SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2004] QCA 184
PARTIES:	**R** **v** **M** (appellant)
FILE NO/S:	CA No 346 of 2003 DC No 2370 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2004
JUDGES:	Davies and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Amend count 6 in the indictment to read relevantly: "That on a date unknown between the first day of January, 1990 and the thirty-first day of July, 1990 at Ipswich and Brisbane in the State of Queensland, M accused PM of committing indictable offences, namely unlawful carnal knowledge of a girl under the age of sixteen and indecent assault, with intent to gain the services of PM which M falsely pretended were those as an informant and undercover operative for M and to obtain the payment of a sum of money to M."** **2. Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where evidence of uncharged acts admitted at trial – whether learned trial judge erred in allowing evidence – basis for admission of evidence of uncharged acts - whether evidence relevant to and probative of the commission of the offences charged CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - PARTICULAR GROUNDS – MISDIRECTION

AND NON-DIRECTION – whether jury misdirected as to the use that could be made of evidence of uncharged acts

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – AMENDMENT – TIME FOR AMENDMENT – amendment of indictment after conviction and on appeal – whether appellant would suffer injustice as result of amendment

Criminal Code 1899 (Qld), s 416, s 427(1)

Gilbert v R (2000) 201 CLR 411; 170 ALR 88, cited
KRM v R (2001) 206 CLR 221;178 ALR 385; 75 ALJR 550, cited
R v AB [2000] QCA 520; CA No 118 of 2000, 19 December 2000, considered

COUNSEL: D C Shepherd for the appellant
D L Meredith, with R Swanwick, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA. Other than in respect of count 6, I agree with his Honour, for the reasons which he gives, that the appeal against all of the verdicts on all counts on which the appellant was convicted should be dismissed. The question whether the conviction on count 6 may be sustained is a more difficult question. In what follows I gratefully adopt his Honour's statement of the relevant facts, especially those with respect to count 6.

[2] Count 6 was in the following terms:

> "That on a date unknown between the first day of January, 1990 and the thirty-first day of July, 1990 at Ipswich and Brisbane in the State of Queensland, M accused PM of committing indictable offences, namely unlawful carnal knowledge of a girl under the age of sixteen years and indecent assault, with intent to gain the services of PM as an informant and undercover operative for M and to obtain the payment of a sum of money to M.
> … "

[3] Ground 6, in which the appellant appealed against his conviction on that count, was in the following terms:

> "In relation to count 6 the learned trial Judge erred by directing the jury that the appellant could be convicted if they found beyond a reasonable doubt that the appellant intended to obtain the benefit of services of the complainant as an informant or undercover operative for the appellant, in circumstances where it was the Crown case that no such services were ever actually to be provided and where in any event the evidence did not support such a finding."

There are some difficulties with the way in which that ground is stated, as there also are with respect to the terms of the indictment, but I shall return to those later.

[4] As Jerrard JA has pointed out, the learned trial judge, both in his directions to the jury and in a redirection said that, to prove count 6, the prosecution had to prove either:

1. that the appellant had the intention of obtaining payment of money from the complainant; or
2. that he had the intention of gaining the performance of services by the complainant as an undercover police operative or informant.

[5] In stating the alternative intentions of the appellant required to prove count 6 in this way, his Honour was following the form of the indictment. However, as was acknowledged by the respondent in this Court, the prosecution could never have proved the second of those alternative intentions because there was no evidence that the appellant ever intended to obtain the performance of services by the complainant as a police operative or informant. Indeed the evidence was to the contrary. There was no work as an undercover police operative or informant which the appellant could ever have offered the complainant.

[6] Relevantly it was open to the jury to conclude on the evidence that the appellant's intention was to gain the performance of services of the complainant which had been falsely represented to him by the appellant as, but which were not in fact, services as a police informant. As the jury had found by their verdict on count 2, the appellant had previously falsely pretended to the complainant, and the complainant had believed, that he had been engaged by the appellant as a police informant.

[7] Jerrard JA is of the view that, because of the evidence and absence of evidence referred to in [5], it would have been obvious to the jury that the appellant could not have had the intention of gaining from the complainant the performance of the services of an undercover police operative or informant. On the other hand, his Honour thinks, there was clear evidence of endeavours by the appellant to obtain money from the complainant. His Honour was of the opinion, therefore, that the verdict on count 6 must have been a verdict on the basis of the first of the alternatives stated in [4].

[8] In my opinion that process of reasoning would have required the jury to ignore directions given by the trial judge, on two occasions, which were plainly given on the assumption that the second alternative intention was a possible intention which could have been inferred from the evidence. I think that we must act on the assumption that, in accordance with his Honour's direction, the jury gave some content and consideration to the second alternative basis for finding the necessary intent.[1]

[9] However it does not follow that, in the light of the evidence and absence of evidence referred to in [5], the jury must have construed literally his Honour's statement of the second alternative basis for finding a relevant intention. As

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1 See the passages from *Gilbert v R* (2000) 170 ALR 88 referred to by Jerrard JA at [66] and [68].

mentioned earlier, it was open to the jury to conclude on the evidence that the appellant's relevant intention was to obtain the performance of services from the complainant which the appellant had falsely pretended were those of a police informant. It is a reasonable inference, in those circumstances in my opinion, that the jury construed his Honour's statement of the second alternative intention as one to obtain the performance of services which, it was open to infer, the appellant intended to obtain. Such an intention would have been sufficient to prove an offence under s 416 of the *Criminal Code*.

[10] Of course that is not what the indictment alleged. But in my opinion, in the light of the evidence, that must have been how the jury construed both it and his Honour's relevant directions with respect to it. In those circumstances, it seems to me, the indictment should be amended to reflect this.[2] No injustice could possibly result to the appellant from that course. Accordingly I would amend count 6 in the indictment to read:

> "That on a date unknown between the first day of January 1990 and the thirty-first day of July, 1990 at Ipswich and Brisbane in the State of Queensland M accused PM of committing indictable offences, namely unlawful carnal knowledge of a girl under the age of sixteen and indecent assault, with intent to gain the services of PM which M falsely pretended were those as an informant and undercover operative for M and to obtain the payment of a sum of money to M … "

[11] On the indictment as so amended a finding by the jury of either alternative intention was sufficient, in the circumstances, to justify the verdict; and either such finding was reasonably open on the evidence. It follows that, for those reasons, this ground must also fail.

Orders

1. Amend count 6 in the indictment to read relevantly:
   "That on a date unknown between the first day of January, 1990 and the thirty-first day of July, 1990 at Ipswich and Brisbane in the State of Queensland, M accused PM of committing indictable offences, namely unlawful carnal knowledge of a girl under the age of sixteen and indecent assault, with intent to gain the services of PM which M falsely pretended were those as an informant and undercover operative for M and to obtain the payment of a sum of money to M.
   … ".
2. Dismiss the appeal.

[12] **JERRARD JA:** On 3 October 2003 M was convicted in the Brisbane District Court of four counts of false pretences, three counts of assault occasioning bodily harm, one count of misappropriation, one count of indecent assault, three counts of indecent assault with a circumstance of aggravation, one count of attempted extortion and one count of fraud. He was sentenced to varying terms of concurrent imprisonment for up to two years on the counts other than attempted extortion, and to three years imprisonment for that offence cumulative on the other terms. He has appealed against his conviction, but abandoned an application for leave to appeal against the sentences.

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2 *R v Fahey, Solomon and AD* [2002] 1 QdR 391; *R v Seymour* [2004] QCA 19.

Grounds of Appeal

[13] The appeals focused upon the convictions on counts 1 – 4 and 6, although some grounds affect all convictions. The grounds of appeal as amended by leave complain:

- of the wrongful admission of evidence from KP in respect of count 1;
- of the wrongful admission of evidence from RM in respect of count 6;
- of a failure by the learned trial judge to properly direct the jury as to which counts on the indictment the evidence from KP and RM, the subject of the earlier grounds of appeal, was relevant if properly admitted;
- that comments by the learned trial judge that the jury might think persons with a perverted interest in sexual matters would put some value on pubic hair, or that the jury might think a fetish industry existed for such items, had caused a miscarriage of justice;
- that the learned trial judge erred by directing the jury that Mr M could be convicted of count 6 if the jury found that he had intended to gain the services of PM as an informant and under-cover operative, where it was the Crown case that no such services were ever actually to be provided, and where the evidence could not support the finding the learned judge described;
- that the verdict in relation to count 6 was unreasonable or could not be supported having regard to the evidence, and accordingly should be set aside.

General Background

[14] To understand the nature and significance of these grounds of appeal it is necessary to have a general grasp of the offences of which Mr M was convicted and their background circumstances. Mr M was a police officer, and met his wife LM in 1976, when she was a school girl who attended the opening of a gymnasium at a police academy. She was an active member of the Church, in which her father was an elder, and she and her other family members had been brought up in what she described in evidence as a very cloistered upbringing.[3] The family members attended church each Sunday all day, had no television until she was 16, (which they very rarely watched) and she had seen a total of two films before she met Mr M. He began coming to those church services with her and after some two years became a member of the church, and in time both a Sunday school teacher and an elder himself. He was at all relevant times a uniformed police officer, and LM's evidence described him having been in turn at the Police Academy where they met, then stationed with the Mobile Police Force, then at North Ipswich, then Inala, then the Police Transport Squad, Oxley Police Station, the Police Information Bureau, and then Ipswich Police Station.

[15] LM described how M had told her, at some stage in the first 12 to 18 months of their marriage in 1981, that he was a member of an under-cover squad working to break into a paedophile ring. Other evidence called by the prosecution established

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3 AR 52

that Mr M was not recorded in any relevant police file as having either made application for any covert police work or been asked to do it. He had no recorded training or experience as a police officer in the field of criminal investigation; had not had any duties associated with investigations into paedophilia, and had no training or any recorded experience in the area of covert operation.[4] Mr M did not give evidence at the trial, and his counsel did not suggest in cross-examination that Mr M had ever actually carried out any covert or surveillance duties, whether formal or informal.

[16] Mr M's claim that he was involved in under-cover police work played a critical role in the offences of which he was convicted. The complainants in those were members of his wife's family, or her friends and associates from the Church. Those other church members had also experienced rather sheltered and protected upbringings. Returning to Mr M, he told LM after their marriage that his asserted membership of that undercover squad explained his being on mailing lists for pornography, of which they were getting a lot.[5]

The offences of which he was convicted

[17] Mr M's offences occurred in three discrete periods. The first group, counts 1 - 5, were committed between 1 January 1983 and 31 December 1985. The second ground, counts 6 – 14, were committed between 1 January 1989 and 31 December 1991. Count 17 was committed between 1 January 2000 and 15 October 2001. The first group of offences were committed against Mr M's sister-in-law KP, brother-in-law PM, brother-in-law DM, and DM's then friend – and later wife – HM. The first four of those convictions were for offences of false pretences[6] in which the chattels or property obtained from the complainants KP, PM, DM, and HM were portions of their pubic or scrotal hair; count 5 was an offence of unlawfully assaulting HM and doing her bodily harm, committed by his having caused her by artifice to prick her finger on a needle.

[18] The second group of offences were committed against PM, and three female church members, of whom one – EB – was a family friend of LM, and the other two, CN and RA, were sisters and friends of EB. Those were offences of assault occasioning bodily harm committed on CN and EB, indecent assault (both with and without circumstances of aggravation) committed upon EB, and dishonest appropriation of money committed upon all three of those female complainants. His last offence was committed upon a woman KS, an administration officer in the Ipswich Police Department, who had wanted to become a police officer and had sought help in achieving that goal from Mr M, as well as others. KS was the only non church complainant against whom he had offended. He had induced her to provide mouth swabs and a urine sample as part of her participation in what he had falsely claimed were recruitment activities for the Queensland Police Service. The Crown led evidence that no one police officer can recruit another.

Counts 1 and 2

[19] Counts 1 and 2 were charged as occurring between 1 January 1983 and 31 December 1984. These involved Mr M's conduct when purporting to engage KP,

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4 AR 304 and 305, evidence of Superintendent Crawford

5 AR 54

6 In breach of the then provisions of s 427(1) of the *Criminal Code of Queensland*

then aged about 12, and PM, then aged 14, as police informants. Mr M asked KP to help him "at your school to catch people, criminals to do with the school"[7], and she was promised $25.00 per week for her help, and told that her brother PM would also be there. This made her more comfortable with the idea. She was told that what she was being asked to do was an important thing, although she was not told what the criminals were doing. Mr M made arrangements with her to take her and PM to Mr M's home at Bellbird Park.

[20] PM was likewise approached with a request that he become a police informant, and told it was to be "an official thing"[8], and that PM would be expected to be on the lookout for things that his friends were doing that might seem illegal. PM was told that Mr M wanted KP involved (which did not please PM, because he and KP often clashed at that stage of their lives), and PM and KP went by arrangement to Mr M's home. There Mr M explained that they were to keep what would be their official work as police informers secret, even from his wife LM, and Mr M caused both children to sign what the children understood to be an official form. PM understood that as a result of signing those that he and KP were police informants.[9]

[21] Mr M then explained that now those documents had been signed, photographs had to be taken of both "informants", in which each had to be naked. KP questioned that last requirement, and Mr M told her that that was standard police procedure and done for identification purposes; and to demonstrate that they were in "complete physical health" and that there was "nothing done to our bodies."[10] Mr M then photographed the naked PM in his sister's absence; and then photographed KP, who was also naked, and who had insisted that Mr M wear a mask and have his eyes covered when taking the photograph on his instamatic camera. KP checked that Mr M was wearing the mask, checked that the instamatic photograph had developed, and put it in an envelope which Mr M taped.

[22] That envelope already had some of the limited quantity of KP's pubic hair in it. Likewise pubic hair had been obtained from PM. This was obtained because Mr M had told both children after those forms were signed that he needed a sample of pubic hair from each of them, he having inquired whether KP had pubic hair, and this was represented as a requirement of the Queensland Police Service.[11] The envelope with the photograph and the pubic hairs were sealed in KP's presence. "Not long" after this Mr M told KP that her photograph had not turned out (that it was not bright enough) and that he needed to take another photograph, to be taken somewhere with more light, somewhere private, and he knew a place in the bush where that could be done. That conversation led to the troubled KP speaking with her mother, and KP later telling Mr M that she, KP, was a minor and that she could not sign any form without her parent's permission, and that she was not going to "do any of this"[12]. She described Mr M being very angry and telling her that what she was doing had repercussions for his career and for LM as well.

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7 AR 149
8 AR 179
9 AR 180
10 AR 181
11 AR 182
12 AR 153

[23] It also resulted in Mr M speaking with PM and telling him that "We need to control KP",[13] and if they did not then "we both would be in trouble". What Mr M proposed to PM was that PM get on a ladder and clean around a light fitting in his parent's kitchen with a chemical, that PM have KP holding the ladder, and that PM should spill chemical on both of them which would cause a burning itchy reaction. Mr M was to supply the chemical. Mr M suggested to PM that both PM and KP would both run into the shower, hastily removing their clothes, and Mr M would appear, ask "what's going on here" and take a photograph of PM and KP. PM refused to help as suggested, and that seems to have been an end at that time to the suggestion that either KP or PM would carry out informant activity.

Counts 3 and 4

[24] In the same period, namely 1 January 1983 – 31 December 1984, similar approaches were made to DM and HM, resulting in the supply of pubic hair by each of them to Mr M. DM was then aged about 19 and HM would have been at least that age, she then having held a driver's license for two years. DM's evidence was that he had been asked by Mr M to become an informant for the police when a teenager and he was to work with HM. DM's evidence was that this request was made before DM and HM were even "going out"[14]. They too signed what appeared to them to be official forms at Mr M's home at Bellbird Park, and they too were each requested to provide a sample of pubic hair, which they did, and these were placed inside an envelope. DM's understanding was that he and HM were being recruited to help Mr M to catch paedophiles and that this would further Mr M's career.

[25] As part of that enrolment process DM was required to be photographed naked by Mr M in Mr M's home, which occurred; HM photographed wearing the bottom half only of her togs. Mr M had told her that she "had to wear my togs there that day", although he did not tell her why.[15] Mr M also wanted to make a video of the two teenagers either "having sex together or pretending" to do so, (AR 98) but they declined. That request was explained to DM as being made because "he wanted us to pose having sex for the paedophile side of things", because "that's what paedophiles were wanting because we were – at that stage I looked fairly innocent".[16]

Purported Under-cover Work

[26] Both DM and HM were asked to carry out activities explained by Mr M to them as helping under-cover work. DM was requested to collect an envelope from Mr M, in a street quite close to the Inala Police Station at which Mr M was then stationed, and then to take it and place it on a fence post at Durack, some four kilometres away. Some years later he was asked by Mr M after a church meeting to take an envelope to some shops, wait at the front of those holding the envelope behind his back and in that fashion deliver it to a person who arrived in a vehicle and removed it from his hand. He did as requested, being driven to and from those shops by Mr M. All DM could say was that the person who arrived was a female.

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13 AR 183
14 AR 75
15 AR 97
16 AR 75

[27] The first occasion on which HM was asked to undertake what she thought was a mission to assist Mr M in his undercover work resulted in the incident charged as assault occasioning bodily harm of her. She was uncertain whether this occurred in Easter 1984 or 1985; hence the dates alleged for counts 5 are that it happened between 1 January 1983 and 31 December 1985. Her description was that one evening she met him at the Booval Railway Station and travelled in her car to a dark area in Inala, walked through some bushland to a clearing which had an ice cream container in the middle of it, and she was requested by Mr M to go and get it. He gave her a very skimpy bikini and told her she had to put that on because there were sensors set up in the area, and if she went into it fully dressed these would pick up her presence. HM said she would take her chances with her clothes on, and did so; Mr M also told her that there could be a needle in the ice cream container, and that if she felt a prick to put her hand on it and make sure "I get a good prick".[17] Why she should do that was not explained. She did put her hand in the container and she did get pricked on the hand, which bled a little, and she had a recurring mark on her palm for some 12 months. She gave both the needle and container to Mr M.

[28] He gave her no explanation then as to what was happening, but a month later contacted her to tell her that the substance that was in the needle was gonorrhoea, and two or three other women had been pricked with that substance around the same time and they had both died. He told her she had to take some tablets that he would give her and that everything would be okay, and she did take tablets he provided. She heard nothing further about gonorrhoea.

[29] On another occasion Mr M telephoned her at her work and told her there was an envelope in a phone box at the top of the street where she lived. She was requested to collect this envelop at a nominated time, which she did, and which she gave to Mr M. She believed both activities she had been engaged in were under-cover police work.

[30] The last such activity occurred when Mr M told her that he was concerned that KP was involved with marijuana, which Mr M said he could smell when he walked into KP's parent's home, and that it had interfered with KP's personality. Accordingly, HM took KP at Mr M's request to the latter's home, at a time one Saturday morning when LM was at work, and Mr M had earlier requested that HM tell KP that HM had a disease and needed a cream put all over her. KP would need the cream rubbed on her as well; otherwise she could contract that disease. Both females were supposed, at Mr M's suggestion or request made earlier to HM, to strip naked and put the cream on each other in the bedroom. In fact KP declined to undress in front of HM, and each put the cream on themselves, and on the other one's back. They then showered. Mr M "turned up" as HM was having her shower, he having previously told her he would be out. That seems to have been an end of the events occurring with HM that the latter associated with Mr M being a police officer; her evidence does not explain why that cream was to be applied. KP's recollection was that the cream was applied to assist HM with her eczema prior to her wedding, and that when Mr M arrived he described the cream as one that was kept for use in the Watchouse for people with herpes and sexually transmitted diseases.

What the evidence of the first group of counts shows

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17 AR 99

[31] No objection is taken on appeal to the admission of any of the evidence described so far herein. If accepted by the jury it shows a great deal of manipulative behaviour by Mr M carried on for little obvious purpose. What Mr M obtained were pubic hairs from three teenagers and one pre-teen; and photographs of all four either naked or semi naked. That evidence also shows some questioning of his bona fides by KP, and a focusing by him on the proposition or suggestion that others might have or might acquire sexually transmitted diseases. It shows generally a considerable level of trust placed in him, which the complainant witnesses described as then existing because of his position in the family, in their church, and with the Queensland Police; and save for KP, it shows their unquestioning and innocent acceptance of what he said. It also demonstrates a willingness to send others on pointless exercises intended to suggest significant under-cover police work, and that he had an unidentified accomplice or assistant. All of those features, other than KP's suspicions, were exhibited in his second batch of offending behaviours, in which he continued to exhibit curiosity about the sexuality of others, particularly teenagers.

The second set of offences

[32] These involved a second approach to PM. He had started going out with RM, whom he later married, when he was 20 and she was 15. He then went to Cairns for four months and apparently quite soon after his return Mr M approached him and told him that he (Mr M) had seen a file on PM's sexual activity with RM. Her recollection was that Mr M described this to them as a children's services file, (meaning the then Department of Childrens' Services) and RM questioned why Mr M would have that file because "it's not your Department."[18] Mr M said that it had been shown to him because other police knew his wife's maiden name.

[33] After that RM received some telephone calls from a female at PM's parent's home, which calls made reference to that file. Following the receipt of those, Mr M told PM and RM that he could "take care of it"[19], but that it would involve their meeting another officer at the Gailes Weighbridge. The two young people were told by Mr M that if they did not co-operate PM would be sent to prison and RM would be put in a girls' home. He described to her an expectation that if that happened she would be assaulted by "butch people" in the home. He suggested that to prove whether the claim was true or was not true RM would have to be examined to determine if she was or was not a virgin.

[34] At least one purported meeting did occur at the Gailes weighbridge. PM and RM drove there in PM's vehicle, and met Mr M, who arrived in an unmarked police car. Those three waited for a while and then a purported call was received on a hand held police radio from the other officer. RM's recollection was that it did not sound like "a real voice. It sounded odd".[20] PM thought it was a muffled or a covered voice.[21] Those complainants described being told that for $50.00 Mr M could make "the file disappear"[22], and that for a monthly transaction he could "keep it lost".[23] Those complainants described being asked to sign a "confession", the signing of

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18 AR 215
19 AR 215
20 AR 217
21 AR 187
22 AR 187, evidence of PM
23 AR 218, evidence of RM

which would mean that RM did not have to have the medical examination, and which Mr M needed to have signed to protect himself because "he was going out on a limb for us".[24] PM was also told that he would go to jail if he did not sign it.

[35] The confessions were prepared documents, which PM recalled asserted that he and RM had engaged in sexual activities consisting of anal, oral, and (vaginal) intercourse.[25] Both complainants refused to sign those, but did sign a document admitting or describing that they had engaged in sexual activity while RM was 15. After those were signed, Mr M requested that the two complainants take their clothes off, so that he could check "for a wire".[26] Both refused. After that, Mr M suggested that PM should continue working for him as an informant, and Mr M claimed to be still involved in "all of that"[27], referring to investigations of paedophiles; on PM's refusal, Mr M spoke separately with RM, asking her to become "like a police go-between"[28], and to do under-cover work luring rapists and paedophiles into a room. She was in fact not asked to perform any activities at any later date, although she occasionally received further phone calls from that same female, including one received either one or two days prior to her wedding to PM.

[36] As well as the invitation to pay $50.00 for having their "file" lost, and perhaps to pay regularly, Mr M also suggested that he would need $5,000.00 deposited into a bank account to make sure that that file permanently stayed lost.[29] PM actually had that amount of money available to him, because he had received a lump sum compensation in payment for a motor vehicle accident in which he had been injured by an alcohol affected driver. He had had 17 operations, and had received his lump sum payment after the last one. He had bought a new car and put a deposit on land, but still had $12,000.00; his evidence was that Mr M was aware of the receipt of that compensation.[30] Mr M was not in fact paid any money at all by either PM or RM, but the requests or suggestions that some money be paid to him formed the basis of the attempted extortion count number 6.

Counts 8-14: The non-family counts

[37] The remaining offences in the second set were not the subject of any specific ground of appeal. Count 8 was an offence of assault occasioning bodily harm to CN. Her evidence included that after being recruited by Mr M into a cell consisting of herself, her sister RA, and EB, she underwent some training in self defence with Mr M. During one training session he came up behind her and applied a hold by putting his arm around her jaw area and lifting her from the floor. She was not expecting this manoeuvre, did not consent to it, and it caused pain. A few days later her jaw dislocated and locked shut. She was required to obtain dental treatment.

[38] The asserted task of this cell was to intercept a paedophile network that Mr M said was operating in Ipswich. The three cell members were required to, and did, each pay Mr M a dollar per week for up to three years; Mr M said that this was payable

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24 Evidence of PM at AR 188
25 AR 188
26 AR 219, evidence of RM; AR 189, evidence of PM
27 AR 189
28 AR 219
29 At AR 188, evidence of PM
30 At AR 189

to a safe insurance company, and paid in case the cell members caused any problems to other people.[31] Extraction of those small weekly amounts in that fashion was the basis of count 9, the dishonest misappropriation charge.

[39] CN's evidence included a description of her having completed a questionnaire Mr M provided, and the questions she was asked resembled those appearing on pages 12 to 17 of exhibit 8, a 35 page document extracted by a forensic computer analyst from a computer disc used by Mr M and provided by LM to Detective Sergeant Lee, and by the latter to the analyst.[32] The questionnaire sought personal information, including bra size; EB and RA were asked similar questions, and EB recalled being asked if she had ever masturbated, had intercourse or been seen naked by a man. Questions of a personal nature appear also in exhibits 6 and 7, those being documents extracted by forensic computer analysis from one or both of two computers used by Mr M.[33] The material on both computers was encrypted, with a password, as was the disc. Those on exhibit 7 contained questions of the type EB recalled, and other intrusive questions about sexual behaviour and experience.

More under-cover work

[40] RA recalled that she had the code name "Amber Wells" as a cell member, and Mr M's was "Bob Stone". Mr M said he was required to report to a supervisor named Peter. CN also recalls that Mr M's code name was "Bob Stone"; she did not describe using any code name for herself. EB's was "Effie".

[41] As with DM and HM these cell members carried out activities at Mr M's request that appear to have been intended to persuade those three complainants that they were performing potentially dangerous under-cover work. EB was required to collect a newspaper from behind a Ipswich Post Office at a specified time from the top of a pillar, while an unidentified male whom she understood to be delivering it to her stood there with his back turned to her. Mr M told her that this newspaper contained encrypted information which he would decode. She also recalls the three cell members travelling with Mr M in a vehicle to the Ipswich Courthouse, where she went up the steps and collected a micro cassette from the hands of a man standing with his back to her, and returned with it to the car. This was done at about 8.00 p.m. at night. She did that because she trusted Mr M as a Christian, a very good friend and a police officer[34], and because they were disrupting a paedophile group.[35]

[42] The next occasion was when all three cell members were taken to an area on the Brisbane River known as Colleges Crossing on a dark night and while RA acted as the lookout, CN was required to retrieve a floating ice cream container from the Brisbane River which contained within it information where a "drop site" was; at that drop site there was a box containing what EB was assured was definitely pornographic material, which she had to look through until she found a code written on the paper, which she required to record and hand to Mr M. All three women performed as requested, with EB delivering the code to Mr M and leaving the

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31 At AR 312, evidence of CN

32 LM's evidence on this is at AR 57; that of Robert Geach, the computer analyst, at AR 241 and 246. The documents were exhibited when EB was giving evidence – see AR 257-259.

33 See AR 241, evidence of Mr Geach, and at AR 246 and 248

34 AR 264

35 AR 263

magazines behind in the box. That same night EB was taken by herself to another location and shown a box containing within it a hypodermic syringe which Mr M told her had been placed there to ensure that only the right people got the information.[36]

[43] The last activity EB recalled was an occasion when she and RA went with Mr M to a park, where at his request they pretended to be girlfriend and boyfriend and embraced each other, while waiting for an unidentified male to deliver a bag to an open air chapel. The male did and EB as requested by Mr M, retrieved a video from that bag and in so doing jabbed her thumb on a needle positioned in the spool of the video. This caused some bleeding and was painful for some days. That injury was the basis of the assault occasioning bodily harm charged in count 10.

[44] Mr M told EB that a potential problem with that needle stick injury was that it might contain a gelatine arrow that paedophiles had placed on it, capable of transmitting an exotic sexually transmitted disease, and that tests would be necessary to determine what that was. Mr M came to her work place at the Dental Clinic one afternoon, and said that she would have to have some tests to find out if she had a disease and how it had affected her. She was told the tests would involve masturbation, which stunned her, and that she would have to shave her genital area. On a later date they met by arrangement and went again to the Colleges Crossing area where she was asked the questions about her sexual experience of the type contained in exhibit 7, required to remove her clothes, take a tablet and then run on the spot (naked) for 20 minutes. Mr M took photographs of her breasts and of her genital area before and after this activity. She was then required to sit on the ground and masturbate until she reached a climax, and when she told him she had, he inserted a cotton bud into her vagina and took a swab. That action was the basis of count 11. He told her that he would take the swab to "the lab" for analysis.

[45] Later Mr M told her that the result of the first test showed she was a carrier and not allowed to engage in any sexual activity; and a second test was carried out at the home of RA and CN. By arrangement the latter two went out and Mr M and EB had the use of the house. On that occasion she was required to have a shower and Mr M then applied an oil all over her body. While he was doing that the phone rang and he answered it, and told her that "the paedophiles" were looking for him. The application of that oil, including onto her breasts and around her genital area, was the basis of count 12. After that EB was required to go into the lounge room, lie on the floor and masturbate until she climaxed, at which time she was provided with what Mr M told her was the antidote tablet. She was also told that blindness was a possible side effect of that tablet. Once again a cotton bud was inserted into her vagina after she told Mr M she had reached a climax. Insertion of that bud was the basis of count 13. As EB understood it, Mr M was video taping all of those events, including her taking the tablet. When she opened her eyes after taking it, she was overjoyed to discover that she was not blind, "so I remember hugging him and dancing around the room because I was okay", because "I believed this man so much".[37] Count 14 was based on a third test she was required to undertake at a rented unit on the North Coast, at which she was again required to masturbate, and once again a cotton bud was inserted into her vagina, purportedly to collect a swab; once again those events were purportedly video taped.

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36 AR 266

37 AR 278

[46] CN described how she and her sister received phone calls asking for Bob Stone, which frightened them considerably, and after the various tests just described were performed on EB the three women asked Mr M for the return of their questionnaires, and wanted to cease under-cover activities. Mr M's response was to say that he would have to ask Peter, his supervisor, for the return of the documents, and he purported to arrange a meeting with Peter when the three women were at CN and RA's home. Mr M telephoned them there to say that there had been a "leak", and while speaking with RA a shot was heard from his end of the telephone. Soon after he arrived at the house, apparently very upset, and said that Peter had been shot and taken away. Mr M claimed to have followed the offenders' car to a water tower, and tried to get the questionnaires returned (apparently from the people who had abducted "Peter"); he had those for the sisters in his possession but not the one for EB. All three women then went with him in a car to that water tower looking for her documents. None were found. Thereafter all under-cover work by the cell members ceased, as did almost all contact between any of them and Mr M.

The argument on ground 1

[47] Mr M's first ground of appeal complains that the learned trial judge erred in admitting the evidence of KP, that when she was aged about eight she went with her sister LM to stay with Mr M for a week. One day during that week she was at home alone with him, her sister having gone to work, and when she was in the hallway she saw that the bedroom door was wide open and that Mr M was sprawled out on the bed naked. KP had not seen a naked man before and her evidence was that it appeared to her to be a posed position, and that Mr M was looking at her through half closed eyes.[38] She shut the bedroom door and stayed in the lounge room, as far away from the bedroom as she could, until her sister came back.

[48] The other evidence led in the trial from KP, and about which objection was taken on the appeal, was evidence of an occasion when she was about 10, and after Mr M and LM had married; and it occurred when she stayed overnight at their home at Mr M's suggestion. After LM had gone to work and when KP was in the shower, Mr M opened the door came in and took her clothes out. She asked what he was doing, and said she would stay in the shower and use all the hot water until he returned her clothes. The next thing she saw was Mr M leaning over the shower at its top with a camera, whereupon she huddled in the corner and covered herself as much as she could, and as soon as he left she seized a towel. When Mr M re-entered the bathroom she asked him to give her clothes back, saying that his behaviour was rude and he was supposed to be a Christian; and Mr M replied to the effect that she was the one that was rude, she was standing half naked in front of a window. Eventually she retrieved her clothes and at her request was taken home. She promised not to tell anybody.

[49] The learned trial judge admitted that evidence over objection from Mr M's counsel, because the learned trial judge considered that it indicated that Mr M had a sexual interest in the body of the then child KP, and that without evidence of his conduct when she was aged eight and 10, the jury might consider her evidence of his conduct when she was 12 to be close to unbelievable, whereas the earlier two

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38 AR 125

incidents made it more believable because it revealed the relationship between them.[39]

[50] The learned judge's reasons for admitting that evidence reflect the remarks of McHugh J in *KRM v R*[40] at [24] and [31]. At [24] His Honour wrote:

> "In cases concerning sexual offences, evidence of uncharged acts between the accused and the complainant has long been admitted where it tends to explain the relationship of the parties or makes it more probable that the charged acts occurred. Thus, evidence of uncharged acts may explain why, on the occasion or occasions charged, the complainant did not rebuff the accused or showed no distress or resentment. It may also tend to prove that the accused had an unnatural passion for the complainant and thus prove the motive for committing the crime charged."

His Honour added at [31] that:

> "Until this Court decides to the contrary, courts in this country should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused, just as they have done for the best part of a century."

His Honour added that judges would often need to warn juries of the limited use that could made of such evidence, and need to give a propensity warning concerning that;[41] the other judgments in the report focus upon the need for, and possible form of, any "propensity" warning in that case.

[51] I respectfully consider the learned trial judge was correct in holding that the challenged evidence was admissible as tending to prove that Mr M had an actual and improper, if not unnatural, interest in viewing KP naked. The existence of that interest made it more probable that the conduct did occur which was the subject of count 1, and was relevant to why it did happen. The jury would have been entitled to conclude that the object of that whole exercise was to obtain the photographs he did take. I also consider that the evidence complained of had the incidental effect of explaining the degree of distrust of Mr M evident in KP's dealings with him in respect of count 1.

[52] I respectfully observe that the basis on which evidence of other acts by an accused person is admissible was well expressed by Atkinson J in *R v AB* [2000] QCA 520 at [122], where her Honour wrote:

> "Other criminal acts or reprehensible uncharged conduct may be probative because it is similar fact, *res gestae*, corroborative, circumstantial, relationship, identity, or propensity evidence. These categories are not exhaustive and are not necessarily exclusive. That it is so able to be characterised, is not the rationale for its admission. Its admission must be relevant to proof beyond reasonable doubt that the accused is guilty of the offence or offences with which he or she

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39 The ruling by the learned judge is at AR 6-7

40 (2001) 206 CLR 221; 75 ALJR 550; 178 ALR 385

41 Hayne J relevantly agreed with McHugh in *KRM v R*, at [133] – [134]

> is charged. The rationale for its admissibility, however the evidence is characterised, is because it is relevant to proof of the offences in that it supports an inference of guilt because it is objectively improbable that there is an innocent explanation for the evidence in all of the circumstances."

I have omitted her Honour's extensive footnotes; I understand the last sentence to mean that the evidence of those other criminal acts or reprehensible conduct renders it objectively improbable that there is any possible innocent explanation for the evidence led in support of the offence charged.

The argument on ground 2

[53] Mr M's second ground of appeal was that the learned trial judge erred in admitting evidence of RM that when Mr M was teaching Sunday school he used to make rude gestures towards her, such as licking his teeth or giving her "the finger", and making comments about her bra, such as "Oh we have got the big girl bra", or comments about its colour.[42] It was not clear on the appeal record quite how old she was then, but this happened before the conduct complained of in count 6. Mr M's grounds of appeal and outline of argument complain that that evidence did not provide any relevant background or context evidence in which the jury might understand the circumstances of the offence charged, nor tend to make it more probable that it occurred, and further that its prejudicial effect outweighed its probative value. The learned trial judge had ruled that evidence admissible because the judge considered that the remarks and gestures indicated a sexual interest in the girl RM at an early age, and that although it was difficult to be precise, perhaps a year or two before the offence occurred of attempted extortion, which offence the learned judge considered had "sexual overtones". The judge regarded the evidence as being relevant and probative with respect to the attempted extortion.

[54] I respectfully consider that the conduct alleged to constitute the offence of attempted extortion does show an inappropriate interest in RM's sexuality or sexual behaviour, and that the evidence of his earlier conduct, whenever it did actually occur, also showed an inappropriate interest then in her sexuality. Proof of that earlier interest makes her account of the conduct constituting the offence more believable, as being conduct focused on her. Mr M's defence to all of these charges was a mixture of denials by cross-examination of some acts, coupled with the suggestion also advanced in cross-examination that the undenied conduct complained of had simply been light hearted joking. The admission of the evidence complained of tended to negate both those defences, and was admissible for that reason as well.

Ground 3

[55] Ground 3 complained that that evidence from RM ought not to have been left to the jury for its consideration, after count 7 on the indictment was made the subject of a *nolle prosequi*. That count was in identical terms to count 6, save that it alleged that Mr M had accused RM of committing an indictable offence, namely indecent assault, with the intent to gain her services as an informant and under-cover operative for Mr M and to obtain the payment of a sum of money to Mr M. Count 6

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42 This evidence is at AR 213

alleged that Mr M had accused PM of committing the indictable offence of unlawful carnal knowledge of a girl under 16, and indecent assault of her, with the intent to gain PM's services as an informant and under-cover operative and to obtain the payment of a sum of money. The Crown withdrew count 7 after the learned trial judge ruled that if Mr M did accuse RM of committing sexual acts with PM while she was under the age of 16, that would not have been an accusation of her having committed an indictable offence, since the provisions of the C*riminal Code* which make it an offence for a male person to have unlawful carnal knowledge or indecent dealings with a girl under the age of 16 do not make unlawful the conduct of the female victim of those offences.[43]

[56] The appellant complains that the evidence objected to could only be relevant to that withdrawn count 7 and not count 6; I respectfully disagree, and consider it admissible on count 6 for the reasons already described, irrespective of whether Mr M was ever charged or not with any count in which RM was the complainant. Mr M's counsel submitted on the appeal that it was an error to admit evidence of prior conduct of Mr M with a witness (on count 6). I consider the relevant issue is whether the contested evidence is relevant to, and probative of, the commission of the offence charged, not whether it specifically relates to any nominated complainant in the count for that offence.

Ground 4

[57] The appellant's ground 4 complains that the learned judge failed properly to direct the jury as to which of the counts the evidence of RM and KP was relevant. The appellant's outline concedes that the jury were given directions about the use to which they might put that "relationship" or "uncharged acts" evidence[44], about which directions there is no complaint other than that in those the learned judge did not identify the specific counts to which the particular evidence of those witnesses related. That submission does not do justice to the careful directions by the learned trial judge, which included warnings about the impropriety of propensity reasoning, and an explanation as to why that evidence had been admitted. This unfairness is not simply because the counts to which the evidence was relevant are really self identifying as being count 1 and count 6. It is because the learned judge explained, specifying that he was then referring to KP, that:

> "If, however, the *specific charge* on the indictment is placed in a wider context, that is, in the context of an ongoing history which shows the existence of a sexual attraction on the part of the accused for the body of the girl [KP], then that curious feature would disappear. It is for that reason and that reason only that the law permits a wider sexual history to be given by the girl [KP]. You must not use those other uncharged incidents involving the girl [KP], if you accept that those uncharged incidents did occur, to reason that if the accused committed those other uncharged acts, then he must have committed the *specific charge* that you are considering." (Italics mine).

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43 The ruling is at AR 471 - 472

44 The directions appear at AR 594 to AR 598. I am repeating the description given to that evidence by the appellant's counsel on appeal.

[58] It is clear that the learned judge referred the jury to considering a specific charge by that direction and explanation, and he told them that exactly the same consideration applied to RM, and that a limited use only could be made in respect of the other incidents involving her not charged in the indictment. Once again in those directions he warned them against reasoning that if those established Mr M was a bad man, he must be guilty of the specific charges brought against him on the indictment. I respectfully consider that there is no substance in the appellant's complaint that the learned judge ought to have made explicit reference to counts 1 and 6 by number when giving those directions and that the failure to do so meant the jury must have felt free to use that "relationship" or "uncharged acts" evidence when considering charges relating to other complainants. I am satisfied that the directions given ensured that there was no danger of that occurring.

Ground 5

[59] Ground 5 complains of the comments by the learned judge regarding pubic hair. Those comments directed the jury's attention to an issue raised in cross-examination of DM, who had agreed with Mr M's counsel that he put no value on his pubic hair, and did not feel defrauded out of any of his personal property or possessions, or feel that he had suffered any loss, caused by Mr M's conduct with DM's pubic hair. The learned judge heard submissions on whether that hair was capable of being a chattel, (as s 427 of the *Code*, under which the count was laid, required) and likewise about whether Mr M could have committed the offence of assault occasioning bodily harm when causing a person to be pricked by a needle. The learned judge made rulings and gave directions on those issues[45] which are not the subject of any complaint on this appeal, but the directions concerning the existence of property in one's pubic hair is subject to collateral attack by this ground of appeal, complaining of directions which may have invited the jury to think Mr M belonged to a disreputable group of people or was in contact with them.

[60] The actual direction given was as follows:

> "Now, the hair on your head has some value, for example, to a wig maker. The hair on your head is an item of property in the eyes of the law, and I direct you as a matter of law that a person's pubic hair is an item of property in the eyes of the law. You might think that to persons with a perverted interest in sexual matters a sample of pubic hair has some value. These persons do exist and will always exist. You might think there is a fetish industry for items such as a sample of pubic hair. The issue in each case is whether the accused by false pretences [induced] a person to deliver to him a sample of pubic hair with intent to defraud."

[61] The appellant's submission is correct that it was sufficient to direct the jury that as a matter of law pubic hair was an item of property. I disagree that the extra directions given were capable of causing a miscarriage of justice, either on counts 1 to 4 or on the indictment generally. The jury were entitled and likely to conclude that Mr M's obtaining the relevant pubic hairs was merely a step along the way to his securing

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45 The Crown relied on *Royall v The Queen* (1991) 172 CLR 378 in respect of those assault charges; (AR 482), and the judge directed the jury in terms of the indirect application of force (AR 613-4) reflecting the definition of assault in s. 245 of the *Code*.

the opportunity to photograph those complainants naked or semi-naked, and that that was his goal. Mildly (or wildly) inflammatory remarks about the reasons for pubic hair having a value were unlikely to distract the jury from the real issues.

Ground 6

[62] The complaint in ground 6 has far more substance. The learned trial judge directed the jury in accordance with the indictment on that count, the terms of which have already been quoted, and which followed the wording of s 416 of the *Criminal Code*. That section relevantly provides that any person who, with intent to extort or gain any property or benefit or the performance of services from any person, accuses that person of committing an indictable offence (or threatens that the person shall be accused by any other person of the indictable offence) is guilty of a crime. The indictment alleged that Mr M's accusation that PM had committed indictable offences of a sexual nature was made with intent to gain the services of PM as an informant and under-cover operative for Mr M, and to obtain money. The learned judge directed the jury as follows:

> "It is not necessary for the prosecution to prove both matters, namely that the accused had an intention to gain performance of services, and in short that's undercover police work to work as an informant, and that the accused also had an intention to obtain payment of money to the accused. It is sufficient that the prosecution proves one only of those matters. Proof of one matter is sufficient. The prosecution does not have to prove both."[46]

[63] The jurors subsequently sought a redirection, which was:

> "Can the Judge give us guidance on the matter of money and whether a passing comment such as the $50 to make a file disappear can be construed as a request for money"[47]

The learned judge had originally directed the jury that they should bear in mind that a nod was as good as a wink and that there did not need to be any demand for money[48]. In response to the request for a redirection the learned judge repeated an earlier direction that what the jury were concerned about was the intention of the accused, that they should look at what he said and did, that a nod was as good as a wink and that the accused might, for instance, simply have produced a wallet and patted it while saying nothing, and that there need not be any request for money or demand for money. The learned judge then added:

> "And the Prosecution says that the intention was to gain the payment or obtain the performance of services as an undercover police operative or informant."[49]

[64] Regrettably, in so directing the jury by that last remark, the learned judge repeated an allegation in the indictment that could not possibly be established by the evidence, namely that Mr M intended to gain the services of PM as an informant

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46 AR 632
47 AR 710
48 AR 631
49 AR 721

and under-cover operative. The jury could conclude from the Crown evidence that Mr M had pretended to PM on two separate occasions that Mr M had that intent, but that it was not genuinely held.

[65] The drafting of the indictment on that count probably reflected the drafting in counts 1 to 4, which alleged a false pretence to the relevant complainants that samples of pubic hair were required prior to that complainant's engagement by Mr M as a police informant. That wording was apposite in those counts, since Mr M's false pretences included that those complainants were being engaged by him as police informants, but was inappropriate in count 6. The appellant's counsel forcibly submitted on the appeal that as it was clearly the Crown case that the appellant never intended that the complainant participate in any genuine police under-cover work, a verdict of guilty on count 6, in accordance with the directions by the judge to the jury, would be a miscarriage of justice and could not stand. It was submitted that the last direction given to them had left the jury with an option to convict on a basis specifically disavowed by the Crown and in relation to which there was no evidence.

[66] The submission has force, particularly because of the observations by Gleeson CJ, Gummow J, McHugh J, and Hayne J in *Gilbert v R* (2000) 170 ALR 88. Gleeson CJ and Gummow J wrote at [13] that:

> "The system of criminal justice, as administered by appellate courts, requires the assumption that, as a general rule, juries understand, and follow the directions they are given by trial judges."

And their Honours wrote at [16].

> "They make their findings of fact in the context of instructions as to the consequences of such findings, and for the purpose of returning a verdict which expresses those consequences."

[67] Likewise McHugh J wrote at [31] that:

> "The criminal trial on indictment proceeds on the assumption that jurors are true to their oath,…..and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian State. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the direction of the trial judge, there is no point in having criminal jury trials."

[68] Hayne J wrote in the same case at [51] that the conclusion he had reached on the appeal:

> "……is a conclusion which depends entirely upon giving due weight to the verdict of the jury in light of what they were told by the judge

> and assuming (there being no basis for suggesting otherwise) that they did their duty conscientiously."

[69] The jurors in this matter were directed by the learned judge in accordance with the indictment, and the final direction did focus upon a basis for convicting Mr M which simply did not exist. The appellant contends that the assumption the respondent argued for on the appeal, namely, that the jurors of necessity convicted on the alternative basis charged, it being that Mr M accused PM of committing a sexual offence to obtain the payment of a sum of money, was not available to the Crown, or could not safely be relied upon. It was submitted that there was simply an unacceptable risk that the jurors had acted in accordance with the direction of the learned judge.

[70] That direction repeated an inaccurate proposition in the indictment, but I am satisfied that the error would have been patently obvious to the jury. They had heard in extensive detail of the nonsensical pretences to which Mr M had subjected various of the complainants, when leading them to believe they were assisting in under-cover work, and the jurors had heard the unchallenged evidence that he had in fact no experience or record of ever having performed any himself. There was no suggestion made in cross-examination that any of the complainants provided or were asked for any actual information about anybody, and the jurors were entitled to conclude that their general unworldliness made them the least likely group of potential informants whom it would be possible to imagine. Likewise there was no suggestion in cross-examination of their having performed anything that could remotely resemble any genuine under-cover assistance.

[71] On the other hand, there was clear evidence of endeavours to obtain the payment of sums of money, being whatever Mr M could extract from PM, be it $50.00 or $5,000.00. The question the jurors asked when seeking redirections focused squarely on whether the money had been requested. In those circumstances I am satisfied that no miscarriage of justice was actually occasioned by the defective drafting of the indictment in count 6, offering as it did what was proven to be an irrelevant alternative to an intent Mr M did have, and an object he did pursue, namely an unsuccessful endeavour to frighten PM into giving him money. Accordingly I would dismiss that ground of appeal.

Ground 7

[72] The final ground of appeal complains that the verdict in count 6 was unreasonable or could not be supported by the evidence. The outline of argument contends that since proof of that count required proof beyond a reasonable doubt that Mr M accused PM of committing indictable offences, that count was not proved by evidence that Mr M had told PM that he had been shown a file in relation to PM and RM being engaged in under age sexual activity. Nor was it established by the request later made for money to make that file disappear, nor by Mr M's requesting PM and RM to sign a confession when saying that failure to do so would mean that the investigations on the file would continue. It was submitted that falsely asserting that such a file existed, and that investigations would continue if the confessions were not made, and that the file would be available to the investigators if monies were not paid, did not amount to an accusation for the purposes of s 416 of the *Criminal Code*.

[73] I consider that production of the prepared confession to varieties of penetrative intercourse, coupled with the assertion that PM would go to prison and RM to an institution if the confessions were not signed, did constitute an accusation that PM had committed that offence. An accusation can be made directly, or aggressively and with confidence (whether known to be false or not); or it can be made more snidely or obliquely, provided it clearly is made. Here, there was not an express accusation but the fact of its truth was presented by Mr M as an assumption on which he was acting and on which he expected the other two to act. That was a subtle accusation that the assumption was true. Since he had undoubtedly fabricated the account of a file and an investigation, he was making the accusation, no doubt to gauge the response. Accordingly, I would dismiss that ground of appeal. I would order that the appeal against conviction be dismissed.

[74] Since writing these reasons in draft form, I have had the opportunity of reading those of Davies JA, and respectfully agree that in this appeal it is appropriate to order that the indictment be amended for the reasons his Honour gives. I agree accordingly with the orders his Honour proposes.

[75] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgement of Jerrard JA and the additional reasons of Davies JA. I respectfully adopt what Jerrard JA has said in his reasons for dismissing the appeal, save as to count 6. In respect of Count 6, I agree for the reasons set out by Davies JA that the indictment should be amended in the terms indicated and that ground 6 of the appeal must also fail. I would also dismiss the appeal.