SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collins* [2013] QCA 389
PARTIES:	**R** **v** **COLLINS, John** (appellant/applicant)
FILE NO/S:	CA No 89 of 2013 DC No 1849 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2013
JUDGES:	Margaret McMurdo P and Fraser JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The verdicts of guilty are set aside.** **3. Re-trials are ordered.** **4. A separate trial is ordered on count 1.** **5. A separate trial is ordered on counts 12 to 15.** **6. A separate trial is ordered on counts 19 to 22.** **7. The application to adduce further evidence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – OTHER MATTERS – where the appellant was charged with 22 counts concerning seven complainants, including 10 counts of rape (counts 1, 4, 8, 10, 12, 13, 15, 17, 18 and 22), five counts of stupefying in order to commit an indictable offence (counts 2, 5, 7, 9 and 16), three counts of sexual assault (counts 3, 14 and 19), one count of assault with intent to rape (count 6), one count of deprivation of liberty (count 11) and two counts of sexual assault with a circumstance of aggravation (counts 20 and 21) – where the appellant was convicted on all counts except counts 6 and 9 – where the prosecutor endorsed the indictment that he would not proceed further on count 11 – where, at a pre-trial

hearing, the appellant's counsel applied for four separate trials for each of the three complainants MB (count 1), KW (counts 12 to 15) and RG (counts 19 to 22) while conceding that the charges concerning the remaining complainants were properly joined as they all involved the distinctive allegation that the appellant had given each complainant alcohol which affected them strangely before he sexually assaulted or raped them – where the pre-trial judge refused that application on the basis that the evidence on all counts demonstrated an underlying theme, unity or pattern – where the appellant contends that the pre-trial judge erred in refusing the application for separate trials and in failing to identify, at the outset of the trial, the issues on which the similar fact evidence was to be tendered – whether pre-trial judge erred – whether, if the pre-trial judge erred, there was no substantial miscarriage of justice in terms of s 668E(1A)

Criminal Code 1899 (Qld), s 567(1), s 567(2), s 668E(1A)
Mental Health Act 2000 (Qld), s 101

DPP v Boardman [1975] AC 421, cited
Markby v The Queen (1978) 140 CLR 108; [1978] HCA 29, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, considered
R v Gregory [2011] QCA 86, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, considered

COUNSEL: S M Ryan QC for the appellant/applicant
M R Byrne QC, with D Nardone, for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, John Collins, was charged on one indictment containing 22 counts concerning seven complainants. The offences were said to have occurred on his yacht at assorted locations in tropical or subtropical Queensland at various times between 1986 and 2000. There were 10 counts of rape (counts 1, 4, 8, 10, 12, 13, 15, 17, 18 and 22); five counts of stupefying in order to commit an indictable offence (counts 2, 5, 7, 9 and 16); three counts of sexual assault (counts 3, 14 and 19); one count of assault with intent to rape (count 6); one count of deprivation of liberty (count 11); and two counts of sexual assault with a circumstance of aggravation (counts 20 and 21). He was convicted on 15 March 2013 after a 19 day jury trial on all counts except counts 6 and 9. The verdicts on counts 2, 5, 7, 9 and 16 (stupefying in order to commit an indictable offence) were majority verdicts. The jury were unable to reach a verdict on the count of deprivation of liberty (count 11) and the prosecutor endorsed the indictment that he would not proceed further on that count.

[2] For much of his 19 day trial the appellant represented himself, even though he was subject to a court order under s 101 *Mental Health Act* 2000 (Qld), requiring that during adjournments of the trial, he be detained for treatment or care at the Park Centre for Mental Health.

[3] On 3 April 2013, the appellant was sentenced to 20 years imprisonment on counts 16, 17, 18 and 22 and to lesser concurrent terms of imprisonment on the remaining counts. The sentences imposed on counts 16, 17, 18 and 22 were declared to be convictions for serious violent offences. Presentence custody of 342 days was declared as time served under the sentence.

[4] The appellant, who is now legally represented, has appealed against his convictions on a number of grounds. The first is that the trial judge erred in determining that the trial should proceed with the appellant unrepresented. The second is that the trial judge erred in determining that the appellant could not have a person present to assist him at trial ("a McKenzie friend"). The third is that the trial judge erred in not warning the jury that they should disregard those aspects of the appellant's presentation of his case that were attributable to his personality, his being unrepresented and his lack of legal training. The fourth is that the judge hearing a pre-trial application erred in law in refusing the applications for separate trials of the counts concerning each of the complainants MB, KW and RG and that the joint trial which proceeded was unfair. The fifth is that the judge erred in law in directing the jury as to the use of similar fact evidence by not identifying which evidence was said to be probative in each case. The sixth is that there has been a miscarriage of justice because of the admission into evidence of the fact of and details of the termination of pregnancies of ND and RG; and of sexually transmitted disease in the cases of ND, RG and MW.

[5] Further, the appellant applied for leave to appeal against his sentence on the grounds that the sentencing judge erred in the exercise of his discretion in giving insufficient weight to the appellant's mitigating circumstances, namely, his mental health, age, the delay in bringing and prosecuting the charges; in taking into account Mental Health Court material; and in drawing conclusions against the appellant's interests that should have been the subject of expert opinion. The appellant also contends that the sentence of 20 years imprisonment was manifestly excessive.

[6] After the hearing of the appeal the appellant applied to adduce further evidence as to the conduct of the trial. As I propose to allow the appeal, it is unnecessary to deal with that application and it should be refused.

[7] For the reasons which follow, I am persuaded that the charges concerning MB, KW and RG were not properly joined with each other and with the remaining counts. In order to discuss that ground, it is necessary to understand the evidence on each count.

The evidence at trial

[8] I will deal with the evidence at trial chronologically. In February 1986, when MB was 17 years old, she met the appellant in Maroochydore. He offered her work as a receptionist in a motel and she went to his yacht to discuss this. The appellant explained he intended to travel on the yacht and was looking for a companion to his young son.[1] She declined that position. He gave her a $150 advance on her

[1] The appellant's son, RP, was then about eight years old.

receptionist wages at the motel. He offered her champagne and encouraged her to drink it. She had two or three sips. He joined her on the settee and leant into her. He used his weight and his arms to pin her against the settee. She told him to get off but he lifted her skirt, moved her underwear aside and penetrated her vagina with his penis. Ignoring her protests, he continued until ejaculation. He kept saying, "It's okay, you'll be okay"[2] (count 1). She did not tell anyone about the incident until 2000 when she read an article in a newspaper which reported the account of a victim of rape in similar circumstances. She made a complaint to police. She had not previously met or had contact with any other complainant. When recording the incident in her diary she used the word "attacked" rather than "raped".

[9] The appellant gave evidence that he did not attack or rape MB. MB denied this in cross-examination. The appellant's daughter, SA, and son, RP, gave evidence in the defence case that they were on the appellant's yacht at the time MB visited and noticed nothing untoward.

[10] Counts 12 to 15 concerning the complainant, KW, were next in time. KW met the appellant in 1986 after responding to an advertisement in a newspaper for someone to teach a child correspondence on a yacht on a voyage to the Whitsundays. She successfully obtained the position. The appellant's son, a woman, K, and a man, A, (a couple), and a woman, G, also made the voyage. Sometimes the appellant asked KW to sunbathe naked or topless but she repeatedly refused. He sometimes touched her on different parts of her body. She made it clear that she was not interested in a physical relationship but he persisted. One evening, after G had left the yacht, it was moored near an island which KW apprehended was deserted. Whilst alone on that island with the appellant, he told her that if she did not have sex with him he knew "evil"[3] people whom he could arrange to harm her parents. She complied because she believed his threats as he had previously spoken of his connections with these kinds of people. The appellant had penile vaginal intercourse until ejaculation during which she cried and repeatedly said, "No, stop, stop"[4] (count 12).

[11] The following evening while the yacht was moored near another island and the other passengers were visiting a nearby boat, KW and the appellant remained on the yacht with the appellant's son who was already asleep. The appellant began to talk about sex and told her it would be a lot easier if she just agreed. She told him she did not want to have sex but he pulled her downstairs to his cabin and threw her on his bed. Despite her crying and protests, he had penile vaginal sex with her until ejaculation (count 13).

[12] Whilst moored near another deserted island the next evening, she was alone on the boat with the appellant and his son, who was asleep. While in the wheelhouse, the appellant began to masturbate. Despite her resistance, he used her hand to masturbate him (count 14). He dragged her down to his cabin where he pushed her onto his bed and held her down whilst continuing to masturbate. Although she was crying and asking him to stop, he had sexual intercourse with her until ejaculation (count 15). She stayed in his cabin that night and left the next morning, wearing a towel. She thought the other passengers saw her leaving. For the remainder of the journey, the appellant had sexual intercourse with her nearly every night until they

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2 T1-51.33.
3 T7-13.12.
4 T7-13.45-46.

reached Hamilton Island, by which time she had moved into his cabin. Whilst on Hamilton Island she unsuccessfully tried to call her parents. A woman noticed that she was crying, gave her a ferry pass to leave the island and assisted her with accommodation until she contacted her mother and made arrangements to return home. She did not make a "full" complaint to her parents. In 2006 her mother told her about a newspaper article about the appellant which prompted her to complaint to police. She had not previously met or had contact with any other complainant.

[13] The appellant gave evidence that all sexual contact with KW was consensual. KW denied this in cross-examination. The appellant's son, RP, gave evidence that the complainant stayed in the appellant's cabin from the beginning of the journey and they appeared to be a couple.

[14] Counts 2 to 4 concerning the complainant MW were next in time. The 21 year old MW met the appellant in January 1987 when she responded to a newspaper advertisement for a nanny/governess to look after a boy on board a yacht. The appellant arranged an interview and an overnight stay on the yacht in Mooloolaba. After dinner, during which MW had a quarter of a glass of wine, the boy went to bed and MW and the appellant went to the cabin. The appellant spoke about men's sexual urges and that previous governesses sunbaked either topless or naked. MW made clear that she was not interested and that she would not sleep with him. The appellant insisted she have more wine. After a couple of sips she began to feel sick, heavy and tired, a sensation she had never before experienced (count 2). She told him she was feeling tired and needed a shower before bed. He directed her to the shower in the main cabin. She was naked and in the shower when the naked appellant entered. She felt his abdomen against her back and he put his hands on her breasts, moving them down her body, between her legs and into her vagina. She asked him what he was doing. He responded, "I'm coming in to have a shower."[5] She told him to get out and repeatedly told him to stop touching her (count 3). Her next memory was that she was on her back on the bed with the appellant on top of her holding her down. He forced his penis into her vagina while she was trying to push him off and was telling him to stop (count 4). At some point, she blacked out. When she came to, she was "wet and sticky and it had the smell of semen".[6] She was really groggy and all she was able to do was to go back to sleep.

[15] MW had no further memory until she woke in the appellant's bed the next day. By the time she showered, others had arrived on the yacht and the appellant was introducing her as his girlfriend. She still felt very unwell and was trying not to throw up. That day she had an outing with the appellant and his son and they returned to the yacht at night. Her next memory was being in bed with the appellant and him raping her again. MW made reference to this alleged rape for the first time when she gave evidence at trial. The following day, the appellant drove her home. They went on to have a personal consensual sexual relationship. She explained this was her way of rationalising to herself how she had come to have sex with him and she did not want to admit that she had been raped. In her world, people only had sex if they were in caring, loving relationships. She agreed the appellant proposed marriage but she declined.

[16] In 1988 she renewed her relationship with her present husband who was the first person to whom she complained about the appellant's conduct. She did not

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5 T7-62.14-15.

6 T7-64.25-26.

complain to others until she saw a newspaper article accompanying a photo of the appellant. This prompted her to tell two friends, HB and JB, and ultimately the police about the alleged offending. Prior to making these complaints, she had not met or had contact with any other complainant.

[17] The appellant's evidence was that all sexual contact with MW was consensual. The appellant's daughter, SA, gave evidence that she accompanied the appellant when he drove MW home and went for a walk with her. MW told her she was in love with the appellant. In cross-examination the complainant denied saying this.

[18] Counts 5 and 6 concerning the complainant MV were next in time. In March 1987, the 20 year old MV responded to a newspaper advertisement about a position as a nanny on a yacht. She telephoned the appellant and flew to Brisbane with her mother for an interview. Ultimately, the appellant offered her the position. His demeanour changed once she was on board. He alternated from being complimentary to being humiliating. He introduced her to people as his wife or girlfriend and encouraged his son to call her "mum".[7] On the last night she was on the yacht, the appellant had been drinking, was agitated and became increasingly angry. He insisted she have a glass of champagne. Afterwards she felt extremely tired, nauseous, dizzy and unwell (count 5). She went to her berth and lay down. She woke up on her back with the appellant on top of her pinning her down by the shoulders. His face was extremely close to hers. He shouted, "Why are you trying to ruin my family?"[8] She could not remember if either of them was clothed. She managed to push him off and move away, stumbling and falling as she negotiated a passage through the yacht (count 6 on which the appellant was acquitted). He then pinned her down again but she was able to escape to the marina where people on a nearby boat took her in until she arranged to return to Sydney. She told her mother, some family members and a friend, PW, about the incident. In about 2006, she saw an article in a Queensland newspaper detailing a similar incident and made a complaint to police. Prior to this she had not met or had contact with any other complainant.

[19] The appellant gave evidence that he neither attacked nor drugged MV. She denied this in cross-examination but confirmed the appellant's shouting was irrational rather than sexual. He gave evidence that he was not happy with her job performance and he devised a plan with his daughter, SA, to board the yacht and pretend that she was to replace MV. MV was "rubbishing"[9] him to SA and refused to leave the yacht or even come out of her cabin. Only then did he yell at her, accusing her of wrecking his family. She finally left, and at his expense and with the assistance of people from a nearby boat, returned to Sydney. The appellant's children, SA and RP, gave evidence consistent with his account.

[20] The next alleged offences in time were those contained in counts 7 to 11 concerning the complainant MF. In 1990 or 1991, when MF was about 21, she responded to a newspaper advertisement for a position as a nanny to a young boy on a yacht. She arranged to meet the appellant for an interview at a Brisbane hotel. About a week later, he phoned her and asked her to travel to Bundaberg to conduct a trial. When she arrived on board, the appellant offered her a beer and said, "You'll be

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7 T8-13.5.
8 T8-15.2-3.
9 T10-15.1.

sleeping with me."[10] She thought he was joking. After drinking the beer, her next memory was waking up to find the appellant having sex with her in his cabin (counts 7 and 8).

[21] Her next memory was waking up the following morning in his cabin feeling very ill, dizzy, disorientated and really confused. The yacht was still moored in Bundaberg. The appellant acted as if nothing had happened. They sailed from Bundaberg for the Gold Coast with the appellant's son. She could not recall if there was any sexual contact before they berthed at Mooloolaba where she met other young women at the yacht club who returned aboard with her. She drank one or two beers on the deck. Her next memory was waking up with the appellant having sexual intercourse with her, again in his cabin (count 9, stupefying, on which the jury acquitted and count 10, rape, on which the jury convicted). She felt ill the next morning. They continued their voyage to the Gold Coast. One morning the appellant told her to take her clothes off and clean the cabin. She refused and he left the cabin. When he returned and she had not done as he requested, he held her, took her clothes off, closed the door and told her to clean. She did not recall checking the door to the cabin but she apprehended she could not leave it. She was naked in the cabin for between 15 and 30 minutes until the appellant returned with her clothes (count 11 on which the jury could not reach a verdict and which has since been discontinued).

[22] When they arrived at Southport she phoned a friend who joined them for drinks. The appellant fell asleep, her friend left, MF retrieved her bag and left the yacht to go to another friend's house and did not return. She made no complaint until she told her husband some time before they married in 2000. Whilst living in the United Kingdom she saw an internet article which prompted her to make a complaint to police. She had not met or had contact with any other complainant at this time.

[23] The appellant gave evidence that he did not drug or rape MF who voluntarily shared his cabin every night. The appellant denied forcibly undressing MF. His account was that she was ill from drinking the previous evening and gave him her clothes to clean. She passed them to him and he passed her cleaning products to clean the cabin. In cross-examination, she maintained her account given in evidence-in-chief. The appellant's son, RP, gave evidence that he saw nothing to suggest MF was drugged or raped.

[24] Counts 16 to 18 concern the 24 year old complainant, ND. In December 1999, she, too, responded to a newspaper advertisement for a nanny on a yacht to take day trips to the islands. She gave evidence that she met the appellant at a marina on the Gold Coast. She claimed that he gave her a drink of sparkling wine and Midori, after which she felt very disoriented, dizzy and wobbly (count 16). The appellant forced himself on her and despite her protests ripped her pants off and put his penis in her vagina until ejaculation (count 17). She woke the next morning with a dreadful headache in the appellant's bed. Later that day he again attacked her and forced his penis into her vagina (count 18). She left the yacht but as her young daughter was still on board, she returned later in the evening, explaining that they had to leave to prepare for her work the next day. The following day she returned with her partner to collect her portfolio. She then told her partner that the appellant had drugged and raped her. They attended a rape centre where she spoke to a counsellor. She made

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10 T8-30.39-40.

a complaint to police four days before the newspaper article concerning RG was published.[11] She had no prior contact with any other complainant. ND became pregnant and terminated the pregnancy. DNA analysis later established that the appellant was the father.

[25] The appellant gave evidence that he did not drug ND and that all their sexual contact was consensual. When this was put to her in cross-examination, she denied it.

[26] Counts 19 to 22 concern the 19 year old complainant, RG, who met the appellant in late 1999 or early 2000 when she responded to a newspaper advertisement about a position as a nanny on a yacht. When she contacted him he said he was intending to write a book while sailing through the Whitsundays. His girlfriend had a young daughter who needed to be cared for. RG went to a Southport marina with a friend, AN, to meet him. RG and the appellant agreed that she would return for a week to live on the yacht to see how she coped. On her first night on the yacht after dinner and drinks, she said she asked to have a shower and was directed to the one attached to the appellant's cabin. He entered the bathroom when she was wearing only a bra. She told him to get out. He told her she was too hairy in the vaginal area and he knew how to make it look pretty. Despite her protests, he grabbed her by the arm, took her to the bed and shaved her pubic area with electric clippers. He told her not to move as he did not want to hurt her. She asked him to stop but he continued until he finished (count 19). She showered and returned to the kitchen area wearing a shirt and shorts. He took her by the arm back to the bedroom. She said, "I don't want to."[12] He told her that everything would be okay and he would be the best she had ever had. Once in the bedroom he took off her clothing and lay on top of her. She was crying when he put his penis into her mouth and used his hands to make her head go back and forth (count 20). He then put his head between and her legs and performed cunnilingus (count 21). She squirmed but could not get away. He got on top of her and put his penis into her vagina until ejaculation (count 22). He left the room. The next morning she spoke with AN who later collected her.

[27] RG told her mother that she had been raped. Her mother contacted the Courier-Mail in an attempt to have the advertisement removed. A journalist spoke with the complainant and an article was published on 23 January 2000.[13] Prior to telling her mother and others, she had no contact with any other complainant. RG discovered she was pregnant to the appellant and had the pregnancy terminated. DNA analysis later established that the appellant was the father.

[28] On 28 January 2000, police searched the appellant's yacht. They did not locate him or seize the yacht. Items including bottles of alcohol similar to those described by RG were taken but no illicit drugs were detected in them. Police found a piece of paper with RG's first name and a phone number on it. The phone number belonged to RG's grandmother with whom RG was living at the time. Police also found clippers with hair in them. A swab taken from the clippers revealed RG's DNA.

[29] The defence case, rejected by RG in cross-examination, was that she told the appellant she did not wear bathers because she was bushier "down there"[14] and that

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11 See [27] of these reasons.
12 T9-17.29.
13 Ex 54.
14 T9-26.55.

she used the clippers after the appellant gave them to her. She then came out of the room naked and initiated sexual intercourse. Whilst away from the yacht, RG phoned the appellant. He was interviewing a girl from New Zealand. RG asked to speak to this girl on the phone and discussed having a "three-some".[15] RG introduced herself to his acquaintances as his "new girlfriend". Her boyfriend owed drug debts and she asked the appellant for $25,000. She went to the newspaper only when he refused her demand for money.

[30] After the publication of the newspaper article[16] and the appellant's yacht was searched, he left Queensland and sailed south. Sometime after October 2003, ED met the appellant, having answered a newspaper advertisement for a housemate to assist on his yacht. She had a three year old son. He purchased plane tickets for her and her son to fly from Tasmania to Melbourne where he collected her and drove her to the St Kilda Marina. He gave her champagne and she drank two glasses. Soon after she felt nauseous and vomited in the en suite. They both lay down on the bed and had consensual sex. They then formed a relationship. He told her that he was wanted by the police following a false allegation of rape. She lived with him for about three years. He explained he intended to change the name and appearance of the boat so he could travel and avoid police.

[31] On 5 June 2006, police boarded the appellant's yacht at Port Lincoln, South Australia. He initially denied that he was John Collins but once arrested and taken to the police station, he admitted his identity.

Joinder

The pre-trial hearing

[32] On 22 March 2011, the appellant's counsel at the pre-trial hearing applied for separate trials on the charges concerning each of the complainants MB (count 1), KW (counts 12 to 15) and RG (counts 19 to 22). He conceded that the charges concerning MW (counts 2 to 4), MV (counts 5 and 6), MF (counts 7 to 11) and ND (counts 16 to 18) were properly joined as they all involved the distinctive allegation that the appellant had given each complainant alcohol which affected them strangely before he sexually assaulted or raped them. That distinctive feature was not present in the charges concerning MB, KW and RG. The appellant contends that the pre-trial hearing judge erred in law in refusing that application.

[33] The appellant's counsel at the pre-trial hearing admitted, for the purposes of that hearing, that the appellant had "sexual intercourse" with KW and RG and had "contact" with MB.[17] The appellant's counsel, both at the pre-trial hearing and on this appeal, submitted that there was no connection between the offences involving MB, KW and RG themselves or with the other charged offences. There was no nexus in time. The offences involving MB (count 1) and KW (counts 12 to 15) were alleged to have occurred in 1986. The offences alleged against RG (counts 19 to 22) occurred between 1 December 1999 and 1 February 2000. The offences alleged against MW (counts 2 to 4) occurred around January 1987. The offences alleged against MV (counts 5 and 6) occurred in about March 1987. The offences alleged against MF (counts 7 to 11) occurred in 1990 or 1991. And the offences

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15 T10-31.25.

16 Ex 54.

17 Pre-trial hearing T1-29.8-13.

alleged against ND (counts 16 to 18) occurred in about December 1999. Absent the distinguishing feature present in the cases concerning MW, MV, MF and ND (that the appellant gave them alcohol which affected them strangely), the offending against each complainant was not similar. MB contended that the appellant was continually reassuring her during the acts of rape with words like "It's okay, you'll be okay". KW gave evidence that the appellant made threats against her parents. The offences involving RG commenced with the appellant shaving her pubic area. Importantly, neither MB, KW nor RG claimed the appellant gave them any alcohol with stupefying effects, a major distinguishing factor from the accounts of MV, MW, MF and ND. Consent was the only issue in all sexual offences of which the appellant was convicted other than count 1 (MB).[18] Consistent with *Phillips v The Queen*,[19] the counts should not be joined with each other or with the properly joined counts against MW, MV, MF and ND, as the evidence was not relevant to or co-admissible on the question of consent. It followed, the appellant's counsel contended, that there should be a separate trial on the charges concerning KW and a separate trial on those concerning RG. The evidence was not so similar as to be relevant to or co-admissible on the issue of whether MB had been sexually assaulted so that there should be a separate trial on that count also.

[34] Counsel for the prosecution conceded at the pre-trial hearing, consistent with *Phillips*, that similar fact evidence could not be used to establish consent but argued the evidence was co-admissible as it went to prove whether the conduct alleged by each complaint occurred at all. The striking similarities in this case went beyond the general similarities in *Phillips*, which should be distinguished.

[35] The pre-trial application judge accepted the prosecutor's submission that the evidence on all counts demonstrated an underlying theme, unity or pattern, namely:

- all complainants were young, aged from 17 to 24;
- they were introduced to the appellant through seeking employment as a nanny on a yacht;
- he then lured them to his yacht with offers of employment, thereby isolating each complainant;
- there was always an offer of a drink, even where there was no charge of stupefying;[20]
- He took advantage of their vulnerable state at his yacht;
- he displayed overtones of control whether by force or other forms of intimidation;
- he sexually assaulted each complainant.

[36] The pre-trial hearing judge did not consider it a significant distinguishing feature that some complainants were given or offered a drink allegedly spiked with drugs while others were not. The facts of each case, his Honour reasoned, were strikingly

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18 The appellant also denied the commission of count 6 (MV) but he was acquitted so that count 6 need not be considered further.

19 *Phillips v The Queen* (2006) 225 CLR 303.

20 At the hearing of the appeal, senior counsel for the respondent informed the Court that at trial KW did not give evidence that she was offered or consumed alcohol.

similar so that there was no explanation of them other than the guilt of the appellant in respect of each count. This was an exceptional case where the evidence on each count was co-admissible on the evidence of the other and was of a very high probative value. The counts were properly joined. The issue of consent was not the sole issue for determination. The surrounding circumstances of each charge were relevant, not simply the act of penetration.

The contentions in the appeal

[37] The appellant relies on the submissions at the pre-trial hearing. Appellate counsel further contended the pre-trial hearing judge erred in not identifying at the outset the issues at trial on which the similar fact evidence was to be tendered, as required by *Phillips*.[21] Absent the striking feature of providing allegedly spiked alcoholic drinks before the sexual offending, a feature present in the cases involving MW, MV, MF and ND but not in the cases involving MB, KW and RG, the evidence was not co-admissible. In reality, the prosecution sought to use the similar fact evidence in the cases concerning KW and RG to establish lack of consent which was the only contentious issue in their cases. In the case concerning MB, the similarities were not sufficiently striking to amount to similar fact evidence supporting joinder.

[38] Counsel for the respondent again accepted that joinder was impermissible to prove lack of consent but submitted the joinder was lawful as the evidence was co-admissible to demonstrate the likelihood that the conduct alleged by each complainant did in fact occur in the way each alleged. The evidence of each complainant differed from the appellant's evidence as to precisely how each alleged sexual offence occurred. Whilst the appellant accepted that sexual intercourse occurred with all complainants other than MB, he did not accept it occurred in the manner they alleged. The significant distinction between each complainant's account and the appellant's was "that the appellant display[ed] overtones of control whether that be by force or other forms of intimidation". The appellant in his evidence at trial denied any sexual contact with MB so that the evidence of all other complainants was admissible in her case both to prove the appellant perpetrated the physical acts she alleged and also to prove his display of overtones of control towards her. The fact that KW did not give evidence that the appellant offered her an alcoholic drink did not detract from the co-admissibility of her evidence and the evidence of the other complainants as there was a common underlying pattern. The evidence was co-admissible and the charges properly joined, consistent with *Pfenning v The Queen*.[22] *R v Gregory*[23] demonstrated that the threshold of similarity justifying co-admissibility was not impossibly high and that threshold was reached here.

Conclusion on this ground of appeal

[39] Ordinarily an indictment must charge one offence only: s 567(1) *Criminal Code* 1899 (Qld). Charges for more than one indictable offence may be joined in the same indictment against the same person under s 567(2) "if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character". Multiple charges can be joined where the evidence on one charge is admissible on the other as propensity or similar fact evidence. Propensity

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21 (2006) 225 CLR 303, [26].

22 (1995) 182 CLR 461.

23 [2011] QCA 86, [24]-[27].

evidence, however, will be excluded if it shows nothing more than general criminal disposition as such evidence is likely to be highly prejudicial. The admission of propensity evidence is exceptional and to be admissible must have a highly material bearing on the issues to be decided.[24] That is because it may well have a prejudicial effect disproportionate to its probative force: *Pfennig v The Queen*.[25] The basis for admission of propensity or similar fact evidence is in its possession of a particular probative value or cogency such that, if accepted, it has no reasonable explanation other than the inculpation of the accused person in the offence charged. Striking similarity or underlying unity are not essential to the admission of propensity evidence but such characteristics are usual prerequisites to admission. Propensity evidence must not be admitted if there is any reasonable view of it consistent with innocence: see *Pfennig v The Queen*.[26]

[40] The appellant rightly concedes the counts concerning MW, MV, MF and ND were properly joined in light of the claims by all those complainants that the appellant had given them stupefying drinks before initiating the alleged non-consensual sexual contact. There was no such evidence from MB, KW and RG that the appellant gave them stupefying drinks in respect of the alleged offences concerning them which are said to have been wrongly joined. Indeed, KW did not give evidence that she was even offered an alcoholic drink.

[41] In *Phillips*, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ jointly noted that:

> "[47] Neither the courts below nor counsel for the respondent cited any case in which similar fact evidence of complainants who said that they did not consent was led to show that another complainant had not consented. Whether or not similar fact evidence could ever be used in relation to consent in sexual cases, it could not be done validly in this case. It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her …".[27]
>
> "[50] In short, as counsel for the appellant submitted, the evidence, tendered as it was on the issue of consent of each complainant, was irrelevant to that issue. 'Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding'. Evidence that five complainants did not consent could not rationally affect the assessment of the probability that a sixth complainant did not consent"[28] (footnotes omitted).

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24 *DPP v Boardman* [1975] AC 421, 439; *Markby v The Queen* (1978) 140 CLR 108.
25 (1995) 182 CLR 461, 487.
26 Above, 481, 484-5 (Mason CJ, Deane and Dawson JJ).
27 (2006) 225 CLR 303, [47].
28 Above, [50].

[42] In determining whether the evidence of the joined charges was co-admissible as propensity evidence, it is important to understand the alleged relevance of the propensity evidence to the prosecution case. In respect of all charges other than count 1 (MB), the sole significant contentious issue at trial was consent. The respondent contends that similar fact evidence was co-admissible in the cases concerning MB, KW and RG, not to prove consent, but to prove that the conduct alleged by each complainant occurred in the way alleged, namely, "that the appellant displayed overtones of control, whether by force or other forms of intimidation", and in the case of MB to also prove that the appellant physically did what MB alleged.

[43] It is true that the unattractive circumstances of this case give an initial impression of striking similarities and an underlying theme or pattern in their commission. But when the matters relied on by the prosecutor below, the pre-trial hearing judge and the respondent are objectively and dispassionately analysed and compared to the complainants' evidence, I am not persuaded they reveal such striking similarities or an underlying theme or pattern.

[44] It is true the appellant was aged between 47 and 61 and the complainants were young adult women aged 17 to 24 when the alleged offending occurred. He lived on a yacht with a child and advertised at various times for a female to work as a nanny. Between 1986 and 2003, a period encompassing the period when the alleged offending occurred, he had sexual intercourse with a number of them. Many people would disapprove of such a lifestyle, considering it immoral, dissolute and predatory, but the sexual intercourse was not rape or sexual assault unless the prosecution established each charged act was done without each complainant's consent. ED's evidence,[29] by contrast, was that she had a consensual sexual relationship with him after applying for the position of nanny in 2003. He denied sexual contact only with MV (he was acquitted of assault of MV with intent to rape, count 6) and MB, so that on the counts alleging sexual assault or rape against the remaining complainants, the fact that sexual intercourse occurred was not in issue. It follows that the sole issue in all cases other than that involving consent, an issue on which propensity evidence was not generally admissible.

[45] It must be kept in mind that, MB, KW and RG, unlike the remaining complainants, did not give evidence that the appellant gave them a stupefying drink before committing the alleged sexual acts. Further, there was no temporal connection between the charges. History has recorded and human experience has established that it is not unusual for men of the appellant's age to seek out contact, including sexual contact, with young adult women. The appellant lived on a yacht with a child and from time to time employed young women to care for the child. This was not unusual conduct for a single parent living on a yacht. The young women who took on this role were removed necessarily from their usual support networks. That was an almost inevitable consequence of taking the job. The appellant may have legitimately sought to employ a nanny to assist in caring for his child.

[46] The respondent now concedes that KW did not give evidence that the complainant offered her a drink. But in any case, as the various complainants were staying on the yacht it is not surprising that he offered them beer or wine. The mere fact that he gave them a drink, absent evidence of its stupefying effect, was unremarkable.

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[29] Summarised at [30] of these reasons.

[47] The respondent on appeal, like the prosecutor below, emphasised as a striking similarity that the appellant took advantage of each complainant's vulnerable state and displayed overtones of control, whether by force or intimidation, and then engaged in a sexual assault upon them. An analysis of the evidence of the complainants, absent the evidence of the stupefying drink, does not support that submission which appears to be an innovative attempt to find some basic common denominator in the quite different experiences related in the evidence of each complainant. It does not bear up to scrutiny.

[48] MB said the appellant used his arms to push and pin her against the settee before moving her underwear aside and penetrating her vagina with his penis, despite her continued protest, whilst he told her she would be okay. KW gave evidence that the appellant threatened to have "evil" people harm her parents if she did not have sex with him before forcing her to have penile vaginal intercourse. The next day he pulled her downstairs to his cabin and threw her on to his bed, again having penile vaginal intercourse until ejaculation despite her protests. The following day he masturbated in front of her and then made her masturbate him before dragging her down to his cabin, pushing her onto the bed and holding her down whilst masturbating and then having forced penile vaginal intercourse until ejaculation. RG gave evidence that her first sexual encounter was preceded by the appellant shaving her pubic hair. Later he forced her to give him oral sex and performed non-consensual cunnilingus before having penile vaginal intercourse against her will.

[49] By contrast, all complainants on the properly joined counts (MV, MW, MF and ND) gave evidence of initial sexual encounters preceded by being stupefied by an intoxicating drink. There is no longer any charge of sexual assault concerning MV as the appellant was acquitted on count 6. MW gave evidence that the appellant approached and fondled her in the shower before raping her. MF passed out and awoke to find the appellant having sex with her. This experience was later repeated. Finally, he shut her in the cabin, took her clothes and told her to clean the cabin naked (count 11 which the prosecution has discontinued). ND said the appellant forced himself on her and ripped her pants off before having penile vaginal sex. Later that day, he again forced her to have penile vaginal sex, after abusing her when she tried to leave and ripping off her clothes.

[50] It must be remembered that the evidence of each complainant as to lack of consent is irrelevant as to whether any other complainant consented. Once the similarities relied on by the respondent, absent the giving of a stupefying drink in the cases concerning MW, MV, MF and ND, are carefully considered, there are insufficient striking similarities to amount to the highly probative quality of striking similarity justifying the unusual step of co-admissibility and demonstrating the likelihood that the conduct of which each complainant gave evidence did in fact occur. This is clearly so in the cases of KW and RG where consent was the only real issue at trial and those counts were wrongly joined with the charges concerning the other complainants.

[51] The joinder of count 1 concerning MB is less clear cut because the issue was not lack of consent; the appellant denied any sexual contact with her. Even so, in the absence of evidence from MB of stupefaction preceding the sexual contact, and after comparing her evidence to that of the other complainants, I am unpersuaded that there is a sufficient connection between the offence about which MB gave

evidence and those about which the other complainants gave evidence to amount to significant cogent evidence of propensity outweighing its potential prejudicial effect and justifying joinder as explained in *Pfennig*[30] and *Phillips v The Queen*.[31]

[52] In reaching that conclusion, I have considered this Court's decision in *R v Gregory*[32] on which the respondent placed some emphasis. I have not found *Gregory* helpful. Cases where propensity evidence is co-admissible warranting joinder of counts necessarily turn on their own facts. Gregory had prior convictions for sexual offences which bore such a similarity that they had a material bearing on the issues for determination at that trial. It is of no assistance in determining whether the joinder was lawful in this case.

[53] For these reasons, I consider that the cases of MB, KW and RG were improperly joined with each other and with the counts concerning MW, MV, MF and ND.

Section 668E(1A) Criminal Code

[54] This Court must allow the appeal and set aside the jury verdicts unless it considers under s 668E(1A) that no substantial miscarriage of justice has actually occurred. The respondent concedes that, ordinarily, where a trial had proceeded on the improper joinder of counts of a sexual nature, the proviso in s 668E(1A) would not apply. Nevertheless, the respondent submits that this is an appropriate case to dismiss the appeal despite the wrongful joinder as the differing jury verdicts demonstrate that the jury approached their task as instructed and did not fall into improper propensity reasoning.

[55] The question for this Court under s 668E(1A) is whether, after reviewing the whole of the evidence, it establishes the respondent's guilt beyond reasonable doubt: *Weiss v The Queen*.[33] The prosecution case portrayed the appellant as a seedy, older man who took advantage of young, perhaps unworldly women attracted to the romance of caring for a child whilst sailing on a yacht in tropical or sub-tropical waters. But that was not a criminal offence. The prosecution case was that he raped and sexually assaulted the complainants. The wrongful joinder of charges of this kind, which involved adding the evidence of three additional complainants to the evidence of the four complainants on the counts which were properly joined, was likely to prejudice jurors against him. The prosecution case considered objectively was not overwhelming. Many complaints were not made in a timely fashion and most came to light only after publication of the sensational newspaper article.[34] A jury could consider that some complainants' evidence as to lack of consent may have been the result of hindsight and reconstruction after reading the article. The counts involving MW were unusually problematic in that she gave evidence of her later having a consensual relationship with the appellant. The appellant gave sworn evidence that he did not commit any of the offences and that all sexual encounters were consensual. His evidence received some support from the evidence of his son and daughter. The determination of the issues in dispute were matters for a properly instructed jury after seeing the complainants, the appellant and his witnesses give evidence. I am not persuaded that this Court can or should determine those issues

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30 *Pfennig v The Queen* (1995) 182 CLR 461, 481, 483 (Mason CJ, Deane and Dawson JJ).
31 *Phillips v The Queen* [2006] HCA 4; (2006) 225 CLR 303, 320 [54]-[55].
32 [2011] QCA 86, [24]-[27].
33 (2005) 224 CLR 300, [41].
34 Ex 54.

without seeing the witnesses give their evidence. This is not an appropriate case to dismiss the appeal relying on s 668E(1A).

[56] It follows that the appeal must be allowed, the convictions set aside and new trials ordered. I note that as the jury acquitted on count 6, there is no longer any alleged sexual offence involving MV. This may affect the question of the joinder of count 5 (stupefying with intent) but as the Court has not had the benefit of submissions on this question, it is not prudent to decide that issue.

[57] The appellant was legally represented on this appeal and now it seems likely he will be legally represented at the re-trials. It is unnecessary, therefore, to deal with the remaining grounds of appeal against conviction. Nor is it appropriate to deal with the application for leave to appeal against sentence.

Summary

[58] The charges concerning the complainants MB (count 1), KW (counts 12 to 15) and RG (counts 19 to 22) were wrongly joined with each other and with the counts concerning the complainants MW (counts 2 to 4), MV (counts 5 and 6), MF (counts 7 to 11) and ND (counts 16 to 18). I am unpersuaded that the wrongful joinder of these counts has not resulted in a substantial miscarriage of justice. As a result, the appeal must be allowed, the verdicts of guilty set aside and new trials ordered on each count. The application to adduce further evidence should be refused and it is unnecessary to determine the remaining grounds of appeal or the application for leave to appeal against sentence.

[59] There must be separate trials in respect of count 1 concerning MB; counts 12 to 15 concerning KW and counts 19 to 22 concerning RG. Subject to the observations in [56] above, the remaining counts concerning MW (counts 2 to 4), MV (count 5), MF (counts 7, 8 and 10) and ND (counts 16 to 18) are properly joined.

Orders

1. The appeal is allowed.
2. The verdicts of guilty are set aside.
3. Re-trials are ordered.
4. A separate trial is ordered on count 1.
5. A separate trial is ordered on counts 12 to 15.
6. A separate trial is ordered on counts 19 to 22.
7. The application to adduce further evidence is refused.

[60] **FRASER JA:** I agree with the reasons for judgment of McMurdo P and the orders proposed by her Honour.

[61] **HENRY J:** I have read the reasons of the President. I agree with those reasons and the orders proposed.