SUPREME COURT OF QUEENSLAND

CITATION:	*R v Orreal* [2020] QCA 95
PARTIES:	**R** **v** **ORREAL, Malcolm Laurence** (appellant/applicant)
FILE NO/S:	CA No 80 of 2019 DC No 1809 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 8 March 2019; Date of Sentence: 11 March 2019 (Fantin DCJ)
DELIVERED ON:	8 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2020
JUDGES:	McMurdo and Mullins JJA and Bond J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where appellant was convicted of rape – where appellant's trial counsel did not call evidence of complainant's previous sexual partners – where appellant's trial counsel did not call evidence of eyewitness regarding timeline of incident – where appellant's trial counsel did not object to admissibility of evidence that the appellant and complainant both tested positive for HSV-1 – whether no rational forensic justification can be discerned for these choices – whether choices constituted a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – APPLICATION OF PROVISO TO PARTICULAR CASES – where evidence that the appellant and complainant both tested positive for HSV-1 was irrelevant – whether, notwithstanding admission of this evidence, there was no substantial miscarriage of justice *Criminal Code* (Qld), s 668E *Kalbasi v Western Australia* (2018) 264 CLR 62; [2018] HCA 7, applied *OKS v Western Australia* (2019) 265 CLR 268; [2019]

HCA 10, considered
Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: A J Kimmins for the appellant/applicant
C W Wallis for the respondent

SOLICITORS: Owens & Associates for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO JA:** The evidence at the trial is set out in the judgment of Bond J and need not be repeated here. Substantially for the reasons given by Bond J, the appellant's arguments, apart from those about the wrongful admission and possible misuse of the evidence that the appellant and the complainant had tested positively for the virus HSV-1, should be rejected. However, in my conclusion, the appellant's arguments about that evidence should be accepted, and, as I will explain, the proviso cannot be applied in this case which turned on the contested credibility of the complainant.[1]

[2] The evidence that a vaginal swab detected the presence of the virus in the complainant was indicative of some sexual contact with a person who, at some stage, had become infected with the virus, and was, at the time of that contact, shedding the virus. There was evidence that not long before the alleged offending, the complainant had had a sexual encounter with her boyfriend.

[3] A sample of the appellant's blood yielded a positive result for the virus. That the appellant had been infected was indicated by the presence of antibodies. As Dr Waugh explained, this meant only that at some time in his life, the appellant had been infected with the virus, and it provided no indication that the appellant was then shedding the virus, or had been doing so on the date of the alleged offence.

[4] Dr Waugh explained that this virus is very common in the community:

> "So herpes simplex virus type 1 causes common cold sores. So the cold sores on people's lips that most people are very familiar with is caused by HSV-1, herpes simplex virus 1. Genital herpes is more commonly caused by HSV-2, which is a very similar virus but not the same. Both viruses can cause genital infections, but HSV-1, because it causes cold sores, is very, very frequently encountered in our community, so most people in adult life have been exposed to HSV-1 so that they're immune to it. You can show that they have an antibody response in their blood tests."

His evidence continued:

> "Do you mean to say that most members in the community have been exposed to HSV-1 at their mouth or at the genitals, or is it the same or doesn't it matter?---Most of the time, HSV-1 is acquired around the mouth, so people are exposed to it and get cold sores –

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1 *Kalbasi v Western Australia* [2018] HCA 7; (2018) 264 CLR 62 ("*Kalbasi*") at 71 [15].

> mouth cold sores much more commonly than they get genital co – genital sores from HSV-1, and that relates to just the timing of the exposure and the frequency of – the likelihood of getting exposed, because you're much more likely to be exposed to someone's mouth than their genitals. So for the majority of people, it's a mouth cold sore.
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> …
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> Having said that, it still is commonly found as a genital infection, as well, and it normally would be spread oral-to-genital spread and then genital-to-genital spread, going on from there. The – if you look at populations in Australia, about – you know, by very early adult life, about 80 per cent of women show that they've been exposed and they're immune to the virus. And a similar but slightly smaller number of men. So it's very common to have evidence on a blood test."

[5] A swab of the appellant's urethra on 8 February 2017 yielded a negative result. Dr Waugh was unable to say, from that evidence or otherwise, whether the appellant was shedding the virus on the date of the alleged offences. He explained that the shedding, for those who do experience it, would usually last less than a period of five days.

[6] The effect of this evidence is that the appellant belonged to a cohort constituted by something "slightly smaller" than 80 per cent of men in the Australian community. Dr Waugh did not express, as a percentage, the incidence of the virus amongst teenage boys, but his evidence indicated a significant possibility that the complainant had become infected in her recent contact with her boyfriend or on some other earlier occasion.

[7] The evidence from the appellant's blood test was irrelevant, because it could not rationally affect the probability of a fact in issue.[2] It added nothing to the evidence that the complainant had at some time been infected with the virus. The evidence as to the presence of the virus in the complainant and the appellant was, in each case, irrelevant and inadmissible.

[8] However, the prosecution contended that the evidence could be of some use to the jury, and the trial judge directed the jury that they could use it. The prosecutor's address to the jury on this subject began with a comment that the evidence was "very neutral" and the concession that, from Dr Waugh's evidence, it could not be said whether one of the appellant and the complainant had transmitted the virus to the other. The prosecutor drew the jury's attention to the possibility that the complainant had been infected by her encounter with her boyfriend. These were proper concessions, and to say that this evidence was "neutral" was to acknowledge that it had no probative value. However, the prosecutor then said:

> "There are plenty of explanations here. It's almost like a chicken and egg argument, but it's still a factor for you to take into account because the point is that both of them do have the same virus. It's a sexually transmissible virus, and the allegation in here is that the defendant forced her to engage in sexual contact and conduct, and so

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2 *Goldsmith v Sandilands* [2002] HCA 31; 76 ALJR 1024 at [2] per Gleeson CJ.

> it's a matter for you with your life experience what you make of that. But I don't suggest that you would really put any weight on it."

Despite that last sentence, the prosecutor did suggest that the jury might use the evidence as proof of facts which supported the prosecution case.

[9] In the judge's summing up, the jury was given a summary of the relevant evidence on this subject, at the end of which her Honour said:

> "So where does that leave you? You might think that evidence does not really help you one way or the other. You are left with evidence that both the defendant and the complainant child both tested positive for the same herpes virus, but on the state of the evidence, you cannot know when she contracted it, you cannot know when the defendant contracted it and you cannot know who she contracted it from. You just take that evidence into account along with all of the other evidence."

[10] The effect of the admission of the evidence, the prosecutor's argument and the judge's direction was that the jury might have used this evidence impermissibly and adversely to the appellant. The evidence was not only irrelevant, but also prejudicial.

[11] The judgment of the High Court in *Weiss v The Queen*[3] requires the appellate court to consider the whole of the record of the trial, including the fact that the jury returned a verdict of guilty. It also requires the court to consider the nature and effect of the error.[4] This is because some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard, for example where the case has turned on an issue of contested credibility.[5] In *Kalbasi*, the High Court instanced *Castle v The Queen*[6] as a case of that kind.[7]

[12] There is a significant possibility that this evidence assisted the prosecution to persuade the jury to accept the complainant's evidence. In such a case, the verdict of the jury provides little if any assistance to the appellate court in deciding whether there has been a substantial miscarriage of justice. Clearly, this jury has concluded that the complainant was a credible witness. However, the jury's verdict might have been affected by the misuse of this evidence, so that the verdict cannot be used by this Court in reasoning that the evidence *properly* admitted at trial proved, beyond reasonable doubt, the appellant's guilt.

[13] An appellate court does have the record, from which it can make some assessment of the prosecution case. In particular, it can assess the complainant's evidence for any inconsistencies or deficiencies. However, there are "the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record".[8] In particular, the appellate court does not see and hear the complainant's evidence or that of other witnesses whose testimony might have affected a consideration of it.

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3 [2005] HCA 81; (2005) 224 CLR 300 ("*Weiss*") at 317 [43].
4 *Weiss* at [44]; *Kalbasi* at [15].
5 *Kalbasi* at [15].
6 [2016] HCA 46; (2016) 259 CLR 449.
7 See *Castle v The Queen* [2016] HCA 46; (2016) 259 CLR 449 at 472, 473 [65]-[68].
8 *Weiss* at [40] citing *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

[14] A recording of the complainant's evidence was played to the jury, and this Court could watch it, if that was appropriate. But it is not for this Court to substitute itself for the jury by an assessment of the complainant's credibility and reliability by seeing and hearing the evidence. In *Pell v The Queen*,[9] the High Court emphasised, by reference to numerous cases in that Court,[10] that:

> "[T]he assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community. Just as the performance by a court of criminal appeal of its functions does not involve the substitution of trial by an appeal court for trial by a jury, so, generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box. The jury performs its function on the basis that its decisions are made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function."
>
> (footnotes omitted)

[15] In *Pell*, the task of the appellate court was to assess whether it was open to the jury to convict. The task in this case is to consider whether it is demonstrated that no substantial miscarriage of justice has occurred. In my respectful opinion, what was said in *Pell* is equally applicable to a case of the present kind.

[16] The complainant's evidence was not the only evidence in the prosecution case, but proof of guilt depended upon it. The result is that it is not possible to conclude that there was no substantial miscarriage of justice in this case. The nature of the error or irregularity prevents that conclusion from being reached by this Court on the record of the trial, because of the "natural limitations" that attend its task.[11]

[17] I would allow the appeal, set aside the convictions and order a re-trial on each count.

[18] **MULLINS JA:** For the reasons given by Bond J, I agree the appeal should be dismissed. I will add some observations in relation to ground 2.

[19] I agree with McMurdo JA at [7] and Bond J at [90] that the evidence adduced at the trial in relation to the virus HSV-1 was irrelevant and inadmissible. That comprised the evidence of Dr Waugh on that topic and the three admissions included in exhibit 7 relating to HSV-1 that were made by the prosecution and the appellant before Dr Waugh gave evidence.

[20] Bond J at [83] to [92] dealt with that aspect of ground 1 of the appeal that was based on the fact that the appellant's counsel at trial did not object to the admissibility of the evidence that both the appellant and the complainant had tested positive for

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9 (2020) 94 ALJR 394; [2020] HCA 12 at [37] and [38].
10 Cited at [37] n16.
11 *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at 480 [29].

HSV-1. As Bond J at [91] discerned, there was an obvious forensic advantage in not doing so, as otherwise the evidence from the complainant of her sexual contact with the 15 year old boy may not have been elicited.

[21] Bond J set out the relevant part of the prosecutor's address to the jury in respect of the virus evidence at [85] and the relevant part of the learned trial judge's summing up at [87].

[22] The appellant's counsel at the trial also addressed the jury in relation to the HSV-1 evidence, emphasising that the evidence regarding the virus did not "prove anything":

> "Now, just briefly in relation to the evidence regarding the herpes virus. The fact that the defendant and complainant have the herpes virus doesn't prove anything. You've heard how common the virus is from the expert and you've also heard how the virus can be transmitted separately, even by having oral sex which, you know, she had with her boyfriend at some point in time. There's no evidence from the prosecution how old the boy was, or that that boy was even tested, who she had the oral sex with, for the virus. If you had the results for the boy and he was also positive for herpes virus, what would you think then? Then again ---
>
> HER HONOUR: Don't invite them to speculate, [counsel for defendant].
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> [COUNSEL FOR DEFENDANT]: I suggest to you that the evidence of the herpes virus doesn't help you with your decision making process at all. It certainly doesn't strengthen the Crown case as you don't know where – you don't know where she got it from, or how long she's even had it."

[23] In the summing up, the trial judge gave the usual directions explaining the function of the jury in determining the facts of the case based on the evidence that was adduced in the trial and requiring them to decide what evidence they accepted, and they were the sole judges of the facts. The trial judge summarised the evidence that had been given, and where required explained its purpose and how it could be used, such as in relation to the preliminary complaint evidence. The usual direction was given that it was up to the jurors how they assessed the evidence and what weight they gave to a witness' testimony or to an exhibit.

[24] As McMurdo JA observed at [8], the prosecutor at the trial appropriately conceded that the HSV-1 evidence was "very neutral" and that it was possible that the complainant had been infected by her encounter with the 15 year old boy, but then qualified those concessions that acknowledged the evidence had no probative value by also saying that the jury could still take the evidence into account "because the point is that both of them do have the same virus" and referred to the fact that it was a sexually transmissible virus and the allegation was that the appellant had forced the complainant to engage in sexual contact and conduct, so that it was a matter for the jury with their life experience "what you make of that". Perhaps the prosecutor had realised that she went too far with that submission and then came back to her original proposition "but I don't suggest that you would really put any weight on it".

[25] Perhaps the appellant's trial counsel endeavoured to make too much of the admission that it was not known whether the 15 year old boy who performed oral sex on the complainant had or has HSV-1, but the appellant's trial counsel did manage to convey otherwise in his address to the jury that the evidence was neutral.

[26] It was the submissions made by both the prosecutor and the appellant's trial counsel to the effect that the HSV-1 evidence was neutral or did not prove anything that was then reinforced in the trial judge's summing up of the evidence about the virus by the suggestion that the jury may think "that evidence does not really help you one way or the other". Although the trial judge finished that part of her summing up with the comment that the jury "just take that evidence into account along with all of the other evidence", that was consistent with her explanation to the jury of their function in relation to the evidence.

[27] For the very reason the HSV-1 evidence should not have been admitted, as it was not probative of any fact in issue in the trial, it was patent from the content of the evidence itself, that it could not assist the prosecution in discharging the onus of proving the appellant committed each of the offences, when almost 80 per cent of the male population would test positive to HSV-1 and it was not known whether the 15 year old boy with whom the complainant had a sexual encounter had or has HSV-1. As Bond J explained at [102], in the circumstances of the conduct of this trial, it was not evidence that could have had any bearing on the jury's assessment of the reliability and credibility of the complainant's evidence.

[28] From the lack of any direction from the trial judge as to how the HSV-1 evidence could be used by them (other than the observation that the evidence did not help them one way or the other) and the lack of utility of the evidence itself, the fact that the evidence was left to the jury does not suggest, in my view, there was a risk the jury would use the evidence in a way that was adverse to the appellant.

[29] There was an error made in the HSV-1 evidence being adduced at the trial, but I agree with Bond J's assessment of the admissible evidence at the trial and conclusion that there was not a substantial miscarriage of justice to preclude the application of the proviso.

[30] **BOND J:** On 8 March 2019 the appellant was convicted of 3 counts of indecent dealing with a child under 16 years and 2 counts of rape.

[31] He was sentenced to 8 years imprisonment for the count of rape which had involved penile penetration and 4 years imprisonment for the other count of rape, which had involved digital penetration. He was sentenced to 18 months imprisonment on each of the indecent treatment counts. All sentences were to be served concurrently. A parole eligibility date was set at 9 March 2023, after the appellant would have served half of his sentence.

[32] The notice of appeal in this proceeding identified as the sole ground of appeal that the verdict of the jury was unreasonable, or could not be supported having regard to the evidence. An application for leave to appeal against sentence was advanced on the ground that the sentence was manifestly excessive.

[33] At the commencement of oral argument, the application for leave to appeal against sentence was abandoned. The sole ground of appeal was also abandoned and the

appellant was given leave to substitute two new grounds of appeal. Ground 1 was that the conduct of the appellant's trial counsel gave rise to a miscarriage of justice and deprived the appellant of a fair chance of acquittal. Ground 2 was that, in all of the circumstances, the admission of medical evidence that both the appellant and the complainant had tested positive for presence of the herpes simplex virus type 1 (**HSV-1**) created an unfair prejudice which gave rise to a miscarriage of justice.

[34] For reasons which follow, neither ground of appeal should be upheld and the appeal should be dismissed.

The relevant evidence

Evidence of the complainant

[35] The complainant was MR's daughter, DR.

[36] The jury heard the recording of the complainant's interview with police on Monday 30 January 2017. She was 12 at the time of the interview. The salient parts of the interview were:

(a) She told police that "someone's just been real sexual to me" and identified the appellant as the person concerned.

(b) She described events which happened in the appellant's bedroom at the appellant's house on the previous evening, Sunday 29 January 2017.

(c) She was in the appellant's room on his bed watching the movie "American Sniper" on TV. She became tired before the movie finished and he turned off the TV.

(d) While she lay on the bed the appellant commenced touching her.

(e) The appellant began rubbing and tickling her back and legs before he had her roll on her back. He touched her genitals [count 1 indecent dealing] and had her touch his erect penis after it was pressed against her [count 2 indecent dealing].

(f) He then put his finger in her vagina [count 3 rape].

(g) The appellant then pulled down her shorts and pushed his penis inside her vagina causing her pain [count 4 rape]. He then stopped. The complainant said whilst this was happening she was crying and upset.

(h) He then started rubbing his fingers on the outside of the complainant's vagina [count 5 indecent dealing], leading the complainant to think "oh no, he's gonna do it again".

(i) He then stopped and asked her to promise not to tell anyone and then went outside, telling her he was going to have a smoke.

(j) After the appellant left, she stood up and went outside the bedroom to see whether her mother was awake but she was not. She heard the appellant coming back and ran back into the bedroom and lay back in the position she had been.

(k) When the appellant returned, he lay back down on the bed and, after a short time, the complainant left the bedroom and went outside laying down head to toe with her sister, who was sleeping on a couch in the lounge room.

(l) The next morning, when the complainant and her mother were shopping, she told her mother what had happened. Her mother then took her to the police.

[37] The jury also heard the complainant's pre-recorded evidence. She was 14 at the time that her evidence was pre-recorded.

[38] In her evidence in chief, she said she told the police the truth during the interview. She was asked whether she had ever had contact with anyone other than the appellant that involved them touching her vagina, and she said she had. As to that contact:

(a) She said that the person involved was a 15 year old boy who had been her boyfriend. He had touched her vagina with his tongue.

(b) She had not seen him for a while and went to see him for "just that one night". She was not asked to identify when "that one night" was.

(c) She was asked to think of the night when the events concerning the appellant had taken place and whether during the period of 3 or 4 days before that night anything was inserted into her vagina. She answered "no".

[39] It is appropriate to make some observations on the circumstances which led to that evidence of the complainant's previous sexual activities being adduced:

(a) The effect of s 4 of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) was that such evidence could not be adduced without leave of the Court.

(b) Having discussed the question with counsel for the defendant out of court, counsel for the Crown sought and obtained leave to introduce that evidence without objection from the defendant.

(c) Counsel identified two justifications for so doing. First, it would address whether there were innocent explanations for the physical condition of the complainant's genitalia which had been noted during her medical examination after the alleged offending. Second, it would address whether there was any other explanation for the fact that the complainant and the appellant both had HSV-1.

[40] The truth of the complainant's evidence concerning the 15 year old boy was not challenged by counsel for the defendant. The complainant was not asked when the contact she described had taken place. Nor was she asked whether the 15 year old boy had touched her vagina in any way other than with his tongue. Although, as will appear, she was eventually asked whether she was sure of her answer recorded at [38](c) above, it was not suggested to her that the answer was false.

[41] The first topic of cross-examination concerned events which occurred on the early morning of the Sunday on which she said the appellant had assaulted her. The complainant agreed that her mother came to collect her from the house where she was staying in Caloundra. Her "great-nanna" owned the house and she had been staying there for about 6 months. Dylan, a 25 or 26 year old male, and Cory, an 18 year old male, also stayed at that house. She regarded Dylan as "like" her foster

uncle. The complainant said that her mother had come to get her as her mother was having an argument with Dylan because her mother used to date Dylan. The important passage was as follows:

> "And when she arrived, you saw your mother arrive at around 10 o'clock; yes? What time was it - - -?---No, it was more like - - -
>
> What time was it?--- - - - 4 o'clock in the morning.
>
> Was it. About 4 o'clock in the morning. Okay?---Yeah, it started getting daylight.
>
> And she observed you in bed with Dylan; correct?---Yes.
>
> And then before, you were telling me that she started then smashing up the windows and things in the house with, like, a golf club or something like that; is that correct?---Yes.
>
> Yeah. Do you remember what she said to you, your mother, when she saw you?---Well, yeah, she was asking me if we did anything. And she had a sit down and talked to me, and I looked her in the eye and said we never did anything.
>
> Okay?---Because he's my [indistinct] uncle and then – we don't do that.
>
> Did you use those words, or do you remember her exact words?---Yes, it was actually my step-mum and her that sat me down and said, "Look at me [DR], and tell me the truth. Did you and Dylan do anything?", and I said, "No".
>
> Okay. Okay. Now, the prosecutor a few moments ago asked you a question about whether or not you'd had anything within the last three or four days of this incident inserted into your vagina, and you said, no; correct?---Yes.
>
> Okay. Now, are you absolutely sure about that?---Yes.
>
> Yes. Okay. And then after that incident, your mother then decided you – to take you back with her, didn't she?---Yes.
>
> And you went then back then on the Sunday then to stay at [the appellant's] place; correct?---Yes."

[42] The complainant was then cross-examined about the details of what occurred at the appellant's place on that Sunday evening.

[43] She said that she, her mother, and her three siblings on her mother's side were present at the appellant's house. So too were the appellant's son and his friend, who she knew as Jay. She wasn't sure whether the appellant's daughter was present.

[44] The house had three bedrooms. Her mother was sleeping in the lounge room on a fold out bed. The complainant said that she was in the appellant's bedroom lying on the bed watching TV with the lights on. Whilst she was doing that, the appellant came in and was turning off the lights at about the time that everyone was going to bed. She was trying to fall asleep. The events she had earlier described then occurred.

[45] She said she didn't just try to get up and leave the room because she didn't know what to do. She didn't shout out or scream out because she was too afraid. She was scared and shocked. She was crying quietly.

[46] She was asked about what happened when the appellant left the bedroom for a smoke. She said he went out at the front of his house. She left the bedroom and went into the lounge room to see if her mother was awake because she wanted to go to her and tell her what had happened, but she found that her mother was asleep. When she heard the appellant coming through the door she got afraid and ran back and jumped in the bed.

[47] She said that when he came back in she "snuck out" and went to the lounge room and lay down head to toe with her sister who was laying on the couch. She said that happened as soon as the appellant came back in. (I observe that this answer established a minor inconsistency with the police interview evidence, which suggested that some further uncharged offending had happened after the appellant came back in and before the complainant left the room.[12]) She didn't say anything to her sister because her sister was only little.

[48] She acknowledged that she didn't tell her mother what had happened when she woke up on Monday morning. But she told her that afternoon.

[49] She acknowledged that prior to the events happening she had been seeing a counsellor because she had family dramas going on at home. She was in a "depression mood" and she had started cutting herself. She said that she had been cutting herself since she was about 8 and got over it when she was 13. She acknowledged that the event happened when she was 12 and she was still feeling depressed at that time.

[50] After the complainant's pre-recorded evidence was heard, the jury were told that the Crown and the defendant formally admitted that on Sunday 29 January 2017 the movie "American Sniper" played on Channel 9 from 9.00 pm.

Evidence of the complainant's younger sister

[51] Next came the evidence of the complainant's younger sister, JHR. She was 11 at the time of the incident. The police had not taken a statement from her at that time. By the time of the appellant's trial, JHR was 13. During the trial, JHR approached counsel for the Crown and revealed that she could give relevant evidence. A recorded police interview was done and then JHR's pre-recorded evidence was taken.

[52] The jury heard the recording of JHR's interview with police, which had been conducted on 5 March 2019. The salient parts of what JHR told police during that interview were:

(a) JHR said she was lying on the couch in the living room at the appellant's house. Her mother was on the floor on a "mattress thing".

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12 In the police interview evidence, the complainant had said that after she ran back in and the appellant returned to the bedroom and laid down, he started "touching her everywhere" and rubbing his penis on her leg and having the complainant touch his penis: see appeal record book p 363 lines 18 to 59.

(b) The complainant had gone into the appellant's room when everyone was going to bed.

(c) JHR said:

> "And I just heard [the complainant] like sulking, and she walked out, and she just came and laid with me and I was wondering why she was crying and like she was kinda like shaking, and so like, and I didn't really wanna' ask her so I just hugged her and fell asleep."

(d) She clarified that by "sulking" she meant that the complainant was crying quietly: "just like … how someone would sound if they were like, crying but trying to be quiet."

(e) She said that had occurred at about 9.00 pm but clarified that she did not really know what time it was when the complainant came out of the room and had said 9.00 pm because that was her usual bedtime.

[53] The jury then heard JHR's pre-recorded evidence. In her evidence in chief, she said that everything she had told the police in the recorded interview was true. She clarified that when she said that she had heard the complainant crying, it was as the complainant was coming around the corner from the hallway.

[54] JHR was cross-examined on her evidence, but no challenge was advanced to the truth of the evidence I have summarised in the previous two paragraphs. She did say that everyone had decided to go to bed at about 8.30 pm. She confirmed that she had seen that her mother was asleep. She said that the complainant had gone to the appellant's bedroom at about the time everyone went to bed and that when she came out crying, it was probably half an hour to an hour later.

Medical evidence

[55] The next witness was from Dr Waugh, a specialist paediatrician.

[56] Before he was called the jury was informed that the Crown and the defendant formally admitted these three facts:

(a) A swab was taken of the appellant's urethra on 8 February 2017. The result for HSV-1 was negative.

(b) The appellant's blood was tested on 10 February 2017. The result for HSV-1 was positive.

(c) It was not known whether the male child who performed oral sex on the complainant had or has HSV-1.

[57] In evidence in chief, Dr Waugh covered the testing for HSV-1 and also the physical examinations of the complainant.

[58] As to HSV-1, Dr Waugh gave the following evidence in chief:

(a) HSV-1 causes cold sores but is also commonly found as a genital infection.

(b) Once someone is infected with HSV-1, the virus remains in the body but the person becomes immune to it. The virus may come back at various times

during the person's life and be "shed" for a few days at a time, during which time the person is infective.

(c) People become infected with HSV-1 when they are exposed to an active lesion or shedding onto broken skin. HSV-1 can be spread to the genitals by oral-to-genital spread and genital-to-genital spread from someone who is "shedding" the virus.

(d) To detect if someone has the virus, it is necessary to conduct a swab. That tests for the presence of the virus itself. A vaginal swab taken from the complainant had tested positive for the presence of HSV-1.

(e) One can also conduct a blood test, but that test identifies whether you have antibodies to the virus so that you are immune to it. A positive blood test reveals that you have had the infection at some stage in the past and that your body has produced antibodies to it.

(f) In Australia by very early adult life, about 80% of women, and a similar but slightly smaller percentage of men, show that they have been exposed to and are immune to the virus.

(g) All that one could conclude from the fact that it was known that –

(i) the appellant's 8 February 2017 urethra swab test for HSV-1 was negative; and

(ii) the appellant's 10 February 2017 blood test for HSV-1 was positive;

was that the appellant had at some point in the past been infected with HSV-1 and was not shedding at the time of the swab. It was not possible to say when he had acquired the virus. It was not possible to say whether or not he was shedding the virus on 29 January 2017, because most people will usually shed the virus for less than a period of 5 days.

(h) All that one could conclude from the fact that the complainant's vaginal swab for HSV-1 was positive was that the virus was present at the time of the swab. It was not possible to say when she had acquired the virus or from whom she had acquired it.

[59] Dr Waugh was cross-examined on the subject of HSV-1. He confirmed that he was unable to state how long the complainant had had HSV-1 but that as the virus was found in her genitals, transmission must have occurred through contact with her genitals rather than her mouth. He confirmed that he could not say from whom she contracted the virus.

[60] As to the physical examination of the complainant, Dr Waugh gave the following evidence in chief:

(a) The complainant was the subject of physical vaginal examinations on 30 January 2017 and 9 February 2017.

(b) He had examined videos of those two physical vaginal examinations.

(c) These examinations revealed initial redness to her genitals consistent with blunt force trauma and a traumatic break of her hymen. He could not propose any other cause of the appearance other than such trauma.

(d) The redness was unlikely to have been caused by a single finger inserted once and was more consistent with multiple fingers having been inserted, or possibly a single finger inserted multiple times.

(e) The injuries were consistent with penetration by a penis, and that penetration having been effected in "a matter of days" preceding the first examination.

(f) The redness was gone by the time of the second examination on 9 February 2017.

[61] Under cross-examination the doctor conceded that he was unable to opine whether the injuries were as a result of consensual or non-consensual penetration.

Evidence of the complainant's mother

[62] The final witness called by the Crown was MR, the complainant's mother. The relevant aspects of her evidence in chief were:

(a) She had dated the appellant's son off and on until about 2 years prior to the incident but had remained good friends with the appellant's family notwithstanding that break up.

(b) On the weekend in question she had taken all her children except the complainant to the appellant's house on the Friday. The complainant was staying at a friend's house and at her uncle's house.

(c) On the Sunday evening people started to go to bed at around 9.00 pm or 10.00 pm.

(d) She was sleeping on a stretcher in the lounge room. The complainant's sister JHR was on one of the couches, next to her. The two other children were either on one of the other couches or one of the bedrooms. The complainant was laying in the appellant's bedroom watching a movie at around 9.00 pm.

(e) She said that she did not go to sleep straight away but was on her phone on social media. She was on the phone quite late, until the early morning. However she couldn't say whether she was awake the whole time or would drift off sometimes.

(f) She did not recall seeing the complainant again until the next morning. During the afternoon when she and the complainant were at a shopping centre, the complainant started crying and said that "[the appellant] had touched me". She took her to the police and to the doctor that day.

[63] The relevant parts of MR's cross-examination were:

(a) Counsel elicited from her that she had had a conversation with the appellant on the weekend of the incident in which she told the appellant that the complainant had lied to her again and that she had to go to collect the complainant from the south side of Brisbane because the complainant was supposed to be staying at a friend's house but was actually staying at a boy's house.

(b) MR had collected the complainant from the boy's mother's house and took her to her own house. She thought that the complainant's "great-nan" had then collected the complainant and had taken her to the great-nan's house.

This occurred on the day before the incident. She had a discussion with the appellant about that and told him that she thought that the complainant could have had sex with the boy that night, but that wasn't the case. She had confronted both the complainant and the boy when she picked the complainant up.

(c) MR was then cross-examined about what occurred on the early hours of the day of the incident. She said that she had gone over to the great-nan's house in the early hours of the morning, but not to pick the complainant up. Rather she went over because she and Dylan were seeing each other and she was upset about him "seeing his ex". She was expecting that the complainant would be at the great-nan's other house but the complainant had somehow ended up at the house at which Dylan was staying (also apparently owned by the great-nan). MR said that she went over to where Dylan was staying, expecting to find Dylan in bed with his ex and found Dylan in the same bed as the complainant. They were both clothed and were both on top of the blanket. MR conceded that after she found the complainant in bed with Dylan she started smashing up the place with a bat or a golf stick or something.

(d) MR said that everyone went to bed that Sunday night at around 9.00 pm. She was on the stretcher near the couch. She didn't remember whether the lights were on or off. But she said she lay there on the mobile phone texting Dylan and continued to do that for some hours. As far as she could remember she said she didn't fall asleep. She did recall that the complainant came from the bedroom to the lounge room during the evening and she asked whether the complainant wanted to sleep on the stretcher and she would sleep on the couch, but the complainant said she was fine. This occurred not long after the complainant had laid down.

The defendant's case

[64] The defendant neither gave nor called evidence.

Ground 1: Trial counsel's conduct gave rise to a miscarriage of justice

The impugned aspects of trial counsel's conduct

[65] The appellant sought and obtained leave from this Court to rely on new evidence[13] in the form of his own affidavit and an affidavit from one JD, being a male friend of the appellant's son who had been present at the appellant's home on the evening the complainant said the offending took place. JD had provided a statement to the appellant's trial lawyers and had been willing and available to give evidence at the trial, but the appellant's trial counsel had elected not to call him.

[66] Then, during oral argument,[14] counsel for the appellant identified the following three aspects of the conduct of the appellant's trial counsel as the aspects which the appellant contended justified appellate intervention:

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13 The evidence was "new" but not "fresh", using the distinction made in *R v Spina* [2012] QCA 179 at [32].

14 Transcript p 23 line 28 to p 24 line 11. Some other matters had been referred to in written submissions, but I have treated counsel's identification as confining the appellant's case.

(a) the failure to bring an application for either the 15 year old boy or Dylan to be called so that they would be available for cross-examination;

(b) the failure by counsel either to cross-examine on the contents of JD's statement or to adduce evidence from JD; and

(c) the failure to object to the admissibility of the evidence that both the appellant and the complainant had tested positively for HSV-1.

[67] I will consider each of the impugned aspects of trial counsel's conduct. But before doing so it is appropriate to identify the legal principles by reference to which this ground of appeal should be analysed.

Relevant legal principles

[68] The long-standing tradition of the criminal law is that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed: *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J. Consistently with that tradition, the High Court has said that any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision:[15] see *Kalbasi v Western Australia* (2018) 264 CLR 62 at [12].

[69] Particular considerations apply where the defect or irregularity in the trial which is said to give rise to a miscarriage of justice is concerned with challenges to forensic judgments that are within counsel's remit.[16]

[70] The High Court has held that an objective test is to be applied to the determination of challenges of that kind, taking into account the wide discretion conferred on counsel under our adversarial system of criminal justice: see *Craig v The Queen* (2018) 264 CLR 202 at [23], citing with approval these observations by Gleeson CJ in *TKWJ v The Queen* (2002) 212 CLR 124 at [8]:

> "On the face of it, [the decision of trial counsel not to call witnesses as to the appellant's character] was an understandable decision. It was certainly not self-evidently unreasonable, or inexplicable. It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts. It is only in exceptional cases that the adversarial system of justice will either require or permit counsel to explain decisions of that kind. A full explanation will normally involve revelation of matters that are confidential. A partial explanation will often be

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15 In Queensland, that is expressed in s 668E(1) of the *Criminal Code*: "The Court on any such appeal against conviction shall allow the appeal if it is of opinion … that on any ground whatsoever there was a miscarriage of justice …".

16 Different considerations again apply where the alleged category of miscarriage of justice involves a forensic choice reserved to the defendant personally, e.g. where the appellant seeks to establish is that he was deprived of the right to a fair trial because the exercise of his right to give evidence in his defence was effectively foreclosed by receipt of incorrect advice: see *Craig v The Queen* (2018) 264 CLR 202 at [33]–[34].

> misleading. The appellate court will rarely be in as good a position as counsel to assess the relevant considerations. And, most importantly, the adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives."

[71] In *Craig v The Queen* the High Court went on to say that a necessary consequence of the wide discretion conferred on counsel is that the accused will generally be bound by counsel's forensic choices and it is only where the appellate court is persuaded that no rational forensic justification can objectively be discerned for a challenged decision that consideration will turn to whether its making constituted a miscarriage of justice.[17]

[72] In such cases, the question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question "deprived the accused of a chance of acquittal that was fairly open": see *TKWJ v The Queen* per Gaudron J (with whom Gummow J agreed) at [26], cited with approval in *R v DBB* [2013] 1 Qd R 188 at [33]. Her Honour also noted at [26] that "[t]he word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open."

[73] That said, it is impossible and undesirable to attempt to define with precision when such cases will amount to a miscarriage of justice: *R v Birks* (1990) 19 NSWLR 677 at 685 per Gleeson CJ (with whom the other members of the Court agreed) and *TKWJ v The Queen* per Gleeson CJ at [16].[18] Thus the fact that counsel's conduct is objectively explicable on the basis that it resulted or could have resulted in a forensic advantage will not necessarily preclude a court from holding that, nevertheless, there was a miscarriage of justice. It may be that, in the circumstances, the forensic advantage was so slight in comparison with the importance to be attached to the defect or irregularity in question as nevertheless to warrant appellate intervention: *TKWJ v The Queen* per Gaudron J at [28], both passages being cited with approval in *R v DBB* at [33] per Muir JA, with whom White JA and Mullins J agreed.

Analysis of counsel's conduct in relation to the 15 year old boy and Dylan

[74] The defendant's case, as expressed to the jury during the closing address, was that the incident did not happen. The complainant had been untruthful. He made these points:

(a) There was no DNA evidence implicating the defendant.

(b) He invited the jury to consider that it did not make sense for the defendant to have been so brazen as to commit the offence in such a small house with so many people present in the house.

(c) He submitted that the exact time of the offences was a little unclear. He pointed to the discrepancies between the timing given by the appellant and that given by her younger sister.

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17 *Craig v The Queen* (2018) 264 CLR 202 at [23].

18 See also *R v DBB* [2013] 1 Qd R 188 at [31] per Muir JA, with whom White JA and Mullins J agreed and *R v Brown* [2020] QCA 33 at [19] per Sofronoff P, with whom Henry and Davis JJ agreed.

(d) He suggested that another discrepancy was that the mother did not give evidence of seeing her child crying. And he said that was a "major problem" in terms of considering whether or not to accept the complainant's evidence because the mother said that she was awake. On the other hand the complainant's evidence was that after she had been assaulted she went outside only to find her mother asleep.

(e) He suggested that it was not credible that the complainant did not try to wake her mother and that she would rush back to the bedroom when the appellant returned from having a smoke. He suggested that the complainant's account of her movements did not make sense.

(f) He suggested that the jury would have concerns about the complainant's reliability because of her concession that she had been self-harming and had been depressed. He noted that her mother had concluded that she had been lied to by the complainant, in particular because the complainant went to stay at the 15 year old boy's house behind her mother's back. He referred to the evidence that the mother had thought the two might have had sex and had confronted them and obtained a denial.

(g) He invited the jury to consider whether the injuries identified by the medical evidence might have been caused by someone other than the appellant. He referred to the oral sexual activity that the complainant said she had with the 15 year old boy. He also referred to the Dylan incident, in particular that in the early hours of the morning the complainant had been in the same bed as Dylan. He asked the jury to "make of that evidence what you will".

(h) He submitted that the HSV-1 evidence did not prove anything. The virus is common and could be transmitted even by having oral sex, pointing out that the complainant had given evidence of that having happened with her boyfriend.

[75] The defendant's case theory at trial effectively rested on two propositions: first that the complainant was a depressed and troubled young girl who had, at the least, a troubled relationship with her mother and who could not be regarded as a reliable narrator; and second, innocent explanations might exist for the physical condition of the complainant's genitals as identified by the medical evidence. The second proposition required the jury not to accept the complainant's evidence that she was absolutely sure that during the period of 3 or 4 days before that night nothing was inserted into her vagina. It invited the jury to conclude that it had not been proved beyond reasonable doubt that the appellant had offended as alleged, because the possibility existed that either Dylan or the 15 year old boy was the true source of the trauma to the complainant's genitals identified by the medical evidence.

[76] I am not persuaded that no rational forensic justification can objectively be discerned for the decision not to seek to have either the 15 year old boy or Dylan called. Theoretically, either of them might have given evidence – inconsistent with that of the complainant – that they had had sexual contact with the complainant of a nature which might have explained the medical evidence. But they also might have given evidence consistent with the complainant's evidence, thereby adding greatly to the weight of that evidence and diminishing the chances that the jury might engage in the course of reasoning in which the defendant's counsel had invited them to engage. Given that there was no evidence which suggested that trial counsel had

any reason to know what they would say, it was entirely rational for him not to take the risk.

[77] On this aspect of the appellant's case, I conclude that the appellant should be regarded as bound by counsel's forensic choices in relation to the calling of the 15 year old boy or Dylan. No occasion arises for appellate consideration to turn to whether making those choices constituted a miscarriage of justice.

Analysis of counsel's conduct in relation to JD's statement

[78] JD's affidavit relied on in this court was to the following effect:

(a) He recalled the incidents of 29 January 2018. [I observe that he deposed to the wrong date because the incident occurred the previous year.]

(b) He lived at the appellant's house and had woken around 1.00 pm on that day, having stayed up late drinking the night before.

(c) After eating dinner between around 6.00 pm to 7.00 pm, he was feeling very tired and a bit hungover and went to bed shortly after 7.00 pm.

(d) He first woke up at around 10.00 pm to go the kitchen to get a drink of water. He noticed that the complainant was in the appellant's bedroom watching a movie. He noticed that MR was on a stretcher in the lounge room, awake and playing on her phone.

(e) He went back to his room and went back to the kitchen to get another drink at around 11.00 pm or midnight. He could hear that the movie was still going. He noticed that MR was now asleep in the lounge room. The complainant walked into the kitchen and they exchanged greetings. She got some milk from the fridge. She seemed perfectly normal and did not appear distressed and walked back into the appellant's room.

(f) After about another half hour, he got up to go to the toilet. The movie was not playing and the appellant's room was dark. He did not hear anything from the room when he walked past the open door to and from the toilet.

(g) After about another half hour, he was in bed trying to get to sleep and noted the complainant walking past his door down the hallway. He did not hear any sounds from the room. He did not recall seeing her come back and fell asleep shortly after that.

(h) He said that all in all he was awake from around 10.00 pm to about 3.00 am the next morning.

[79] JD's evidence would have been inconsistent with the precise timelines adduced from the complainant and from her younger sister. But it was not otherwise inconsistent with the complainant's evidence that the offending took place after the movie was turned off and the bedroom was in darkness. Nor was it inconsistent with the complainant's evidence that she left the bedroom after the offending. Nor, because he did not exclude the possibility that the complainant may have come and gone without his noticing, was it inconsistent with the complainant's evidence that she left the bedroom, returned, and then left again to go to sleep with her younger sister.

[80] It is true that the complainant did not say that before the TV was turned off she had left the room to get a glass of milk and had encountered JD in the kitchen. But she was not asked a question which would have elicited that answer, if it had happened. Unsurprisingly the focus of the police interview was on what happened once the TV had been turned off and the offending commenced. And if she had gone to the kitchen before that happened, then on her evidence she would not have been distressed.

[81] Thus the evidence of JD would not have advanced the defendant's case much at all. However, importantly, if JD had been called, it would have damaged the ability of the defendant's counsel to argue that there was a "major problem" in terms of considering whether or not to accept the complainant's evidence because the mother said that she was awake. That proposition would have been inconsistent with the evidence of the complainant, her sister JHR and, if JD was called, also JD. Moreover, trial counsel would have lost the forensic advantage of the right to address last. In those circumstances I am not persuaded that no rational forensic justification can objectively be discerned for the decision not to call JD and I reach the same conclusion in relation to this aspect of counsel's conduct that I reached in relation to counsel's forensic choices in relation to the calling of the 15 year old boy or Dylan.

[82] I should say that I cannot discern any rational forensic justification for defence counsel not asking the complainant about whether, before the TV was turned off, she had left the bedroom to go to the kitchen. There was no risk to the defendant's case in asking such a question and there was a chance of a real upside if asking the question elicited a version of events which was in fact inconsistent with evidence which counsel would have known could be elicited from JD. But even though I cannot see any rational forensic justification for not advancing such a line of cross-examination, there is no basis for reaching a conclusion that the failure to ask that question deprived the accused of a chance of acquittal that was fairly open.

Analysis of counsel's conduct in relation to the HSV-1 evidence

[83] I have earlier described the circumstances which led to the complainant being asked some questions about her sexual history and how the justification for so doing was connected at least in part to the anticipated HSV-1 evidence: see [38] to [41] above.

[84] During the trial in discussion with the trial judge, counsel for the Crown submitted that the HSV-1 evidence was neutral in the sense that it was circumstantial evidence which neither inculpated nor exculpated the defendant. She conceded that there was evidence that the complainant had one other sexual experience which could explain her having the virus as well (namely the oral-to-genital contact from the 15 year old boy). But she submitted that the evidence was a factor that they could take into account.

[85] In her address to the jury, and consistently with that discussion, counsel for the Crown said:

> "… I'll deal first with this herpes thing. The herpes thing is not the lynchpin in this case. It's very neutral, really. We know from Dr Waugh's evidence that we can't say whether the defendant gave [the complainant] the virus or even whether [the complainant] gave

> the defendant the virus or even if they both independently had the virus of each other.
>
> We also know from [the complainant] that she'd had one instance of sexual contact before and that involved her boyfriend performing oral sex on her. That's the one sexual instance that she spoke about or the only other sexual instance that she's been involved in. And you might well think that given the evidence that we heard about herpes simplex virus type 1 generally being associated with oral herpes, you might well think that she caught it from her boyfriend's mouth rather than the defendant's penis.
>
> There are plenty of explanations here. It's almost like a chicken and egg argument, but it's still a factor for you to take into account because the point is that both of them do have the same virus. It's a sexually transmissible virus, and the allegation in here is that the defendant forced her to engage in sexual contact and conduct, and so it's a matter for you with your life experience what you make of that. But I don't suggest that you would really put any weight on it."

[86] I have already mentioned how the defendant's trial counsel dealt with the issue.

[87] In her summing up, the trial judge put it this way:

> "I am going to deal first with the evidence about herpes virus. Before referring to his evidence on that issue, I will remind you of the admissions in exhibit 7. They are that the defendant had a swab taken of his urethra on 8 February 2017 which returned a negative result for the herpes virus, but he then had a blood test two days later on 10 February 2017 which returned a positive result for the herpes virus. There is also an admission that it is not known whether the male child who performed oral sex on [the complainant] had or has herpes virus. That is, herpes virus type 1.
>
> Now, what was Dr Waugh's evidence about that? He gave evidence that [the complainant] also tested positive for herpes virus 1 on a swab taken from her vagina. So that is the same herpes virus that the defendant returned a positive blood test for. He said that that virus, herpes virus 1, causes common cold sores around the mouth. It can also cause genital infections. He said the virus is also commonly found as a genital infection. In that case, it would normally be spread oral to genital or genital to genital. He did not see any evidence of herpes on the complainant's physical examination. He said you can have that herpes virus without knowing that you have it; that is, you can have no symptoms.
>
> This is probably the most important part of his evidence, and there are three parts of it. First, it is not possible to say with any certainty when [the complainant] contracted the virus. Second, he said it is not possible to say when [the appellant] contracted the virus. Third, he said it is not possible to say who [the complainant] contracted the virus from. He said for a child her age, it would be unlikely for her to have had a genital herpes virus infection for a long period

> beforehand. He said it does require genital contact to acquire it, but he does not know when that happened.
>
> So where does that leave you? You might think that evidence does not really help you one way or the other. You are left with evidence that both the defendant and the complainant child both tested positive for the same herpes virus, but on the state of the evidence, you cannot know when she contracted it, you cannot know when the defendant contracted it and you cannot know who she contracted it from. You just take that evidence into account along with all of the other evidence."

[88] The appellant submits that the conduct of the appellant's trial counsel in failing to object to the HSV-1 evidence gave rise to a miscarriage of justice and deprived the appellant of a fair chance of acquittal.

[89] There were two bases on which objection could have been advanced. The first was that the evidence was not admissible at all because it was not probative of any relevant fact. The second was that, even if the evidence was admissible, the trial judge should have exercised the discretion given to her by s 130 of the *Evidence Act* 1977 (Qld) to exclude otherwise admissible evidence on the ground that she was satisfied that it would be unfair to the accused to admit the evidence.

[90] Evidence is relevant if it could rationally affect, directly or indirectly, the probability of the existence of a fact or facts in issue.[19] The fact in issue to which the medical evidence might have been relevant was whether the appellant and the complainant had had intimate genital-to-genital contact. But it was plain that the evidence was not probative of that fact whether directly or indirectly: see at [58] above. That much was implicitly recognised by counsel for the Crown and for the defendant in their respective closing addresses and also by the trial judge in her summing up. In my view the evidence was not admissible because it was irrelevant. It is unnecessary to consider the further basis on which objection could have been pressed.

[91] However the conclusion that the evidence was not admissible does not make good this ground of appeal. Counsel may well decide not to object to evidence which is not admissible but which it is known the Crown proposes to adduce, if there is a forensic advantage in so doing. In this case, objectively assessed, there was an obvious forensic advantage. Unless this evidence was going to come in, then the evidence of the sexual contact with the 15 year old boy would not have been elicited and, as the respondent contended in this Court, that would have taken with it a piece of the defendant's case theory.

[92] In the circumstances, I conclude that the appellant should be regarded as bound by counsel's forensic choices in relation to the HSV-1 evidence. No occasion arises

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[19] *R v Davari* [2016] QCA 222 at [44] per Gotterson JA, with whom Morrison and Philippides JA agreed, citing with approval Gleeson CJ in *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at [2]. Gleeson CJ there observed that that definition of relevance was not materially different from that given by Sir James Stephen in his *Digest of the Law of Evidence*, 5th ed (1887) Art 1 at 2 adopted by McHugh J in *Palmer v The Queen* (1998) 193 CLR 1 at [55], namely "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or nonexistence of the other."

for appellate consideration to turn to whether making those choices constituted a miscarriage of justice. I should observe that even if I were wrong in this regard, I would have concluded that in light of:

(a) the unanimity in both closing addresses as to the insignificance of the evidence; and

(b) the terms of the trial judge's directions to the jury in relation to this evidence;

there was no basis for reaching a conclusion that the failure to object to the evidence deprived the accused of a chance of acquittal that was fairly open.

Conclusion on ground 1

[93] I have explained why I have formed the view that, considered separately, none of the impugned aspects of counsel's conduct justifies appellate intervention. For completeness, I should record there is no reason to reach any different conclusion if one considers them together. Accordingly, ground 1 of the appeal fails.

Ground 2: Unfair prejudice and miscarriage of justice because of the admission of the medical evidence concerning the presence of HSV-1

[94] My analysis of ground 1 of the appeal permits me to conclude that the HSV-1 evidence was not admissible at all because it was not probative of any relevant fact. Even though the evidence was adduced by agreement and without objection, the primary judge should have directed the jury that they were obliged to disregard the evidence entirely. The summing up did not go that far. On the basis of the law as explained at [68] above, a miscarriage of justice within the third limb of the common form provision is established.

[95] Counsel for the respondent invited this Court to apply the proviso,[20] if we were persuaded that error had occurred in the sense described at [68] above.

[96] If a miscarriage of justice within the third limb of the common form provision is established, the appellate court is apparently commanded to allow the appeal.[21] The apparent tension between (a) the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, and (b) the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred, is resolved by reference to history and legislative purpose: see *Kalbasi v Western Australia* at [12]. The determination of whether, notwithstanding the error, there has been no substantial miscarriage of justice is committed to the appellate court: see *Kalbasi v Western Australia* at [12].

[97] As to the test to be applied by the appellate court when making that determination:

(a) No single universally applicable description of what constitutes "no substantial miscarriage of justice" can be given: see *Weiss v The Queen* (2005) 224 CLR 300 at [44].

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20 In Queensland, the proviso is expressed in s 668E(1A) of the *Criminal Code* "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

21 Section 668E(1) of the *Criminal Code* provides "**The Court** on any such appeal against conviction **shall allow the appeal if it is of opinion** … that on any ground whatsoever **there was a miscarriage of justice** …" (emphasis added).

(b) The appellate court's assessment does not turn on its estimate of the verdict that a hypothetical jury, whether "this jury" or a "reasonable jury", might have returned had the error not occurred. The concepts of a "lost chance of acquittal" and its converse the "inevitability of conviction" do not serve as tests because the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had: *Kalbasi v Western Australia* at [12].

(c) That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty: see *Weiss v The Queen* at [41] and *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [27].

(d) It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty: *Weiss v The Queen* at [44]. To put that negative condition another way, the conviction of a person whose guilt has not been proved, beyond reasonable doubt, on admissible evidence, will always be a substantial miscarriage of justice: see *Kalbasi v Western Australia* at [13].

(e) However, the negative condition stipulated in *Weiss* must be regarded as a necessary but not sufficient condition of the engagement of the proviso: *AK v Western Australia* (2008) 232 CLR 438 at [53]; *Baiada Poultry Pty Ltd v The Queen* at [29]. There will be wrong decisions of law or failures of trial process that will occasion a substantial miscarriage of justice notwithstanding the cogency of proof of the accused's guilt: cf *Kalbasi v Western Australia* at [16]. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind: see *Weiss v The Queen* at [45] referred to with approval in *Kalbasi v Western Australia* at [16].

(f) The appellate court must consider the nature and effect of the error in every case: *Kalbasi v Western Australia* at [15]. It is not possible to describe the metes and bounds of those wrong decisions of law or failures of trial process that will occasion a substantial miscarriage of justice notwithstanding the cogency of proof of the accused's guilt. The fundamental question remains whether there has been a substantial miscarriage of justice: *Kalbasi v Western Australia* at [16].

[98] As will have been apparent, I have conducted an examination of the evidence properly admitted at trial as expressed in the appeal record. The Court was not invited to view the video-recorded evidence and I have not viewed it. I observe that this is consistent with observations made by the High Court in *Pell v The Queen* (2020) 94 ALJR 394 at [36] to [39].

[99] The Crown case turned on accepting the evidence of the complainant. I proceed on the assumption that the complainant's evidence was assessed by the jury to be credible and reliable: see *Pell v The Queen* at [39]. Having regard to the record, I observe that in my judgment that evidence was cogent, compelling and not embellished in its delivery. And, unlike the circumstances of *Pell v The Queen*, there was not a body of other unchallenged evidence which directed one to the conclusion that the jury acting rationally should have entertained a doubt as to guilt. The complainant's evidence of her conduct and her quiet distress once she left the appellant's bedroom was supported by the evidence of her younger sister. And, critically, the HSV-1 evidence improperly admitted did not impact upon the credibility of the complainant or the reliability of her evidence. In fact, because it was admitted, other evidence (namely the evidence concerning sexual contact with the 15 year old boy) was admitted which, if anything, could only have assisted the defendant. Even making due allowance for the limitations of proceeding wholly by reference to the record, I am persuaded that the evidence properly admitted at trial proved beyond reasonable doubt the appellant's guilt of the offences of which the jury found him guilty.

[100] A different conclusion on the operation of the proviso would have been necessary if it had been appropriate to conclude that the evidence improperly admitted could have impacted on the jury's assessment of the reliability or credibility of the complainant. Such a conclusion would have warranted categorising this case as within the class of cases in which the natural limitations of proceeding on the record would not permit the appellate court to attain the requisite state of satisfaction: *Kalbasi v Western Australia* at [16]. As the High Court observed in *Collins v The Queen*, "**[w]here … proof of guilt is wholly dependent on acceptance of the complainant and the misdirection may have affected that acceptance**, the appellate court cannot accord the weight to the verdict of guilty which it otherwise might."[22]

[101] A recent example in which the error at trial had affected the assessment of the credibility of a complainant, thereby rendering the proviso inapplicable, was *OKS v Western Australia* (2019) 265 CLR 268. That case involved an historic sexual offence in which the central issue at trial had been the credibility and reliability of the complainant's evidence. The Court of Appeal had found there had been an erroneous direction as to the law "prohibiting the jury from "engaging in a process of reasoning, favourable to the appellant, in relation to fact-finding concerning [the complainant's] honesty and reliability as a witness that was open to them"."[23] However, the Court of Appeal applied the proviso, essentially reasoning that the effect of the impugned direction had been neutralised by other reliability directions. The High Court allowed the appeal. The plurality concluded:[24]

(a) the impugned direction had qualified each of the other reliability directions;

(b) the Court of Appeal's conclusion that the impugned direction would not have affected the jury's verdict of guilty was critical to its satisfaction that guilt had been established beyond reasonable doubt;

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22 *Collins v The Queen* (2018) 265 CLR 178 at [36] per Kiefel CJ, Bell, Keane and Gordon JJ (emphasis added).

23 *OKS v Western Australia* (2019) 265 CLR 268 at [19] per Bell, Keane, Nettle and Gordon JJ.

24 *OKS v Western Australia* (2019) 265 CLR 268 at [28]–[31] per Bell, Keane, Nettle and Gordon JJ.

(c) the Court of Appeal's only gauge of the sufficiency of the complainant's evidence to prove the appellant's guilt to the criminal standard was the verdict; and

(d) "It cannot be assumed that the misdirection had no effect upon the jury's verdict **in circumstances in which the misdirection precluded the jury from adopting a process of reasoning, favourable to the appellant, that was open to it**."[25]

[102] The nature and effect of the error in this case places it outside the category of cases of which *OKS v Western Australia* is an example. There was no suggestion in either counsel's closing addresses or in the trial judge's directions that the HSV-1 evidence was relevant to an assessment of the reliability or credibility of the complainant's evidence. The trial judge directed the jury that they had been left with evidence that both the defendant and the complainant had tested positive for the virus, but on the state of the evidence, they could not know when the complainant contracted it, could not know when the defendant contracted it and could not know from whom the complainant contracted it. To my mind, the jury, acting rationally and following the directions given to them, could not have had their view of the reliability or credibility of the complainant's evidence affected by the HSV-1 evidence. As the High Court observed in *Weiss v The Queen* at [43], "there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury." In the circumstances of this case, in my view there is no reason for this Court not to give the weight to the verdict of guilty required to justify a conclusion that there has been no substantial miscarriage of justice.

[103] It remains to note that I am conscious that there can be failures of trial process that will occasion a substantial miscarriage of justice notwithstanding the cogency of the proof of an accused's guilt, but this is not one of those cases.

[104] The determination that, notwithstanding the error, there has been no substantial miscarriage of justice, should be made.

[105] Accordingly, ground 2 of the appeal also fails.

Conclusion

[106] The appeal should be dismissed.

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25 *OKS v Western Australia* (2019) 265 CLR 268 at [31] per Bell, Keane, Nettle and Gordon JJ (emphasis added).