SUPREME COURT OF QUEENSLAND

CITATION:	*R v Li; R v McKenzie; R v Pisasale* [2020] QCA 39
PARTIES:	**In CA No 206 of 2019:** **R** **v** **LI, Yutian** (appellant) **In CA No 214 of 2019:** **R** **v** **McKENZIE, Cameron James** (appellant) **In CA No 219 of 2019:** **R** **v** **PISASALE, Paul John** (appellant)
FILE NO/S:	CA No 206 of 2019 CA No 214 of 2019 CA No 219 of 2019 DC No 2956 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court in Brisbane – Date of Convictions: 24 July 2019 (Farr SC DCJ)
DELIVERED ON:	10 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2019
JUDGES:	Morrison and Philippides JJA and Mullins AJA
ORDER:	**In CA No 206 of 2019:** **Appeal dismissed.** **In CA No 214 of 2019:** **Appeal dismissed.** **In CA No 219 of 2019:** **Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES –

PROPERTY OFFENCES – EXTORTION AND LIKE OFFENCES – EXTORTION OR DEMANDING WITH MENACES – where Pisasale was told by Li that she had been wronged by the complainant to her financial detriment – where Pisasale resolved that he would try to get Li's costs from the complainant – where Li had said to Pisasale that she wanted to punish the complainant – where Pisasale made a number of telephone calls to the complainant in which he demanded the complainant pay a sum of money between $5,000 and $10,000 for the costs, or part of the costs, of an investigation carried out by Pisasale's private investigation company – where Pisasale threatened to cause detriment to the complainant – where Pisasale had McKenzie, a solicitor friend, demand the complainant pay a large sum of money which was said to reflect expenses incurred for a private investigator, miscellaneous charges and legal costs – where the demand in the letter was accompanied by a threat to cause a detriment to the complainant – where Li encouraged, aided and joined in sending that letter saying that she wanted to punish the complainant – where the above events resulted in two charges of extortion, that is making demands without reasonable cause, with intent to gain a benefit or cause a detriment, contrary to s 415 of the *Criminal Code* – where Li, Pisasale and McKenzie were all found guilty on both charges – where all three appellants challenge their convictions – whether the grounds of appeal have merit

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where it is contended that the verdicts are unreasonable and not supported by the evidence – whether or not the verdict is supported by the evidence – whether or not the verdict is unreasonable and against the weight of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where it is submitted that the learned trial judge erred in not leaving s 24 of the *Criminal Code* for the consideration of the jury – where it is contended that the learned trial judge erred in failing to direct the jury on the application of s 24 of the *Criminal Code* – where it is argued that the learned trial judge erred in directing the jury in relation to "reasonable cause" – where it is submitted that the learned trial judge erred in directing the jury on the application of s 22(2) of the *Criminal Code* as it related to s 415 of the *Criminal Code* – where it is contended that the learned trial judge erred in directing the jury that they may find the co-accused guilty only if they first convicted McKenzie of count 2 – whether the learned trial judge erred in not directing the jury on the

application of s 22 of the *Criminal Code* – whether the learned trial judge erred in his directions to the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where it was submitted that the address of defence counsel was advanced on the basis that s 24 was available following a ruling by the learned trial judge – where it was contended that the subsequent exclusion of that defence during summing up undermined the fairness of the trial resulting in a miscarriage of justice and denying the appellants a fair chance of acquittal – whether the exclusion of the defence resulted in a miscarriage of justice – whether the appellants were denied a fair chance of acquittal

Criminal Code (Qld), s 7, s 8, s 22, s 24, s 415

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
R v ABD [2019] QCA 72, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v Buckett (1995) 132 ALR 669, applied
R v Campbell [1997] QCA 127, followed
R v Mrzljak [2005] 1 Qd R 308; [2004] QCA 420, distinguished
R v PBA [2018] QCA 213, applied
R v Succarieh [2018] 3 Qd R 104; [2017] QCA 282, considered
R v Sun [2018] QCA 24, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: S A Lynch for the appellant, Li
K Prskalo for the appellant, McKenzie
A J Glynn QC, with K W Gover, for the appellant, Pisasale
S J Farnden with S J Bain for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the appellant, Li
Legal Aid Queensland for the appellant, McKenzie
Anderson Fredericks Turner for the appellant, Pisasale
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** In 2017 Mr Pisasale formed a friendship with Yutian Li, a Chinese woman working as an escort in Australia.

[2] Through her limited English she told him she was very angry about the treatment she had received at the hands of the complainant, Xin Li. Amongst other things she told Mr Pisasale that in early 2016, when she was living in Singapore and the complainant was living in Sydney, they developed an intimate relationship, meeting for holidays in Bali and the Maldives. The complainant led her to believe they would marry and enjoy a life together in Australia. Later that year he told her he had a terminal illness and did not want her to go through the resultant suffering.

[3] When she arrived unannounced in Sydney, intending to look after him, she discovered he had lied. He had not revealed that he was already married and had a child. He did not have a terminal illness, and he did not wish to marry her.

[4] Ms Li told Mr Pisasale she wanted to investigate the truth. She said it had cost her airfares, accommodation, and investigation costs trying to find out the truth. Mr Pisasale resolved that he would try to get her costs from the complainant.

[5] Ms Li encouraged Mr Pisasale and joined in him doing so, saying she wanted to punish the complainant, and arming Mr Pisasale with her full name, the complainant's name, address and phone number, and information about the relationship.

[6] As a consequence, on 15 January 2017 Mr Pisasale made a number of telephone calls to the complainant in which he:

(a) demanded that the complainant pay a sum of money between $5,000 and $10,000 for the costs, or part of the costs, of an investigation carried out by Mr Pisasale's private investigation company; and

(b) threatened to cause detriment to the complainant, including by: being subjected to court proceedings; being sued for $200,000; incurring costs of $20,000 in court; being subjected to the adverse publicity of court proceedings; and being summoned to go to court.

[7] Two weeks later, on 1 February 2017, Mr Pisasale had Mr McKenzie, a solicitor friend, send a letter to the complainant demanding that he pay $8,400, which was said to reflect expenses incurred of $6,100 for a private investigator, $1,500 miscellaneous charges, and $800 legal costs.

[8] That demand was accompanied by a threat to cause detriment to the complainant, namely:

(a) that in the absence of payment the complainant was to "Answer for your actions in the Federal Court of Australia"; and

(b) that a failure to accept the offer may lead to the complainant being criminally prosecuted through his actions being discovered in a court of law.

[9] Ms Li encouraged, aided and joined in sending that letter by telling him that she wanted to punish the complainant, and providing Mr Pisasale with: her full name; the complainant's name, address and phone number; information about the relationship; and the complainant's personal details and documents.

[10] Mr Pisasale encouraged, aided and joined in sending that letter by providing the information to write the letter, having input into the form of the letter, providing the email address to send it to, and encouraging it being written and sent.

[11] Out of these events there were two counts of extortion, that is making demands without reasonable cause, with intent to gain a benefit or cause a detriment, contrary to s 415 of the *Criminal Code* (Qld). The phone calls formed the basis of count 1 against Mr Pisasale and Ms Li only. The sending of the letter formed the basis of count 2 against Mr McKenzie, Mr Pisasale and Ms Li.

[12] After a trial verdicts of guilty on both counts were returned. The convictions are challenged on various grounds. Ms Li's grounds are:

(a) grounds 1 and 2: the verdicts are unreasonable and not supported by the evidence;

(b) ground 3: the learned trial judge erred in not leaving s 24 of the *Criminal Code*; and

(c) ground 4: the learned trial judge erred in directing the jury in relation to "reasonable cause".

[13] Mr McKenzie's grounds are:

(a) ground 1: the learned trial judge erred in failing to direct the jury on the application of s 24 of the *Criminal Code*;

(b) ground 2: the learned trial judge erred in directing the jury on the element of "reasonable cause";

(c) ground 3: the learned trial judge erred in directing the jury on the application of s 22(2) of the *Criminal Code* as it relates to s 415 of the *Criminal Code*;

(d) ground 4: the learned trial judge erred in directing the jury that they may find the co-accused guilty only if they first convicted the appellant of count 2;

(e) ground 5: the verdict is unreasonable and against the weight of the evidence; and

(f) ground 6: where the address of defence counsel was advanced on the basis that s 24 was available following a ruling by the learned trial judge; the subsequent exclusion of that defence during summing up undermined the fairness of the trial resulting in a miscarriage of justice and denying the appellant a fair chance of acquittal.

[14] Mr Pisasale's grounds are:

(a) ground 1: the learned trial judge erred in failing to leave s 24 of the *Criminal Code* for consideration by the jury;

(b) ground 2: the learned trial judge erred in directing the jury with respect to the relationship between s 22(2) and s 415(1) of the *Criminal Code*;

(c) ground 3: the learned trial judge erred in directing the jury as to the element of "reasonable cause" under s 415(1);

(d) ground 4: the learned trial judge erred in failing to direct the jury to consider whether s 22(2) had been negatived with respect to the appellant before reaching a verdict on count 2; and

(e) ground 5: where the address of defence counsel was advanced on the basis that s 24 was available following a ruling by the learned trial judge; the subsequent exclusion of that defence during summing up undermined the fairness of the trial resulting in a miscarriage of justice and denying the appellant a fair chance of acquittal.

[15] Mr McKenzie's application for leave to appeal against sentence was abandoned at the hearing before this Court.

Background

[16] In setting out the relevant facts, both here and in relation to individual defendants, it is important to recognise that not all evidence was admissible against all defendants. Thus:

(a) evidence not admissible against Ms Li: phone calls between Mr Pisasale and Mr Zenonos[1], and between Mr Pisasale and Mr Di Carlo;[2] recording of interview with Mr McKenzie;[3]

(b) evidence not admissible against Mr Pisasale: recording of interview with Mr McKenzie;[4] and

(c) evidence not admissible against Mr McKenzie: phone calls between Mr Pisasale and Mr Zenonos, Mr Xin Li, Mr Di Carlo and Ms Li, and admitted facts concerning certain subscribed phone numbers of Mr Xin Li, Mr Pisasale, Ms Li, Mr McKenzie, Mr Di Carlo, Mr Pinzone and Mr Zenonos.[5]

[17] The jury were directed accordingly.[6] In the analysis of issues later in these reasons I have restricted consideration of the evidence to that which was admissible against the particular defendant in issue.

[18] In 2016 Ms Li had a relationship with the complainant (Xin Li). They met in early 2016 when he was a taxi driver, and drove her from Sydney Airport. They then stayed in daily contact, Ms Li in China and the complainant in Sydney. They sent texts and videos, and spoke to one another, all via an application called WeChat.

[19] The complainant had previously been married and divorced, and had a seven year old son from that marriage. In March 2016 he married for the second time.[7] By the time he met Ms Li, the complainant and LSW had already separated.

[20] The complainant and Ms Li subsequently met face to face only three times.

[21] The first time was in June 2016 when they met in Singapore and travelled to Bali for a holiday. They spoke of loving each other, and Ms Li said she wanted to marry the complainant. While in Bali Ms Li told him she was married but had been separated for some time.

[22] After the Bali trip they discussed their future, including Ms Li coming to live in Australia and marrying the complainant, but no promises were made. They kept up contact via WeChat.

[23] The second time was in October 2016 when they again met in Singapore and travelled to the Maldives for a holiday. He told Ms Li about his son, and that he was married. He returned to Sydney.

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1 Call 1, Exhibit 2, transcript at Appeal Book (**AB**) 509.
2 Calls 3 and 15, Exhibit 2, transcripts at AB 512 and 572.
3 Exhibit 9, AB 596.
4 Exhibit 9, AB 596.
5 Calls 1-13 inclusive, Exhibit 2, transcripts at AB 509, 510, 512, 525, 529, 531, 533, 534, 535, 536, 540, 556 and 558; Exhibit 1, AB 394, admitted facts 2a, 2f, 2g, 2h, 9, 19-26 and 34.
6 The jury were given a handout which listed the evidence by reference to individual defendants: AB 707.
7 She has no connection with the relevant events but, as will be seen, her name was wrongly used in subsequent correspondence from Mr McKenzie. I shall refer to her as "LSW".

[24] The WeChat contact continued, regularly but not daily. The complainant decided that he did not want to continue the relationship. He lied to Ms Li, saying that he was sick.

[25] That led to the third time, in December 2016, when Ms Li arrived, unannounced, in Sydney. She stayed five days at the complainant's house. During that time the complainant ended the relationship. Ms Li said she was going back to China and left.

[26] In January 2017 Mr Pisasale was Mayor of Ipswich. His acquaintance, Mr Sam di Carlo, sent Ms Li to Mr Pisasale to give him a massage. By then Ms Li was working as an escort, using the name Angela. They met and Ms Li told Mr Pisasale, in her poor English, about her meeting the complainant and that "he hurt her very much", "he'd lied to her and made promises". Mr Pisasale saw she was very upset.

[27] Mr Pisasale and Ms Li met again, over dinner at a restaurant. She told him her story:[8]

> "She told me that she met the taxi driver. … had a relationship with him on WeChat and they had spent some time together. He came to Singapore. They went to Bali. They went to the Maldives. In exchange he was talking about getting married to her. Building a house. They went to the Maldives because he said it was a good place to get married. And while they were there they booked wedding photos and she was excited. He said that they would build a house together when they lived in Australia and that he would help her a lot. And they went back to Singapore and he came home and then he contacted her and said that he was dying and that he had a growth on his spine and he wasn't going to survive and he didn't want her to go through the suffering that he's going to go through. So then she decided to come to Australia to nurse him back to health. Offered to give him four to $5000 to help him. He refused that and she showed up in Australia, which she said that he told her that he didn't want to marry her."

[28] Mr Pisasale said she was "so upset" that "her whole world had been destroyed", and he was "so angry that someone would do this to someone like that". He said "anybody who had have been there would have felt the same … just seeing someone who had a wonderful life and had it all destroyed".[9]

[29] They met again at another restaurant, this time with Ms Li's new friend, Vanessa. Once again Ms Li told him about her position:[10]

> "We started talking about this and she started talking about that she wanted to rebuild her life, but he needs to pay – he needs to pay what it's cost her because she's got no money left and I was giving her some dollars … just to help her with food. … it had cost her airfares, accommodation, investigation costs and all the cost in trying to find out the truth. And she – even as she was talking about it, you could

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8 AB 240 lines 23-35.
9 AB 240 lines 37-47.
10 AB 241 lines 22-31.

> see the pain in her face. … and Vanessa kept saying, "We need to do something about this.""

[30] Mr Pisasale explained his position in relation to what he heard, in particular about the "investigation":[11]

> "Now, just going back to what she was talking about with costs. You mentioned investigation?---Yes.
>
> Can you tell us as best as you can what did she say about that?---She didn't say too much about it at that time. She just said that she spent a lot of money in finding out the truth through her investigations and I had no reason not to believe her.
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> What did she tell you about finding out the truth? What did she find out?---Well, she found out a whole range of things, she spoke about. But we didn't talk about that much because, you know, I wanted to satisfy myself, you know, that was happening. And I could just see by the look on her face and Vanessa was talking about, you know, "He can't get away with this. He needs to pay you what you've spent to come here" because she had no money left.
>
> Did you ask her how much it had cost her?---I did ask her and she said it's cost her around $10,000.
>
> Was she able to provide any breakdown or detail about that?---It was no time to ask that. … at the time she was crying, she was very upset and, you know, I'm not there to question what she was saying."

[31] They met again, this time at the Gold Coast. Mr Pisasale in Ms Li's presence rang the complainant, pretending to be a health person doing a survey. He asked a number of questions about whether the complainant was married, had children, building a house and about his health. Mr Pisasale explained why he lied about who he was and what he was doing:[12]

> "I was trying to find out the truth and I really didn't want to say I was the Mayor of Ipswich because, you know, that would have been intimidation and it had nothing to do with Ipswich."

[32] Mr Pisasale spoke to Ms Li on 13 January 2017, when she told him "But you … needed to punishing my ex-boyfriend". He replied "Yes we're gonna do that. Bring his number".

[33] On 15 January 2017, Mr Pisasale had a number of telephone calls with the complainant. Ms Li was present for them. During the calls Mr Pisasale said:

(a) he was a private investigator, whose company had been hired by Ms Li to find out the truth about the complainant;

(b) the complainant had destroyed Ms Li's marriage by making false promises and promising to marry her; she felt heartbroken and deceived;

(c) he had a file, with documents including texts, WeChat messages and photos;

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11 AB 241 line 33 to AB 242 line 6.

12 AB 242 lines 24-26.

(d) Ms Li did not want to cause the complainant or his wife and family any trouble;

(e) the investigation had cost Ms Li about $10,000, but maybe he could get that reduced to $5,000; later he said that the cost was about $6,000 to $7,000;

(f) he was billing her and had given her a discount because he felt sorry for her;

(g) if the complainant did not cooperate by paying the costs of her investigation, they would issue proceedings in the Federal Court;

(h) the court proceedings would attract publicity which the complainant would not want, and would cost the complainant $20,000 to $30,000;

(i) Ms Li was then in Beijing;

(j) if it went to court she would be suing for $200,000; and

(k) the complainant would be getting a letter from a barrister or lawyer, to appear in court.

[34] On 16 January 2017 Mr Pisasale phoned Mr McKenzie asking for a letter of demand to be sent to the complainant. He told Mr McKenzie that:

(a) Ms Li had discovered she had been lied to by the complainant;

(b) Mr Pisasale had called the complainant the day before, pretended to be a private investigator, and demanded costs from the complainant;

(c) Mr Pisasale wanted her "to get about seven grand";

(d) he wanted Mr McKenzie to do a letter of demand saying "these are all the costs", of which Mr McKenzie's costs were to be "two grand" and "investigation costs five grand"; further, it was to be paid into Mr McKenzie's trust account, from which "I'll pay your costs then I'll give her the rest";

(e) Mr Pisasale proposed the form of the letter, including the threat to go to court; and

(f) Mr Pisasale asked the question "That's not blackmail is it?", and Mr McKenzie responded, "No it's not blackmail … that's simply … a letter to him … saying hey if you pay my costs I'll walk away, otherwise … I'll claim everything I'm entitled to".

[35] On 1 February 2017 Mr McKenzie sent Mr Pisasale an email proposing the wording of the letter. The email said that his client (wrongly given the name of the complainant's second wife, LSW) demanded that the complainant reimburse her $10,000 for expenses incurred as a result of his malicious deceit, failing which an application would be filed in the Federal Court.

[36] On 2 February 2017 Mr McKenzie sent a letter of demand to the complainant which said:

(a) Mr McKenzie's client was LSW;

(b) that the complainant had "now been divorced several times according to court records";

(c) the client and the complainant met in a taxi, and as a taxi driver the complainant owed "a duty of care to your passengers" and "you have breached your duty of care to our client and abused the relationship of trust";

(d) it accused the complainant of "malicious deceit" causing "significant life changes and … significant loss" to the client;

(e) that had "caused our client to engage an agent to investigate your affairs";

(f) demanded that the complainant "reimburse her $8,400.00 for expenses incurred as a result of the above (made up of $6,100.00 for investigator, $1,500.00 miscellaneous charges and $800.00 legal costs as at today)";

(g) gave the trust account details for payment;

(h) threatened that an application in the Federal Court would be filed if the offer was not accepted; and

(i) recommended that the offer be accepted "as your actions being discovered in a court of law may lead to you being criminally prosecuted".

[37] In his evidence the complainant said that after getting the letter he spoke to Ms Li, who told him to forget it, and she would resolve the problem with a lawyer.

[38] On 4 February 2017 Ms Li sent Mr Pisasale a message saying she knew a secret about the complainant cheating the Australian Government because he had used a false name to enter Australia. She provided his original Chinese ID which, she said, showed his name and age were wrong on his Australian passport. She then requested that Mr Pisasale did not say that in "the first time", to which Pisasale replied "It's okay. he will pay, let me plan it. Only scare him."

[39] On 13 February 2017 a second letter was prepared between Mr Pisasale and Mr McKenzie. It contained a reference to the existence of evidence that the complainant had lied to immigration authorities, and demanded $9,400, adding that if his actions were discovered in a court he could be criminally prosecuted or deported to China. The letter was not sent.

[40] On 21 March 2017 Ms Li told Mr Pisasale that "I don't want to freaten (sic) my X-boyfriend again because I just want to totally forget forever!"

Miscarriage of justice by not leaving s 24 to the jury, misdirection on "reasonable cause" (Pisasale, grounds 1 & 3; McKenzie, grounds 1 & 2; Ms Li, grounds 3 & 4)

[41] Section 415 of the *Criminal Code* 1899 (Qld) provides that certain conduct is the offence of extortion:

> "**415 Extortion**
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> (1) A person (the ***demander***) who, without reasonable cause, makes a demand—
>
> (a) with intent to—
>
> (i) gain a benefit for any person (whether or not the demander); or

(ii) cause a detriment to any person other than the demander; and

(b) with a threat to cause a detriment to any person other than the demander;

commits a crime."

[42] Section 22 of the *Code* provides a defence if the acts are done under a *bona fide* claim of right:

"**22 Ignorance of the law—bona fide claim of right**

(1) ….

(2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

[43] Section 24 of the *Code* provides a defence if the acts are done under an honest and reasonable, but mistaken, belief:

"**24 Mistake of fact**

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

[44] In order to prove the offence under s 415 the jury must be satisfied beyond reasonable doubt that the person acted "without reasonable cause".

[45] Whether an accused acts "without reasonable cause" is a matter to be determined objectively.[13] The scope of the application of the phrase "without reasonable cause" extends to both that which is demanded to be done as well as the threatened detriment.[14]

[46] In order to exclude the defence under s 24 the jury must be satisfied that the belief under which the person acted was one not held honestly **and** reasonably. Even if held honestly, if the belief was not reasonable the defence fails. As will appear, the test to be applied to s 24 is an objective test, albeit that the belief is that of the particular accused, and not the putative belief held by the reasonable person.

[47] In *Succarieh*[15] this Court referred to the decision in *R v Campbell*,[16] and the question of the application of s 24:

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13 *R v Campbell* [1997] QCA 127 at p. 5.
14 *R v Succarieh* [2018] 3 Qd R 104; [2017] QCA 282 at [29]-[46].
15 *Succarieh* at [43]; internal citations omitted; emphasis added.
16 [1997] QCA 127 at p. 5.

> "[43] In *Campbell*, the Court (Fitzgerald P, Davies and McPherson JJA) had been referred to both the English cases and the article. In their reasons for judgment, their Honours observed:
>
> > "While the issue of "reasonable and probable cause" is not without potential difficulty, the problems which could arise need not be discussed in detail on this occasion. It is not obvious that the word "probable" adds to the phrase. Further, it seems that there cannot be reasonable and probable cause to make a demand "containing threats of injury or detriment" which would involve the commission of a criminal offence. And at common law, an honest belief by an accused that the demand was made with reasonable and probable cause might not suffice. **If s 24 of the Code introduces a subjective element into an alleged offence against sub-s 415(1)(a)**, a submission which was not directly advanced either at trial or in this Court and need not be decided on this occasion, **the belief must not only be honest but reasonable; the requirements of reasonable and probable cause and honest and reasonable belief therefor both involve an objective standard, viz., reasonableness**."

[48] In *Succarieh* the accused asserted that the person who was threatened owed money to a third party, and Succarieh demanded that debt. Mistake of fact was an issue because Succarieh believed the debt existed. The trial judge found that "... there was no reasonable cause because there was no admissible evidence of a debt and if, which is likely, [Succarieh] believed the debt existed, he did not so believe on reasonable grounds."

[49] Senior counsel for Mr Pisasale cited a passage in the reasons of Gotterson JA in *Succarieh*, where his Honour referred to the way in which the findings were framed, and specifically a comment that "Subject to the claim of an honest and reasonable but mistaken belief, there is, therefore, no evidence of reasonable cause for the demand". Gotterson JA made the following *obiter dicta* observation:[17]

> "I would add that it was not necessary that his Honour have reached conclusions as to honesty and reasonableness of a belief as to indebtedness within a context of s 24. It was, of course, open to him to have done so outside that context."

[50] The submission then relied upon what was said by McHugh J in *Fingleton v The Queen*.[18] It was submitted that McHugh J found that the directions in *Fingleton* "invited the jury to decide the 'reasonable cause' issue without taking into consideration the subjective beliefs of the appellant". And that, in McHugh J's view, those subjective beliefs could constitute "reasonable cause".[19] On that basis it was then submitted:[20]

> "28. In that context, the preferable view of the quoted passage from *Succarieh* is that the learned trial judge could have considered any honest and reasonable belief without relying upon s 24.

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17 At [57].
18 (2005) 227 CLR 166 at [98], [101] and [104].
19 Pisasale outline, paragraph 27.
20 Pisasale outline, paragraphs 28-29; internal citations omitted.

Reaching those conclusions via a potential mistake of fact defence was simply a different path to the same end.

29. This is said against the background of the consideration in *R v Mrzljak,* in which this Court held that the issue of reasonableness in s 24 is not the view of the "reasonable man" but that of the appellant acting reasonably. I.e. that it has a subjective element. This has two consequences for this case:

    a. The direction that reasonable cause is purely objective is wrong; and

    b. Section 24 adds a dimension of subjectivity to the issue for the jury i.e. did not add "an additional hurdle" for the defence as his Honour ruled."

[51] In my view, there are a number of difficulties confronting the submission.

[52] First, *Fingleton* considered a different offence created by s 119B of the *Code*. That section provided that a crime was committed if a person "**without reasonable cause**, **causes**, or threatens to cause, any injury or detriment to a judicial officer … **in retaliation** because of … anything lawfully done by the judicial officer as a judicial officer".[21] As Gleeson CJ observed:[22]

> "[20] The offence involves causing or threatening harm by way of retaliation without reasonable cause. In the conduct of the present case at trial, the elements of retaliation and of absence of reasonable cause were treated as being separate, but related factually. Ordinarily, causing or threatening harm to a witness in retaliation because of something lawfully done by the witness in judicial proceedings would also be without reasonable cause. It is not mere retaliation that attracts the operation of the section. It is causing or threatening injury or detriment in retaliation because of something lawfully done. The occasions on which there would be reasonable cause for such conduct might, in practice, be relatively rare. **The qualification, "without reasonable cause", is not related to purely objective conduct. It is related to purposive conduct, that is to say conduct causing or threatening harm in retaliation for lawful conduct by a judicial officer, juror, or witness. As will appear, in the way in which the prosecution and defence cases were conducted at trial, the question of how s 119B operates in a situation where, objectively, there may have been reasonable cause to take or foreshadow some action which would involve detriment, but subjectively a threat was made for the retaliatory purpose described in the section, was not a subject of argument. Nor was it a subject of argument in the Court of Appeal**."

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21 Emphasis added.

22 *Fingleton* at [20]; emphasis added.

[53] The plurality expressly excluded any consideration of how s 119B should be construed.[23] The case therefore offers no relevant guidance as to whether there is a subjective element in the phrase "reasonable cause" in s 415 of the *Code*.

[54] Secondly, McHugh J was doing no more than saying that when "reasonable cause" is considered, part of that consideration is the asserted state of mind of the accused, or, to put it another way, the asserted belief of the accused. That is made clear by what McHugh J said:[24]

> "[87] These were the only references his Honour made to the appellant's state of mind in respect of the s 119B charge although in my opinion **her state of mind was the critical issue in respect of the "reasonable cause" issue. And, arguably, "reasonable cause" was the key issue in the case.** Thus, on the critical issue of "reasonable cause" the jury had no assistance concerning the relevance of the appellant's state of mind. That the judge's directions concerning the appellant's state of mind were limited to the retaliation issue is not surprising. Counsel for the appellant put the issue of "retaliation" in the forefront of the appellant's defence. He told the jury that the "retaliation" issue was the most complicated of the three issues in the case because it concerned an analysis of the appellant's mind. He appears to have overlooked that her beliefs concerning Mr Gribbin were fundamental to another of the issues he mentioned – "reasonable cause".
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> …
>
> [98] Thus, the evidence of the appellant was that she believed Mr Gribbin was not loyal to her and did not have confidence in her leadership of the Magistrates Court. As a result, she did not have confidence in him and believed that, unless he cooperated, he had to be removed. It was because of these beliefs that she called on him to show cause why he should not be removed from his office. **For the Crown to succeed in the prosecution, it had to prove beyond reasonable doubt that she did not hold that belief or, if she did, that it was not a "reasonable cause" for her e-mail. Unless the jury were satisfied that she did not have that belief, they had to consider whether holding that belief was a "reasonable cause" for sending the show cause notice and whether that belief caused her to send it. That meant that the Crown had to prove inter alia that her belief did not constitute a "reasonable cause"** for issuing a notice to Mr Gribbin calling on him to show cause why he should retain the office of Co-ordinating Magistrate."

[55] Thirdly, McHugh J said nothing as to any defence under s 24. His Honour limited his comments to the one issue, "reasonable cause". Further, his Honour's comments were *obiter dicta*, and not supported by any other judge in that case.

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23 Gummow and Heydon JJ at [124], Kirby J at [184], and Hayne J at [193].

24 *Fingleton* at [87], [98]; emphasis added.

[56] Fourthly, because of the particular way the trial was conducted in *Succarieh*,[25] the trial judge considered two pathways to the issue of "reasonable cause".[26] One was based on whether there was evidence that the debt existed. His Honour found that there was no debt, therefore there was no "reasonable cause".[27]

[57] The other was to consider whether, assuming that the belief was honest and reasonable but mistakenly held, the nature of the demand was such that there was "reasonable cause". The trial judge held that because the demand was made with threats of unlawful violence and unlawful trespass there was no "reasonable cause".[28]

[58] The trial judge had previously considered the s 24 case, which assumed a belief that there was a debt. As to that, the trial judge made no express finding that the belief was honestly held, but did find that it was not reasonably held.[29] On that basis the Crown had excluded the operation of s 24.

[59] That explains why Gotterson JA made the comments quoted in paragraph [49] above. His Honour was merely observing that in light of the findings that there was no reasonable cause, either because there was no debt or because the demand was accompanied by threats of unlawful activity, it was unnecessary to make findings as to honesty and reasonableness of the belief as part of a consideration of s 24 issues. However, his Honour said, it was open to the trial judge to find that the belief was unreasonable outside the context of s 24 issues, i.e. as part of a consideration of whether there was "reasonable cause". That is plainly the way those remarks are to be understood because, as mentioned in the previous paragraph, his Honour had already noted that there was no finding as to the honesty of the belief, only that it was unreasonable.

[60] Fifthly, for that reason the submissions in paragraph 28 of Mr Pisasale's outline impermissibly expand the limits of what Gotterson JA said. It may be that in a particular case the question of whether an asserted belief was honestly held or not will arise as part of a consideration of "reasonable cause". But that was not the finding in *Succarieh* and Gotterson JA did not have to deal with it.

[61] Sixthly, in my view, reliance on *R v Mrzljak*[30] is misplaced. True it is that this Court held that for the purposes of s 24 the relevant belief is not the putative belief of the reasonable person, but rather the belief of the accused, based on the circumstances as the accused perceived them to be, but nonetheless held on a reasonable basis.[31] As Williams JA put it:[32]

> "[53] The critical fact for a defence based on s. 24 is the offender's belief. For the defence to arise the belief held by the offender must be both honest and reasonable. Whilst that means that the belief must be based on reasonable grounds it is nevertheless the belief of the offender which is critical. That

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25 *Succarieh* at [50]-[51].
26 *R v Succarieh* [2017] QDC 73 at [164]-[166]; quoted at *Succarieh* [14].
27 *Succarieh* at [52] quoting paragraph [57] of the trial judge's reasons.
28 *R v Succarieh* [2017] QDC 73 at [166]; quoted at *Succarieh* [14].
29 *Succarieh* at [53].
30 [2005] 1 Qd R 308; [2004] QCA 420.
31 *Mrzljak* at [53]-[54] per Williams JA, [79]-[81] per Holmes J.
32 *Mrzljak* at [53].

> must mean, in my view, that the critical focus is on the offender rather than a theoretical reasonable person. It is the information available to the offender which must determine whether the belief was honest and also was reasonable."

[62] However, *Mrzljak* did not consider s 415 or the question of "reasonable cause". But even if what was said could apply to s 415, all that would mean is that the accused's belief would be assessed as part of the consideration of "reasonable cause", and that belief would have to be held on reasonable grounds. So, whilst one would look to the accused's particular belief rather than the belief that would be held by a putative reasonable person, nonetheless the assessment of whether that belief was held on reasonable grounds would still import an objective test. So too, the test of "reasonable cause" is an objective test.[33] I respectfully agree with what was said by this Court in *R v Campbell*:[34]

> "If s. 24 of the Code introduces a subjective element into an alleged offence against sub-s. 415(1)(a), a submission which was not directly advanced either at trial or in this Court and need not be decided on this occasion, the belief must not only be honest but reasonable; the requirements of reasonable and probable cause and honest and reasonable belief therefore both involve an objective standard, viz., reasonableness."

[63] That was also adopted by McHugh J in *Fingleton*:[35]

> "[109] The indeterminacy of the term "reasonable cause" makes it necessary for a jury in a case like this to be given all possible assistance as to the circumstances that should be taken into account in determining whether a reasonable cause existed. As the Queensland Court of Appeal pointed out in *R v Campbell*, in relation to the similar term "reasonable and probable cause", it "is not without potential difficulty". **The Court of Appeal in *Campbell* thought that the expression raised an objective test, that it was determined by "what a reasonable person would consider as reasonable or probable" and that "more complex directions and fuller explanations than were contained in the trial judge's summing-up in this case will sometimes be required." The same comment can be made in respect of the expression "reasonable cause"**."

[64] Therefore, in my view, the submissions that s 415 should not be assessed objectively, and that s 24 "adds a dimension of subjectivity to the issue for the jury",[36] cannot be sustained.

[65] For the reasons above the tests to be applied to "reasonable cause" and the aspect of reasonable belief under s 24 are, in each case, an objective test. The accused's belief that he/she was entitled to act as they did is a relevant factor to be assessed in considering "reasonable cause". Therefore, if the jury are satisfied that the accused

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33 *Succarieh* at [41]; *R v Kelly, Baker & Perry* CA No. 144 of 1991, 29 August 1991, pp. 3-4, 5; *R v Campbell* [1997] QCA 127 at p. 5.

34 [1997] QCA 127 at p. 5.

35 *Fingleton* at [109]; internal citations omitted; emphasis added.

36 Pisasale outline, paragraph 29.

acted "without reasonable cause" for the purposes of s 415, the jury will necessarily have excluded the reasonableness of any belief held that the accused was entitled to so act.

[66] It follows, in my view, that the learned trial judge was correct to not leave s 24 to the jury, but to go straight from a consideration of s 415 to the defence of honest claim of right under s 22.

[67] Further, in my view, the jury were adequately directed as to the issue of reasonable cause.

[68] The only belief advanced in evidence on behalf of Mr Pisasale was his belief that Ms Li was entitled to compensation or reimbursement for costs she had incurred. The Crown did not challenge that he had been told that Ms Li had incurred costs. What was not accepted by the Crown was that the complainant was obligated to reimburse Ms Li, or that Mr Pisasale believed the complainant was.

[69] In address, Mr Pisasale's counsel told the jury that Mr Pisasale's belief was that Ms Li was entitled to reimbursement or compensation for the costs she had expended.[37]

[70] And on the topic of reasonable cause, the case put was "what he was doing was simply trying to get a little bit of justice on behalf of a young woman who he wanted to help … and was trying to help her … to claim what was, he believed, legally her right to claim which was the compensation, the reimbursement of those costs which she told him that she had incurred".[38]

[71] For Mr McKenzie the jury were told that his belief was that a private investigator had been involved and costs were actually incurred.[39]

[72] In the address for Ms Li, the jury were told that the "reasonable cause" element could not be satisfied because it was a question of fact that involved the engagement of the legal system in the face of a failure to repay a debt, and:[40]

> "Now, all that really happened in this matter is Mr Pisasale and I think Mr McKenzie said is that they sent a letter of demand for what they perceived to be a legitimate expense, and then, well, the threat is that the justice system will be engaged. The element of reasonable cause is not made out in this matter, members of the jury."

[73] Thus, on the question of "reasonable cause" the belief in each case was central to the defence and squarely put as the actual motivation for what was done, i.e. that belief was the actual reasonable cause. Therefore, in each case the jury were confronted with the defence that the Crown could not exclude that what was done was "without reasonable cause" because Mr Pisasale and Mr McKenzie held the beliefs referred to.

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37 AB 42 lines 23-24; AB 42 line 41 to AB 43 line 1; AB 45 lines 14-20; AB 45 lines 27-32; AB 45 lines 38-40; AB 46 lines 33-35; AB 46 line 45 to AB 47 line 2; AB 49 line 24 to AB 50 line 26; AB 57 lines 37-41; AB 63 lines 27-30.

38 AB 42 line 41 to AB 43 line 1.

39 AB 87 lines 19-21; AB 90 lines 1-5, 14-19.

40 AB 98 lines 19-22.

[74] Then, in summing up the jury were told how to deal with the evidence by Mr Pisasale and Mr McKenzie as to what they were told:[41]

> "… Pisasale testified that the defendant [Ms Li] told him … about the history of her relationship with Xin Li, of her account of incurring expenses as a result of things said to her by Xin Li, that type of thing, so is the evidence contained on the interview with the police by Mr McKenzie of the things that he was told by Mr Pisasale. Now, the evidence of those things that they were told is not led in an attempt to prove that the alleged events that were spoken of actually occurred. That is**, it is not placed before you in an attempt to prove the truth of the assertions contained in whatever is said. Rather, that evidence is placed before you as evidence of what was allegedly said by [Ms Li] to Pisasale or Pisasale to McKenzie, and therefore forming the basis of, and reasons for Pisasale's or McKenzie's understanding and belief**. In so far as Pisasale's evidence as to what he was allegedly told by Li is concerned, you treat his evidence the same as you would as any other witness. It is a matter for you, as I've said, to determine whether you accept all of what a witness – all of a witnesses evidence or some of it, or none of it. Similar considerations apply also when you assess that which was said by the defendant McKenzie in his police interview."

[75] Later, the jury were provided with a document that set out the elements of the offence of extortion under s 415, which relevantly said as to the element of "intent":[42]

> "**In ascertaining the defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning his state of mind**.
>
> Intention may be inferred or deduced from the circumstances in which the demand was made and from the conduct of the defendant before, at the time of, or after he made the demand. And, of course, **whatever a person has said about his intention (if there is any such evidence) may be looked at for the purpose of deciding what that intention was at the relevant time**."

[76] The handout then said as to "reasonable cause":[43]

> "What constitutes reasonable cause is for you to determine. The phrase 'without reasonable cause' applies to all of the conduct that is prescribed - that is, each of elements 1, 2 and 3 above.[44]
>
> A consideration of whether there is reasonable cause for making a particular demand involves consideration of **not only the demand itself in its factual circumstances as you find them to be** but also consideration of any detriment threatened in the course of making the demand. Therefore, it is not limited just to a consideration of

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41 AB 106 lines 23-38; emphasis added.
42 AB 710; emphasis added.
43 AB 710; emphasis added.
44 These were the elements: 1. the demand; 2. the threat; and 3. the intent to gain a benefit or cause a detriment.

> whether there is reasonable cause for that which is demanded to be done.
>
> The belief of an accused person that he or she had a reasonable cause is immaterial to the determination of this issue. It is an objective, not a subjective, test.
>
> It is not for the defendant to prove that he acted with reasonable cause. It is for the prosecution to prove beyond reasonable doubt that he did not."

[77] Both of those statements were reiterated by the learned trial judge in his summing up.[45] His Honour then directed the jury that they had to consider the elements of s 415 first, and only if they were satisfied about them would they then move to the s 22 defence (honest claim of right).[46]

[78] Subsequently in the summing up the learned trial judge directed the jury by reference to the Particulars which the Crown relied upon.[47] His Honour told the jury that they had to be satisfied as to the absence of reasonable cause, in Mr Pisasale's case directing their attention to this paragraph:[48]

> "The demand/s and/or threat/s were without reasonable cause **in circumstances where there was no money that Xin Li either owed or was liable to pay [Ms Li] and/or there was no reason to believe or suspect that there were any private investigator costs, let alone from a company owned by Paul Pisasale**. In all the circumstances the threat/s accompanying the demand/s, either on their own or in combination, were baseless and/or wrong and/or suspected to be wrong and/or without reasonable cause."

[79] As to count 2 and Mr McKenzie, his Honour directed the same way, by reference to paragraphs which contended that there was no reasonable cause for demanding the sums demanded or threatening the actions threatened, and the jury were reminded that it was an objective test.[49]

[80] Thus the jury were directed that "reasonable cause" was a factual question, to be assessed by them on all the evidence from Mr Pisasale and Mr McKenzie respectively, including what they said about their state of mind at the time, and for that to be assessed objectively. The jury could not have misunderstood that they needed to consider the proffered states of belief, and whether it was objectively reasonable to hold them, not subjectively reasonable.

Ms Li - Ground 3

[81] Ms Li's contentions on this ground differed from those of Mr Pisasale and Mr McKenzie. It was said that s 24 was not raised at trial in relation to her. She did not have an honest claim of right under s 22 in respect of investigation costs, but those costs were central to the particulars of unlawful demand. Her state of mind was relevant

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45 AB 107 lines 34-45; AB 108 lines 4-14.
46 AB 109-110.
47 AB 504.
48 AB 118 lines 32-36; emphasis added; AB 504.
49 AB 506-507; AB 118 line 47 to AB 119 line 3; AB 119 lines 14-15.

because there was a distinction in the Crown case between accommodation and flight costs on the one hand, and investigation costs on the other. The submission was:[50]

> "16.4 In circumstances where the evidence was the appellant was seeking costs not particularised as being part of the offence, the Crown were required to negative beyond a reasonable doubt that the costs she honestly and reasonably but mistakenly believed that Pisasale would seek were legitimate costs (those accommodation and flights).
>
> 16.5 To be reasonable, the belief must be one held by the appellant, in her particular circumstances, on reasonable grounds. The honesty in her belief comes from the lack of evidence of her seeking anything other than the costs not particularised as the subject of the offence. In considering the reasonableness of her belief, consideration would be given to her lack of comprehension of English and mandarin (sic) being her first language. She was after all present for the relevant discussions Pisasale had with the complainant."

[82] Ms Li was alleged to be liable on counts 1 and 2 on the basis of s 7(1)(b), s 7(1)(c) or s 8 of the *Code*. In summary, in one case, Mr Pisasale (count 1) or Mr McKenzie (count 2) was the principal offender and Ms Li enabled or aided the offence: s 7(1)(b) and (c); and in the other, she formed a common intention with Mr Pisasale or Mr McKenzie to prosecute an unlawful purpose in conjunction with him, and the extortion was committed to carry out that purpose: s 8.

[83] There are a number of obstacles to acceptance of those submissions.

[84] First, there was no evidence from which the jury could have found that Ms Li had a particular belief that would attract the operation of s 24. Ms Li did not give evidence and was not interviewed by police. The evidence by Mr Pisasale of what Ms Li told him was, as the jury were directed,[51] not admitted as proving the truth of what was said. None of the letters or emails by Mr McKenzie was done on instructions from Ms Li, as Mr Pisasale was the only source of that information. The admissions took the matter no further. The recorded telephone calls involving Ms Li relevantly showed only that on 13 January 2017 Ms Li said to Mr Pisasale "you needed to punishing my ex-boyfriend" and Mr Pisasale said he was going to do that.[52]

[85] Secondly, counsel for Ms Li did not advance such a case at trial. The decision of Ms Li's counsel to confine the case to the party provisions was logical in the circumstances, given that if the jury were satisfied of the requisite knowledge to ground s 7 or s 8 culpability, there was no basis upon which her belief would excuse her conduct. A party is normally bound by the conduct of counsel at trial.[53]

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50 Ms Li outline, paragraphs 16.4-16.5.

51 AB 106 lines 23-38.

52 AB 527 lines 9-10.

53 *Crampton v The Queen* (2000) 206 CLR 161 at [15]-[19]; *Dhanhoa v The Queen* (2003) 217 CLR 1; *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55 at [77]; *R v ABD* [2019] QCA 72 at [3]-[10].

[86] Thirdly, Ms Li's liability depended upon the jury being satisfied of the guilt of Mr Pisasale and Mr McKenzie in respect of count 1 and 2 respectively, as they were the principal offenders and her exposure was under the party provisions of s 7(1)(b) and (c) and s 8. In each case the element of reasonable cause that had to be proven was in respect of the acts of Mr Pisasale and Mr McKenzie. If that was proven there was no room for the operation of s 24 as to Ms Li. In any event, Ms Li's knowledge, in so far as it could be inferred, was before the jury to enable an assessment of whether she had sufficient knowledge to be criminally responsible.

[87] Fourthly, in so far as it is contended that there was a distinction between investigation costs and the costs otherwise, the distinction does not assist Ms Li's case. As particularised,[54] the demands on count 1 were for various sums of money "which was said to reflect the cost (or part thereof) of an investigation carried out by Pisasale's company". For count 2, the particulars were that the $8,400 demanded "was said to be expenses incurred of $6,100 for an investigator, $1500 miscellaneous charges and $800 legal costs".[55] In each case the particulars were based on what the costs were **said** to be, not what they actually were, nor what an individual appellant thought they were for. Any evidence that what either Mr Pisasale or Mr McKenzie thought the money was for was, in fact, different from what was actually demanded, was evidence demonstrating that there was no reasonable cause.

[88] These grounds fail.

Miscarriage by exclusion of s 24 during summing up (Pisasale, ground 5; McKenzie, ground 6)

[89] In his address to the jury, senior counsel for Mr Pisasale made submissions about the operation of s 24. During the summing up the learned trial judge referred to that part of the address in these terms:[56]

> "Mr Crowley also took you to something called mistake of fact, but that does not really concern you, ladies and gentlemen, here. The way that the matter has been developed before you, it really is a question of you assessing the defence of honest claim of right, taking into account the evidence and what you accept of the evidence before you."

[90] Before this Court it was submitted that most of the trial had been conducted on the basis that s 24 was available to Mr Pisasale. During discussions with the trial judge in the absence of the jury, Mr Pisasale's counsel clearly expressed that s 24 formed the basis for the s 22(2) defence. That reasoning was fundamental to the way the case was presented to the jury.

[91] However, it was submitted, the direction set out in paragraph [89] above suggested that counsel had based his closing submissions on a significant error of law which went to the heart of his submission. That was because he was the only advocate who made s 24 a focus of his closing address.

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54 AB 504.
55 AB 506.
56 AB 121 lines 16-20.

[92] Thus it was said that the form of the direction was likely to create an impression of unreliability on the part of Mr Pisasale's counsel and Mr McKenzie's counsel, and a real risk that it undermined counsel's credibility, and caused the jury to disregard their submissions overall. This risk was not mitigated by the learned trial judge's directions.

[93] I do not accept the contention.

[94] Mr Pisasale's counsel did discuss the defence of mistake of fact, but in the context of the real issue of honest claim of right. The jury were told that there were two bases for the defence case that the acts were done with reasonable cause. One was because he honestly and reasonably believed that Ms Li had incurred costs, and the second was that there was an honest claim of right to do what he did:[57]

> "**And what the defence case here is, members of the jury, is that, well, it was done with reasonable cause, and there's a defence that's put forward on two bases here. The first is that Mr Pisasale honestly and reasonably believed that [Ms Li] … had spent money** tracking down and finding Mr Xin Li who had betrayed her, promised to marry her, destroyed her life. ...
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> Under the law, members of the jury, there is a defence which is called mistake of fact. And what it provides, members of the jury, is that a person who doesn't act under an honest and reasonable, but mistaken belief in the state of things – in a fact – if they do that under an honest and reasonable belief about that fact, then they're only criminally responsible to the extent as if that thing – the state of affairs actually existed. Here, what that means is, in Mr Pisasale's case, he honestly and reasonably believed that these costs had been incurred by Ms Li. And when he was making the calls and asking for the letter to be sent, all he was doing was following up what he believed she had actually spent and actually incurred thousands of dollars in pursuing. And that includes airfares, accommodation, tracking down and investigation costs all in the amount of about $10,000.
>
> **Second part that goes with this members of the jury, is under the law, there's another concept: claim of right**. A person who honestly believes that they have a right in respect of property to make a claim – assert their claim of their right, well, that person is not criminally responsible for the act that they're doing by making that claim. Here, what the case is for Mr Pisasale is that he was acting on behalf of Angela [Ms Li] to make the claim for the compensation – the reimbursement of those moneys which he honestly and reasonably believed that she had spent. **So the two things go together in the case for Mr Pisasale: (1) his state of mind which you consider did he have an honest and reasonable belief about those costs; and, secondly, if he did, when he made those phone calls and when he had the letter written, was he asserting her right to claim back those costs? Was he doing that honestly?**"

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[57] AB 45 lines 12-32; emphasis added.

[95] The jury would have understood the two to be linked as part of the overall defence case that what was done was done with reasonable cause.

[96] Mr McKenzie's counsel told the jury that the only real issue was whether the Crown "have been able to establish beyond a reasonable doubt that [Mr McKenzie] did not have reasonable cause for sending the letter, and also whether the relevant defences – mistake of fact and a bona fide right of claim – apply".[58] He then addressed on the defence of honest claim of right,[59] but all that was said which might be attributable to s 24 was:[60]

> "The material supports the instructions provided to Mr McKenzie, specifically that fees and other costs had been incurred. As I indicated earlier, if my client thought there was no private investigator, why would he request and keep the documents? The only rational inference is my client honestly believed these fees had been incurred and Mr Li was liable to answer for them in court or for his conduct."

[97] When the learned trial judge told the jury that "The way that the matter has been developed before you, it really is a question of you assessing the defence of honest claim of right", I do not consider that it could have been taken as a form of rebuke that damaged counsel's standing in the jury's eyes. It was simply a direction that, as a matter of law, the mistake of fact defence was not something they had to be concerned with.

[98] The debate between the learned trial judge and all counsel, which led to s 24 being excluded from the directions, took place after all counsel had addressed. The consequence was that the Crown and counsel for Mr McKenzie had each addressed s 24.[61] But each had focussed on the s 22 defence,[62] and in the case of counsel for Mr McKenzie, precious little was said about s 24.

[99] In my view, there was no miscarriage of justice by the learned trial judge's comments. For the reasons given earlier there was no error in withdrawing s 24. The directions given did nothing to limit the scope of s 22. There was no application made to discharge the jury, either following the decision to withdraw s 24, or when the impugned comments were made, nor was any redirection sought. No submission was made at the trial that counsel's credibility had been undermined.

[100] This ground fails.

Error in directing on the relationship between s 22(2) and s 415 (Pisasale, ground 2; McKenzie, ground 3)

[101] This ground focussed on the directions given by the learned trial judge, in the course of discussing the elements of the offence under s 415, as to what "reasonable cause" meant. The directions were given by reference to a handout explaining the elements.[63] What his Honour said reflected the terms of the handout:[64]

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58 AB 85 lines 12-15.
59 AB 90 lines 5-33.
60 AB 90 lines 1-5.
61 AB 66 lines 32-46; AB 85 lines 12-14.
62 AB 66-68; AB 90 lines 4-29.
63 AB 710.
64 AB 108 lines 1-14.

> "The term "reasonable cause" is something for you to determine. What constitutes reasonable cause is a matter for you to determine. A phrase without reasonable cause applies to all of the conduct that is prescribed; that is, each of elements one, two and three at the top of the page. A consideration of whether there is reasonable cause for making a particular demand involves consideration of, not only the demand itself in its factual circumstances as you find them to be, but also consideration of any detriment threatened in the course of making the demand.
>
> Therefore, it is not limited just to a consideration of whether there is a reasonable cause for that which is demanded to be done. The belief of an accused person that he or she had a reasonable cause is immaterial to the determination of this issue, this element. It is an objective not a subjective test. It is not for the defendant, however, to prove that he acted with reasonable cause. It is for the prosecution to prove beyond reasonable doubt that the defendant did not so act."

[102] It was submitted that those directions were unlikely to have assisted the jury in considering whether the Crown had negatived that element. By reference to *R v Mogg*,[65] *R v Mowatt*,[66] and what was said by McHugh J in *Fingleton*,[67] it was submitted that the directions did not relate the issues to the law and facts of the case, and were merely an abstract expression of legal principle.[68]

[103] Then it was submitted that the abstract directions given would have been particularly confusing where the jury were required to consider "reasonable cause" in the context of s 22(2), which required them to consider a subjective element of honesty and an objective element of reasonableness.

[104] Further, it was submitted that his Honour incorrectly directed the jury that s 22(2) "excludes element number 4", that being "the absence of reasonable cause", because an honest claim of right, if not negatived beyond reasonable doubt, would establish a "reasonable cause". Further, the qualification that an honest claim of right did not apply to the element of reasonable cause was at best apt to confuse, and at worst, risked neutralising the operation of s 22. Where the appellant was relying upon s 22(2), these directions were potentially confusing. There was a risk that the jury disregarded Mr Pisasale's evidence that he honestly believed Ms Li was entitled to be reimbursed for her costs without considering whether he held such a belief. If the subjective aspect of Mr Pisasale's case was excluded from the jury's deliberations, a conviction was almost inevitable.

[105] Counsel for Mr McKenzie added further submissions specific to issues concerning his case. It was submitted that the error in the s 22 directions were compounded by the way the Crown case was put:

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65 (2000) 112 A Crim R 417 at [73].

66 [1968] 1 QB 421 at 426.

67 *Fingleton* at [77], [108]-[109].

68 In so far as these contentions were raised in respect of Mr Pisasale's ground 3, they have been dealt with at paragraphs [67] to [80] above. There was no distinct contention advanced beyond that on this ground.

(a) in closing address the Crown suggested[69] that Mr McKenzie's intention to not actually litigate was tantamount to an intention to defraud; this was said to be the case even if there was an honest belief of the fact that money was owed; if that submission was accepted by the jury, it would defeat an honest claim of right, but it cannot be the law that a person who sends a letter of demand for expenses legitimately incurred (or believed to be legitimately incurred) commits an offence of extortion because they do not in fact intend to ultimately pursue a claim in court; the submission was not corrected by the learned trial judge;

(b) the particulars, which remained in the possession of the jury during the trial and deliberations by agreement of all counsel, asserted that there was an absence of reasonable cause evidenced by any one or a combination of the factors listed; for example, the Crown argued that there was an absence of reasonable cause because Mr McKenzie did not articulate or formulate a cause of action in the letter of demand; however, an honest claim of right may stem from a belief in a right which the law does not recognise, and under an honest claim of right, the absence of reasonable cause could not be evidenced by his failure to formulate or articulate a cause of action in the letter of demand, or indeed by the absence of a cause of action in law; and

(c) even though the Crown case against Mr McKenzie was expressly said to not be upon the basis of a departure from the standards of a competent legal practitioner, the factors identified were largely irrelevant to the issues to be determined by the jury, and predominantly related to Mr McKenzie's competency as a solicitor, not to the issue of whether there was an absence of reasonable cause; there was no objective standard placed before the jury by which those factors could be assessed and no evidence that Mr McKenzie had departed from his usual practice.

[106] It was submitted that the real issue in the trial was whether legitimate expenses were incurred and if not, whether Mr McKenzie honestly believed that they were. If he believed that the expenses were incurred, that would amount to reasonable cause in the circumstances. As to reasonable cause, his opinion or view that he was entitled to make the demand may be immaterial in an objective test, but his subjective understanding of the facts was not. In the circumstances, a direction that an honest claim of right only applied to the first three elements of extortion was a fundamental misdirection.

Discussion

[107] At the heart of the submissions is the proposition that an honest claim of right under s 22(2) can apply to the fourth element of extortion under s 415. That element is the requirement to prove, beyond reasonable doubt, that there was an absence of reasonable cause.

[108] In my respectful view, the contentions advanced on behalf of Mr Pisasale and Mr McKenzie do not give appropriate weight to the fact that the claim of right under s 22(2) of the Code must be "an honest claim of right **and without intention to defraud**". In the handout the jury were directed as to how the defence applied:[70]

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69 AB 68 lines 25-30.

70 AB 711; emphasis added.

> "Under our law, a person is not criminally responsible for an offence relating to property, if what he did with respect to the property was done in the exercise of **an honest claim of right and without intention to defraud**. Extortion is an offence relating to property.
>
> An accused person acts in the exercise of an honest claim of right if he honestly believes himself to be entitled to do what he is doing.
>
> **To 'defraud' in this context means to do something dishonestly, so the requirement that the claim of right be honest and the requirement of the absence of an intention to defraud are really two ways of saying that the defendant must have honestly believed himself to be entitled to do what he did**."

[109] By the handout on this issue, the jury were then told that:

> "Any such claim relates to the first three elements of the offence. Therefore, if the prosecution proves to your satisfaction beyond reasonable doubt at least one of the following:
>
> 1. the defendant did not honestly believe he was entitled to make the demand; or
> 2. the defendant did not honestly believe that he was entitled to make the threat to cause the detriment (that is, the threat that was actually made) when he made the demand; or
> 3. the defendant did not honestly believe that he was entitled to gain a benefit for [Ms Li] or to cause a detriment to Xin Li;
>
> then the prosecution would have negatived this potential defence."

[110] Therefore the jury would have understood that the references to whether a defendant "did not honestly believe" something meant that the claimed right was honest **and** without intention to defraud.

[111] Therein lies the difficulty confronting this contention. If the Crown proved that when the demand and the threat were made, the relevant accused: (i) did not hold the belief, honestly and without intention to defraud, that he was entitled to do so, or (ii) did not hold the belief, honestly and without intention to defraud, that he was entitled to gain the benefit for Ms Li, then the defence would have been negatived. But to reach that point the jury would have been satisfied that the relevant accused's belief was not honest and that the accused had an intention to defraud. In other words, the jury would have been satisfied that the relevant accused was acting dishonestly. That being so, there could not possibly be an honest claim of right as to the reasonable cause for acting that way.

[112] Put in terms of the onus of proof,[71] if the Crown could not negative any of the three factors in paragraph [109] above then the relevant accused would be acquitted. It was therefore not necessary that the jury consider whether the honest claim of right resulted in there being reasonable cause.

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71 The onus being on the Crown, to negative the defence.

[113] Once that is understood it becomes clear that the appellants were not deprived of a fair chance of acquittal by reason of the directions on this aspect.

[114] In fact, had the directions gone further, as was submitted, there was a real risk of the jury becoming confused as to the task they confronted. The direction given was in accordance with Direction 76.1 of the Bench Book, and in the form approved in *R v Mill*.[72] As No. 76.1 of the Bench Book shows, the suggested direction explains that the requirements for the defence are not only that the claim of right is honest, but also there must not be an intention to defraud.

[115] These grounds fail.

Failure to direct jury to consider s 22(2) before reaching verdict on count 2 (Pisasale, ground 4)

[116] Mr Glynn QC and Ms Gover of counsel submitted that there was error on the part of the learned trial judge because he did not direct the jury to consider whether s 22(2) had been negatived before reaching a verdict on count 2 as it applied to Mr Pisasale.

[117] It was submitted that the handout provided to the jury contained only two questions when it came to Mr Pisasale's liability on count 2:[73] (i) "Are you satisfied beyond reasonable doubt that McKenzie is guilty of the offence?"; and (ii) "Are you satisfied beyond reasonable doubt that Pisasale was a party to the offence pursuant to the provisions of either s 7(1)(b) or s 7(1)(c) or s 7(1)(d) or s 8?"

[118] It was further submitted that the directions in the summing up, which were to the same effect,[74] were incorrect as a matter of law because the jury were effectively directed to consider an honest claim of right defence in relation to Mr McKenzie but not Mr Pisasale. Mr Pisasale's claim of right was not dependent upon that of Mr McKenzie. That was particularly problematic where Mr McKenzie was a practising solicitor and s 22(2) involves the subjective element of honesty. The jury may have more readily found that Mr McKenzie did not honestly believe Ms Li had a right to claim reimbursement of her costs. A different conclusion may have been reached in relation to Mr Pisasale, resulting in an acquittal on count 2.

[119] Finally, it was submitted that the jury could have convicted Mr McKenzie on the basis that he was a qualified solicitor and did not honestly believe Ms Li was legally entitled to reimbursement, while acquitting Mr Pisasale on the basis that he sought and accepted legal advice about that entitlement.

[120] For the Crown, Ms Farnden and Mr Bain of counsel submitted that Mr Pisasale's trial counsel specifically submitted that they were not seeking that the jury be directed in this way once the particular that Mr Pisasale could be convicted without Mr McKenzie first being convicted under the innocent agent provision (s 7(4) of the *Code*) was removed from the jury's consideration. This was a conscious decision no doubt made after a considered weighing of the competing risks.[75]

[121] Further, whilst the submission refers to a different state of knowledge between Mr Pisasale and Mr McKenzie, it does not sufficiently grapple with how a path to

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72 [2007] QCA 150.
73 AB 722.
74 AB 114 line 38 to AB 117 line 44.
75 Reference was made to *TKWJ v The Queen* (2002) 212 CLR 124 at [16].

an acquittal was open for Mr Pisasale if the s 22 defence was rejected for Mr McKenzie. A consideration of the logical reasoning that the jury were required to go through on count 2 for Mr Pisasale, including the elements requiring proof under the party provisions, demonstrates that Mr Pisasale was not deprived of a fair chance of acquittal by the separate s 22(2) defence not being left. So much was accepted by his trial counsel. What was originally submitted by trial counsel as a potential path by relying on "legal advice", or the fact that a lawyer was writing the letter, could only have led to Mr Pisasale having a mistake of law which would not excuse his conduct.[76]

Discussion

[122] As was accepted by Mr Glynn QC, Mr Pisasale's trial counsel accepted that the directions should be given as they were on this aspect. How that position was reached is of some moment.

[123] During the course of debate about what directions should be given, counsel for all parties and the learned trial judge addressed the interplay between s 24 and s 22(2). In the discussion, which occurred after senior counsel for Mr Pisasale had addressed, but before any other addresses, counsel for Mr Pisasale agreed that s 24 led into a consideration of s 22.[77] The learned trial judge then raised with Mr Pisasale's counsel the question whether it was being suggested that notwithstanding that s 22 and s 24 would be considered in respect of Mr McKenzie on count 2, they would need to do the same thing for Mr Pisasale:[78]

> "HIS HONOUR: Now, the other thing for your client is section 24 and section 22, do you suggest that it arises in relation to count 2, where he's charged as a party?
>
> MS O'CONNOR: We do, your Honour. For count 2 the case would be – the defence case is that Mr Pisasale honestly and reasonably, but perhaps mistakenly, believed that the expenses were incurred in the amount of around $10,000.
>
> HIS HONOUR: Well, no, no, take it back a step further. Before your client can be convicted of step 2 the jury would have to be satisfied, beyond reasonable doubt, that McKenzie is guilty of count 2, correct?
>
> MS O'CONNOR: Yes.
>
> HIS HONOUR: And if they're satisfied, beyond reasonable doubt, that McKenzie is guilty of count 2, they would have already had to have considered mistake of fact and claim of right in relation to McKenzie.
>
> MS O'CONNOR: Yes.
>
> HIS HONOUR: And they would have necessarily therefore have concluded that the Crown have negatived each of those provisions, beyond reasonable doubt. So are you suggesting that

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76 Reference was made to *Ostrowski v Palmer* (2004) 218 CLR 493; [2004] HCA 30.

77 AB 322 line 28 to AB 323 line 8.

78 AB 323 line 14 to AB 323 line 41.

> notwithstanding that they have done that in relation to McKenzie, that they would then need to go and do exactly the same thing for your client as a party?
>
> MS O'CONNOR: I don't see that that would be necessary, but perhaps if I could confirm with my instructor. I don't think that they would need to revisit it, but if your Honour would give me one moment."

[124] After some further discussion the trial judge asked counsel to consider whether s 22 separately arose on count 2. The Crown then submitted that the Particulars included the innocent agent provision in s 7(4) of the *Code* in respect of Mr Pisasale for count 2, so that Mr Pisasale could be convicted on count 2 without a conviction of Mr McKenzie. In that case s 22 would have to be separately considered for Mr Pisasale.[79] The learned trial judge said the matter would be discussed again prior to the summing up. The remaining addresses then occurred.

[125] The learned trial judge then returned to the issue of s 7(4), indicating that in his view it could not apply.[80] The Crown accepted that view, and said it would not press s 7(4).[81] Counsel for Mr Pisasale then said:[82]

> "Your Honour, … provided that section 7(4) isn't left for Mr Pisasale, we would be content for the jury to be directed simply that if Mr McKenzie is not guilty of count 2, then Mr Pisasale is not guilty, and it wouldn't require another examination of section 22 and 24."

[126] The learned trial judge agreed, saying that it was "the logical conclusion in all the circumstances of this case".

[127] In the circumstances, a conscious decision was made not to seek the direction that is now said to be necessary. In *R v ABD*[83] this Court referred to the relevant considerations where such is the case:

> "[3] A miscarriage will have occurred if the direction should have been given and it is reasonably possible that the failure to direct may have affected the verdict. A failure to seek a direction is significant to the question whether there has been a miscarriage of justice. In *R v Smart* the Victorian Full Court said that in general an applicant for leave to appeal against conviction is not allowed to rely on a criticism of a summing up which was not raised at trial. That limitation is not imposed as a punishment for counsel's conduct of the trial but exists because a jury trial involves the making of constant decisions by counsel, as well as the trial judge, based upon perceptions and motivations, many of which will be in conflict. Moreover, many of these decisions must be taken by counsel knowing that there are risks attendant upon each available course.

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79 AB 325 lines 31-45.
80 AB 327 lines 18-45.
81 AB 328 line 45.
82 AB 329 lines 3-6.
83 [2019] QCA 72 at [3]-[6]; internal citations omitted.

[4] *General Motors-Holden's Pty Ltd v Moularas* was a personal injury case tried before a jury in which the unsuccessful defendant appealed on the ground that the trial judge had failed to direct the jury about possible contingencies that might reduce the plaintiff's future economic loss, and particularly in relation to a pre-existing condition. On appeal it was said that the failure to give such a direction had occasioned a miscarriage of justice. The Victorian Full Court dismissed the defendant's appeal.

[5] In the High Court, Barwick CJ considered the course that trial counsel had taken. After the summing up, counsel had raised with the judge his failure to give the direction. The judge asked whether he should now bring the jury back and give them the further direction. Barwick CJ said:

> "Counsel, who realized that he faced a dilemma – of either risking undue emphasis in the minds of the jury on the issue of damages or of forfeiting or risking the benefit of the deficiency in the summing up by not requiring the judge to amend his charge, opted to take that risk. In my view, he chose not to ask the judge to correct the summing up in the aspects he had raised. In thus reciting the conduct of the trial I am far from criticizing the course counsel took. He was in the atmosphere of the trial and chose what may well have been the wiser course in the interest of his client. But his choice cannot be regarded as without consequence before the Full Court and before us on appeal from the Full Court."

[6] Barwick CJ then considered the terms of the summing up. Although his Honour thought that the trial judge should have alerted the jury about how to use evidence of the plaintiff's pre-existing condition when assessing damages, he said that nevertheless there was no misdirection. His Honour regarded it as significant that counsel, who had heard the summing up, and who "may have thought that the jury had had their attention sufficiently called" to the issue, had sought no redirection. Barwick CJ observed that, although there were some directions that are so indispensable that they must be given in all cases, as to other directions, "the infinite variation of the facts of cases, and the varying consequences of the manner in which they are fought and the different ways in which a summing up may communicate the issues and the facts of a case to a jury make it … undesirable to make any universal and inflexible rule with respect to them."

[128] The case put before this Court was that Mr Pisasale might have had quite an independent view of the situation from that held by Mr McKenzie. As it was put in oral submissions:[84]

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84 Appeal transcript T1-8 lines 7-23.

> "… the jury were not told that he, in fact, might have a quite independent view of the situation from that which was held by Mr McKenzie. The two men came from different backgrounds. One was a lawyer, one was, amongst other things, a politician, with different knowledge of the world. Mr Pisasale had been in contact with Ms Li, the other co-accused, Mr McKenzie had not. The jury may well have, for example, taken the view that Mr McKenzie's failure to take instructions directly from the likely client was a matter that removed from him the protection of section 22, whereas Mr Pisasale's - although the jury may have found that he was a party, was still, in our submission, required to consider whether or not he still had a defence himself, based on his belief in the rightness of the conduct or in the entitlement in the conduct.
>
> And, in fact, the jury might well think that the fact that he went to a lawyer and was concerned that … what they were doing shouldn't amount to blackmail, might indicate, in fact, that … the lawyer having agreed to write the letter, he did have such a belief. So that that should have been independently, with respect, put to the jury in respect of count 2, which it wasn't."

[129] The sequence of events in which Mr Pisasale was involved need to be borne in mind. His evidence was that soon after first meeting Ms Li he formed his own view that she had a legitimate claim for costs incurred.[85] Before speaking to Mr McKenzie he spoke to a barrister, Mr di Carlo, who told him: (i) he needed to get a solicitor to write a letter of demand; (ii) that as long as Ms Li's costs were reasonable she was entitled to reimbursement; and (iii) the process would be to go to the Federal Court to pursue the claim.[86]

[130] In cross-examination he said the call to Mr McKenzie on 16 January 2017 was before he spoke to Mr di Carlo about going to court.[87] The jury may have doubted that response given that in one of the calls to the complainant on 15 January 2017 Mr Pisasale said they would issue Federal Court proceedings,[88] and Mr McKenzie's handwritten notes[89] nominate the Federal Court as the venue.

[131] On 15 January 2017 Mr Pisasale had various phone calls with the complainant, during which he lied about a number of things, pretending to be a private investigator and threatening a law suit for $200,000, a figure he admitted he made up. In the last call that day the complainant said he would call the police because "you are blackmailing me",[90] and he questioned whether what Mr Pisasale was seeking was money for himself rather than his putative client: "is it … she wants or you want?", and "Pay you or pay her?"[91] He also told Mr Pisasale that Ms Li had told the complainant that she did not want the money, only to have Mr Pisasale persist in demanding money and threatening a court case.[92]

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85 AB 243 line 20; AB 246 lines 42-45; AB 251 lines 42-43; AB 270 lines 7-8; AB 271 lines 1-2.
86 AB 243 lines 21-39; AB 247 lines 1-15; AB 249 lines 12-15; AB 250 lines 4-11.
87 AB 284 lines 26-41.
88 AB 542, 544, 550.
89 AB 416-417.
90 AB 559.
91 AB 560.
92 AB 563.

[132] Mr Pisasale's evidence was that in the call with Mr McKenzie on 16 January 2017 he wanted to be careful it was not blackmail, which is why he said they had to word the letter carefully,[93] and he asked the question, "that's not blackmail is it?" Mr McKenzie's response, which he took as advice, was:[94]

> "No it's not blackmail … that's simply … a letter to him ... saying hey if you pay my costs I'll walk away, otherwise you know I'll, I'll claim everything I'm entitled to."

[133] There are several things to note about that. Given that he had been accused of blackmail the day before, the jury may well have considered that to be the reason why Mr Pisasale raised it with Mr McKenzie. However, he did not give Mr McKenzie a full, let alone frank, account of the exchanges between himself and the complainant. Importantly, he did not mention that Ms Li had said to the complainant that she did not want the money, he did not mention that the complainant had threatened to go to the police over his being blackmailed, and did not offer any proof or verification that costs had actually been incurred, or that there was a genuine claim.

[134] By the time the learned trial judge and Mr Pisasale's counsel had the discussions referred to in paragraphs [123] to [126] above Mr Pisasale had completed his evidence, in the course of which, on any rational view, his credit had been severely damaged. For example, he revealed he made no effort at all to question Ms Li about, or verify, the costs he was pursuing; he continued on that basis even though Mr di Carlo had said any claim to reimbursement depended upon the costs being reasonable; he made no effort at all to verify the investigation he assumed had been done; he had not examined the documents she gave him; he made no effort at all to ascertain if she was entitled to reimbursement; he had threatened going to court when he knew that would not happen; and cross-examination extracted numerous admissions that he was a liar, who made up the figures he used when calling the complainant.

[135] In those circumstances it would have been obvious to Mr Pisasale's counsel that his chance of successfully relying upon a s 22(2) defence was problematic, to say the least. Moreover, it would have been obvious that the chance of Mr McKenzie successfully relying upon such a defence was much greater. He was a solicitor acting on Mr Pisasale's instructions in circumstances where he could say to the jury that he justifiably trusted those instructions, and considered the question of blackmail, however briefly.

[136] In my view, that provides a rational basis for the forensic decision made by Mr Pisasale's counsel to abandon the need for a direction on s 22(2) on count 2. Once the only avenue of Mr Pisasale's exposure to a finding of guilt even if Mr McKenzie was acquitted on count 2, namely the s 7(4) case, was removed, it made eminent sense to eliminate the likelihood of the jury being reminded of the inadequacies of Mr Pisasale's basis for belief and the inadequacies in his account of the facts when he spoke to Mr McKenzie, not forgetting the deceit involved in his approaches to the complainant. Counsel was right to assess that the best chance of success on count 2, at least as far as s 22(2) was concerned, lay with Mr McKenzie's defence.

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93 AB 254 lines 16-20.

94 AB 571 lines 8-10; AB 255 lines 3-6.

[137] This is, in my view, the sort of situation where the deliberate decision not to seek the direction should bind Mr Pisasale.[95] Accordingly I am not persuaded that there was a miscarriage of justice by reason of the failure to direct on s 22(2) on count 2 as it applied to Mr Pisasale.

[138] In any event, I am not persuaded that the omission of the direction on s 22(2) deprived Mr Pisasale of a fair chance of acquittal.

[139] As mentioned above in paragraphs [68] to [73] and [94] the belief put forward on Mr Pisasale's part was that Ms Li had incurred costs and was entitled to be reimbursed by the complainant. But, as I have discussed, that was a view he formed well before he spoke to Mr McKenzie. Further, before he spoke to Mr McKenzie he had what he regarded as advice from Mr di Carlo that as long as Ms Li's costs were reasonable she was entitled to claim reimbursement, and a solicitor's letter of demand was necessary before making that claim.

[140] Mr McKenzie's comment about it not being blackmail to make a demand was on the basis that the demand was for costs to which Ms Li **was entitled**. Therein lay the difficulty for Mr McKenzie as he had nothing beyond Mr Pisasale's instructions to show that there were any costs genuinely incurred or which she was genuinely entitled to claim.

[141] Mr Pisasale was in a worse position. As set out in paragraph [134] above he had done nothing to question or verify the costs, made no effort at all to verify the investigation he assumed had been done, had not examined the documents she gave him, made no effort at all to ascertain if Ms Li was entitled to reimbursement, and he had threatened going to court when he knew that would not happen. On the evidence before the jury there was simply no basis at all for his asserted beliefs, beyond his groundless assumptions. And, the deceitful way he approached the complainant, and made up the figures he demanded, provided an ample foundation for the jury to reject his evidence that he honestly held the beliefs he asserted.

[142] Therefore, whilst he had a different set of beliefs, or a different basis for his beliefs, than was the case for Mr McKenzie, the foundation for their being honestly held was lacking. The conversation with Mr McKenzie added little, if anything, to the substance of his then existing beliefs, which were underpinned by what Mr di Carlo had already told him, that the costs could be claimed if they were reasonable, and that a demand could be made. The defect in all that was that Mr Pisasale had no basis for believing, even wrongheadedly, that costs had been genuinely incurred, that they were reasonable, or that Ms Li was entitled to claim them.

[143] In the circumstances the chance of success of Mr Pisasale's s 22(2) defence was so slight it cannot be said that he lost a fair chance of acquittal.[96]

[144] This ground fails.

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95 *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46 at [16] per Gleeson CJ, [26]-[28] per Gaudron J, [101] per Gummow J, [106]-[108] per Hayne J; *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60 at [15]-[19]; *R v ABD* [2019] QCA 72 at [3]-[8]; *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55 at [77].

96 *R v ABD* [2019] QCA 72 at [62].

Misdirection - co-accused guilty only if McKenzie first convicted of count 2 – (McKenzie, ground 4)

[145] This ground concerned the following directions given by the learned trial judge when discussing how the jury were to apply the party provisions in s 7(1) and s 8 of the *Code*:[97]

> "… as you will be able to see from that, ladies and gentlemen, in relation to section 7(1)(b), 7(1)(c) and section 8, the first thing that you have to be satisfied of beyond reasonable doubt is that the principal offender is guilty of the offence, that is, for count [1] Pisasale is guilty of the offence, for count 2, McKenzie is guilty of the offence.
>
> …
>
> We then move on to count 2, and, again, 3 and 4 both relate to count 2. So in relation to count 2, are you satisfied beyond reasonable doubt that McKenzie is guilty of the offence. If the answer is no, then you must acquit. If the answer is yes, then you move on to consider the party provisions.
>
> …
>
> The Prosecution must prove that there was a principal offender or perpetrator and the commission of the offence by that someone and that the defendant Pisasale aided that person to commit it. The Prosecution must prove that the other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant Pisasale.
>
> …
>
> So you may find the defendant Pisasale guilty of the offence in count 2 only if you are satisfied beyond reasonable doubt about four things: (1) the first is that McKenzie is guilty of the offence in question, (2) that the defendant Pisasale either in some way assisted the perpetrator McKenzie to commit the offence or did an act with the purpose of assisting or enabling him to commit the offence even if that act did not, in fact, assist, (3) that the defendant Pisasale assisted or did the act with the intention of helping the perpetrator McKenzie to commit the offence and (4) that when the defendant Pisasale assisted the perpetrator McKenzie or did the act for that purpose, the defendant Pisasale knew that McKenzie intended to make a demand with intent to gain a benefit for Yutian Li or another, known to McKenzie as LSW, or to cause a detriment to Xin Li and that the demand would be made with a threat to cause a detriment to Xin Li…"

[146] As with other parts of the directions the learned trial judge was here reading from a handout given to the jury, Ex MFI "M".[98]

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97 AB 113 lines 39-43; AB 114 lines 23-26; AB 115 lines 16-20; AB 115 lines 26-34.

98 AB 718-721.

[147] For Mr McKenzie it was submitted that it was an error to direct the jury that they could only convict Mr Pisasale on count 2 if they first convicted Mr McKenzie. His case was to be assessed separately to that of Mr Pisasale, based upon Mr McKenzie's subjective belief as to the existence of legitimate expenses incurred by Ms Li. While Mr McKenzie provided legal advice to Mr Pisasale, Mr Pisasale provided factual instructions to Mr McKenzie. The subjective understanding of the objective facts by each accused was not necessarily identical and therefore could give rise to different verdicts on count 2. In oral address Ms Prskalo of counsel put the submission this way:[99]

> "… a direction that the jury must first convict Mr McKenzie before they can convict Mr Pisasale is wrong in law. While proof of the commission of the principle offence is necessary to establish the liability of an accessory, a conviction is not. That is because it's clearly recognised within the case law that criminal liability for co-offenders may result in differing verdicts depending on the admissible evidence against each and the defences which may apply.
>
> So my submission is it is fundamentally wrong in law to tell a jury that a conviction is required for one offender before another is liable, particularly in the circumstances of this case where the admissible evidence was different as against each offender and where the defences which applied had a subjective component to them.
>
> … my submission about ground 4 is that their culpability is to be considered separately and individually in the circumstances of this case and that this is a fundamental error in law for the jury to be told that they have to convict McKenzie first before they can convict Pisasale and human nature being what it is, the … potentially a subjective taint if they thought Pisasale was guilty in relation to determining the case for Mr McKenzie."

[148] For the Crown, it was submitted that no submission to this effect was made at trial and no redirection was sought at the conclusion of the summing up. Further, the Crown case against Mr Pisasale on count 2 was based solely on ss 7(1)(b), (c), (d) or s 8 of the *Code*, i.e. culpability as a party to the offence. The first element for culpability pursuant to s 7 requires proof that an offence is committed. In order to prove criminal responsibility under s 7 the Crown was required to establish, as a fundamental fact, by admissible evidence, that the principal offence was in fact committed by the principal offender.[100] This includes proving that any defence available to the principal would not have been successful.[101]

Discussion

[149] The directions given by the learned trial judge followed the handout given to the jury. The document commenced by setting out s 7, the opening words of which are "When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence …" The document continues:

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99 Appeal transcript T1-26 line 27 to T10-27 line 2.

100 Referring to *R v Buckett* (1995) 132 ALR 669 at 676.

101 *R v Buckett* (1995) 132 ALR 669 at 677.

> "Proof of aiding involves proof of acts and omissions intentionally directed towards the commission of the principle offence by the perpetrator, and proof that the defendant (Pisasale) was aware of at least the essential matters constituting the crime in contemplation. To aid means to assist or help.
>
> The prosecution must prove that there was a principal offender or perpetrator, and the commission of the offence by that someone, and that the defendant (Pisasale) aided that person to commit it. The prosecution must prove that the other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant (Pisasale)."

[150] The document then turns to each of the separate relevant provisions in s 7(1), outlining the matters of which the jury must be satisfied in order to find a party "guilty of the offence in Count 2". The sequence is the same in each case; it will suffice to set out that which relates to ss 7(1)(b) and (c):

> "So you may find the defendant (Pisasale) guilty of the offence in Count 2 only if you are satisfied beyond reasonable doubt about four things:
>
> 1. The first is that McKenzie is guilty of the offence in question;
>
> 2. That the defendant (Pisasale) either in some way assisted the perpetrator (McKenzie) to commit the offence or did an act with the purpose of assisting or enabling him to commit the offence even if that act did not in fact assist;
>
> 3. That the defendant (Pisasale) assisted or did the act with the intention of helping the perpetrator (McKenzie) to commit the offence; and
>
> 4. That when the defendant (Pisasale) assisted the perpetrator (McKenzie) or did the act for that purpose, the defendant (Pisasale) knew that the perpetrator (McKenzie) intended to make a demand with intent to gain a benefit for [Ms Li] (known to McKenzie as LSW) or to cause a detriment to Xin Li and that the demand would be made with a threat to cause a detriment to Xin Li.
>
> If you are satisfied that the prosecution has proved these four things beyond reasonable doubt, then you should convict. If you are not so satisfied then you should consider the provisions of s 7(l)(d)."

[151] Given that the section only applies "when an offence is committed", and applies to those whose conduct deems them to "have taken part in committing the offence" and therefore who are "guilty of the offence", it is difficult to see what was said that compromised Mr McKenzie's trial or his fair chance of acquittal. The first step in the sequence above simply states what the section requires, that there be an offence. This part of the case alleged Mr Pisasale was a party to the offence committed by Mr McKenzie when he sent the letter of demand. Of course, the first step was that Mr McKenzie was guilty of the offence. If he was not, there was nothing to consider with respect to Mr Pisasale.

[152] The direction followed No. 74.1 in the Bench Book:[102]

> "The prosecution do not need to prove that the person who actually committed the offence has also been convicted. It is enough if the prosecution proves, not necessarily the identity of the perpetrator, but that there was a principal offender or perpetrator, and proof of the commission of an offence by that someone, and that the defendant aided that person to commit it. **The prosecution must prove that that other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant.**
>
> …
>
> *S 7(1)(b) and (c) direction (shorter version)*
>
> You may find the defendant guilty of the (offence) only if you are satisfied beyond reasonable doubt of four things. **The first is that (an identified or unidentified perpetrator) committed the offence**; that is, that (the perpetrator) [outline elements of offence]. The second is that …."

[153] For the proposition highlighted in the first paragraph quoted above, the decision of the NSW Court of Criminal Appeal in *R v Buckett*[103] is cited. That court said:[104]

> "Where the Crown relies upon s 5 of the Crimes Act to make an accessory responsible for the commission by the principal offender of the offence against a law of the Commonwealth (the principal offence) it must establish by evidence admissible against that accessory that the principal offence was in fact committed by the principal offender. Proof of that fact is fundamental: *R v See Lun and Welsh* (1932) 32 SR(NSW) 363 at 364; *Walsh v Sainsbury* (1925) 36 CLR 464 at 477; *R v Goldie* (1937) 59 CLR 254 at 263; *Mallan v Lee* at 205; *Georgiani v R* at 491, 500; *R v Stoke and Difford* (1990) 51 A Crim R 25 at 37. If the principal offender is provided with a defence, and if he would have succeeded in establishing that defence had he been charged, the offence has not been committed. The fact that such offender would have carried the onus of proof in relation to that defence cannot alter that fact. In prosecuting the accessory, the Crown must therefore establish not only the essential ingredients of the offence committed by the principal offender but also that any defence so provided to him would not have been successful."

[154] Further, the document did not refer to Mr McKenzie having been **convicted** of the offence. Rather, in words that mirrored s 7(1) the jury were told that they had to be satisfied that a person was guilty of the offence. Contrary to the submission made for Mr McKenzie, that is a step required in the jury's analysis of the liability of an aider and abetter under the party provisions.[105]

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102 Internal citations omitted; emphasis added.

103 (1995) 132 ALR 669 at 676.

104 Hunt CJ at CL, at 676-677; McInerney and Bruce JJ concurring.

105 *R v Buckett* (1995) 132 ALR 669 at 676; *Clarke v Chief Executive Officer of Customs* [2005] SASC 165 at [58].

[155] In my view, the directions were not deficient, but concise and well supported by authority. This ground fails.

Unreasonable verdict – (McKenzie, ground 5; Ms Li, grounds 1 & 2)

[156] This ground was advanced by Ms Li and Mr McKenzie only. Their different interests were reflected in the varying submissions.

Legal principles

[157] The principles governing how this ground of appeal must be approached are not in doubt. In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[106] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[158] In *M v The Queen* the High Court said:[107]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[159] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[108] As summarised by this Court recently in *R v Sun*,[109] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[110] in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[111] The High Court said:[112]

> "With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of

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106 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.

107 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13.

108 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35.

109 [2018] QCA 24 at [31].

110 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.

111 *Baden-Clay* at 329, citing *M v The Queen* (1994) 181 CLR 487 at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.

112 *Baden-Clay* at 330 [66].

> the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty"."

[160] Further, as was said by this Court in *R v PBA*,[113] in the course of elucidating the applicable principles:

> "The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted."

Ms Li's case

[161] For Ms Li, it was submitted that:[114]

(a) the Particulars provided in respect of count 1 were demanding a sum of money to reflect the cost (or part thereof) "of an investigation carried out by Pisasale's company"; the Particulars of count 2 related to demanding a sum said to reflect expenses incurred for an investigator; either way, the Particulars did not relate to demanding a sum for the financial loss for accommodation and flights;

(b) in respect of count 1, Mr Pisasale said he assumed that Ms Li had engaged an investigator; there was no evidence that Ms Li encouraged Mr Pisasale to seek reimbursement of investigator costs, or provided invoices or in any way enabled him to demand such costs; she was present when such a demand was made but one can see from the evidence that she had trouble understanding him and her English was poor;

(c) in terms of s 8, there was no evidence that the plan was to seek anything other than the financial loss for accommodation and flights; and

(d) much the same is contended in respect of count 2, with two additional features: Ms Li did not at any time see the written demand; and by the time the written demand had been sent, the complainant had told Mr Pisasale that in his conversation with Ms Li she had said she did not want money; to that extent, it seems that any plan she had to recover the flights and accommodation costs had been abandoned.

Discussion

[162] The Particulars on count 1 were that what was demanded was "a sum of money of between $5000 - $10,000 **which was said to reflect the cost (or part thereof) of an investigation** carried out by Pisasale's company".[115]

[163] Those Particulars did not allege that what was demanded was actually the investigation costs, or that there was an investigation at all. In fact, the Particulars

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113 [2018] QCA 213 at [80].
114 Ms Li outline, paragraphs 15.1-15.4.
115 AB 504; emphasis added.

made it clear that on the Crown case there was no such investigation, by alleging that the demand was made without reasonable cause because there was no reason to believe or suspect that there were any private investigator costs, let alone from a company owned by Mr Pisasale.

[164] The Particulars on count 2 were that what was demanded was "$8,400 … **said to reflect expenses incurred** of $6,100 for an investigator, $1500 miscellaneous charges and $800 legal costs".[116]

[165] Once again those Particulars did not allege that what was demanded was actually the investigation costs, or that there was an investigation at all. In fact, the Particulars made it clear that on the Crown case there was no such investigation, by alleging that the demand was made without reasonable cause because, as Mr McKenzie knew, Mr Pisasale told him he had pretended to be an investigator, and there were no documents to support the costs quoted.

[166] The submission that there was no evidence that Ms Li encouraged Mr Pisasale to seek reimbursement of investigator costs, or provided invoices or in any way enabled him to demand such costs, calls for some analysis of the evidence admissible against Ms Li.

[167] The starting point is that Ms Li's liability was under s 7(1) and s 8 of the *Code*.

[168] The evidence of Ms Li's involvement was considerable:

(a) she provided Mr Pisasale with all the information he had, including a critical matter, namely the complainant's phone number; that enabled Mr Pisasale to start and maintain his campaign of trying to extract money by threats;

(b) she was present in the car for the call when Mr Pisasale said he was "George Robinson" and doing a health survey; she obviously knew he was using a false name;

(c) she asked Mr Pisasale to "punish" her ex-boyfriend, and Mr Pisasale said he would do that, and she was to "bring his number";

(d) she was present and provided ongoing assistance while the calls the subject of count 1 were being made; in those calls Mr Pisasale: (i) used a false name ("John"), (ii) pretended that Ms Li had hired his private investigation company, he worked for her, and was billing her, (iii) used and referred to information provided by Ms Li about the complainant, including messages, photos, texts and Centrelink details, (iv) consulted Ms Li about the correct spelling of her name; (v) threatened court proceedings; (vi) pretended he had a file which he was consulting; (vii) lied, saying she was then in Beijing; (viii) threatened to "get the lawyer"; (ix) lied, saying that Ms Li had "some lawyer friends that … are prepared to help her"; (x) threatened that he would have the complainant "exported (sic) out of Australia for the way [he was] talking"; (xi) lied, saying it had cost Ms Li $10,000, or $6,000 to $7,000, in fees and searches; (xii) continued to demand money after the complainant said that Ms Li told him she did not want the money;

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116 AB 506; emphasis added.

(e) after the letter was sent on 2 February 2017 Ms Li told Mr Pisasale that "he doesn't pay the money", and two days later, that she did not want to destroy the complainant's life by revealing his immigration defaults; Mr Pisasale responded that "it's ok he will pay, let me plan it only scare him"; Ms Li's response was "please don't put this one in our plan just we know it and observe his reaction then use the point deal with him"; she urged that revealing the immigration default could hurt others who were innocent; Mr Pisasale responded "Yes will not hurt others"; and

(f) her comment (on 21 March 2017, well after the event) that she no longer wished to frighten her ex-boyfriend, together with her continued presence and assistance, and her reference in the text exchange above to "our plan", was evidence that at the time of count 1 she knew (at least) the essential ingredients of the offence, or alternatively that there was a plan to unlawfully obtain money from the complainant.

[169] That evidence came from Mr Pisasale, the intercepted phone calls and admitted facts. It was, in my view, open to the jury to accept that evidence, to the extent it was admissible against Ms Li, and conclude that Ms Li was centrally involved in Mr Pisasale's efforts to extract money by threatening the complainant. The jury could have concluded that if the demands for the costs were genuine, one would have expected some documentation to show the cost of the airfare and accommodation. There was none. In Ms Li's presence Mr Pisasale demanded such varying sums, which he admitted were made up, that it was open to conclude they were fictional.

[170] Further, in order to establish liability pursuant to s 7 or s 8 the prosecution was not required to prove that she knew that Mr Pisasale was demanding investigation costs rather than the flight and accommodation costs allegedly sustained. I say allegedly sustained because there was no evidence that Ms Li had incurred costs for travel or accommodation, let alone investigation costs. She arrived in Australia but there was no evidence how she travelled here, or from where she left, or that **she** paid for the airfares or accommodation, or was obliged to meet them. The jury could infer that there was a cost to travelling here, but there was no basis to infer that Ms Li paid for or was responsible for those costs. Mr Pisasale gave evidence that she told him it had cost her airfares, accommodation and investigation costs,[117] and that was about $10,000.[118] But they were only out of court statements by Ms Li, and the jury were instructed that they were not admitted to prove the truth of what was asserted.

[171] This ground fails.

Mr McKenzie's case

[172] For Mr McKenzie it was submitted that his conduct in sending the letter of demand may have fallen well short of that of a competent legal practitioner, but it was not open to a jury to conclude beyond reasonable doubt that Mr McKenzie knew that Ms Li had not incurred expenses (if, in fact, that had been proven).

[173] Further, Mr McKenzie's criminal responsibility fell to be assessed upon his state of knowledge at the time he sent the letter of demand on 2 February 2017. He was told

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117 For example, AB 241 lines 28, 37.

118 For example, AB 242 line 1.

by Mr Pisasale that Ms Li had incurred costs in investigating the complainant. Mr Pisasale was known to Mr McKenzie and was the Mayor of Ipswich. There was no reason for Mr McKenzie to disbelieve him. Further, he made a file note of his conversation with Mr Pisasale, which noted the words "private investigator". And, the letter of demand directed that the money be placed into his trust account.

[174] It was further submitted that the fluctuations in the amount of the demand were not so divergent that they could not be rationally explained by an initial estimate and subsequent correction. There is nothing unusual in a client varying their instructions or being imprecise in the information they provide. A letter of demand is often merely a starting point for negotiation. Mr McKenzie may not have made the inquiries which might be expected of a competent lawyer, but nor was he commencing a civil claim. His approach was incautious but it does not follow that the only rational inference therefore was that his conduct was dishonest.

[175] For the Crown, Ms Farnden submitted that the Crown was not seeking to compare Mr McKenzie's conduct to that of a competent legal practitioner, but rather were seeking to prove that the demand was made with threats without reasonable cause. There was no issue that either the demands or threats were made. It was unsurprising that the jury were satisfied that there was objectively no reasonable cause for the demands. That was particularly so in light of the fluid nature of what was being demanded, the nature of the calls and communications themselves between Mr McKenzie and Mr Pisasale, including the call where Mr Pisasale told Mr McKenzie he was pretending to be a private investigator, as well as the lack of articulation of a basis as to why Ms Li was entitled to the money. Additionally the conduct after the letter was sent gave the jury a real insight into their true motivation.

Discussion

[176] Mr McKenzie came on the scene after Mr Pisasale had called the complainant and threatened him, demanding money. Of course, Mr McKenzie did not know that until Mr Pisasale told him.

[177] On 16 January 2017 Mr Pisasale called Mr McKenzie. Amongst other things he was told:

(a) Ms Li had discovered she had been lied to by the complainant;

(b) Mr Pisasale had called the complainant the day before, pretended to be a private investigator, and demanded costs from the complainant;

(c) Mr Pisasale wanted her "to get about seven grand";

(d) he wanted Mr McKenzie to do a letter of demand saying "these are all the costs", of which Mr McKenzie's costs were to be "two grand" and "investigation costs five grand"; further, it was to be paid into Mr McKenzie's trust account, from which "I'll pay your costs then I'll give her the rest";

(e) Mr Pisasale proposed the form of the letter, including the threat to go to court; and

(f) Mr Pisasale asked the question "That's not blackmail is it?", and Mr McKenzie responded, "No it's not blackmail … that's simply … a letter

> to him … saying hey if you pay my costs I'll walk away, otherwise … I'll claim everything I'm entitled to".

[178] On 19 January 2017 Mr McKenzie asked for Ms Li's full name, and received a text stating her name. Later the same day Mr Pisasale asked to be told when the letter was ready.

[179] On 1 February 2017 Mr McKenzie emailed a draft to Mr Pisasale, asking "How's this?"

[180] The letter was sent on 2 February 2017, and copied to Mr Pisasale.[119] Its contents are set out a paragraph [36] above.

[181] Other draft versions of that letter revealed that $10,000 was to be demanded as an all up sum, without the requirement to pay it into the trust account.[120]

[182] The letter was sent by Mr McKenzie as a pro bono favour to Mr Pisasale,[121] who acted as intermediary between Mr McKenzie and Ms Li. He told police that his understanding was that if the complainant did not pay up "we weren't gonna pursue it further".[122] He regarded what was demanded as being "compensation for financial loss incurred".[123]

[183] Mr McKenzie never met or spoke to his client,[124] did not see any documents to justify the costs demanded, nor did he find out the name of the investigation company or see any receipt from the investigator. He simply took Mr Pisasale at his word.[125] He said that "for the purposes of what I was doing and not getting paid for … I didn't wanna put too much time and effort into it".[126] Mr Pisasale told him the documents given to him came from the private investigator, and that LSW had hired the private investigator.[127]

[184] Mr McKenzie was asked about the phone call where Mr Pisasale told him he had pretended to be an investigator. He said it would not surprise him if he did that because Mr Pisasale "likes jokes and he likes pranks",[128] and:[129]

> "I actually believe there was a private investigator and Paul just did this little phone call to find out more information or whatever from the guy, or try and get a settlement".

[185] The jury were not bound to accept what Mr McKenzie told police as to his believing what Mr Pisasale said. The jury may well have concluded that Mr McKenzie knew so little that he could not have had reasonable cause to make the demand and threat, in that he:

(a) never met or spoke to his putative client; and knew so little that he named someone else entirely;

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119 AB 402.
120 AB 401.
121 Mr McKenzie described it as a "no win, no fee pro-bono basis": AB 647 line 2567.
122 AB 637 line 2068.
123 AB 638 line 2079.
124 That was disputed by Mr Pisasale (AB 255-256, 285) but the jury were not compelled to accept that evidence.
125 AB 641 lines 2229-2232. He said he believed what he was told by Mr Pisasale: AB 651-652.
126 AB 641 lines 2237-2241.
127 AB 650 lines 2697-2707.
128 AB 679 lines 4190-4194.
129 AB 680 lines 4225-4227.

(b) only dealt with Mr Pisasale, for whom he was doing a favour on a no win, no fee pro bono basis;

(c) was told that Mr Pisasale had called the complainant pretending to be a private investigator;

(d) never knew the name of the private investigator, nor saw any receipt or other documentation verifying who that was, or that the investigator's costs had been incurred as he was told;

(e) never saw any document that verified any of the costs had actually been incurred, and why the complainant was liable to reimburse them; this was particularly significant as Mr McKenzie justified the threat in the letter as simply being Ms Li stating she would claim "**everything I'm entitled to**"; the jury could have reasoned that Mr McKenzie had no basis for thinking that Ms Li was entitled to anything;

(f) was told varying sums by Mr Pisasale, who wanted to get her about "seven grand", and that Mr McKenzie's costs were to be "two grand" and "investigation costs five grand";

(g) made initial handwritten notes of what he was told by Mr Pisasale, listing the total costs as $7,100, split between legal costs of $2,100 and the investigation costs at $5,000; then drafted a letter seeking $10,000; then one that apportioned the costs as $6,100.00 for investigator, $1,500.00 miscellaneous charges and $800.00 legal costs;

(h) could not have reasonably thought the costs were already incurred, or could be explained away as initial estimates then corrected, as the variances continued;

(i) could not have reasonably thought that his client (Mr Pisasale's female friend) was LSW, because he had (at the time he drafted the letter): (i) a copy of LSW's New South Wales driver's licence dated August 2016,[130] (ii) a Campsie Family Medical Centre letter dated 4 December 2015 in relation to LSW referring to her treatment in August 2015,[131] (iii) a real estate agent's letter addressed to the complainant and LSW at Campsie, NSW, and dated September 2015,[132] (iv) a Federal Circuit Court order dissolving the marriage of LSW and [another person], dated 30 June 2013,[133] and (v) a letter from the NSW Department of Roads and Maritime Services to LSW at a Campsie, NSW, address dated 22 February 2016, listing what had to be done to her then existing NSW licence;[134] yet according to what he was told by Mr Pisasale his client had been in a relationship with the complainant for only one year and had only recently arrived in Australia from China; and

(j) the documents referred to in the preceding subparagraph were evidently the source of the address for LSW in Mr McKenzie's files;[135] there was ample time between the first contact by Mr Pisasale on 16 January and when the letter was sent on 2 February for a full examination of the documents.

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130 AB 434.
131 AB 418.
132 AB 420.
133 AB 423.
134 AB 432.
135 Exhibit 10, AB 451.

[186] Further, the jury could have taken the view that the exchanges subsequently revealed the true nature of what was intended when the letter of demand was sent. On 13 February 2017 Mr Pisasale proposed another letter to the complainant to "scare the shit out of him" by alluding to the immigration defaults in relation to the complainant's identity. That letter was proposed in order to "scare him into" paying up, "give him the shits" and "poke and prod him". That purpose was repeated in conversations on 23 February 2017. When the second letter was drafted Mr Pisasale wanted it made milder "so we won't do it like it's blackmail" but still to "just scare the shit out of [him]", "We're not gonna go to court … we're just gonna have some fun", and "we'll scare him … poke the bear". Mr McKenzie shared those sentiments, or went along with them.

[187] In my view, it was open to the jury to be satisfied that Mr McKenzie did not have reasonable cause to make the demand and threat in the letter he sent.

[188] This ground fails.

Conclusion

[189] I have had the advantage of reading the additional reasons of Mullins AJA, with which I agree.

[190] As all grounds have failed the appeals should be dismissed. I propose the following orders:

1. In CA No. 206 of 2019, appeal dismissed.
2. In CA No. 214 of 2019, appeal dismissed.
3. In CA No. 219 of 2019, appeal dismissed.

[191] **PHILIPPIDES JA:** I agree that the appeals should be dismissed for the reasons given by Morrison JA.

[192] **MULLINS AJA:** Subject to the following additional comments, I agree with the orders proposed by and the reasons of Morrison JA.

[193] Both Mr Pisasale and Mr McKenzie assert there was an error on the part of the learned primary judge in directing on the relationship between s 22(2) and s 415 of the *Criminal Code* (Qld). It is submitted that the limitation placed by the trial judge on the defence applying to elements 1, 2 and 3 of the offence of extortion and not element 4 was incorrect.

[194] If either appellant was to succeed on the defence under s 22(2) of the *Code*, the jury would have to be satisfied the prosecution had failed to prove one of the elements of the offence of extortion on the basis of the honest claim of right asserted by that appellant. The jury had been directed that the elements of the offence of extortion were:

> "1. The making of a demand;
> 2. Accompanying that demand was the making of a threat to cause a detriment;
> 3. The demander had an intent to gain a benefit or to cause a detriment; and
> 4. The absence of reasonable cause."

[195] In practical terms, the defence could succeed only if the prosecution failed to prove beyond reasonable doubt one of the matters identified by the trial judge in giving the direction on the defence:

> "1. the defendant did not honestly believe he was entitled to make the demand; or
>
> 2. the defendant did not honestly believe that he was entitled to make the threat to cause the detriment (that is, the threat that was actually made) when he made the demand; or
>
> 3. the defendant did not honestly believe that he was entitled to gain a benefit for Yutian Li or to cause a detriment to Xin Li;"

[196] That is because element 4 relates to whether the prosecution excluded beyond reasonable doubt that the making of the particular demand and the threat that accompanied it was objectively without reasonable cause. Theoretically, element 4 could have also been the subject of a direction under s 22(2), but to be successful it could apply only to the circumstances that would have already resulted in the defence succeeding, because of the failure of the prosecution to exclude the defence in relation to one of elements 1, 2 or 3. In the circumstances of this trial, it was therefore unnecessary for the trial judge to complicate the direction further by giving a direction with no practical consequence in relation to the application of s 22(2) of the *Code* to element 4.