiropractor would cross refer the patient to one of the therapists. The appellant

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[34] AB273/1.

was employed to perform remedial massage, not sensual massage. The services performed did not include offering Brazilian waxes. The clinic had nothing to do with massages being offered at client's homes or at the appellant's home.

[167] Each patient was allocated an individual file or card, kept in the massage room with all other patient files. The card would record the patient's basic details, the days of any treatment and any notes as to treatment administered on a particular day. Whitfield did not review these treatment notes. Patients would pay for a massage at the front desk. Three clients complained about the appellant.

[168] MQ complained on 24 February 2014. Whitfield spoke to her and her husband by telephone for about 10 to 15 minutes. MQ indicated the appellant had inappropriately touched her during her massage, on her breasts and down in her private parts. She did not tell him anything else about the massage.

[169] FE complained about a massage that happened in March 2014. He was informed about the complaint in early to mid-April 2014, whilst he was on holidays. FE told him the appellant had touched her inappropriately, both in the breast area as well as digitally penetrating her vagina. FE had no interest in discussing it any further and did not want to be in the same room as the appellant.

[170] KA called the receptionist around October/November 2014. He spoke to KA for approximately 10 minutes. KA said the appellant touched her inappropriately in the genital and vaginal area. It caused her to jump off the table. KA did not wish to have any further massages.

[171] In cross examination, Whitfield agreed MQ said she was embarrassed. He also agreed he had described the relationship between KA and the appellant as a platonic friendship. Whitfield was aware they had had some contact outside of massages. It did not concern him at that particular time. Whitfield accepted his wife had originally brought some candles into the clinic. There were candles for clients when the appellant was performing massages. He did not know who purchased those candles.

[172] After receiving the complaints from MQ, FE and KA, Whitfield suggested the appellant only book males for massages. The appellant agreed to that option. Whitfield also indicated it was crucial female patients give full permission to the massage of any part of their body.[35] Whitfield accepted there was no discussion with the appellant about consent forms. Whilst the chiropractor side of the clinic had patient consent forms, a patient getting a massage would not fill in a patient consent form.

Appellant's evidence

[173] The appellant had been working professionally as a masseur since 2003, although he had commenced working para-professionally in 1997, on a voluntary basis. He had several certificates and a diploma in remedial massage through the Massage Association of Australia. He undertook massages in particular areas, such as the cycling and running community and for a variety of organisations. He ceased practice as a therapist and being a member of the Massage Association of Australia on 14 October 2014.

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35 AB304/25.

[174] The appellant was employed at the Algester clinic on a contractual basis. Clients would book a massage through the clinic. The appellant was later employed at the Boondall clinic. When a client attended he would speak about areas of concern. If it was the first attendance he would complete a card and review process. If they had previously attended the clinic he would reconfirm that information. The appellant would also ask lifestyle related questions to find out if people were active or inactive, the quality of their sleep and the types of therapies possibly available. This initial consultation for a first time client would take four to six minutes and two to three minutes for a returning client.[36]

[175] At the Algester clinic, the appellant never sighted a consent form. The only time he took informed consent from a client was during a massage. If he found a problem that concerned him, he terminated the massage and suggested the client return for a follow up. In the meantime, he downloaded internet details about the particular complaint and sticky taped it to the record card. The client initialled it at the time of the treatment. The appellant did not undertake that process for any of the complainants. He was trusting and naïve and assumed consent had already been taken by the clinic owners.

[176] The appellant did not accept he had ever touched a client's breasts without their consent. There was a specific request regarding the breast from CA and her partner, CB. CB asked about techniques he could do at home to help CB through the pain and problems she was having with the lower back and the sciatic nerves, during the pregnancy. There were also problems in the breast area and minor tingling down the legs. That conversation occurred approximately two weeks prior to her first massage.

[177] During CA's first massage, the appellant reconfirmed with CB that there were techniques he wanted to continue at home. The appellant demonstrated, with the help of CB, where CB could massage CA's breasts. On the second massage, which occurred when CA was by herself, the appellant asked CA if her partner had been able to replicate some of those techniques. CA replied they had not had much time to practise. He performed a gentle all over pregnancy massage. It included a massage peripheral to the greater breast tissues, whilst CA was lying on her side. The appellant denied touching the whole of her breast.[37]

[178] CA's third massage was a remedial massage. There were specific concerns regarding the lowness of the baby's position. That massage was totally different to the second massage. There was no touching of breast tissue at all. The massage focussed on the muscles, joints, lower back, hips and tingling down the legs. He spent a lot of time on the lower back. He also attended to the shoulders and neck.

[179] He sidestepped the breast tissue as much as he could because CA had a fixation with her breasts.[38] He made a notation of sciatic pain, even though that pain was due to pregnancy. He could not explain why he made a note of that transitory complaint, but made no note about a complaint about problems with the breasts, when he saw that as also being a condition that would go away on birth. He denied saying to CA it was healthy for women not to wear underwear for two days a week,

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36 AB330/20.
37 AB333/20.
38 AB444/5.

to let the vaginal area breath. CA's husband would have "punched me in the nose".[39]

[180] The appellant did a breast massage of WH on request. She was getting swelling and pressure and her breasts were sore from time to time. She exhibited menopausal responses. She was having hot flushes. She was quite sweaty a lot of the time. The appellant initially applied gentle pressure to feel around the breast tissue. Her breasts were very firm. He cupped the inner part of the breast containing the nipple and palpated outwards to find any pressure and nodes and lumps. He obtained WH's verbal consent prior to undertaking this technique, in the form of a request from WH. There was no signed consent form. He accepted in his police interview, he had spoken about consent forms. That was in the theoretical world.

[181] The appellant said he had never written on the record card that WH was waiting for him in the car park on two occasions before he turned up for work. He had to tell her to back off.[40] He accepted the drawing made by WH did not contain shading on the breast area. It did however contain extensive shading on the right hand side of the torso.[41] He did not make a note on WH's card about a problem with pressure in her breasts. That is a temporary situation that will correct itself after every period.

[182] In respect of the remaining complainants, the appellant said he had never heard of a nipple massage and had never heard of anyone squeezing a nipple. He had not undertaken such a procedure on any of his female patients. There were occasions when he would massage around the upper part of the body, but he would not have touched the nipples. The concept of running his hands up the body and touching the breasts was, "a great way to annoy and alienate a woman straight away".[42] He did not rub a client's breasts in circular type motions. That was not a valid technique in his eyes. He did not put his lips upon a client's breast or nipple.

[183] RJ asked for a 'glute' massage. In his view, a person who books for a massage gives implied consent. When they ask for a 'glute' massage they give express consent. He does not get them to sign a form. It only becomes a problem if there is a need to get into an area, such as the 'butt crack'. In that instance, he would tell the client he was going to mark it on the card and have the client sign it. He did not undertake that process in RJ's case. The appellant denied using his fingers down RJ's 'butt crack', penetrating past the anus to the vagina.

[184] The appellant used a technique on KA to address lymphatic drainage problems or trigger point problems. It was a gentle sweeping massage. He curved his hand to the same shape as the thigh and gently swept, with light pressure, in one direction to the collection of lymph nodes which lie in the inguinal crease. He could have touched in the groin area whilst re-positioning the towel. KA was mistaken about the allegation of deliberate touching of the groin area.[43] He touched KA's pubic area just where the index finger of the masseur came into the underpants. He did not obtain KA's consent as it was simply a demonstration. It was a gentle motion indicating what he was going to do, to which KA replied, "No, no, no, it's too sore".[44]

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39 AB4446/30.
40 AB455/40.
41 AB457/1.
42 AB336/15.
43 AB339/35.
44 AB341/20.

[185] KA was particularly fragile. She suffered from fibromyalgia and had thyroid cancer. She was on a cocktail of prescription drugs. He had suggested he would introduce her to a publisher friend who was writing her life story. KA arranged coffee, chose the place and time. He simply turned up. By the time the massage performed on KA on 22 October 2010 was completed, the receptionist had left the clinic. He set up a lot of candles and dimmed the lights, but did that for everyone. KA said, "the girls are sore. Today I'm leaving the bra on." He said, "fine". Part of his hand very briefly went into her underwear, near her pubic hair. He denied saying, "you know men don't like prickly bushes" or telling her he did waxes. KA's allegations were "just pure fantasy".[45]

[186] The appellant had undertaken manoeuvres with FE and KA for the purpose of stretching the whole lower body. The entire thigh would have been manipulated following that stretch.[46] The thigh would be kneaded in both directions. At times you are going up and down at the same time. There needs to be a re-positioning of the towel from time to time. He would normally do that with his fingertips between the legs. He denied ever touching FE's vaginal area. There was no difference in his methodology between FE and KA.

[187] HL made a specific request for massage of the 'glutes'. She was running habitually and attempting her first half marathon. She was sore and needed 'glute' work. He did not sign up any consent form for HL. He asked HL whether she would be embarrassed if he moved down to her buttocks to see if she was going to be uncomfortable if he moved her underwear down. There is a lot of trust involved in massages. He did not have a good feeling about HL. He wanted to make sure.[47]

[188] The appellant used a technique of stretching the leg open so that he could forcibly move the muscle from the pubic ramus towards the hip bone. He performed it on MQ and HL. In HL's case he tried to get to the muscle by pulling the leg of her underpants up, but he found it was too tight. He therefore abandoned that procedure. He did not massage that area of FE, but he did undertake some stretching. His hand would go within an inch and a half of the area from which women urinate. He denied touching any area much lower around the vagina.

[189] The appellant undertook abductor work on MQ, KA, FE, HL and, to a very small extent, EB. The leg would be pulled outwards, whilst the heel of the hand started in the groin and came down. There is no intentional touching of the vaginal area. There may be an incidental or accidental touching of the vaginal area with the towel, but not the fingers. You are very careful about the fingers because you are using a liniment, which creates heat. You can also turn the procedure into a hamstring stretch by raising the lower leg, which tensions that muscle.[48]

[190] When the knee is pushed towards the shoulder, you use the heel of the other hand to rub up and down the thigh, basically from the bottom to the back of the knee. He adopted that procedure on every complainant, except CA, WH, RJ, LN and KM. The massage did not take place around the vagina, or in the 'butt crack' area.

[191] The appellant had another technique for abductor type exercise. He adopted it with MQ. It involves a "great stretch" of pulling the leg towards him in order to stretch

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45 AB453/10.
46 AB347/20.
47 AB350/5.
48 AB353/10.

the abductor in the upper inner thigh. However, even in that position he would massage down the leg towards the knee.[49] In respect of no complainant, did he massage from the knee into the groin. The appellant denied deliberately touching MQ's genitals. When asked if it could have occurred accidentally, he replied "anything's possible".[50]

[192] The massages provided for LN and FE were half hour promotional massages designed to bring in more business. They were for back, neck and shoulder relaxation. There was no opportunity or time for either of them to turn over so they were lying on their back.[51] CA requested a very specific massage. CA found a belly pillow to be comfortable, when they tried to put her on her side. He massaged the side of her chest, between the ribs. He would not have come close at all to her breast tissue.

[193] HL was fully draped with two towels. He did not massage her breasts over the nipples.[52] He did not touch any of her greater breast tissue. He also denied touching any of KM's breast tissue. He denied saying to EB she should get herself a toy. He had a discussion with EB about an ultra sound machine in respect of her left knee. The appellant did not have any conversations with any complainant about their nipples.

[194] WH turned up for the second massage in pyjamas. He asked whether she actually wore all that to bed. He denied making any comment about relationships and the wearing of pyjamas. He denied any conversation with any complainant about his wife's underwear. The appellant had set up a subsidiary business called "SMB", for "secret men's business". It was a waxing service offered to males. One or two of the complainants heard of that information via the receptionist. He recalled saying to FE, who was worried about the fact her legs were stubbly, that he had seen worse in the waxing game. He did not mention anything about waxing to any other complainant.

[195] In cross examination, the appellant accepted he brought his own equipment to both clinics, including disposable G-strings. FE was wearing one of the disposable G-strings. EB was naked in her final massage, by choice. He suggested she wear a disposable G-string, but she declined to do so. There was a point in time during HL's massage that her underwear was pulled down. He could not say whether LN was wearing just a G-string. He only performed a back, neck and shoulder massage on her. RJ was wearing a G-string during her massage.

[196] There were codes of conduct for the performance of remedial massages. That code required draping. The code also provided that a therapist was not to slide hands underneath draping and that genitals or breasts were not to be left exposed. The appellant discouraged naked patients in a remedial massage. That was why he supplied G-strings. The appellant did not suggest HL come naked to her massage. The appellant told HL if she was serious about getting her 'glutes' massaged, she should either come wearing a G-string or ask for a G-string, or leave off her underwear. He asked EB to put on a disposable G-string. She told him not to ask

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49 AB357/45-46.
50 AB361/33.
51 AB363/45.
52 AB374/5.

her to wear one "of them bloody things".[53] He massaged EB naked on that occasion.

[197] The appellant accepted that providing massages involved administering treatment to clients who were stripping off their clothes, in a room with a closed door. He accepted he had power or control over a client. However, the appellant described the relationship as a partnership, whereby he was the giver and the client was the receiver. Clients have to ask for a massage. He had to take particular care about obtaining informed consent to massaging certain parts of the body, particularly the breasts, buttocks and genital area. He was the person responsible for getting consent from the client.

[198] If there was work to be done on the breast itself, there would be a need for written consent. He accepted he told police in his interview that he needed a client's permission to treat the 'pec' muscles and that he would note that on the card and have them initial it, to say they had given informed consent. He never had that consent from KM as he only massaged her 'pec minor' deltoid. It was not a component of the breast. If he was massaging the 'pec major', which is a breast support muscle, he would obtain informed consent. He also required informed consent before massaging close to the 'crack' of a client's buttock.

[199] The appellant accepted that in EB' final massage in November 2014, her breasts were exposed, but said EB exposed herself entirely. The appellant attempted to leave, but EB said, "Oh for Pete's sake". He accepted her saw her completely naked.[54] He denied the reason why he avoided her for seven months was because he had raped her by sticking his fingers inside her vagina. He did not want to see EB. He told Whitfield there were several clients that he did not want anything to do with. When Whitfield suggested in July he concentrate on males, he agreed but continued to treat females as he, "massaged whoever was booked in".[55]

[200] The appellant helped MQ take off a G-string after she incorrectly placed the G-string over her existing underwear. He said, "MY, instead of, not on top of." He turned his back whilst she took off her underwear and put back on the G-string. He recalled saying to her, "if I have to go outside. MB's sitting outside. He's going to think something is wrong, so I'm just going to turn my back."[56] She put back on one of the disposable G-strings. This exchange occurred at the start of the massage. The rest of the massage proceeded with MQ wearing the disposable G-sting.

[201] The appellant accepted there was nothing in MQ's patient records to support he had undertaken a pectineus stretch. You only get one line per consultation, so you only note the major components. A pectineus stretch is a fairly minor stretch, even though it is rarely done. He denied giving a false explanation for touching near MQ's vagina. He had not made a note of undertaking an abductor stretch or hamstring stretch on MB. However, he did perform those stretches on MQ.

[202] He never had any of the complainants' initial consent for a 'pec minor' massage. It was not a muscle in a personal place. If clients were not certain about areas being touched, they should ask.[57] The appellant would generally say, "I'm going there

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53 AB384/33.
54 AB400/30.
55 AB401/15.
56 AB405/10.
57 AB413/15.

next, the pec minor as we discussed". If they say "stop", he would stop. He accepted touching someone and waiting for them to tell him to stop, was not consent at all.

[203] The appellant denied he had failed to appropriately drape female clients. HL threw the upper towel off as she turned over. He draped KM's breasts with the hand towel, after he lowered the large towel from her breasts. To this day, he does not know whether it fell off, or whether KM dropped it. He caught a fleeting glimpse of her breasts. He was caught by surprise. His comment "nice job", after he had raised the scars on her breasts, was totally inappropriate. He said "nice job" meaning good surgery. KM was quite relaxed and they were engaged in conversation. He was just being friendly.

[204] The appellant did not have written consent from EB to touch her buttock area. He demonstrated on her body the Sartorius muscle, which goes up the thigh and diverges close to the groin and goes to the outside of the hip, by running the heel of his hand up the inside of the leg and then diverging past the groin to the hip. EB had a towel over her vagina. He denied he penetrated her vagina with his fingers and said, "that is your G-spot". No therapist would ever talk about doing that sort of thing. He did not suck on her nipple, breast or any breast tissue.

[205] The appellant did not make a note on CA's record card that she had a problem with the breast area. Pregnancy is a temporary condition. She was rapidly approaching term. CA gave him express consent to touch her breasts by asking him to do that demonstration.[58] He did not make a notation of touching her breasts on the record card because he had not undertaken a breast massage.

[206] In re-examination, the appellant said there was a big difference between the 'pec major' muscle and the 'pec minor' muscle. The 'pec major' muscle lies from the nipple line and below. The 'pec minor' muscle lies immediately under the clavicle. There is about a hand span difference between where they lie.[59] You would require consent to massage the 'pec major' as it was a private area. Similarly, massaging or trigger pointing very close to the cleft or crease between the two bottom cheeks, would require a client's consent. That did not apply to the broader buttock or broader gluteal. It is massaged habitually.[60]

[207] The appellant also called his wife, Wendy, and four other witnesses. They gave evidence as to his general good character and reputation. The appellant's wife also gave evidence that the appellant had fairly long fingernails, mainly on his right hand because he plays the guitar. In 2014 and 2015, she estimated the tip of the thumb fingernail went probably out about a centimetre. She described the appellant as a very kind, caring person who wanted to help people.

Appellant's submissions

[208] The appellant submits that the trial judge failed to properly instruct the jury of the dangers of convicting the appellant based on the accumulated complaints of all complainants, in a manner that was instructive to jurors. There were multiple charges, multiple offences and multiple complainants. The directions failed to simplify the issues to be considered by the jurors in respect of each count. As a

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58 AB441/10.
59 AB480/5.
60 AB483/15.

consequence, determining guilt was beyond the ability of the members of the jury, as they were unable to properly distinguish and keep separate the facts of each charge.

[209] The appellant further submits that defence counsel failed to seek rulings as to the admissibility of the evidence of one complainant in the case against other complainants. Defence counsel ought to have made an application to sever the charges, particularly having regard to the number of complainants, the varying seriousness of the charges and the complexity of the evidence. As a consequence of defence counsel's failure to do so, the appellant was embarrassed and prejudiced in his trial, such that there was a miscarriage of justice.

[210] The appellant further submits that the pre-trial ruling declining to separate the charges, involved errors of law, as the judge hearing that application simply accepted the submissions of the Crown without addressing the test necessary for the admissibility of evidence of one complainant, in the case of another complainant. A proper application of those tests would have resulted in a ruling that the charges be heard separately, particularly having regard to the significant difference in the allegations and the elements of each offence.

Respondent's submissions

[211] The respondent submits that the judge hearing the pre-trial application did not err in refusing to sever the counts. This was not a case in which the similarities were of a generalised nature. There was, in respect of each complainant, an underlying similarity in that the sexual conduct occurred under the guise of therapeutic services. That guise formed a strong probative value, particularly in the context of denials by the appellant of any such acts having taken place. There were strong probative reasons for the joinder of the complaints, in the context of an improbability of similar lies being told by victims of disparate backgrounds, ages, and circumstances.

[212] The respondent further submits that there was no error of law in the directions to the jury and there is no basis to conclude that defence counsel's conduct led to a miscarriage of justice. The trial judge was careful in directing the jury as to the use to be made of each complainant's evidence, in the context of carefully considering each case individually. There were specific warnings against simple propensity reasoning, with the jury being specifically directed that they must be satisfied beyond reasonable doubt, as to the truth and reliability of each complainant's evidence. The jury were directed as to the elements of each offence, the evidence relevant to each offence and of the need to be satisfied of the appellant's guilt in respect of each offence beyond reasonable doubt.

Discussion

Unreasonable verdicts

[213] A determination of this ground requires the court to undertake an independent review of the trial record to determine whether it was open, upon the whole of the evidence, for the jury to be satisfied of the appellant's guilt of each count, beyond reasonable doubt.[61] In doing so, special respect and legitimacy should be accorded for the jury's verdict on each count. Such accord recognises the serious step of setting aside a verdict on the ground it is unreasonable without particular regard

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61 *MFA v The Queen* (2002) 213 CLR 606 at [59].

being given to the jury's position and the advantage it enjoyed in having seen and heard the witnesses called at trial.[62]

[214] In the present case, each complainant gave direct evidence of the appellant having committed each of the acts, particularised to support the individual counts. That evidence was not shaken in cross examination. In the case of a number of the complainants, the consistency of their account was supported by evidence of a preliminary complaint. Acceptance of each complainant's account rendered it open to a jury to reject the appellant's denials of having undertaken the conduct, the subject of each count.

[215] Once the appellant's denials were rejected, it was open to the jury, even accepting that there were aspects of each complainant's account which may call into question the reliability and accuracy of their evidence, to accept that the evidence of each complainant in respect of each act, the subject of a count on the indictment, was sufficiently reliable and accurate to satisfy the jury beyond reasonable doubt of the appellant's guilt on each of the counts.

[216] There was nothing in the accounts given by the respective complainants which required the jury to have a reasonable doubt of the accuracy and reliability of their evidence as to the commission by the appellant of each of the acts, the subject of the counts on which he was convicted.

[217] The verdicts of the jury were not unreasonable. It was open, on a consideration of the whole of the evidence, and affording proper respect for the need to view each case separately, notwithstanding the joint trial, for the jury to be satisfied of the appellant's guilt of each of counts 1 to 15 and 18 to 21 inclusive. This ground fails.

Joinder / separate trials

[218] It is convenient to next deal with the grounds of appeal relevant to the joinder of the various counts and the rejection of the application for separate trials.

[219] In proceeding with an indictment containing counts in respect of differing complainants, the prosecution relied upon section 567(2) of the *Criminal Code*. It provides:

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

[220] At the pre-trial hearing, the defence did not contend the joinder of the counts was contrary to section 567(2) of the *Criminal Code*. Rather, the defence submitted that separate trials ought to be ordered in respect of some counts, on the basis evidence relied upon as similar fact evidence was not cross admissible on the other counts. It was contended there was prejudice to the defendant in the admission of that evidence.

[221] In response, the prosecution submitted the evidence was properly admissible in respect of all counts. The counts related to a series of offences involving adult

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62 *R v Baden-Clay* (2016) 258 CLR 308 at [329].

female complaints committed by the appellant under the guise of legitimate massage techniques. There were strong similarities in the manner in which each complainant had been treated by the appellant. The evidence was also admissible to rebut a defence of coincidence, having regard to the objective improbability that complainants who had no connection with each other would complain of similar circumstances of offending by the appellant. Any prejudicial effect of that evidence was outweighed by its probative value and overcome by appropriate directions.

[222] In his reasons for rejecting the application for separate trials, the pre-trial hearing judge said, "I agree with all those submissions", made by the prosecution and, "for those reasons, that the Crown is justified in having all these alleged offences on the one indictment, so I am against on the severance", and that the prosecutor "said just then, all of the points that support the retention of the current indictment and in rejecting the application for severance".

[223] Those brief reasons failed to disclose a reasoned basis for a finding that allegations from different complainants of differing sexual conduct could properly be admissible as similar fact evidence. However, the failure to give sufficient reasons does not inevitably mean the appeal should be allowed; the issue is whether the joint trial of those counts resulted in a miscarriage of justice.

[224] A consideration of the counts on the indictment supports a conclusion that there was no miscarriage of justice by reason of the joinder of the counts. The counts involving the various complainants formed part of a series of offences of the same or similar character. All of the counts involved unlawful sexual conduct, engaged in by the same offender in respect of women he had access to only as a consequence of purporting to provide professional massage services to members of the public. The fact they involved different complainants and, in some instances, different locations, did not detract from a conclusion that the counts were properly joined pursuant to section 567(2) of the *Criminal Code*.

[225] That conclusion does not, however, mean the application for separate trials was properly refused by the pre-trial judge. The outcome of that application required a consideration of whether the evidence of each complainant was admissible as similar fact evidence in respect of the remaining counts. If it was not, there was an obvious prejudice to the appellant in that evidence being led in a joint trial of all counts. Unless there is a specific connection with the commission of the offence charged, similar fact evidence is prima facie inadmissible because of its prejudicial affect.

[226] In *Phillips v The Queen*,[63] the High Court reaffirmed that the admission of similar fact evidence is exceptional. The stringency required for its admission meant it must have "a really material bearing on the issues to be decided", that "its probative force 'clearly transcends its merely prejudicial effect'", and that "[i]t is necessary to find 'a sufficient nexus', between the primary evidence on a particular charge and the similar fact evidence".[64] The need for a common linkage was recently re-affirmed by the High Court in *R v Bauer*.[65]

[227] To be admissible, similar fact evidence must have a specific connection to the issues to be decided at trial.[66] That connection may arise from the evidence giving

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63 (2006) 225 CLR 303.
64 *Phillips v The Queen* (2006) 225 CLR 303 at [54].
65 [2018] HCA 40 at [58].
66 *Pfenning v The Queen* (1995) 182 CLR 461 at [485].

sufficient cogency to the prosecution case or some aspect or aspects of it. Whether that specific connection is met in a particular case requires an assessment of the similarities in the evidence.

[228] In undertaking that assessment, it is relevant to have regard to the observations of the High Court in *Phillips*:

> "Criminal trials in this country are ordinarily focused with high particularity upon specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided."

[229] At the pre-trial hearing, the defence conceded that the counts of unlawful and indecent assault constituted by a touching or massaging of a complainant's breasts, including the nipples,[67] were properly joinable, notwithstanding that they involved different complainants, and that counts of unlawful and indecent assault relying upon particulars of touching in the vaginal, groin, pubic or buttock areas[68] were open to be tried together, notwithstanding they involved different complainants, but that the counts of rape should be tried separately as should the count of sucking of the nipples.

[230] A consideration of the principles applicable to the admission of similar fact evidence, supports a conclusion that there was an underlying pattern to the appellant's conduct towards the complainants in the conduct constituting unlawful and indecent assault by reason of touching or massaging the breast and nipple areas. There was an obvious and striking similarity in the acts undertaken by him in respect of each of those complainants.

[231] That evidence was highly probative of the issues to be decided at trial. That probative force went not only to whether the conduct took place in fact. It included the probative value of the improbability of similar lies being told by different complainants in respect of whom there was no evidence of a prior connection.

[232] A similar conclusion is open in relation to the counts of unlawful and indecent assault relying upon particulars of touching in the vaginal, groin, pubic and buttock areas, notwithstanding that they involved different complainants.

[233] However, there were obvious and significant differences in the appellant's alleged conduct involving the rape of EB (Count 15) and HL (Counts 16 and 17). Those differences were stark and undermine the formulation of an underlying pattern of conduct by the appellant. Without that underlying pattern of conduct, the evidence of the rape of EB was not admissible as similar fact evidence, in the proof of the rape by the appellant of HL or of the acts of unlawful and indecent assault against the other complainants.

[234] That conclusion is not displaced by the similarities in the circumstances of the complainant's offending, namely, that all the offences are alleged to have occurred

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67 Counts 2, 3, 5, 6, 7, 8, 12 and 21 (and 9 depending on the particulars).

68 Counts 1, 4, 9 (depending on the particulars), 10, 11 (depending on the particulars), 13 and 18.

when the appellant was providing massage services to members of the public, that each offence occurred when the complainant was alone with the appellant and that the offending conduct purported to be part of the provision of normal massage services. Those similarities, cogent as they may be to the improbability of the complaints being false, properly are to be characterised as general in nature.[69]

[235] The lack of cross admissibility of the evidence of the alleged rapes of EB and HL, together with the differing nature of the appellant's conduct in respect of the touching of the vaginal, groin, pubic and buttock areas, of MQ, FE, KA, RJ and EB, means there was admitted into evidence at the joint trial, highly prejudicial material. The consequence is that there has been a miscarriage of justice. The following observations of the High Court in *Phillips*,[70] are apposite:

> "… the dangers, in the trial of the appellant, of admitting the evidence relevant to all the several allegations against him, was very great. Despite the efforts of the trial judge to give the jury precise instructions on the separate admissibility and use of different evidence, in a case such as the present, such instructions were bound to be confusing and prone to error. The prejudice to the fair trial of the appellant was substantial."

[236] The dangers as to the impermissible use of that prejudicial evidence by the jury, when considering the guilt of the appellant, infect all of the convictions in the present case. For this reason, the ground of appeal that the pre-trial hearing judge ought to have ordered a separate trial of some of the counts, has been made out.

[237] As a miscarriage of justice has arisen as a consequence of the failure to so order, the appeal must be allowed and all convictions quashed. This conclusion renders consideration of the remaining grounds of appeal unnecessary.

Orders

[238] I would order:

1. The appeal be allowed.
2. The verdicts of guilty in respect of counts 1 to 15 (inclusive), and 18-21 (inclusive) be set aside.
3. There be new trials in respect of all counts.

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69 cf *R v Nibigira* [2018] QCA 115 at [106].

70 *Phillips v The Queen* (2006) 225 CLR 303 at [78].