SUPREME COURT OF QUEENSLAND

CITATION:	*R v Butler & Lawton & Marshall* [2011] QCA 265
PARTIES:	**R** **v** **BUTLER, Davin Roy** (appellant) **R** **v** **LAWTON, Julian Marc** (appellant) **R** **v** **MARSHALL, Joshua Peter** (appellant)
FILE NO/S:	CA No 35 of 2011 CA No 34 of 2011 CA No 37 of 2011 DC No 7 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	4 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2011
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 35 of 2011:** **1. Appeal against convictions dismissed.** **In CA No 34 of 2011:** **1. Appeal against convictions allowed.** **2. Convictions and verdicts set aside.** **3. Verdicts of acquittal entered on counts 1, 2 and 3.** **In CA No 37 of 2011:** **1. Appeal against convictions dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT

UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellants were convicted of two counts of rape and one count of attempted rape – where the appellant, Butler, claimed the trial judge erred by admitting his record of interview into evidence – where Butler claimed the trial judge failed to adequately direct the jury with respect to lies in the interview – where Butler claimed that the verdicts were unsafe and unsatisfactory – where Butler further claimed that there was a miscarriage of justice owing to the manner in which the Crown Prosecutor's statements and questions were conveyed – whether the record of interview was properly admitted – whether trial judge failed to adequately direct the jury with respect to lies in the interview – whether the discrepancies and inconsistencies in the complainant's evidence were of such a nature as to compel a jury to reject the complainant's testimony – whether the Crown Prosecutor's expressions would have distracted the jury from its task of assessing whether the evidence established Butler's guilt beyond reasonable doubt

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellants were convicted of two counts of rape and one count of attempted rape – where the appellant, Lawton, claimed the verdicts were unreasonable having regard to the evidence – where Lawton alleged the trial judge failed to properly direct the jury with respect to s 7(1)(c) of the *Criminal Code* – where Lawton further claimed that there was a miscarriage of justice owing to the manner in which the Crown Prosecutor's statements and questions were conveyed – whether the Crown Prosecutor's expressions would have distracted the jury from its task of assessing whether the evidence established Lawton's guilt beyond reasonable doubt – whether the appellant's presence amounted to aiding for the purposes of s 7(1)(c) of the *Criminal Code* – whether the trial judge failed to adequately direct the jury with respect to the meaning and operation of s 7(1)(c) of the *Criminal Code* – whether the verdicts were unreasonable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellants were convicted of two counts of rape and one count of attempted rape – where the appellant, Marshall, claimed that there was a miscarriage of justice owing to the manner in which the Crown Prosecutor's statements and questions were conveyed – where Marshall claimed that the verdicts were unreasonable

having regard to the evidence – whether the Crown Prosecutor's expressions would have distracted the jury from its task of assessing whether the evidence established Marshall's guilt beyond reasonable doubt – whether the verdicts were unreasonable

Criminal Code 1899 (Qld), s 7(1)(c)

Deriz v R (1999) 109 A Crim R 329; [1999] WASCA 267, considered
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, considered
Libke v The Queen (2007) 230 CLR 559; [2007] HCA 30, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
R v Beck [1990] 1 Qd R 30; (1989) 43 A Crim R 135, applied
R v Hall [1987] 1 NZLR 616, considered
R v Hay and Lindsay [1968] Qd R 459, considered
R v M [1991] 2 Qd R 68, considered
R v PV; ex parte Attorney-General [2005] 2 Qd R 325; [2004] QCA 494, applied
R v Roulston [1976] 2 NZLR 644, considered
R v Williams [1987] 2 Qd R 777; (1987) 25 A Crim R 234, considered
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, considered

COUNSEL: D C Shepherd for the appellant Butler
J J Allen for the appellant Lawton
K Prskalo for the appellant Marshall
R G Martin SC for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Chesterman JA and with the orders he proposes.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the orders proposed by his Honour.

[3] **CHESTERMAN JA:** The appellants were jointly charged with the rape of on 14 December 2007. The indictment alleged three counts of rape by each of the appellants. On 10 February 2011, after a six day trial, each appellant was convicted of two counts of rape and one count of attempted rape. Lawton was sentenced to seven years' imprisonment for the rapes and four years for the attempted rape, to be served concurrently. Marshall was sentenced to eight years' imprisonment for the rapes and five years for the attempted rape, to be served concurrently. Butler was sentenced to eight and a half years for each of the two rapes and five years for the attempted rape, to be served concurrently. All have appealed against their

convictions. Marshall applied for leave to appeal against his sentences but abandoned the application.

[4] The offences occurred very late at night in a park at Rockhampton. The complainant had drunk heavily during the day and evening and was alone in the park at night smoking cigarettes and listening to music. The appellants encountered her by chance.

[5] The facts relevant to count 1 were said by the prosecutor in his opening address to be Marshall penetrating the complainant's vagina with his penis. Those relevant to count 2 were Butler inserting his penis into the complainant's mouth. The allegations in respect of count 3 were that Butler inserted his penis into the complainant's vagina. The appellants Butler and Lawton were charged in respect of count 1 on the basis of giving assistance to Marshall. With respect to counts 2 and 3 Marshall and Lawton were charged on the same basis. The convictions on count 2 were, as I mentioned, for attempted rape, not rape.

[6] The appeal was conducted upon the basis of the agreed statement of facts. It is not necessary to refer to the whole of the statement. The following is a sufficient account:

> "12. The first witness was the complainant (F). She said at the relevant time she staying with her aunt. On 13 December 2007 she was intending to visit her father in Mt Isa but missed the train as a result she was feeling somewhat upset. That evening she was at her aunt's and grandmother's house and commenced drinking with her aunt (J). At some point in the night she went for a walk to look for cigarettes. She went by herself. She walked to the train bridge and just sat there for a while. At the spot where she was sitting there was a local pool nearby.
>
> 13. She said after a short time sitting she was joined by three people she did not know. They were all men. She heard them coming over the bridge and asked them if they had a smoke. There was one dark fellow and two light-skinned fellows who looked white. She remembered one of them had hair down to his shoulders and one of the others was quite a big fellow, bigger than the other two. The third person she described as being dark and not wearing a shirt. That person had a tattoo across his chest which said the word 'butler'. She asked him if the tattoo was his last name and he said '*yes*'. She asked him if he knew Davin Butler and the response received was, "*Yeah, that's my brother*". The person said his name was Aaron Butler.
>
> 14. She said that at the relevant time there was no one else in the park, but at some point a car came along and one of the men who was then talking to her walked over and spoke to someone in the car. She wasn't sure how many of the men went over to speak to the people in the car. The car left and then at least one of the men asked her to have sex with them. She told them she would not as she had her period. The big

fellow said something to the effect of "*Just you and me go*" and she again said "*no, I've got my period*". One of them said, "*I don't care*".

15. After this she sat on a park bench. She was sitting there and "And then trousers just came off". She said her trousers were pulled off by the fellow with the long hair and that her underwear came off when her trousers were taken off. She said those men then had sex with her.

16. In her evidence she said "*that guy had sex*". When she was asked by the prosecutor "*which guy*" she said "*The one there.*" She said this male put his penis into her vagina, and there was another fellow trying to stick his penis into her mouth. When asked who was trying to do that she replied, "*it was the dark one*". She bit his penis because he wouldn't take it away. She said that when she bit the dark man's penis he slapped her in the face.

17. She was asked, "*After you had bitten this man's penis and he had obviously moved back, what was going on with the first man who put his penis in your vagina*". Her response was "*I don't know*". She was asked again, "*Was he still doing that*". The transcript suggests a positive response was made but there did not appear to be any audible answer.

18. She said that when the first man finished having intercourse with her that the dark fellow then had intercourse with her. He, the dark fellow, said something to the effect of, "*You know you want it*". She said that while the first man with the shoulder length hair put his penis in her vagina, followed by the darker man's attempt to place his penis in her mouth, and then that darker man having intercourse with her, the third person was just standing there, probably about a metre away. He was not outside the park but he was about a metre away. During the course of the attack "*he hit me on the back of the head*" but she could not recall if he said anything at the relevant time. She then clarified and said "*that was the last thing that they did.*" After the third man hit her on the head they just walked off.

…

22. She said she spoke to police but could not recall the detail of what she told them. She later saw a doctor. The complainant said she had a graze on her arm – on her right elbow – as a result of falling.

23. In cross-examination the complainant said she did not know the two white males but some years earlier had met the dark male who she agreed had the name Damon (sic) [Davin] Butler. She also agreed that she did not recognise him on that night. The witness agreed that on the afternoon in question she had been drinking at a bingo hall, had about 11 cans of rum and cola and about 2 cups of wine at her

aunt's house before going for her walk in search of cigarettes. She agreed she was affected by liquor but not falling down drunk.

24. She agreed that after she left her aunt's house she sat on the railway bridge for about 45 minutes smoking "dumpers" and listening to music on her walkman. She then came back to the park. She saw some people in the park and was going to ask them for a cigarette but heard someone walking over the railway bridge. She had to go through a tunnel to meet with them to ask them for a smoke. She ended up in another area of the park. The men asked if they could sit with her. She said yes. She denied that she asked the men to come with her to this other area (referred to as the little park).

25. She was not sure who asked her for sex or if it was more than one of them. After refusing to have sex with all of them and then only one of them the male with the long hair pulled her pants off. At this time the dark male walked up to them but she didn't know where the other male was.

26. When asked about the detail of the positioning of various people at the time she was having intercourse with the first male the complainant gave some explanation but when asked "*How was your body positioned as the fellow with the long hair was having sex with you*" said "*Can't remember*". She went on to say that it all happened so fast and that she was sure she was not lying down. She did not know how the long haired male was positioned; whether he was standing or kneeling.

27. The complainant denied that she had agreed to have sex with the dark male but agreed that she said at the committal that at the time she had agreed to have sex with one of them. She then said she could not recall questions and answers given by her at the committal hearing. She agreed she said she would have sex with one of them (the dark male) but meant only if she did not have her period.

28. The complainant agreed that she did not scream out because she was afraid of what might happen to her but said that she was not afraid to bite the dark man's penis to get it away. She said she did not bite it too hard because if she did she might be slapped harder. She said that she was trying to push them away but was not being held down.

29. She said that the larger male punched her in the back of the head after she got up to get her trousers. She could see the other two so it must have been the other fellow behind her who punched her. She later said that she did not know where she was hit from but that it wasn't from the front. She denied she followed the men for a short time to retrieve her cap.

…

31. The complainant agreed that there were some inconsistencies between her statement to police and evidence particularly whether she saw their exposed penises before the sex acts occurred; that the men were holding her down when the sex occurred; that the larger male asked for sex after the others stopped.

32. The complainant then said that she did not tell police those things contained in her statement and it was in fact the detective putting words in her mouth and she just agreed. She said that she could not recall if she read the statement. She also agreed that she made some minor changes to the statement at the committal hearing but not specifically those referred to in cross examination earlier.

…

52. The final witness was Doctor Karen Jane Quinn. The doctor gave evidence that on 14 December 2007 she examined (F) and Davin Butler. The doctor described the complainant as calm, generally well presented, extremely quiet and extremely co-operative. The complainant told the doctor that she had gone for a walk and was approached by three men. She told the doctor that she had been thrown to the ground, had been vaginally penetrated by one of the men and that one of the men tried to put his penis in her mouth but she bit him. The complainant also said she struggled on the ground.

53. The doctor's examination revealed tenderness and swelling to the right side of her head (temple to jaw area), tender swelling to the right upper arm and an abrasion to the left elbow. Genital examination revealed she was menstruating quite heavily. There were no external injuries to the vagina but some internal tenderness. Examination was extremely painful for the complainant. No other injury or abnormality was noted.

54. The examination of Butler revealed only that there was a small abrasion on the head of the penis which was evident on retraction of the foreskin. The doctor said the appearance of the lesion indicated it was less than 48 hours old. The appellant said he had no other injury or medical reason which might explain the injury. The injury did not appear to be one caused by anything other than direct trauma but this did not include an injury caused by a zip.

55. The doctor said the injury was not likely to be caused by a fingernail and if it was caused by the incisor or front teeth more trauma particularly bruising would be evident. That was not present. The injury might be consistent with a bite which was not hard." (footnotes omitted)

[7] Several witnesses were called to give evidence of recent complaint. The evidence was essentially consistent though there was some variation in detail. The witnesses agreed that the complainant was upset and complained that she had been raped by

two white men and one aboriginal man. The investigating police officer who interviewed the appellants Butler and Lawton also gave evidence. Lawton gave an account of consensual intercourse between the complainant and his co-accused which he observed but took no part in. Butler denied meeting the complainant or any other aboriginal woman on the night. The police officer denied assisting the complainant with the content of her statement. Lawton's mother was a witness. Her testimony was limited to the fact that Butler and Marshall were friends of Lawton and the three men were in each other's company on the evening of 13 December 2007.

[8] DNA taken from Marshall was found in a swab taken from the complainant. Neither Butler's nor Lawton's DNA was found on the complainant. The complainant identified Butler from a photoboard of 12 photographs none of which depicted his tattoo.

Appeal – Butler CA 35 of 2011

[9] The grounds advanced were:

(a) The trial judge erred by admitting Butler's record of interview into evidence;

(b) The trial judge failed adequately to direct the jury that any lies contained in the record of interview could not be relied upon as proving a consciousness of guilt;

(c) The verdicts were unsafe and unsatisfactory;

(d) There was a miscarriage of justice because the Crown Prosecutor's statements and questions tended to convey to the jury that the prosecutor believed the appellants were guilty thereby creating a serious possibility that the jury was improperly influenced.

[10] Counsel for Butler unsuccessfully objected to the admission of the record of interview at the trial. It was argued that the appellant's responses when questioned did not contain any admissions of guilt or acceptance of complicity in the offences charged so that the statements were irrelevant and that it was prejudicial to his case to have the accusations put to him by the police in their interrogation admitted into evidence.

[11] Relevantly the questioning began with an explanation that the police wished:

> "… to question you about … a … sexual assault … between … midnight and four AM … this morning … in a park … directly behind the South Side Memorial Pool, near the [railway] bridge."

Butler said he "Wouldn't know about it", and when asked if he knew anything about the matter, said "No". About his movements during the relevant time he said he had been drinking at an aunt's house until about 11 pm when he left to go to the house of a friend where he stayed until about 1 am when he moved to Marshall's house where he went to sleep because he "was a bit drunk … so … wasn't moving far." The account did not include going to the park where the complainant said she was raped. He identified the people he was with that night as Lawton and Marshall. He said that having got to Marshall's house he remained until about nine the next morning. He denied meeting anyone in the walk from the house where he had been drinking to Marshall's house. He denied that he came "across anyone during (his) walk."

[12] This was said:

> "Were you involved in any … such behaviour such as this earlier this morning?
>
> I doubt it. No.
>
> Were you with anyone other than Josh (Marshall) last night?
>
> No, just me and Joshy.
>
> Was Josh involved in anything of that nature last night?
>
> I wouldn't know."

[13] A little before that the investigating police officer had put to Butler the detail of F's complaints which by then had been reduced to writing. He denied in plain terms that he was the aboriginal male involved in the assault. The interview concluded:

> "Do you have anything to say in respect to the allegations that this girl has raised?
>
> Nup.
>
> Do you deny that you were involved?
>
> I wouldn't know, I don't deny it but I can't say I did it.
>
> So is there … a possibility that you may of … Been involved?
>
> No I'm not like that.
>
> …
>
> You couldn't deny it … .
>
> Yeah I couldn't deny it, but I don't think we come into any [complainant's name] sheila, or black sheila last night anyway."

[14] It was the concluding passage which was relied upon by the trial judge for ruling the interview admissible. The statement that he did not deny the allegations, and could not say "if (he) did it" was ruled to be capable of being an admission against interest. The submission advanced on appeal was that the remarks are at best equivocal and contain no acceptance that Butler had been present when F was assaulted, or that he had played any part in the assault. The appellant relied upon a passage in the judgment of Andrews CJ in *R v Williams* [1987] 2 Qd R 777 at 780:

> "Where however, nothing in the surrounding circumstances is shown which could reasonably be thought to compel a denial by a person interrogated or where he gives an answer which is ambiguous, neutral, equivocal, or otherwise not plainly inconsistent with a consciousness of innocence it ought not be left to the jury with a direction to the effect that it is left to them as a fact for their consideration and … that they might regard it as probative … ."

[15] There was compelling evidence that the appellant Butler was present at the park with Marshall at the time F complained of being raped. Butler's counsel conceded in address that he was present. His statement that he did not deny involvement in the rape therefore takes on particular significance. Given the circumstance that he

was being formally questioned about a serious criminal offence a failure to give an unequivocal denial is capable of being regarded as an implicit, grudging, admission of complicity. It is significant that it followed an earlier adamant denial of the particular allegations put to him from the complainant's statement. The jury could conclude that the appellant had resiled from his denial.

[16] The record of interview had another relevance. The appellant's answers to questions from the police officers put him in company with Joshua Marshall in the relevant hours of the morning of 14 December 2007. There was no doubt that Marshall was in the complainant's company in the park. McMurdo P pointed out in *R v PV; ex parte Attorney-General* [2005] 2 Qd R 325 at 329:

> "An admission against interest which is not a direct admission of an offence charged may nevertheless be relevant and admissible".

[17] The record of interview was properly admitted. It contained sufficient admissions against Butler's interest to make it admissible.

[18] Ground 2 is that the trial judge failed to direct the jury about what use, if any, they could make of the lies Butler told the police in his interview. He had denied being in the park or meeting the complainant "or any other aboriginal sheila" that night. He said instead he was drunk and asleep at Marshall's house. By the time the case concluded it was plain beyond dispute that Butler and Marshall were both with the complainant in the park and that Marshall had had intimate contact with her. It was submitted that in those circumstances the trial judge should have warned the jury they should not reason that Butler was guilty because he told lies. In the absence of such a direction the appellant complained that the jury may have felt entitled to use his dishonesty as evidence of guilt. The failure to caution the jury against such an approach was said to have caused a substantial miscarriage of justice.

[19] The prosecutor did not rely on, or even refer to, the appellant's false account of his movements, and false denials that he had encountered the complainant in the park. The prosecutor did not argue that the falsehoods provided proof of the appellant's guilt. The only reference made in his address to the record of interview was to the passage paraphrased as "I couldn't deny it. It's not like me but I couldn't deny it." The trial judge likewise said nothing about falsehoods in the record of interview. No redirection on this point was sought by the appellant's trial counsel. Defence counsel mentioned them. She advanced reasons why the jury would not assume they were connected with guilt of the offences charged.

[20] Notwithstanding the absence of complaint at the trial it was argued on appeal that the trial was unfair in the absence of a warning to the jury that they could not reason that the appellant was guilty because he had lied about his movements and his presence in the park.

[21] It is not the law that whenever there is evidence that an accused has lied in an out of court statement the trial judge must warn the jury in the terms suggested by *Zoneff v The Queen* (2000) 200 CLR 234, i.e. that where there is a risk that a jury might misunderstand the significance of lies where the prosecution did not rely upon them as indicating guilt they should not "follow a process of reasoning … that just because a person is shown to have told a lie … that is evidence of guilt."

[22] In *Dhanhoa v The Queen* (2003) 217 CLR 1 Gleeson CJ and Hayne J said (at 12):

> "It is not necessary for a trial judge to give a direction, either of the kind referred to in *Edwards*, or of the kind referred to in *Zoneff*, every time it is suggested, in cross-examination or argument, that something that an accused person has said, either in court or out of court, is untrue or otherwise reflects adversely on his or her reliability. Where the prosecution does not contend that a lie is evidence of guilt, then, unless the judge apprehends that there is a real danger that the jury may apply such a process of reasoning, as a general rule it is unnecessary and inappropriate to give an *Edwards* direction. *Zoneff* was said to be an unusual case, and the direction there proposed was said to be appropriate where there is a risk of misunderstanding about the significance of possible lies … ." (footnotes omitted)

[23] McHugh and Gummow JJ said (at 17-18):

> "It is possible, therefore, that the jury may have reasoned that the accused was guilty because he had lied to the police. It is not necessary for a trial judge to give a direction concerning lies as evidence of guilt whenever a prosecutor suggests directly or indirectly that an accused's out-of-court statement is a lie. But in this case it would have been better if the trial judge, having given the direction that he did, had instructed the jury as to how they were to use any lie told by the accused. Given the way that the Crown conducted its case, it would have been better if the trial judge had directed the jury that the accused's lies, if they found he had lied, only affected his credibility.
>
> However, it is not enough to establish that a miscarriage of justice has occurred by showing that it would have been better if the trial judge had given an appropriate direction concerning the effect of lies or that there is a possibility that the jury may have reasoned that the accused was guilty because he had lied to the police. To succeed in the appeal, Dhanhoa must establish that it is a *reasonable* possibility that the failure to direct the jury "may have affected the verdict". We do not think that he has done so." (footnotes omitted)

[24] The judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Zoneff* itself (at 245) shows that there is a risk in giving a direction about lies when that topic had not been relied upon by the prosecutor and no counsel had sought a direction on the point. Their Honours said:

> "It follows … that it was unnecessary, indeed undesirable, that a direction of the kind with which *Edwards* was concerned be given in the circumstances of this case. In order to give it … the trial judge would have had to decide which of the appellant's answers were or were not capable of being regarded as lies indicative of a consciousness of guilt. Such a direction here could have had the effect of raising an issue or issues upon which the parties were not joined, and of highlighting issues of credibility so as to give them an undeserved prominence in the jury's mind to the prejudice of the appellant."

[25] With this caution in mind the trial judge should not have embarked upon a direction about lies without first ascertaining from prosecutor and defence counsel their

submissions on the appropriate direction. A difficulty for the defence with any direction was that it would have drawn attention to the appellant's dishonesty and focused the jury's attention on what use they could make of that dishonesty. Although defence counsel may have hoped for a direction of the *Zoneff* type the point having been raised squarely the prosecutor may have asked the trial judge to instruct the jury in accordance with *Edwards*, that if satisfied lies were deliberately told because of the consciousness that to tell the truth would have implicated him in the rape of the complainant they could regard the lies as implicit admissions of guilt. The lies by their content and circumstance were amenable to that construction. It would have been entirely appropriate for the trial judge to have given such a direction, which would not have been in the appellant's interests.

[26] There were sound tactical reasons why the appellant's trial counsel would not have sought a direction on lies. There was good reason for thinking his interests were best served by ignoring the topic. A direction may not have diffused their potential for damaging Butler's case.

[27] Because the prosecution did not rely upon the lies or even refer to them, this is not a case in which the lack of a direction brought about a reasonable possibility that its absence may have affected the verdict. The appellant's untruths in the record of interview was simply not an issue the jury would have thought they had to consider.

[28] This ground of appeal has not been made out.

[29] The third ground is that the convictions were unsafe and unsatisfactory because an evaluation of all the evidence showed it was not open for the jury to convict: and the evidence as a whole gives rise to a reasonable doubt which the jury should have entertained. See *M v The Queen* (1994) 181 CLR 487 at 493-4. The basis for the argument was that the complainant's evidence was so unreliable and so beset with inconsistencies that no reasonable jury could have been satisfied to the relevant standard, either that the appellant Butler had had intercourse with the complainant or that, if he had, it was non-consensual.

[30] The submission identified a number of inconsistencies within the complainant's own testimony. They were:

- Her failure to immediately identify the appellant by name after she had seen his tattoo;
- Her claim that she was too frightened to call out for help but still bit one of the assailants on the penis;
- Her evidence that she did not bite hard because she feared she might herself be hit harder;
- Her inability to explain the positions of the men who had intercourse with her;
- Discrepancies in her testimony at trial, at committal and in her statement; and
- Her evidence concerning the removal of her trousers.

[31] As well the submission pointed to differences between the complainant's evidence and that of other witnesses. These were whether:

- She struggled with the assailants;

- She was held down; and
- The police officer invented parts of her statement.

[32] The flaws in the complainant's testimony were apparent and formed the mainstay of the appellant's arguments to the jury. The prosecutor accepted that this was the ground on which the case was to be fought. He said in his final address:

> "I'll tell you straight up now that if you don't accept what (the complainant) has to say beyond a reasonable doubt on the salient features of her evidence – not on every little aspect … - but on the salient parts, the important parts … if you don't accept her as both an honest and a reliable witness, return verdicts of not guilty … . This case stands or falls on your assessment of her."

Later he submitted, in effect, that the inconsistencies were in matters of detail readily explicable given the confrontation between the complainant and three strange men late at night when she was in a state of intoxication and confusion caused by fear. He invited the jury to find the essential, salient, parts of her evidence were given consistently and could be relied upon.

[33] The same argument was advanced by the respondent on the appeal. The inconsistencies pointed to were said to be matters for the jury's consideration, but neither individually nor collectively did they compel disbelief in the complainant's testimony, or reveal such discrepancies or inadequacies as to lack sufficient probative force to support the convictions.

[34] The prosecution case was a substantial one. There was evidence against all three appellants that they were in the complainant's presence in the park. Butler in the end conceded he was there. The complainant was able to identify him from photographs. There was evidence that the complainant had had intercourse without her consent. She was injured and had marked tenderness in the vaginal area. She complained immediately and was observed to be distressed. The act she described of biting an assailant's penis inserted into her mouth matched an injury on Butler's penis. There were as well objective indications indicating the unlikelihood of consensual intercourse. She was menstruating, she did not know any of the appellants and the relevant activity was group sex in a public place.

[35] Set against these considerations the individual criticisms lose significance. The failure to identify Butler from his tattoo was unimportant when the complainant recognised his face. The evidence that the complainant did not bite Butler's penis hard because she was afraid of a violent reaction is entirely plausible. The other criticisms could well have been due to intoxication and confusion caused by the rapidity of events and/or fear.

[36] The discrepancies and inconsistencies were properly matters to be considered by the jury when assessing the complainant's credibility and the reliability of her evidence. They were not, however, of such a nature as to compel the jury to reject her testimony entirely, or to compel disbelief that she had been subjected to a sexual assault. The attack on the complainant's credibility does not satisfy the description in *M*. The jury's advantage in seeing and hearing the complainant is a sufficient answer to the contention that the testimony contained inconsistencies. Those inconsistencies do not point inevitably to incredibility in the complainant's evidence. Her evidence was capable of belief, which takes the case out of the category with which *M* was concerned.

[37] The ground of appeal is not made out.

[38] The last ground is that the trial miscarried because of the prosecutor's conduct. The submission was:

> "The … prosecutor's opening address commenced with a factual assertion that the complainant was raped. The opening remark was not … a summary of any evidence the Crown intended to call but a bold assertion of the very issue which had to be determined by the jury. He went on to assert as fact the individual acts relied on by the Crown as particulars. His whole opening was couched in similar terms. There was no tone of objective independence in this opening address … (which) … was capable of conveying to the jury that it was the clear view of the prosecutor that the appellants were guilty. … ."

[39] Some individual criticisms were levelled at the prosecutor's remarks during the trial. On one occasion he referred to "the day after (F) was attacked in the park". He asked the examining doctor "How many rape victims have you spoken to … ?" In his closing address the prosecutor noted that he might attract criticism for "defending (the complainant) too much". The address was said to be "a personalisation of the case" by the prosecutor and an indication that the complainant was his client. He was said therefore to have lost the objectivity required of a Crown Prosecutor and his advocacy for the complainant may have improperly influenced the jury.

[40] In oral submissions it was said that the prosecutor had urged the appellant's guilt on the jury and had not conformed to the prosecutor's role of proving by evidence "that which was stated as fact during the course of that address". Counsel for the appellant did not complain that the prosecutor had used emotive or inflammatory language or improperly commented (or indeed commented at all) upon the evidence against the accused. The complaint was only that the prosecutor had expressed a concluded opinion as to the appellant's guilt by the expressions mentioned earlier indicating the veracity of the prosecution case: that the complainant was a woman who had been "attacked" and that she was a victim of "rape". The prosecutor had, it was said, made "… statements of concluded fact" indicating "the prosecutor's personal view of the matter".

[41] The complaints relate to the prosecutor's opening address. No criticism is made of the closing address save for the prosecutor's reference to his "defending (the complainant) too much", which is said to reinforce the earlier indiscretion of identifying himself with the complainant's case.

[42] In *R v Hay and Lindsay* [1968] Qd R 459 WB Campbell J (at 476) quoted with approval from *Kenny's Outlines of Criminal Law*:

> "A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty – that of doing everything that he honourably can to protect the interests of his clients. He is entitled to 'fight for a verdict'. But the Crown counsel is a representative of the State, 'a minister of justice'; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight

> in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. 'It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.' 'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done.'"

[43] In *R v Roulston* [1976] 2 NZLR 644 the Court of Appeal said (at 654):

> "… it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused. Such conduct is entirely inappropriate and a basic misconception of the function of any barrister who assumes the responsibility of speaking for the community at the trial of an accused person. … Nevertheless, it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to … order a new trial."

[44] The authorities were considered and applied in *R v M* [1991] 2 Qd R 68 at 79-82. The court there decided that if there were a serious possibility that having regard to the conduct of the case and the issues before the jury the prosecutor's misconduct might have influenced the jury to return a verdict of guilty there will have been a miscarriage of justice. Cooper J (with whom Kneipp and Shepherdson JJ) agreed referred with approval to a judgment of Bisson J in *R v Hall* [1987] 1 NZLR 616 at 620:

> "It may be natural for one prosecutor to adopt a quiet but incisive style while another prosecutor may be more vocal and expressive but whatever style is adopted, the facts should not be distorted or overstated and counsel's address should not include inflammatory invective or emotive language nor be accompanied by a theatrical stance and gestures which would be both unseemly and prejudicial to a fair trial. Such behaviour is not responsible if it appeals to prejudice or sympathy … . If prosecuting counsel oversteps the mark … the Judge should intervene, whether or not defence counsel has raised the matter … ."

[45] In *Deriz* (1999) 109 A Crim R 329 it was said:

> "[65] It is clear that prosecuting counsel is charged with the responsibility, in the proper discharge of his … functions in a trial, of opening the prosecution case with fairness and

> accuracy and avoiding language likely to excite undue prejudice or emotion … . It is often said that the impartiality which should characterise the presentation of the Crown case has the consequence that the prosecutor should not fall into the role of urging or fighting for a conviction ... .
>
> [66] It remains the case, however, that the nature of a criminal trial in our system of justice is adversarial. While the prosecutor must not pick and chose the witnesses or evidence to be presented … but should present impartially the available, relevant credible evidence, whether it tends for or against conviction, and should recognise and not seek to hide any weaknesses of the prosecution case, the impartial role of the prosecution … does not preclude advocacy which fully tests the defence case and which presents the case for a conviction clearly and forcefully and in the best light which it fairly bears."

[46] If one examines the prosecutor's remarks with these strictures in mind it is clear that there was no impropriety or misconduct of any kind.

[47] In accordance with the usual practice when the jury had been empanelled the trial judge invited the prosecutor to read aloud the names of the proposed witnesses for the prosecution. That was done. The trial judge then explained to the jury the course the trial would take. His Honour said:

> "The next step … involves … the opening speech by the Crown Prosecutor … . In the course of that … he will outline the nature of the case against each of the defendants, and he will give you full details of each of the charges. He will also summarise the evidence which the prosecution intends to rely upon in order to prove those charges, and he will then proceed to call each of the prosecution witnesses. … The Prosecutor … will question the witness first … . Each of the defence counsel will then have the right of cross-examining the witness … ."

[48] The prosecutor delivered his opening address:

> "Ladies and gentlemen, on the 14th of December 2007, (F) was raped … near the Southside Memorial Pool … by the three men that are seated in the dock. Firstly, Marshall put his penis inside (F's) vagina without her consent. Whilst that was going on, Butler put his penis inside (F's) mouth. She bit it. When Marshall had finished, Butler put his penis in (the complainant's) vagina. At no stage did Lawton put his penis in either (F's) mouth or vagina. All of that took place without her consent. …"

He then explained the factual content of each of the counts in the indictment and the role of each of the appellants with respect to those counts. He outlined the facts of the case and related the facts to the witnesses who were to depose to them. The address naturally consisted predominantly of the complainant's account of the events in the park.

[49] In concluding the prosecutor stressed the question of consistency of testimony:

> "… when I'm talking about consistency I mean consistency on the prominent features of the accused. Not every little aspect of it. And that's important … because this case, effectively stands or falls on your assessment of (F) as an honest witness and a reliable witness, because she was the only one effectively there, that you'll hear from, live in the witness box."

[50] Despite the absence of criticism of the prosecutor's concluding address it is nevertheless important to have regard to what was said when one considers whether the prosecutor's conduct produced an unfair trial. He said:

> "… I'll mention this point now because it's important … throughout the entirety of the deliberations, and I hope you've had this steadily in mind since the start of the trial, … it's very important at the heart of our criminal justice process that you have no sympathy for (F). You have no sympathy for either of the men … in the dock; likewise that you have no prejudice against (F) perhaps for how she was answering her questions here. Perhaps she turned you off. Perhaps you wouldn't like to have her around for dinner. That's not the point. Or prejudice against any of these men. Your verdict can be based on only one thing, not sympathy for anyone, not prejudice for anyone, but only on the evidence."

[51] The prosecutor then turned to consider what he called "red herrings", arguments or points of evidence that were, he contended, irrelevant. He went on:

> "Whether you accept what I say about them is a matter for you, just like what we all say to you now and what I said to you at the start. It's not evidence, it's just argument. Some of what I say might appeal to you. … Likewise, if anybody says anything down (the defence) end of the Bar table that you think sounds attractive, that you think makes sense to you, that you agree with, well, act on that. … So whilst I might be criticised for perhaps defending too much the Crown case, defending too much (F), I have no interest in having these three men convicted out of fear or sympathy or prejudice. If you're going to convict these three, it's important that you do a proper job of it, and a proper job means that you consider fully all the arguments, for and against. Not just mine, not just what I'm saying to you now, what I've said to you already and what … (defence counsel) … says … ."

[52] There is no substance in the criticisms levelled against the prosecutor. His language was not intemperate or inflammatory. He did not resort to personal denigration of the appellants or describe them by any personal attributes. He referred to them only by reference to the evidence to be led against them. He did not, and made it plain that he did not, appeal to any emotion or prejudice in aid of a conviction. Instead he very properly pointed out that conviction or acquittal would depend upon the jury's assessment of the complainant and whether she was truthful and reliable.

[53] It is not possible that the jury misunderstood the prosecutor's role and thought that they might act upon his own opinion as to the appellant's guilt. The jury can have entertained no doubt that the prosecutor intended to call witnesses whose testimony they were to assess with a view to determining whether they were satisfied beyond reasonable doubt of the substance of the counts in the indictment.

[54] In *Libke v The Queen* (2007) 230 CLR 559 the prosecutor had subjected an accused who gave evidence to cross-examination which Heydon J described (at 598) as "wild, uncontrolled and offensive". Nevertheless the High Court (Gleeson CJ, Hayne and Heydon JJ) concluded that the trial was not thereby rendered unfair. The test posed was whether "the cross-examination was such as to distract the jury from a proper and dispassionate examination of the issues in the case" (at 588). Hayne J said (at 589):

> "The trial prosecutor should not have aligned himself with the prosecution case, which is what he did whenever he conveyed to the jury his own opinion of the appellant's evidence. Would these repeated expressions of alignment with the prosecution case have distracted the jury from their task of assessing whether the evidence that was led at trial established the appellant's guilt beyond reasonable doubt? … ."

In that case the question was answered in the negative. In this case there was no possibility that the jury was not aware that their responsibility was to determine by reference to the evidence whether they were satisfied of the appellant's guilt beyond reasonable doubt.

[55] It is, I think, likely that but for the prosecutor's self criticism that he may have defended the complainant "too much" this ground of appeal would not have been advanced. In context the prosecutor was accurately advising the jury of their role in the trial process. He made it abundantly clear that his role was to present a case for the jury to assess. He did not go beyond the limits described by the authorities for the role of prosecuting counsel.

[56] This ground of appeal, like the others, has not been made out. The appeal by Butler should be dismissed.

Appeal – Lawton CA 34 of 2011

[57] There were three grounds:

(a) The verdicts are unreasonable or cannot be supported having regard to the evidence;

(b) The trial judge failed to properly direct the jury as to the case against the appellant pursuant to s 7(1)(c) of the *Criminal Code*;

(c) There was a miscarriage of justice because the Crown Prosecutor's statements (and questions) throughout the trial made it unfair. The statements and questions tended to convey to the jury the Crown Prosecutor held the opinion that the appellants were guilty thereby creating a serious possibility that members of the jury were improperly influenced.

[58] The arguments in support of ground (c) were the same as those advanced in support of the identical ground in Butler's appeal. The arguments should be rejected for the reasons given in that appeal.

[59] The other grounds have as their basis the limited factual involvement of Lawton in the sexual assault by his co-accused upon the complainant.

[60] The prosecution case against Lawton was that he was guilty pursuant to s 7(1)(c) of the *Criminal Code*:

> "… each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (c) every person who aids another person in committing the offence; … ."

The aiding was said to be encouraging Marshall and Butler to perpetrate their respective acts of violation by his deliberate presence.

[61] The appellant's counsel pointed out that there was no evidence that he did or said anything during the sexual assaults committed by the others. Likewise there is no evidence that his presence at the scene of the offending in any way encouraged Butler and/or Marshall to rape the complainant. The evidence, it was argued, did not show that Lawton was anything other than a witness or bystander to the others' offending and that the evidence was insufficient to satisfy a jury beyond reasonable doubt that the appellant aided the others in the commission of any of the counts on the indictment.

[62] The evidence concerning Lawton was sparse. The complainant was asked about his involvement:

> "… You've described the actions of two of the three men that were there. What was this third one doing? – He was just standing there.
>
> How far from you was he? – Probably like a metre away.
>
> …
>
> Did he do anything during the course of this attack on you? – He hit me on the back of the head.
>
> Did he say anything when he hit you on the back of the head? – No, not that I remember.
>
> Do you remember when he hit you on the back of the head? – It was after … all this – it was the last thing they did.
>
> And after this third man … hit you on the head, what did they do? - Just walked off."

[63] The complainant then gave this evidence in cross-examination:

> "… we've heard a lot of evidence … about this fellow with the long hair and the dark fellow, what about … Lawton, was he doing anything at this stage? - No.
>
> …
>
> … you said that at one stage the bigger bloke hit you, or pushed you, or something. I'm not sure what you said … but he assaulted you in some way? – He punched me in the back of the head.
>
> …
>
> And what were you doing that caused that punch? – I was getting up. … When I pushed them away, I was getting up to get my trousers.
>
> …

> … I'm putting to you that you tried to grab this cap off his head. He told you to let it go. You kept trying to grab it. So that's when he pushed you against the side of the face and knocked you to the ground? – No. He hit me for nothing, man. I didn't even see him in my view.
>
> Well … how do you know he hit you? – Because I seen them other two fellas. … And I didn't see him. So it must have been him that hit me.
>
> And did you say to (the prosecutor) yesterday that that was pretty much how it all ended, was after you were hit that everyone walked off and you stayed there? – Yes."

[64] In his record of interview Lawton admitted being in the park with the other appellants and the complainant. He gave an account of their having consensual intercourse during which he "was just laughing at it." He admitted slapping or punching the complainant to the head after the sexual activity had ceased. His reason, he said, was that the complainant had taken his hat. He denied any sexual contact with the complainant and further denied having an interest in such contact.

[65] The complainant had said in her statement (though not in evidence) that Lawton had asked her for intercourse after the others had had it but she refused. She did not suggest that Lawton did anything but accept her rejection. That allegation was put to Lawton and he flatly denied it. He also denied that his co-accused had struck the complainant or held her down. He said he saw both of them engage in intercourse with the complainant.

[66] The prosecution case against Lawton was that he was "deliberately there" when Butler and Marshall raped the complainant, and he was "persistent in his presence." The prosecutor referred in his closing address to the evidence that Lawton hit the complainant in the head. He described the timing of that assault as "unclear … whether they stopped raping her or it was just towards the end, but (it was) at any rate, still in that atmosphere that Butler and Marshall have created of fear and submission on her part."

[67] The evidence is, I think, clear that Lawton struck the complainant after the acts of intercourse by the co-accused and at a time when the complainant was putting her clothes back on. The motive for the blow is unclear: whether it was to dissuade the complainant from following the three men or because the complainant had, or Lawton believed she had, taken his hat. There is no evidence that he said anything to the complainant or the co-accused during their activity with the complainant. There is no evidence he did anything to facilitate their acts with the complainant. The case against him comes down to the fact that he was present.

[68] Presence by itself is not enough to constitute aiding for the purposes of s 7(1)(c) of the *Criminal Code*. The law was explained by Macrossan CJ in *R v Beck* [1990] 1 Qd R 30 at 37 and 38. The Chief Justice said:

> "Intentional encouragement may come from expressions, gestures "or actions intended to signify approval". Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding. It seems that all will depend on a scrutiny of the behaviour of the alleged

> aider and the principal offender and on the existence which might appear of a bond or connection between the two actors and their actions. The fortuitous and passive presence of a mere spectator can be an irrelevance so far as an active offender is concerned. But, on the other hand, a calculated presence … can project positive encouragement and support to a principal offender. The distinction between a neutral and a guilty presence of a person at the scene of a crime will be for the jury to assess. Proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no telltale acts are performed by the alleged aider but the intention behind and the effect of the presence of the additional person at the scene may be established by other evidence from which it is possible to say that a case of intentional encouragement or support of the principal offender is made out.
>
> …
>
> It is not possible to be an aider through an act which unwittingly provides some assistance to the offender in the commission of the offence and it is not possible to be an aider, whatever the intention, unless support for the commission of the offence is actually provided. In some cases … where positive intervening acts in support of the commission of the offence by the principal offender may not have occurred it has been natural to speak of encouragement and this will often be an appropriate word to convey, in the absence of direct physical involvement, the relevant active element in the aiding which has taken place."

[69] There is, in this case, no evidence of expressions, gestures or actions by Lawton intended to signify his approval of what the co-accused were doing. One must scrutinise the behaviour of the alleged aider to see whether it affords evidence of wilful encouragement. Such scrutiny reveals nothing. The important proposition is that proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no telltale acts are performed by the alleged aider. There were no acts. The intention behind and the effect of the presence of the aider at the scene may make out a case of intentional encouragement. There is no evidence that the appellant's presence had any effect on the others. Intention is dealt with next.

[70] It is important to recall that the three men encountered the complainant by chance. None of them went to the park intending to commit rape. The meeting was by chance and the offences were opportunistic or fortuitous. In that circumstance it is inaccurate to describe Lawton's presence as deliberate, or intentional. He was at a place where a crime was opportunistically committed. It is true he did not leave or do anything to discourage those committing the crime from the course they set upon but that does not make him an aider. The point is that there was nothing sinister in his presence. The case may be contrasted with that of a man who goes with others to where a crime is committed, knowing those others intend to commit the crime.

[71] In short the evidence was insufficient to prove that Lawton aided either Marshall or Butler to rape the complainant. The appellant has made out his first ground of appeal. The convictions are unreasonable and cannot be supported having regard to the evidence. The appellant is entitled to be acquitted.

[72] The second ground, that the summing up was inadequate involves an error of fact in the prosecution case.

[73] The prosecutor described Lawton as having struck the complainant during the course of the offending by the others and invited the jury to infer that the blow was delivered to help subdue the complainant. It is, as I have said, sufficiently clear from the evidence that the assault occurred after the offences were complete. The jury was asked to consider the case on a wrong factual basis.

[74] The conduct of one charged as an aider after the completion of the offence he has said to have aided may provide a basis for an inference that his presence at the commission of the offence was meant to and did encourage the principal offender. That was not how the case was put against Lawton and on the evidence his assaulting the complainant was equivocal in terms of providing evidence as to the nature of his earlier presence.

[75] The trial judge's summing up with respect to the meaning and operation of s 7(1)(c) were unexceptional and no complaint was made about them. The criticism is that by repeating the prosecutor's argument that the blow struck by Lawton was in the course of the offences committed by the others the case was put to the jury on a wrong factual basis. In the course of dealing with the arguments against the three appellants the trial judge said:

> "You may, for example, not be satisfied beyond a reasonable doubt that Lawton, who did not physically do anything apart from hitting her, actually provided encouragement or assistance. … ."

And

> "In respect of Mr Lawton, (the prosecutor) argued that he was not merely present, but was a party, and in particular, he argues that he was persistent in his presence, which was voluntary, and also he relied upon the fact that Mr Lawton hit (the complainant) on the back of the head, and by doing so, he argued, assisted the other two to get away or to dissuade her from following."

[76] This latter direction was inadequate, if it was meant to convey that the blow delivered after the commission of the rapes somehow provided a factual basis for inferring that Lawton's earlier presence aided the offences. The evidence was not, I think, capable of such an inference. To put the matter as baldly as did the trial judge was to permit the jury to convict on a wrong basis.

[77] Acceptance of the first ground of appeal has a consequence that Lawton is entitled to be acquitted of all charges. Acceptance of the second ground would entitle him to a re-trial. That is not appropriate given the insufficiency of the evidence against him. I would accordingly allow Lawton's appeal, set aside the convictions and enter verdicts of acquittal.

Appeal – Marshall CA 37 of 2011

[78] The appellant Marshall advanced two grounds of appeal.

(a) There was a miscarriage of justice because of the Crown prosecutor's statements (including the content of some questions to witnesses) throughout the trial

deprived the appellant of a fair trial. Such statements and questions tended to convey to the jury that the Crown prosecutor was of the opinion that the appellants were guilty and thereby created a serious possibility that members of the jury were improperly influenced.

(b) The verdicts were unreasonable and cannot be supported having regard to the evidence.

[79] Marshall relied upon the arguments advanced of the same grounds in Butler's appeal. No further material or argument was advanced in support of either ground. For the reasons given in Butler's appeal the grounds of Marshall's appeal should not be accepted. The appeal should be dismissed.