SUPREME COURT OF QUEENSLAND

CITATION:	*R v PS* [2004] QCA 347
PARTIES:	**R** **v** **PS** (appellant/applicant)
FILE NO/S:	CA No 75 of 2004 CA No 149 of 2004 DC No 101 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Innisfail
DELIVERED ON:	24 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2004
JUDGES:	Williams JA and Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, Williams JA and Cullinane J agreeing as to the orders made, Jones J dissenting in part
ORDERS:	**1. Appeal against convictions dismissed** **2. Grant leave to appeal against sentence and allow the appeal to the extent only of setting aside the sentence on Count 7 of nine years imprisonment and substituting a term of seven years imprisonment and further setting aside the serious violent offence declarations made with respect to Counts 7 and 8**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – OF COUNTS – BY STATUTE – SAME FACTS OR SERIES OF OFFENCES OF SAME OR SIMILAR CHARACTER – where appellant charged with eight offences of sexual nature – where charges joined – whether sufficient similarity in offences to justify joinder – whether evidence on each count cross-admissible on other counts – whether joinder caused miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – JOINT

TRIAL OF SEVERAL COUNTS – where appellant convicted on three counts of rape, two counts of unlawful carnal knowledge and one count of assault with intent to rape – where learned trial judge directed jury as to the use that could, and could not, be made of evidence of each complainant in considering each of the other counts involving different complainants – whether learned trial judge sufficiently warned the jury against "propensity reasoning"

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where jury found appellant guilty of rape and not guilty of indecent assault with a circumstance of aggravation with respect to one complainant and not guilty of rape and guilty of unlawful carnal knowledge with respect to a different complainant – whether rational explanation for jury's verdicts – whether verdicts open on the evidence – whether verdicts unsafe and unsatisfactory

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant sentenced to nine years imprisonment with serious violent offence declaration for one rape offence and lesser concurrent terms of imprisonment for other two rape offences and two unlawful carnal knowledge offences – where sentenced to three years imprisonment with a serious violent offence declaration for assault with intent to rape, cumulative on other sentences – whether sentence of nine years for rape offence was manifestly excessive – whether serious violent offence declarations rendered sentence manifestly excessive

Criminal Code 1899 (Qld), s 567, s 597A

BRS v The Queen (1997) 191 CLR 275, cited
De Jesus v The Queen (1986) 61 ALJR 1, considered
DPP v Boardman [1975] AC 421, considered
DPP v Kilbourne [1973] AC 729, considered
Gipp v The Queen (1998) 194 CLR 106, applied
Glennon v The Queen (1994) 179 CLR 1, referred to
Hoch v The Queen (1988) 165 CLR 292, considered
Jones v The Queen (1997) 191 CLR 439, applied
M v The Queen (1994) 181 CLR 487, applied
MacKenzie v The Queen (1996) 190 CLR 348, cited
MFA v The Queen (2002) 213 CLR 606, cited
Pfennig v The Queen (1995) 182 CLR 461, followed
R v Bedington [1970] Qd R 353, cited
R v Cranston [1988] 1 Qd R 159, cited
R v Kirkman (1987) 44 SASR 591, cited
R v Kray [1970] 1 QB 125, cited

R v Markuleski (2001) 52 NSWLR 82, cited
R v O'Keefe [2000] 1 Qd R 564, cited
R v Phillips & Lawrence [1967] Qd R 237, cited
R v Sims [1946] KB 531, considered

COUNSEL: S G Durward SC, with J D Henry, for the appellant/applicant
L J Clare, with S G Bain, for the respondent

SOLICITORS: MacDonnells (Townsville) for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** An indictment was presented in the District Court charging the appellant with eight offences of a sexual nature. There were six different complainants named in the indictment and the time frame for commission of the offences was between 31 July 2000 and 11 May 2003. Prior to trial there were proceedings pursuant to s 590AA of the Criminal Code which confirmed that the trial was to proceed on all the charges joined in the indictment. After a three week trial in the District Court at Innisfail the jury returned verdicts on 10 March 2004 as hereinafter set out. The appellant was sentenced in relation to the charges on which he was found guilty on 26 March 2004; the sentences were as hereinafter set out. The appellant has appealed against his convictions on numerous grounds. His application for leave to appeal against sentence was filed out of time, but at the outset of the hearing of the appeal, the Crown not opposing, the court ordered that time be extended for the filing of the application for leave to appeal against sentence to 28 May 2004, which enabled that application to be heard on the merits.

[2] The following table sets out details of the charges, verdicts and sentences:

Count	Date of Offence	Offence	Complainant	Verdict	Sentence
1	31.07.00 to 01.09.00	Indecent assault with circumstance of aggravation	BS	Not Guilty	
2	31.07.00 to 01.09.00	Rape	BS	Guilty	Four years imprisonment
3	About 24.02.01	Rape	TK	Not Guilty (including all alternate counts)	
4	28.02.01 to 01.04.01	Rape	ML	Guilty	Four years imprisonment
5	30.06.01 to 01.08.01	Rape	SW	Not Guilty rape; Guilty unlawful carnal knowledge	Three months imprisonment

Count	Date of Offence	Offence	Complainant	Verdict	Sentence
6	About 19.11.01	Rape	MM	Not Guilty rape; Guilty unlawful carnal knowledge	Three months imprisonment
7	About 19.11.01	Rape	MM	Guilty	Nine years imprisonment with serious violent offence declaration
8	11.05.03	Assault with intent to rape	JD	Guilty	Three years imprisonment cumulative, with serious violent offence declaration

[3] The Notice of Appeal against conviction contains a number of grounds. In broad terms the appellant contends that the pre-trial ruling that the charges be joined and ought not be separately tried was wrong in law, that the learned trial judge erred in ruling that evidence with respect to each complainant was cross-admissible, that the learned trial judge erred in directing the jury as to propensity evidence, that the learned trial judge erred in other respects in admitting evidence, that the learned trial judge erred in the course of directing the jury on issues of evidence, that certain of the verdicts were inconsistent, and that in all the circumstances the guilty verdicts of the jury were unsafe and unsatisfactory. The appellant relied heavily on the contention that there was evidence of some collusion between the Innisfail complainants.

[4] With the exception of Count 8, all of the incidents occurred in or near Innisfail; each of the complainants in Counts 1 to 7 resided in or near Innisfail. Count 8 occurred at Burbank, an outer Brisbane suburb, where the appellant was temporarily residing with his mother whilst on bail with respect to the Innisfail charges; the complainant in that case resided at Wellington Point.

[5] The appellant was born on 28 July 1984; the first incident occurred when he was aged 16 and the last when he was 18. He was aged 19 when sentenced. Details of the ages of the complainants are as follows:

Complainant	Date of Birth	Age at time of incident
BS	1984	16
TK	1985	16
ML	1985	15
SW	1986	14

MM	1986	15
JD	1984	18

[6] Before considering the grounds of appeal it is necessary to set out, albeit relatively briefly, the critical evidence relating to each charge. Whilst the following recitation of relevant facts takes a number of pages it must be appreciated that it is but an overview of the evidence sufficient to enable the grounds of appeal to be evaluated. The whole of the evidence at trial occupied more than 1,000 pages of transcript and, of course, it is impossible to re-create in these reasons for judgment the full impact of all the evidence presented to the jury. Each complainant was extensively cross-examined.

BS

[7] This complainant had met the appellant previously whilst at school and they had also met at a party in about August 2000. On the night in question the appellant was with his friend BM (who also knew the complainant) at his parents' home outside of Innisfail. There was apparently some discussion about girls which led to BM telephoning the complainant and saying to her that there was a party. The suggestion was that there would be a number of persons present and arrangements were made to pick the complainant up from her home in Tully. The appellant and BM collected her at about 9.15pm; until then the complainant was not aware that the appellant was involved. BM gave evidence that in the course of driving to Tully to pick up the complainant the appellant asked him whether BS "was easy and if he looked good enough to get a fuck". On arrival back at the residence of the appellant's parents some steps were taken to keep their arrival unknown to his parents. There was no party. Some beer was consumed, primarily by the males. There was evidence from the appellant, largely contested by the complainant, that he flirted with her during the evening and that included some kissing. In the early hours of the morning an arrangement was reached that the complainant would be driven home the following morning when BM was collected by his mother. There was then discussion about sleeping arrangements. According to the complainant the appellant suggested that she sleep upstairs in his sister's room. He took her to that room where there was a mattress on the floor. The appellant changed her clothes and got ready for bed. After about 10 minutes the appellant came into the room and asked for a kiss. The complainant said "no", mentioning that he had lied about the party. Thereafter according to the complainant the appellant tried to pull her pants down and became fairly aggressive. Ultimately the appellant succeeded in forcefully removing her pants and he lay on top of her with his hand over her mouth. At an early point of time in the incident the appellant asked the complainant to "suck him off" and forced her mouth over his penis for a short time. There followed an act of aggressive intercourse during which the complainant told the appellant that he was hurting her and she begged him to stop; he inserted his penis about "half of the way" into her vagina. The appellant then asked the complainant to "jerk him off"; when she declined he masturbated until he ejaculated over her body. The complainant maintained that she was yelling loudly for him to stop throughout the episode which caused her pain. Under cross-examination she denied she started kissing the appellant to initiate the incident, she denied voluntarily undressing, and denied voluntarily giving the appellant "oral sex". According to the complainant's evidence after the incident she went downstairs and slept on a

mattress until the following morning. The residence was in a remote location and the complainant had to wait for transport back to Innisfail or Tully. The room in question was not in fact that of the appellant's sister; it was his own.

[8] Count 1 on the indictment was particularised as the incident where the appellant forced the complainant to perform oral sex on him whilst he was touching her vagina. Count 2, rape, related to the penetration of the complainant's vagina by the appellant's penis.

[9] In giving her evidence the complainant dealt with the oral sex after detailing the intercourse though she said the oral sex occurred at an earlier point of time. In referring to the oral sex the complainant made no mention of the appellant touching her vagina at that time.

[10] The appellant's evidence was that the complainant asked him to keep her away from BM and was flirting with him, which included touching and kissing. According to him the complainant asked whether there was somewhere else they could go and following that they went upstairs to his room. According to the appellant his parents were in the room next door. The appellant's evidence was that in his bedroom each undressed, and the complainant then gave him oral sex of her own volition for some two or three minutes. That was followed by her spreading her legs and consenting to a completed act of intercourse. He said that he ejaculated onto a tissue. According to him both slept on the same mattress until the following morning.

[11] There was no recent complaint. After MM complained to police an investigation was commenced and it would appear the police spoke to BM who supplied them with BS's name. After being contacted by police BS gave a statement on 13 February 2002. On the evidence BS had no contact with any of the other witnesses (other than BM) between the incident and making her complaint to police; there was no evidence she knew any of the other complainants.

TK

[12] This complainant and the appellant were well known to each other. They initially got to know each other at school and subsequently in the year 2000 had gone out together as boyfriend and girlfriend over several weeks. The defence tendered a letter, Exhibit 8, written by the complainant in about August or September 2000 which evidenced the romantic feelings which she then held for the appellant. The appellant was also friendly with the complainant's brother and from time to time would visit TK's house and stay overnight. According to the complainant there had been no sexual activity between she and the appellant prior to the occasion giving rise to the charge.

[13] On the night in question the complainant was celebrating her 16th birthday and had some friends, including two other girls and the appellant, at her house. There was alcohol at the party and both the appellant and the complainant consumed some. Evidence was given of a "truth or dare" game during which the appellant took off his clothes and the other two girls removed some of theirs. At one stage the appellant was kissing one of the other girls. The complainant gave evidence that on one occasion she was sitting partly on the appellant's lap but denied, as was the appellant's evidence, that they were both naked, kissing and touching one another. The party went until the early hours of the morning when the appellant, the

complainant, and her two female friends, were the only persons left. The two girls went to bed and the complainant and the appellant sat on the stairs. The appellant tried to kiss the complainant but she pushed him away and said she was going to bed. According to the complainant the appellant then took her downstairs to her brother's room and threw her onto the bed. He removed his clothing and forcibly removed hers and then started to kiss her. The appellant held her down on the bed and she could feel his penis enter her "a short way". When the appellant went to close the door the complainant pulled up her pants and tried to run away but she was pushed back onto the bed. She was crying and telling the appellant to stop but he again penetrated her with his penis. The prosecution particularised this second penetration as constituting the charge of rape. According to the complainant she said that what he was doing was rape to which the appellant responded that he knew that but could not stop. According to the complainant she made a phone call to a boyfriend on her mobile phone and told him not to hang up; she told the appellant to get off her. The complainant then went upstairs whilst talking on the mobile phone.

[14] Under cross-examination the complainant denied that on a prior occasion she performed oral sex on the appellant.

[15] According to the appellant in his evidence, prior to the night in question the complainant had given him oral sex once in her bedroom. His evidence was that the complainant initiated that activity on that occasion; she started pulling his pants down, got herself naked, and voluntarily gave him oral sex. He said in evidence it "was a bit out of the deep".

[16] His evidence was that on the night in question they had initially gone into a room used as an office, closed the door, stripped naked, and commenced kissing "full flair" while sitting in a chair. There was a knock at the door which interrupted their activity. They freaked out and got dressed. According to the appellant that was the only sexual contact that night.

[17] When her friends awoke after the night in question TK told them what had happened with the appellant; that was tantamount to a complaint of rape. Some four days later a doctor noted "small, possibly recent, tears to the hymen." In February/March 2001 ML telephoned TK to get the appellant's telephone number. ML told TK that the appellant had sexually abused her at a party and TK said what had happened to her. The police contacted TK in June 2002 and she provided a statement containing her allegations as to what happened to her and also detailing her conversation with ML. In about July 2002 TK sought to withdraw her complaint against the appellant. She did not know any complainant other than ML.

ML

[18] This complainant and the appellant attended a large party at a house on the outskirts of Innisfail. The complainant had been drinking alcohol and acknowledged feeling tipsy and drunk. The appellant was known to her as they had a number of mutual friends. The appellant sat next to her at one stage and after a brief conversation he handed her a two litre Coke bottle telling her to hold onto it and bring it over to him across the road if he was not back within a time. As the complainant had not returned after a lapse of time she went across the road and found him talking to other people. He told her to sit down on the gutter; he sat down next to her and they had a conversation. The appellant said she needed some fresh air, put his arm around her and started walking her down the yard of a house which was across the

road from where the party was being held. The appellant then sat the complainant on a garden ledge and he was then standing between her legs. He tried to kiss her but she said "No"; she told him "Fuck off". According to the complainant she has no recollection of the immediately following events; she claims she must have passed out because of the alcohol she had consumed. Her next recollection is of her legs hanging over the edge of the ledge with her jeans removed and the appellant's penis entering her vagina and pushing inside her. This was particularised as the rape. According to the complainant she screamed, swore at him, and told him to "fuck off". According to her a light then came on a nearby house and the appellant said to her that she did not "even make him come". At that stage she was able to get her jeans back on. The complainant conceded under cross-examination that at the committal proceedings she said she could remember that the appellant unbuttoned her jeans and pulled them off.

[19] According to the appellant after they had moved to the cement ledge the complainant turned to him and said "Oh fuck it" and started kissing him. She then asked him whether he wanted to go somewhere and the two of them went down the side of the house. According to him each took off clothing, kissed and then intercourse took place; according to the appellant it was "just all action". According to the appellant the complainant was moaning and touching him all over. His evidence was that he could not complete the act of intercourse because he was too drunk but the complainant said for him to go on. According to him she said "usually my exes would have finished by now". According to him the complainant asked him to resume having intercourse but he said words to the effect "You can't make me come".

[20] On rejoining her friends ML told them the appellant forced her to do something she did not want to do. Her friends noticed that she was upset, she had marks and scratches on her back and she had grass stains on her clothes. The next day she told a friend she had passed out and woke up with a guy on top of her. In February/March 2001 she telephoned TK to get the appellant's telephone number and in the course of that conversation told TK the appellant had sexually abused her at a party. On about 3 February 2002 she was spoken to by a police officer and on 11 February 2002 gave a statement to police detailing her complaint against the appellant. She did not know any complainant other than TK.

SW

[21] The complainant and a girlfriend (KW) made arrangements for a "small get together" at the flat where the complainant lived with her elder sister who was away at the time. Her friend arranged for BM and two of his friends (including the appellant) to attend. The complainant had not previously met the appellant. It appears that all present drank alcohol and smoked some marijuana. They played a game of dare with a Coke lid and a helmet. The complainant participated by throwing the lid at the helmet but did not otherwise participate. The game involved stripping and by the end of it the boys were naked and the complainant's girlfriend was wearing only her g-string. Later the complainant's girlfriend gave BM a massage and she suggested to the complainant that she should massage one of the other boys. In consequence the complainant began massaging the appellant's bare back. She was fully clothed. Positions were swapped and the appellant gave the complainant a massage. According to the complainant the appellant massaged her breasts. He then took her by the arm and walked her into a bedroom. The evidence

of the complainant was that the appellant lifted her top up and felt her breasts, took his pants off, and made her put her mouth "over his cock". Her evidence was that the appellant pushed her head down, that she didn't mind it at first, then she got a bit scared. She tried to push him away and he asked if he could "jack off" while he was near her. According to the complainant the appellant then pulled her pants down and she felt something go inside her. She then felt something bigger go inside her and it hurt. She was clearly referring to penetration of her vagina. Her evidence was that her girlfriend then tried to come in and the appellant got up to close the door. KW gave evidence of seeing SW with her pants down and the appellant naked with an erection. SW gave evidence the appellant came back and penetrated her a second time. He pushed her back down though she was telling him to stop and was crying. She noticed bleeding on her underwear the following day. That was her first sexual experience. She could not recall handing the appellant a condom or a condom breaking. She denied subsequently telling a doctor that she'd been raped by two boys.

[22] According to the appellant he and the complainant went into a bedroom; he followed her in. The appellant said that he was "weird about all this". The complainant started kissing him and pulled out a condom and said "just in case". She took off her clothes and started to give him a "bit of oral". She then laid back prepared for intercourse. He put on the condom, it split. He couldn't be sure if he inserted his penis into her vagina; he conceded it was touching her but he wasn't sure if it went in.

[23] Shortly after that BM announced it was time to go and he left.

[24] BM gave evidence some of which supported the appellant's account. He admitted that he returned to the flat later that night. According to the complainant she then had intercourse with BM but he denied that. BM gave evidence that he noticed an opened condom packet and a condom in the bedroom.

[25] There was evidence capable of being recent complaint to KW. BM telephoned SW on 26 November 2001 and gave her details of how to contact MM. SW spoke to MM on the phone and on the next day, 27 November 2001, gave a statement to police detailing her complaint against the appellant. Her evidence was that she was not encouraged by BM to go to the police, but she went under her "own free will". There was no evidence she knew any of the other complainants before telephoning MM.

MM

[26] This complainant and the appellant knew each other from school, though they were not close friends. Prior to the date in question the complainant had been living with her boyfriend, a youth named PP. For a variety of reasons she had become dissatisfied with that relationship, and with living in a home with PP and other members of his family. She wanted to return to her mother's home at Mission Beach but had no transport to get there. During the day prior to the evening on which the incidents giving rise to the charges occurred, the appellant and a friend of his, MS, arrived at PP's home, and subsequently the complainant spoke to the appellant about her wish to return home to Mission Beach. The appellant's initial response was to give her a $20.00 note and tell her to "Catch a bus, or call your mum and try and organise a time." Subsequently the appellant said words to the effect that perhaps he could arrange something. There followed some discussion

about the appellant picking her up for that purpose. Nothing was finalised, and the appellant left. About half an hour later the appellant telephoned the complainant and said he could pick her up and take her home. He said he would collect her in about half an hour. The complainant did not want PP to know she was leaving. She packed some clothes and waited in her bedroom until the appellant and MS arrived. She departed the house secretly without seeing PP; she probably left by jumping out the window. They initially drove to Mena Creek where a friend of the complainant lived. She stayed there for about half an hour before MS returned alone in the utility. The complainant's evidence is a little unclear as to her intentions, but she left with MS and was driven to the appellant's parents' place where the appellant was waiting.

[27] There were two houses on the property owned by the appellant's parents. The complainant was taken to a vacant house some distance from the house in which the appellant's family lived. The appellant and MS left the complainant alone in that house advising her to watch out for snakes; she was given a baseball bat to take with her if she went for a walk around the property. Some time later the appellant returned to that house with his mother; they brought with them additional bedding, food supplies and a bottle of Tia Maria. That was the first time the complainant had met the appellant's mother. After the mother left the appellant had a beer and the complainant a drink of Tia Maria; then they went for a ride around the property on the appellant's four wheel motorbike. Each had another drink when they returned to the house and then ate some of the food. That was followed by another ride around the property. They visited a house where there was a telephone and the complainant telephoned PP. They then returned to the vacant house. More food and drink was consumed and by that time it was well after dark. The complainant said she wanted to go to sleep; there were two separate beds made up on the floor some distance away from each other but in the living room.

[28] At that stage the appellant asked for a goodnight kiss but the complainant said no. On the complainant's evidence the appellant was wearing boxer shorts and on her refusing to give him a kiss "he pulled out his penis from his pants and started, like, wanking himself." The complainant, fully clothed, lay down on her bed. The complainant then said she moved away from the appellant and he went downstairs. He returned with the baseball bat that she had been given to take with her if she walked around the property. The appellant then demanded that she "get into the room". He had the baseball bat raised when he said that; the appellant then told the complainant to remove her shirt. When she said she didn't want to the appellant raised the bat again; in consequence she removed her shirt. He ordered her to remove her bikini top and she began to cry. He raised the bat again as if he was going to swing at her and the complainant complied with his demand to take her bikini top off. She was crying throughout the incident. In her evidence she said she was "scared, I didn't know if he was going to hit me." According to her the appellant was "still masturbating" and that is when he asked her "to give him a bit of head". The complainant refused, was still crying, and was threatened with the bat again. According to the complainant's evidence: "I did what he said to me to do and then I tried to make up excuses why not to do it. My mouth hurts and my cheeks are hurting; anything I could think of at the time." At that stage, and whilst the complainant was still crying, she was told to take her pants off. She did so, then the appellant pushed her back onto the bedding and tried to insert his fingers into her vagina. Then he got on top of her and tried "to have sex with me". When asked whether the appellant's penis went inside her she replied: "Not all the way". She

said she was trying to tense her body up. She said that "it was hurting from trying to push it inside of me"; she was just saying "no". The appellant then said: "Let's do it doggy". According to the complainant the appellant manoeuvred her into that position and tried to insert his penis from behind. Again she said it did not go in all the way but there was penetration. According to the complainant the bat was behind the appellant throughout the incident. Then the appellant said: "This ain't working" and he got up and had a cigarette in the adjoining room.

[29] At that stage the complainant also had a cigarette. The complainant was still crying; she said she could "remember her body shaking, like, shock I suppose". The appellant then asked for more oral sex and the complainant complied, although she said "no", because she was "scared". In evidence she said: "There was the bat with him which was – I know it was with him. And I do remember them telling me about a shotgun in the house". She conceded she had not seen a gun. Then the appellant lay on top of the complainant and tried to open her legs. There followed an episode roughly the same as that which had occurred previously. Again she said his penis penetrated her but not all the way.

[30] The baseball bat remained either in the appellant's possession or near to him throughout the whole episode. After the second episode of sex the complainant said to him: "Just throw it out the window." The appellant did so.

[31] Before throwing the bat away the appellant used his video camera to take some footage of the complainant whilst she was still naked.

[32] The complainant subsequently got dressed and put a torch under her pillow. She then, fully clothed, lay on the bed and the appellant lay down fairly close to her. After apparently sleeping for a time the complainant woke up, grabbed her shoes and the torch and ran from the house. She saw a light and ran towards it. That took her to another house where she spoke to the occupants and telephoned PP; it was about 4.45am on 19 November. She did not explain to those people why she was at their house in the middle of the night. She accepted a lift from them back to PP's place. Later during the day she gave a statement to police about the incident with the appellant; that was after she told a person at the Youth Shelter that she had been raped. There was no evidence that she knew any of the other complainants before speaking to the police.

[33] Under cross-examination the complainant agreed that at the committal proceedings she said that the appellant "didn't get it in" but reiterated in re-examination that there had been penetration "but not far at all".

[34] When the police went to the house in question after the complaint they located a baseball bat on the ground beneath the window referred to by the complainant.

[35] The sexual episode before the complainant had a cigarette was Count 6 on the indictment and the subsequent episode Count 7.

[36] The critical evidence of the appellant was that in the early hours of the morning there was some sexual activity. According to him they were "laying down, changing music. Like, we were both laying on our stomachs and, like, resting on our elbows, just looking through CDs and shit. . . And it just sort of eventuated from there, like, just touching, flirting and stuff like that." He said: "So I went a bit further and just started kissing a bit and then it just sort of led to, like, just a bit

more touching, like, the stomach and just rub each other. She was, like, touching my chest and stuff like that." According to him each then undressed. His evidence went on: "She went down on me for a little bit, not long. I couldn't say how long." When asked: "Did you touch anywhere near the genitals?" He replied: "Yeah, probably just like up top and that – like just up the top, like around, like I didn't have sex with her." He expressly denied having sexual intercourse. He denied threatening the complainant with a bat and also denied masturbating in front of her.

[37] There are two further aspects of the case involving the complainant MM which must be mentioned; the video, and a telephone conversation between the complainant and the appellant which was recorded by police officers.

[38] The video was admitted as an exhibit at the trial and was viewed by the jury. Because of its significance I have watched it. The first relevant segment shows the complainant, obviously affected by alcohol to some extent, laughing and cavorting with the appellant before any of the sexual activity occurred. It clearly shows a young man and woman obviously enjoying each other's company. The second aspect is that taken after the sexual episodes and while the complainant was still naked. She is depicted lying on a mattress with her legs apart displaying her genitalia. Throughout most of that segment her face does look somewhat drawn, but right at the end there is something of a laughing girlish smile. According to her evidence that was a response to a specific question when the appellant said he wanted a close up of her face. Again according to the complainant her conduct in the second episode depicted on the video was a consequence of her being scared, particularly by the appellant having the baseball bat as a means of injuring her if she did not comply with his demands.

[39] In the recorded telephone conversation made about 8pm on 19 November there is no express admission that the appellant had intercourse without the complainant's consent, but there are passages which could be regarded by the jury as supporting that inference. The relevant extracts from the transcript of the conversation are as follows (C represents the complainant and A represents the appellant):

"C. like can you remember like,
A. yeah
C. what you did
A. yeah.
C. why did you do it
A. hey?
C. why did you do it?
A. why did I?
C. yeah
A. I have no idea. Fuck, I couldn't say, I don't know. I'm fucking, and you don't think I haven't been thinking about that?
C. you don't think I'm not scared
A. yeah, I, I know you are.
C. you threaten to hit me with that bat
A. hey?
C. you had the bat, you were going to hit me with it
A. yeah, but I was not going to hit you, but uhum, that's why I threw it out the window. I was just, I was more scared you're going to pick up and hit me.

C. oh, if you had've put it down near enough to me I would've
A. I know. ...
…
C. I still want to know why you did it. Why did you do it? Or why did you at least threaten me?
A. ah, I don't know. I don't know. I've. I don't know. It's just, like, I was. I don't. I said it, I said most of it then. But like, I don't know. Just. I don't know. Fucked me. ...
...
C. … why did you want to do it, if I didn't and I said no. And you know I said no.
A. I thought it did look like I could get off on it anyway ay.
C. yeah, well you were trying. And I still said no. And you know I have a boyfriend
A. so but have you seen [PP]?
...
A. how you doing anyway? If you don't mind me asking.
C. well, I'm pretty scared.
A. at what?
C. what do you think?
A. me?
C. yeah. Hey, I don't know if you're like, going to do it again, or if you're going to do it to someone else
A. nuh. I'm fucking, trust me, I'm fucking, you don't know what I'm, I'm going through a bit too. I don't know. I don't know what the fuck I. I didn't, I didn't, I didn't know what fuck come ey, I don't know. But I. All I know is that I could never fucking, I wouldn't hit you or nothing. But I don't know what the fuck come over me
C. so you still threatened me
A. I don't know. It's fucking, oh.
C. well you still threatened me, and that, like
A. I know
C. how am I supposed to not take that seriously when you're fucking, you know,
A. yeah
C. done to me
A. I was expecting really to get knocked out while I was asleep
C. no, I wouldn't bother
...
C. yeah it's all sorted out and, if my dad finds out he'll kill you, no he won't kill you, he'll ah, he'll be pretty pissed off. Yeah, oiy I'm going to go, okay.
A. righto. You can do what you want. You can tell how many people you want, but, look for fucking, there's much. If it's, and like, if it's any concern, which I doubt it would be, but, fucking, I don't know why I did it and I don't know how come and, fucking I'm going. I feel like shit ey, I really do, and I'm really sorry fucking, I want you to know that I feel like fucking real shit. ..."

JD

[40] On a night in May 2003 this complainant went to the Wellington Point Hotel with a female friend and in the course of the evening met the appellant there; that was the first occasion on which they met. The appellant invited a group of young people, including the complainant, back to his parents' place at Burbank for a party. The complainant was not familiar with the area where that home was; it was a fairly isolated property. The group played pool and smoked pot over several hours. Some time around 3.00am the party ended and the complainant was given a lift home.

[41] At about 2.30am on 11 May 2003 the complainant received a telephone call from the appellant saying that he was organising a group of people to go back to his place to play pool and he invited the complainant to join them. She was persuaded to agree and met the appellant some 15 minutes later near her home. The appellant's mother was driving the car. The appellant said that about 10 people would be coming to the party. When they arrived at the Burbank place only the appellant and complainant were present. The appellant said that his friends had ditched him for the city. They played some pool and smoked some pot. Some alcohol was also drunk. Whilst they were playing pool the appellant placed his hands on the complainant's body but she pushed him away. According to her the appellant offered to give her $15.00 if she would take her shirt off; when she said no he increased the amount to $20.00. At one stage the appellant picked up a piece of thick chain, which was described as a necklace, and held it up in a way which according to the complainant "scared the crap out of me really". It was that which caused the complainant to decide that she should leave. There had been talk about the appellant's sister driving her home, but the appellant did not wake his sister up to do so. The complainant then said that she would get a cab. The appellant declined to give her the address so that she could order a taxi. She then went to walk out of the door but the appellant blocked her way. The complainant had taken her shoes off while she was in the shed playing pool and they were near the door. When the appellant blocked the complainant's access to the door she noticed that his penis was erect. He also grabbed one of her shoes and would not give it to her. There was an argument about that. The complainant said she "just wanted to get out of there" and demanded he give her her shoe back. Ultimately she retrieved the shoe and she began to leave. The complainant's evidence then proceeded:

> "And he was walking towards me and I just turned around to leave, and as I went to leave, he grabbed like around my wrists, grabbed each of my hands and I went to try and pull away and I couldn't pull away from him and he just was sort of looking me and I was telling him to let me go and he didn't say anything. … then he picked – like he got me from behind and picked me up in like a bear hug and like my arms were stuck to my body, and he picked me up off the ground …
>
> …he picked me up and my feet were off the ground, and he started walking me towards – like, near the clothesline, and he had – I don't know – but I managed to get my feet on the ground, and with – with a push sort of away from the shed, because at that stage I realised that's where he was taking me …

> And at this stage I was – I think I was almost in tears, and I was just saying, like, 'Please, no', and telling him to let me go, and that I had to go and I had to be somewhere, and – but he didn't take me in through that door. He – he sort of went around the front again – in front of the large doors … and then he went around to the other side in between, like, the fence and the shed, and took me down there. About half-way down there's like a window, and he had – he pushed me up against the shed near that, and leaned up and opened the window, and as he was doing that he was going, 'Oh, I don't know why you're stressing. I just want to talk to you', and I was just telling him to – to fuck off, and to let me go, and – he's telling me to get in the window.
>
> … By the time I got to there I figured, well, it was – that was pretty much the only time I had to get away, so I was a lot louder than – than I was getting there, and I was fully yelling at that stage for him to fuck off …
>
> … he was sort of trying to lift me up there with firewood or wood leaned up against the shed … his whole body sort of pushed against me, and like, every time I tried to push him off I couldn't get sort of – I could get my hands so that – like, they were there but I couldn't push because he was always leaning onto me. …
>
> And he was, like, lifting – like, my thighs and stuff up onto this wood to get me closer to the window, and that was when his mum came around the corner, and she was standing, like, in the middle between the fence and the shed, and – fuck, it was like, 'What's going on?', and he turned around and told her to fuck off, and just ignored her, and – yeah, took maybe another couple of minutes and I managed to push him off, because he was still standing there, and then I sort of walked as fast as I could up to her, and she turned around and walked back towards the house, and I followed her in through that same side door I think, and I asked her what the address of the house was, and she gave it to me, and then I turned around and left out through the garage, then went up to the road, and I called a cab on my mobile".

[42] It is sufficient to say that ultimately the complainant returned in various ways to her home. After telling a friend what happened, the next day she went to the police. There is no evidence she knew any of the other complainants.

[43] According to the appellant, in his evidence, when he and the complainant arrived at the shed they drank, smoked pot, and played pool. According to him he was looking for some more marijuana at about daybreak when his mother came to the shed. She asked what he was doing and he replied "nothing". His mother walked away and shortly after the complainant left. The appellant denied any incident involving his grabbing her and pushing her through or towards a window of the shed.

[44] The appellant's mother gave evidence that she did not know that her son had cannabis in the shed. She said that on the morning in question she went towards the shed and saw the appellant and complainant facing each other, a foot or two apart,

with the complainant's back towards the shed. She said words to the effect "What's going on" or "What's happening" to which her son made a response she "Couldn't make out". She denied he told her to "fuck off". She then returned to the house and the others followed.

[45] I now turn to consider the grounds of appeal.

Grounds 1-3:

THE LEARNED TRIAL JUDGE ERRED IN RULING THAT THE CHARGES WERE PROPERLY JOINED, IN DECLINING TO ORDER THAT THE CHARGES BE SEPARATELY TRIED, IN RULING THAT THE EVIDENCE PERTAINING TO EACH COUNT ON THE INDICTMENT WAS CROSS-ADMISSIBLE IN RESPECT OF THE OTHER COUNTS, AND IN DIRECTING THE JURY AS TO THE USE THEY COULD MAKE OF "PROPENSITY EVIDENCE".

[46] These issues were initially canvassed at the pre-trial proceedings conducted pursuant to s 590AA of the Code, and again at the outset of the trial counsel for the appellant renewed an application that there be separate trials of the counts on the indictment. Applications raising these issues were made, or renewed, on a number of occasions throughout the trial.

[47] Section 567 of the Code permits the joinder in the same indictment of a number of charges "founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose." Here each charge at least was of a "similar character" in that each involved an allegation of rape or attempted rape. (Count 1 on the indictment, because it involved the appellant's penis penetrating the complainant's mouth, would have been rape after 27 October 2000 when the definition was changed; but in the circumstances those facts, charged as indecent assault with a circumstance of aggravation, are of a "similar character" to rape as traditionally defined.) But something more must be established before there can be a "series" for purposes of the section. In *De Jesus v The Queen* (1986) 61 ALJR 1 at 9 Brennan J said: "However, for two or more offences to constitute a series there must be a nexus or a connection between them." (See also *R v Cranston* [1988] 1 Qd R 159 at 164.) That nexus could be found in circumstances such as time or place or in striking similarities between the offences. As is also demonstrated by the reasoning in *De Jesus* that nexus would be sufficiently established where the evidence was cross-admissible applying, for example, the tests of cross-admissibility derived from *Pfennig v The Queen* (1995) 182 CLR 461. (See also *R v Kray* [1970] 1 QB 125 at 130-1.) If the evidence is not cross-admissible separate trials should ordinarily be ordered: *De Jesus* at 3 and 7 and *Hoch v The Queen* (1988) 165 CLR 292 at 294 and 298.

[48] The real issue in *De Jesus*, as in most cases where a number of charges are joined in the one indictment, was not whether the charges were properly joined, but rather with whether there should have been separate trials of the charges. The critical question becomes whether or not the court ought, pursuant to s 597A of the Code, order that there should be separate trials with respect to some or all of the counts on the indictment. An order may be made under that section where 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". In

determining whether there is prejudice or embarrassment "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." (s 597A(1AA))

[49] Before considering the position of the appellant in the light of the authorities relevant to ordering separate trials in circumstances such as exist here, it should be noted that a trial following a joinder of charges which is subsequently held to be unjustified or a trial of numerous charges where it is subsequently held on appeal that there should have been separate trials is not a nullity; if there has been no miscarriage of justice (see s 668E of the Code) convictions should not be quashed: *R v Phillips & Lawrence* [1967] Qd R 237 at 277 per Hart J, *R v Bedington* [1970] Qd R 353 at 357 and *R v Cranston* at 165-6.

[50] In determining whether there has been a miscarriage of justice in permitting a trial to proceed where offences of a similar character are joined in the indictment regard must be had in particular to the reasoning in *De Jesus v The Queen*, *Hoch v The Queen, Pfennig v The Queen*, and *R v O'Keefe* [2000] 1 Qd R 564. Two passages from *Pfennig* are in my opinion of critical importance for present purposes. Mason CJ, Deane and Dawson JJ said at 481-2:

> "The insistence in some of the judgments of this Court on the need to show that propensity evidence was relevant to 'some other issue' as one of the prerequisites of its admissibility so as to prove the commission of the offences charged contributed to a misunderstanding of the *Makin* principles and to statements of principles which lacked a clear and coherent theoretical foundation. So much was recognised by Mason C.J., Wilson and Gaudron JJ. in *Hoch v. The Queen* [at 294] where their Honours stated that the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged."

[51] After rejecting the proposition that "striking similarities" are "essential prerequisites" to the admissibility of similar fact evidence in every case their Honours went on at 482 to say:

> "Where the propensity or similar fact evidence is in dispute, it is still relevant to prove the commission of the acts charged. The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred. Obviously the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed. But the prejudicial effect of those facts may not be significantly reduced because the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither logic nor experience would necessitate the conclusion that it clearly

> points to the guilt of the accused. Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such."

[52] In *Pfennig* the High Court referred with approval to various passages in the reasoning in the judgments in *Hoch*; it is sufficient for present purposes to refer to the following passages from the judgment of Mason CJ, Wilson and Gaudron JJ at 294-6:

> "The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged … . …
>
> Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force … . That strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.
>
> …
>
> Where, as here, an accused person disputes the happenings which are said to bear a sufficient similarity to each other as to make evidence on one happening admissible in proof of the others, similar fact evidence bears a different complexion for the issue is whether the acts which are said to be similar occurred at all. In such a case the evidence has variously been said to be relevant to negative innocent association or as corroboration but the better view would seem to be that it is relevant to prove the commission of the disputed acts … . Certainly that is the thrust of its probative value. That value lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred. …
>
> Similar fact evidence which does not raise a question of improbability lacks the requisite probative value that renders it admissible. When the happenings which are said to bear to each other the requisite degree of similarity are themselves in issue the central question is that of the improbability of similar lies … .
>
> …
>
> In cases such as the present the similar fact evidence serves two functions. Its first function is, as circumstantial evidence, to corroborate or confirm the veracity of the evidence given by other complainants. Its second function is to serve as circumstantial evidence of the happening of the event or events in issue. In relation to both functions the evidence, being circumstantial evidence, has

> probative value only if it bears no reasonable explanation other than the happening of the events in issue."

[53] In the course of their judgments in *Hoch* and *Pfennig* the judges of the High Court referred with approval to various passages in English authorities some of which are very pertinent to the situation now under consideration. In *R v Sims* [1946] KB 531, a case dealing with the joinder of several counts of sodomy, the Court of Criminal Appeal said at 540:

> "The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence on the others should be considered, and that, even apart from the defence raised by him, the evidence would be admissible."

[54] In *DPP v Kilbourne* [1973] AC 729, a case involving several counts of indecency with boys, Lord Hailsham of St. Marylebone L.C. said at 748-9:

> "When a small boy relates a sexual incident implicating a given man he may be indulging in fantasy. If another small boy relates such an incident it may be a coincidence if the detail is insufficient. If a large number of small boys relate similar incidents in enough detail about the same person, if it is not conspiracy it may well be that the stories are true. Once there is a sufficient nexus it must be for the jury to say what weight is given to the combined testimony of a number of witnesses."

[55] Finally in this context reference should be made to *DPP v Boardman* [1975] AC 421, another case involving gross indecency with boys. There Lord Wilberforce said at 444:

> "This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s)."

[56] As Lord Cross of Chelsea said in the same case at 459:

> "The likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar allegations and the more striking are the similarities in the various stories."

[57] In Queensland those passages must be read in the light of s 597A(1AA) which was inserted into the Code to overcome the decision in *Hoch*; however the issue of collusion or conspiracy remains an important consideration for the jury in determining the relevance of the evidence and the weight to be attached to it.

[58] The initial pre-trial hearing was concerned only with the charges involving the complainants other than JD. In his reasons for upholding the joinder of the charges, and in declining to order separate trials, the learned trial judge noted the following points of similarity common to each complaint:

> "(a) All of the girls were aged in their early to mid-teens.
>
> (b) All of the incidents included penis/vagina intercourse.
>
> (c) All of the girls were within the accused's extended circle of friends.
>
> (d) In all cases each of the girls was readily able to identify the accused, and he must have known that.
>
> (e) In all cases the accused did not immediately commence to treat the girls violently. He made sexual advances to each of the girls of such a nature that it left the way open for them to engage in sexual activity of their own free will. In the case of Count 4 [SW] the girl actually did consensually engage in some sexual activity. In every case there is common thread indicating a preference for consensual sexual intercourse and then little or no hesitation in resorting to the use of force to achieve his ultimate desire when the girl resists."

[59] Then the learned trial judge enumerated "additional features common to some, but not all, incidents". They were the following:

> "(f) In Counts 1, 4 and 5 [BS, SW and MM] the accused indicated a desire to have the complainant perform oral sex upon him. In fact in Count 4 [SW], the complainant did voluntarily perform oral sex upon the accused before she indicated her unwillingness to continue with the sexual activity.
>
> (g) In Counts 1 to 4 inclusive [BS, TK, ML and SW], there were other people relatively close by to whom the accused's conduct could have been revealed had the girl chosen to be more vigorous and vocal in her resistance. This factor, in conjunction with (e) above, indicates some desire and hope on the part of the accused that the girls would consent to engaging in consensual sexual activity culminating in the intercourse.
>
> (h) In Counts 2, 3 and 4 [TK, ML and SW] the incidents occurred in association with parties attended by both the accused and the complainant.
>
> (i) In Counts 1, 3 and 5 [BS, ML and MM] the accused was instrumental in engineering an opportunity to have the complainant alone with him. This is not to say that they demonstrate a conscious intention to rape prior to the girl offering resistance, but it does at least indicate a degree of premeditation in the accused's desire to have sexual intercourse with them.

(j) The five incidents occurred within the space of 16 months. There is of course significant temporal separation between each incident, so that they cannot be said to be temporally connected. However, they are sufficiently close in time to indicate an ongoing state of mind in the accused that if he gets the opportunity to have a sexual encounter with a girl and the girl displays an unwillingness to join in he is immediately prepared to continue the sexual encounter without the girl's consent.

(k) In spite of the similarities which I have mentioned above, some of the facts in relation to Count 5 [MM] are somewhat different from the earlier incidents. In relation to the complainant in that instance the accused behaved as a sympathetic friend which resulted in him taking her to the isolated unoccupied home at Cowley. He could just as easily have taken her to his parent's home as he did with the complainant in Count 1 [BS]. Also in Count 5 he resorted to much more significant violence than in the earlier incidents by the use of a weapon to make threats to the complainant. These differences may be explained simply as an increase in the level of violence to which he was prepared to resort to achieve his aim."

[60] A subsequent pre-trial hearing was held with respect to the charge involving JD. The learned trial judge then noted that there were similarities in the incidents involving all of the six complainants as follows:

"(a) In each case the girl was of similar age to the accused;

(b) The complainant was within the accused's circle of friends;

(c) The complainant in each case is readily able to identify the accused;

(d) The accused's initial sexual advances suggest a desire that each complainant should engage in consensual intercourse."

[61] Then the learned trial judge made the following finding:

"However, in my view, the common feature which gives the evidence of the complainant in Count 6 [JD] substantial probative value in respect of Counts 1 to 5 (particularly counts 1, 2 and 5) [BS, TK and MM] and vice versa is that in all cases in spite of the ability of all complainants to be able to identify the accused and in spite of their resistance, the accused persisted in attempting to have intercourse against the complainant's will almost to the point of reckless disregard of the consequences. This feature, if believed, shows a particular attitude or propensity on the part of the accused."

[62] In all of his rulings with respect to the joinder and the cross-admissibility of evidence the learned trial judge reiterated that the "probative value of the evidence is its ability to show the improbability of similar lies by each of the complainants." As he pointed out on a number of occasions in dealing with submissions on these issues, if each of the charges was tried separately defence counsel would urge the jury to have doubts about the truthfulness of the complainant's evidence or its

reliability "because it would be highly unlikely that the accused, knowing that he was able to be identified, knowing that he was proceeding to sexual intercourse against the complainant's will, would do such a thing because of the potential consequences."

[63] As already noted the critical issue before this court is whether there has been a miscarriage of justice occasioned by the refusal to order separate trials. That means that this court is entitled to have regard to all the evidence at the trial, including the evidence of the appellant, in considering whether or not there were sufficient similarities as between each of the incidents to warrant the joinder and make the evidence cross-admissible. Counsel for the respondent on the hearing of the appeal referred to additional similarities, namely the initial clumsy attempt at seduction in each instance, and the appellant's difficulty in achieving penetration with respect to the complainants BS, TK, SW and MM. In addition, one could add the circumstance that, according to the appellant, each of BS, SW and MM initiated oral sex without any request or suggestion on his part; his evidence was to similar effect with respect to an earlier incident with the complainant TK.

[64] In summary the case was one where each of the complainants (save for TK) was barely known to the appellant but was within his general circle of friends, each was a young teenage girl relatively sexually immature and unable to respond appropriately to the appellant's advances, each was apparently prepared to explore some physical relationship with the appellant but was unable to cope with pressure for intercourse subsequently applied, and in each case the appellant persisted and ignored the complainant's non-consent to intercourse.

[65] It is clear in my view that the learned trial judge correctly assessed the situation when he observed that on separate trials the defence would ask the jury to conclude that the complainant girl was telling a highly improbable story in saying she did not consent. That brought into focus the improbability of a number of different, but similar, accounts being untrue.

[66] In his summing up the learned trial judge directed the jury that they were required to deliver separate verdicts in respect of each of the accounts charged; it was pointed out that depending on the jury's view of the evidence the appellant could be found guilty on some charges and not guilty on others.

[67] Although the passage is lengthy I feel it necessary to set out in full the directions given by the learned trial judge with respect to the use that could, and could not, be made of the evidence of other complainants in considering each of the charges. The learned trial judge told the jury:

> "I need to give you very careful direction as to how you may use the evidence of all the girls in combination, all six girls in combination, because you may only use it in a very limited way.
>
> First of all, you cannot use it unless the evidence of each of the six girls is independent. Therefore I direct you, you cannot use the evidence of all of the six girls in combination unless you are satisfied that there is no real risk that the evidence they have given in the trial is untrue by reason of concoction. The value of any combination, any strength in numbers, if you like, is completely worthless if there

is any real risk that what they have said is untrue by reason of concoction.

In the context of this case, members of the jury, 'concoction' means collusion, that is two or more girls agreeing to give false evidence about PS. It is not collusion to agree to give true evidence. Suggestion; an example, one girl tells a second girl that she is going to give evidence against PS and the second girl decides to give false evidence to similar effect. It is not suggestion if the second girl decides to give true evidence. Thirdly, what might be termed 'incitement'. That is, an outsider such as BM or a police officer tells one girl that other girls are giving evidence against PS and the one girl decides to help out by giving false evidence. It is not incitement if one girl is persuaded or minded to give true evidence.

You must be satisfied not just that there has been no concoction; you must be satisfied there has been no real risk of concoction. It is a very high standard. A real risk is not one that is fanciful or theoretical, it is a risk based upon the evidence and which you as reasonable people of commonsense find to be real. So if you think that there is a real risk that any one or more of the six girls have given concocted evidence you must look at each incident completely separately from all the others and you may not use the combined evidence of all six girls in any way at all.

However, if you are satisfied that there is no real risk of concoction, no real risk that the evidence they have given is untrue as a result of concoction, in considering any incident relating to one girl, you may have regard to the evidence of all of the other girls. So that is the first thing. Before you can use it in combination you must be satisfied there is no real risk of concoction. Even after that you may only use it in a particular way. You may use it to measure the probability of all six girls telling a similar lie.

I explained to you the essential elements of indecent assault, rape, attempted rape and assault with intent to rape. You will recall that I drew your attention to the one common essential element and that is the absence of consent. If PS is not guilty of all those charges as he says he is then all six girls have lied when they say that he did something of a sexual nature to them without their consent. I emphasise again that PS does not have to prove his innocence. Prosecution must prove his guilt. I am simply explaining the only use you may make of the combined evidence of all of the girls together in the process of finally reaching a verdict of guilty or not guilty in relation to each offence.

So you ask yourselves this, what are the probabilities that all six girls have lied when they say they did not consent to PS dealing with them sexually. If you think it could possibly be just an unlucky coincidence then you consider each incident and the evidence of each girl's completely separately and you reach your verdicts in light of your view of the evidence relating to each incident completely separately. But if you are satisfied that the only reasonable

conclusion to be drawn is that they are all telling the truth when they say they did not consent to PS dealing with them sexually then you may use that conclusion in your thinking along the path to deciding whether PS is guilty or not guilty of each of the offences.

I will say it again, consider all of the girls' evidence. If you are satisfied that the only reasonable conclusion to draw is that they are all telling the truth when they say they did not consent to PS dealing with them sexually, then you may consider your verdicts on that basis. A conclusion is reasonable if you, as people of reason and commonsense, are satisfied that it is reasonable.

Let me offer you a few words of caution to explain how you cannot use it. Firstly, I am telling you how you may use it. I am not telling you that you should use it in that way; I am not telling you that you must use it, and, in fact, if you are able to resolve these charges by looking at each of the incidents separately and considering only the evidence in relation to each incident, then you should do so. But you can only use it in judging the reliability of the girls when they say they did not consent to PS dealing with them sexually. You cannot use it to decide whether or not there was penetration; you cannot use it to decide whether or not PS knew any particular girl was not consenting, that is, whether he might or might not have made an honest mistake; you cannot use it to judge one of the girls' memory of some detail as being reliable or not; you cannot use any sort of 'Where there's smoke there's fire' type of reasoning; you cannot say to yourself, 'Oh, well, they can't all be telling lies, therefore, they must all be telling the truth'; you cannot decide, for instance, that you believe one or two girls and then say, 'Well, we're satisfied he's raped on two occasions, therefore, he's more likely to have raped on the other occasions, therefore, we'll find him guilty of the lot.' Members of jury, whilst it might be said, as a matter of probabilities, that most people who give evidence complaining in some way of what another person has done are telling the truth, experience in the Court over the centuries is that it is not unknown that people tell lies. Sometimes people will tell a lie about being assaulted in a violent way; people will tell lies about someone having stolen property from them; having tricked them in some way to commit a fraud. The difficulty is knowing whether such a lie has been told in any particular case.

You might say, 'Well look, they can't all be lying.' But if what if one's lying? If one is telling lies and you were to convict PS of an offence in relation to that girl, then that would be unjust and not according to law.

So I will remind you again, you may only use the evidence of all six girls in combination in relation to the question of whether or not all of the girls are reliable when they say they did not consent to PS dealing with them sexually. You may only use the evidence of all six girls in combination if you are satisfied that the only reasonable conclusion to be drawn, after considering the evidence, is that they

> are all reliable when they say they did not consent to PS dealing with them sexually. It is all or nothing.
>
> A conclusion that all girls are telling the truth when they say they did not consent does not automatically translate into a guilty verdict on all offences. It is simply a possible step in the process of arriving at a verdict. There are other issues to consider such as penetration in some cases, honest mistake in others, and you can never find him guilty of any offence unless you are satisfied beyond reasonable doubt that he is guilty.
>
> A conclusion that the combined evidence of the girls may be a coincidence does not automatically translate into not guilty verdicts. It simply means that you look at each incident and the evidence of each of the girls separately. You may decide that any one or more or all of the girls is telling the truth independently of the others, if so, you use that as part of your reasoning process towards your verdicts."

[68] Towards the very end of the summing up the learned trial judge reiterated some of the statements made in that passage, but it is not necessary to set out those statements because they are substantially identical with what is in the quoted passage.

[69] The learned trial judge was clearly aware of the obligation imposed on him of giving "careful directions" as to the use the jury could make of the evidence of other complainants when considering a specific charge, and also of the obligation on a judge in summing up to direct jurors that they could not use the evidence other than for the identified purpose. (cf *BRS v The Queen* (1997) 191 CLR 275 at 305 and 329 and *Gipp v The Queen* (1998) 194 CLR 106 at 132.) It is also important in a case such as this for the trial judge in his summing up to warn the jury of the danger of reasoning from a suggested propensity that the accused must be guilty. The passage quoted from the summing up in the instant case contains passages adequately warning the jury as to that danger. The jury was also clearly directed as to the limited identified purpose for which they could use the evidence.

[70] The issue of collusion was a major focus of attention during addresses. That topic was the subject of intense debate prior to addresses commencing; exhibit "G" was handed by defence counsel to the trial judge and it collated evidence relevant to the issue of the opportunity for collusion or suggestion as between complainants. It is clear that each counsel in addressing the jury had regard to the contents of that document.

[71] In dealing above with the evidence relevant to each charge I have included a brief summary of the evidence in relation to each complainant's opportunity of colluding with another. MM and JD made complaints to police and very shortly after the incidents in question, but BS, TK and ML were approached in the first instance by police. It is clear that their names came to the attention of investigating police when they were investigating the complaint of MM. SW approached the police but only after she had been informed by BM that police were investigating the appellant. It is also true that details of some of the initial contact between investigating police officers and complainants were not recorded in police notebooks.

[72] But having said all of that there is no evidence of substance supporting the proposition that there was collusion (or conspiracy) between the complainants.

[73] What is more important is that, as already noted, the question of collusion was fully canvassed in addresses before the jury. Ultimately the issue fell to be resolved by findings as to the credibility of each of the complainants. In the passage quoted above from the summing up the jury was directed on more than one occasion that they had to be "satisfied that there is no real risk of concoction, no real risk that the evidence they have given is untrue or a result of concoction" before they could treat evidence as cross-admissible with respect to other charges on the indictment. They were also directed that it was only if they were "satisfied that the only reasonable conclusion to be drawn is that they are all telling the truth when they say they did not consent" that the evidence was cross-admissible with respect to the charges on the indictment.

[74] In argument in this court senior counsel for the appellant stressed that there were distinctions between the various incidents such as made the joinder improper/or ought to have resulted in a ruling that the evidence was not cross-admissible. In particular he referred to the evidence of violence in the incident involving MM, to the fact that the incident with ML occurred virtually in a public place rather than in a house, and to the significant alleged dissimilarities between the incident involving JD and all the others. Of course it has to be admitted that such distinctions existed, but the focus in a case such as this must be more on the similarities. If there are sufficient similarities as between the evidence of the incidents to make the evidence cross-admissible the existence of some dissimilarities or distinctions will not necessarily reverse that position. As is often the case the ultimate decision will call for a careful exercise of judgment by a trial judge and, in my view, it cannot be said that the learned trial judge here erred in ruling as he did and in directing the jury as he did.

[75] The protection of the accused, particularly where questions relating to similar fact evidence are involved, will always be a vital consideration, but the mere fact that the evidence is highly prejudicial does not of itself mean that it must be excluded. This case was finely balanced and the learned trial judge was called upon to make critical decisions possibly having a significant effect on the outcome of the trial. He was also faced with an ever-changing kaleidoscope of facts. That is why he was called upon to deal with these issues both at pre-trial hearings and throughout the trial. As he acknowledged, the position did change somewhat after the appellant gave evidence, but that does not mean that the earlier decisions were wrong.

[76] In oral submissions before this court counsel for the appellant argued that his client was deprived by the joinder of the exercise of a free and fair choice as to whether to give evidence. It was said that the evidence against him on the MM counts almost compelled him to give evidence and that necessitated his giving evidence, and exposing himself to cross-examination, on all counts. That is a consequence of evidence being cross-admissible and would be a relevant matter for a judge to take into account when determining whether or not to grant separate trials, but it could hardly ever be a decisive consideration. Here the probative value of the evidence outweighed the prejudicial consequence to the appellant.

[77] My major concern has been the propriety of joining the charge involving JD with the others. That incident occurred much later in point of time and after the appellant was charged with the earlier offences. Whilst some violence was allegedly involved

and there were at least sexual overtones, the incident was not as overtly sexual as were the incidents involving the other complainants. As already noted the learned trial judge in his pre-trial ruling emphasised the fact that in spite of the complainant's ability to identify the appellant he persisted in making advances with almost a reckless disregard of the consequences.

[78] Both at trial and on the hearing of the appeal counsel for the prosecution contended that the evidence of the Innisfail complainants was admissible in the count involving JD to prove the intent of the appellant. The learned trial judge did not allow that approach to go to the jury. In my view it is not necessary for this court to rule on the submission that the evidence was admissible in that way.

[79] It is not without some hesitation that I have come to the conclusion that the evidence on Count 8 was cross-admissible with the evidence on each of the other counts because of all the similarities noted above and there was no miscarriage of justice in allowing the matter to go the jury on that basis.

[80] The Director of Public Prosecutions submitted to the court on the hearing of the appeal that if the conclusion was reached that Count 8 should have been the subject of an order for a separate trial nevertheless the convictions should stand as the proviso would apply. In that regard reference was made to the fact that the jury did differentiate between complainants as evidenced by the "not guilty" verdicts returned. Senior counsel for the appellant responded to that by referring to the observations made in *Glennon v The Queen* (1994) 179 CLR 1 at 9. As I am of the view that the rulings made by the learned trial judge can be supported there is no need to consider those submissions further.

[81] Bearing in mind the passages quoted from the authorities referred to above I am not persuaded that the learned trial judge erred in permitting the trial to proceed as a joint trial with respect to all the charges against the appellant and in ruling the evidence was cross-admissible.

[82] Having considered the evidence, and the matters put to the jury in addresses and in the summing up, I have come to the conclusion that it was reasonably open to the jury to conclude that the evidence excluded any real risk of collusion and in those circumstances the jury was entitled to use the evidence in accordance with the directions given in the summing up.

[83] Finally, I am not persuaded that there was any error in the summing up with respect to the use that the jury could make of "propensity evidence".

[84] It follows that the grounds of appeal referred to above have not been made out; neither the joinder nor the directions given to the jury resulted in a miscarriage of justice.

[85] There were eight other specific grounds relied on in support of the appeal against convictions, and it is necessary to deal with them separately.

Ground 5

[86] It was contended that the learned trial judge erred in admitting evidence of BM on the charges involving the complainant BS. BM gave evidence that on the drive to pick her up from her home the appellant asked him "if he had fucked [BS] before, whether she was easy and if he looked good enough to get a fuck". It was submitted

that the evidence was speculative and prejudicial. Given that, on the appellant's own evidence, he had consensual sexual intercourse with BS later that evening it is difficult to see how the evidence was prejudicial to his case. The evidence does indicate the appellant's state of mind at the time and puts into context the later events. In my view, as submitted by counsel for the respondent, the evidence was relevant and admissible.

Ground 6

[87] It was submitted that the learned trial judge erred in not requiring the prosecution to elect which act was advanced in proof of the charge involving SW. The particulars provided by the prosecution of this count of rape were as follows:

> "The accused pushed his penis into the vagina of [SW]. The penis moved out of her vagina when he moved to shut the door; he then put his penis inside her again. This episode when the accused forced his penis into the vagina of [SW] a number of times is the episode relied on for this count of rape. [SW] cannot be certain whether it was the accused's penis or finger that was forced into her vagina during these occasions. This course of conduct occurred after [SW] had performed oral sex on the accused, and after the accused had masturbated and touched her vaginal area with his finger."

[88] At the outset of the trial counsel for the appellant asked for further and better particulars of the act said to constitute the rape. Whilst conceding that each separate penetration did not constitute a separate offence the submission was, and is, that the "prosecution should have been required to elect between distinct acts separated by interruption by other parties opening the door to the bedroom … and the movement of the appellant away from the complainant to the door and returning to her". It was said that there was a danger that the jury "might view one or more particular act or acts as constituting the offence." The position was complicated somewhat because the complainant was unsure whether it was a penis or finger (or perhaps each at different points of time) which penetrated her.

[89] The whole episode took place within a very short time frame and it would have been artificial to isolate one particular penetration as that constituting the offence. It is clear that the offence was sufficiently identified by time and place and the appellant clearly knew the case that he had to answer. Whilst the appellant may well have pulled out of the complainant in order to close the door the evidence is that he did not move away any significant distance. Indeed the evidence of the complainant on one occasion suggested that the appellant merely lent over in order to close the door. Photographs of the bedroom were in evidence and they showed the proximity of the bed to the door.

[90] In the circumstances I am not satisfied that the appellant was in any way prejudiced by want of particulars with respect to the charge of rape involving SW.

Ground 8

[91] It was submitted that the learned trial judge in directing the jury with respect to the use of evidence of other complainants departed from the document containing the direction he proposed to make and which was given to counsel prior to their final addresses to the jury. It was said that that change disadvantaged the appellant.

[92] The notes of the proposed direction were marked Exhibit K.

[93] It is obvious that the learned trial judge expanded on the three paragraphs contained in Exhibit K when giving directions to the jury, but in my view he did not depart in any substantial way from what was said therein.

[94] Nothing said in the course of argument has persuaded me that any prejudice, as contended for, was created by the learned trial judge expanding on the content of Exhibit K when directing the jury.

Ground 9

[95] It is alleged that the learned trial judge erred in declining to redirect the jury on four matters:

(a) As to the features of the evidence relevant to the defence of mistake of fact with respect to consent on the charges involving ML and SW;

(b) As to the inconsistencies in the evidence of MM on the issue of penetration;

(c) In omitting reference to JD's evidence that "the appellant's struggle with her continued for about a minute after the appellant's mother arrived on the scene";

(d) As to the evidence of real risk of collusion and suggestion.

[96] The learned trial judge let mistake as to consent go to the jury with respect to the counts involving ML and SW. However, he did not specifically identify evidence particularly relevant to that consideration. In the circumstances that omission is understandable. On the evidence of each of the complainants she was clearly voicing her lack of consent to what was happening, and on the appellant's evidence each of the complainants was a very willing participant in what was happening. With respect to the incident with ML the learned trial judge in his summing-up detailed the appellant's evidence that ML initiated the sexual episode, that she removed her own clothing, that she wrapped her legs around his body, that when he stopped she asked him to come back, and also said: "Well, you know, all my other boyfriends would have come by now". It is difficult to know what else could have been said by the learned trial judge which the jury could have had regard to when considering a defence of mistaken belief that the complainant was consenting.

[97] The position is similar with respect to the summing-up on the count involving SW, and it is not necessary for me to repeat here what was said.

[98] In my view the appellant has not demonstrated any error on the part of the learned trial judge in his summing-up with respect to mistaken belief as to consent on the part of ML and SW.

[99] In outlining the relevant evidence with respect to the charges involving MM I have referred to the fact that there was an issue with respect to penetration. At the committal proceeding she did say on one occasion that the appellant "didn't get it in", but the general thrust of her evidence at trial was that she was penetrated "but not far at all".

[100] In his summing-up the learned trial judge directed the jury that in order to find the appellant guilty of Count 6 "you must be satisfied beyond reasonable doubt that he actually achieved penetration of the vagina". He told them that the two issues for their consideration were penetration and lack of consent. He then repeated that in dealing with Count 7. In dealing with the specific evidence he referred to the fact that the complainant said "he did not get it all the way in". Then he told the jury that "if you are satisfied beyond reasonable doubt that she is telling the truth, firstly, that he actually got his penis into her vagina part of the way and that she was not consenting, your verdict on Count 6 would be guilty. If you have a reasonable doubt about either one of those things, your verdict on count 6 would be not guilty". Much the same was then said with respect to Count 7. Later the learned trial judge summarised Counts 6 and 7 and there was reference again to whether "penetration was achieved".

[101] Earlier in his summing-up the learned trial judge dealt generally with inconsistencies between, for example, what a witness said at the trial and what was said at committal. He directed the jury that if there were "significant inconsistencies" the jury was entitled "to form the view that the witness is unreliable, whether by reason of imperfect memory or deliberate lies". After making the observation that people may not always use the same words in describing a particular incident, he again told the jury they were "entitled to take account of inconsistencies in judging a witness' honesty, reliability or both". Though the learned trial judge did not specifically refer at any stage in the summing-up to the "inconsistency" now highlighted by counsel for the appellant with respect to the evidence of MM, I am not persuaded that the omission to do so resulted in a misdirection being given.

[102] It is clear from what was said by the learned trial judge that penetration was in issue with respect to both Counts 6 and 7 and in consequence there was, in my view, an adequate direction given to the jury.

[103] In dealing with Count 8 the learned trial judge summarised the evidence of the complainant, the appellant, and the appellant's mother in the course of his summing-up. However he did not refer to the following answer given by the complainant in the course of her examination-in-chief. After giving evidence of the arrival on the scene of the appellant's mother and the exchange of words between the appellant and his mother, the complainant was asked: "And how long after that was it that you were able to get away from him?" She replied, "Probably a minute or two before I could actually push him off me". During cross-examination she again said: "Maybe a minute or so before I managed to push him off". When counsel took her back to that answer she replied: "That's what it felt like to me".

[104] Counsel for the appellant asked for a redirection specifically drawing the jury's attention to the evidence that the time frame in question was "a minute or two". The learned trial judge declined to do so, but did give the jury a general reminder that they should have regard to all of the evidence.

[105] Counsel for the appellant submitted in this court that the answer in question was "important in the determination of [JD's] credit and the plausibility of her account of the appellant's conduct". That was said to be so "because of the improbability of his behaving that way in the presence of his mother".

[106] There was, of course, a conflict between JD on the one hand and the appellant and his mother on the other as to what the appellant said to his mother. If the jury accepted the evidence of JD that he told his mother to "fuck off" his continuing to push JD up to the window for some short time after his mother's arrival would not be improbable. Further, the evidence as to time was clearly of an impression only and specific reference to the answer could have given it greater importance than it warranted.

[107] In the circumstances I am not persuaded that there was any unfairness occasioned to the appellant by the learned trial judge declining to remind the jury of that specific piece of evidence.

[108] Finally, on this ground I am not persuaded that there was any misdirection in failing to deal at any greater length with evidence relevant to a "real risk of collusion and suggestion". On the evidence the complainants did not know each other. With the exception of BS all complainants had made some complaint of rape prior to any connection with other witnesses. BS complained when the police contacted her and she had spoken to BM on some two or three occasions between the incident involving her and the making of a complaint to the police. All of those matters were canvassed at length before the jury, particularly in the final addresses of counsel. The critical passages in the summing-up dealing with the "real risk of collusion" have been quoted above.

[109] In the circumstances it has not been established that there was any error made by the learned trial judge in declining to give further direction on that issue as requested.

Ground 10

[110] It was submitted that the learned trial judge failed to put the appellant's case to the jury adequately. In that regard reference was made to statements as to the obligation of a trial judge to fairly put the defence case found in *R v Mogg* (2000) 112 A Crim R 417.

[111] The defence case was that in each instance whatever happened between the appellant and a complainant was fully consensual. The learned trial judge clearly put the appellant's version of relevant events to the jury in the course of his summing-up.

[112] A reading of the summing-up does not persuade me that the learned trial judge failed in his obligation to put the defence case fairly. In support of this ground counsel reiterated the matters raised as particulars of ground 9 and for the reasons already given I conclude that there is no substance in those contentions.

Ground 11

[113] This ground concerned the response of the learned trial judge to a question asked by the jury in the course of its deliberations. The following question was asked by the jury:

> "On the count 8 charges, can you identify the initial charges suggested to [JD] following her complaint prior to the involvement of Detective Dugger and his knowledge of Intel?"

[114] After hearing submissions from counsel the learned trial judge directed the jury as follows:

> "Members of the jury, just to put the timing in context the incident involving [JD] occurred on the morning of 11 May 2003. She went to the police on 12 May 2003 and spoke to Constable Middleton and on 13 May 2003 was when Dugger first made contact with her. And she was asked these questions about her options and I will just remind you of the evidence."

[115] The learned trial judge then read to the jury an extract from the cross-examination and re-examination of JD. The following questions and answers were read:

> "Mr Durward: … Since it's been raised, when you went to see Constable Middleton you gave an account of what you say happened?- Yes.
>
> Were you still in two minds as to whether you wanted to press any charges?-- I wasn't sure what could be done.
>
> Yes. And – but when you went back on the Wednesday and made a statement perhaps to Detective Barba you – you then, if you like, made a formal complaint?-- Yes.
>
> Well, you spoke to Middleton and signed his notebook. It's the case, isn't it, that you were unsure if you wanted to make a complaint or not about what had happened?-- Oh well, they told me that there was two options that I could have taken. One was some sort of stalking charge where they would warn him and he wouldn't have any contact with me or I could do the statement and take it to court.
>
> Well, did you tell the police when you made your statement on 14 May after you had – well the time that you had spoken to Constable Middleton, "at that time I was unsure if I wanted to make a complaint or not about what had happened". Is that correct?-- I told them I was unsure what I wanted to do, yes.
>
> Yes?-- But not on the 14th, I'm sorry, on the 12th I was unsure.
>
> …
>
> Ms Bain: Well, just sticking with that same subject, is that because at that stage you'd been told that you had two options of how you could deal with it?-- Yeah.
>
> And you were considering which of those options you wanted to take?-- Yes."

[116] The learned trial judge then asked the jury spokesman whether that was what the jury wanted to know and the spokesman indicated the jury "just wanted to clarify what those two options were, and we know of the stalking option, was – was the other option assault or assault with intent to rape?" To that the learned trial judge responded:

> "… Complainants do not decide what the charges are, police have to look at the statements they give and then they work out what charges might be sustainable if that account is true. But, even what the police decide does not matter, it is for you to decide whether the charges are sustained on the evidence you hear during the course of the trial. Okay? So, does that cover it for you do you think?"

[117] After that the jury retired to deliberate further with respect to the charges.

[118] The contention of counsel for the appellant is that the latter direction was "unnecessary and non-responsive to the jury's enquiries and may have undermined a critical part of the defence case concerning the risk of collusion and suggestion". The police officers involved in the JD matter were cross-examined as to when they became aware through "Intel" of the fact that the appellant was facing charges of rape with respect to the Innisfail complainants. Defence counsel had cross-examined with a view to establishing that JD was aware of the other complaints before she made her formal complaint. Ultimately there was no evidence that the police told JD about the other girls prior to her making her complaint.

[119] The response of the learned trial judge to the questions asked by the jury was appropriate and, in my view, did not result in a mistrial.

Ground 12

[120] The appellant contends that the jury verdicts with respect to the complainants BS and MM are inconsistent. With respect to BS the jury returned a verdict of not guilty of indecent assault with a circumstance of aggravation (Count 1) but guilty of rape (Count 2). With respect to MM they found the appellant not guilty of rape but guilty of unlawful carnal knowledge on Count 6 and guilty of rape on Count 7. Different considerations apply with respect to the verdicts involving each complainant and the submissions must be considered separately.

[121] The approach of an appellate court to a contention that the jury has returned inconsistent verdicts has been considered in a number of recent cases; it is only necessary to refer to *MFA v The Queen* (2002) 213 CLR 606, *M v The Queen* (1994) 181 CLR 487, *MacKenzie v The Queen* (1996) 190 CLR 348, *Jones v The Queen* (1997) 191 CLR 439, *R v Markuleski* (2001) 52 NSWLR 82 and *R v Kirkman* (1987) 44 SASR 591.

[122] The complainant BS did not come up to proof with respect to Count 1. As already noted the original particulars relied on by the Crown had that incident occurring prior to sexual intercourse and had the appellant touching her vaginal area at the same time. In her evidence she initially omitted all reference to oral sex prior to detailing the act of intercourse. The jury could well have gained the impression that her evidence as to oral sex was something of an afterthought. Further, at no time in her evidence did she mention the appellant touching her vaginal area during the episode of oral sex. Those considerations alone could well have caused the jury to differentiate between the two counts; whilst accepting BS as an honest witness the jury could have had a doubt as to whether all elements of Count 1 were sufficiently proved. The appellant admitted intercourse, so the only issue on Count 2 was consent.

[123] When dealing generally with the elements of the offence of rape the learned trial judge directed the jury that they must be satisfied beyond reasonable doubt that the accused "knew the woman was not consenting". He then referred to the "possibility of an honest mistake" as to consent. Though the learned trial judge did not return to that when dealing specifically with BS the jury would have been well aware of the defence; it was referred to on a number of occasions throughout the summing-up. Particularly given the conflict of evidence between the complainant and the appellant the jury could have had a reasonable doubt as to Count 1 but not with respect to Count 2.

[124] Further, as the learned trial judge observed in the course of his sentencing remarks another possible explanation was that the jury applied some concept of "fairness". With respect to BS the prosecution laid separate charges with respect to the oral sex and sexual intercourse, whereas with the complainant MM no charge was laid with respect to the oral sex. Also no charge was laid with respect to the episode of oral sex involving the complainant SW which, at least initially, was consensual.

[125] Against all that background the verdict of not guilty on Count 1 but guilty on Count 2 is not an affront to logic and commonsense. Applying the principles recognised in the cases referred to above these verdicts were neither unreasonable or unsafe.

[126] The appellant faced two charges of rape with respect to MM because, on her evidence, there were two acts of intercourse separated by the smoking of a cigarette. No charge was laid with respect to the incidents involving oral sex before each act of intercourse. Again, as was suggested by the learned trial judge in his sentencing remarks, the jury may have considered it somewhat unfair that the appellant faced more than one charge of rape with respect to this complainant when there was in a broad sense only one episode.

[127] It must also be remembered that the jury had the benefit of seeing the video which contained some footage of the complainant and appellant prior to the first sexual conduct. There is also the taped telephone conversation. Because the appellant at trial denied any actual sexual intercourse there was no specific mention made of mistaken belief as to consent with respect to the charges involving MM. But, as noted above, on a number of occasions in the course of the summing-up reference was made to that defence and the jury would clearly have understood that the prosecution had to negative a reasonable but mistaken belief on the part of the appellant that MM was consenting. With respect to the first charge, Count 6, it would not have been unreasonable on the evidence for a jury to have accepted the complainant's evidence that intercourse took place but to have had a reasonable doubt, particularly because of all the events including the drinking of alcohol which preceded it, that the appellant had a reasonable belief that the complainant was consenting. But after that the complainant's conduct could have been regarded by the jury as sufficiently indicating to the appellant that she was not consenting to any further sexual activity; yet the appellant persisted in having intercourse with her.

[128] Again, bearing in mind the authorities referred to above, there is a rational explanation for the jury's verdicts. They were satisfied beyond reasonable doubt that on two occasions the appellant had sexual intercourse with a 15 year old girl, and they were satisfied beyond reasonable doubt that she did not consent to the second. On that analysis the only concerning feature about the evidence is that there appears to have been more reference to the bat about the time of the first, rather than

the second incident; however, in my view, that is not necessarily a decisive consideration.

[129] In all the circumstances I am not persuaded that the verdicts are an affront to logic and commonsense and in the circumstances the verdicts returned by the jury do not render the convictions unsafe and unsatisfactory.

Ground 13

[130] Pursuant to this ground it was submitted on behalf of the appellant that in all the circumstances the verdicts of the jury were unsafe and unsatisfactory. Counsel relied on all of the other specific submissions as particulars of this ground. I have reached the conclusion that, looked at in isolation, none of those contentions necessitate setting aside the convictions; and I am also not persuaded that looked at globally, and applying the test derived from *M v The Queen*, *Jones v The Queen*, and *Gipp v R*, the convictions should be quashed.

[131] It follows that the appeal against the convictions should be dismissed.

Sentence

[132] It is now necessary to deal with the application for leave to appeal against the sentences imposed, particulars of which are set out in the schedule in paragraph [2] above. As is obvious from the discussion with respect to convictions the appellant was a juvenile when the offences constituting counts 2, 4 and 5 were committed and an adult when the offences being counts 6, 7 and 8 were committed. Because the *Juvenile Justice Act* applied to those offences committed as a juvenile, the maximum applicable penalty for the rapes being counts 2 and 4 was 10 years, and for the unlawful carnal knowledge, count 5, was seven years. The Criminal Code applied to offences committed as an adult and in consequence the rape, count 7, carried life imprisonment, whilst with respect to counts 6 and 8 the maximum penalty was 14 years imprisonment.

[133] In his sentencing remarks the learned trial judge indicated that the significant feature was “the prisoner’s persistence”. He referred to the fact that in each instance there was an unsuccessful attempt at seduction followed by proceeding to obtain sexual gratification notwithstanding absence of consent.

[134] The learned trial judge also noted that he did not consider there was “substantial premeditation”, nor could the appellant be regarded as “giving way to the impulse of the moment”.

[135] The observation was also made that the appellant had “shown no remorse”; that was clearly justified on the evidence.

[136] The learned trial judge expressed the view that the sentence on count 8 should be cumulative because the appellant had been arrested, charged and committed with respect to the earlier offences “and yet he persisted”.

[137] The stated justification for making a serious violent offence declaration was “because of the repetition of offending. Rape is not just a sexual offence, it is a violent offence. It is always a violent offence and the law recognises that.”

[138] The appellant had no criminal history other than some traffic offences which, correctly, were said to have no relevance to the sentences to be imposed for the offences in question.

[139] The submissions of senior counsel for the appellant concentrated on three aspects of the sentence:

(i) there was no feature of the case which warranted the making of serious violent offence declarations with respect to counts 7 and 8;

(ii) nine years imprisonment for count 7 was manifestly excessive and a sentence in the range four to five years imprisonment was contended for;

(iii) the sentence of three years imprisonment on count 8 was manifestly excessive, though it was conceded that the making of a cumulative sentence was within appropriate sentencing discretion. A sentence of one and a half to two years imprisonment was contended for.

[140] This court must have regard to the effect of the overall sentence; effectively the appellant was sentenced to 12 years imprisonment with a serious violence offence declaration. That means that he would have to serve approximately nine and a half years before becoming eligible for post-prison community based release. Despite the number of offences involved that was said to be a crushing sentence on a 19 year old with no previous convictions.

[141] The Director of Public Prosecutions submitted that the making of a declaration was appropriate. The submission was made that the sentence for count 7 must be seen in the context of the convictions for rape on earlier occasions of BS and ML. Reference was also made to the fact that there appeared to be an element of escalation of the violence as the offending continued.

[142] It is correct to say, as was submitted by counsel for the respondent, that the offences exceed "any allowance that can be made for a youthful enthusiasm for the opposite sex, or for an immature or unsophisticated way with women". But nevertheless, in my view, there was an element of immaturity on the part of both the appellant and the various complainants which contributed in some way to what happened. Whilst that does not absolve the appellant from criminal responsibility for his acts, it is a consideration which is relevant on the issue of sentence.

[143] Given the circumstances in which courts are these days called upon to deal with the offence of rape, it has to be said that these offences did not fall within the worst category. The most significant aggravating feature is the serial nature of the offending.

[144] With respect to count 7 the court cannot ignore the fact that a verdict of not guilty of rape, but guilty of carnal knowledge, was returned on count 6. That incident occurred only a short while before the events constituting count 7. I have indicated above in dealing with the appeal against conviction that the jury verdicts are not necessarily inconsistent, but on the issue of sentence the jury verdicts cannot be ignored.

[145] Because of the almost infinite variety of circumstances in which the offence of rape is committed not much assistance can be gained from a perusal of other decisions of this court reviewing sentences for rape. Sentences anywhere in the range five years

to 20 years have been upheld given all of the relevant circumstances in a particular case.

[146] Having regard to all that has been said in these reasons I have come to the conclusion that a sentence of nine years imprisonment with a serious violent offence declaration is manifestly excessive on count 7. Particularly given the youth of the appellant a serious violent offence declaration is not justified. A sentence of seven years imprisonment in my view is not only within range, but is the proper sentence to impose for that count in all the circumstances.

[147] I am not persuaded that the sentence of three years imprisonment cumulative on the other sentences is manifestly excessive for count 8, particularly given the fact that the conduct terminated when it did, albeit fortuitously on the arrival of the appellant's mother. However, again I am not persuaded that a serious violent offence declaration is justified. In my view if such a declaration is imposed that makes the sentence originally imposed on this count manifestly excessive.

[148] It follows that I would set aside the serious violent offence declarations on counts 7 and 8, and reduce the sentence on count 7 from nine years to seven years. The effect of that is that the appellant would be sentenced overall to 10 years imprisonment and would have the statutory eligibility to apply for post-prison community based release after serving five years.

[149] **Orders**

The orders of the Court should therefore be:

(i) Appeal against convictions dismissed;

(ii) Grant leave to appeal against sentence and allow the appeal to the extent only of setting aside the sentence on Count 7 of nine years imprisonment and substituting a term of seven years imprisonment and further setting aside the serious violent offence declarations made with respect to Counts 7 and 8.

[150] **CULLINANE J:** I have had the opportunity of reading the reasons of Williams JA in this matter. I agree with the orders he proposes for the reasons given by him.

[151] **JONES J:** I have had the advantage of reading the reasons of Williams JA and but for one matter I agree with them and the orders proposed.

[152] The one matter with which I am unable to agree with relates to the variation of the sentence for Count 7 - the rape of complainant MM. I agree that the serious violent offence declarations should not remain but once removed the appellant has to be re-sentenced.

[153] The sentencing in respect of this offence has to be considered against the background of the jury's verdict in relation to Count 6 – not guilty of rape but guilty of unlawful carnal knowledge of complainant MM. The learned sentencing Judge assessed the outcome as being a "merciful verdict". His assessment was based upon the jury not having an intimate understanding of the sentencing process, and having an expectation that the appellant might receive double the punishment for that incident from which two charges arose.

[154] The complainant alleged that prior to this offence she had been threatened with a wooden baton (described by the learned sentencing Judge as a sledgehammer handle) and that her cooperation with the appellant was still influenced by that threat. No serious physical force was in fact inflicted upon the complainant and she suffered no physical harm from the acts constituting the offence. However the risk that she took in making her escape is an indication of the extent of her fears. The learned sentencing Judge found that:

> "Count 7 is somewhat different. In that case, the prisoner took advantage of the having the complainant alone at night, in a relatively isolated home over which he had control. He threatened her with a potentially dangerous instrument in order to secure her reluctant consent, if it could be called that, to his conduct."[1]

[155] On behalf of the appellant, it was argued that four to five years was the appropriate range having regard to the accused's immaturity and the relative age of the complainant.

[156] This was the third rape committed by the appellant over a period of 16 months. In relation to the first two the appellant was still a juvenile and the penalties imposed of four years imprisonment were appropriate to that status and his closeness in age to the complainants. By the time of the subject offence, he was 17 years and four months old and the complainant was a 15 year old schoolgirl. She was initially in his company because she believed he was helping her to leave her then residence and to return to her mother's house. Her subsequent behaviour suggested that the initial sense of urgency to go home had faded. The circumstances in which the offence occurred demonstrated features of premeditation and predatory behaviour on the part of the appellant. Of particular concern, is the escalation of offensive conduct with the threat of force when compared with the circumstances of the earlier offences. The learned sentencing Judge found that the "persistence and apparent recklessness displayed by the prisoner in the repetition of offending is disturbing".[2] He commented also on the appellant's lack of remorse and his "callous disregard for the rights of the young women".[3]

[157] The repetition of offending and the circumstances in which this particular offence was committed called for the imposition of a significant term of imprisonment. For my part, I would impose a sentence of nine years imprisonment. With the penalty for Count 8 to be served cumulatively this would result in a total term of imprisonment of 12 years with the prosect of post prison community cased release after six years. Such a penalty does not, in my view, offend the totality principle.

[158] I would therefore dismiss the appeal against conviction. I would allow the appeal against sentence in respect of Counts 7 and 8. For Count 7, I would vary the sentence to nine years imprisonment. For Count 8, I would vary the sentence to three years imprisonment to be served cumulatively upon the sentences on the other counts.

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[1] Record of Proceedings Vol 8 1942/12
[2] Record of Proceedings Vol 8 1942/52
[3] Record of Proceedings Vol 8 1943/25