SUPREME COURT OF QUEENSLAND

CITATION:	*R v Van Der Zyden* [2012] QCA 89
PARTIES:	**R** **v** **VAN DER ZYDEN, Johannes Zweerus** (appellant) **R** **v** **VAN DER ZYDEN, Johannes Zweerus** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant)
FILE NO/S:	CA No 249 of 2011 CA No 251 of 2011 SC No 923 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by Cth DPP
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2012
JUDGES:	Chief Justice and Muir JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NONDIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of committing acts of indecency and intercourse whilst outside of Australia on complainants that were under 16 in contravention of the *Crimes Act* 1914 (Cth) – where the prosecutor invited the jury to consider the complainants' absence of motive to support a finding that the offending took place – where the primary judge gave a direction with respect to motive – where no redirection was sought by defence – where there was delay in the prosecution of the matter – where the primary judge directed the jury with

respect to delay – where the primary judge did not give a direction with respect to identification of the appellant – where defence did not seek such direction at trial – where the primary judge gave a direction with respect to preliminary complaint – where no redirection was sought – where the appellant submitted that the trial judge failed to adequately warn with respect to propensity reasoning – whether the primary judge properly directed the jury with respect to motive – whether the primary judge gave an adequate *Longman* direction – whether failure to direct constituted a miscarriage of justice – whether the primary judge should have given an identification direction – whether the trial judge's preliminary complaint direction was erroneous – whether the trial judge failed to adequately warn against propensity reasoning – whether the conviction was unsafe and unsatisfactory

CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY INADEQUATE – where the appellant was convicted of committing acts of indecency and intercourse whilst outside of Australia on complainants that were under 16 in contravention of the *Crimes Act* 1914 (Cth) – where the appellant received a head sentence of three years and six months imprisonment with a fixed non-parole period of 21 months for each of the intercourse offences – where the appellant received lesser concurrent terms of imprisonment for the acts of indecency – whether the sentencing judge erred in making all sentences concurrent – whether the sentencing judge gave insufficient weight to aggravating factors and excessive weight to mitigating factors – whether the sentences imposed were manifestly inadequate

Crimes Act 1914 (Cth), s 50BC, s 50BA
Criminal Law (Sexual Offenders) Act 1978 (Qld), s 4A(2)

Ali v The Queen (2005) 79 ALJR 662; (2005) 214 ALR 1 ; [2005] HCA 8, considered
Attorney-General v Tichy (1982) 30 SASR 84, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, considered
Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
GAS v The Queen; SJK v The Queen (2004) 217 CLR 198; [2004] HCA 22, cited
Hargraves and Stoten v The Queen (2011) 85 ALJR 1254; [2011] HCA 44, considered
Hili v The Queen (2010) 242 CLR 520; (2010) 272 ALR 465; [2010] HCA 45, cited
Kaye v The Queen [2004] WASCA 227, cited
Lowndes v The Queen (1999) 195 CLR 665; [1999] HCA 29, considered
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA

25, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, considered
R v BBS [2009] QCA 205, cited
R v GX [2006] QCA 564, cited
R v Harris (2007) 171 A Crim R 267; [2007] NSWCCA 130, cited
R v Johnston (1998) 45 NSWLR 362, cited
R v L; ex parte Attorney-General [1996] 2 Qd R 63; [1995] QCA 444, cited
R v Marlow (unreported, 31 May 2000, County Court of Melbourne, Robertson DCJ), cited
R v Martens [2007] QCA 137, cited
R v Nuttall; ex parte A-G (Qld) [2011] 2 Qd R 328; [2011] QCA 120, cited
R v Smith (unreported, 7 June 2002, District Court of NSW, Coolahan DCJ), cited
R v T [1999] QCA 376, considered
R v Todd [1982] 2 NSWLR 517, cited
R v W [1998] QCA 90, considered, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: P E Smith for the appellant in Appeal No 251 of 2011 and the respondent in Appeal No 249 of 2011
W Sofronoff QC SG, with S M Ryan, for the respondent in Appeal No 251 of 2011 and the appellant in Appeal No 249 of 2011

SOLICITORS: Buckland Allen Criminal Lawyers for the appellant in Appeal No 251 of 2011 and the respondent in Appeal No 249 of 2011
Commonwealth Director of Public Prosecutions for the respondent in Appeal No 251 of 2011 and the appellant in Appeal No 249 of 2011

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **MUIR JA: Introduction** After a trial in the Supreme Court, the appellant was convicted of:

> Eight counts of, while being an Australian citizen and outside Australia, committing an act of indecency on a person under 16, in contravention of s 50BC of the *Crimes Act* 1914 (Cth);[1]

[1] As it was in February 1997.

Seven counts of, while being an Australian citizen and outside Australia, engaging in sexual intercourse with a person under 16, in contravention of s 50BA of the *Crimes Act*.

[3] He appeals against his convictions.

[4] The Commonwealth Director of Public Prosecutions appeals against the sentences imposed for the offences which were:

- three years and six months imprisonment with a fixed non-parole period of 21 months for each of seven offences of engaging in sexual intercourse with a person under 16;
- 12 months imprisonment for two offences of committing an act of indecency on a person under 16; and
- 18 months imprisonment for each of six offences of committing an act of indecency on a person under 16.

[5] The offences the subject of counts 1, 2 and 5 were alleged to have been committed at the appellant's residence in the Defence compound in Tarawa in the Republic of Kiribati on or about 9 February 1997. The complainants were: count 1 – RH; count 2 – ST; and count 5 – TT, then aged respectively 11, 11 and 13. RH said that the appellant held his penis (count 1) and ST's penis (count 2). He said that he went to sleep and upon waking he went to the bathroom where he saw the appellant kneeling in front of TT near his groin. TT swore that the appellant gave him oral sex in the bathroom of the house (count 5). ST swore that the appellant handled the penis of each complainant and had oral sex with each complainant in the shower.

[6] The complainant in respect of counts 6, 7, 10, 11, 14 and 15 was TT. The complainant in respect of counts 8, 9, 12, 13, 16 and 17 was TE, then aged 14 or 15 and now deceased. All of these offences were alleged to have occurred between 9 February 1997 and 7 January 1999 at Tarawa: counts 6–9 inclusive near a damaged boat on a beach; counts 10–13 inclusive at an abandoned house; and counts 14–17 inclusive at a disused bunker near the Maritime Training Centre.

[7] According to TE's committal evidence, on one occasion, the appellant touched and sucked his and TT's penes on the damaged boat. He said also that after this incident they went to an abandoned house where the appellant repeated such conduct. About a month later, according to TE, the appellant sucked his and TT's penes and masturbated him at the bunker.

[8] The appellant gave evidence to the following effect. He served for approximately 30 years in the navy, attaining the rank Lieutenant Commander. In 1996, he was posted to Kiribati as a Maritime Surveillance Advisor. As such, he was the senior person in a contingent consisting of himself and two petty officers. His role was to assist and advise members of the Kiribati police force in the operation of a patrol boat donated by the Australian government to the Republic of Kiribati. On Kiribati, the appellant resided in one of three residences within a fenced and gated defence compound with an Indonesian man, Mr Tandjung, with whom he had a homosexual relationship. The appellant worked mainly in the National Coordination Centre which was about a five or six minute walk from his house and was accessible through the police headquarters building. The appellant's tour of duty in Kiribati was from about 29 April 1996 to 18 January 1999.

[9] The appellant kept a diary in which he had a practice of entering the events of each day at the end of the day. Having refreshed his memory from the diary, he gave the following evidence of his activities at relevant times. On 8 February 1997, he took a house guest to the airport at 08:00. The aircraft was late and he and others went to a nearby hotel to await its arrival. After the aircraft arrived, he went back to the defence compound to work, although he normally did not work on a Saturday. At 16:45, he returned to the airport to await the arrival of an Orion aircraft. After the aircraft arrived, he accompanied the crew to the hotel and arrived home at 21:30.

[10] On 9 February, he picked up the crew of the aircraft from the hotel at 07:30. After their departure at 10:00, he went back to his office. He went home for lunch at 12:15 and returned to his office at 13:00, where he stayed until 21:30. He left for work at 07:55 on 10 February, returned for a normal lunch break at midday, attended a meeting on a nearby island at 15:15 and arrived home at 17:15.

[11] On work days the appellant wore a khaki uniform, which he would also wear on a weekend if he went to his office. He would have worn his uniform on 9 February because he was meeting with air force personnel. He denied any sexual contact with any of the complainants as alleged.

Grounds 1 and 2

Ground 1 – There was a miscarriage of justice as the prosecutor in his closing address invited the jury to consider an absence of motive for making a complaint by each of the complainants to support a finding that the offending occurred.

Ground 2 – The primary judge erred in failing to give appropriate directions in respect of the prosecutor's impermissible submissions regarding motive.

[12] The appellant relied on the following passages from the prosecutor's address:

> "None of the complainants, I suggest to you, has any motive whatever to manufacture, distort or embellish evidence."

[13] Those observations were introduced as follows:

> "Members of the jury, as you might expect, I will canvass the evidence available to you on the various charges. But before I do that I want to make some preliminary observations about several matters that I suggest are really central to your assessment of the case, and it won't take long to mention them, but despite that I would ask you to keep them squarely in mind at all times during your deliberations.
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> The first matter has to do with the proposition that my learned friend put in relation to [TT] and [TE] when he described them as liars and used their 2009 statements as, he says, the evidence of that. Well, I want to talk about motive, and I'm not talking about any motive the defendant might have had; I am talking about the witnesses' motive, or, rather, a lack of it.
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> What I suggest to you is that there is an important respect in which this case is if not unique, it is certainly very unusual. Looking at the history of this matter and also taking cultural factors into account,

> one can say confidently that none of the complainants is driven by any desire for or sense of retribution or vengeance."

[14] The prosecutor, having told the jury that it was only because of the Australian Federal Police (AFP) investigation that the charges were laid, said:

> "From their perspective, and you can surmise this is a cultural thing, from their perspective, it was a sufficient outcome for them that the defendant and his partner had left Kiribati, and it would have rested there forever, if it were not for police officer Stephen Turnbull. He apparently reviewed an old file, he certainly initiated the visit to Kiribati and he initiated the interviews with the witnesses, and it seems as though they had to be rounded up for that purpose, and yet although they made no complaint – you might again surmise perhaps this is a cultue thing – when they were asked by police about what had happened, they were prepared to speak freely, conscious of the need to try to do so honestly. These people are not motivated by any desire for retribution, they have no motive to lie or to embellish, their only motivation out of all of this was when confronted by police as to give their account as to what happened, they did it as honestly as they can."

[15] Towards the end of the prosecutor's address, he returned to the issue of motive, saying:

> "I mentioned yesterday, and I will say it again, there is simply no motive or agenda for either of these witnesses to be dishonest. Think of it this way: in terms of telling lies, people generally tell lies for one or two reasons: either they want to get something or they want to cover something up.
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> Well, these two fellas were not looking – in raising this and telling police about it, they were not looking to cover anything up, obviously, they were looking to introduce additional facts which by then they had recalled to mind. Well, did they have any motive to do that by way of getting something from it? Well, in one sense, I suppose, they did get something from it. Let me tell you what it is: they got the opportunity to spend even longer than they would otherwise have done in the witness-box…
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> Really, when you look at it that way, that all this did was to prolong the time that they were going to spend in the witness-box, that's not much of an incentive to tell a lie, is it?
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> And it goes back to what I said yesterday: there isn't any element of retribution in this…
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> These fellows raise this matter in 2009 and later gave sworn evidence about it because it was their honest recall and for no other reason."

[16] At the conclusion of the prosecutor's address, the trial judge discussed her proposed directions with counsel. Defence counsel referred to *Palmer v The Queen*[2] and submitted that it was improper of the prosecutor to suggest to the jury that the

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[2] (1998) 193 CLR 1.

complainants had no motive to make false complaints. He observed that motives for a false complaint are often "…not identifiable, if they exist". He argued that it was not for the defence to prove absence of motive for a complainant to make a false complaint. The prosecutor asserted that motive was raised by him in response to an allegation put by defence that the witnesses were liars. Defence counsel was asked by the trial judge if he had "…thought of something [he] want[ed] [her] to say [to the jury]" and responded:

> "Simply that it's not for the defendant to show any motive at all for a complaint, that often such motives are never known, but the onus remains on the prosecution to prove guilt. It's not on the defence to establish, for example, innocence or motive for a complaint or a false complaint."

[17] The trial judge gave the following direction within minutes of the conclusion of the discussion:

> "Something that has arisen is the issue of the motives of the complainants, for example. Don't think for a moment that the defendant has any obligation in this trial to prove anything, let alone the motive for a complaint by a complainant. That's just one example I am giving you to illustrate what I want to emphasise, that there is no burden on a defendant in a criminal trial to establish any fact, let alone his innocence."

[18] The direction was in accordance with defence counsel's suggestion except that it omitted the words "often such motives are never known". The trial judge went on to direct on the burden of proof and did not return to the issue of motive.

[19] Counsel for the appellant submitted that the trial judge's directions were inadequate as:

- they did not identify "the motive issues" relied on by the prosecution;
- the jury was not told that it was wrong to reason that the complainants had no motive to lie – it was unknown if they did: complainants may make false complaints for a variety of reasons; and
- they failed to refer to the suggestion by the defence that there had been collusion in the making of the complainants' 2009 statements and to instruct the jury that they should discount the invitation by the prosecution to consider the absence of a motive to lie as supporting the complainants' evidence and also their assertions of non-collusion.

[20] The background to the alleged inadequacy in the directions was said to arise from the following. The complainants did not make any complaint to the authorities until after being contacted by the AFP. Before any decision was made by the AFP to charge the appellant, the local authorities confirmed that they would not prosecute the appellant. The complainants were brought to Australia at least twice before the committal hearing and provided different and additional versions corroborating one another's allegations in greater detail. The jury were invited by the prosecutor to conclude that "cultural issues" might explain why the complainants did not make earlier complaints to authorities. However, their conduct in this regard was also

explicable by the complainants' accounts having been fabricated or by their having felt under some compulsion to tell some such story when picked up by police. The complainants were cross-examined to the effect that they had falsely accused the appellant because of pressure brought to bear on them by the AFP.

[21] There is no substance in the contention that the prosecutor illegitimately invited the jury to speculate that the reluctance of the complainants to complain to authorities was a "cultural thing". There was evidence capable of supporting the prosecutor's submission in that regard. Although there was no evidence directed to establishing to what extent, if at all, any relevant cultural influences affecting the willingness of ethnic residents of Kiribati to complain to authorities of sexual misconduct might have borne on the complainants' conduct, that was a matter for argument.

[22] The prosecutor, in my view, should not have asserted emphatically that the complainants had no motive to lie and that, on the contrary, they were motivated to give their honest accounts of what had happened. Although the defence contention that the complainants had given false evidence as a result of pressure applied by the AFP was not particularly persuasive, its rejection did not necessitate the conclusion that the complainants had no other motive to give false evidence. By his submissions, the prosecutor implicitly invited the jury to accept the complainants' evidence unless there was some demonstrated motive to lie.[3]

[23] *Palmer v The Queen*,[4] on which the appellant placed a great deal of reliance, concerned the legitimacy of cross-examining an accused as to the complainant's motive to lie and whether the directions given by the trial judge were sufficient to neutralise the prejudicial effect of the prosecutor's questioning. *Palmer* did not directly concern the raising by a prosecutor in his closing address of an alleged lack of motive to lie on the part of complainants. However, in discussing the impermissibility of the questioning of an accused about his lack of knowledge of any reason why a complainant should lie, Brennan CJ, Gaudron and Gummow JJ observed:[5]

> "Nevertheless, as the question is irrelevant to any issue in the case, it ought not be asked. As Hunt CJ at CL pointed out in *R v Uhrig*, to ask the question "Why would the witness lie?":
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> > 'invites the jury to speculate… to the conclusion that, unless they are satisfied by the accused that the witness has a motive to lie, they should accept the evidence of that witness and convict. In my view, that danger of such illegitimate speculation is a sufficient reason for saying that the rhetorical question should not be raised in such a case.'"

[24] After referring to a contrary view expressed in the Victorian Court of Appeal, their Honours observed:[6]

> "With respect, a complainant's account gains no legitimate credibility from the absence of evidence of motive. If credibility

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3 c.f. *Hargraves and Stoten v The Queen* [2011] HCA 44 at [44].

4 (1998) 193 CLR 1.

5 c.f. *Palmer v The Queen* (1998) 193 CLR 1 at 9.

6 *Palmer v The Queen* (1998) 193 CLR 1 at 9.

> which the jury would otherwise attribute to the complainant's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished. That is the converse of the proposition stated by Cresswell J in the case cited by *Wills* where his Lordship acknowledged that proof of a motive to lie weakened a complainant's credibility. The correct view is that absence of proof of motive is entirely neutral."

[25] In his reasons, Kirby J made the following relevant observations:[7]

> "It was accepted by both sides that the issue of a complainant's motivation ought never to be injected gratuitously into a trial nor made the central point of argument, whether by the prosecutor or by the judge. To elevate to the central theme of a trial consideration of the complainant's motives to lie would, it was conceded, involve error. If raised unnecessarily in the judge's charge to a jury, it would involve a misdirection carrying such a risk of miscarriage as ordinarily to require a new trial.
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> …
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> It was also common ground that, where the accused puts forward, by evidence or submission, a proposition that a witness vital to the Crown case has a particular motive to lie, the judge should direct the jury that, even if they were to reject such motive, that would not mean that the impugned witness was necessarily telling the truth. It would remain for the prosecution to satisfy them that the witness was truthful. Logically this must be so because the accused might have insufficient materials to prove the false motives of an accuser or may be completely ignorant of, or mistaken about, the true motive which lies behind the falsehood."

[26] In *Hargraves and Stoten v The Queen*,[8] Heydon J observed:

> "All the questions so far identified are related to the type of issue associated with *Palmer v The Queen* – a case not discussed in argument, save in its references to *Robinson v The Queen*. The difficulty is illustrated by the facts of *Robinson v The Queen*. That was a rape case in which the accused admitted intercourse but denied non-consent. A jury would inevitably be struck by the circumstance that someone on trial for rape who puts in issue only non-consent has a great deal to lose by not presenting the strongest possible testimony supporting consent. The jury would also be likely to think that a witness complaining of rape may have a lot to lose if a jury experiences a reasonable doubt about the correctness of her testimony. And the jurors might well ask themselves: 'She has suffered many disadvantages in going to the police and now in coming to the court: why should she lie?' ***Palmer v The Queen*** **forbids the questioning of the accused about whether he could suggest any motive in a complainant to lie, and also forbids the**

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7 *Palmer v The Queen* (1998) 193 CLR 1 at 38-39.

8 [2011] HCA 44 at [55].

> **prosecution asking rhetorical questions along those lines in address. But the law does not require that the jury be directed not to ask themselves why a complainant would lie.**" (emphasis added)

[27] It was said of *Palmer* in the joint reasons in *Hargraves*:[9]

> "In *Palmer v The Queen*, the plurality held that to ask a person accused of sexual offences, in cross-examination, whether that person could offer any reason or motive for the complainant to lie diminished the standard of proof by strengthening the complainant's credibility. As the plurality in *Palmer* pointed out, absence of proof of a motive for the complainant to lie about the incident in issue 'is entirely neutral' and, as a result, the fact that the accused can point to no reason for the complainant to lie is 'generally irrelevant'. To introduce an inquiry into why would the complainant lie would focus the jury's attention on irrelevancies by inviting the jury to accept the complainant's evidence unless there were some demonstrated motive to lie. That would deny that the trial is an accusatorial process in which the prosecution bears the onus of proving the offence beyond reasonable doubt.
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> *Robinson*, too, is to be seen as a particular application of this more general principle. Inviting a jury to test the evidence given by an accused according to the interest that the accused has in the outcome of the trial, or suggesting that the accused's evidence should be scrutinised more carefully than the evidence of other witnesses, deflects the jury from recognising and applying the requisite onus and standard of proof. It is for the prosecution to prove its case, not for the accused to establish any contrary proposition. The instructions which a trial judge gives to a jury must not, whether by way of legal direction or judicial comment on the facts, deflect the jury from its fundamental task of deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt.
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> The principle that is identified is expressed at a high level of abstraction: did the judge's instructions deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt?"

[28] It does not follow from the emphasised observation of Heydon J in paragraph [27] hereof concerning "rhetorical questions" that a prosecutor is prohibited from raising the absence of evidence of a complainant's motive to lie in his address to the jury where, as was the case here, the defence has alleged that the complainant is lying.

[29] In *R v T*,[10] Thomas JA expressed agreement with the following comments of Pincus JA in *R v W*:[11]

> "Whether or not anyone turns the jury's attention towards that topic, a jury may well give consideration to it and may ponder the problem

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9 At [44] – [46].
10 [1999] QCA 376.
11 [1998] QCA 90.

> of why a complainant in a sexual case, or indeed any other witness for either side, might invent his or her evidence. There is nothing wrong with that approach; what must be avoided, in my opinion, is a summing-up which suggests to the jury that unless they can think of a good reason why a person complaining of an offence might make up his or her story they must be inclined to believe it, or one which says in effect that there is in truth no good reason to think the complainant has a motive to lie."

[30] Thomas JA observed earlier that:[12]

> "…the question of motive for a false complaint should not be regarded as territory which a Crown prosecutor may not enter. In most if not all trials of this nature the critical question is whether the complainant is telling the truth. In any such trial, and particularly when the contest is between the complainant's version and a defence version which says nothing improper happened, and both corroboration and disproof are lacking, it is almost inevitable that counsel and for that matter the jury will seriously consider whether any motive exists for bringing a false complaint."

[31] Thomas JA noted that where defence counsel discussed possible motives for the bringing of a false complaint it was open to the prosecutor to counter the defence argument and, in so doing, submit that the complainant did not have any alleged motive. His Honour said:[13]

> "What the Crown must not do, and what the court must ensure does not happen, is to permit the impression to be gained that the defence has any onus of showing that there was a particular reason for the complainant not telling the truth; or that at the end of the day the absence of any perceived reason for a false complaint strengthens the suggestion that the complainant must be telling the truth."

[32] In my respectful opinion, the prosecutor having elevated the absence of any motive to lie on the part of the complainants to a matter "central" to the jury's assessment of the case and having positively asserted the absence of such a motive, it was appropriate that the trial judge direct the jury along the lines that:

- any failure or inability on the part of the accused to prove a motive to lie did not establish that such motive did not exist;
- if such a motive existed, the accused may not know of it;
- there could be many reasons why a person may make, or join in the making of, false complaints; and
- if the jury was not persuaded that any motive to lie on the part of a complainant had been established, it would not necessarily mean that the complainant was truthful and it remained necessary for the jury to satisfy themselves of the complainant's truthfulness.

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12 *R v T* [1999] QCA 376 at [13].
13 *R v T* [1999] QCA 376 at [14].

[33] The direction given by the trial judge was insufficient to address the risk arising from the prosecutor's approach that the jury might conclude that the absence of any proven reason for a false complaint strengthens the suggestion that the complainants must be telling the truth[14] or might reason that unless each complainant could be shown to have a motive to lie his evidence should be accepted.[15]

[34] Defence counsel failed to seek a redirection, but that is not necessarily fatal to the success of this ground of appeal.[16]

[35] When no redirection is sought in circumstances such as the present, the appellant will succeed only by showing that the failure to direct constituted a miscarriage of justice. No miscarriage of justice will have occurred unless the appellant demonstrates that the direction should have been given and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict".[17]

[36] Also relevant is the application of the principle that a party to litigation, even criminal litigation, is bound by the conduct of his or her counsel.[18] Defence counsel, having had an opportunity to consider *Palmer*, told the trial judge the content of the direction he considered appropriate. The trial judge omitted from defence counsel's suggested direction the words "often such motives are never known". Because of the proximity of the giving of the direction to the discussion about motive and the formulation by defence counsel of his preferred direction, it is unlikely that it escaped his attention that his suggestion had not been followed faithfully.

[37] It would have been a rational forensic decision on the part of defence counsel not to attempt to have the wording of the direction supplemented. The trial judge's direction had contained an emphatic assertion that the respondent had no burden of proving a motive for the making of a complaint. The need for the jury to be satisfied of each element of each offence was also clearly stated.

[38] Defence counsel submitted to the jury that the complaints had been the result of the complainants' succumbing to pressure applied by the AFP. The prosecutor debunked this argument. He asserted that the reluctance of the complainants to complain to the authorities demonstrated an absence of any desire to exact retribution and hence an absence of any motive to make false complaints. The appellant's argument was a difficult one. In order to accept it, the jury would have needed to have found that all four, or at least three, complainants had succumbed to pressure from the AFP and fabricated their respective accounts; accounts which hung together reasonably well and bore no apparent signs of collusion. The only references by defence counsel to indications of collusion in his address to the jury were the evidence that TE had reminded TT about the bunker incident, the late complaint by TT concerning it, and the evidence that there was no suggestion of the bunker incident when the AFP were being shown the locations of the offending conduct.

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14 *R v T* [1999] QCA 376 at 6 – 7.

15 c.f. *Palmer v The Queen* (1998) 193 CLR 1 at 9; and *Hargraves and Stoten v The Queen* [2011] HCA 44 at 15 [44].

16 *Palmer v The Queen* (1998) 193 CLR 1 at 37; and *R v T* [1999] QCA 376 at 20.

17 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13; see also *Simic v The Queen* (1980) 144 CLR 319 at 332.

18 *TKWJ v The Queen* (2002) 212 CLR 124 at 147 per McHugh J; see also *R v Birks* (1990) 19 NSWLR 677 at 684 per Gleeson CJ.

[39] In the circumstances, the decision not to seek a redirection was one which was reasonably explicable as a rational forensic decision. It follows that a miscarriage of justice has not been shown. Hayne J, with whose reasons McHugh J agreed, said in *Ali v The Queen*:[19]

> "An appellate court does not and may not know what information trial counsel had when deciding whether or not to object to evidence. That is why, in *TKWJ*, I concluded that the question of miscarriage does not turn on a factual inquiry into why trial counsel acted or did not act in a particular way. That kind of inquiry cannot be made. Rather, the question is whether there *could* be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred."

[40] Callinan and Heydon JJ with whom Gleeson CJ agreed made a similar statement of principle[20]:

> "As Gaudron J in *TKWJ v The Queen* said:
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> > '[W]hether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on the basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.
> >
> > One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test.'"

[41] In addition to the foregoing, having regard to the other considerations discussed in relation to the unsafe and unsatisfactory ground, it is quite unlikely that, as a result of the direction under consideration, the jury was deflected from "its fundamental task".[21]

[42] For these above reasons, this ground of appeal has not been made out.

Ground 3

The primary judge's *Longman* direction was defective in that it did not address:

- **the alibi witnesses who could have been relied upon by the appellant;**

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19 (2005) 214 ALR 1 at [25].

20 At [99].

21 *Hargraves and Stoten v The Queen* [2011] HCA 44 at 15 [46].

- **the question of identification;**
- **the opportunity for collusion between the witnesses;**
- **the inconsistencies between the complainants' evidence when giving the directions;**
- **the consequential effect of the delay in that the death of the complainant TE meant the preliminary complaint could not be tested by the appellant;**
- **the fact that the death of TE meant that his evidence could not be adequately assessed by the jury; and**
- **did not properly address the disadvantage and was undermined by the references to corroborating evidence.**

[43] Counsel for the appellant argued that the trial judge's direction in relation to delay could only have misled the jury and detracted from the fundamental purpose of giving the *Longman* direction: the identification of the disadvantage to the appellant flowing from the delay. The appellant's argument was developed as follows. The direction was deficient in that it did not draw the jury's attention to the need to provide separate consideration of the issue of corroboration.[22] Moreover, the direction should have included mention of specific consequences of the delay such as the inability of the appellant to call his deceased friend and another person whose surname was unknown to the appellant, the loss of the ability to test the evidence of TE, and the possible loss of military records.

[44] The trial judge's direction is as follows:

> "In the case of each of the complainants, there has been a long delay between the time when they say the incidents happened and the giving of their first statements to the police in 2006. That has an important consequence. The evidence of each of the complainants cannot be adequately tested or met after the passage of so many years because the defendant has lost, by reason of that delay, the means of testing and meeting the allegations that would otherwise have been available, or may otherwise have been available to him.
>
> Although it seems that by January 1999 the defendant had been made aware that there were allegations against him, it is clear that the detail of those allegations does not emerge until the 2006 statements were taken by Mr Turnbull.
>
> By the delay, the defendant has been denied the chance to assemble, soon after each incident is alleged to have occurred, evidence as to what he and the other potential witnesses were doing when, according to the relevant complainant, the incident happened. Had the details of the complaints been made known to the defendant soon after the alleged incidents, it may have been possible then to explore the pertinent circumstances in detail and perhaps to gather and to consider calling other evidence at the trial throwing doubt on the relevant complainant's story.

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22 *R v BBS* [2009] QCA 205 at [20]-[21].

> You might think that the fairness of the trial as the proper way to prove or challenge the particular complaint may have been impaired by the long delay between the time when the complainants say the incidents happened and the giving of their first statements to the police in 2006.
>
> The prosecutor, during his address to you, indicated where there is evidence from another complainant to support a complainant's evidence about the alleged offence against the complainant. It is a matter for you whether you accept the supporting evidence of a witness in relation to a particular complainant's complaint. In relation to [TT] and [TE], they were supportive of each other in general terms in relation to counts 6 to 17, and in relation to almost all of those counts there was evidence of one of those witnesses supporting the account of the other as to either the sexual conduct or the oral sex."

[45] The trial judge then went on to discuss, at length, the evidence of other complainants which, if accepted, could corroborate the complainants' evidence on a particular count. Having completed this exercise, her Honour said:

> "Now, the reason that I have been going through this is that I have got to give you another direction on the law, and this direction on the law is relevant where you are looking at – you might get to the position in relation to a particular offence that the only evidence that you accept in relation to the particular charge is the complainant's evidence, there isn't any supporting evidence, and I must warn you that it would be dangerous to convict in respect of any charge upon the relevant complainant's evidence alone unless after scrutinising it with great care, considering the circumstances relevant to its evaluation, such as the age of the complainant at the time of the alleged offence, the likelihood of error in recollection, and taking notice of this warning you are satisfied beyond reasonable doubt of its truth and accuracy.
>
> So that warning that I've given you applies if you got to the situation in a particular charge that the only evidence that you decided to accept in relation to that charge was from the complainant and there wasn't any other supporting evidence.
>
> So that's why I took you to those counts in order to illustrate the point, although, as I said, it might be that even though in relation to count 14 you might not find any other evidence of the actual conduct that was the subject of count 14; there is, depending on what evidence you accept, supporting evidence from [TE] about all of the surrounding circumstances in which [TT] said his penis was touched by the white man."

[46] In my view, the trial judge's direction was lucid and comprehensive. It was adequate to alert the jury to the nature and extent of the prejudice experienced by the appellant as a result of the delay in the formulation and particularisation of the complaints against him and in bringing the case to trial.

[47] It would have been preferable had the trial judge specifically referred to the death of TE, to the consequent inability to test his evidence, and to the possible loss of the opportunity to call a witness or witnesses who may have been able to provide an alibi. However, those were matters which would have been obvious enough to the jury and it is unrealistic to think that the direction provided would not have caused the jury to give consideration to such matters.

[48] The purpose of a *Longman* direction is to ensure that the accused has a fair trial and what is sufficient, in that respect, "must depend on the whole of the circumstances".[23] The jury was told: that the fairness of the trial may have been impaired by the long delay; that it was dangerous to convict upon "the relevant complainant's evidence alone"; why it was dangerous to convict on uncorroborated evidence and that the evidence of the complainants could not be "adequately tested or met after the passage of so many years".

[49] It was unnecessary for the trial judge to include a discussion on identification in this direction for the reasons later discussed in respect of ground 3A. Nor was it necessary to direct that, with the passage of time, witnesses would have had a greater opportunity for collusion. That would have been evident enough from the evidence of the witnesses. But, it was apparent from their first statements that if any collusion argument was sustainable, other than with respect to TT not disclosing the bunker incident until he was reminded of it by TE before they gave evidence in the Magistrates Court, the collusion had to have occurred before the witnesses gave their initial statements.

Ground 3A - The primary judge erred in failing to give a direction which warned of the dangers of convicting on identification evidence

[50] Counsel for the appellant argued that although an identification direction was not sought by defence counsel, despite the trial judge having raised the possibility that one might be given, it was incumbent on the trial judge to give such a direction having regard to the delay between the date of the offences and the bringing of the charges and the absence of any complaint referring to the appellant by name.

[51] In support of this ground, counsel for the appellant pointed to the evidence that the appellant was only ever referred to by the complainants as "the white man" and that the only identification of him was provided by ST and TT who claimed to recognise a photo on a bulletin board on a wall in a building in the police compound as being a photo of "the white man" who had committed the offences against them. This identification was made some years after the alleged offences.

[52] There is no substance in this ground. Identification was not an issue on the trial. Although the appellant denied any wrongful conduct in relation to the complainants, it was never suggested that there may have been another man who performed the acts complained of by the complainants.

[53] The evidence was clear that the complainants RH, ST and TT went to the house in the compound inhabited by the Indonesian man and an Australian officer. They gave evidence of its interior layout and of some of its furnishings. It was not suggested that their descriptions were wrong or that they had been to the house on some other occasion. Nor was it suggested that some other officer may have been in the house at relevant times.

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[23] See the discussion in *R v Johnston* (1998) 45 NSWLR 362 at 369.

[54] There was evidence that the complainants had seen both the Indonesian man and the patrol boat officer on many occasions. He was identified spontaneously by ST and TT as the person in the bulletin board photograph. Moreover, the cross-examination of ST proceeded on the assumption that the person whom ST alleged had sexually assaulted him was the appellant. For example, counsel for the appellant put to ST, "The white man never touched your penis at any time in that house?"

Ground 4 - The trial judge erred in relation to preliminary complaint:

- **in failing to inform the jury as to the weight of the complaint by TE to his mother;**
- **in failing to inform the jury as to the weight of the complaint by TT to TE; and**
- **in directing the jury that the complaint by RH was preliminary complaint evidence.**

[55] The trial judge's direction in respect of preliminary complaint related to:

(a) the evidence of RH's father that RH complained to him "about the Indonesian man". RH gave no evidence of any other complaint to his father;

(b) that part of TE's statement in which TE claimed to have had a conversation with his mother concerning the appellant's alleged sexual acts. His mother did not give evidence at the trial; and

(c) TE's statement concerning statements made to him by TT about the appellant's alleged sexual misconduct.

[56] It was contended that RH's complaint should not have been treated by the trial judge as a preliminary complaint as it was not in respect of any charged conduct by the appellant. Furthermore, it was submitted that the trial judge erred in directing the jury that RH's complaint was not evidence of the truth of its content. It was a previous inconsistent statement concerning the appellant's conduct and, as such, admissible against the prosecution.

[57] The evidence of RH's father was recognised by the prosecution as evidence favourable to the appellant and led on that basis. It was not led as a preliminary complaint, although the trial judge, erroneously, summed up on the basis that it evidenced a preliminary complaint. There was an obvious inconsistency between the preliminary complaint account given by RH's father and RH's evidence, which inconsistency, as has been mentioned, was relied on by the defence. The prosecutor did not refer to the evidence of RH's father in his address.

[58] The trial judge's mistake did not prejudice the appellant in any way. Defence counsel cross-examined RH's father effectively on his statement and made much of it in his closing address. The trial judge directed that the evidence related only to the complainant's credibility and that consistency between the preliminary complaint account and the complainant's other evidence could be taken into account as "possibly enhancing the likelihood that the complainant's evidence is true", whereas inconsistency "may cause [the jury] to have a (sic) doubts about the complainant's credibility or reliability".

[59] Defence counsel did not seek any redirection. It is probable that this was because he saw no need for one, it being obvious that the evidence of RH's father favoured the appellant. If there was any deficiency in the direction as to the limited use to which the evidence could be put, it had no practical effect. The statement provided no evidence that the appellant had not dealt with RH as alleged, but plainly went to the credibility of RH's later statements that he had been so dealt with.

[60] It was contended that the direction in relation to the part of TE's statement describing a conversation between himself and TT was erroneous in that, if the evidence was admissible, the jury should have been directed as to the weight to be given to it and as to whether it related to any charged act.

[61] The relevant direction was:

> "I will just remind you, because it is short, [TT's] statement to [TE], [TE] gave evidence about. It is page 9, exhibit 25, and [the prosecutor] read that out to you this morning. [TE] was giving evidence about the greeting by [TT] to a white man, and then after the - at line 8 the prosecutor said to [TE], 'Did [TT] say anything to you about the white man?' Answer: 'There was.' Question: 'What did he say?' Answer: 'Yes, he said - he said that he's been also assaulted by this man.' Question: 'When you say assaulted, what did he say that man did to him?' Answer: 'He told me that he also been sucked by him.'"

[62] The appellant's complaint is misguided. The following exchange occurred in TT's cross-examination:

> "[COUNSEL]: And the first time you told anybody else about any of these things was in 2006 when you gave your first statement?
>
> INTERPRETER: Yes.
>
> [COUNSEL]: Specifically, you never talked to [TE] about these things?
>
> INTERPRETER: No, but I told him first at the broken boat site.
>
> [COUNSEL]: What did you tell him at the broken boat site?
>
> INTERPRETER: I told him that that was the European man who used to have oral sex."

[63] There is a discrepancy between the respective accounts of TT and TE, but the two are not necessarily inconsistent. It is certainly not the case, as the appellant claimed, that TT gave evidence that "he did not tell anyone or discuss the matter with anyone". But even if the evidence had been correctly described by the appellant, it would not follow that TE's evidence was inadmissible. Section 4A(2) of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) provides:

> "Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the

> defendant is admissible in evidence, regardless of when the preliminary complaint was made."
>
> "… ***complaint*** includes a disclosure."

[64] That provision would appear to make a complainant's own evidence of making a preliminary complaint admissible.

[65] The criticism that the jury should have been directed as to whether the subject evidence related to any charged act is unjustified. It must have been apparent from the relevant part of TE's evidence that it could relate only to the incident in the patrol boat house and, in particular, to count 5, which was the alleged performance of fellatio by the appellant on TT.

[66] It was submitted that TE's statement to his mother was not admissible as a preliminary complaint as it did not relate to a charged act and was not substantiated by evidence from the complainant's mother.

[67] The summing up relevantly stated:

> "The second bit of evidence is [TE's] complaint to his mother, and that was also given in [TE's] evidence in the Magistrates Court, exhibit 25, page 18, and he couldn't remember the date when he spoke to his mother, and on page 18, question from the prosecutor: 'What did you say to your mum?' Answer: 'I told her it is true what she told me.' Question: 'What did she tell you?' Answer: 'The story about what happened. She heard from a neighbour, so when she told me then I started to talk about it.' Question: 'What - what story did she tell you she'd heard from a neighbour?' Answer: 'That there's something related - pardon me, I'll rephrase that question.' 'Sure.' Answer: 'It is that we're involved with those two.'
>
> Question: 'When you say we, who is we?' Answer: 'It's me and [TT]. That's what they know.' Question - and there seemed to then be some confusion, and then jumping down to line 50 on page 18 of exhibit 25. Question: 'Can you remember as much as you can of exactly what your mum said to you?' Answer: 'It is about that story that we'd been assaulted.' Question: 'What did - what did you say to your mum?' Answer: 'I told her they are true. They are true.'"

[68] There is no substance in the contention that the absence of evidence from TE's mother made the evidence inadmissible. If there was any doubt whether the complainant could give evidence of preliminary complaint in the absence of evidence of complaint by the complainee[24] it has been removed by s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld). Evidence by the complainant of a preliminary complaint, if unsupported by the evidence of a complainee, may serve to buttress the credit of the complainant if the complainant is believed, even though it suffers from a want of corroboration. Such evidence, therefore, cannot be said to be irrelevant.

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[24] *R v GX* [2006] QCA 564; but c.f. *R v Kincaid* [1991] 2 NZLR 1; and *White v The Queen (PC)* [1999] 1 AC 210.

[69] The part of TE's evidence quoted by the trial judge sets out only part of TE's evidence. It is apparent from the part of his statement which precedes the quotation that TE was discussing the incident at the bunker and that the assault referred to either, or both, of the sexual episodes at the boat and the bunker.

[70] For the above reasons, the appellant has failed to sustain this ground of appeal.

Ground 6 - The trial judge erred in failing to adequately warn against propensity reasoning in respect of:

(a) uncharged sexual acts;

(b) the use the jury could properly make of evidence corroborating the complainants' evidence;

(c) the proper use the jury could make of the evidence concerning each complainant in relation to counts in respect of other complainants; and

(d) the cross-examination of the appellant by the prosecutor.

[71] In the part of the cross-examination the subject of ground 6(d), the prosecutor asked the age of Mr Tandjung and established that he was five years younger than the appellant. He also asked whether the appellant entertained children at his house and was told no except for occasions when children would come to the house with their parents. Defence counsel then objected to the questioning and the objection was upheld. The appellant argued that "the irregular disclosure of previous character" could have affected the judgment of the jury. It was contended that the evidence that Mr Tandjung was five years younger than the 50 year old appellant, left open the inference that the appellant liked younger men. It was submitted that the trial judge should have directed the jury immediately after the objectionable evidence was given to disregard it and then directed the jury against propensity reasoning in the summing up.

[72] The submissions, with respect, are fanciful. The questioning in relation to the invitation of children to the house elicited no answers which were in any way harmful to the appellant. There was ample evidence, not the subject of objection, that the appellant was in a homosexual relationship with Mr Tandjung. The fact that there was a relatively small age difference between the two men could not have had the faintest bearing in the minds of jurors on whether the appellant had a sexual interest in boys aged 11 to 15 upon which he might be disposed to act.

[73] The evidence of uncharged acts relied on in relation to ground 6(a) were:

1. evidence of the performing of sexual acts on the complainants by Mr Tandjung in circumstances in which some witnesses gave evidence that the appellant perpetrated the acts;

2. evidence of sexual acts involving ST which were the subject of the discontinued counts 3 and 4; and

3. evidence of TT about the Indonesian man fondling his penis and the penis of ST and RH on the beach and performing oral sex on all three boys and another incident when TT was in company with TE at the broken boat which concerned

the fondling of the boys' penes by the appellant who also sucked their penes. It is said that one of these incidents must have been in respect of counts 6 and 7 and that the other was an uncharged act.

[74] Additionally, it was submitted that some of the inconsistencies in the various versions given in respect of counts 1, 2 and 5 meant that some of the acts alleged against the appellant were uncharged acts.

[75] The trial judge gave this direction concerning Mr Tandjung:

> "You have also heard evidence from the complainants, [TT], [Mr H] and [Mr T], alleging sexual misconduct against the [appellant's] partner, Mr Tandjung. That evidence was allowed to be put before you as part of the narrative of events. If you accept that evidence, you should not allow that evidence to prejudice you in any way against the defendant. It is not a permissible way to reason in this trial that if you were to accept evidence that Mr Tandjung did certain sexual acts in relation to one or more of the complainants, that it is likely that the complainant's evidence against [the appellant] is true."

[76] The appellant accepts that the trial judge later specifically identified relevant uncharged acts before providing this further direction:

> "This evidence of additional sexual activity is relevant for evaluating the reliability and credibility of those witnesses' evidence and the evidence of the other complainants in relation to the same incidents. If you do not accept this evidence of other sexual acts, it will then - that finding of yours will then bear upon whether or not you accept the relevant witnesses' evidence relating to the charges before you beyond a reasonable doubt.
>
> Even if you were satisfied that some or all of those other acts that are not the subject of charges did occur, it does not inevitably follow that you would find the defendant guilty of the acts the subject of the charges. You must always decide whether having regard to the whole of the evidence the offence charged has been established to your satisfaction beyond reasonable doubt.
>
> So, what I have done is I have gone a long way about showing you how you need to deal with that evidence of additional sexual activity that's not the subject of charges, but how you deal with it depends on whether you accept it or not."

[77] The appellant complains that the trial judge's directions were deficient in that they failed to warn that if the jury accepted the complainants' evidence of the uncharged acts, they could not reason that the appellant had a tendency to commit offences of the type charged and to reason further that it was therefore more likely that he had committed the charged offences.

[78] The complaint in relation to the evidence concerning Mr Tandjung lacks substance. The jury would have understood from the trial judge's direction that the role of the evidence concerning Mr Tandjung was to put the evidence against the appellant in

context and that such evidence could not bear upon the jury's assessment of guilt in relation to the offences with which the appellant was charged. The jury were advised that each element of each offence had to be proved beyond reasonable doubt and that each charge had to be considered separately by "evaluating the evidence relating to that particular charge".

[79] It does not appear to me that the trial judge erred in failing to give a further direction along the lines of that contended for by the appellant. This was not a case of sexual offending occurring against the background of other unlawful sexual conduct which could serve to shed some light on the relationship between the offender and the victims or, for that matter, on whether the offender had a propensity or tendency to commit offences of the type in question. The relevant acts were merely ones which were said to have occurred in the course of the three incidents which gave rise to all of the charges. As the trial judge appreciated and, as counsel for the respondent submitted, the real relevance of the "uncharged acts" lay in the extent to which they revealed material inconsistencies in the complainants' various accounts. Unsurprisingly, defence counsel did not seek any further directions along the lines of the direction which the appellant suggests was necessary. There was no unfairness to the appellant. This ground must also be rejected.

Ground 5 - The conviction was unsafe and unsatisfactory

[80] The matters relied on by counsel for the appellant in support of this ground were:

- The delay between the alleged offending acts and the complaints and then the trial;
- Inconsistencies in the evidence of the complainants concerning counts 1, 2 and 5;
- The sworn evidence of the appellant that he was not at home on the morning of 9 February 1997; and
- Collusion between the witnesses TT and TE in relation to counts 14-17.

[81] The following explanation was given by counsel for the appellant of the inconsistencies relating to counts 1, 2 and 5:

(a) Count 1 was particularised as the touching of RH's penis in the lounge room – RH gave evidence of such touching, however TT gave no evidence of RH being touched in the lounge room in his evidence-in-chief. He confirmed an absence of recollection of such conduct in his cross-examination.

(b) ST gave evidence of a tall European man with a balding head who had been described in his 2008 statement as having fondled the penes of the three boys in the lounge room, but his 2006 statement did not mention any such conduct having occurred in the lounge room. In his first two statements RH alleged that the white man had washed his and ST's penes. In his oral evidence, he said that this did not happen. He explained the change in his evidence by the fact that he was only 11 years of age at the time of the subject events.

(c) In relation to count 2, which was particularised as the touching of ST's penis in the lounge room, TT gave evidence that nothing had happened.

(d) Count 5 was particularised as fellatio performed on TT in the bathroom. TT's evidence was that this occurred in the bathroom and not in the lounge and that RH and ST did not come into the bathroom when he was there. RH swore that he saw the man kneeling in front of TT in the bathroom. He said that he and ST had a shower but at no time did the white man suck his or ST's penis in the shower. ST said that the oral sex with TT occurred in the lounge room, that all three of them had a shower together and that their penes were handled and oral sex occurred in the shower. His 2006 statement did not mention oral sex.

- In relation to counts 15, 16 and 17, which were in respect of the bunker, TT and TE each gave two statements prior to giving evidence at the committal hearing. TT's evidence on trial was that the European man gave him and TE oral sex at the bunker. The bunker incident was not mentioned in his first two statements. He accepted in cross-examination that he had not remembered the bunker incident when he gave his statements. He said he remembered it afterwards. One of the statements, however, did have the incidents of sexual misconduct taking place at three places.

- TT denied having spoken to TE about new statements given by him and TE to police in October 2009. However, he conceded that TE had reminded him of the bunker incident.

- A police officer, agent Dixon, swore that the bunker incident was raised just before the committal. He said that the complainants were taken to various locations on the island to point out where the offences had occurred and that the police were not taken by the complainants to the bunker. In TE's statement he explained that the incident at the bunker occurred about a month after the broken house incident. He said that he did not show police the bunker because he had forgotten about the incident. It was not mentioned in his 2006 and 2008 statements. He denied speaking to TT about the matter.

[82] The delays between the alleged offending conduct, the making of complaints and the trial were substantial. However, as discussed earlier, the trial judge gave an appropriate direction in this regard.

[83] There were inconsistencies in the evidence as counsel for the appellant explained. Given the lapse of time between the events in question, the complaints and the trial and the ages of the complainants at the time of the alleged offending conduct, the existence of some inconsistencies was hardly surprising. Nor is it surprising that the evidence of the complainants would differ in some respects. The jury was well aware of the inconsistencies. They were adverted to in the primary judge's summing up and relied on by defence counsel. Their resolution was very much a matter for the jury.

[84] In *MFA v The Queen*,[25] McHugh, Gummow and Kirby JJ remarked, in effect, that it was "not uncommon in most trials" for "some aspects of the evidence [to be] less than wholly satisfactory". Their Honours said in that regard:

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25 (2002) 213 CLR 606 at 634.

> "Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention."

[85] Their Honours observed earlier in their reasons that determination by an appellate court as to the reasonableness of a jury's verdict:

> "…involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials."[26]

[86] In deciding what weight was to be given to the inconsistencies relied on by the defence, the jury were entitled to have regard to the fact that each complainant's evidence in respect of the great majority of the complaints was corroborated by the evidence of at least one other person. The separate accounts given by the complainants contained believable detail. For example, the defence was unable to point to errors in the descriptions of the interior of the appellant's residence or in respect of the other locations at which the offending was said to have occurred.

[87] The accounts given by each complainant at different times were generally consistent and the jury were entitled to conclude that the discrepancies between the accounts given by different complainants indicated an absence of collusion. It is correct, as counsel for the appellant pointed out, that TT conceded that he had been reminded of the bunker incident by TE. That and the emergence of TT's complaint in this regard required the jury to approach TT's evidence in this regard with caution. It did not require the rejection of his evidence.

[88] The jury could have had regard also to the fact that the complaints were made reluctantly. Defence counsel submitted to the jury that this reluctance supported the conclusion that the complainants succumbed to pressure and told officers of the AFP what they wanted to hear. However, it was open to the jury to conclude that the complainants' reluctance to make complaints to the authorities enhanced, rather than diminished, their credibility, particularly as their respective accounts bore no sign of collusion or fabrication.

[89] It is true that the appellant's denials gained some assistance from his diary entries, but if the appellant had engaged in the offending conduct it would not be surprising if it was not recorded in his diary. In his address to the jury the prosecutor submitted, with some justification, that even if the relevant entries in the diary were to be accepted at face value, the appellant would have had time to commit the offences.

[90] In my view, it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt.

Conclusion on the appeal against conviction

[91] None of the grounds of appeal has been made out. I would order that the appeal against conviction be dismissed.

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[26] *MFA v The Queen* (2002) 213 CLR 606 at 624.

Appeal against sentence

[92] The grounds relied on by the appellant Commonwealth Director of Public Prosecutions were overlapping. They were that:

(a) the sentencing judge erred in making all sentences concurrent;

(b) the sentencing judge did not give sufficient weight to the circumstances of the case and, in particular, the objective seriousness of the offences;

(c) the sentencing judge erred in giving too much weight to mitigating factors and insufficient weight to aggravating factors; and

(d) the sentences imposed were manifestly inadequate.

[93] The appellant submitted that the terms of imprisonment imposed in respect of each count should remain unchanged, but that they should be made cumulative so that:

(a) the sentences imposed in respect of counts 1, 2 and 5 commence on 8 August 2011;

(b) the sentences imposed in respect of counts 6, 7, 8 and 9 and 10, 11, 12 and 13, commence on 8 August 2012;

(c) the sentences imposed in respect of counts 14, 15, 16 and 17 commence on 8 August 2013; and

(d) in lieu of a non-parole period of 21 months – a non-parole period of three years (i.e. concluding on 8 August 2014) should be fixed.

Such sentences would result in an effective head sentence of five years and six months imprisonment with a non-parole period of three years.

[94] It is convenient to deal immediately with grounds (b) and (c). The thrust of the appellant's submissions on these grounds was that sentencing error could be deduced from the levels of the sentences imposed. In other words, the matters relied on in respect of these grounds were in aid of the manifestly inadequate ground. In relation to ground (b), it was submitted that the sentencing judge must have failed to appreciate sufficiently, or at all, the aim of the subject legislation to punish those who exploited the vulnerability of children whose home country does not protect them in the same way as the laws of Australia attempts to protect Australian children. The vulnerability of "international complainant children", it was said, rendered offending of the type in question particularly reprehensible.

[95] The appellant argued that although the respondent was not in a position of trust in respect of the complainants, he was in a privileged position of authority, influence and access as a member of the Australian military. The abuse of the respondent's privileged position as a member of the military and a representative of Australia was an aggravating feature of the offending conduct which was further aggravated by being committed against four complainants on three separate occasions.

[96] The only discrete error of law the appellant identified was the sentencing judge's treatment of the respondent's partner's introduction of the complainants into the respondent's dwelling as a mitigating factor. It was submitted that the respondent

did not turn the complainants away, but allowed them into his home for the sole purpose of sexually abusing them in his partner's company.

[97] The sentencing judge did not err as the appellant submitted. She merely identified the manner in which the complainants came to the respondent's house as "relevant to the circumstances in which counts 1, 2 and 5 were committed". It would appear from the sentencing remarks that the primary judge did not sentence on the basis that the respondent had prior knowledge of his partner's intention to bring the children to the dwelling. She was right to take that approach. It was not established on the balance of probabilities that the respondent had any such prior knowledge.

[98] Nor does it seem to me that there is substance in the contention that the respondent was "in a privileged position of authority, influence and access" which he abused. No evidence was pointed to which suggested that the complainants were any more or less susceptible to the respondent's predatory conduct as a result of his position or status or that he made relevant use of that status either deliberately or unwittingly. It does not appear that the respondent offered the complainants any financial or other inducements in relation to the offending conduct or that the respondent's position or status affected the complainants' conduct.

[99] The sentencing remarks do not indicate that the primary judge overlooked the purpose of the legislation or the seriousness of the offences it creates. Quite the contrary, her Honour, in rejecting defence counsel's submission that the appropriate sentences should be determined by reference to comparable offences against State legislation, observed that:

> "…the comparable sexual misconduct committed within the State does not incorporate the added feature that has been marked out by the Commonwealth Parliament for specific deterrence, which is the commission of sexual abuse by Australians against children overseas."

[100] It was contended by the appellant that the respondent's good character was not of much weight in determining the appropriate penalty in the circumstances of this case. Reference was made to the observation in *R v Nuttall; Ex parte Attorney-General*:[27]

> "That an offender is of otherwise good character is a mitigating factor, but it may sometimes be overridden by the objective seriousness of the offences, by countervailing evidence or by other considerations."

[101] In this regard, the appellant repeated the submission that the respondent's position in the military gave him status in Kiribati and access to its residents. There is no evidence to support that contention either as a general proposition or in so far as it concerns the complainants.

[102] The sentencing judge referred to the respondent's "excellent past record in the Navy" and the volunteer work undertaken by him after his retirement, his good prospects of rehabilitation and the absence of any suggestion of his reoffending in the lengthy period since the subject offences were committed. She referred also to

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[27] [2011] QCA 120 at [57].

the lengthy delay in bringing matters to trial. The relevance of the delay was twofold. Firstly, the respondent spent many years in a state of uncertainty about the likelihood of prosecution and then with respect to the timing of any trial. The other relevant consideration in this regard is that the sentencing judge was in a position to see whether the respondent had re-offended and then to gauge the progress of his rehabilitation. In *R v Todd*,[28] Street CJ remarked in relation to such delay that it could, "at times… require what might otherwise be a quite undue degree of leniency being extended…".

[103] It does not appear to me that the sentencing judge gave undue weight to the respondent's previous good character or to other mitigating circumstances unless it is possible to deduce that from the level of the sentences imposed. Section 16A(2)(m) and s 16A(2)(n) of the *Crimes Act* 1914 (Cth) specifically require an offender's character and prospects of rehabilitation to be taken into account.

[104] In relation to ground (a), the appellant submitted that the fact there were three distinct incidents involving four complainants should have caused the sentencing judge to "consider whether it was appropriate to order that the sentences be served cumulatively".

[105] Whether the sentencing judge failed to give consideration to a cumulative sentence is not obvious from the sentencing remarks. She made no reference to a cumulative sentence, but it does not follow that a cumulative sentence was not considered. It would, however, not be remarkable if the primary judge gave no serious consideration to making the sentences cumulative as the prosecutor did not seek cumulative sentences. On the contrary, the prosecutor submitted that the sentencing judge "could impose a sentence reflecting the seriousness of the matter as a whole for the sexual intercourse offences". The change in the appellant's approach in this regard is relevant to this Court's determination.[29]

[106] The appellant referred to *R v Harris*,[30] in which principles relating to the determination of whether sentences should be concurrent or cumulative were discussed at some length and in which the need for the adequate punishment of separate offences was emphasised.

[107] *Harris* does not expound, and the appellant does not go as far as submitting that, as is implicit in the foregoing discussion, there is a universal fixed principle which requires a sentencing judge to impose cumulative rather than concurrent sentences where the offender is being sentenced for a number of offences committed at different times and in different places. What is essential is that sentences imposed properly reflect the overall criminality of the offending conduct. Where the offences are discrete, subject to the application of the totality principle, cumulative sentences will normally be more appropriate. The question of whether cumulative or concurrent sentences should be imposed was the subject of insightful discussion by Wells J in *Attorney-General v Tichy*:[31]

> "It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may

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28 [1982] 2 NSWLR 517 at 520.

29 *Everett v The Queen* (1994) 181 CLR 295 at 304 – 305 and 307; and *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198 at 213 [40].

30 [2007] NSWCCA 130.

31 (1982) 30 SASR 84 at 92-93.

> determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. When an accused is on trial it is part of the procedural privilege to which he is entitled that he should be made aware of precisely what charges he is to meet. But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient. There are dangers in each course. Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed, there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration."

[108] The following passage from the judgment of the Court in *Mill v The Queen*[32] is also instructive:

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp. 56-57, as follows (omitting references):
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> > 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each

[32] (1988) 166 CLR 59 at 62 – 63.

> properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong["]; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".'
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> See also Ruby, *Sentencing*, 3rd ed. (1987), pp. 38-41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

[109] Furthermore, the circumstances of the offending conduct were not such as to make the imposition of concurrent sentences unorthodox. The offending conduct was of a similar nature. It took place over a short period of time. The first two groups of offences were committed at about the same time and one complainant was common to all three incidents.

[110] The respondent advanced the lengthy delay in bringing the matter to trial which was in no way attributable to the respondent[33] and the fact that the complainants had not been forced or subjected to violent conduct or threats of any kind as mitigating considerations.

[111] The comparable sentence on which principal reliance was placed by the appellant was *R v Marlow*.[34] The primary judge regarded *Marlow* as the most relevant of the decisions to which she had been referred, but considered Marlow's offending more serious than the respondent's. The appellant took issue with this conclusion, noting that Marlow had pleaded guilty and that, in the present case, there were four complainants and three separate incidents of offending.

[112] In *Marlow*, there were two counts of indecency and one count of engaging in sexual intercourse with a person under the age of 16. The former counts concerned the fondling of the victim's penis and mutual masturbation. The other count was in respect of an act of fellatio. The complainant was a 13 year old male who came from an impoverished family. The sentencing judge described the complainant as having been "entrapped… by… offers of money, meals, goods and the like". The offender had ingratiated himself into the complainant's family circle and was in

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33 *R v L; ex parte Attorney-General* [1996] 2 Qd R 63.

34 (unreported, 31 May 2000, County Court of Melbourne, Robertson DCJ).

a position of trust and influence in respect of the complainant as a result of a religious role: he was to baptise the complainant. The offender was sentenced to 12 month terms of imprisonment for each of the lesser counts and to three years and six months imprisonment for the most serious count. All of the sentences were made concurrent.

[113] There were thus aspects of Marlow's offending which were substantially more serious than that of the respondent. Marlow selected a vulnerable victim and executed a plan to take advantage of that vulnerability. By the time he offended, he had achieved a position of trust and influence over the complainant. It is, of course, highly relevant to sentence that Marlow pleaded guilty, but there were other considerations, not present in *Marlow's* case, which the sentencing judge was able to take into account. I refer in particular to the very substantial delay, both in the making of complaints and in the trial of the charges. Although there were four complainants, there was a degree of commonality in the offending conduct which was opportunistic. It is a relatively minor point, but the complainants, unlike the complainant in *Marlow*, were never in a position in which they were alone with the perpetrator and entirely at his mercy.

[114] At first instance, the prosecution tendered and relied on a comparable sentence schedule. As one might expect, the cases on the schedule covered a wide spectrum of offending conduct. Neither counsel challenged the sentencing judge's conclusion that *Marlow* was the most relevant of the scheduled cases.

[115] Three of the decisions on the schedule are perhaps worth mentioning. The offender in *R v Smith*[35] was a mature aged ship's engineer who befriended young children and provided them with toys. He procured girls aged six to remove their clothing before he photographed their genitals. He licked one of the girls in the vaginal region. He was diagnosed as a paedophile with a high risk of future offending and was on a probation order for similar offences at the time of sentencing. He was sentenced to three years imprisonment with release after 21 months.

[116] The offender in *Kaye v The Queen*[36] was sentenced to six years imprisonment with a non-parole period of three years. His offending conduct involved numerous sexual encounters with boys aged between 15 and 16. The offender travelled abroad for the purposes of engaging in paedophilia and to entice his victims he placed advertisements in a newspaper. The nature and degree of the offending was far worse than in the present case.

[117] The 56 year old offender in *R v Martens*[37] was refused leave to appeal against a sentence of five and a half years imprisonment with a non-parole period of three years imposed for an offence of sexual intercourse with a person under 16 years while outside Australia. The offender had unprotected intercourse with the complainant causing vaginal bleeding. She had not had sexual intercourse before. The case provides little guidance for present purposes.

[118] As no error in principle on the part of the sentencing judge was established, the appeal can succeed only by showing that the sentence imposed was manifestly inadequate.

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35 (unreported, 7 June 2002, District Court of NSW, Coolahan DCJ).

36 [2004] WASCA 227.

37 [2007] QCA 137.

[119] Where an appeal against sentence is not based on a specific error of principle, but on grounds that the sentence is manifestly inadequate or excessive: [38]

> "…appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons."

[120] After referring to the above passage with approval, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen*[39] said, "But, by its very nature, that is a conclusion that does not admit of lengthy exposition".

[121] Their Honours[40] rejected the view that "manifest error is fundamentally intuitive" but accepted the Court of Criminal Appeal's statement that manifest error "arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it." Their Honours then observed, "But what reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence".

[122] In determining whether a sentence is manifestly excessive or inadequate, particularly by comparison with a limited number of comparable sentences with varying degrees of relevance, it is as well to have regard to the following observations in *Markarian v The Queen*[41] of Gleeson CJ, Gummow, Hayne and Callinan JJ:

> "As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies."

[123] In a similar vein, the Court observed in *Lowndes v The Queen*:[42]

> "…a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. ...The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice."

[124] It does not appear to me that, having regard to the particular circumstances of this case, that the sentences imposed were outside the permissible range.

[125] For the above reasons, I would order that the appeal against sentence be dismissed.

[126] **MARGARET WILSON AJA:** In each appeal, I agree with the order proposed by Muir JA, and with his Honour's reasons for judgment.

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38 *Wong v The Queen* (2001) 207 CLR 584 at [58].
39 (2010) 272 ALR 465 at [59].
40 At 208 [60].
41 (2005) 228 CLR 357 at 371.
42 (1999) 195 CLR 665 at 671-672.