SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCO & SCP* [2016] QCA 248
PARTIES:	**In CA No 47 of 2016** **R** **v** **SCO** **(first appellant)** **In CA No 53 of 2016** **R** **v** **SCP** (second appellant)
FILE NO/S:	CA No 47 of 2016 CA No 53 of 2016 DC No 2 of 2016 DC No 3 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Emerald – Date of Convictions: 12 February 2016
DELIVERED ON:	5 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2016
JUDGES:	Margaret McMurdo P and Morrison JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal by the first appellant is dismissed.** **2. The appeal by the second appellant is allowed.** **3. The verdicts of guilty against the second appellant on counts 14 and 15 are set aside.** **4. A retrial of the second appellant on counts 14 and 15 is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the first appellant was tried on an indictment charging 20 counts of indecent treatment of a child under 16 under his care – where the counts concerned his alleged offending against five complainants,

who all gave evidence against him at trial – where, on appeal, the first appellant submitted, *inter alia*, that there was a miscarriage of justice because there should have been separate trials for each complainant – where no application was made at trial for there to be separate trials – where the way the trial was conducted strongly suggested that there was a perceived forensic advantage for the first appellant in conducting the trial as a joint trial – whether it would be appropriate, in the circumstances, for the Court to sustain a complaint that there should have been separate trials

CRIMINAL LAW – APPEAL AND NEW TRIAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the first appellant submitted, *inter alia*, that certain evidence of the appellant's uncharged sexual acts and other discreditable conduct was inadmissible and that its admission had caused a miscarriage of justice – where the evidence was relevant to explaining or making intelligible the context or environment in which the offences occurred – where the trial judge gave careful directions about the limited way in which the jury could use the evidence – whether the evidence was properly admitted

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON DIRECTION – JOINT TRIAL OF SEVERAL PERSONS – where the second appellant submitted, *inter alia*, that the trial judge misdirected the jury as to the use that could be made of the evidence led against her co-accused, the first appellant – where the admissible evidence in the trial overwhelmingly dealt with the first appellant – where the trial judge's summing up included a misstatement that the relevance of evidence to the three counts against the second appellant was a matter for them – where the trial judge summarised the evidence on those counts without making any distinction between the evidence against the first appellant and the evidence against the second appellant and without referring to the second appellant's evidence on those counts other than when summarising her counsel's submissions to the jury – whether as a result of the misstatement and omissions in the summing up, the second appellant was denied a fair trial

Criminal Code (Qld), s 597A, s 597B

De Jesus v The Queen (1986) 61 ALJR 1; [1986] HCA 65, applied
Dupas v The Queen (2010) 241 CLR 237; [2010] HCA 20, cited
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, applied
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, applied

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
O'Leary v The King (1946) 73 CLR 566; [1946] HCA 44, cited
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, cited
R v MAP [2006] QCA 220, cited
R v Roberts & Pearce [2012] QCA 82, cited

COUNSEL:

In CA No 47 of 2016
S M Ryan QC for the appellant
G P Cash QC for the respondent

In CA No 53 of 2016
K Prskalo for the appellant
G P Cash QC for the respondent

SOLICITORS:

In CA No 47 of 2016
Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

In CA No 53 of 2016
Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Atkinson J's reasons for dismissing the first appellant's appeal against conviction and for allowing the second appellant's appeal against conviction.

[2] I have only one further observation in respect of the first appellant's first ground of appeal. There was a sound forensic reason, in addition to those mentioned by Atkinson J, for him not applying for separate trials in respect of each complainant. He was charged on counts 14, 15 and 16 jointly with the second appellant. Count 14 involved the second complainant, count 15 the first complainant and count 16 the fourth complainant. It was very much in the first appellant's interest for the jury in determining all 20 counts against him to hear the second appellant's evidence. Her version of events exculpated not just her on counts 14, 15 and 16 but also him, and not just on those counts but on all counts against him. It seems he made a reasonable forensic decision to proceed to trial jointly with the second appellant on all counts. In those circumstances, he is bound by his conduct of the trial in this appeal, even though his tactical decision did not result in his hoped for acquittal on all counts.

[3] I agree with the orders proposed by Atkinson J.

[4] **MORRISON JA:** I agree with the reasons and orders proposed by Atkinson J. I also agree with the additional reasons of the President.

[5] **ATKINSON J:** The first appellant was tried on an indictment charging 20 counts of indecent treatment of a child under 16 under his care. The second appellant was his co-accused on three of those counts (counts 14-16). The offences were alleged to have taken place between 31 December 1990 and 31 December 1994 in regional

towns. Counts 1 to 9 and count 15 involved one complainant; counts 10, 14, 17, 19 and 20 involved a second complainant; counts 11 and 12 involved a third complainant; counts 13 and 16 involved a fourth complainant; and count 18 involved a fifth complainant. The appellants are a married couple. The complainants were aged between 12 and 14 years at the time of the offending.

[6] A trial took place before a jury in the District Court at Emerald commencing on 3 February 2016. After a no case submission by the defence, the prosecution entered a *nolle prosequi* with regard to count 1 on the indictment. The jury retired to consider its verdict on the remaining 19 counts on day seven of the trial. On the following day, the jury returned verdicts of guilty against the first appellant on counts 2-12, 14-15 and 17-20; and not guilty on counts 13 and 16. With regard to the second appellant, verdicts of guilty were returned on counts 14 and 15 and not guilty on count 16.

[7] The first appellant was sentenced to concurrent periods of imprisonment of four and a half years on counts 7, 8, 9 and 12; four years on count 18; three years on count 17; two and a half years on counts 3 and 4; two years on counts 5, 6, 10, 11, 19 and 20; and 18 months on counts 2 and 15. The second appellant was sentenced on counts 14 and 15 to 12 months' imprisonment wholly suspended with an operational period of 12 months.

[8] In his summing up the learned trial judge told the jury each of the elements of each offence that the prosecution was required to prove beyond reasonable doubt and also told the jury that the essential dispute was about whether or not the events alleged by the complainants had in fact happened. The jury was required to be satisfied beyond reasonable doubt in each case that the act alleged by the complainant had in fact happened. The facts of the various counts on the indictment as outlined in the summing up were as follows.

[9] Count 2 concerned a particular occasion when the first complainant was watching television and the first appellant came up behind her naked with an erection saying to her that she made that happen to him.

[10] Counts 3 and 4 concerned an occasion where the first complainant was in her room reading a book when the first appellant came out of the shower and got on the bed next to her and tried to tongue kiss her. He was naked under his towel. Count 3 consisted of his grabbing her hand and putting it on his penis and count 4 involved his touching her breast area.

[11] Count 5 was alleged to have occurred when the first complainant was travelling in a car with the first appellant driving and the second appellant sitting on the other side of her in the front seat. The first appellant asked the first complainant to put her hand on the gear stick. When she did he moved his hand further and further up her leg until he got to her crotch where he cupped his hand.

[12] Counts 6 to 9 also involved the first complainant. Counts 6 and 7 were alleged to have occurred when the first complainant was swimming in a tank and the first appellant came up behind her and touched her on the breasts over her swimming costume (count 6) and placed his finger into her vagina under her swimming costume (count 7).

[13] Count 8 was alleged to have occurred on another occasion when she was in the tank. The first appellant ran his hands up the complainant's legs and again pushed her

swimming costume aside and put his finger inside her vagina for about 10 seconds until she was able to get away. On that occasion she said it hurt. A third occasion in the tank was the subject of count 9. The first complainant said she was in the middle of the tank, which was very deep, when the first appellant dived in and draped his arm over her shoulder and grabbed her on the breast and again put his finger insider her vagina. She struggled to get away because there was no support in the middle of the tank.

[14] Counts 10 and 11 concerned the second complainant and the third complainant. It was alleged that the first appellant invited them to look through a hole in the wall between the bathroom and a bedroom. First the second complainant and then the third complainant looked through the hole and saw the first appellant performing oral sex on the second appellant on a waterbed in that room.

[15] Count 12 involved the third complainant. She and some other children were swimming in a dam when she swam away from them with her boogie board. The first appellant followed her, pulled her underwear to the side and inserted his fingers into her vagina. She said she froze. He then asked her if she liked it and when she said she did not, he took his fingers away and swam away.

[16] Count 13 concerned the fourth complainant. She said that the first time that she went to stay at the appellants' house for the weekend the first appellant put on a pornographic film for her and some other girls to see which showed "a woman giving a head job to a man, and then there was a man behind a woman doing doggie style to her, and I remember as well a girl touching herself." There was no evidence from the other complainants about such films. He was acquitted on that count.

[17] Counts 14, 15 and 16 were counts alleged against both appellants. It was alleged that four girls were present, including three of the complainants. Count 14 involved the second complainant. She said she was watching a movie with some other girls. They had all been drinking. She saw the second appellant giving oral sex to the first appellant. Count 15 is an account of the same incident observed by the first complainant. Count 16 was based on the fourth complainant's account of the same incident. She said, however, that her recollection was hazy. She was asleep or "pretty much passed out" when she came to and she could see the second appellant giving the first appellant a "head job". She only looked for a couple of seconds until she realised what was going on. The appellants were acquitted on count 16.

[18] The indecent dealing that was the subject of count 17 concerned the second complainant. She said that the incident occurred at the appellant's holiday house when she was watching a movie in the lounge room with the appellants. The first appellant lay behind her on the couch and stroked her breasts and rubbed her vagina first over her pants and then went to go underneath her pants. She got up and went to the bathroom.

[19] The allegation with regard to count 18 concerned the fifth complainant. She said that she was asleep in bed and awoke when the first appellant who was lying beside her pulled her chin towards him and kissed her on the lips while rubbing her upper thigh and vaginal area and her breasts. When he reached under her clothing she told him to stop and he did. She said she had been drinking the night before. She said that the second and fourth complainants were nearby but they were asleep.

[20] Counts 19 and 20 concerned the second complainant and an incident on a motorcycle. The first appellant was showing her how to ride the motorcycle. He sat at the front and she sat behind him while they went for a ride. Her hands were wrapped around his waist and she said he grabbed her hand and pushed it down towards his penis. She said one of her hands touched his penis. Subsequently he sat behind her and put his arms around her waist and while she was riding the motorcycle he put his hands over her breasts.

[21] The first appellant was granted leave at the hearing to argue the following grounds of appeal:

1. There was a miscarriage of justice because the first appellant's trial concerned his alleged offending against five complainants in circumstances where there should have been separate trials for each complainant to ensure a fair trial for the first appellant.

2. If the first appellant is wrong and severance was not necessary – the learned trial judge erred in law in failing to direct the jury about how they could, or could not, use the evidence about the charged acts concerning one complainant in the case of another.

3. There was a miscarriage of justice because the evidence at trial included evidence of the first appellant's uncharged sexual conduct or sexual conversation.

4. There was a miscarriage of justice because the evidence at trial included evidence of the first appellant's permissive attitude towards the complainants drinking alcohol, his supplying them with alcohol, and his offering them valium.

5. The learned trial judge erred in law in his directions to the jury about 'wilful exposure'.

[22] The second appellant appealed against her convictions on these grounds:

1. The verdicts of the jury on counts 14 and 15 were unreasonable;

2. The learned trial judge erred in the directions he gave to the jury as to the element of 'wilfulness'; and

3. The learned trial judge erred in the directions he gave to the jury as to the use that could be made of evidence led against the second appellant's co-accused.

[23] In order to assess the grounds of appeal it is necessary to set out the evidence led at the trial. I have adopted the detailed summary provided by the first appellant which the prosecution has accepted as accurate.

[24] At the relevant time, the appellants had two properties: a farm and a holiday house near a dam.

The evidence of the first complainant

[25] The first complainant first visited the farm when she was about 12 years old. She continued to visit and stay overnight until she was 14. At the farm, she (and the

other girls she invited to the farm) rode motorbikes, shot guns, helped with the cattle and the crops and drove an old "bush-bashing car".

[26] The first complainant said some "bad stuff" started happening. The first appellant started showing her pornographic material within about six to eight weeks of her first visit. It included Penthouse and Playboy books and special books in plastic sleeves that were triple X rated. While he was showing her that material he said things like "this is what the big people do" and "this is what you need to learn". The first piece of pornographic material the first appellant showed her was a book called *The Joy of Sex*. He called her into a room she called "the alcove" and asked her to sit down. He showed her through the book and told her the sexual positions he had tried. Nothing else happened "the first time with the book but another time with the book".

[27] During that "other time", she was reading on her bed. The first appellant came out of the shower, wearing only a towel. He jumped on the bed next to her; tried to tongue kiss her; put his hand up her shirt; touched her breasts (count 4); and grabbed her hand and put it on his penis (count 3). He had the book with him.

[28] The first appellant often walked around the farmhouse wearing nothing. The first complainant recalled an occasion on which he came up behind her in the hallway, naked and with an erection. He said "You made me do this" (count 2).

[29] The first appellant showed her sex toys. He showed her a penis ring and said he used it to stay erect longer. He showed her a vibrator which he said made the second appellant feel good. The second appellant was in the house on two or three occasions while the first appellant walked around naked.

[30] The first complainant travelled with the first appellant to buy alcohol from a bottle shop which he gave her to drink (when the other girls were also at the farm). The first appellant gave her valium two or three times. There were other girls staying at the farm when the appellant gave her valium. She could not recall the second appellant being present when the first appellant gave her valium.

[31] On a trip from one town to another to pick up a mechanical device, while the first complainant was sitting between the appellants on the bench seat of their white Ford Courier utility holding on to the gear stick to stop it popping out, the first appellant put his hand on her leg, moved it up to her crotch and cupped it (count 5).

[32] The first complainant invited her friends (the second, third, fourth and fifth complainants and another girl) to the farm. The first complainant said the first appellant "lost a little bit of interest in me when the other girls started coming up". He talked to her a little bit about sex, but mostly focused on the second complainant. She heard him talk to the second complainant about sex, including how good it felt and that she should be looking forward to it. The first appellant walked around naked when the other girls were at the farm.

[33] The first complainant remembered three or four sexual touchings when she was swimming in the water tank at the farm. She was hanging over the side of the tank when the first appellant came up behind her, slid his hand up her legs, pushed her swimming costume apart and put his finger in her vagina (count 7) and grabbed her breasts over the top of her costume (count 6). She pushed him off. On the next occasion, to show her how deep the tank was, he used her legs as a gauge. He ran his hands down her legs until he got to the bottom of the tank (she was on the edge

of the tank again) and as he came up, he ran his hands up her thighs, pushed her swimming costume apart and stuck his finger inside her vagina (count 8). She wriggled away. The penetration hurt a lot. On the third occasion, she was in the middle of the tank. The first appellant put his right arm over her shoulder and grabbed her breast. He pushed her swimming costume aside and inserted his finger into her vagina (count 9). The second appellant and the second complainant were outside the tank at that time.

[34] The first complainant stayed over at the appellants' holiday house once or twice with the second, fourth and fifth complainants. She recalled feeding lorikeets in the afternoon when the second complainant called her name. The second complainant told her to "have a look at this". She pointed into the appellants' bedroom. The curtain was open. There was no flyscreen. The appellants were having sex. They noticed the girls and waved to them.

[35] One evening at the farm the first, second, fourth and fifth complainants were in the lounge room with the appellants. The four girls were on one couch. The appellants were on another. The girls were watching a movie; the first complainant thought it was *Babe*. The lounge room was dimly lit by the kitchen light. The second complainant hit the first complainant on the shoulder and pointed to the appellants. The second appellant was lying across the first appellant's lap, performing oral sex on him. Her head was lying away from the girls. The activity continued for about ten minutes (count 15).

[36] The first complainant was cross-examined about (among other things) the timing of her visits to the relevant properties; the floorplan and design of the relevant properties; her obtaining "help" from the appellants years after the events and telling the first appellant she would "love" to spend time at his farm in an effort to alleviate her depression (she contacted the first appellant by Facebook message in 2010); the first appellant contacting her via Facebook on 29 November 2012 and her calling him "Dad" in her reply; her failing to complain, including to psychologists, when she had opportunities to do so; her admission to Damascus House in 2010 for drug dependence and her criminal convictions for dishonesty (obtaining scripts for prescription medications using her girlfriend's Medicare card).

[37] The first complainant was also cross-examined about the cars owned by the appellants. It was suggested to her that at the farm there were two vehicles, a Mazda Bravo, which was driven on the road, and a Ford Courier, which was used for driving around the farm. It was put to her that the Ford was never taken on the road. She said that it was.

[38] It was put to that there were no pornographic magazines at the farm. She said there were – "scattered everywhere", "in piles". It was put to her that the only magazines the appellant had at the farm were Pix People magazines. She said "No, they were far worse". She said it was "a sure thing" that she was shown *The Joy of Sex*.

[39] It was put to her that there was no sexual touching; there were no sex toys at the farm; none were shown to her at the farm (or elsewhere); the first appellant never provided her with alcohol or valium; she did not drive in the white Ford Courier with the first appellant to collect machinery; the first appellant never dived off the edge of the water tank into the tank (a detail of count 8); *Babe* was not released until December 1995 (she said she'd just guessed at the movie they were watching); she did not see the second appellant perform oral sex on the first appellant. She was

questioned about heavy rubber-backed curtains and fixed fly screens (relevant to her allegation that she had seen the appellants having sex through a window).

[40] Her responses to the questions asked of her in cross-examination were consistent with her allegations.

[41] She agreed that she had spoken to the second and fifth complainants and may have spoken to the fourth complainant about this matter but she said she did not speak to them about what she put in her statement.

Evidence of the second complainant

[42] The second complainant went to the appellants' farm with the first complainant and her parents in early 1991 or 1992. She visited there 15 or 20 times. At the beginning, it was just with the first complainant, then the third, fourth and fifth complainants and two other girls, one of them only once.

[43] The second complainant described the things she did on the farm including motorbike riding. She described a sexual incident which occurred when the first appellant was teaching her to ride a motorbike. She was behind him on the bike with her hands around his waist and he grabbed her hand and pushed it down towards his penis. One hand touched his penis (count 19). She immediately pulled back. They swapped positions. He put his arms around her waist and put both hands on her breasts (count 20). She pulled away.

[44] The second complainant remembered the first appellant telling her "how to give a boy a head job and also a hand job and to always carry tissues… in case the boy came, that you could wipe the cum up in the tissues". She did not recall anyone else being around during this conversation. On one occasion, after she and the first complainant and the appellants had been swimming in the water tank, the first appellant told her that while she and the first complainant were swimming the second appellant was "wanking him and… he was fingering" the second appellant.

[45] The second complainant said that the first appellant "would always speak about sex … it was either a sexual gesture … could be anything. He had magazines lying on the ground, sexual magazines like Picture magazines with naked women. He would sit on the couch in his stubbies, short blue shorts … his legs would be open and … his penis or his balls would hang out the side and he told me one time that he sat on the front stairs naked as the [school] buses go past, having a cup of coffee." She could not remember anyone else being present for the bus conversation. She said she saw his genitals exposed through his shorts maybe three times.

[46] The second complainant said she saw Picture magazines on the floor in the lounge room. On one occasion, the first appellant showed her pictures of semi-naked women as he flicked through the magazine, when she was by herself.

[47] On a couple of occasions, the first appellant told the second complainant that he wanted to be the first person she had sex with, so he could show her what to do. No one else was present for that conversation. Otherwise, he joked or spoke about sex "all the time" in the presence of the first, second, third and fifth complainants.

[48] The second complainant said the appellants gave them alcohol. She remembered rum and vodka. She said the appellants bought the alcohol when she was with them but she could not remember whether anyone else was with them.

[49] The second complainant said that the first appellant told her that he and his wife would be having sex "tonight" and invited her to watch through a hole in the bathroom wall. She told the third complainant about the invitation. They did and saw the first appellant rubbing and licking the second appellant's vagina as she sat up in bed reading a book (count 10). When the first appellant asked the second complainant the next day if she had looked she said that she had not.

[50] The second complainant said that when she, the first, fourth and fifth complainants and another girl and her two brothers were at the holiday house with the appellants, the first appellant stroked and circled her breasts and rubbed her vagina over her pants as they lay on a couch together watching a movie under a blanket. She said that she got up and walked to the bathroom when the first appellant went to go underneath her pants (count 17). When she came back from the bathroom, he asked her whether she had "wet stuff on [her] pants". She said that she did not. She said that the second appellant got the first appellant the blanket with which he covered himself and the second complainant when he asked for it.

[51] The first appellant showed the second complainant the second appellant's dildo in her bedside table. The second complainant remembered it as purple. He said it was there if the second complainant wanted to use it. She was alone with him at the time.

[52] The second complainant remembered walking with the first appellant near chicken pens on the farm and telling him not to touch her again. She recalled, "he said to me that if I wanted to go to the police that he would admit to it, and I said to him no. I won't be going to the police." He did not touch her again. She did visit him at a second farm with the fifth complainant maybe half a dozen times and with her boyfriend once. She went to the appellants' wedding.

[53] The second complainant remembered seeing the second appellant giving the first appellant oral sex. She was with the first, fourth and fifth complainants. They had been drinking and the first appellant had offered them valium. The second complainant said she was lying on the ground with the girls watching a movie. She looked back and saw the appellants engaged in the sexual act (count 14).

[54] The second complainant remembered seeing the appellants having sex in the bedroom at the holiday house as she walked past the window. She told the first complainant and she looked through the window as well. The second complainant remembered the curtains flapping. She did not remember there being a flyscreen on the window. She remembered the bedroom they were in as off a verandah at the back of the house (although their usual bedroom was at the very front of the house). She said that the appellants looked at her and the first complainant and smiled.

[55] The second complainant was cross-examined about (among other things) the timing of her trips to the properties, the other people who visited the properties and the location of the appellants' bedroom at the farm. It was suggested to her that there were no pornographic magazines in the house; that the first appellant was not always talking about sex; that there was no indecent touching on the quadbike; that there was no conversation about boys, head jobs and tissues; that there was no conversation about hand jobs; that the first appellant did not say that he wanted to be her first sexual experience; that the first appellant did not tell her about the second appellant giving him a hand job at the water tank; that the first appellant did

not supply her with alcohol or valium; that the bathroom incident did not happen; that the lounge room incident did not happen; that the incident of seeing the appellants have sex at the holiday house did not happen – the windows were screened; that the touching during a movie at the holiday house did not happen; that the first appellant did not show her a dildo; that she did not tell the first appellant in a conversation to stop touching her; that the first appellant did not tell her that he would be naked when the buses would go past the front door; and that the first appellant's genitals did not slip through the leg of his shorts.

[56] Her responses were consistent with her allegations.

Evidence of the third complainant

[57] The second complainant invited the third complainant to the appellants' farm. The third complainant could not remember who else went with them. The first appellant said something which caused the second and third complainants to go into the bathroom and look through a hole into the appellants' bedroom. She saw the first appellant performing oral sex on the second appellant through the hole. The second appellant was reading a book (count 11).

[58] During a trip to the holiday house, while the third complainant was swimming, the first appellant came up behind her, pulled her underpants to one side and inserted his fingers into her vagina (count 12).

[59] It was suggested to her in cross-examination that neither incident happened. She maintained her allegations.

The fourth complainant

[60] The fourth complainant's evidence was that she went first went to the appellants' farm in 1993 with the first and second complainants. Over a period of about two years, she visited the farm with the first, second and fifth complainants and on one occasion with two other girls.

[61] She said they were told to shower together to save water. There was a timber slat missing in the bathroom which allowed the girls to see into the appellants' bedroom. When the fourth complainant asked the first appellant why he did not fix it, he said "don't you trust me to not look at you?"

[62] The fourth complainant said the first appellant "would teach us things … he would teach us what to do with boys, or if we wanted to touch ourself, he would tell us how to." She said the first appellant "would put on porno movies sometimes. He did it the first time when we stayed that full weekend. And he would tell us what felt good for a boy." She said that she and the first and second complainants watched the movie. The first appellant discussed "headjobs" and masturbation with them as the movie was playing. He told them that if they wanted him to be their "first" he would look after them and not hurt them, and it would not then hurt as much with another. There were many conversations with the first appellant about sex and what to do with a boy – including when the fifth complainant was present. Her evidence as to the showing of the film was the only evidence of count 13. He was acquitted on that count.

[63] The fourth complainant said that she recalled the first, second and fifth complainants watching pornographic videos but she was more interested in riding motorbikes. She had a hazy recollection of one occasion in which she was asleep or "pretty much passed out" in the lounge room, when it was really dark but she could see the flash of the television. She rolled her head over and could see the second appellant giving the first appellant a "head job". It took her a couple of seconds to realise what she was seeing, then she rolled back over. She said that the second appellant was on her knees, in his lap. Her head was going up and down on his penis with her hand on him. She did not remember seeing the other girls there. They had had valium and alcohol. This was count 16 of which both appellants were acquitted.

[64] On another occasion, the fourth complainant said she and her brother and the first and second complainants visited the holiday house where they had alcohol, but not much, and no valium. She remembered running up the hallway of that house and seeing the appellants having sex in their bedroom. The first complainant and her brother were with her. They laughed, ran away and told the second complainant. The appellants were not looking in their direction.

[65] The police approached her for a statement. In cross-examination it was put to her, among other things, that there was not a slat missing from the bathroom wall, rather there was a gap between the slats where light came through. She said that a whole piece was missing. It was put to her that the first appellant did not have a VCR at the farm. She said, in effect, that she had seen videos played. As mentioned earlier, that related to count 13 of which the first appellant was acquitted. It was put to her that she did not see the second appellant giving the first appellant oral sex. She said she saw it happen. As mentioned before, these were the facts of count 16 of which the appellants were acquitted.

Evidence of the fifth complainant

[66] The fifth complainant first met the appellants when she was 13 or 14. She could not recall the number of times she visited the farm.

[67] As to alcohol, she said "we" would give the first appellant the money and one of the appellants, she could not recall which, would obtain alcohol for them. She drank alcohol every evening she stayed at the farm. The first appellant offered her a valium. She could not remember whether she took it. She could not remember whether she saw the first appellant offer tablets to anyone else.

[68] She added another girl to the list of girls who the first complainant said visited the farm.

[69] She said she went swimming in the water tank once or twice but did not like it. She remembered swimming with the second and fourth complainants and the first appellant.

[70] She was asked about the topics of conversation between "the girls" and the appellants. She said "… he always used to call us his girls… and I remember he used to say that he could teach us how to masturbate and he'd teach us how to kiss so when we had a boyfriend that we would know what to do". She said it was a "running conversation". She thought he was joking. By "running conversation" she meant that the conversation happened more than once. The second and fourth complainants were present for it. The fifth complainant called the first appellant a "dirty old bastard".

[71] On one occasion, while she was asleep in bed, the fifth complainant was awoken by the first appellant lying beside her. He pulled her chin towards him, kissed her on the lips, and rubbed her legs and breasts. She said "no. I don't like that. I don't want to do that." He said "I don't want to make you do anything you don't want to do" and he stopped. It was when he reached under her clothing and touched her vagina that she told him to stop (count 18). The second and fourth complainants were there but they were asleep. They had been drinking. The first appellant had given them the alcohol.

[72] When she was 13 or 14, in the school holidays of 1994 or 1995, after the visits to the farm, the fifth complainant watched *Blue Lagoon* at the first appellant's second farm which was in another town. She was there with the second and fourth complainants. They did not drink as much at that farm because there was much more to do. The three of them went to the appellants' wedding.

[73] The fifth complainant said that the police approached her to give a statement in this matter. Under cross-examination, she agreed that her statement was dated 17 February 2013. She also agreed that she had a Facebook conversation with the first complainant on 24 January 2013 and a telephone conversation with her on the next day. She explained that she spoke to the first complainant because she was "placed in an incident" (being in the lounge room while the incident the subject of counts 14, 15 and 16 took place) that she could not recall and she wanted to "piece that together".

[74] The fifth complainant said that she was offered valium more than once but could only remember taking it once at the farm. It was put to her that the first appellant never offered valium, never supplied her with alcohol and did not touch her sexually in the bedroom. Her responses were consistent with her allegations.

[75] In re-examination the fifth complainant confirmed that she did not recall seeing the second appellant performing oral sex on the first appellant while she was at the farm with the first complainant. She also said that, although the first complainant asked her whether she remembered the first appellant touching anybody in the water tank, she did not.

Evidence of two other girls

[76] The first girl to give evidence who was not one of the complainants said she often stayed in the town, where the farm was, with friends. They went to the appellants' farm at the second complainant's invitation once. The first complainant was there and a couple of other girls from the town. This first girl brought alcohol with her. She did not recall seeing other alcohol. The first appellant told her to be careful and responsible with her drinking; that the second complainant was in charge and that if the second complainant "was okay then it was okay."

[77] The second girl who gave evidence stayed at the appellants' farm once at a "girls' weekend away" organised by the second complainant. The first appellant told her and the other girls that they were allowed to drink but not to tell their parents. He told them to have fun and to feel they could talk to him about anything at all. The first appellant bought them alcohol with their money and they drank the whole weekend. She was there with the second, fourth and fifth complainants and the first girl. The girls were talking about boys and school and what they wanted to do when the first appellant joined in their conversation. He asked them whether they had kissed

boys; whether they were sexually active and invited them to ask him anything they wanted to know.

[78] On the Saturday night, the fifth complainant had stomach pains and the first appellant offered to give her a "matchstick massage". He ran the matchstick over her stomach and legs. He offered to give the other girls a massage after eliciting a statement from the second complainant that they could trust him. He offered the fifth complainant valium to help her sleep and relax. He offered all the girls valium. Everyone had a matchstick massage. During the massage of the second girl he ran the matchstick over her breasts but did not touch her nipples. He told her she could trust him and that he was trying to make her feel relaxed. Under cross-examination it was put to her that the conversation in the lounge room did not take place; nor did the first appellant buy the girls beer, offer them Valium or give them a matchstick massage. Her responses were in accordance with her accusations.

Evidence of the second appellant

[79] The second appellant gave evidence that the first appellant suffered back injuries in January 1991; he had surgery in 1991 and in early 1992, during which a dorsal stimulator was inserted. The first complainant came out to the farm in the later part of 1990, before the first appellant's injury. The second appellant did not recall the girls visiting much, if ever, in 1991 because the first appellant was in bed most of the time.

[80] In 1992, the first complainant started visiting again; she brought a friend and "further down the track, [the second complainant] started invited her friends from her age group". The appellants sold the farm in August 1993 and the holiday house in September 1993 and moved to another town where the second farm was situated.

[81] The second appellant remembered the second complainant being at the second farm quite a lot in 1993. She remembered the fourth complainant coming out "on occasions". She did not remember the fifth complainant and did not know the third complainant. The other two girls were "kind of familiar", but she did not talk to them much or "hang with them" much. They were there for a teenage, girly, weekend.

[82] In 1997, the first complainant lived with the appellants for a couple of months and the second complainant lived with them for a couple of weeks.

[83] With regard to the holiday house, there was a verandah at the back of the house. All of the windows were screened with screwed-on screens which were heavy and dense. The curtains at the house were not light-weight or fluffy or capable of fluttering out the window. They were heavy, floor to ceiling curtains which the second appellant had made.

[84] The second appellant said she did not see alcohol at the farm or at the holiday house. The appellants were non-drinkers. The first appellant had valium after his injury; "he was referred to a pain clinic because of the chance he could become addicted… so they weaned him off." Neither appellants owned a sex toy. She did not see anything pornographic. They could not afford magazines. They did not have Pix People nor pornographic magazines lying around. They had no cupboards in which to store magazines. Their bedroom did not have a door. The first appellant did not walk around the house naked and she would have chastised him had he done so.

[85] The second appellant did not recall driving to another town to pick up machinery. They mostly used the Mazda Bravo Four Wheel Drive dual cab with a utility back.

[86] The second appellant said she could recall no oral sex (by the first appellant upon her) at either the farm or the holiday house. Oral sex was "something that was so rare, I'd probably go so far as to say it didn't happen during those period [*sic*] of time." She could not recall having sex with the first appellant in the afternoon; sex between herself and the first appellant was "exceedingly rare" because she had been interfered with as a child. It would never have happened that she gave the first appellant oral sex in the lounge room.

[87] Under cross-examination the second appellant said she was not aware of any occasions when the girls stayed at the properties while she was not there. The first appellant did not ride the motorbike, which was child-sized, but the girls did. The second appellant said she organised the horse riding activities until the girls were competent on their own. She said there was not a lot of swimming in the tank. There were not many occasions when the first appellant swam in the tank after he had injured his back; often he enabled those swimming to get out. The first appellant was capable of climbing up and getting into the tank by standing on a quadbike. The second appellant could recall at least two occasions when the first appellant was in the tank swimming with the girls and later in evidence said "I can't say that… the incidents I remember him being there were only with [the first complainant] … I can recall him being in there at the same time … as [the second complainant]." The second appellant had no recollection of being in the tank with the first appellant at the same time as the first and second complainants but it was "quite possible". The second appellant said she was always there when the girls were swimming (the first appellant was not on his own with them).

[88] The second appellant said the first appellant showed the girls how to ride the quadbikes. Usually he sat at the front. She could not say that she was there every time he took the second complainant for a ride. She said that after showing the girls the controls, he would sit behind them and let them control the quadbike. She agreed that "the preference when introducing a new person to the quad is to have them hold on around the waist of the driver because it's more stable for the passenger". However, she could not recall the first appellant having his arms around the second complainant when he allowed her to drive. It "did happen" that he was behind the second complainant on the quadbike but he "could very well have been hanging on to the bars" (rather than having his arms around her).

[89] The second appellant said that she probably had sex with the first appellant at the farm and at the holiday house on a couple of occasions; "it's not that we totally abstained". Her recollection of them experimenting with oral sex was "much later" when they were living in the city; it never happened during the relevant time span.

[90] Her evidence was that they did not have a VCR at the holiday house until January 1993 when town power was connected. There was no VCR at the farm although there was a television. She said there were no pornographic magazines like Pix People at the farm or elsewhere. The *Joy of Sex* was not at the farm – neither she nor the first appellant owned it.

[91] The second appellant said there were no slats missing from the bathroom. There was a hole in one of the bathroom slats between it and a bedroom. She became

aware of it when the girls were there. That bedroom contained a Queen sized water bed which the appellants slept in, at times, if they stayed over after the first appellant's brother left the property from March 1993. When the girls stayed, they slept in that bedroom. She did not feel it was true that at least on one occasion when the second and third complainants were there that the appellants slept on the water bed – but she could not deny it. She did not hear or see the first appellant talk to the girls about sexual matters.

[92] The second appellant said it was "an absolute lie" that the girls drank alcohol at the farm. During 1992 and 1993, the first appellant was taking medication for his back, but "not on a regular basis". In 1993, when the girls visited the property, the second appellant did not see the first appellant in possession of prescription drugs which looked like valium. All his tablets were white. She had no recollection of the first appellant taking a tablet while the girls were there and no recollection of the first appellant giving the girls any white tablets (or drugs of any sort) when they visited in 1991, 1992 or 1993.

[93] The second appellant said the first appellant did not wear shirts very often. She would not have had the first appellant perform oral sex on her while the girls were at the farm. She did not think that the first appellant swam in the dam at the holiday house because of his back. Apart from opening the sliding doors to the back balcony at the holiday house, the windows were shut because the house was air-conditioned. The windows to the main bedroom were never opened. The screens were not detachable. She disagreed "wholeheartedly" that she and the first appellant had sex in the bedroom with the door open and the window open while the girls were there. Her evidence was that the first and second complainants could not have been looking in through the window in that bedroom because there was nothing underneath that window and it was a two storey house. There was no window on the back verandah and there was no back verandah. She said there was "no way" she would have given the first appellant oral sex and certainly not in the lounge room in front of the girls.

[94] The second appellant did not "rule out" driving the Ford Courier on the road, especially if she and the first appellant were doing different things. She had no recollection of a trip with the first appellant and the first complainant at night in the Ford Courier.

[95] The first appellant might have told the girls the odd dirty joke or jokes with a sexual connotation which embarrassed her. She was not looking for indicators of a sexual dynamic between the first appellant and anyone else. She saw nothing that indicated the first appellant was particularly friendly to any particular person or that he was clingy.

[96] The second appellant was cross-examined by counsel for the first appellant about the curtains she had made for the house in the floor plans. She said it would not have been possible for the first appellant to dive into the water tank because the rim was too thin and because it was dangerous to do so. The second appellant was also questioned about the layout of the houses in reference to photographs of them. The judge thereafter permitted the prosecutor to ask the second appellant more questions about the layout of the houses.

No evidence by the first appellant

[97] As was his right, the first appellant did not give evidence.

Separate trials

[98] The first ground of appeal raised by the first appellant was that there was a miscarriage of justice because the trial concerned his alleged offending against five complainants in circumstances where there should have been separate trials for each complainant.

First Appellant's Submissions

[99] The first appellant submitted that allegations of sexual offences should be tried separately, except where evidence of one count is admissible on the other.[1] It was then submitted that the evidence on the counts in this case was not cross-admissible, except as regards the counts in which there were co-complainants (such as counts 10 and 11 and counts 14, 15 and 16).

[100] It was submitted that the following principles applied in this case in which the issue was whether or not the conduct occurred. Similar fact evidence is prima facie inadmissible because of its prejudicial effect.[2] The admission of similar fact evidence is exceptional and requires a strong degree of probative force. It must have a really material bearing on the issues to be decided. It is only admissible where its probative force clearly transcends its merely prejudicial effect. It is necessary to find a nexus between the primary evidence on a particular charge and the similar fact evidence. The probative force must be sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused. A strong degree of probative force is required if the exclusionary rule is to be displaced and "striking similarity" will be necessary if the evidence of similar facts is to have a sufficiently strong degree of probative force to displace the exclusionary rule.[3]

[101] The first appellant submitted that notwithstanding there was no application by defence counsel, the judge, who recognised that the evidence of the counts concerning one complainant was not admissible in the case of another, should have acted under s 597A of the *Criminal Code* and ordered separate trials for each of the complainants. The first appellant submitted that he suffered a miscarriage of justice by reason of the joint trial.

Discussion

[102] So far as is relevant, s 597A provides as follows:

> "**597A Separate trials where 2 or more charges against the same person**
>
> (1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in the person's defence by reason of the person's being charged with more than 1 offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any 1 or more than 1 offence charged in an indictment the court may order a

---

1 Citing *De Jesus v The Queen* (1986) 61 ALJR 1; *R v MAP* [2006] QCA 220 at [37].
2 *Phillips v The Queen* (2006) 225 CLR 303.
3 *R v MAP* [2006] QCA 220 at [43].

> separate trial of any count or counts in the indictment.
>
> (1AA) In considering potential prejudice, embarrassment or other reason for ordering separate trials under this provision in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion."

[103] No application was made at any time before or during the trial by either appellant for any offences on the indictment to be heard separately.

[104] The leading case on when separate trials are appropriate is *De Jesus v The Queen*[4]. In that case, the appellant had been charged with two counts of rape and other related charges. At the trial, counsel applied for separate trials of each of the two rape counts. Although there were points of similarity between the two cases of rape, there were points of marked dissimilarity. With regard to one rape, the appellant denied having been involved at all and with regard to the other he admitted sexual intercourse but said that it was with the complainant's consent. The evidence of one rape was inadmissible on the charge of the other. The joinder was held to be highly prejudicial as the appellant was raising an issue of identity in one case and an issue of consent in the other.

[105] Where no application for separate trial had been made, the relevant principle to be applied on appeal and its qualification was set out by Gibbs CJ who held at 3:

> "It has been settled, at least since *Stirland v Director of Public Prosecutions* [1944] AC 315 at 327-328, that it is not necessarily fatal to an appeal that counsel for the accused at the trial failed to raise the necessary objection. Of course, if it were thought that counsel had deliberately refrained at the trial from submitting that the joinder was impermissible in order to gain some tactical advantage, the case would be different, but it is apparent that in the present case counsel for the applicant simply proceeded on a misunderstanding, shared by counsel for the Crown, as to the correct principle to be applied."

[106] In this case not only was no application made for the complainants to be heard separately, but rather the appellant gained forensic advantage from having the complainants heard at one trial. Firstly, there was cross-examination of the first complainant and the fifth complainant designed to show that there had either been collusion or at least inadvertent contamination of their evidence. Secondly, counsel for the first appellant referred to inconsistencies between the evidence of various complainants to undermine the credibility of each of the complainants. When the learned trial judge referred to those submissions in his summing up he gave some details and then said "The point being made is that the various accounts don't match and would give you real doubt about whether the event happened at all."

---

4 (1986) 61 ALJR 1.

[107] These two factors strongly suggest that there was a perceived forensic advantage for the first appellant in conducting the trial as a joint trial. It would be inappropriate in those circumstances for a successful complaint to be made on appeal that there should have been separate trials. It was not necessary to ensure a fair trial.

Directions on cross-admissibility of evidence

[108] The first appellant's second ground of appeal was that, even if severance was unnecessary, the judge erred by failing to direct the jury as to how they could, or could not, use the evidence about the charges concerning one complainant in the case of another.

First Appellant's Submissions

[109] To support this ground, the first appellant drew attention to remarks by the prosecutor in his closing address which were said, in effect, to argue that the evidence of one complainant was bolstered by the evidence of others, without limiting that submission to evidence of alleged conduct against co-complainants and without differentiating between evidence of charged offences and uncharged acts. The prosecutor's address contained the following passage:

> "… Ultimately my submission to you about all the evidence of the complainants is that the evidence of each of the complainants fits well with the evidence of both of the other complainants and all the surrounding evidence given by the other witnesses, and you build up a picture from all of the evidence, both of the environment in which the offences happened, and of each of the incidents themselves, and I'd suggest that the evidence as a whole powerfully supports the evidence of each of the complainants about the offences."

[110] It was submitted that the trial judge's reasoning did not adequately advert to the issue of cross-admissibility of the evidence as regards the alleged offending against each complainant separately but rather, in the following passage, his Honour's remarks risked encouraging 'strength in numbers reasoning' in the case of every count:

> "… in some cases, witnesses have given evidence about the same alleged events or statements made. And the obvious examples are counts 10 and 11, and counts 14 to 16. In considering that, you must be satisfied that the evidence of each of the complainants is independent of the others. You can't use the evidence of a complainant in combination with other evidence of another complainant unless you're satisfied that there's no real risk that the evidence is untrue because of concoction because they're putting their heads together. Obviously, the value of any combination, and, likewise, any strength in numbers is completely worthless if there's a risk that what the complainant said is untrue because of concoction by them. You must be satisfied there's no real risk of concoction."

Discussion

[111] Although separate trials with regard to each complainant was not necessary to ensure a fair trial, the joint trial put a significant burden on the trial judge to ensure that the jury reached a verdict on each count related only to evidence admissible

against each defendant on that count. In order to determine whether or not that was done it is necessary to consider the judge's summing up to the jury in detail.

[112] His Honour explained to the jury that his summing up would be in three parts (which he referred to as chapters). In the first part, he told them that he would give them the directions which are generally given to juries to take into account in their deliberations. The second part was to consist of an examination of the charges, their legal ingredients and the facts and evidence relevant to them as well as directions as to how to deal and how not to deal with some of the evidence. The third part was to be a brief review of the arguments of counsel.

[113] The learned trial judge first gave a general overview of the charges faced by each defendant. He ensured that the jurors had copies of those charges. He reminded them that the first appellant faced 19 charges and the second appellant three charges and that there were three counts in which they were co-accused. He told the jury there were three different types of charges: the first type was indecent dealing; the second type was wilfully and unlawfully exposing a child to an indecent act; and the third type was unlawfully exposing a child to an indecent image without a legitimate reason.

[114] His Honour's directions then covered the following usual directions: the different functions of judge and jury and the requirement for the jury to follow the judge's directions on the law but that they could ignore any comment that he made about the facts; the need to try to reach a unanimous verdict; that a verdict must be reached only on the evidence; that they should ignore anything external to what had happened in the courtroom; what parts of the trial are not evidence; how inferences could be drawn; the burden and onus of proof which meant that they must be satisfied beyond reasonable doubt of all the elements that make up a charge; the requirement to acquit if they were not satisfied beyond reasonable doubt; the requirement to approach their task dispassionately; the right of the first appellant not to give evidence; the effect of the second appellant's giving evidence; and how the credibility and reliability of the evidence of witnesses could be examined. He explicitly told the jury that they must take into account the evidence relevant to each charge.

[115] His Honour then explained each of the elements of the charge of indecent dealing with a child which was the offence found in counts 3, 4, 5, 6, 7, 8, 9, 12, 17, 18, 19 and 20. The first appellant was the only person charged on those counts.

[116] The judge told the jury that before they could convict on a count of indecent dealing the prosecution must satisfy them beyond reasonable doubt of the following:

1. the first appellant dealt with the particular complaint, which, in this case, meant touching the child or having the child touch him;
2. the dealing was indecent;
3. the dealing was unlawful;
4. the complainant was under 16; and
5. the child was at the time under his care.

He correctly told the jury that the only real issue in the trial was whether the particular touching that was alleged had occurred.

[117] The judge instructed the jury as to the second type of charge: wilfully and unlawfully exposing a child under 16 to an indecent act. This charge was the subject of counts 2, 10, 11, 14, 15 and 16. His Honour explained again that before they convict of such a charge the prosecution would have to prove the following elements:

1. The defendant wilfully and unlawfully exposed the complainant to an act;

   His Honour defined the terms, "wilfully", "unlawfully" and "exposed". He told the jury that "wilfully" means deliberately: that is, that the defendant deliberately exposed the child to an indecent act. The judge did not refer to the extended meaning found in the bench book, which is that the defendant deliberately did an act aware at the time that the result charged was a likely consequence of the act and yet *recklessly* proceeded regardless of the risks. In other words, he directed them that in this case "wilfully" must mean deliberately. His Honour explained that "unlawfully" meant not justified, authorised or excused by law. He further explained that "exposed" meant showing someone something or causing them to be aware of it or at risk of seeing or being aware of the incident.

2. The act was indecent;

3. The complainant was under 16 years; and

4. At the time of the act the child was under his care.

[118] The third type of charge was wilfully exposing a child under 16 to an indecent image. There was only one of those charges which was count 13. His Honour reminded the jury that the prosecution must prove each of the elements beyond reasonable doubt. He explained the elements to be:

1. the defendant wilfully exposed the child. He again explained that "wilfully" meant deliberately and that "exposed" in these circumstances meant showed, so "wilfully exposed the child" meant deliberately showed the child the material;

2. to an indecent image. He reminded them that he had already defined "indecent" to them twice;

3. the complainant was under 16 years;

4. the defendant had no legitimate reason to expose the complainant to the image; and

5. the child was under his care.

His Honour told the jury that the way the case had been conducted there was really only one question, that is whether there was an exposure of the child to the particular material.

[119] The learned trial judge reminded the jury that there were two defendants and 19 counts and that both appellants were charged with counts 14 to 16 and that only the first appellant faced the rest. Significantly, his Honour then said to the jury:

> "You must consider each charge separately, and evaluate the evidence relating to that particular charge, to decide whether you are satisfied, beyond reasonable doubt, that the prosecution has proved its essential elements. You'll return separate verdicts for each charge. And although I'll talk about this again later, when I say 'evaluating the evidence relating to the particular charge', as a matter – it's

> obvious to you that will mean the evidence of the particular complainant about what it's said happened on that day. That's the nu[b] of it. Do you accept, beyond reasonable doubt, when a complainant says this happened? If you have a doubt about it, you must acquit. In relation to – the evidence in relation to each separate charge is different, and so your verdicts need not be the same. The elements, as I've just shown you, are not the same for all of the offences, and again, so your verdicts need not be the same.
>
> Although the two defendants are being tried together, you must give the cases against and for each of them separate consideration. For that matter, much of the evidence is not relevant to the three charges that [the second appellant] faces. You might take the view that none of it is, except for the particular evidence, but that's a matter for you.
>
> Where evidence is admitted against only one accused, you must consider it separately. In respect of each charge, each defendant is entitled to have their case decided on the evidence and the law that just applies to the charge to the person. So you've returned separate verdicts in respect of each defendant, and in respect, of course, of each charge."

[120] His Honour then went on to speak about each of the complainants, reminding the jury that "the question is: looking at each episode, are you satisfied beyond reasonable doubt that it happened?" His Honour then instructed them:

> "If you have a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one count, or more counts, that must be taken into account in assessing the truthfulness or reliability of her evidence generally. Suppose, when considering one count, you get to the point where you have some reasonable doubt about guilt of that particular offence. If that's the case, then first, of course, you find the defendant not guilty in relation to that count, because you have reasonable doubt about it.
>
> But there's another aspect to it. That doesn't necessarily mean that you can't convict of any other charge. But you must, of course, consider why you have a reasonable doubt about that part of the complainant's evidence, and consider whether it affects the way you assess the rest of her evidence. Does your doubt about that aspect of her evidence cause you to have a reasonable doubt about her evidence relevant to another count?"

[121] His Honour then went through the specific evidence relevant to each count and reminded the jury that in order to find either appellant guilty of any of the counts they had to be satisfied that each of them did the thing of which they were accused. The learned trial judge reiterated from time to time with regard to each count that the jury must be satisfied beyond reasonable doubt that the event occurred before they could convict on that count.

[122] His Honour then referred to evidence other than direct evidence of specific offences. Those directions are more relevant to the third and fourth grounds of appeal and will be referred to in the discussion of those grounds.

[123] His Honour then referred to the charges where witnesses had given evidence about the same alleged events or statements, the examples being counts 10 and 11 and

counts 14 to 16. His Honour told the jury that in considering those charges, they must be satisfied that the evidence of each of the complainants was independent of the others. They could not use the evidence of a complainant in combination with other evidence of another complainant unless they were satisfied that there was no real risk that the evidence was untrue because of concoction. He warned them that the value of any combination or strength in numbers was completely worthless if there was a risk that what the complainant said was untrue because of concoction by the complainants. They must be satisfied that there was no real risk of concoction.

[124] His Honour then directed the jury about how they could use the admission that the second complainant said that the first appellant made to her. He then referred to evidence of complaints made after the event by various complainants. His Honour then returned to the statement, which as he said he had made frequently, that the prosecution case for each charge depended fundamentally upon the jury accepting beyond reasonable doubt the evidence of the particular complainant on each charge being true and reliable and, as he had said repeatedly, if they had a doubt about the complainant's evidence for a particular charge they must acquit.

[125] He then gave them a direction about the delay between the time the events were alleged to have occurred and when it was bought to the attention of the police.[5] His Honour told the jury that as a matter of law they could not convict unless they were satisfied beyond reasonable doubt by the evidence of the complainants. They could only act on that evidence if, taking into account the warnings he had given them, they were convinced of its truth and accuracy.

[126] The learned trial judge then summarised the submissions made on behalf of the second appellant. No complaint was made against the accuracy or adequacy of the summary.

[127] His Honour then summarised the submissions by counsel for the first appellant. He referred to her submissions that the inconsistencies in the evidence of the complainants would leave the jury in a state of reasonable doubt. His Honour referred to counsel's comparison between the evidence given by the five complainants and the evidence given by the second appellant and why the jury would find the second appellant's evidence reliable and how that was inconsistent with the guilt of the first appellant. Counsel for the first appellant had reminded the jury of all of the evidence about later contact between some of the complainants and the appellants which was said to be inconsistent with any suggestion that the offences occurred. His Honour again referred to submissions made by counsel for the first appellant about the various inconsistencies in the evidence given by the various complainants and matters that would undermine the credibility of the first complainant and the second complainant in particular. His Honour then went through the first appellant's counsel's submissions about each of the counts as to why the jury would not accept that these events happened as set out in the charges.

[128] His Honour then summarised the address to the jury by counsel for the prosecution.

[129] There were no requests for any redirections.

[130] It can be seen from the foregoing summary of the judge's summing up to the jury that the judge was punctilious in reminding the jury on more than one occasion that

---

5 Generally referred to as a Longman direction.

they must consider each charge separately, that they must evaluate the evidence relevant to that charge and convict on that charge only if they were satisfied beyond reasonable doubt that the elements of the charge were proved and that the evidence of the complainant as to the offence alleged was truthful and reliable. He set out the evidence relevant to each charge separately.

[131] These directions were sufficient to instruct the jury to convict on each charge only on the evidence admissible on that charge.

[132] The second ground of appeal has not been made out.

Evidence of uncharged acts and discreditable conduct

[133] The third and fourth grounds of appeal by the first appellant were that certain evidence of the appellant's uncharged sexual acts or discreditable conduct was inadmissible and that its admission had caused a miscarriage of justice.

First appellant's submissions

[134] The first appellant submitted that the test to determine whether or not such background or context evidence was admissible depended on whether the evidence, if it was not an ingredient of the charged offence, was necessary for the intelligible presentation of the prosecution case.[6]

[135] The first appellant conceded that evidence of the uncharged sexual conduct towards each of the first complainant and the second complainant rendered the evidence of each of them of the offences committed against them intelligible. He submitted, however, that it was unnecessary to lead evidence of his uncharged sexual behaviour to the girls in general to render their evidence intelligible. Neither was evidence of uncharged sexual behaviour towards the girls collectively necessary to render the charged acts regarding the third and fourth complainants intelligible. It was conceded that it was arguable that uncharged sexual behaviour to the complainants in general in so far as it included the fifth complainant was admissible as it was necessary to ensure that the charged act concerning the fifth complainant was intelligible and in context. It was submitted that, as the jury were told to use the uncharged sexual conduct in cases involving all of the complainants, a miscarriage of justice was caused by the admission of that evidence.

[136] The first appellant then referred to the evidence admitted which showed the appellant's permissive attitude to the girls drinking alcohol or his supplying them with alcohol and offering them valium. It was submitted that this was evidence of the first appellant's bad character generally and said nothing about his sexual propensity. Further, it was submitted that the evidence was wholly irrelevant to the charged offences by way of context or otherwise. The first appellant submitted that since so much of this evidence was admitted, the trial miscarried.

Discussion

[137] The evidence of the first appellant's discreditable conduct, both uncharged sexual behaviour and his conduct in providing alcohol and valium to underage girls, was relevant to explaining or making intelligible the context or environment in which

---

6 See *O'Leary v The King* (1946) 73 CLR 566 at 575 (Latham CJ), 575-576 (Rich J), 577 (Dixon J) and 582 (Williams J).

the offences occurred. If evidence is relevant it is admissible unless some rule of evidence warrants its exclusion.

[138] The question of the admissibility of such evidence was considered in *HML v The Queen*[7]. At [5], Gleeson CJ set out the general rule:

> "The basic principle of admissibility of evidence is that, unless there is some good reason for not receiving it, evidence that is relevant is admissible."

[139] At [6], his Honour set out the general guiding principle for the admissibility of evidence of the type admitted in this case:

> "Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative."[8]

[140] The evidence will, however, be excluded if its probative value is outweighed by its prejudicial effect. If, for example, the only purpose of leading the evidence is to show that the person is likely from his or her other criminal conduct or character to have committed the offence for which he or she is on trial, then it must be excluded.[9]

[141] In this case the evidence of what might be considered grooming of the complainants by the first appellant, that is sexual conversations and behaviour and permissive attitudes to the use of alcohol and valium by 12 to 14 year old girls, would help to answer questions that might arise in the jury's mind about the context in which the offences were able to occur and why some of the complainants maintained a relationship with the appellants after the offences occurred.[10]

[142] If such evidence, commonly called propensity evidence, is not excluded because this was not the purpose for which it was called but rather because it provided an understanding of the context in which the offence was alleged to have occurred, then the trial judge should ensure that the jury is given proper directions as to how that evidence may, and may not, be used.

[143] If the admission of such evidence has a prejudicial effect then, unless the risk of prejudice is such as to put it beyond effective management by the judge, it should be managed by, for example, giving suitable directions and warnings to the jury.[11] Gleeson CJ held[12] that it is ordinarily not necessary or appropriate for a trial judge to give directions to the jury that uncharged acts must be proved beyond reasonable doubt unless the relevant evidence is an indispensable step to reasoning towards

---

7 (2008) 235 CLR 334.
8 See also at 477-480 [423]-[433], 485 [457] (Crennan J).
9 See at 354 [12] (Gleeson CJ) and 492-3 [487] (Kiefel J).
10 See at 497-8 [500] (Kiefel J).
11 See at 489 [471] (Crennan J) and 498 [502] (Kiefel J).
12 At 360-1 [32]; see also at 490 [477] (Crennan J).

guilt or where it is unrealistic to contemplate that any reasonable jury would differentiate between the reliability of the complainant's evidence as to the uncharged acts and the complainant's evidence as to the charged acts.

[144] In this case, the jury were thoughtfully and properly instructed as to the use that they could, and could not, make of this evidence.

[145] After referring to the specific evidence relevant to each count his Honour described evidence other than direct evidence of specific offences as "a body of evidence put before you for the prosecution's purpose to establish the context or the background for the specific evidence of the events giving rise to the charges". That was said to include evidence of his giving alcohol to the complainants which was said by one of them to be why they kept going out there; valium being offered to the complainants; and general evidence about massage and sexual talk. With regard to that type of evidence he gave them a specific direction that they could only use that evidence if they were satisfied of it beyond reasonable doubt. He instructed them that if they did not accept a witness's evidence about one of those matters then that finding would bear on whether or not they accepted the witness's evidence with respect to a charge that they had to decide. He explained that the evidence was designed to show, if they accepted it, that the complaints of the charges did not come out of the blue. It was to allow the complainants to give their accounts in context.

[146] His Honour instructed the jury that they should have regard to this evidence which was not direct evidence of an offence only if they found it reliable. He specifically instructed them that if they accepted the evidence they must not use it to conclude that the first appellant was someone who had a tendency to commit the kind of offences that he was charged with. The evidence was only to set a context and had the limited purpose which he had told them about. He then immediately reminded them:

> "And before you can find a defendant guilty of any charge you must be satisfied beyond reasonable doubt that the charge has been proved by evidence relating to the charge."

[147] His Honour then specifically referred to other evidence of uncharged sexual conduct concerning the first complainant and the second complainant. He again reminded the jury that, as he had already said, they must consider each case and each charge separately and that if they had a reasonable doubt about an essential element of a charge they must find the defendant not guilty of that charge.

[148] He directed the jury with regard to the evidence relevant to the first and second complainants as follows. If they did not accept the evidence from either of them as to whether those other acts of a sexual nature occurred or statements of a sexual nature were made, then they should just ignore it. If they did not accept some of the evidence that might affect their assessment of the credibility of that complainant generally. If they did accept evidence that other acts or statements of a sexual nature took place, then the jury could only use that evidence against the first appellant in relation to the charges he faced with respect to that particular complainant and only if they were satisfied that the evidence showed beyond reasonable doubt that he was demonstrating a sexual interest in that complainant and that he was willing to give effect to that interest by doing the acts that gave rise to the charges. It was a matter for them to decide whether any of the conduct that the judge referred to occurred and, if they were so satisfied, it was up to them to decide whether that conduct made it more likely that the first appellant did the acts with which he was

charged. Even if they were satisfied that the conduct occurred, it did not necessarily follow that they would find him guilty of any of the charges. Again he reminded them that they must not use the evidence of other conduct or statements to conclude the first appellant was someone with a tendency to commit the kind of offences with which he was charged.

[149] His Honour also told the jury that they should not reason that if they were satisfied that he had done something like one of the charges on another occasion on that basis he should be convicted of the offence that he was charged with, if the particular offence charged was not proved beyond reasonable doubt. Before they could find the first appellant guilty of any charge, they must be satisfied beyond reasonable doubt that the charge had been proved by evidence relating to that charge. His Honour then carefully repeated to the jury the limited way in which they could use that evidence and the ways in which they could not use the evidence.

[150] The careful instructions made a distinction between the evidence relevant to all of the complainants and the evidence relating only to the first complainant or the second complainant. The evidence was relevant and admissible and any risk of unacceptable prejudice was satisfactorily dealt with by the comprehensive directions given to the jury.

Directions as to the meaning of "wilful"

[151] The first appellant adopted the written submissions made by counsel for the second appellant with regard to her second ground of appeal so I shall deal with those grounds of appeal together. These were expanded in oral submissions by counsel on behalf of both appellants.

Submissions of the appellants

[152] The second appellant submitted that one of the essential elements of counts 14 to 16 on which the second appellant was co-accused with the first appellant was the element of wilfulness. It was submitted that while the trial judge accurately told the jury all of the elements of the offences including the element of wilfulness near the beginning of his summing up, he did not make any specific reference to that element at the part of this summing up dealing with the specific offences covered by counts 14 to 16.

[153] It was submitted that given the line of sight that might be imputed to the second appellant and the reasonable likelihood that even if the sexual act was occurring as described by the complainants, the second appellant may have believed no one was able or in a position to see it, the issue of wilfulness was a live one.

Consideration

[154] As set out earlier in these reasons, his Honour specifically directed the jury with regard to this charge that "wilfully" meant "deliberately". There was and could be no complaint about that direction. The judge told the jury that they must be satisfied that each element of the charge, including that the exposure was wilful, was proved beyond reasonable doubt. His Honour had identified, with the agreement of both defence counsel in argument prior to the summing up, that the "real question" was whether the event occurred. In those circumstances the direction given by his Honour which is set out below was adequate to deal with the real dispute between the parties but

also to remind them that all of the elements of the offence had to be proved beyond reasonable doubt:

> "Now members of the jury, before you could convict [the first or second appellant] of count 14, 15 or 16 you must be satisfied beyond reasonable doubt that the event occurred as described. In particular what you must be satisfied of, beyond reasonable doubt, it seems to me, is that — to borrow from the wording — [the first and second appellants] unlawfully exposed each child for each charge, being under 16 years, to an indecent act, the indecent act being an act of oral sex. If satisfied beyond reasonable doubt of that **and of all of the other ingredients**, you may convict. If you have a reasonable doubt about whether it occurred in each case, you must acquit." (emphasis added)

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

[156] The first appellant has not been successful in any of the grounds of appeal which he argued and his appeal against conviction must therefore be dismissed.

Unreasonable Verdicts

[157] The second appellant raised two further grounds of appeal. The first was that the verdicts of the jury on counts 14 and 15 were unreasonable and the second, related, ground was that there was a misdirection as to the use that could be made of the evidence led against her co-accused, the first appellant.

Second Appellant's Submissions

[158] The second appellant referred to the fact that four versions of the conduct which was the subject of counts 14, 15 and 16 were given. The three complainants gave differing accounts of the incident, while the second appellant gave evidence that no such event had ever occurred. It was submitted that the verdicts delivered by the jury indicate that they did not believe the appellant's denial but, given the acquittal on count 16, they also did not believe the fourth complainant's account. Accordingly, it was submitted, the jury must have believed the event occurred, but only as retold by the first and second complainants.

[159] The second appellant then pointed to features of the evidence given by the first and second complainants that would give objective cause for disquiet. This included, *inter alia*, the fact that the first complainant asserted that four girls (including the fifth complainant, who was not added to the indictment as a co-complainant for this offence) were sitting on a two-seater couch with the appellants sitting on another couch opposite them. By contrast, the second complainant gave evidence that the girls were lying on the ground with the appellants sitting on a couch behind them.

[160] The second appellant submitted that the divergence between the accounts of the complainants was itself concerning but that, even taking their versions of events at their highest, including accepting that an indecent act occurred, the element of wilful exposure was not proved by the prosecution beyond reasonable doubt.

[161] It was reasonably open for the jury to conclude – on the complainants' evidence – that the room was dark, that both appellants were situated behind the complainants (out of their line of sight), that the complainants were intoxicated and, even if awake, were watching television. There was no suggestion that the appellant saw the complainants looking at her, nor that she had any awareness that they might have

been. The evidence could not exclude the reasonable possibility that the appellant did not mean the complainants to see the act.

Consideration

[162] The question of whether or not the verdicts should be considered to be unreasonable depends on whether this Court thinks that on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the second appellant was guilty.[13] In this case, the jury saw and heard the evidence given by the complainants. Their verdicts were nuanced, acquitting both appellants on count 16, which suggested that they followed the judge's directions as to the burden of proof and the need to consider each of the counts separately.

[163] The evidence of each complainant contained no internal inconsistencies although the versions given by each complainant was slightly different as might be readily explained by the variations likely in the honest recollection of two witnesses who have not colluded.

[164] The suggestion on appeal that the evidence meant it was so dark that the second appellants would not have thought they could have been observed tended to be contradicted by the evidence of two sources of light – the kitchen light and the television in the room – as well as the second appellant's own evidence that if she had engaged in the sex act alleged, she would have expected the girls to be able to see it.

[165] This ground of appeal is not made out.

Misdirection to the jury as to the evidence relevant only to the second appellant

Second appellant's submissions

[166] The second appellant submitted that the charges against her concerned a single event occurring on a single evening. The evidence relevant to those charges was heard in a context that was, for two fundamental reasons, problematic. Firstly, the jury heard evidence concerning a further 16 counts of sexual offending by her co-accused, in circumstances where the second appellant was charged with none of them; and, secondly, the additional 16 counts involved the same complainants, amongst others, as the three counts with which the second appellant was charged.

[167] In such circumstances, careful instruction was required in order to ensure that the jury did not engage in improper reasoning in arriving at their verdicts. More particularly, the jury needed specific direction as to what evidence could properly be taken into account in determining the guilt of the second appellant.

[168] However, in the course of his summing up, his Honour said:

> "Although the two defendants are being tried together, you must give the cases against and for each of them separate consideration. For that matter, much of the evidence is not relevant to the three charges that [the second appellant] faces. You might take the view that none of it is, except for the particular evidence, **but that's a matter for you**". (emphasis added)

---

13 *M v The Queen* (1994) 181 CLR 487 at 494-5; *MFA v The Queen* (2002) 213 CLR 606 at 623.

[169] The vast bulk of the evidence heard in the trial was, as a matter of law, irrelevant to the three counts against the second appellant. But it had the potential to cause prejudice to her case. This was so particularly in the case of evidence that concerned incidents where she was present.[14] The potential for such evidence to be used (unfairly) against the second appellant was plain – it created a risk that the jury would find guilt by association and implication.

[170] As stated in *Dupas v The Queen*, what "is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence …"[15]

[171] Although his Honour went on to complete the orthodox direction about "separate consideration", he did not furnish it by specifying that the bulk of the evidence was admitted only against one accused. He did not withdraw the discretion he had just conferred on the jury to use inadmissible evidence if *they* thought it relevant. The summing up lacked "clear and firm directions to the jury about the body of evidence which the jury could consider" against the appellant.[16]

[172] The licence given by the learned trial judge in this case necessarily deprived the appellant of the chance of an acquittal that was fairly open. By inviting the jury to undertake their own assessment as to which evidence they could take into account in reaching their verdicts, his Honour opened the way for them to follow paths of reasoning which were plainly forbidden.

Consideration

[173] As the second appellant submitted, the decision about which evidence was relevant to which charge was *not* a matter for the jury. It was a matter for the trial judge. A trial judge is required to "identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts".[17]

[174] In this case, the admissible evidence in the trial overwhelmingly dealt with the first appellant.

[175] No application was made for a separate trial for the second appellant[18] and no complaint was made on appeal about the failure to given the second appellant a separate trial.

[176] There were clear advantages to the first appellant in being tried with the second appellant, not the least of which was that she gave evidence which tended to exculpate him. There were no such advantages for her in being tried with him. Indeed the prejudice of having all the evidence given against him being led in the joint trial meant that it was incumbent upon the judge to give clear directions as to the evidence admissible against her alone to ensure that the jury followed his directions to consider the case against her without being influenced by the bulk of the evidence led against the first appellant.

[177] In oral argument, counsel for the second appellant submitted that the real issue on the appeal was the lack of proper direction on the evidence admissible in her case. The admissible evidence against her was very limited and related only to the

---

14 See, in particular, counts 10 and 11.
15 (2010) 241 CLR 237 at 248-9 [29].
16 *R v Roberts & Pearce* [2012] QCA 82 at [127].
17 *Fingleton v The Queen* (2005) 227 CLR 166 at 197 [77] (McHugh J).
18 *Criminal Code* s 597B.

evidence led against her on counts 14 to 16. The jury were not given any direction to put all of the other evidence of charged acts, sexual and other discreditable behaviour against the first appellant out of their consideration when considering the case against her. Such a direction was necessary when there was so much evidence in the case which was relevant only to the counts against the first appellant, irrelevant to the case against the second appellant and highly prejudicial to her.

[178] An example can be seen by the learned trial judge's misstatement which could be misunderstood by the jury to mean that the relevance of the evidence other than the evidence relating to the three charges she faced was a matter for them to determine, leaving open the distinct possibility that they may have used irrelevant evidence against her. This was reinforced when the learned trial judge summarised the evidence on those counts without making any distinction between the evidence against the first appellant and the evidence against the second appellant and without referring to her evidence on those counts except when summarising her counsel's submissions to the jury.

[179] As a result of the misstatement and omissions in the summing up, the second appellant was denied a fair trial. Her appeal should be allowed. It could not be said that a properly instructed jury would not convict her on the admissible evidence led at trial. A retrial should therefore be ordered.

Orders

1. The appeal by the first appellant is dismissed.
2. The appeal by the second appellant is allowed.
3. The verdicts of guilty against the second appellant on counts 14 and 15 are set aside.
4. A retrial of the second appellant on counts 14 and 15 is ordered.