SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBL; R v BCT* [2014] QCA 93
PARTIES:	**In CA No 76 of 2013:** **R** **v** **CBL** (appellant/applicant) **In CA Nos 80 and 189 of 2013:** **R** **v** **BCT** (appellant/applicant)
FILE NOS:	CA No 76 of 2013 CA No 80 of 2013 CA No 189 of 2013 DC No 190 of 2012 DC No 757 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Convictions Sentence Applications
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2014
JUDGES:	Muir and Gotterson JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 76 of 2013:** **The appeal against conviction be dismissed and the application for leave to appeal against sentence be refused.** **In CA Nos 80 and 189 of 2013:** **1. The appeal be allowed.** **2. The verdicts be set aside.** **3. A re-trial be ordered.** **4. The application for leave to appeal against sentence be refused.**

CATCHWORDS: In CA No 76 of 2013:

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the first appellant was tried with his co-accused, the second appellant – where the complainant was the second appellant's natural daughter – where the appellants were each tried on three counts rape, two counts grievous bodily harm, three counts assault occasioning bodily harm and one count torture – where the appellants entered pleas of not guilty on all counts – where the appellants were convicted on all counts except two counts assault occasioning bodily harm, one of which was an alternative to rape – where the first appellant participated in a "walk through" interview with police and a recorded interview at the hospital – where the first appellant applied to the primary judge under s 590AA of the *Criminal Code* 1899 (Qld) (the Code) to have these interviews rejected – whether the primary judge erred in law in not excluding the interviews

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where two applications for a separate trial were brought – where both applications were refused – whether the respective judges that heard the applications erred in failing to order a separate trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the first appellant brought an application under s 590AA of the Code to exclude evidence of disclosures made by the complainant to her grandparents – where the primary judge declined to make a ruling on the basis that the contingency upon which the Court was being requested to rule may never arise – whether the primary judge erred in failing to exercise discretion to hear the application

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the first appellant was convicted on various counts, including oral penile rape – where the first appellant submitted that no reasonable jury could have been satisfied beyond reasonable doubt that the only possible mechanism for the injuries to the complainant's mouth was the first appellant's penis – whether the conviction was unreasonable and not supported by evidence – whether it was open to the jury to be satisfied beyond reasonable doubt of the first appellant's guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the first appellant contends that the primary judge erred in finding, on the balance of probabilities, that the first appellant used his penis to commit the vulval and anal rapes – where the first appellant argues that penile rapes attract harsher penalties than rapes effected by other means – whether the sentence is manifestly excessive

In CA No 80 of 2013:

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the jury regarded the first appellant as the principal offender and the second appellant as the aider – whether it was open to the jury to be satisfied beyond reasonable doubt that the second appellant aided the first appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the second appellant was present when the first appellant provided arguably false explanations of the complainant's injuries – where the jury was directed that the second appellant's failure to disavow the first appellant's explanations amounted to acquiescence – whether the second appellant adopted the first appellant's falsehoods by remaining silent – whether the primary judge erred in directing the jury that allegedly false statements made by the first appellant were admissible against the second appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the complainant's grandmother gave a statement to police about an occasion on which the second appellant had been violent towards the complainant – where in cross-examination the complainant's grandmother accepted she made the statement but did not adopt it as true – where the director of a day care centre noticed bruising on the complainant – where in summing up the primary judge directed that the evidence of the grandmother and the director indicated previous violent conduct by the second appellant towards the complainant – whether the primary judge's directions were adequate – whether the primary judge erred in directing the jury

Criminal Code 1899 (Qld), s 590AA, s 597B
Evidence Act 1977 (Qld), s 18, s 101, s 102, s 130, s 132C
Police Powers and Responsibilities Act 2000 (Qld)
Police Powers and Responsibilities Regulation 2012 (Qld)

Barca v The Queen (1975) 133 CLR 82; [1975] HCA 42, considered
CB v The State of Western Australia (2006) 175 A Crim R 304; [2006] WASCA 227, followed
Driscoll v The Queen (1977) 137 CLR 517; [1977] HCA 43, applied
Ex parte McGavin; Re Berne (1945) 46 SR (NSW) 58; [1945] NSWStRp 51, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Lamb v Moss (1983) 76 FLR 296; [1983] FCA 254, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, considered
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, applied
Newmarch v Atkinson (1918) 25 CLR 381; [1918] HCA 53, followed
R v Bairia [2009] QCA 332, considered
R v Collins [2004] 1 WLR 1705; [2004] EWCA Crim 83, applied
R v Corr; ex parte A-G (Qld) [2010] QCA 40, considered
R v Davidson [2000] QCA 39, considered
R v Franicevic [2010] QCA 36, applied
R v Hall [1986] 1 Qd R 462, applied
R v Hasler; Ex parte Attorney-General [1987] 1 Qd R 239, followed
R v MBG & MBH [2009] QCA 252, distinguished
R v Pearson [1964] Qd R 471, considered
R v Roughan & Jones (2007) 179 A Crim R 389; [2007] QCA 443, followed
R v Salahattin [1983] 1 VR 521; [1983] VicRp 49, applied
R v Schultz (unreported, CA No 349 of 1990), applied
R v Soma (2003) 212 CLR 299; [2003] HCA 13, considered
R v Swaffield (1998) 192 CLR 159; [1998] HCA 1, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered
Stateliner Pty Ltd v Legal and General Assurance Society Ltd (1981) 29 SASR 16, followed

COUNSEL: C Sweeney QC, with M J Henry, for the appellant in CA No 76 of 2013
M J Copley QC for the appellant in CA No 80 of 2013
D Boyle for the respondent

SOLICITORS: Saba Lawyers for the appellant in CA No 76 of 2013
Legal Aid for the appellant in CA No 80 of 2013
Director of Public Prosecutions (Queensland) for the respondent

In CA No 76 of 2013:

[1] **MUIR JA:** The first appellant was tried on the following counts on an indictment: count 1 rape (penile penetration of the mouth); count 2 assault occasioning bodily harm (in the alternative to count 1); count 3 rape (penetration of the labia); count 4 rape (penetration of the labia, penetration of the anus); count 5 grievous bodily harm (force to the vulva causing lacerations of the clitoris); count 6 grievous bodily harm (force to the abdomen causing haemorrhaging); count 7 assault occasioning bodily harm (force causing fracture to the back); count 8 assault occasioning bodily harm (force causing a tear to the right gluteal muscle); count 9 assault occasioning bodily harm (force causing a subdural haemorrhage); count 10 torture (intentional infliction of severe pain or suffering by the acts in counts 1–7 and 9 above). The first appellant was convicted on all counts except count 2, an alternative to count 1, and count 7, in respect of which a not guilty verdict was directed.

[2] The first appellant was tried with his co-accused, the second appellant, with whom he was in a de facto relationship. The complainant, born on 16 October 2006, was the second appellant's natural daughter. All of the offending was alleged to have taken place between 1 September 2009 and 9 November 2009 at Macleay Island, where the three resided together at relevant times. The complainant, who was then either three years of age or almost three, attended a day care centre on the island.

[3] On 3 September 2009, Ms Swan, the director of the centre, photographed bruises and red marks on the complainant's buttocks and scratches on her lower back. When the second appellant collected the complainant that day, Ms Swan asked her how the bruises and red marks had been caused. The second appellant said they had moved into a house which had tiled floors and that the complainant had fallen when wearing a nappy that did not have much padding. She said that the scratches were caused when the complainant fell into the toilet bowl when seated on the toilet. The explanations were not given hesitantly.

[4] On 6 September 2009, Ms FLD, the complainant's grandmother observed that the complainant was reluctant to sit in the bath. Ms FLD then noticed bruises, which she described as severe, on the complainant's buttocks. She had her husband photograph them.

[5] At 10.14 pm on 7 November 2009, the first appellant called '000'. The second appellant may have heard what the first appellant told the operator. He said that the complainant was "unconscious"; that they:

> "… had an accident on the motorbike yesterday … she's got bruising on her head she's just slipped over in a bit of wee on the floor in the shower … She's hit her head she's unconscious making funny noises … We've just noticed a heap of bruisings come out on her belly I'd say from the bike accident … she's having trouble breathing … It's hurting her she's having trouble breathing … she's pushing and breathing but she's making a a (sic) painful sound on the way out …".

[6] The first appellant confirmed that the complainant was "still unconscious".

[7] The operator enquired, "So this is involved in a motorcycle accident yesterday is that correct?" The first appellant responded:

> "Yes oh what's today Saturday yes yesterday morning she come (sic) out with a couple of bruises on her head … But she looked alright now we've noticed she's got all this bad ah bruising on her belly and around her crouch (sic)".

[8] The first appellant continued, "She's just slipped onto and …". The operator interrupted, "And and just knocked herself out". The first appellant continued, "She got up … And then she just went limp".

[9] A paramedic who responded to the '000' call arrived at the first appellant's house at 10.25 pm on 7 November. He found the second appellant kneeling beside the naked complainant who was lying on a floor. The complainant was "obviously very cold". The first appellant told him that, "they had been doubling on a little motorbike the day before and apparently they had come off the bike and that's how the injuries occurred".

[10] At the hospital into which the complainant was admitted just after midnight on 8 November 2009, the first appellant gave an account of the motorbike accident and the fall in the bathroom consistent with the account given to the telephone operator and the paramedic. One such account was given to a nurse, Ms Hoskin, early on the morning of 9 November. She asked the first appellant and the second appellant, who was sitting on a chair next to the first appellant, how the complainant came to be injured. The first appellant, who answered all questions put to the couple, said that:

> "… 36 hours ago on Macleay Island, he had [the complainant] sitting in front of him and he was alone on a bike with her and they hit a bump and she hit her groin and then she'd come off without a helmet hitting her head over the top of the bike."

[11] After observing the complainant's injuries, an emergency physician, Dr Wood, requested that the complainant be seen by the hospital's child protection doctor, Dr True.

[12] Dr True and Ms Hoskin decided, after a preliminary examination of the complainant, that, having regard to the extent of her injuries, in particular a large laceration from the anus to the vagina, the complainant should be examined in an operating theatre.

[13] Asked about the laceration by Ms Hoskin or Dr Wood, the first appellant said, "We didn't know that there was one down there because she did all of her own toileting". Later in the conversation he said, "we both had a good look down there before we came and there was nothing there".

[14] The first appellant, in the presence of the second appellant, gave a history of the alleged accidents to Dr True which included the following:

> "[The complainant] was said to be riding in the front – on the front of the – in front of him on the postie motorbike, and she was wearing an adult bike helmet at the time. He then said that he fell off and [the complainant] stayed on the motorbike and went forward for another five metres. Then she fell off and was wedged between the front wheel and the frame of the bike. It was quite difficult to understand this, so – but [the first appellant] wasn't able to describe the fall at

> any further detail at that time. He said her helmet had moved to over her face. He thought they had been travelling about 30 kilometres an hour and suggested that [the complainant] might have also applied the throttle. **He said that she did not appear injured after the accident and was able to walk home to her house and was well for the rest of the day. On the Saturday, he said she was fairly well, she ate well and she slept on and off** and her main symptom was she had several episodes of explosive diarrhoea. There was also a vague history that she had some yellowing of her abdomen and some blood noted on her underwear on the Saturday. **She was never described as being in any pain or discomfort at any time** and no further history was obtained in regards to that. The main reason for not seeking any medical attention at the time was that [the complainant] was well and they had no money or transport." (emphasis added)

[15] In respect of the second fall, Dr True was told that, the complainant "had wet herself in the bathroom and she had slipped on her own urine and fell back and hit her head, and then she appeared to arch backwards, and was said to have been unconscious for – for about 10 to 20 minutes". In the course of discussion during the initial examination by Dr True, the second appellant said that after the motorbike accident the complainant appeared well.

[16] Dr True explained the desirability of conducting a more detailed examination under anaesthetic. She said that the first appellant, "didn't want [the complainant] to have a general anaesthetic because he'd had a relative die under a general anaesthetic and he thought we could use some topical cream or local anaesthetic as she was quite a tough kid". Approximately three hours were spent in persuading the first appellant to consent to the administration of the anaesthetic. During such discussions, the first appellant said that they would like to go to another hospital. Dr True explained that the complainant was too sick to be moved.

[17] Before the examination in the operating theatre, the first appellant accused Dr True and Ms Hoskin of having caused the anal and other tears in their earlier examination. He suggested that when the complainant fell off the motorbike she may have "straddled part of the motorbike". He also claimed that there were no genital or anal injuries present when the ambulance was called. Around the same time he explained that, "they don't usually – that [the complainant] toilets herself, so they don't usually look in that area", referring to the genital and anal areas.

[18] Dr True's examination under general anaesthetic revealed: multiple bruises to the face and head; areas of hair loss with scabs or pustules where her hair had been removed; ulcers on the left and right side of a toe; a tear inside the lower left lip; ulcers inside the left and right cheeks; laceration of the upper and lower frenulum; healing crusting wounds behind an ear; abrasions around the nose; bruising to the upper and lower chest; a swollen and bruised abdomen; red and swollen buttocks; abrasions to the buttocks "very similar to what you would get from a fingernail-type scratch abrasion"; bruising to both arms; burn-like bruising on the abdomen; "fingertips or oval-shaped bruising" to the abdomen; and swelling and redness on the outer and inner thighs.

[19] Dr True identified the following injuries to the complainant's genital and anal areas. Bruising and swelling around the anus, tearing around the anus including a "very

deep extensive tear … just on the outer of the anus that extended all the way into [the complainant's] genital area" (a tear of the posterior fourchette), smaller tears in the posterior fourchette area, a tear and bruising on the inside labia minora, an ulcer formation on the left side of the labia minora, a small tear near the urethra, a very deep lacerated and ulcerated area at the junction of the meeting of the labia majora which extended into the clitoral area, a swollen labia majora.

[20] The complainant's injuries included: subdural bleeding around the brain; bleeding within the backs of both eyes; and bleeding within the muscle layer of the abdomen. The subdural haemorrhage was accompanied by bruising within the scalp on one side of the head. It and the retinal haemorrhages were likely to have been caused by a hit on the head with significant force or by the head hitting an object with significant force. The retinal haemorrhaging could have resulted from the complainant having been shaken.

[21] In Dr True's opinion the complainant had probably suffered oral, anal and genital sexual assaults, including "at least two episodes of assault in her genital area" and at least one anal assault.

[22] The mouth injuries could have been caused by a penis being forcefully placed in the complainant's mouth. In her opinion, the genital injuries were in keeping with a forceful penetration of the vulva by a penis placed within the labia minora with its tip "near the clitoral area and the mons pubis area". Dr True said that the injuries were "classic of [such] mechanism".

[23] In Dr True's opinion, the complainant had sustained "massive blunt force trauma to her abdomen". That injury could have been caused by a motorbike accident but the injury was such that a child "would not be able to get up and walk away from [it]". Moreover, the bruising was "highly unusual", it "goes around to the sides of [the complainant's] abdomen, and she's also got the oval shaped bruises at the sides of her abdomen, which [suggest] … a restraint-type injury for being held with fingertips". She ruled out the possibility that the injuries to the complainant's genital and anal regions were the result of a straddle injury from a motorbike. Also, in her view, if the complainant had been injured in a fall from a motorbike, it was likely that there would have been cuts and grazing to her lower arms and legs.

[24] Because of its age, the head injury could not have been caused by a fall in the shower as described by the first appellant.

[25] Professor Kimble, director of Burns and Trauma at the Mater Children's Hospital, gave evidence of the complainant's injuries generally consistent with that of Dr True. In his opinion, the complainant suffered injury to her internal organs as well as extensive abdominal bruising.

[26] In cross-examination, Professor Kimble said, in effect, that he was a specialist in the interpretation of children's injuries. He explained that it was part of his job and that of his staff to "look at all the patient's injuries and try and fit some sort of pattern into it" rather than considering individual injuries in isolation. He observed, "when you put the whole thing together, a pattern develops, and that's what we do". Asked in cross-examination whether it was possible for a person looking at the complainant not to have seen an ulcer on the complainant's labia majora, Professor Kimble responded, "the deep chronic ulcer was quite visible". He later observed, "This child was covered in

bruises, grazes. So much of the body was swollen that to talk about not seeing one ulcer. It doesn't mean that much to me". Professor Kimble concluded that the perineal injuries happened at different times because of the existence there of chronic ulcers.

[27] According to Dr Posselt, an ophthalmologist, the most common cause of retinal injuries, such as those suffered by the complainant, was repeated shaking. Dr Posselt could not date the injuries with any degree of accuracy.

[28] Before addressing the grounds of appeal, it is useful to explain briefly the prosecution case in respect of each count.

Count 1 – rape, alternatively (count 2) assault occasioning bodily harm

The first appellant penetrated the complainant's mouth with his penis and the second appellant aided by holding the child down or by actively encouraging the first appellant by her presence.

[29] Professor Kimble's opinion was that the mouth injuries could have been caused by penile penetration or by penetration from a finger. Professor Duflou considered that the mouth injuries could have been caused by a variety of objects including a penis. In his opinion the injuries to the frenulum occurred on different occasions.

Count 3 – rape

The first appellant used his penis to penetrate the complainant's vulva and the second appellant aided him. Alternatively, the second appellant penetrated the vulva with something other than a penis and the first appellant aided her.

[30] The first appellant alleged that Dr True and Ms Hosken caused at least some of the injuries during their initial examination of the complainant.

[31] Professor Kimble's opinion was that the injuries were not caused in the preceding 24 hours but may have been present for several weeks. He concluded that the injuries could have been caused by a large blunt object, a broom or a penis. In Professor Duflou's opinion, any rigid or semi-rigid object of suitable size could have caused the injuries and it was not possible to elevate the possibility of a penis above any other possibility. He considered that the injuries were a number of days old.

Count 4 – rape

The first appellant inserted his penis or other object into the complainant's anus and the second appellant aided him. Alternatively, the second appellant inserted the object and the first appellant aided her.

[32] Dr True observed that the anal area was generally bruised and swollen. Professor Kimble's opinion was that the injuries may have been present for between several days and some weeks. He considered that anal penetration had occurred. Professor Duflou considered that there had been anal penetration by some object which may have been a penis, a finger or something else. In his opinion, the injuries were likely to have been caused some days earlier.

Count 5 – grievous bodily harm

The first appellant applied force to the complainant's vulva causing laceration to her clitoris. The second appellant aided by physical involvement in the assault or by encouraging the first appellant through her deliberate presence when the offence occurred. Alternatively, the second appellant applied the force and was aided by the first appellant.

[33] Professor Kimble gave the opinion that, because there were a lot of open wounds in the genital area, it was hard to consider each in isolation. The combination of them could have endangered the complainant's life.

Count 6 – grievous bodily harm

The first appellant applied force to the abdomen while trying to restrain the complainant in order to sexually assault her. The second appellant either sexually assaulted the complainant or encouraged the first appellant by her deliberate presence. Alternatively, the second appellant caused the injury and the first appellant aided her.

[34] Dr Phillips said that the abdominal bleeding had occurred more than 24 hours earlier but within the previous fortnight.

[35] Professor Duflou's opinion was that the abdominal wall injury was very unusual. It was possibly caused by a fall from a motorbike but he had never seen that type of injury resulting from such an accident. If the injury had been caused by the restraining of the complainant, he would have expected to see the imprint of the object used to restrain.

Count 8 – assault occasioning bodily harm

The first appellant assaulted the complainant and the force used caused a tear to the right gluteal muscle. The second appellant aided the first appellant. Alternatively, the second appellant assaulted the complainant and the first appellant aided her.

[36] In Dr Phillips' opinion, the injury to the gluteal muscle was common in athletes but it could be caused by forceful penetration of the anus, particularly if the victim resisted.

[37] In Dr True's opinion, significant force was required to cause the injury. It could be provided by a kick, a punch or the complainant landing on a surface after falling from a height higher than a bench.

Count 9 – assault occasioning bodily harm

The first appellant or the second appellant assaulted the complainant causing a subdural haemorrhage and the other accused aided by physical involvement or encouragement.

[38] In Dr True's opinion, significant force was required to cause the injury. A fall to the bathroom floor was a possibility but as the bleeding occurred before the fall in the shower referred to by the first appellant, a fall could not have caused the subdural bleeding.

[39] In Dr Phillips' opinion, the bleeding could have occurred within 10 days prior to admission to hospital. Forcible shaking was its likely cause.

Count 10 – torture

[40] All counts other than count 10 were relied on by the prosecution. As with the other counts, it was alleged that the first appellant or the second appellant was the principal offender and that the other aided.

[41] It is now convenient to turn to the grounds of appeal. The first ground, modified to make it comprehensible and to accord with the arguments of the first appellant's counsel, was as follows.

Ground 1 – The judge who heard an application under s 590AA of the *Criminal Code* 1899 (Qld) (the Code) to exclude a recording of a police interview of the first appellant at the hospital on 8 November 2009 and a filmed electronic interview on 8 November 2009 in which the first appellant participated in a "walkthrough" at the Macleay Island home erred in law in not excluding such evidence

[42] Two grounds were advanced on the hearing of the application to support the exclusion of the evidence. One was that unfairness to the first appellant mandated the exclusion of the evidence under s 130 of the *Evidence Act* 1977 (Qld). The other ground was that the evidence should have been excluded on the basis that it was illegally or improperly obtained as the police officers failed to appropriately caution the first appellant and inform him that the first conversation would be tape recorded.

[43] It was submitted that the judge applied the wrong test or failed to apply the correct test in respect of the public policy ground. The judge, it was argued, based his decision on the absence of unfairness to the first appellant in the prosecution's use of the conversations notwithstanding the absence of any caution and lack of warning. This argument, with respect, does not do full justice to the judge's reasons.

[44] In relation to unfairness, or lack thereof, the judge said:

> "What persuades me that there is no unfairness in relation to each of these matters is that the account given by the [first appellant] is consistent throughout. He gave a similar account in his triple 0 call, he gave an account to an ambulance officer, he gave an account to two doctors prior to police involvement alleging injuries occasioned by a motorcycle accident and a slip in the bathroom. What's more, in two subsequent formal interviews with the police where he was formally warned and cautioned, he again repeated in significant detail that account of a motorcycle accident and a slip and fall in the bathroom. His account has been consistent throughout."

[45] The primary judge had earlier said that the first appellant "was assertive with the police in what he was describing to them" and that he was "specific as to details" which were consistent with what the first appellant said in later conversations with police officers. His Honour noted that the central details provided in the challenged interviews did not change over time and that the first appellant made no admissions.

[46] Although the primary judge wrote in terms of unfairness, it is apparent that he also had in mind the oddity of excluding from evidence tainted statements in which an

accused has revealed matters no more detrimental to his interests than he has voluntarily disclosed in prior and subsequent statements that are admissible against him. There was no evidence that any of the police officers concerned breached their obligations under the *Police Powers and Responsibilities Act* 2000 (Qld) or the *Police Powers and Responsibilities Regulation* 2012 (Qld) in a deliberate or calculated way. Nor was there any evidence to the effect that the first appellant's conduct would have been different had statutory requirements been met. It was not argued on appeal that the first appellant would have acted differently. The first appellant's prior and subsequent conduct suggests the contrary. That is significant in considering the overlapping factors of unfairness and public policy.[1]

[47] Consequently, there is something of an artificial or technical flavour about the first appellant's argument which, no doubt, was not lost on the primary judge. The primary judge commented on, and implicitly took into account, the fact that the first interview occurred without appropriate warning being given to the first appellant and after the first appellant said that he would not sign any statement until he had spoken to a legal representative. He also remarked on the fact that the first appellant was not told that the first conversation was being tape recorded. Plainly, he also took that matter into account. He noted, however, that a police officer informed the first appellant on the first interview, "If you don't want to talk, it is your decision".

[48] Another factor which the primary judge took into account was that what took place:

> "… was not an interrogation, it was a conversation that was recorded in the [complainant's] hospital room. It was sporadic. It consisted of the [first appellant] on occasions volunteering information rather than answering questioning, although there clearly was questioning during the course of that conversation. It also involved the [first appellant] alleging that the paediatricians had caused the injury to the [complainant's] genitals."

[49] Counsel for the first appellant also argued that, in concluding that there was no unfairness in respect of either interview, the primary judge failed to give sufficient weight to the disorientation of the first appellant resulting from his physical state during the two interviews. Counsel for the first appellant did not point to any evidence that might suggest that the first appellant's physical state was such as to make it inappropriate for the interviews to proceed. He merely referred to this passage from the judge's ruling:

> "I can see no unfairness against him from the Crown using each of these conversations, notwithstanding the caution that should have been apparent because of his physical state."

[50] No evidence was identified which might cast doubt on this conclusion or which indicated that the first appellant was not well aware of what he was doing or incapable of making informed and appropriate decisions.

[51] Another argument put forward was that some of the details of the accident, the injuries sustained and the behaviour of the complainant after the motorbike and shower incidents varied in each of the accounts given by the first appellant. Some of the matters referred to by counsel for the first appellant are more properly

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1 *R v Swaffield* (1998) 192 CLR 159 at [91].

referred to as additional information or elaboration of earlier statements. Having regard to the entirely different ways in which the "walk through" interview on Macleay Island and the recording at the hospital were conducted in comparison with the two formal interviews at the police station, it is hardly surprising that there would be differences in detail and emphasis between the two sets of accounts. No reference to any such discrepancies was made in the summing up.

[52] Section 130 of the *Evidence Act* provides:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

[53] In *R v Roughan & Jones*,[2] Keane JA quoted with approval the following passage from the reasons of Thomas J in *R v Hasler; ex parte Attorney-General*[3] expounding principles applicable to the exercise of a discretion under s 130:[4]

> "It is desirable that I attempt to summarise the conclusions I have reached from reviewing the relevant authorities on this question.
>
> (a) The exercise of the discretion is not a simple balancing function in which the judge decides whether the overall effect of the evidence is more prejudicial to the accused than it is beneficial to the Crown case. Sometimes the discretion is elliptically described in headnotes and elsewhere as a 'discretion to exclude where prejudicial value outweighs probative value'. Such abbreviations should not be permitted to modify or distort the true test, and should be recognised as mere shorthand references to it.
>
> (b) Exclusion should occur only when the evidence in question is of relatively slight probative value and the predjudicial (sic) effect of its admission would be substantial. Without dissenting from any of the five formulations quoted above, it is apparent that those stated by Barwick CJ and by Stephen and Aickin JJ in *Bunning v Cross* give proper recognition to these factors and that they may safely be used as concise working statements of the principle.
>
> (c) In performing the balancing exercise, the only evidence that should be thrown into the 'prejudice' scale is that which shows discreditable conduct *other than* those facts which directly tend to prove the offence itself. The 'prejudice' cannot refer to the damage to the accused's case through direct proof of the offence. To speak of a 'balancing' of prejudicial effect against probative value of such evidence is absurd, because the weight of each will be exactly the same. If prejudice arising from strict proof of the case were to go into the 'prejudice' scale, then the additional prejudicial effect would always tip the scales and the evidence would never be admissible."

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2 (2007) 179 A Crim R 389.

3 [1987] 1 Qd R 239 at 251.

4 *R v Roughan & Jones* (2007) 179 A Crim R 389 at [76].

[54] The subject evidence had significant probative value. That fact did not make its admission into evidence unfair. The alleged unfairness lay in the circumstances in which the evidence was obtained but the primary judge was surely correct in concluding that any potential unfairness was greatly diminished by the fact that the first appellant made similar admissions on a number of other occasions to others, including police after appropriate warnings, which were admitted into evidence without objection. Moreover, as noted earlier, it seems likely that had appropriate warnings been given, the first appellant would not have behaved differently. No particular error of law in the exercise of the primary judge's discretion was identified. Nor were the subject rulings unreasonable or plainly unjust.[5]

[55] This ground was not made out.

Grounds 2 and 3 – The judge hearing the application for a separate trial on 17 January 2013 pursuant to s 597B of the *Criminal Code* erred in failing to order a separate trial, as did the primary judge by refusing the first appellant's application for a separate trial made on the sixth day of the trial

[56] The arguments advanced in support of this ground were to the following effect. The application for separate trials heard on 17 January 2013 was brought in a timely way but the primary judge did not appear to take that matter into account. By suggesting that the question could be revisited if the second appellant actually gave evidence, the primary judge impliedly suggested that the application was premature.

[57] The primary judge failed to understand and identify the extent to which the first appellant would be prejudiced by not having a separate trial. Defence counsel had argued that statements of the second appellant in a record of interview to the effect that she had been struck and sexually abused by the first appellant would, if admitted into evidence, be highly prejudicial to the first appellant. The primary judge noted in his reasons that the prosecutor had indicated that the record of interview would not be relied on. Defence counsel contended that this did not resolve the problem as the second appellant might give such evidence herself.

[58] Addressing this argument, the primary judge said:

> "[23] I do not accept that is the case. If the co-defendant gives such evidence, the applicant's position presumes that the co-defendant's evidence about her own abuse will be accepted. Her evidence, if she were to give evidence, will be that the applicant not only did those things to her but was responsible for the abuse of the complainant child. In consideration of the issue it is therefore necessary to bear in mind that the evidence that the co-defendant will give against the applicant clearly will implicate him in the abuse of her and her daughter. There can be no dispute that her evidence of his abuse of the complainant is admissible in his trial. It does not seem to me that to also hear evidence of the abuse of her by the applicant is likely to substantially affect the jury's assessment of him. It is very unlikely that a jury would approach the question by first considering the evidence of his abuse of her and, on concluding that had been proven, to then

5 *House v The King* (1936) 55 CLR 499 at 505.

> use that fact to influence their deliberations on the question of whether he abused the complainant. In my view a jury, properly directed, would be able to set aside that irrelevant evidence, and consider the strength of the case against him by consideration of the co-defendant's evidence about his abuse of the complainant. I do not think that issues associated with their assessment of him on the basis of his conduct towards the co-defendant will unfairly prejudice the trial.
>
> [24] In the circumstances I do not think that the test in *Madubuko v R* (supra) has been satisfied. It is my view that there is no proper basis at this stage for ordering a separate trial. There is not such a significant risk of prejudice that a separate trial ought to be ordered; indeed the risk of prejudice is in my assessment slight."

[59] It was submitted that the primary judge's reasoning failed to account for the fact that the second appellant was never intending to give evidence that would implicate the first appellant in the very serious charges of rape and grievous bodily harm. The primary judge's confidence that the jury could be expected to disregard serious allegations made about highly criminal acts of a similar nature to those being tried on the basis that any prejudice could be overcome by judicial direction was a "triumph of hope over experience". Given that the evidence of uncharged acts could be used by the jury only for the purposes of evaluating the extent of the second appellant's alleged impaired capacity during the relevant period and could not be used against the first appellant, comprehending any direction in that regard would have required a remarkable mental feat on the part of the jury.

[60] Although such evidence was not given at the trial by the second appellant, the proceeding had to be conducted in a certain way in light of the fact that the trial proceeded with the second appellant. The first appellant was thus obliged to give evidence to pre-emptively defend himself against allegations of a nature that would have severely damaged his defence.

[61] Counsel for the respondent referred to the undertaking given by the prosecution at a pre-trial hearing not to lead evidence of the first appellant's violent conduct in relation to the second appellant. It was submitted that it was on the basis of that undertaking that the primary judge concluded that there was "no proper basis at this stage for ordering a separate trial". Moreover, as counsel for the respondent submitted, the subject evidence was not led by any party on the trial and there could be no miscarriage of justice. I accept these submissions. Having regard to the nature of the allegations against the first appellant and the nature and extent of the complainant's injuries, the primary judge was surely right to conclude that there was no real risk that the jury would determine whether the first appellant was guilty of maltreating the second appellant or reason from that that he was likely to be guilty of the charges against him. Nor do I accept that the primary judge erred in concluding that any risk of the jury engaging in impermissible reasoning could be obviated by appropriate directions. The evidence that the first appellant was said to be obliged to give "pre-emptively" was not identified.

[62] The second limb of this ground of appeal was that the primary judge erred in refusing to accede to an application by the second appellant for a separate trial, joined in by the first appellant, made on day six of the trial.

[63] The second appellant's application for a separate trial was based on some assertions in records of interview given by the first appellant which revealed aspects of the contact of the second appellant with the complainant, her child, and her consequent likely knowledge of any relevant physical condition exhibited by the child. This argument was fanciful. It was abundantly clear from evidence apart from statements made by the first appellant that the second appellant was the complainant's primary carer and that it would be highly unlikely that she would not have been fully conversant with the complainant's physical condition and symptoms throughout.

[64] The other basis for the application was that entries in a diary ruled inadmissible against the second appellant might be admitted in the prosecution case against the first appellant and thus cause prejudice to the second appellant. The argument before the primary judge did not identify any particular entry or entries. The diary, which I understand to be notes made at the request of police by the complainant's grandparents after the incident of relevant, or possibly relevant, statements by the complainant was not in the appeal record. No reference was made to its contents at first instance except by the prosecutor who observed that "The diary entry does refer to an incident of violence". He went on to say:

> "But there is already other evidence of [the second appellant's] excessive force in disciplining the child."

[65] It was contended in the first appellant's written outline of argument that the primary judge erred by failing to consider that the manner in which the second appellant had conducted her defence had visited a positive injustice upon the first appellant whose grounds for a separate trial were considerably stronger than those of the second appellant. The nature of that "injustice" was not identified. The primary judge rejected the application because it was made so late in the trial and because, in her view, the diary entry was not "so prejudicial … [to warrant] a separate trial being granted". The primary judge also noted, correctly, that the considerations that had earlier led to the refusal of the first appellant's application for a separate trial had not changed or changed sufficiently to warrant allowing the first appellant's application. Nothing before this Court casts any doubt on the validity of those reasons.

[66] In *R v Davidson*,[6] de Jersey CJ and Davies JA said:

> "Generally there are strong reasons of principle and public policy why joint offences should be tried jointly and the mere fact that one result of joinder will be that evidence admissible against one but inadmissible against the other accused will be before the jury is not a reason for ordering separate trials. Moreover the exercise by the trial judge of the discretion conferred by s 606 of the *Criminal Code* against separate trials for joint offenders is rarely interfered with. That is not to say of course that the facts may never disclose such potential for unfairness that separate trials should never be ordered. But *R v Lewis and Baira* is an example of a recent case in which an appeal against refusal of separate trials was dismissed in circumstances in which the evidence of one co-accused accused of rape was highly prejudicial to the other." (citations omitted)

[67] In *Roughan & Jones*, Keane JA described the decision as to whether separate trials should be ordered as being of a "broad discretionary nature" in respect of which "an appellate court will interfere only in the case of manifest error".[7]

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6 [2000] QCA 39 at [12].

7 *R v Roughan & Jones* (2007) 179 A Crim R 389 at 399.

[68] The first appellant's argument did not expose any particular difficulties in identifying and directing on the bodies of evidence that were admissible against one of the appellants but not the other. It was not alleged that the primary judge had misdirected or failed to give appropriate directions in that regard. Moreover, the bulk of the evidence was admissible against both appellants. Also, as counsel for the respondent submitted, there were strong reasons for a joint trial. The prosecution case was substantially circumstantial and each of the co-accused, in respect of most counts, was alleged to be either the principal offender or to have aided and abetted his or her co-accused. The respective roles of each accused had to be resolved.

[69] The exercise of the primary judge's and the primary judge's respective discretions were not shown to have miscarried in any way. No error of law on the part of the primary judge was established.

[70] These grounds were not made out.

Ground 4 – The primary judge erred in refusing to consider an application on the admissibility of evidence pursuant to s 590AA of the *Criminal Code* or alternatively in failing to exercise a discretion to hear such an application

[71] On 15 February 2013, the first appellant brought an application under s 590AA of the Code "to exclude the evidence of the disclosures made to the [complainant's] grandparents from being put before the jury". The "disclosures" referred to the notes made by the grandparents of relevant utterances of the complainant concerning the complainant's injuries.

[72] An interview with the three year old complainant had been recorded by police. In the course of it, the complainant, it was asserted by defence counsel, had admitted that she had a bike accident. He contended also that the complainant's statements raised some doubt about the identity of a person who was said to have attacked her.

[73] The prosecution had informed the defence that they did not intend putting the complainant's statement in evidence because the complainant's evidence was not thought to be sufficiently reliable. She had just turned three when interviewed. The prosecution intimated that if the defence succeeded in putting the statement in evidence, the prosecution would seek to cross-examine the complainant and, depending on the answers she gave, may wish to rely on prior inconsistent statements in the statement.

[74] The primary judge declined to make the ruling requested on the basis that the contingency upon which he was being requested to rule may never arise. He said:

> "In my view the application is truly clearly premature and whether or not the need for a ruling will arise is as yet unknown. But we do not rule on nebulous possibilities in the future."

[75] The primary judge's ruling accorded with the prosecution's submission that the application was "predicated on several scenarios that may or may not arise, and this is not the appropriate time to make such a determination". The second appellant's counsel made generally similar submissions.

[76] The primary judge was correct in taking the view that the ruling sought was in respect of a contingency that might never eventuate and that the making of any ruling on the point was best left until the point ceased to be hypothetical. Before the prosecution would wish to rely, in any way, on the material in the diary, the defence

would have to elect to lead evidence and would need to tender the complainant's record of interview. A question of admissibility would then arise. The prosecution could challenge its admissibility on the ground that the complainant lacked capacity to give evidence. The prosecution had already formed a view in that regard. If the record of interview went into evidence, the prosecutor's approach in relation to the diary would be dependent on a decision or decisions taken in the cross-examination of the complainant consequent on her answers to questions.

[77] Section 590AA of the Code provides:

> "**590AA Pre-trial directions and rulings**
>
> (1) If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial or any pre-trial hearing.
>
> (2) Without limiting subsection (1) a direction or ruling may be given in relation to—
>
> (a) the quashing or staying of the indictment; or
>
> (b) the joinder of accused or joinder of charges; or
>
> (ba) the disclosure of a thing under chapter division 3; or
>
> (c) the provision of a statement, report, proof of evidence or other information; or
>
> (d) noting of admissions and issues the parties agree are relevant to the trial or sentence; or
>
> (da) an application for trial by a judge sitting without a jury; or
>
> (e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted; or
>
> …
>
> (l) the *Evidence Act 1977*, part 2, division 4A or 6; or
>
> (m) encouraging the parties to narrow the issues and any other administrative arrangement to assist the speedy disposition of the trial.
>
> (3) A direction or ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling.
>
> (4) A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence."

[78] The first appellant argued that s 590AA imposed an obligation on the Court to make a ruling on any application made by a party under that section. Reliance was place on observations of Jordan CJ in *Ex parte McGavin; Re Berne*[8] in relation to a section in an act which provided, "A court of quarter sessions may submit any question of law arising on any appeal coming before it to the Court of Criminal Appeal for determination". Jordan CJ's observations were:[9]

> "The word 'may' is *prima facie* facultative only ; but it was pointed out in *Macdougall v. Paterson*, that 'when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application' : *Cook v. Cook* ; *R. v. Mitchell*. Section 23 of the Interpretation Act of 1897 does not prevent the application of this rule, where it is necessary to give effect to the evident intention of the statute : *Smith v. Watson*. In my opinion, it is the duty of a Chairman of Quarter Sessions to submit to the Court of Criminal Appeal any question of law which either party to the appeal may raise and ask to be so submitted, unless, in his opinion, the question is so obviously frivolous and baseless that its submission would be an abuse of process."

[79] It may readily be accepted that, although a word such as "may" is primarily permissive or facilitative in meaning, when used in a statute or rules bestowing a power or discretion on a court, the context in which it is used may show that the court has a duty to act.[10]

[80] In *Lamb v Moss*,[11] the Court observed that, although when the word "may" was used to create a power, *prima facie* the exercise of the power was not compulsory. Their Honours added:[12]

> "3. However, the contrary may emerge from the enactment by which the power is granted; although the word 'may' is always permissive in a particular enactment its operation may be such as to oblige the court to act. This may appear in a number of ways; for example, from the general scope and objects of the enactment, the nature or purpose of the power, the character of the person or tribunal to whom or to which the power is given or of the functions of that person or tribunal, the conditions upon which the power is exercisable, and/or the identity of the person or class of persons for whose benefit the power is conferred.
>
> 4. Thus, where a jurisdiction is given to a court, generally, at least, the conferral of the jurisdiction carries with it the duty to entertain applications for the exercise of that jurisdiction.
>
> 5. (a) Permissive language may be used in such a case because it is for the court to determine the existence and validity of the claim.

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8 (1945) 46 SR (NSW) 58.

9 *Ex parte McGavin; Re Berne* (1945) 46 SR (NSW) 58 at 60–61.

10 *Newmarch v Atkinson* (1918) 25 CLR 381 at 387; *Lamb v Moss* (1983) 76 FLR 296.

11 (1983) 76 FLR 296.

12 *Lamb v Moss* (1983) 76 FLR 296 at 311.

(b) Further, such language is consistent with the existence of a discretion in the court as to the kind of relief to be granted in the event that the claim is established.

(c) Such language does not necessarily indicate a discretion to refuse relief notwithstanding the establishment of the claim.

6. Conversely, the existence of a duty to exercise a jurisdiction does not of itself necessarily establish the further obligation to grant relief upon application and upon satisfaction of the existence and validity of the claim. (See also *Re Carl Zeiss Pty Ltd's Application* (1969) 122 C.L.R. 1 at 5, per Kitto J.)"

[81] The primary judge heard argument and decided, correctly, not to make the ruling sought by the defence because, in effect, the question on which he was being asked to rule was hypothetical.

[82] Section 590AA is plainly facilitative in nature. It is designed to assist in the simplification and expedition of criminal trials, not to place an additional burden on the courts and the parties. Moreover, it is generally procedural in nature and most directions, rulings or orders made pursuant to it do not determine substantive rights.

[83] Accordingly, it would be a remarkable construction of the section to conclude that a court on an application made under it could not, as the primary judge did, rule that the application was premature or decide that any ruling on it should be deferred until such time as the ruling could be seen to have practical utility.

[84] If the primary judge's remark that there was "no application before [him] at this stage upon which a ruling can or should be made" suggests that his Honour was stating that he lacked jurisdiction to make the ruling sought, the first appellant may have a theoretical ground for complaint. The primary judge, however, did, in effect, rule on the application. His ruling was unexceptional. It caused no prejudice or unfairness to the first appellant in the conduct of the trial and gave rise to no miscarriage of justice.

[85] This ground was not made out.

Ground 5 – The conviction on count 1 is unreasonable and cannot be supported having regard to the evidence

[86] Count 1 was particularised as an act of oral penile rape. Counsel for the first appellant referred to passages from the evidence of the prosecution's expert witnesses, Dr True, a paediatrician, and Professor Kimble, a paediatric surgeon.

[87] Both witnesses accepted that the complainant's oral injuries were not necessarily the consequence of the forcing of a penis into the complainant's mouth. The first appellant relied on the following passage from the evidence of Dr True:

> "Okay. Now, any sort of blunt force trauma could have caused those oral injuries, couldn't they, or couldn't it?-- Well, the – a lot of the injuries in her mouth could have been caused by blunt force trauma. It's the vertical tears on her lips – the upper and lower lip – which are very – not typically seen by just a blunt blow to the mouth.

> But they can be seen by a blunt force trauma, too, can't they?-- It's possible, but just the – how the symmetry on the upper and lower lips is very unusual.
>
> But you've accepted that it's possible that any sort of blunt-----?-- It's possible, yes."

[88] In the following passage from his evidence in cross-examination, Professor Kimble accepted that the oral injuries could have been caused by the insertion of a finger:

> "Okay. I'm just going to put a few mechanisms to you, so looking at the mouth injuries to [the complainant], and we've discussed those, it's correct to say that could be the result of some [blunt force] trauma?-- Yes.
>
> Yeah. It could also be the result of say someone's fingers being put into the mouth of the child to remove a blockage if she was choking or something?-- No, I don't – I don't buy that simply because you've got opposite injuries on the top and the bottom and this is – is not consistent and you don't get ulcers from that so I – I – I wouldn't buy that at all, no.
>
> So you, I mean, have you suggested that it could have been a penis but it can't have been a finger?-- Yes, it could be either.
>
> It could be either?-- Yes.
>
> So you're not in a position to say. Mentioning either of those mechanisms is just pure speculation on your part, isn't it?-- Well, yeah, but when you say pure speculation, that is our job, to look at all the patient's injuries and try and fit some sort of pattern into it."

[89] On the basis of this evidence, the first appellant submitted that no reasonable jury could have been satisfied beyond reasonable doubt that the only possible mechanism for the injuries to the complainant's mouth was the forceful insertion of the first appellant's penis.

[90] Counsel for the respondent relied on the passage from Dr True's evidence, quoted above, and the question and answer that followed in this passage:

> "And what about the loss of hair?-- Okay. The loss of hair can occur at the same time as an oral sexual assault with the pulling out of the child's hair."

[91] Counsel for the respondent also relied on the last question and answer quoted in paragraph [88] above but continued the quotation of Professor Kimble's evidence in cross-examination with the following:

> "If you take – if you take individual injuries in isolation, that's a very dangerous thing to do, because each individual injury, you could say, could it be – you could have a whole range of mechanisms for each individual injury, but – but when you put the whole thing together, a pattern develops, and that's what we do.

> But you can't make any comment about whether these injuries were inflicted at the same time or on different occasions?-- I can.
>
> You can?-- I can say that there were – there are injuries there which were definitely inflicted at different times.
>
> Okay. So on at least two occasions these injuries have been inflicted?-- Yes."

[92] Counsel for the respondent submitted that, although each count needed to be considered separately, the prosecution was able to rely on the combination and nature of injuries to the complainant to support the inference in respect of count 1 that the injuries had been caused by penile penetration.

[93] The function of this Court on this ground of appeal is that described in the following passage from the reasons of Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*:[13]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[94] Their honours qualified this general proposition as follows:[14]

> "But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[95] In *SKA v The Queen*,[15] French CJ, Gummow and Kiefel JJ observed:

> "The starting point in the application of s 6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses. However, the joint judgment in *M* went on to say:
>
> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.'" (citations omitted)

[96] After stating that the test set down in *M*, and restated in *MFA v The Queen*,[16] was that the Court must make "an independent assessment of the evidence, both as to its

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13 (1994) 181 CLR 487 at 493.
14 *M v The Queen* (1994) 181 CLR 487 at 493.
15 (2011) 243 CLR 400 at 405–406.
16 (2002) 213 CLR 606.

sufficiency and its quality", their Honours quoted the following passage from the reasons of Mason CJ, Deane, Dawson and Toohey JJ in *M*:[17]

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'." (citations omitted)

[97] The jury would not have experienced much difficulty in deciding beyond reasonable doubt that the injuries to the complainant's mouth were the result of a sexual act or acts. The evidence of Professor Kimble and Dr True pointed decisively against the possibility that the complainant had sustained significant injuries relevant in a motorbike accident or in a fall in the bathroom as the first appellant contended. Dr True's evidence was to the effect that a child who had sustained the "massive blunt force trauma to her abdomen" that the complainant exhibited would not be able to get up and walk away. She said that the complainant would have been in "a lot of pain" and could have been expected to have sustained more and different cuts and bruising.

[98] Professor Kimble was also of the view that the abdominal injuries would have caused the complainant severe pain and suffering. He concluded that "the vast majority of the injuries" he detected on examination of the complainant were inconsistent with injuries inflicted through the mechanism of a motorcycle accident. He did not comment specifically on whether the complainant would have been able to walk after sustaining the abdominal injuries but he did observe that her genital injuries would have been "very painful" and that the complainant would have found it very painful to walk as well as to pass urine and have bowel motions. Both doctors, particularly Professor Kimble, were extremely experienced in the investigation and treatment of paediatric injuries. Their strong evidence that the anal and genital area injuries were caused by sexual conduct was not weakened by cross-examination. It will also be recalled that there was ulceration of the complainant's labia, indicative of injury having been caused to it on separate occasions, and evidence of anal penetration and resulting injury.

[99] The injuries to the mouth occurred at around the same time as all, or some, of the injuries to the genital and anal areas and the clear evidence is that the oral injuries were caused by the penetration of the mouth by some object or objects. Once it is accepted that the injuries to and around the anus and vulva were the result of sexual acts, there is a strong inference that the oral penetration was also of a sexual nature. That, in turn, would strongly suggest penile penetration.

[100] It is possible that the first appellant caused the injuries to the complainant's mouth with his fingers or through the insertion of some object other than his penis. The medical experts conceded that possibility, although the opinion of both Dr True and Professor Kimble, after considering all of the injuries, was that the injuries to the mouth had probably resulted from the insertion of a penis in the mouth.

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17 (1994) 181 CLR 487 at 492–493.

[101] The question whether the mouth injuries were caused by the first appellant's penis was quintessentially one for a jury to decide. They had to draw on their collective experiences of life, human nature and conduct. The medical evidence was but part, albeit an important part, of the matters to be taken into account. They were properly directed and it was open to them to reject the possibility that the injuries were caused other than by penile penetration. Non-penile penetration would be more consistent with cruelty of a non-sexual nature and it was apparent that the conduct here was sexually motivated.

[102] In my view, it was open to the jury to be satisfied beyond reasonable doubt of the first appellant's guilt.

[103] This ground of appeal was not made out.

Application for leave to appeal against sentence

[104] The first appellant contends that the primary judge erred in finding, on the balance of probabilities, that the first appellant used his penis to commit the vulval and anal rapes. It is argued that if this contention is accepted, the exercise of the sentencing discretion necessarily miscarried as penile rapes attract harsher penalties than digital rapes or rapes effected by means of the insertion in a bodily orifice of some foreign object.

[105] *R v MBG & MBH*,[18] the case relied on by the first appellant to support this proposition does not in fact do so. It may be accepted, as a general proposition, that penile rape is more culpable than, for example, digital rape. The latter does not carry with it the same risk of disease or of pregnancy. Nor does digital rape, generally, give rise to as great a sense of violation on the part of the victim. There is, however, no universal rule or principle as the first appellant's arguments suggest. A rape perpetrated with an object such as a broom handle or bottle, because of the pain and injury inflicted or the creation of the risk and fear of injury, may be more culpable than a penile rape. The extent of the physical and psychological harm suffered by the victim is a significant factor in the sentencing process.

[106] In *R v Corr; ex parte A-G (Qld)*,[19] McMurdo P, with the concurrence of myself and Douglas J, rejected the proposition that an offence of rape not involving sexual gratification was necessarily less culpable than an offence which involve sexual gratification. Her Honour explained:[20]

> "I do not accept the respondent's contention that a rape offence is necessarily less serious and deserving of a lesser penalty if it can be categorised as an offence of violence rather than one giving sexual gratification. The appropriate sentence for an offence of rape will vary depending on the particular relevant circumstances pertaining in each case. But the appropriate sentence will not necessarily depend on whether the offending involved an aggressive violent act, sexual gratification, or as is often the case, a combination of both."

[107] This Court was not referred to any comparable sentences which might suggest that the sentences imposed for the rape offences, whether the injuries inflicted were the result of penile penetration or otherwise, were manifestly excessive.

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18 [2009] QCA 252.

19 [2010] QCA 40.

20 *R v Corr; ex parte A-G (Qld)* [2010] QCA 40 at [31].

[108] The submission that it was not open to the primary judge to conclude that the complainant's anal and genital injuries were caused by penile assault should be rejected. The primary judge saw and listened to the whole of the evidence including the police interviews. Dr True and Professor Kimble were each of the view that the complainant had been sexually assaulted more than once, both anally and in her vulva. They favoured the conclusion that the anal, vulval and oral injuries were inflicted by a penis.

[109] The jury's guilty verdict on count 1 was possible only if the jury found penile penetration of the complainant's mouth. It would tend to follow that the jury considered that the anal and vulval injuries were also caused by penile assault. Having regard to these matters and to the fact, which was not contested, that the anal and vulval injuries were caused by sexual conduct, it was well open to the primary judge to find that the anal and vulval rapes were committed by penile assault. There is nothing which supports the contention that the primary judge failed to have regard to s 132C(3) and (4) of the *Evidence Act* 1977 (Qld).

[110] Accordingly, this ground of appeal was not made out.

Conclusion

[111] For the above reasons, I would order that the appeal against conviction be dismissed and that the application for leave to appeal against sentence be refused.

[112] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[113] **DOUGLAS J:** I also agree with the orders proposed by Muir JA and with his Honour's reasons.

In CA Nos 80 and 189 of 2013:

[114] **MUIR JA**: Most of the facts relevant to the determination of this appeal are set out above in the reasons in *R v CBL*. Like her co-accused, the first appellant, the second appellant was convicted of all counts on the indictment except count 2, an alternative to count 1, and count 7, in respect of which a not guilty verdict was directed. She appeals against her convictions and seeks leave to appeal against the sentences imposed on her. It is convenient to now address the grounds of appeal.

Ground 1 – The verdict is unreasonable and cannot be reasonably supported having regard to the evidence

The second appellant's arguments

[115] The second appellant's argument was to the following effect. The nature of the sexual injuries sustained, and the suggested connection between those and other injuries, especially those which were alleged to have constituted grievous bodily harm, militated in favour of a conclusion that the injuries were caused by penile penetration. Having regard to the verdict on count 1, the jury appears to have regarded the first appellant as the principal offender and the second appellant as the aider. But, in the absence of any evidence as to what was taking place in the house, it was not open to the jury to be satisfied beyond reasonable doubt that the second appellant held the complainant in order to aid the first appellant or that she was present when the offences occurred and aided him by her presence.

[116] There was also, arguably, a nexus between some of the penetrative injuries and some of the non-sexual injuries. Dr Phillips conceded that an act of sodomy could have produced the subdural haemorrhage (count 9), the anal injuries, the abdominal injuries (count 6) and also the gluteal tear (count 8).

Consideration

[117] Counsel for the respondent accepted that logically and consistent with the verdict on count 1, the jury was probably satisfied that the first appellant was the principal offender in relation to the other offences of a sexual nature.

[118] There was evidence that the second appellant was a full time mother and that the first appellant worked from home. She said that the longest that the complainant was ever left alone with the first appellant was four to five minutes. She emphasised that she and the first appellant "were always together". She referred to the sharing of parental responsibility and the first appellant's closeness to the complainant.

[119] The complainant's injuries could not have been sustained without the second appellant being aware that they were being inflicted or had just been inflicted. There was ample evidence of the very substantial pain the complainant would have suffered when the injuries were being inflicted and afterwards as a result of the injuries. The second appellant could not have failed to have been unaware of the complainant's pain, extreme discomfort and symptoms flowing from the injuries and the injuries themselves. There is thus a substantial body of evidence from which the second appellant's knowledge of the way in which the injuries were inflicted may be inferred. Also it was well open to the jury, having regard to the expert medical evidence and the nature and location of many of the complainant's injuries to reject the explanation that they resulted from a fall in the bathroom and/or from a motorbike. Once these explanations were rejected, it was open to the jury to conclude that the second appellant was present when the injuries were inflicted.

[120] Counsel for the second appellant accepted that the first appellant's lies, if adopted by the second appellant, were also part of the circumstantial case against her. Having regard to these matters, it was open to the jury to be satisfied beyond reasonable doubt that the second appellant aided the first appellant as alleged by the prosecution. This ground was not established.

Ground 2 – The primary judge erred in directing the jury that allegedly false statements made by the first appellant were admissible against the second appellant and/or the primary judge erroneously directed the jury about the use that could be made of those allegedly false statements and other conduct

[121] In order to prove its case on all counts, the prosecution relied on six circumstances described by the primary judge in her summing up as:

> "Evidence of physical and sexual abuse, opportunity, the relationship between the two with [the first appellant] as a dominant and obsessive person and [the second appellant] dependant. The other injuries caused by [the second appellant]. The attitude to the [complainant] by the [the first appellant and the second appellant]. Lies, the delay in seeking treatment. The Crown says fearing the [complainant] would die they got their story straight and then rang an ambulance and then they discussed the aiding."

[122] The jury were directed, in effect, that because the second appellant was present when the first appellant provided arguably false explanations to hospital staff to account for the complainant's injuries, the second appellant's failure to demur from what the first appellant said amounted to acquiescence by her. The jury were also directed, in effect, that the conduct engaged in to delay an examination under general anaesthetic was also acquiesced in by the second appellant. The jury were reminded that the prosecution placed reliance on lies as evidence of guilt.

[123] In her summing up, the primary judge identified the first appellant's lies as:

1. some of the injuries were occasioned by the alleged bike accident;

2. some of the injuries were due to a fall in the shower;

3. the assertion that Dr True caused the injury to the genitals; and

4. the second appellant told Dr True that the complainant was fine thereby "just trying to minimise and downplay the injuries".

[124] Although the jury were instructed about what they needed to be satisfied of in order to conclude that the alleged lies were told or engaged in out of a consciousness of guilt, the primary judge erred in permitting the jury to consider the second appellant's failure to disavow the first appellant's explanations about how some of the injuries were sustained. What the first appellant said in that regard was not admissible against the second appellant unless the circumstances were such that it was open to the jury to conclude that the occasions when the first appellant provided the explanations were occasions where it might reasonably have been expected that the second appellant would disavow his explanations. For that to be so, the facts as the first appellant claimed them to be had to be within the personal knowledge of the second appellant.[21] Since the second appellant did not witness either the bike riding or the complainant's activity in the bathroom when the alleged fall took place, whether the explanations advanced by the first appellant to account for some of the injuries were true was not within her personal knowledge. Accordingly, it was not permissible for the jury to consider whether the silence of the second appellant was attributable to an adoption of lies told from a consciousness of guilt.

[125] Even if what the first appellant said was admissible against the second appellant, the jury had to be, but were not, directed that before reliance could be placed on any lies the first appellant told, they had to be satisfied that some response was called for by the second appellant[22] and that by remaining silent, she was adopting the falsehoods as her own.[23] The omission to give these directions tainted not only the jury's consideration of the lies just discussed but also the other alleged lies and conduct relied on by the prosecution.

Consideration

[126] The applicable principle was stated in the following terms by McInerney and Murray JJ in *R v Salahattin*:[24]

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21 *R v Salahattin* [1983] 1 VR 521 at 527.

22 *R v Collins* [2004] 1 WLR 1705 at [35].

23 *R v Collins* [2004] 1 WLR 1705 at [35]; *Barca v The Queen* (1975) 133 CLR 82 at 107–108.

24 [1983] 1 VR 521 at 527.

> "… the principle is that an allegation is not admissible in evidence against an accused person unless the circumstances are such as to leave it open to the jury to conclude that the accused, 'having heard the statement and having had the opportunity of explaining or denying it, and the occasion being one upon which he might reasonably be expected to make some observation, explanation or denial, has by his silence, his conduct or demeanour or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some part of the allegation made in his presence': see *R. v. Smith* (1897), 18 Cox C.C. 470, at p. 471, per Hawkins, J. – or that he has so conducted himself as to show consciousness of guilt – see *R. v. Thomas*, [1970] V.R. 674, at p. 679."

[127] It may be accepted, at least as a general proposition, that the principle cannot operate unless the facts alleged to have been admitted were within the personal knowledge of the admitter.[25] It is not the case, however, that the second appellant's knowledge of and concerning the bike accident and the fall in the shower were insufficient to enable the first appellant's relevant statements to be admissible in evidence against her. The matters discussed in respect of ground 1 show that it was open to the jury to conclude that the second appellant was well aware, either that the alleged bike accident and the fall in the shower did not occur or that they had nothing to do with the injuries to the complainant's mouth, anus and genitalia.

[128] The second appellant's evidence in relation to the motorbike accident was to the effect that the complainant suffered no apparent ill effects. She said that the first appellant told her that she "took a tumble" and that the complainant looked at her and "went all good mummy". The second appellant said that although she did not see the accident in the bathroom, she heard it, went into the bathroom and saw the complainant in the first appellant's arms. Plainly, the bathroom accident, if it occurred, could not have caused injuries anything like a great many of the injuries sustained by the complainant.

[129] In relation to the first appellant's assertion that Dr True caused the injury to the complainant's genital area, it was open to the jury to accept the evidence of Dr True and Nurse Hoskins as to the care that was taken in examining the complainant's injuries and as to their existence at the commencement of the examination. It was equally open to the jury to find that the second appellant was aware, generally, of the extent and nature of the injuries before the commencement of the medical examination.

[130] It was not suggested that the second appellant may not have heard what was relevantly said by the first appellant. The second appellant was sitting next to the first appellant in the room when the medical examination was being conducted. Professor Kimble spoke to the both the first appellant and the second appellant together. Subject then to the second appellant's argument about the inadequacy of the directions in relation to lies, it was open to the jury to conclude that the second appellant had adopted the first appellant's lies by her silence.

[131] In *Barca v The Queen*,[26] Gibbs, Stephen and Mason JJ observed:[27]

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25 See *R v Salahattin* [1983] 1 VR 521 at 527.

26 (1975) 133 CLR 82.

27 *Barca v The Queen* (1975) 133 CLR 82 at 107.

> "In any case, where evidence is admitted of statements made in the presence of an accused it is in general desirable that the judge should explain to the jury that they can only use the statements as evidence of the truth of what was stated if they are satisfied that the accused has by his speech, silence or conduct admitted their truth. The applicant clearly denied the statement that his sister had given him a rifle and there was no evidence that by his demeanour or conduct he accepted its truth."

[132] Counsel for the respondent submitted that the primary judge directed as follows:

> "The defence say in [the second appellant's] case that [the second appellant] was, in effect, under [the first appellant's] thumb and that you wouldn't take the fact that she sat there silently as any indication that she was acquiescing or agreeing with what was being said, more that she was effectively a little mouse who didn't say anything when [the first appellant] was around."

[133] That passage was not a direction delivered with the authority of the judge on a question of law. It was merely an explanation of the defence case. The respondent's counsel accepted that a direction such as that referred to in *Barca* should have been given but submitted that because the second appellant adopted the same version of events subsequently in her interview with police no further direction was necessary. The point is perhaps arguable but it is obviously unsatisfactory that in respect of such an important aspect of the prosecution case, the jury should have been left uninstructed on the circumstances in which silence can be taken to constitute an admission.

[134] In view of my conclusions in respect of ground 3, however, it is unnecessary to pursue this issue any further.

Ground 3 – The primary judge erred in directing the jury that evidence given by Ms FLD and Ms Swan was evidence of violent conduct by the second appellant towards the complainant and if Ms FLD's evidence was admissible for that purpose the primary judge inadequately directed the jury about it

[135] Ms FLD gave evidence of an incident at her house prior to the second appellant going to live with the first appellant. The complainant spilt some water and became upset. The first appellant asked the second appellant whether she was going to do something about it. A look of fear came over the second appellant's face and she smacked the complainant before taking her to a bedroom. That was the only occasion on which Ms FLD had seen the second appellant discipline the complainant.

[136] This exchange occurred in the cross-examination of Ms FLD by the first appellant's counsel:

> "Mmm. And did you tell the police that [the second appellant] came over – and this is in describing the incident you just gave evidence about, namely the incident of violence that you witnessed against [the second appellant] – you told them that [the second appellant] came over, grabbed her, as in [the complainant], by the right arm, picked her up off the background (sic) and started smacking. She was

> hitting her very hard on her bottom and upper leg and you started staying, 'Stop it. What are you doing? Leave her alone.' The [complainant] was screaming and you tried to physically get the [complainant] off [the second appellant]. Did you say that to the police?-- Yes, I did say that to the police.
>
> So, were you telling the truth in court today or were you telling the truth to police?-- No, I'm telling the truth in court and to police."

[137] It was then put to Ms FLD that she had told the police that the second appellant had thrown the complainant on the bed. Ms FLD said that she did not see the complainant thrown on the bed. She was then further questioned about what was in her statement in that regard. After she accepted that she had said what was in her statement, she said, referring to the police interviewer:

> "What I'm trying to say to him is that at this stage, I was still in shock with everything. I was in a state of shock … That was my state of mind."

[138] In summing up, the primary judge said to the jury:

> "… there's also evidence in this trial of violent conduct by [the second appellant] towards the complainant …, namely the evidence of [the first appellant] and the evidence of Ms FLD (sic), and evidence of the child-care centre people seeing some bruising. So, in relation to that, remember Ms Swan gave evidence and she went through some minor incidents that had happened at the child-care centre, sand in their eye, those sorts of things, and then she talked about there being a note on the 3rd of September 2009, there was red marks on the bottom and bruising and a little bit higher up on the back was scratches going cross ways, and that's Exhibit 14. There's a photo of what was seen.
>
> She spoke to [the second appellant] about it and she was told this. She said, '[the second appellant], I would just like to talk to you about some marks we found on [the complainant] today.' I asked her about the bruising that was on her bottom and the red marks and [the second appellant] said that that – because they just moved into a few house and it had tiles on floor, when [the complainant] used to throw herself down because her nappy wasn't as padded, because she was toilet training, it was leaving marks on her bottom because she wasn't used to falling on the tiled floor. She was asked, 'Did you raise the back injury with her?' She said, 'Yes, and then I asked her about the other – the scratches that were on her back, and [the second appellant] said that she's toileting and using the big toilet when she's sitting on toilet because she hasn't got the strength to hold herself up she was falling through, and then she would pick herself up to, you know, get out and that's where the scratches were coming from.' Now, Ms Swan said she accepted that explanation from the [second appellant] and then the [complainant] stayed in care until the 17th of September when she was taken out."

[139] Later in her summing up, the primary judge observed that when she was talking previously about Ms FLD's evidence and the difference between her evidence-in-chief and the content of her record of interview, she failed to mention that in the record of interview Ms FLD did not suggest that "the hitting of the [complainant] and putting her in the room or throwing her in the room was done under the direction or after a comment of [the first appellant's]". The primary judge then added:

> "So you take that into account when assessing that evidence. You need to bear in mind with that evidence that what she said in her statement to the police is also evidence of the facts as was put to her because it's what we call a previous inconsistent statement, or it may be depending on what view you take of it."

The second appellant's argument

[140] It was contended that these directions were erroneous as Ms FLD's acknowledgement of what she had said in her record of interview was not admissible to prove the truth of the contents of the statement. It was relevant only to the assessment of Ms FLD's credit.[28] That was said to be because Ms FLD had distinctly admitted that she had made the prior inconsistent statement thus obviating the need to prove that she did, in fact, make it.[29]

[141] Even if the evidence was admissible for the purpose stated by the primary judge, the jury should have been directed to exercise caution about the weight to be given to the prior inconsistent statement in view of the claim that the witness was in a state of shock which may have led her to misrepresent facts.[30] In an otherwise circumstantial case, direct evidence of violent behaviour allegedly seen by the second appellant's mother had the potential to very damaging to the second appellant's case if it was evidence of the truth of facts stated in it.

[142] The evidence of Ms Swan was also left to the jury as evidence "of violent conduct by [the second appellant] towards the complainant". The primary judge erred in this regard as Ms Swan did not assert that the second appellant made any admissions concerning the injuries of which Ms Swan spoke.

Consideration

[143] The primary judge erred in summing up on the basis that Ms FLD's statement provided evidence of violent conduct by the second appellant towards the complainant. The primary judge also erred in not directing that, although relevant to the reliability of Ms FLD's evidence at the trial, the statement could not be treated as evidence of the truth of its contents.[31]

[144] Section 101(1) of the *Evidence Act* 1977 (Qld) provides:

> "(1) Where in any proceeding—

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28 *R v Hall* [1986] 1 Qd R 462 at 463.

29 *Evidence Act* 1977 (Qld), s 18, s 101; *R v Schultz* (unreported, CA No 349 of 1990) at 8; *R v Franicevic* [2010] QCA 36 at [10].

30 *Evidence Act* 1977 (Qld), s 102; *Morris v The Queen* (1987) 163 CLR 454 at 468–470.

31 *Driscoll v The Queen* (1977) 137 CLR 517 at 522 per Barwick CJ and 536–537 per Gibbs J.

> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or
>
> (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated;
>
> that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible."

[145] It was not suggested by the respondent, and it is not the case, that s 17 or s 19 of the *Evidence Act* 1977 (Qld) are relevant for present purposes. Section 18 provides:

> "**18 Proof of previous inconsistent statement of witness**
>
> (1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.
>
> (2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement."

[146] The second appellant's submission that the witness' previous inconsistent or contradictory statement was not proved by virtue of s 18 must be accepted. The witness did "distinctly admit" that she had "made such statement". The operation of s 18(1) was not triggered and no proof was necessary that the witness made the statement. Nor was it necessary for the procedures in s 18(2) to be followed and they were not, in fact, followed.

[147] The respondent relied on dicta in *R v Bairia*[32] for the proposition that, if the witness "admitted to the previous statements, the prosecutor had succeeded in proving them".

[148] That statement, with respect, would be inaccurate if what was being stated was that mere acceptance of the making of the previous statements meant that the statements could be used as proof of the truth of their contents. In *Driscoll v The Queen*,[33] Gibbs J, dealing with the questions that arise when a witness is shown to have made a previous statement inconsistent with the evidence given by that witness at the trial, said:[34]

> "As to the first of these questions it is clearly settled that the previous statement is admitted merely on the issue of credibility, and is not evidence of the truth of the matters stated in it: *Taylor v. The King*;

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32 [2009] QCA 332 at [32].

33 (1977) 137 CLR 517 at 535–536.

34 *Driscoll v The Queen* (1977) 137 CLR 517 at 536.

> *Deacon v. The King*; and *Reg. v. Pearson*. **Since the jury, if uninstructed, are not likely to be aware of the limited use to which the previous statement may be put, it is essential that this should be made clear to them by the trial judge**." (emphasis added; citations omitted)

[149] Gibbs J, with whose reasons the other members of the Court relevantly agreed, then dealt with the nature of the directions, if any, that should be given in respect of the reliability of the witness's evidence:[35]

> "As to the second question, the whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable. In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony. For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable."

[150] If the maker of the prior inconsistent statement adopts as true facts stated in it, the witness, by so doing, will be giving evidence of those facts which evidence can be relied on independently of the statement.[36]

[151] In order to ascertain whether Ms FLD adopted or affirmed the truth of some of the content of her statement, it is necessary to consider the transcript of her cross-examination in some detail.

> "DEFENCE COUNSEL: Mrs FLD, you agree that you gave a statement to the police and then you gave a further statement on the 17th of November 2009?-- I couldn't give you the exact date, but I do know I gave an addendum statement after the original statement.
>
> [This part of the transcript is quoted in paragraph [136] hereof.]
>
> So, were you telling the truth in court today or were you telling the truth to police?-- No, I'm telling the truth in court and to police.
>
> Okay. Well, that's not how you presented your evidence before?-- Yes, it is.
>
> Okay?-- Yes, it is.
>
> Okay. So, you agree that-----?-- I saw – I saw what happened. What – what has been said and what has been typed is the same thing.

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35 *Driscoll v The Queen* (1977) 137 CLR 517 at 536–537.

36 *Stateliner Pty Ltd v Legal and General Assurance Society Ltd* (1981) 29 SASR 16 at 51; *CB v The State of Western Australia* (2006) 175 A Crim R 304 at 316.

> And you said to the police that [the first appellant] was on the veranda?-- Yes, he was.
>
> Okay. And he wasn't in the room when this happened?-- He was on the veranda in our house. At that part – at that place, there was a sliding glass door and he was leaning against that glass door and between the coffee table and where it was happening, he was from you to me away.
>
> And the door was shut?-- No, the door was open.
>
> So, then you told the police that [the second appellant] – after you had tried to remove [the complainant] from [the second appellant], you – [the second appellant] lifted [the complainant] onto her right hip, walked into the door of [the complainant's] bedroom and threw her onto the bed?-- No, she went to the door of the bedroom and I didn't see what happened to her after that. She put her into the room. That's what she did, because I was sitting – I was seated at that stage. I could see to the left and she put her into that room.
>
> But you previously told the police that she threw her onto the bed?-- Well, if that's in the statement – I did not see her throw her on the bed.
>
> HER HONOUR: Well, do you accept that that's what you said in your statement?-- Well, at that stage, your Honour-----
>
> Well, it's a yes or no at this stage?-- Well, if I've said it-----
>
> Do you accept that that's what you said or do you want to see the statement?-- Well, if I've said it in the statement, I've said it.
>
> Do you want to see the statement? You can see it if you like?-- No, it's all right.
>
> Okay?-- If I've said it, I've said it.
>
> All right?-- But-----
>
> Now, sorry, you can say what you wanted to say, but I just wanted to find if you accepted that that's what you said?-- Yeah.
>
> DEFENCE COUNSEL: Yes, your Honour.
>
> WITNESS: What's got to be – you want me to say something?
>
> HER HONOUR: Well, you can say what you wanted to say?-- Yeah. What I'm trying to say to him is that at this stage, I was still in shock with everything. I was in a state of shock-----
>
> DEFENCE COUNSEL: Your Honour, that wasn't the question asked. So-----?-- That was my state of mind."

[152] If one focuses on the statement, "No, I'm telling the truth in court and to police", it may be possible to argue that the witness adopted what she said in the statement but in that case the witness would be vouching for the accuracy of two inconsistent accounts. However, when the whole of the above passage is considered, it is apparent that the witness is not adhering to the content of her statement or adopting

the truth of things stated in it. By observing that when she made it she was in a state of shock, Ms FLD is explaining why her present recollection does not accord with the content of her statement. The questioning, intentionally or otherwise, was directed to establishing that the witness had said things in her prior statement. It did not seek to have the witness confirm the truth of those matters.

[153] In *Morris v The Queen*,[37] Deane, Toohey and Gaudron JJ, in a discussion concerning a prior inconsistent statement, made admissible by s 101 of the *Evidence Act* 1977 (Qld) observed:[38]

> "The receipt into evidence of a prior inconsistent statement as evidence of the facts therein contained poses particular problems in a criminal trial, especially where the prior inconsistent statement is more damaging to an accused person than is the testimony of the witness. Where the prosecution seeks to adduce such evidence from a prosecution witness, an issue may well arise as to whether the prejudicial nature of the statement does not outweigh its probative value, such that as a matter of judicial discretion it should be excluded: see *Harris v. Director of Public Prosecutions*; *Kuruma v. The Queen*; *Driscoll v. The Queen* and *Cleland v. The Queen*. If however, such a statement is admitted, it will usually be necessary for the trial judge to give very careful and very precise instructions to a jury as to the weight the evidence should be given. The nature of the instructions will necessarily depend on the particular case. It is difficult to conceive that in a case where the prior inconsistent statement is more damaging to the accused person than the evidence given by the witness, a mere invitation to the jury to consider the matters referred to in s. 102 of the *Evidence Act* would be a sufficient instruction. In many cases such an invitation may be to the disadvantage of the defence case." (citations omitted)

[154] Statements in more absolute terms as to the necessity for directions to be given on the use to be made of the content of prior inconsistent statements are to be found in *Driscoll* (in a passage from the reasons of Gibbs J quoted above), *R v Soma*[39] and *R v Pearson*.[40]

[155] Here the content of the prior inconsistent statement was much more damaging to the second appellant than Ms FLD's oral evidence. The primary judge gave no instructions as to the weight the evidence should be given. In particular, the primary judge did not refer to Ms FLD's explanation for the difference between the content of her statement and her oral evidence. It may be noted in this regard that the cross-examiner did not attempt to explore with Ms FLD why it was that her state of shock had any bearing on the accuracy of her recollection.

[156] The respondent argued that the following direction by the primary judge was sufficient to cure any of the difficulties addressed above:

> "You can only use the evidence of previous acts of violence if you're satisfied of them beyond a reasonable doubt. If you do accept this

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37 (1987) 163 CLR 454 at 468.

38 *Morris v The Queen* (1987) 163 CLR 454 at 468–469.

39 (2003) 212 CLR 299 at 334 per Callinan J.

40 [1964] Qd R 471 at 473 per Philp ACJ, at 474 per Mack J and at 479 per Hart J.

> evidence, then it can only be used by you in relation to the charges before you in the specific way in which I now direct.
>
> The evidence may be used by you to find that [the second appellant] had a relationship with [the complainant] that involved violence and that she had inflicted injury on her during the periods set out in the indictment.
>
> …
>
> You should have regard to the evidence of the instances not the subject of charges only if you find it reliable. If you accept that you can't use it to conclude that she is someone who has a tendency to commit the type of offence with which she's charged, it would be quite wrong for you to reason that you're satisfied that she committed some acts on other occasions of violence, therefore, it's likely that she committed a charged offence.
>
> Further, you shouldn't reason that she had done things equivalent to the charges charged on other occasions and on that basis could be convicted of the offences charged even though the particular offences charged are not proved reasonable doubt."

[157] The direction could not cure the deficiencies under discussion. It operated on matters which should not have been in evidence except for the limited purpose of assessing credit. As previously remarked, the matters in the statement were potentially extremely damaging to the defence case. The problem was exacerbated by the direction that Ms Swan's evidence was "evidence in this trial of violent conduct by [the second appellant] towards the complainant". As counsel for the second appellant submitted, the second appellant made no admissions of responsibility for the marks on the complainant referred to by Ms Swan. The second appellant's explanations for the injuries in her discussions with Ms Swan, although perhaps not particularly convincing, were accepted by Ms Swan. Moreover, if they were the result of maltreatment, there remains the question whether the injuries were inflicted by the first appellant rather than the second appellant.

[158] This ground of appeal has been established. The first appellant has succeeded in showing errors of law that require the verdicts to be set aside.

Conclusion

[159] For the above reasons, I would order that:

1. The appeal be allowed.

2. The verdicts be set aside.

3. A re-trial be ordered.

4. The application for leave to appeal against sentence be refused.

[160] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[161] **DOUGLAS J:** I also agree with the orders proposed by Muir JA and with his Honour's reasons.