SUPREME COURT OF QUEENSLAND

CITATION:	*R v Silcock* [2020] QCA 118
PARTIES:	**R** **v** **SILCOCK, Marc Charles** (appellant/applicant)
FILE NO/S:	CA No 338 of 2019 DC No 403 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 13 December 2019; Date of Sentence: 16 December 2019 (Richards DCJ)
DELIVERED ON:	5 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 and 21 April 2020
JUDGES:	Morrison JA and Applegarth and Boddice JJ
ORDERS:	**1. The appeal against conviction be allowed.** **2. The verdict of guilty on each count be set aside.** **3. There be a retrial on each count.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant was found guilty by a jury of two counts of rape and two counts of sexual assault – where the appellant was sentenced to seven years' imprisonment with a parole eligibility fixed at 14 June 2023 – where the appellant appeals the convictions on the ground that the verdict of rape on Count 1 is unreasonable or cannot be supported having regard to the evidence – where the counts arose out of one incident involving the same female complainant – where the complainant and the appellant were friends – where the complainant stayed at the appellant's apartment after a night out – where the appellant submits the complainant's accounts of whether or not penile/vaginal intercourse occurred were variable – where the Crown submits the complainant's accounts were consistent with a developing memory – whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the first count of rape

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO – OTHER IRREGULARITIES – where the appellant appeals the convictions on the ground that a miscarriage of justice occurred because of the way the appellant's trial was conducted by defence counsel – where the appellant submits specific matters were put to the complainant, which were contrary to the appellant's instructions – where the Crown submits the defence was conducted in accordance with a strategy approved by the appellant – whether a miscarriage of justice occurred

BCM v The Queen (2013) 88 ALJR 101; (2013) 303 ALR 387; [2013] HCA 48, cited
Colley v the State of Western Australia [2015] WASCA 79, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Farooqi [2013] EWCA Crim 1649, cited

COUNSEL: S C Holt QC for the appellant/applicant
D C Boyle for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the orders his Honour proposes. I also agree with the additional observations of Applegarth J.

[2] **APPLEGARTH J:** I agree with the reasons of Boddice J and with the orders proposed by his Honour.

[3] I am indebted to Boddice J for his Honour's account of the facts and the submissions of the parties. It is unnecessary to repeat those matters.

[4] His Honour's analysis of Ground 5 shows that the disposition of the appeal turns on a narrow, but important, point. In respect of Count 2, it relates to a specific matter that was put to the complainant by defence counsel who appeared at the trial which positively suggested that the appellant licked her clitoris. These concurring reasons seek to emphasise the precise nature of the appellant's complaint, namely that specific matters were put to the complainant and were put in a way which suggested that the appellant had a recollection of detail which he earlier claimed not to have. I also wish to add something about why counsel putting certain matters to the complainant in the manner which he did deprived the appellant of an opportunity of an acquittal on Count 2.

The defence strategy

[5] It was not inappropriate to conduct the defence on the basis of instructions which accepted that certain sexual contact occurred which the appellant could not

remember. In a case in which an accused says he cannot remember certain things due to intoxication, amnesia or some other cause, it is open to the accused to accept certain evidence and give instructions to conduct the defence on the basis that certain things occurred. However, in such a case care is required by defence counsel to not positively put a proposition to a complainant about a matter or in a way which may suggest, contrary to the fact, that the accused recalls that matter and that counsel's instructions are based on that recollection.

[6] The defence strategy adopted on the appellant's instructions in advance of the trial and following counsel's advice was a sensible one in the circumstances. It is unnecessary to elaborate in great detail as to why this is so. It is sufficient to point to two aspects of the evidence which made it sensible to accept that certain sexual contact occurred.

[7] The first is the text messages between the complainant and the appellant which are quoted by Boddice J at [137]. The complainant asked the appellant about what happened on the Saturday night, and asked him to tell her what he remembered because "I woke up with no pants on and your head between my legs". She wrote that she needed to know "what else, if anything happened".

[8] After a further prompt by text two hours later in which she asked the appellant to talk to her, the appellant responded by text:

> "I don't think anything else happened, I'm sorry I was in a state I didn't mean to do anything."

[9] These text messages were open to the reasonable interpretation that the appellant accepted that, at some stage, the complainant woke up without pants on and with his head between her legs.

[10] The second aspect of the evidence was the covertly recorded conversation with Parker on 8 July 2017. Although in parts of that conversation the appellant indicated he could not remember exactly what happened because he was "kinda like half awake, half asleep" and was relying upon what the complainant or Cody told him, other parts of the conversation suggested some recollection of events. For instance, the appellant said:

> "Like I never like, never like force -, like I never like forced her or anything, like, like I didn't like, I dunno, I wasn't like aggressive or anything like that".

[11] The appellant's instructions to his legal representatives to accept that certain things happened which the appellant claimed not to be able to recall could be acted on without breaching counsel's obligations.

[12] The solicitor's evidence in this Court, which commands acceptance, is that by the time the cross-examination of the complainant commenced on 17 October 2019, the appellant's instructions were that he agreed the defence case at his trial on Count 2 should be presented on the basis that "the appellant accepted the allegation that he licked the complainant's vagina, to the extent that he licked the outside of her vulva, but not accepting any penetration". In their evidence to this Court, the appellant and the appellant's father effectively accepted that instructions of this kind were given. The fact that such instructions were given is confirmed in the solicitor's letter to the appellant dated 9 December 2019 which recorded that counsel reminded the

appellant that the case put on his instructions to the complainant in respect of Count 2 was "oral stimulation of her vulva – something like that did occur, with her consent, and without penetration."

[13] Conducting the defence case on the basis of those instructions was strategically sound. It did not involve presenting a positive defence that was inconsistent with the accused's instructions as to what actually occurred.[1] That issue does not arise in respect of the pre-trial instructions which the appellant gave in respect of Count 2. Those instructions were:

(a) consistent with the pre-trial evidence of the complainant, particularly her statement to police in which she accepted that he was "just licking the outside area" and did not think that he penetrated her vagina at the time, and

(b) also consistent with the appellant's professed lack of memory of what occurred because of his intoxication.

[14] In short, the instruction to accept the allegation that the appellant licked the outside of the complainant's vulva, but to not accept that there was any penetration, was not inconsistent with the accused's instructions about what occurred because the accused's instructions were to the effect that his state of intoxication on the night and his impaired memory as a result meant that he could not recall all that happened. Importantly, his instructions accepting that he licked the outside of the complainant's vulva were not stated by him to be derived from his memory, but involved an acceptance by him of some parts of the prosecution case.

[15] As a result, care was required by counsel in conducting cross-examination to not positively put to the complainant a version that was inconsistent with the appellant's instructions. To do so risked two consequences. The first was that positively putting an allegation that was inconsistent with the accused's instructions could be treated by the prosecution as a form of admission. McLure P, with whom Mazza JA agreed, stated in *Colley v The State of Western Australia*:

> "it is outside the scope of any implied retainer for trial counsel to conduct a positive defence that is inconsistent with the accused's instructions as to what had actually occurred. A 'positive defence' includes cross-examination of witnesses for the prosecution suggesting, expressly or impliedly, that counsel is putting his client's instructions as to relevant factual matters".[2]

[16] The second consequence of positively putting such a version was the potential to discredit the appellant's out of court statements. Such a positive suggestion in cross-examination would tend to suggest that the appellant had a recollection of detail which he earlier had claimed not to have.

The trial

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1 In *Colley v State of Western Australia* [2015] WASCA 79 at [15], [33], [34] and [96], it was unnecessary to determine whether trial counsel may, with the client's consent, put in cross-examination a positive defence that is inconsistent with the client's instructions as to what actually occurred.

2 [2015] WASCA 79 at [32].

[17] The defence strategy encountered an unexpected problem when the complainant, in her evidence-in-chief, departed from what she had told police and, instead, alleged penetration. Defence counsel had no instructions to accept that penetration occurred. The evidence in this Court, including paragraph 26(b) of the solicitor's affidavit and paragraph 12(ii) of the appellant's father's affidavit, establishes that the instructions to accept that there was some sexual contact in respect of Count 2 was based on the complainant's disclosures and witness statements which indicated that the conduct did not include penetration. Consistent with that, defence counsel cross-examined the complainant about her statement to police in which she accepted that the appellant did not penetrate her vagina. The complainant at trial said that her statements to police were based on a misunderstanding of what was classed as penetration and that she did not realise at the time "that him licking my clitoris was also classed as penetration", which is why she accepted that the licking occurred just on "the outside".

[18] The critical point was reached when defence counsel suggested to the complainant that the appellant had licked her clitoris, but at no stage did he have his fingers opening her vagina. At the end of his cross-examination he put to the complainant, among other things, that the appellant "did in fact have oral sex with you by licking your clitoris but did not put his hands near your vagina", to which the complainant responded that he did and he spread her vagina open.

[19] These aspects of the cross-examination suggested that the appellant had licked the complainant's clitoris and the manner in which matters were put tended to suggest that the appellant had a recollection of detail which he earlier claimed not to have. The things positively put in cross-examination were open to be construed as an admission of penetration, contrary to the appellant's instructions that no penetration had occurred.

[20] The implications of positively suggesting in cross-examination that the appellant licked the complainant's clitoris were not fully appreciated by the appellant, his counsel or others at the time. As the solicitor states in his affidavit, a distinction between the "outside" and the clitoris subsequently assumed significance in the course of the trial, as the trial judge initially directed the jury that licking the clitoris would involve some penetration of the vulva or the vagina.

[21] The appellant's affidavit at paragraph 5(b) indicates that, to the best of his memory, in pre-trial conferences trial counsel said that the jury was likely to believe on Count 2 that something did happen and that the defence strategy would be to say "There was licking on the outside of the clitoris not on the inside". If there was reference in those pre-trial conferences to the "outside", it probably was based upon the complainant's statement to police in which she accepted that he was "just licking the outside area". The appellant's recollection that trial counsel referred to "the outside of the clitoris" may be inaccurate. It is more likely, and consistent with the solicitor's contemporaneous notes, that the instructions were to accept that there was oral stimulation on the outside of her vulva and without penetration. The trial solicitor's evidence in this Court, which was considered and impressive, was that, upon reflection, he could not say that the appellant had given instructions about accepting that he made contact with the clitoris.

[22] Although the implications of admitting that the appellant licked the complainant's clitoris may not have been fully appreciated at the time of the cross-examination,

there were two consequences of counsel's making that positive suggestion to the witness. First, it tended to suggest that the proposition was based on the appellant's instructions about what occurred, and that such an instruction was based upon his memory. This, in turn, had the potential to suggest that his memory was better than he had earlier claimed it to be and undermined some earlier out of court statements in which he denied having a memory of any such detail.

[23] The second, and more significant consequence, was that the positive suggestion in cross-examination was capable of being construed as an admission of penetration. This is how the trial judge interpreted it when she instructed the jury on Count 2 that the complainant's evidence that the appellant was licking her clitoris "would involve penetration of the vulva or the vagina, if you accept that that happened – that is what she says happened". This became the subject of a redirection when the judge told the jury that the defence accepted that the appellant was giving her oral sex and that if the jury accepted her evidence that he was licking her on the clitoris then the jury had to decide whether that involved penetration of the complainant's vagina or vulva. The jury was reminded of certain parts of the evidence about what the complainant said to police and her evidence about licking her clitoris and penetration.

[24] The first consequence which I have mentioned, namely that the suggestion called into question the appellant's earlier professed lack of recollection of detail, might be said to be unimportant. As matters transpired, the prosecutor deployed the matter in address as part of an argument that there were "glaring inconsistencies or an evolving version of events" in the appellant's versions. The fifth and final version of events was said by the prosecutor to emerge from the cross-examination of the complainant. The prosecutor pointed out that defence counsel would not be making things up as he went along but was duty-bound to put forward the appellant's case for him. Without that aspect, the prosecutor probably would have made something of the appellant's alleged evolving version of events. However, it provided a basis for the prosecutor to submit to the jury that the appellant's memory had become better that year. The real forensic disadvantage of pointing to the appellant's alleged evolving version of events and improved memory is that it helped deflect defence criticisms of the complainant's evolving memory of events and apparent inconsistencies in versions which she had given.

[25] I turn to the second consequence, namely the potential for the suggestion to be taken as an admission of penetration. If the point had been better appreciated at, or shortly after, the complainant's cross-examination on 17 October 2019 and counsel had appreciated that he had not acted in accordance with his instructions in making the suggestion about licking the clitoris and thereby, arguably, admitting penetration, then the matter might have been raised with the prosecutor. The prosecutor might at least have not relied on that part of the cross-examination to allege that the appellant's memory had improved in 2019. However, it is difficult to see how the matter might have been retrieved insofar as it amounted to an admission of penetration. When the trial judge so regarded it, defence counsel did not indicate to the trial judge or the prosecutor in the absence of the jury that, unfortunately, the suggestion which he put to the complainant, insofar as it might be taken as an admission of penetration, was inconsistent with his instructions. If he had, then the jury might have been discharged.

Was there a miscarriage of justice?

[26] The respondent submits that no real prejudice was done to the appellant. He did not give evidence and was not exposed to cross-examination about what was put to the complainant. Also, the level of detail suggested in cross-examination broadly accorded with the agreed defence strategy, suggested acts of lesser seriousness than that given by the complainant and the detail given by counsel is submitted to not have caused any special prejudice against the appellant. That the matter did not assume significance at the trial is said to be supported by the evidence of defence counsel whose evidence was that he did not consider it to be a significant issue and did not attempt to take steps to ameliorate the effect of the submission made by the prosecutor about evolving versions. According to the respondent, in the context of the prosecution case, the alleged inconsistency in the evolving versions of the appellant was a relatively minor matter. It submits that the appellant was not deprived of a real chance of acquittal and there was no resulting miscarriage of justice.

[27] I am unable to accept this submission. There was some prejudice in the prosecutor being able to rely upon the cross-examination as evidence of inconsistencies or an evolving version of events by the appellant. The substantial prejudice, however, was that the relevant cross-examination in relation to Count 2 was capable of being used as an admission of penetration. This was inconsistent with the appellant's instructions that the defence case on Count 2 was to accept that there had been licking of the complainant to the extent that he licked the outside of her vulva and without penetration.

[28] If, in accordance with the trial judge's directions about penetration, the cross-examination which suggested that the appellant had licked the complainant's clitoris was taken as an admission of penetration, then this left the only defence to Count 2 as being an honest but mistaken belief as to consent. It deprived the appellant of a real chance of acquittal on Count 2 on the basis that the prosecution had not proven beyond reasonable doubt penetration in circumstances in which the complainant's early statements to police were to the effect that the appellant licked the outside and did not penetrate.

[29] I acknowledge that the complainant, in her evidence-in-chief, departed from that earlier version and positively asserted that the licking of her clitoris involved penetration as she now understood it. However, to the extent that her evidence-in-chief might be criticised as inconsistent with her earlier version, any such criticism was defused somewhat by the reliance which the prosecutor was able to place upon the cross-examination as evidence of the appellant's own evolving story and improved memory.

[30] Ultimately, the cross-examination by counsel on Count 2 was able to be relied upon as an admission of penetration. The appellant's instructions were to not accept that penetration occurred. The cross-examination deprived the appellant of a real chance of acquittal on Count 2.

[31] It is unnecessary to address the evidence in relation to Counts 3 and 4 and the cross-examination about them which likewise positively suggested matters of detail.

[32] As Boddice J states, the denial of a fair chance of acquittal in respect of Count 2 affected the appellant's prospects of acquittal on the remaining counts. This is why

the appeal should be allowed, the verdict of guilty on each count be set aside and a retrial ordered on each count.

[33] **BODDICE J:** On 13 December 2019, a jury found the appellant guilty of two counts of rape and two counts of sexual assault. All counts arose out of one incident involving the same female complainant.

[34] On 16 December 2019, the appellant was sentenced to an effective head sentence of seven years' imprisonment. A parole eligibility date was fixed at 14 June 2023.

[35] The appellant appeals those convictions. He relies on six grounds of appeal:

(1) The verdict on Count 1 (rape) is unreasonable or cannot be supported having regard to the evidence.

(2) The learned trial Judge made a wrong decision on a question of law by refusing to warn the jury in accordance with the decision of *Robinson v The Queen*.

(3) The learned trial Judge misdirected the jury about section 24(1) of the *Code* when her Honour impermissibly imported a "reasonable person" test.

(4) A miscarriage of justice occurred because the learned trial Judge failed to direct the jury as to the appropriate use of evidence, namely, a covert recording between Mitchell Parker and the appellant which was said to constitute admissions by the appellant.

(5) A miscarriage of justice occurred because of the way in which the appellant's trial was conducted:

   (a) that detailed matters were put to the complainant which were contrary to the appellant's instructions; and

   (b) when those detailed matters were deployed by the prosecution as admissions, there was no challenge made.

(6) A miscarriage of justice occurred because of:

   (a) defence counsel's failure to call relevant and admissible evidence from Dr Treasure McGuire, consultant pharmacist and pharmacologist, on the effect of the complainant's alcohol consumption; and

   (b) defence counsel's failure to put to the complainant that she and the appellant had kissed at the "small bar" contrary to the appellant's instructions.

Background

[36] The appellant was born on 21 April 1992. He was aged 25 at the time of the offences and 27 at the time of his sentence.

[37] The complainant was aged 25 at the time of the offences. She was known to the appellant and moved in the same circle of friends as the appellant.

Trial

[38] The Crown case at trial was that the appellant, whilst intoxicated, twice raped the intoxicated female complainant by first putting his penis in her vagina without her consent (Count 1) and then putting his tongue in her vagina or vulva without her consent (Count 2) and twice sexually assaulted the complainant by first touching her breast with his hand without her consent (Count 3) and later touching her vaginal area with his hand without her consent (Count 4).

[39] Counts 1 and 2 occurred in the appellant's bedroom in the early hours of 25 June 2017. Counts 3 and 4 occurred in an adjoining bedroom, usually occupied by the appellant's housemate, Mitchell Parker, that same morning.

[40] The appellant did not give or call evidence at trial. The defence case was that the first count of rape did not occur; that an act of oral sex did occur (but differently to that alleged by the complainant) with the complainant's consent or in the mistaken belief of consent (section 24 of the *Code*); that touching of the breast did occur (but differently to that alleged by the complainant) with the complainant's consent or in the mistaken belief of consent; and that touching of the vagina did not occur but that the appellant had put his hand down the front of the complainant's underwear, before withdrawing before any touching when the complainant said no, with the complainant's consent or in the mistaken belief of consent.

Evidence

Complainant

[41] The complainant had been friends with the appellant for approximately four years prior to 25 June 2017. She met the appellant through a friend. Through the appellant, she met Nelson Turner. The complainant formed a relationship with Turner. Her relationship with Turner ended in February 2017. The complainant remained friendly with the appellant after the end of that relationship.

[42] In June 2017, the appellant was living with two housemates, Cody Gleeson and Mitchell Parker. The complainant had known both Gleeson and Parker for a long time, having attended school with them. She had dated Parker in secondary school. She described both Gleeson and Parker as good friends.

[43] On 24 June 2017, Gleeson invited the complainant to their apartment for drinks and to catch up. At that stage, Parker was holidaying in the United States of America. He returned on 8 July 2017.

[44] The complainant drove her own car to the apartment, arriving at about 7.30 in the evening. She was intending to have one or two drinks before driving home as she had a children's party to attend the following day. She was wearing gym tights and a sweater. She drank with Gleeson and the appellant for a couple of hours. The complainant estimated she had four Corona beers at the apartment.

[45] Gleeson and the appellant convinced the complainant to go into the Valley. The group hired an Uber to the complainant's house, where the complainant changed clothes. They then went to another residence. There were three males and two females the complainant did know at that residence. They sat in the lounge room, talking and drinking for a while.

[46] The complainant had about four vodkas. They were free poured by the appellant so there could have been a little more or less. The appellant sat with her for most of

the time. He was flirtatious and put his hand on her leg. The complainant moved it away. She made a comment that it would not happen.[3] The complainant said there had been an occasion before that night on which she had also told the appellant there would be no relationship.

[47] In April 2017, the complainant and the appellant were exchanging text messages about catching up. After the appellant had texted the complainant saying "you're so cute", the complainant said, "for a second I thought you were hitting on me. I was like yeah, definitely not, haha", to which the appellant replied "that's not how I would hit on you cause I'm your mate". The complainant texted "definitely nothing will ever happen between us is what I meant because that would be all sorts of weird" to which the appellant replied "I wasn't insinuating that" and "we are mates. You have to be my wing woman", to which the complainant replied "ultimate wing woman!".

[48] The complainant spoke to Gleeson about the appellant's flirting. She asked Gleeson to have a word to the appellant. Gleeson told the appellant the complainant felt uncomfortable and just to back off. Gleeson said the appellant said "okay. Sorry".[4] Gleeson told the complainant he had said something to the appellant.

[49] After spending a couple of hours at that residence, the group took a maxi taxi to a night club in Fortitude Valley. Whilst the complainant was drinking a gin and tonic, the appellant noticed a VIP area upstairs. He arranged with the security guard for the complainant and the appellant to go into that area. They remained there for about five minutes before coming back to the dancefloor area. The complainant said she went straight to the bathroom and threw up. She then returned to the group.

[50] One of the group was a male called Jesse. The complainant had met that night. She got along "very, very well" with him. They kissed on the dance floor.[5] Whilst doing so, the appellant slapped the complainant on the bottom. It startled her.

[51] After a couple of hours, the complainant, Gleeson and the appellant went to another bar in Fortitude Valley. The boys obtained drinks. The complainant did not drink much of her drink as she was "pretty upset at that stage" about the breakup with Turner. The complainant was talking to the appellant about the breakup.

[52] Less than an hour after arriving at this bar, the complainant said she wanted to go home. She was far too emotional. She was crying and wanted to go to sleep. All three returned by taxi to the appellant's apartment. The arrangement earlier in the night was for the complainant to sleep in Parker's room as he was overseas. She would then drive herself home in the morning.

[53] The complainant went to the kitchen and obtained a glass of water. The complainant described herself as very tired and very upset. The complainant asked the appellant if she could borrow some clothes to sleep in. They went into the appellant's room. He gave her a shirt and some shorts. Both were very baggy. The complainant put the clothes on in the appellant's bedroom. The appellant was on the other side of the bed, facing away.

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3 AB144/30.
4 AB322/45.
5 AB145/45.

[54] The complainant was wearing a romper,[6] a one piece outfit, like a dress, but with shorts. The complainant unzipped her romper at the back and put the tee-shirt over it. The shirt was so baggy it covered her bottom. She then took the romper off and put on the shorts. The complainant thought she left the romper on the bedroom floor.

[55] The complainant said after she had changed clothes, the appellant told her to stay in his bed and he would sleep in Parker's room. The complainant hopped straight into his bed. She believed the appellant had gone into the ensuite. He was not in bed when she fell asleep. When she fell asleep she was wearing the shorts, shirt and a G-string. She was laying on her stomach, facing the ensuite.

[56] The complainant said she woke up and found the appellant was cuddling her in bed. She was still in the same position, on her stomach facing the ensuite. The appellant was pressed up against her back with his arm over her in a "spooning" position.[7] The complainant said she did not move or say anything at that point. She thought it was harmless and went straight back to sleep.

[57] The complainant said her next memory was she awoke, still lying on her stomach but her legs were spread, her shorts and g-string were off and the appellant was on top of her, penetrating her. Her hips were being held up in the air by the appellant. His penis was going in and out of her vagina.

[58] The complainant said she pulled away from the appellant and slapped him. It was not a hard slap. It was "just a like – a go away leave me alone kind of just slapping".[8] The appellant got off the top of her and laid back down next to her.

[59] The complainant said she fell asleep almost instantly. When she next awoke, she was on her back with her legs spread. The appellant's head was between her legs. The appellant was "spreading my vagina open with his hands and was touching with his tongue in my vagina". The appellant was "licking the area".[9] Her legs were slightly bent but still down.

[60] The complainant said when she realised what was happening, she said to the appellant "what are you doing?" and pulled away. She also pushed his head away from her. She thinks she told him to stop or go to sleep. When she said "what are you doing?" the appellant said "oh fuck". He then told her to go to sleep. The complainant said she did not go back to sleep. She used a flash light on her mobile phone to find her clothes. Her romper was on the floor where she had left it next to the bed. The shorts and G-string she was wearing were up on the TV cabinet at the bottom of the bed.

[61] The complainant gathered those clothes and went into the bathroom. At that point, she noticed she was very sore internally. Her vagina was also very wet. The complainant put on the G-string and shorts before going into Parker's room. She took her telephone and romper to that room. She shut the bedroom door. She laid down on the left side of the bed in her normal sleeping position and fell asleep.

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6 AB147/45.
7 AB150/5.
8 AB150/45.
9 AB151/35.

[62] The complainant said she woke up to the door opening. The appellant came into the room and laid on the bed next to her, on top of the covers. The appellant did not say anything. The complainant also did not say anything, she just stayed still. After a couple of minutes, the appellant rolled over to cuddle up to the complainant. He put his hand up her shirt and touched her left breast. The complainant said "stop", pulled his hand away and told him to go to sleep. The appellant did not say anything in reply. He rolled away.

[63] The complainant said she tried to remain calm. A minute or so later, the appellant rolled back over and went to put his hand up her shirt again. The complainant stopped him by grabbing his hand before he got to her breast. She shoved his hand down all the way. She told him to stop. The appellant did not say anything. He got out of bed and left the room. The complainant stayed in bed. She did not move. She was not sleeping. She was freaking out. She was trying to figure out if she was able to drive herself home. She described herself as scared.

[64] The complainant said about 20 minutes to half an hour later, she heard walking down the hallway. The bedroom door opened and the appellant asked the complainant if she was awake. The complainant pretended to be asleep. The complainant was, at that point, lying on her stomach. The appellant got into the bed and rolled straight over to cuddle her again. He put his hand under her pants. His hand got to the top of the labia. The complainant grabbed it and pulled it away.

[65] The complainant said she hopped out of bed straight away. She grabbed her telephone and romper and said she was going to the toilet. She shut the door behind her as she walked out of the bedroom. The complainant said she went to the toilet but did not go inside. She switched on the light and shut its door. She then crept into the lounge room, changed into her romper and left the apartment. She drove herself home.

[66] She arrived home at about 5.30 in the morning. She had a really long shower. Later that day she washed her clothing. She did not tell anyone about what had happened that day but she did tell a work colleague on the following Monday. She also spoke to her sister-in-law, Stephanie and her brother. She told Cody Gleeson, her sister. Angela, her best friend and police. She later spoke to a doctor and a counsellor.

[67] The complainant said after she told her sister about the incident, she spoke to Parker. Originally, it was via Snapchat message. They subsequently had a brief conversation. The complainant did not go into any detail. She described herself as very upset and wanting to vent to him. She said she was also extremely upset when she told her sister.

[68] The complainant made a complaint to police on 3 July 2017. On 5 July 2017, a police officer took her mobile phone.

[69] The complainant said she did not give the appellant permission to penetrate her vagina with his penis, or his tongue, or to touch her breast or her labia area.

[70] In cross-examination, the complainant accepted she had been diagnosed as suffering from depression about 12 months prior to these events. That condition had worsened in the six months prior to these events. She was also suffering from a chronic illness causing abdominal pains, and had other medical conditions in her

life. She was prescribed anti-depressant medication at the start of 2017. It was a low dosage, to be taken only if needed.

[71] The complainant accepted she had long term issues with sleeping and had significantly increased her intake of alcohol. She described herself as very rarely drinking to a state where she lost her memory. She accepted she was highly depressed and taking antidepressants at the time and that she may, on occasions, have completely written herself off through drinking.[10] There were also problems with her relationship with Turner, which ended on 12 February 2017.

[72] In early 2017, the complainant was having employment difficulties. She was having problems with her manager. She was also running her own personal training business which she found very stressful and considered was contributing to her depression. She had worsening motivation at that time. It was recommended she commence cognitive behavioural therapy. She was stressed about money. She felt she was not spending wisely. She agreed she was also self-conscious about her image.

[73] The complainant accepted she had been advised by her doctor that she should not be drinking alcohol whilst taking antidepressants. She accepted she was feeling physically exhausted and had difficulty sleeping. She had witnessed a vicious assault, which had a profound effect on her, causing her to suffer a bad anxiety attack. When her relationship with Turner broke down, she told a friend that she was absolutely heartbroken. However, by March 2017, she had formed another relationship with a man in Townsville. It lasted for three or four months. The night she first met him she was very drunk.

[74] The complainant accepted she was good friends with the appellant prior to these events. She agreed she was a friendly person and that that can be misread as flirtation. The appellant was also a very affectionate person and very protective of his friends. However, there was always a very knowing fact that it would not happen between them as the complainant was not interested in the appellant.

[75] The complainant had lost contact with the appellant a little bit, because she had had a fight with his now ex-girlfriend. She had found out that the appellant had broken up with his girlfriend. They reconnected at the time of her break-up from Turner. They had regular contact thereafter, although it was not daily contact.[11] The complainant accepted that when she broke up with Turner, she telephoned the appellant. They were the type of friends that would talk about those sorts of things.

[76] The complainant accepted that, prior to the night in question, she was aware that the appellant thought there was chemistry between them. On the night in question, she told the appellant, "it's never going to happen", when she moved his hand away from her leg. She could not recall how many times the appellant had put his hand on her leg, but it was definitely at least once. The complainant accepted she had told police the appellant was flirting with her; that she did not think anything of it; and that she never thought the appellant would try anything with her.[12] Her failure to tell police about pushing his hand off her knee was an oversight.

[77] The complainant accepted she told police that one of the reasons she originally was not going to go out partying that night was that she did not have any money. The

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10 AB189/30.
11 AB206/35.
12 AB211/5.

appellant and Gleeson insisted she go out and said they would pay for her. She told police the appellant was paying for her all night. She had told police that, when she arrived at the first nightclub she was pretty drunk, although she could still stand up.

[78] Whilst at the nightclub, the complainant had asked one of the other girls whether Jesse was single, and if he was interested in the complainant. The girl asked the complainant "aren't you with [the appellant]?". She replied "no, definitely not".[13] The complainant said the appellant was very flirty and she was very friendly. They had danced together that night as friends. She thinks that was misread from the female's point of view.[14]

[79] The complainant accepted that the first time she had said she told the appellant that night "no, it's never going to happen" was when she spoke to the Crown prosecutor on the morning she gave evidence in Court. She had obviously forgotten to tell the police during her statement. She also accepted she told police that, shortly after being told that Jesse was interested, she approached him and they kissed. At that point, the appellant had "grabbed my arse". She told police she did not think that kind of behaviour was abnormal, but thinking about it there is a lot of signs that the appellant was interested in her.[15]

[80] The complainant accepted she told police that, towards the end of the night, Jesse had asked for her number and said he would message her later, but when Jesse asked her name, she said "you arsehole" and "no dice". The complainant said, by that stage, Jesse should have known her name. The complainant denied that she was angry with Jesse. She said calling him an arsehole was joking.

[81] The complainant could not recall if the appellant had his arm around her while they walked to the next bar. She told the appellant she was still in love with Turner and that she missed him. She accepted the appellant could have been comforting her.

[82] The complainant said her intention was to sleep in Parker's bed. She had sent Parker a message asking if it was "cool that I stay in your bed tonight". The only reason she went into the appellant's bedroom was to get something comfortable to sleep in. She did not get changed in Parker's bedroom as they were talking and they both got changed in the appellant's bedroom. The complainant had never got undressed in front of the appellant before and she did not do so on this night. They had their backs to each other and she put the shirt over before pulling the romper down.

[83] The complainant said by that stage she was feeling pretty "out of sorts". She was emotional and felt "kind of drugged to be honest". She was very woozy and she just wanted to go to sleep. She could not recall if the appellant had placed his arm around her while she was sitting on the bed. If he had, she would not have thought anything of it. She did not sit on the bed for very long. The complainant said she went to go to sleep in Parker's room. The appellant said "don't worry. I'll sleep in there, you sleep in here". The complainant did not recall the appellant walking out of the bedroom but accepted he may have gone into the kitchen.

[84] The complainant did not accept that she had remained awake and that the appellant had returned and hopped into bed and commenced cuddling her, at which point she

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13 AB216/20.
14 AB217/5.
15 AB219.

told him to go to sleep. She first remembered the appellant cuddling her when she woke up. She does not know how long she was asleep. When she next woke up the appellant was having intercourse with her. He was holding her hips up. She pulled away, put her hand back and slapped him away and told him to go to sleep. She was "extremely" clear in her memory of that penile rape.

[85] The complainant accepted she sent the appellant a message on the following Monday, saying "tell me about what you remember, because I woke up with no pants on and your head between my legs and I need to know what else, if anything, happened". The complainant said she did not want to accept that a friend had raped her and she was trying to understand in her mind. The complainant said she knew, at that stage, that the appellant had had sexual intercourse with her. She wanted him to admit it.

[86] The complainant denied she sent the message to the appellant because she wanted to know if she had dreamt that he was having sex with her. She was never uncertain about what had occurred with the appellant. She agreed she told police on 3 July 2017:

> "I remembered him taking my pants off at – on the night. I had a memory of it and I wanted to know what happened because I didn't know if I had dreamt him having sex with me from behind or if it was real."

[87] The complainant accepted she had told her friend, Stacy, "I have a memory of him on top of me from behind and I am trying to remember what the fuck happened and I can't". The complainant said it took her a few days to process: "I knew what had happened. It's just was really hard for me to – sorry, it was really hard for me to understand that a friend could do that to me and I was trying to process it. So, no, that's – that memory is burned in my mind and I'll never forget it."[16]

[88] When it was suggested to the complainant that she stated to her sister-in-law, that it was like a dream or daze and that when she awoke she found the appellant with his head between her legs, the complainant said "I know that it was – to me it was a bit of a daze that in between what had happened but when I woke up and he was having sex with me that wasn't a daze. That happened. Me falling back asleep – I still can't understand how I did that but I did". She denied telling her sister-in-law she was uncertain about the first occasion of intercourse.

[89] The complainant accepted that when she saw her counsellor, within a couple of days of these events, she may have told the counsellor she woke up with the appellant's head in her crotch; that she had then locked herself in the spare room; and that later the appellant had touched her breasts.

[90] The complainant accepted that, in her statement to police, she said that after waking to find the appellant's head between her legs "it was pretty clear to me that something – when I woke up at that point I didn't remember him having sex with me from behind". The complainant said she did remember it afterwards. She told police that, whilst she was in the bathroom, she remembered about the appellant having sex with her on his bed.[17]

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16 AB237/15.

17 AB240/30.

[91] The complainant also accepted that, in evidence, she recalled the appellant was spreading her vagina open with his fingers and he was licking her clitoris, but that in her statement to police she said "my legs were spread quite widely and bent and [the appellant's] head was between my legs and he was going down on me so mouth on the vagina". When asked by police what he was doing, the complainant replied "licking". The police officer asked "did he penetrate your vagina at the time?", to which she replied "I don't think so". She had agreed, when the police officer said "just licking the outside area".[18] The complainant said her understanding was that penetration of the vagina actually meant putting the tongue in the vaginal fold. She did not, at that stage, realise that licking the clitoris was classed as penetration.

[92] The complainant said, in response to a question put, that whilst the appellant had been licking her clitoris he at no stage had his fingers opening her vagina "No. I just told you. He had my – he had me spread open so he had a clear view of it".[19] She accepted the first time she had said that was when she gave evidence in chief. The complainant said "memories had come flooding back of what had happened".[20] She was absolutely hysterical when giving her statement to police. She missed out some details.

[93] The complainant accepted she did not raise her voice or yell at the appellant. She remembered being confused and scared. The complainant accepted she told police the appellant told her to go in the ensuite when she said she needed to go the toilet. She said she would go in the master and had said "I'll be back". The complainant probably said she would be back so the appellant did not follow her. She went into Parker's bedroom after using the bathroom. She shut the door to Parker's bedroom. There were no locks on that door. If there had been, she would have locked the door.

[94] The complainant accepted she had her mobile telephone in that bedroom. She had Gleeson's number. She did not try to ring him as she thought Gleeson was asleep in his bed at that stage. Gleeson's bedroom was directly across from Parker's bedroom.

[95] The complainant agreed she told police that when the appellant put his hand up her shirt, grabbing her left breast, she told the appellant to go to sleep. She was not angry, she just wanted to go to sleep. The appellant then left the room. The complainant denied she had told the appellant to cuddle her in bed. The complainant accepted she told police the appellant returned back into the bedroom. On this occasion, he put his hand down her pants and just touched the top of her vagina but she pulled away "really fricking quickly".[21]

[96] The complainant accepted that, on Tuesday, 27 June 2017, she sent a message to her sister saying Turner had been on her mind; she wanted to see him; and she felt every decision she had made in the past six months had been the wrong one. She also accepted that, on Friday, 30 June 2017, she had seen a photograph of Turner, Gleeson and the appellant drinking together. She got really angry and telephoned Turner. She told him what had happened. Turner's response was "well how drunk

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18 AB242/35.
19 AB244/10.
20 AB244/15.
21 AB261/15.

were you?". She was furious and abused him and hung up. She made her complaint to police the following Monday, 3 July 2017.

[97] The complainant accepted that when she gave police possession of her mobile phone on 5 July 2017, she had deleted 881 text messages. The complainant deleted text messages from Turner and herself in a fit of rage because of what he had said when she told him what had happened to her. She deleted the messages not knowing that police needed the telephone. She purposely kept messages from witnesses in case she decided to go to the police.[22]

[98] At the conclusion of the cross-examination, there occurred the following exchange:

> "Can I suggest to you firstly that, in relation to the four incidents you've spoken about, that at no time did [the appellant] have intercourse with you. That's the first incident … Sor – I'm sorry I missed that question. Sorry sir.
>
> That [the appellant] didn't have sexual intercourse with you on this particular night? … He did.
>
> Yep? … That okay?
>
> Secondly – yes – that he did in fact have oral sex with you by licking your clitoris but did not put his hands near your vagina? … No, he did, and he spread them open.
>
> And, so far as the breast, he did put his hand on your breast, lightly, and then put it on your stomach and then moved his hand down to your underpants and put his hand under your underpants but didn't touch your vagina because you told him to stop? … He touched my breast. I pulled away. He tried again. He left. He came back. He put his hand down my pants to the top of my vagina and then I walked away."[23]

Gleeson

[99] Gleeson recalled going out with the appellant and the complainant on the evening of 24 June 2017. Gleeson had invited the complainant to come for drinks. The complainant drove to their apartment at about 7.30 in the evening. They drank Coronas for an hour and a half before leaving to go to a friend's apartment. The three of them finished a carton of Coronas.

[100] Gleeson said, when the complainant came to their apartment, it was not her intention to go to other places. He convinced her to go out. They had to call into her unit so she could change her clothes. The appellant went into the complainant's room. He was lying on her bed. Gleeson asked him to come out of her room so that she could get ready. Gleeson said the appellant said no, he wanted to stay there. The complainant was in the bathroom getting ready. Gleeson estimated they stayed at the complainant's residence approximately half an hour.

[101] Gleeson said arrived at a friend's house at approximately 10 o'clock at night. There were about 10 people at that residence. The three of them drank vodka at that

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22 AB269/15.
23 AB269/20 – 40.

residence. The appellant was pouring the drinks. Gleeson described the appellant as being very cuddly, very "handsy" with the complainant. The appellant "Just had to keep having a hand on her at some point, whether it was a leg or a shoulder or an arm around her or something like that".[24] He told the appellant to back off.

[102] After approximately one hour they all went by taxi into Fortitude Valley. Gleeson noticed the appellant being handsy with the complainant again. Gleeson mentioned it to the complainant. He told her he thought it was a bit weird and if she needed anything, just to talk to him. Whilst out, the complainant said she was interested in one of the group, Jesse. He said the appellant looked fairly disappointed and upset.

[103] After about an hour, Gleeson said the appellant said the complainant wanted to leave as she was not feeling the best. The three of them went to a bar in Fortitude Valley. Along the walk, Gleeson and the complainant saw some friends from high school. They said hello. Gleeson said the appellant seemed very protective of the complainant when she gave their friend a hug on the street.

[104] Gleeson said at this next bar, the complainant and the appellant sat against the wall in the corner. He could not hear what was being said in their conversation. However, at one point, he saw the complainant was crying. The appellant came up and said the complainant wanted to go again. They returned back to their apartment. It was about 2.30 in the morning.

[105] The appellant and the complainant went upstairs. Gleeson was waiting downstairs for a friend. When he went upstairs with that friend, he saw the complainant and the appellant sitting on the couch. They were drinking some water. Gleeson estimated he had been downstairs for about half an hour or forty minutes. He had fallen asleep for a short period, whilst waiting for his friend.

[106] Gleeson said when he returned to the apartment, he heard the complainant say she was cold. The appellant offered to get her some warm clothes. The appellant also offered for the complainant to sleep in his room and he was going to sleep in Parker's room. Gleeson heard the complainant say "thanks". Shortly after, he heard the appellant's bedroom door close and then Parker's bedroom door close.

[107] Gleeson went to bed. He awoke at about 6 am. He noticed the clothes the complainant had worn to bed folded on the couch. The complainant had left the apartment. Gleeson went into the appellant's bedroom. The appellant was in his bed. Gleeson asked "did you and [the complainant] hook up last night?". Gleeson said the appellant had a smile on his face and said "I don't know. I don't know".

[108] On Monday 26 June 2017, Gleeson said the complainant sent him a message through Snapchat. The message said the appellant had come into the bedroom where the complainant was sleeping at their apartment and had performed acts on her and that she had walked out of the bedroom into Parker's room, where she was again followed by the appellant. There were oral acts and penetration as well. By penetration he meant they had sex. The complainant said she had woken up to that happening and had pushed the appellant away.

[109] Gleeson's recollection was that there were two incidents. The complainant said she had woken up and her underwear was off. The appellant was inside her. Gleeson could not recall in which room that had happened, but he was told by the

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24 AB322/35.

complainant there were sexual acts in two different rooms: first in the appellant's room, second in Parker's room. The complainant said she got changed, ran out of the house and went home in her car.[25]

[110] Gleeson spoke to the appellant about the complainant's message that night. Gleeson said "look. I've spoken to [the complainant]. You need to tell me exactly what happened, this is really serious". The appellant just said he was really embarrassed. He said he could not remember.

[111] Gleeson said the appellant moved out of the apartment in early July 2017. Gleeson later provided a statement to police, on 16 July 2017. He had not seen the appellant since that time. He also had not seen the complainant since last year.

[112] In cross-examination, Gleeson accepted that the appellant, the complainant and he consumed a carton of Corona beers before leaving for the friend's house that evening. Gleeson could not say if they were drinking one for one. He thought he and the appellant had the edge. At the friend's residence, the three of them consumed a bottle of vodka between them. He described his state of sobriety upon arrival at the Valley as not okay to drive.

[113] Gleeson said, the complainant did not make a big scene when she spoke to him about the appellant at the friend's residence. Gleeson accepted he told police that he went back to the complainant and told her he had spoken to the appellant, "so hopefully he'll back off now" and to let him know if she felt uncomfortable again. Gleeson had felt concerned about her again whilst in Fortitude Valley. The complainant had indicated that, if she needed him to say anything to the appellant, she would let him know but she never raised anything again with him that night.

[114] Gleeson accepted that after speaking to the complainant on 26 June 2017, he sent Parker a text on 29 June 2017:

> "I feel like a fuckwit because it happened in our house and if I had known he would be like that I wouldn't have let it happen. He was fine all night. It was only after I went to bed he started being seedy."

Stephanie

[115] Stephanie said the complainant immediately broke down in tears when she spoke to Stephanie on 26 June 2017. The complainant told her she had been raped. The complainant said she had been out on Saturday night with some friends; she had had too much to drink to drive; they went back to the appellant's apartment; she had passed out asleep on the bed; when she woke up the appellant had his head between her legs; she had no underwear on at that time; the appellant was performing oral sex on her; the complainant told him to get off; and he tried to grab her from behind and cuddle her. Stephanie said the complainant was so distraught she did not want to go into any more detail.

[116] Stephanie asked the complainant if the appellant had had sex with her. The complainant said yes, that he raped her and that "it felt like she was in a dream and then when she woke up – and that was then [the appellant] was between her legs and that she could feel that he had had sex with her". The first thing the

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25 AB333/25.

complainant said was that she was raped. She provided some details about oral sex and then, after some more questions, she told Stephanie about more traditional sex. Stephanie asked the complainant if he had raped her, as in had sex with her, and the complainant said yes. The complainant said she was sure.

[117] Stephanie spoke to the complainant about going to police. The complainant was reluctant. The complainant was scared. The appellant was supposed to be her friend. Stephanie told her husband. He went and spoke to the complainant.

[118] In cross-examination, Stephanie did not accept she told police that the complainant said she dreamt that the male was having sex with her. The complainant said it felt like she was dreaming and then she woke up and found the appellant between her legs. Whilst the police officer's notes recorded "didn't articulate if she could feel if she had been involved in sex", Stephanie said the complainant was adamant that the appellant had sex with her. The complainant had indicated she started screaming at the appellant to get away.

Angela

[119] Angela said when the complainant spoke to her on Wednesday, 28 June 2017, the complainant said she had been raped. She started crying uncontrollably. When Angela asked if it was the appellant, the complainant replied yes. The complainant said they went out and she was feeling a little bit emotional from the breakup of her ex-partner and was pretty drunk. The appellant had been acting a little weird throughout the night. He had touched her on the bottom. When they went back to the appellant's apartment, the complainant went into the appellant's room to ask which was Parker's room. The appellant told her to sleep in his bedroom and he would sleep in Parker's room. The complainant said she passed out in the appellant's bed. She woke up with her face being pushed into the pillow. The appellant was having sex with her from behind.

[120] Angela said when she asked "do you mean like actual sex?", the complainant replied "yes he was having sex with me". The complainant said "stop. Get off me". The appellant stopped. When the complainant woke up next time, she was on her back and the appellant was going down on her. Angela knew from that that it was oral sex. The complainant said she swatted him away. She went into Parker's room, where she passed out again. The complainant said something happened again in Parker's room. The complainant went to the bathroom, got her keys and drove home. The complainant said she sat in the shower for two hours because she felt so yuck.

Parker

[121] Parker said, after the complainant's relationship with Turner ended, he discussed the complainant with the appellant. The appellant believed there was some chemistry between them and said "I'm going to have a crack at her, she's into me, she's keen on me".[26] The appellant said he wanted to try and have sex with her. Parker said there were multiple times when he and Gleeson stated that the complainant should be off limits, she was one of their close friends and it would interrupt the dynamic of their circle. Parker told the appellant that the complainant is quite a friendly,

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26 AB361/45.

open, genuine person and not to take that as an indication of her willingness to go out on a date with the appellant or to have sex with him.

[122] Parker said he left for overseas in late June 2017. He returned on 8 July 2017. Whilst in Las Vegas, he received a communication from the complainant quite early one morning. He mentioned the appellant's name. The complainant said "Do not mention his name to me again".[27] Parker asked whether the complainant was okay. The complainant called him, crying, very upset. She told him the night had gone bad. She said Gleeson, the appellant and the complainant went out drinking and had come back to the appellant's house. She woke up multiple times with the appellant being persistent.

[123] The complainant said she was going to sleep in Parker's bed and the appellant had said to sleep in his bedroom and he would sleep in Parker's room. The complainant woke up with the appellant in the bed. He had his arms around her and was fondling and trying to make a move. The complainant let the appellant know she was not happy and told him to go to sleep. The complainant said she woke up a few minutes later with the same thing happening. The appellant was caressing her and trying to have sex with her. The complainant said she got angry at the appellant. Parker believed that was when she left the appellant's bedroom.

[124] Parker could not remember whether it was the first or second time that she woke up, but the complainant said on one of the times the appellant was on top of her, with her pants down and he was thrusting her. Parker clearly knew that she meant the appellant was penetrating her, having sex with her. The complainant was certain she did not take her pants off.

[125] Parker said the complainant told him she went into Parker's bedroom, closed the door and went to sleep. She woke up again with the appellant under the bedsheets with her. The complainant also said she had woken on one occasion and the appellant was giving her head. The appellant's head was between her legs. He could not recall which of the occasions. The complainant said the appellant got up and said sorry. The complainant said it proceeded to happen again when she went back to sleep. She woke up a fourth time with him spooning her again.

[126] Parker said his recollection was that the complainant told him the appellant was going down on her in Parker's bedroom, but he would not "bet his life" on the order being precise. When the complainant described the spooning, she said the appellant had creeping hands and was touching her breasts and rubbing her vagina.[28] The complainant said she left the bedroom, went to the bathroom and turned on the bathroom fan to lead the appellant to believe she was in there, then grabbed her clothes and left the apartment. Parker described the complainant as distraught to the point where it was hard to understand what she was saying to him.

[127] Parker said, when he returned to Brisbane, he was first met by police officers. They asked him to record a conversation with the appellant. He agreed to do so. Parker was then met by the appellant at the airport. They had a conversation in the motor vehicle on the journey home. The appellant moved out of the apartment a few days later. He has not had contact with the appellant since that time.

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27 AB364/10.
28 AB368/25.

[128] In the recorded conversation, Parker asked the appellant what had happened that night. The appellant replied "yeah. It was a pretty fucked up night to be honest". The appellant said he had started drinking, they had gone out and the complainant had come back to the apartment. The appellant said:

> "She come over. I told her she was single and whatever. Like yeah righto. And then yeah we just had like a big night out, then um she came back with us to our place. And then I, I gave her like a pair of clothes or whatever and she come and slept in my room. And like, we were, like spoonin' or whatever. And then like I was pre-, pretty fucked up so like it, you know when you're kinda like half awake, half asleep. And um, yeah like, I don't really remember exactly what, what I did, but like, from what she's told me and what Codey said, like I was like, you know, like touching her and stuff. And um, yeah then she like, she like left, um and went in ah, went in your room. And then I remember being like downstairs in the carport area".[29]

[129] The appellant continued "I don't know what I was doing but I was just not really with it and I'm yeah then like I came back up and I kinda like jumped into bed next to her". The appellant confirmed that it was Parker's bed and then said "I went to like cuddle her and she like pushed me off. I was like oh okay, um yeah and then I woke up in the morning she wasn't there". Parker asked the appellant why he would follow her into Parker's bed, to which the appellant replied "mate I've got no idea".

[130] Parker told the appellant that the complainant had called him, bawling her eyes out. He told the appellant it made him mad. He said the appellant needed to learn self-control. He asked the appellant whether he had spoken to the complainant. The appellant said he had texted her. Parker told the appellant the complainant was saying some bad things and he should go and see her in the next few days. The appellant responded "Just like, it's just such bullshit, like [indistinct] like, I just got myself like in a complete mess. Like I just, I just wish she ne-, she never like come and stayed in my room. Wish she just went straight to your room or something. Um, like nothing woulda happened, I would just fuckin' passed out".[30]

[131] The appellant told Parker that the complainant came into his room and he gave her a pair of clothes to wear and he jumped into his bed. He just remembered spooning the complainant. The appellant said he never forced her and that he was not aggressive. Thereafter, the following exchange was recorded:

> "PARKER: She seems to think you were. Fuck. Doesn't look very fucking good, does it? She said she wakes up from being passed out and you're naked on top of her. Imagine how that fucking would feel for someone. Yeah, yeah. Have you tried speaking to her?
>
> SILCOCK: Nah.
>
> PARKER: You just kinda, just like leavin' it now?

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29 AB535/45.
30 AB537/10.

SILCOCK: Um, I can't like, I don't know what to say to her.

PARKER: Don't know what to say to her. I don't know man. But she thought you were like one of her good friends. Maybe she, I don't know, I don't know.

SILCOCK: Just make me feel sick. Like I just feel like worst person in the world."

[132] The appellant went on to say that he had apologised to the complainant in a message.

[133] In cross-examination, Parker said when he spoke to the complainant whilst he was in Las Vegas, the complainant was crying and seemed sober. Parker accepted that, on the day after his recorded conversation with the appellant, he met with the complainant for breakfast. He did not receive any more details at that time. All the details mentioned in his recorded conversation with the appellant came from what he was told by the complainant. The police did not give him any further detail. They asked him to engage in a normal conversation with the appellant. He was not instructed to ask any specific questions.

[134] Parker accepted that the allegation of the appellant going down on the complainant was something that was very clear in his mind. He accepted he made no mention of it in his statement to police on 27 July 2017. He also accepted that, in his recorded conversation with the appellant, he only made reference to the complainant waking up and finding the appellant naked on top of her. Parker said it was a very stressful time. There were a lot of emotions in the air.

[135] To the best of Parker's recollection, the complainant told him of two events that took place in the appellant's room. One was the thrusting of the penis into the vagina, the first one was spooning. The complainant clearly indicated to Parker that she had pushed the appellant off and yelled at him. Parker accepted that, in his statement to police, he only described one incident in his bedroom, being the touching of the breasts and the vaginal area.

Other

[136] As part of the police investigation, an analysis was undertaken of the remaining messages on the complainant's mobile telephone. The complainant was told not to delete any messages from that telephone prior to police seizing it.

[137] On Monday, 26 June 2017, there were the following messages. The complainant sent a message to the appellant "hey. I need you to tell me what happened on Saturday night when we got home". The appellant responded nearly eight minutes later "I was in a bad way on Saturday night. I was in bed till 3 pm yesterday. I have like flashes of memory from the night [indistinct] …". Less than a minute later, the complainant replied "well. Tell me about what you remember because I woke up with no pants on and your head between my legs". Sixteen seconds later, the complainant added "and I need to know what else if anything happened", before responding a little bit later "please talk to me". The appellant was recorded as responding "I don't think anything else happened. I'm sorry I was in such a state. I didn't mean to do anything". The complainant responded "okay".

[138] At the conclusion of the Crown case, there was tendered a number of joint admissions as to the time and contents of conversations between the complainant and Stacey Saunders on Monday, 26 June 2017. In those conversations, the complainant was recorded as telling Saunders she needed to talk to her, to which Saunders replied "if you tell me you slept with Mark, imma slap ya ☺". The complainant responded "I think he raped me Stace", to which Saunders replied "oh fuck, of course you can call me when I go to lunch". The complainant was recorded as asking Saunders not to tell anyone. When Saunders asked if she was alright, the complainant was recorded as saying "not really, I just want to know what happened".[31]

[139] Later, the complainant was recorded as saying "I'm so disgusted in him. How could he do that to me? Nelson and Lani like what the actual fuck?". The complainant was also recorded as sending the following messages to Stacey:

> "I have a memory of him on top of me from behind. I'm trying to remember WTH happened and I can't. I remember going to sleep and then kind of pushing him away and then woke up to his head down there and my pants were on the floor.
>
> I don't know.
>
> I know that I got up and went to sleep in Mitch's room and he followed me and then started touching me and I told him no and pushed him away. Then he left and came back like 20 minutes later and tried again so I went to the toilet [indistinct] but casually got my shit and drove home."

[140] Finally, the complainant was recorded as telling Saunders that she could not tell the police and she did not want to press charges.[32]

Appeal hearing

[141] Evidence was called from four witnesses at the hearing of the appeal, as part of the appellant's application to adduce evidence in support of Grounds 5 and 6.

[142] The appellant gave evidence that he had a number of conferences with counsel and his solicitor prior to trial. A common theme of those conferences was that his legal representatives were of the view that a jury would likely believe that something sexual happened between him and the complainant and that it would not be in his interests to give or call evidence at trial, having regard to the consequence of the loss of the benefit of final address to the jury.

[143] The appellant said that counsel suggested a possible defence strategy of denying that Count 1 occurred, accepting that an act of oral sex had occurred which did not involve penetration and which was consensual or undertaken in the mistaken belief of consent and an acceptance of cuddling but no touching of the breast or vulva as described by the complainant in Counts 3 and 4. The appellant accepted he agreed to the defence case being conducted on that basis. He confirmed that basis prior to the complainant giving evidence.

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31 AB398/15.
32 AB400/25.

[144] The appellant accepted he was present in Court, when the complainant gave evidence and it was put to her that he had licked the complainant's clitoris but had not used his hands to spread the lips of her vagina. He said he did not realise that those questions would effectively become his version of events. He saw it as cross-examination of the complainant on her evidence and its inconsistencies.

[145] The appellant accepted that the recorded evidence was accurate and that he had sent those text messages to the complainant. He did not accept he had ever said to Gleeson that he did not know what had happened. He told Gleeson nothing happened. He told Parker he did not really remember exactly what he did but maintained that nothing sexual happened with the complainant that night. There was spooning and he had offered for the complainant to sleep in his bedroom.

[146] The appellant accepted that he took his legal representatives' advice not to give or call evidence, knowing that the consequence would be that Dr McGuire would not be called at trial. He agreed to that course. He also accepted that, just prior to the close of the Crown case, there was a discussion with counsel about whether he would give evidence. He was guided by counsel's advice not to give or call evidence. He denied ever saying there was no way he was giving evidence.

[147] The appellant said he had given instructions that there was a kiss between him and the complainant at the bar that night. He had been asked by counsel to provide a short statement. The appellant said he specifically instructed his solicitor that he wanted that kiss to be put to the complainant. He accepted he did not refer to that conversation in his affidavit. He was one hundred per cent certain the kiss had taken place although, in a conference on 21 July 2019, he could have said he was ninety-nine per cent sure. At no stage did he tell his legal representatives that his memory had changed from the instructions he had provided to them.

[148] The appellant's father gave evidence that he was proactive in preparing documents in his son's defence. Care was taken in the disclosure of documents as there was a concern that their telephone and email communications were being intercepted by police. He would give them to the appellant to provide to the legal representatives. He did attended most conferences with the legal representatives. He deliberately excused himself on occasions when instructions were taken from the appellant. He made suggestions to his son about the conduct of the defence. When he attended conferences he would listen to the advice.

[149] The appellant's father accepted that from the first conference the legal representatives expressed the view that the jury would think that some sexual contact had occurred between the appellant and the complainant that night. The legal representatives also did not want to lose the right of last address. He did not accept that his son had an incomplete recollection of events because of excessive alcohol intake that evening. At no stage prior to the complainant giving evidence, did the appellant vary his version of events. There was consensual cuddling and spooning, but no sexual acts.

[150] The appellant's father said the advice of the legal representatives was accepted and they acquiesced in that advice. They never realised the implications of the trial strategy and of putting a positive version to the complainant. He raised his concerns with the solicitor after the cross-examination of the complainant. His concern was that licking of the clitoris was not what the complainant had initially said to police.

He also had discussions with the solicitor after the appellant was convicted of the offences.

[151] The appellant's father recalled that the kiss in the bar was raised and said the legal representatives were given a lot of information as to possible issues for questioning of the complainant. The final decision was left to counsel. There was a suggestion that the complainant could be bluffed into thinking that the defence were in possession of CCTV from the bar area. He thought the solicitor used the phrase "bluffing" or "it's a spoof".

[152] The appellant's father said he was very keen to have Dr McGuire called as they had a considerable investment in obtaining that expert opinion. His preference was to follow the strategy suggested by counsel, which was to provide the expert opinion to the prosecution so that they would get their own expert, who could be cross-examined as a prosecution witness. When the prosecution were not "playing ball", there was a discussion of how to maximise the benefit of the expenditure. Counsel advised that counsel could adduce the evidence. Counsel's advice was followed, although it was "almost an instruction".[33] There had been errors in Dr McGuire's initial report but the expert had revised that calculation.

[153] The appellant's trial solicitor gave evidence that he could not ever recall a discussion with the appellant about how particular matters would be put to witnesses, either in terms of his instructions or in putting the defence case. He also did not recall any discussion with the appellant about the consequences of inferences that could be drawn if positive assertions were put by counsel to witnesses. The solicitor said he could not recall any complaint by either the appellant or his father about the matters that were ultimately put to the complainant in the course of her cross-examination.

[154] There were some discussions about putting an allegation of a kiss between the complainant and the appellant in the bar, in an attempt to bluff the complainant into thinking the defence had CCTV footage, which would make her cautious in denying there had been a kiss. The solicitor recalled indicating to the appellant and his father that it was likely to be ineffective. The proposal of the bluff came as one of the numbered pages authored by the appellant's father. The appellant's father was providing an analysis of information so regularly the solicitor commenced numbering the documents. The page numbers exceeded 3,050. These documents were being produced because the appellant and his parents believed their electronic communications were being monitored by police.

[155] In cross-examination, the solicitor accepted the appellant had given instructions that there had been spooning but at no stage did he describe or admit any sexual contact of the kind alleged by the complainant. Two written instructional statements were prepared; the second at the request of counsel, who sought further instructions on the complainant's behaviour towards the appellant at the small bar and in the movements before and after.

[156] The solicitor accepted that, in the course of cross-examination, counsel put to the complainant that certain specific sexual contact occurred between the appellant and the complainant. No amended instructional statement was obtained to that effect. There was also no contemporaneous note of any instruction consistent with the putting of those matters.

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33 Transcript 1-29/30.

[157] The solicitor accepted that the putting of those matters was inconsistent with the contents of the draft instructional statement taken by him in September 2018. Those matters arose out of an acceptance by the appellant of some parts of the prosecution case. They were not stated by the appellant to be derived from his memory. The solicitor could not explain the specific putting of the licking of the clitoris by counsel.

[158] The solicitor's recollection was that there was some discussion with the appellant about what would be required to effect penetration for the purpose of the charge of rape, the subject of the oral sex component. The case strategy discussed with the appellant was to admit there had been oral sexual contact but to assert that did not involve penetration. That would mean the charge of rape would not be made out. When counsel put that the clitoris was licked, it crystallised an acceptance of penetration. The solicitor could not say the appellant had given instructions accepting that he made contact with the clitoris. There was no basis for the putting to the complainant that the appellant had licked her clitoris other than the instructional basis of accepting the licking of the outside without any penetration.

[159] When the issue of penetration arose in the course of the summing up, there was some discussion about anatomy. He undertook some internet searches about the mechanics of stimulating the clitoris, but could not recall any discussions about whether or not the matter had been put on the basis of the appellant's instructions. He could not recall any discussion with the appellant as to specific ways in which the theory of the case would be put to witnesses, or about inferences which could be drawn from positive assertions put by counsel to witnesses in cross-examination.

[160] The solicitor accepted that a final decision had not been made at the commencement of trial as to whether the appellant would give evidence. That decision always waits until the end of the prosecution case. His understanding and counsel's advice throughout had been that the appellant ought not to give evidence. The appellant always seemed to accept that advice. Counsel took those final instructions in his absence at a break very late in the day, towards the end of the prosecution case. The solicitor did not have the opportunity to obtain a signed record of that instruction.

[161] The solicitor accepted that a kiss between the complainant and the appellant was potentially important to a mistaken belief defence, but said the view taken by the trial Judge in the summing up was that none of what occurred in the bar had much to do with whether consent was given later at the apartment. One of the features to be dealt with at trial was that the complainant was adamant she would never have had any sexual interest in the appellant. Against that background, it seemed a reasonable question not to ask because the answer would have likely prompted a speech about how she would never do such a thing "because he was just like a brother to her and she had made the point in a text message to him a few months beforehand". The solicitor accepted that the kiss was not put to the complainant in circumstances where no decision had been made as to whether the appellant would give evidence.

[162] In a conference on 21 July 2019, counsel indicated a firm view that the appellant should not give evidence. In that conference, counsel also advised that the complainant had been relatively consistent in respect of the count of rape the subject of the oral sex allegation. Counsel said it would be foolish to say that that did not occur when the complainant did not say there was any penetration with the tongue.

[163] The solicitor said that, whilst Dr McGuire had provided a useful expert report, counsel advised they ought not to pursue calling Dr McGuire. Whilst counsel's advice was recorded as being influenced by how he expected the trial Judge would view the matter, the ultimate decision not to call Dr McGuire was based on the overall strategy that it was not in the appellant's interest to give or call evidence. Counsel's advice was that the matters addressed in the report were matters of common and ordinary experience and could be effectively dealt with in his address.

[164] The solicitor said his advice would have been that the appellant not give evidence. First, the appellant would have to explain things he had said in the text message exchange with the complainant following the offences. Second, the prosecutor would address the jury after defence counsel. Third, there was the issue of what confidence the appellant could give to any of his recollections of the evening. All of the factors which impinged upon the complainant's reliability, particularly her level of intoxication, could be the subject of cross-examination of the appellant as to how intoxication affected his memory. Fourth, the solicitor's assessment of the appellant is that he would have been a very confident and reasonably articulate witness, but could come across as arrogant or smug or, as the prosecution was found to say in the trial, "self entitled". He would not have created a good impression with the jury. The solicitor's impression was that there was never any enthusiasm or interest expressed by the appellant in giving evidence. He was content to accept and follow the advice.

[165] The solicitor did not turn his mind to the consequence of the specific propositions put by counsel to the complainant as to whether or not they were inconsistent with what had been discussed with the appellant and whether or not they were the product of the appellant's memory. What was being put to the complainant was consistent with the agreed theory of the defence case.

[166] Counsel gave evidence that, in conference with the appellant and his father, he raised concerns that a jury may have difficulties in accepting that nothing had happened between the appellant and the complainant. There were a number of discussions as to the best way to cross-examine the complainant. On no occasion was there a challenge by either the appellant or his father. Over a period of time it was basically accepted by the appellant that there was sexual contact of some description, especially in light of the text message and the recorded conversation with Parker.

[167] Counsel said the appellant accepted the defence strategy and gave instructions that he would not give or call evidence. In his final discussion with the appellant, towards the end of the prosecution case, the appellant said "I'm never getting in the witness box". Counsel did not recall any discussions at that point about whether Dr McGuire would be called in the defence case. The question he had asked the appellant was whether he would give or call evidence.

[168] Counsel recollected that there was a discussion about obtaining a statement in relation to a kiss between the complainant and the appellant. Counsel did not discuss with anyone whether he would put that particular allegation. When it was put to the complainant in cross-examination that the appellant had his arm around her, the complainant said she could not remember. At that stage, counsel decided not to put the kiss to the complainant. Counsel was content to leave the matter at that point.

[169] In cross-examination, counsel agreed that any change of instructions had not come from the appellant actually saying he now remembered those sexual acts. After it was pointed out to the appellant some of the problems in running a case of "I can't remember", it was accepted by the appellant and his father that certain things did occur. At no stage, did he give the appellant advice as to the possible consequences of framing questions which suggested that counsel was putting instructions on factual matters.

[170] The matters specifically put by counsel were not put on the basis that the appellant had a memory of those things occurring. His understanding was that the appellant accepted he had had oral sex with the complainant. There had been an acceptance of proceeding on the basis an act of oral sex had taken place.

[171] Counsel accepted that part of the defence strategy was that there would be raised a defence of mistaken belief in relation to Counts 2, 3 and 4. There were problems because the appellant did not give evidence. Counsel saw evidence of a kiss in the bar as being important to that defence. The appellant had given instructions that he and the complainant had kissed at the bar, but the complainant had always indicated she was not the slightest bit sexually interested in the appellant. He did not think putting to her that a kiss had occurred at that point would be successful. He did his best to take the issues as far as he could in relation to the placing of an arm around the complainant. He made a tactical decision to leave it at that point.

[172] Counsel said a decision was made not to call Dr McGuire for two reasons. He did not believe there would be any occasion that Dr McGuire would be called as a witness. He also came to the conclusion that what was being said was a matter within the province of the jury.

[173] Counsel accepted that when he specifically put to the complainant that the appellant had licked the clitoris, he did not give consideration to the consequence that that would amount to penetration. Counsel's recollection was that the complainant had given evidence that the appellant had licked her clitoris. Counsel said the complainant's version changed in evidence.

Appellant's submissions

[174] The appellant submits the verdict of guilty of Count 1 was unreasonable or cannot be supported having regard to the evidence. The complainant's accounts about whether or not penile/vaginal intercourse occurred were variable, uncertain and vague. A jury ought to have been left with a reasonable doubt as to whether that act of sexual intercourse occurred at all. That doubt existed even making full allowance for the advantages enjoyed by a jury.

[175] The appellant submits the trial Judge erred in refusing to warn the jury in accordance with *Robinson v The Queen*. The trial Judge accepted that two of the features relied upon in support of the defence request for such a direction warranted additional comment, namely, the complainant's intoxication and the fact that the complainant was not sure if it was a dream. The direction given by the trial Judge was insufficient. It did not use the words "you will need to scrutinise the evidence of the complainant with great care before you could arrive at a conclusion of guilt" and that the jury should "only act on that evidence if, after considering it with that

warning in mind, and all the other evidence, you are convinced of its truth and accuracy".

[176] The appellant submits the trial Judge misdirected the jury as the defence of mistaken belief. Whilst the trial Judge initially provided the jury with a correct direction as a matter of law, the trial Judge impermissibly imported thereafter a reasonable person test. The proper test is whether the appellant's belief, based on the circumstances as he or she perceived these to be, was held on reasonable grounds. The misdirection was apt to prevent the jury from performing its function and was likely to have caused confusion. It was likely to result in a substantial miscarriage of justice.

[177] The appellant submits that a miscarriage of justice occurred when the trial Judge failed to direct the jury as to the appropriate use of the contents of the covert recording between Parker and the appellant. The contents of that conversation, insofar as they were said to constitute admissions, contained substantial ambiguity and lacked certainty. The jury ought to have been directed that they could only use those statements as evidence of the truth of what was stated if they were satisfied the appellant had, by his words, silence or conduct, admitted their truth. There was a real risk the jury approached those matters as if they were admissions rather than subjecting them to the requisite scrutiny.

[178] The appellant submits a miscarriage of justice occurred because of the way in which the appellant's trial was conducted by defence counsel. Specific matters were put to the complainant, contrary to the appellant's instructions. Those matters were deployed by the prosecution as being specific instructions consistent with an evolving story. The evidence of the appellant, his father, the solicitor and counsel all support a conclusion that, whilst the appellant had acquiesced in a defence strategy of accepting that an act of oral sex had occurred without penetration, that acquiescence did not constitute instructions to put specific matters when those matters were not on the basis of the appellant's memory and were open to criticism as consistent with a change in version.

[179] The appellant submits a miscarriage of justice occurred because of defence counsel's failure to call Dr McGuire, who gave relevant and admissible evidence, and the failure to put to the complainant that she and the appellant had kissed at the small bar, contrary to the appellant's specific instructions. Whilst the conduct of counsel generally binds a defendant, there was no objective forensic justification for the decision not to call Dr McGuire and to not put the kiss. A central issue at trial was the reliability and credibility of the complainant. Dr McGuire's evidence was relevant to the effects of the complainant's intoxicated state and the kiss was relevant to the existence of a mistaken belief.

Respondent's submissions

[180] The respondent submits the verdict on Count 1 was not unreasonable. Whilst aspects of the complainant's account were consistent with a developing memory of the first act of rape, the complainant gave specific evidence of waking up with the appellant on top of her, penetrating her vagina with his penis, and had consistently made complaints to that effect in a text message to a friend, to Gleeson, to her sister, to her sister-in-law and to Parker. She also gave evidence that, when she went into the bathroom, she felt sore internally, consistent with penile rape.

[181] The respondent submits the trial Judge did not err in declining to give a direction in accordance with *Robinson v The Queen*. The requirement to give a warning arises when it is necessary to do so to avoid the risk of a miscarriage of justice. The trial Judge properly determined that two features were to be brought to the attention of the jury and gave appropriate directions in respect of those matters. There was no need to give a specific warning in those circumstances.

[182] The respondent submits that, whilst the trial Judge did erroneously mention "a reasonable person" in the context of discussing the defence of mistaken belief, the jury were correctly directed on that defence on a number of occasions, including being directed that the Crown had to exclude that defence. A consideration of the summing up as a whole supports a conclusion that the jury would not have misapprehended the proper test. There is no risk the appellant was, as a consequence of the use of those words, denied a fair chance of acquittal.

[183] The respondent submits that the contents of the covertly recorded conversation between the appellant and Parker were consistent with admissions. Once it is accepted that the words were reasonably capable of being construed as an admission, they were admissible. It was a matter for the jury to determine whether or not they amounted to an admission and what weight, if any, that admission should be given. There was no need for any further directions.

[184] The respondent submits that the conduct of the defence did not give rise to a miscarriage of justice. The defence was conducted in accordance with the specific strategy approved of by the appellant. That involved a rational, tactical decision. The appellant is appropriately to be bound by the conduct of the case by defence.

[185] The respondent submits that a miscarriage of justice did not arise as a result of the failure to call Dr McGuire or to cross-examine the complainant in relation to the kiss. If Dr McGuire was to be called, it would result in the appellant's counsel losing the right of last address. That was a significant aspect of the strategy agreed to by the appellant. The decision not to call Dr McGuire in such circumstances was rational and reasonable and for tactical advantage. Similarly, the circumstances of the kiss between the appellant and the complainant added nothing to the defence of mistaken belief. It occurred much earlier in the night. Counsel made a rational, tactical decision having regard to the concessions he had obtained from the complainant.

Consideration

Unreasonable verdict

[186] A determination of this ground requires the Court to undertake an independent assessment of the evidence as a whole to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the first count of rape. If, upon a consideration of the record as a whole, the evidence "contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility

that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence".[34]

[187] In undertaking that independent assessment, the Court is required to independently assess the sufficiency and quality of the evidence.[35] Where proof of guilt beyond reasonable doubt would require the acceptance of a particular witness as credible and reliable, the Court undertakes that assessment upon the assumption that the evidence was assessed by the jury to be credible and reliable but examines the record to see whether, notwithstanding that assessment, either by reason of inconsistencies, discrepancies, or other inadequacy or in the light of other evidence, the Court is satisfied the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[36]

[188] In the present case, a consideration of the complainant's evidence raises significant concerns as to the reliability of her account of an act of penile/vaginal rape on the night in question. Her initial account to police, as well as statements to friends, used words consistent with her recollection being of a dream rather than an actual event.

[189] However, those concerns must be considered in the context of all of the evidence. That evidence includes a consistent account of waking with the appellant on top of her, holding her hips raised whilst his penis was inside her from behind, and the raising of complaints of penile intercourse in her conversations with Gleeson on 26 June 2017, with Saunders in text messages on 26 June 2017, with Parker whilst he was overseas and with Angela on 28 June 2017.

[190] Parker's account was supported by Parker's recorded conversations with the appellant on 8 July 2017, which included reference to the complainant having alleged that she woke up and "you're naked on top of her".

[191] That consistency was properly a matter for the jury to have regard to when assessing whether they were satisfied beyond reasonable doubt that the complainant's account of an act of penile/vaginal rape was both reliable and credible and did not constitute a reconstruction of a dream.

[192] The fact that the complainant sent a text message to the appellant the following day, in which reference was made only to an act of oral sex, with a question as to what else had occurred, did not detract from an acceptance of the complainant's account in relation to this act of rape being both reliable and credible. The complainant gave an account for sending a text message in those terms as she wanted the appellant to admit to his conduct. It was open to a jury, on a consideration of the evidence as a whole, to accept that explanation.

[193] Once consideration is had to those matters, a consideration of the evidence as a whole supports a conclusion that the discrepancies and inconsistencies in the complainant's account of the events the subject of Count 1 were not such that a jury ought to have a reasonable doubt as to the appellant's guilt of that offence.

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34 *M v The Queen* (1994) 181 CLR 487 at 494 – 495; *R v Baden-Clay* (2016) 258 CLR 308 at 330 [66].
35 *BCM v The Queen* (2013) 303 ALR 387 at 392 [31].
36 *Pell v The Queen* [2020] HCA 12 at [39].

[194] Having considered the record as a whole, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the first count of rape.

[195] This ground fails.

Conduct at trial

[196] It is convenient to deal next with the ground relevant to the conduct of the trial by the appellant's legal representatives.

[197] A consideration of the evidence led at the appeal supports a conclusion that, whilst the appellant never gave instructions of a memory of any sexual acts between him and the complainant on the night in question, the appellant accepted the trial being conducted on the basis that it would be put to the complainant that Count 1 did not occur, that Count 2 did occur, to the extent that there was oral stimulation of her vulva with her consent and without penetration, and that Counts 3 and 4 did not occur as described by the complainant, in that there was no touching of the breast or vulva, but there was cuddling and spooning with consent.

[198] That conclusion was consistent with the appellant's concessions in evidence. It was also consistent with the contents of the letter forwarded to him dated 9 December 2019, sent by his solicitor confirming the contents of their recent conference.

[199] The strategy adopted at trial, although not based on instructions from the appellant's memory, is properly to be viewed as consistent with the appellant giving instructions as to the conduct of the defence at trial. Those instructions allowed counsel and instructing solicitor to conduct the case on the basis there was an acceptance of an act of oral sex between the complainant and the appellant.

[200] An acceptance of the complainant's evidence of such an act would not, of itself, breach counsel's obligations in relation to the conduct of a case. It is open to a defendant to give instructions that aspects of the Crown case are not to be challenged, even though the defendant has no specific memory of those events. Such a course can be followed by counsel, if those instructions constitute an acceptance of those aspects of the Crown case.

[201] Counsel must take extreme care when conducting a case on that basis. It would be impermissible, in that circumstance, to expressly or impliedly purport to put a positive defence case contrary to the client's acceptance of the Crown case. Specific advice would also have to be given to the client as to the consequences of the course to be followed pursuant to the client's instructions. Those consequences include that the defendant would not be able to give evidence at trial inconsistent with the acceptance of the Crown case.[37]

[202] If a defendant gives instructions to accept aspects of the Crown case, the non-challenge by counsel of those aspects of the Crown case would be consistent with counsel's instructions. That is, however, a different proposition to counsel putting a positive defence inconsistent with a client's instructions. It is also a different proposition to what would constitute an impermissible defence strategy, namely, the

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37 *Colley v The State of Western Australia* [2015] WASCA 79 at [33].

inventing or suggesting of a different account of the facts to provide a client with a better defence.[38]

[203] The case conducted by counsel at trial was not merely that the appellant accepted the complainant's account of an act of oral sex on the night in question. Specific allegations were put to the complainant as part of the defence case, namely, that the appellant had licked her clitoris, that the appellant had not used his fingers to open her vagina and that she had pressed the appellant's head and he had stopped performing the act of oral sex.

[204] Nothing in the appellant's instructions or acceptance of the trial strategy permitted counsel to put such specific allegations. They were not based on instructions. They were, in fact, inconsistent with the instructions that had been given by the appellant, namely, that the acceptance of an act of oral sex did not involve acceptance of there having been penetration.

[205] The putting of specific allegations, by counsel, can only ever be done on client's instructions. As was observed by McLure P (with whom Mazza JA agreed) in *Colley v The State of Western Australia*:[39]

> "… [I]t is outside the scope of any implied retainer for trial counsel to conduct a positive defence that is inconsistent with the accused's instructions as to what had actually occurred. A 'positive defence' includes cross-examination of witnesses for the prosecution suggesting, expressly or impliedly, that counsel is putting his or client's instructions as to relevant factual matters."

[206] The conduct of the defence case had two consequences. First, in the way in which the case was put to the complainant, it amounted to an admission of penetration, an essential element of the offence of rape the subject of Count 2. Second, it permitted the Crown prosecutor to make specific submissions as to the putting of specific matters, namely, that they were based on instructions. This allowed the Crown prosecutor to legitimately develop a criticism of the appellant's account as an evolving story.

[207] These two consequences had a significant impact on the conduct of the trial. Each resulted in outcomes adverse to the appellant's interests. Those outcomes were not consistent with his acceptance of the trial strategy.

[208] The consequence of those outcomes is that the appellant did not receive a fair trial. There is a real risk that a miscarriage of justice occurred in that the appellant was denied a fair opportunity of an acquittal of Count 2. As the Crown properly conceded, a denial of a fair chance of acquittal in respect of that count also permeated across the appellant's prospects of a fair chance of acquittal in the remaining counts.

[209] As a miscarriage of justice has occurred in the way the case was conducted at trial, the verdicts of guilty should be set aside and a retrial ordered of each count.

Other grounds

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38 *R v Farooqi* [2013] EWCA Crim 1649; [2014] 1 Cr App R 8.

39 [2015] WASCA 79 at [33].

[210] The conclusion in respect of the conduct of the trial renders it unnecessary to consider the remaining grounds of appeal. Having regard to their contents, it is also inappropriate to do so.

[211] Whilst the evidence led at this trial properly raised for consideration whether a direction ought to have been given in accordance with *Robinson v The Queen*, and there was was an erroneous reference to a reasonable person in the direction to the jury as to the defence of mistake of fact, the directions to be given at any retrial will ultimately depend upon the state of the evidence led in that trial.

[212] On any retrial, the trial Judge will have the legal obligation to determine what directions are appropriate, having regard to that evidence. That Judge will be obliged to direct in accordance with the appropriate law, having regard to those determinations.

Orders

[213] I would order:

(1) The appeal against conviction be allowed.

(2) The verdict of guilty on each count be set aside.

(3) There be a retrial on each count.