SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAS* [2005] QCA 97
PARTIES:	**R** **v** **BAS** (appellant) **R** **v** **BAS** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 212 of 2004 CA No 249 of 2004 DC No 487 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	8 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2004
JUDGES:	Davies and McPherson JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. CA No 212 of 2004 dismissed** **2. CA No 249 of 2004 dismissed**
CATCHWORDS:	CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Particular grounds – Unreasonable or insupportable verdict – Where appeal dismissed – Where appellant convicted of multiple indecent dealing, sexual assault and rape counts – Where all complainants consented to acts committed by appellant – Where consent obtained by fraud – Whether it was reasonably open to the jury to conclude the appellant's purpose was for self gratification and not therapeutic purposes CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Particular grounds – Unreasonable or

insupportable verdicts – Where appeal dismissed – Indecent dealing – Where indecency arises not simply from the identity of the part of the subject's anatomy touched, but also from the appellant's purpose in touching them – Whether jury reasonably entitled to find indecency on the whole of the evidence

CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Objections and points not raised in court below – Misdirection and non-direction – Particular cases – Appellant made implied representations as to the purpose of his conduct – Where defence counsel made no requests for particulars identifying such representations – Where defence case accepted the complainants believed the appellant was acting for therapeutic purposes – Whether it was reasonably possible that failure to direct the jury in such circumstances may have affected the verdict

CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Appeal by Attorney-General or other Crown law officer – Applications to increase sentence – Offences against the person – Digital rape – Where sentence not manifestly insufficient

R v Austerberry, unreported, DC No 664 of 2003, 6 June 2003, noted
R v Flattery (1877) 2 QBD 410, cited
R v Glattback [2004] QCA 356; CA No 53 of 2004, 1 October 2004, cited
R v Harkin (1989) 38 A Crim R 296, applied
R v Veltheim [1987] CCA 135; CA No 120 of 1987, 18 August 1987, discussed
R v Williams [1923] 1 KB 340, cited

Criminal Code 1899 (Qld), s 24, s 245, s 246, s 347, s 348, s 349, s 352
Criminal Practice Rules 1999 (Qld), r 66(2)(b)

COUNSEL: P J Davis for the appellant/respondent
C W Heaton for the respondent/appellant

SOLICITORS: Russo Lawyers for the appellant/respondent
Director of Public Prosecutions (Queensland) for the respondent/appellant

[1] **DAVIES JA:** I agree with the reasons for judgment of Fryberg J and with the orders he proposes.

[2] **McPHERSON JA:** The appellant was convicted of acts of rape, as well as sexual assault on and indecently dealing with a number of women committed by him in the course of practising natural or alternative medicine on the Gold Coast. Details of the counts in the indictment and the evidence in support of them are given in the

reasons of Fryberg J which I have had the advantage of reading. Essentially the acts proved against the appellant were that he inserted his fingers in the vaginas of some of the complainants and touched them or others on the breasts and other parts of their bodies.

[3] Rape has as recently as 2000 been re-defined in s 349 of the *Criminal Code* in what may be described as, for the most part, gender neutral language. For present purposes, it is enough to focus on those parts of the definition in s 349(2)(b) that have the effect of making it rape if a person "penetrates" by inserting a finger or fingers in a woman's vagina without her consent. By s 348(1), "consent" means consent freely and voluntarily given. Consent in this sense is excluded under s 348(2) if it is obtained:

> "(e) by false and fraudulent representations about the nature or purpose of the act".

This does not differ markedly from the original definition of rape in s 347 of the Code, which made it rape if the complainant's consent was obtained "by means of false and fraudulent representations as to the nature of the act". At the time the Code was enacted in 1900, there were already reported decisions on rape at common law in which the accused had succeeded in persuading a woman to consent to sexual intercourse by fraudulently representing that he was performing a medical operation or the like. See, for example, *R v Flattery* (1877) 2 QBD 410. In *R v Williams* [1923] 1 KB 340, a church choirmaster was convicted of rape after inducing the complainant to believe that what he was doing would improve her singing voice. He was also convicted of indecently assaulting another girl after a similar pretence.

[4] Decisions like those were at the time regarded as examples of consent obtained by fraudulently misrepresenting the "nature" of the act, which was the expression used in this context in the now repealed s 347 of the Code. The current s 348(2)(e) extended it to false and fraudulent misrepresentations about "the nature *or purpose*" of the act. Proof of purpose entails inquiry into the state of mind of the person alleged to have it, in order to determine that person's true or "genuine" state of mind at the time. Coupled with the requirement that the representations about purpose be "false and fraudulent", it means that in this case the prosecution undertook the burden of proving to the satisfaction beyond reasonable doubt of the jury that the appellant had dishonestly misrepresented his purpose, or his true state of mind, to the complainants whom he persuaded to consent to the acts which he carried out.

[5] At the trial the Crown succeeded in proving this subjective state of mind on the part of the appellant. In summing up the trial judge directed the jury that, before convicting, it was necessary for them to be satisfied that the appellant had fraudulently misrepresented his purpose to be something it was not. To take only one example of his Honour's direction the learned judge said:

> "Before you can convict the accused of any of the rape counts in the indictment, you will have to be satisfied beyond reasonable doubt that the accused was dishonest, was lying when he told the various complainants or implied to the various complainants that the insertion of his finger or fingers into their vaginas was done for therapeutic purposes".

Elsewhere he said, for example in summing up on the charges of indecent dealing, that the appellant's acts would not be unlawful or indecent if they had been done for what he believed were genuine therapeutic reasons.

[6] The reference to "therapeutic" purpose or reasons arose from the need in summing up to accommodate the provision in s 347 of the Code by which the word "penetrate" does *not* include penetrating "for a proper medical … purpose only". His Honour directed the jury that "proper medical purpose" included a purpose of a natural or alternative medicine. He contrasted such a purpose genuinely or honestly held, in the sense that the appellant himself believed that the acts were done for a therapeutic purpose, with a purpose on his part that was "prurient" as being done for the sake of sexual self-gratification. The contrast or dichotomy between the two concepts was adopted by the parties at the trial and the case went to the jury on that basis. It is interesting to see that in *R v Flattery* (1877) QBD 410, 411, the charge against the accused there was formulated as "not believing that the advice he was about to give would be of any service to the prosecutrix, not intending nor with any view to performing a medical or surgical operation, but solely with a view to gratify his lust …", the accused had induced her to consent to an act of sexual intercourse with him. It and the case of *R v Williams* would in Queensland now be subsumed under s 348(2)(e) of the Code as examples of a consent obtained by fraudulent representations about the nature or purpose of the acts to be done.

[7] Those cases might be thought to be more obvious or less subtle examples of fraudulent representation than this; but the success of fraud varies with the temper of the times. On appeal the appellant contended that there was no evidence on which the jury could reasonably have found beyond doubt that the appellant believed the acts done by him were not therapeutic. But that is not so. In §82 of his reasons, Fryberg J refers to matters on the basis of which the jury were entitled to reach the conclusion that the appellant did not believe that his purpose was therapeutic, or, conversely, that those acts were in fact done for the purpose of sexual self-gratification. This suffices to dispose of grounds 1A(b) and 2A(a) of the amended notice of appeal. Ground 1A(a) mistakes the substance of the charges against the appellant by attempting to reduce it to a question of whether the acts were in fact therapeutic, whereas it was whether the appellant in fact honestly believed them to be therapeutic. The verdicts of guilty show that the jury rejected the appellant's evidence about the honesty of his belief and purpose. Given that the jury found that the appellant did not himself honestly believe in the therapeutic value of his acts, s 24 of the Code had no application. Section 24 predicates a belief that is not only reasonable but honest. If the appellant had no honest belief in the therapeutic value of his acts, it was immaterial that such a belief in the existence of such a state of things might be reasonable. Ground 2A(b) is therefore untenable.

[8] The judge's directions on consent were unassailable. There was evidence on which the jury could properly find that the complainants did not freely and voluntarily give their consent, but that their consent to the acts in question was, within the meaning of s 348(1)(e), obtained by false and fraudulent representations about the nature or purpose of those acts. Grounds 2 and 3 cannot be sustained. On the other grounds 4 to 7 in the notice of appeal (inconsistency of verdicts), I am content to adopt what Fryberg J has said in his reasons for dismissing the appeal against conviction.

[9] I have not separately addressed the issues arising on the appeals against the convictions for sexual assault under Code s 352(1)(a). It raised the issue whether the appellant's touching or, in one instance, blowing on the complainant was done without her consent, or with her consent "if the consent is obtained by fraud" within the meaning of s 245(1) of the Code. If as the jury must necessarily have found, the appellant did not believe that his acts were therapeutic as he pretended, but undertook them for the purpose of his own sexual self-gratification, the consent of the complainants was obtained by fraud. That being so, the appellant's action was an "assault" as defined in s 245(1), and he was rightly convicted of the offence under s 352(1)(a).

[10] I would therefore dismiss the appeal against conviction. I agree with the reasons of Fryberg J for dismissing the appeal against sentence.

[11] **FRYBERG J:** On 8 June 2004 the appellant was arraigned before Healy DCJ in the District Court at Southport on an indictment charging 38 offences: 16 counts of indecent dealing under s 210(1)(a), 16 counts of sexual assault under s 352(1)(a) and six counts of rape under s 349 of the Criminal Code. On his pleas of not guilty the trial proceeded. It lasted for 13 days. Some days before its conclusion the Crown prosecutor entered a nolle prosequi in respect of count four. The jury returned their verdicts on 25 June 2004. They found the appellant guilty on nine counts of indecent dealing, 12 of sexual assault and three of rape; and not guilty on the remaining 13 counts left for their decision. He now appeals against the convictions.

[12] The circumstances were, to say the least, unusual. The conduct in question took place between September 2001 and March 2002. It consisted of acts of touching of breasts by hand and by machines, blowing air on to a breast, touching an area between the anus and the vagina with a machine and digital penetration of vaginas. The acts were performed on seven young women: two from one family[1], four from another[2] and one who was a close friend of one of those four[3]. One from each family was under 16 years of age.[4] All consented to the acts in question. The Crown alleged that their consent (and that of their mothers) was obtained by fraud or, in the case of the two aged under 16, that consent was irrelevant. The Crown case was that the appellant dishonestly represented that his conduct was for the purpose of "alternative therapy" when in fact his purpose was prurient. That purpose made it indecent and the dishonest misrepresentations meant that the women's consent was obtained by fraud. In the main the appellant admitted the relevant conduct. He had not attempted to conceal it (in the case of one girl, most of the conduct took place in the presence of her mother, who sometimes participated in the procedures). The defence case was that the purpose of the treatment was therapeutic, that was its nature, and if it was not, the defendant at least believed it was therapeutic. Consequently there was no fraud or indecency.

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1 JHA and JHB .
2 BS, KS, AS and MS.
3 MM.
4 JHB (15) and AS (13).

The grounds of appeal

[13] The appellant was granted leave to amend the grounds of appeal at the commencement of oral argument. Ground 1, relating to severance, was abandoned. As amended the live grounds are[5]:

> "1A. That the convictions on all counts are unsafe and unsatisfactory on the basis that:
>
> (a) The jury was not, on the evidence, and on the directions given, reasonably entitled to find that the acts done by the appellant were not therapeutic;
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> (b) The jury was not, on the evidence, and the directions given, reasonably entitled to find that the appellant believed that the acts done by him were not therapeutic.
>
> 2. As to the convictions on counts 12, 14, 15, 18, 20, 21, 22, 28, 29, 30, 33, 34, 35, 36, 37:
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> (a) there is no evidence to support the lack of consent;
>
> (b) the trial judge did not properly direct the jury on the issue of consent;
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> Alternatively,
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> (c) the convictions are unsafe and unsatisfactory as the jury was not, on the evidence, and on the directions given, reasonably entitled to find a lack of consent.
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> 2A. As to the convictions on counts 2, 3, 5, 6, 7, 9, 10, 11 and 23 (indecent dealing):
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> (a) the verdicts are unsafe and unsatisfactory as the jury was not, on the evidence, and on the directions given, reasonably entitled to find that the appellant believed that the acts done by him were not therapeutic; further
>
> (b) the trial judge should have directed the jury in relation to s 24 of the Code.
>
> 3. All the verdicts of Guilty are, in all the circumstances, Unsafe and Unsatisfactory.
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> 4. The verdicts on counts 2, 3, 5-7, 10-12 are inconsistent with the verdicts with counts 1 and 8 (JHB).
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> 5. The verdicts on counts 13, 16, 17 are inconsistent with the verdicts on count 12, 14, 15 and 18 (BS).
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> 5A. The verdict on count 19 is inconsistent with the verdict on counts 20-22 (KS).
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> 6. The verdicts on counts 28-30 are inconsistent with the verdicts on count 31 and 32 (JHA).

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[5] The obvious overlap between grounds 1A and 2A(a) may be ignored.

7. The verdicts on count 38 is inconsistent with the verdicts on counts 34-37 (MS)."

[14] The trial judge had to direct the jury on the law concerning three different but related charges. His summing up extended over two days. He dealt with the relevant law on the first day and summarised it again, by way of reminder, on the second day. It is unnecessary to review the whole of what he said. What is material is the part of the summing up which, in the context of each charge, dealt with the questions of whether what the appellant did was therapeutic, whether the appellant believed it was therapeutic, whether it was done for a therapeutic purpose, whether (where relevant) it was indecent and whether (where relevant), consent was obtained by fraud.

Grounds 1A and 2A(a): indecent dealing

[15] In relation to the charges of indecent dealing, the judge explained the concept of indecency in general terms and there is no challenge to that explanation. He also told the jury on the first day of the summing up:

> "A touching of an under-aged girl on the breasts, if the touching was done by a medical practitioner or by a person practising alternative medicine for a diagnostic or a therapeutic purpose would be authorised, justified or excused by law and therefore would not be unlawful.
>
> …
>
> It is the Crown case that the accused was not genuinely practising natural medicine, or providing a genuine massage, and that the touchings were unlawful and indecent. The defence case is that the touchings of the breasts of two under-aged complainants were done for genuine, alternative medicine therapeutic purposes and were not unlawful or indecent.
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> …
>
> If, although he is not a qualified alternative or natural medicine practitioner in the sense that he does not have formal qualifications, the accused touched the breasts of the complainants with his hands or with an electronic device for genuine therapeutic reasons, or for what he believed were genuine therapeutic reasons, his actions would not be unlawful, nor would they be indecent.
>
> In relation to each of the 15 indecent dealing counts in the indictment, before you can convict the accused, you must be satisfied beyond reasonable doubt that the touchings of the breasts of the complainants, if you are satisfied that they are established, were not done for a therapeutic purpose, but the touchings were done for a prurient reason, that is, for sexual gratification of some kind."

Next morning, he summarised:

> "In each of the 15 indecent dealing counts - do you want to write this down? In each of the 15 indecent dealing counts in the indictment, before you can convict the accused you must be satisfied beyond a reasonable doubt that the touchings on the breasts of the two complainants with hands or with an electronic device were not done

> for a therapeutic purpose - were not done for a therapeutic purpose. But the touchings were done for a prurient purpose. That is, for sexual gratification of some kind."

[16] On that direction it is quite clear that to convict, the jury had to be satisfied beyond reasonable doubt that the appellant's purpose in doing the relevant acts was not therapeutic. On that direction, the indecency arose not simply from the identity of the parts of the subjects' anatomies which were touched, nor from the effect upon them, therapeutic or otherwise, of the touching, but also from the appellant's purpose in touching. In focusing on the appellant's purpose, the direction was in accordance with the law as stated in *R v Harkin*:

> "It is in my view clear that if there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. … [In such a case the] purpose or motive of the [accused] in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury. But if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification."[6]

Although that was said in the context of a charge of indecent assault, the concept of indecency is relevantly the same in relation to the offence of indecent dealing.

[17] Thus, the jury was not required to consider whether the appellant's conduct had therapeutic (i.e. curative or perhaps palliative) effects in order to reach its verdict on the indecent dealing charges. There is no reason to suppose that it did other than follow the judge's directions. On those directions ground 1A(a) of the amended grounds of appeal cannot directly support the setting aside of the convictions for indecent dealing.

[18] Ground 2A(a) refers to the appellant's belief as to the therapeutic qualities of the acts done by him. Read literally, it too cannot support the setting aside of the convictions for indecent dealing. On the judge's directions the question for the jury was not whether the defendant believed that his acts were therapeutic (i.e. had therapeutic effects), but whether his *purpose* in performing them was not therapeutic. An act performed by even a medical practitioner, the therapeutic effect of which is unchallenged, may be indecent if the practitioner's purpose is self gratification, not therapy. Similarly, even if the appellant believed (rightly or wrongly) that the acts had therapeutic value, he could as a matter of law have been convicted if the jury was satisfied beyond reasonable doubt that his purpose was prurient.

[19] However notwithstanding the wording of this ground (and that of ground 1A(b) which in relation to indecent dealing covers the same territory), the parties' submissions did to some extent address the question of the appellant's purpose. It is I think desirable to consider whether the jury was reasonably entitled to find, as it

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6 (1989) 38 A Crim R 296 at p 301.

must have done in respect of those charges of indecent dealing upon which it returned a verdict of guilty, that the appellant's purpose was prurient. [7]

[20] I turn to the evidence upon which the jury could have relied.

The events giving rise to the charges

[21] In 2001 Mr S lived with his wife and four daughters at lower Beechmont. During that year, he was introduced to the appellant by a mutual friend, a Mr R. Mr R and the appellant were seeking funding to establish a shelter for abused men. Mr S and the appellant developed a business interest in common. Mr S introduced the appellant to Mr H who was seeking funding for a humanitarian project (both Mr S and Mr H were members of the same church. It was thought that the appellant might have contacts who could provide such funding. A number of business meetings took place at Mr S's home and also at Mr H's home at Mudgeerabah. In the latter part of 2001 Mr S went with the appellant to Adelaide to investigate a company involved in a project in Fiji. While in Adelaide he contracted a virus. The appellant told him that he was proficient in massage and sports medicine. He worked on the muscles in Mr S's back and provided him with "a lot of relief". He repeated that process at Mr S's home after their return to Queensland. Mrs S also suffered from back problems. She discussed them with the appellant who offered to provide treatment. He brought a TENS machine to their home and showed her, by diagrams and demonstration, where to apply the terminals to her lower abdomen.

[22] Meanwhile the appellant also had a number of meetings with Mr H at his home. The Hs had 11 children, five of whom[8] were still living at home. The appellant saw their pictures in the dining room and discussed the children with Mrs H. He told her of his interest in sports medicine. Two of her sons, BH and DH, played rugby league and the appellant first met them in September 2001. He showed them, in the presence of their sister JHB, moves to deflect tackles. It seems this happened on the first occasion he met the children. BH had a fractured sternum and frequently dislocated his shoulder. Mrs H told the appellant of this and he told BH that he could help him. He felt the injuries and showed Mrs H how to massage them. DH also had a sports injury and the appellant then (and on several subsequent occasions) gave him treatment.

JHB – counts 1-11

[23] JHB had one shoulder higher than the other. He asked what sport she played. When she told him netball and touch football, he said that he had noticed one of her shoulders was higher than the other and that she was rolling out on her feet. He asked to look at her arm and after doing so said that she was lacking iron. He asked her mother about JHB's menstrual cycle and was told that she was having problems. He said he could help her with that and fix it. As a result of her observations of him and listening to him speak it seemed to JHB that he was quite a knowledgeable man when it came to sport and the human body. She agreed in cross-examination that over a period of time she gained the impression that he was qualified and experienced in treating people.

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[7] It is unnecessary to consider the position which would arise if the appellant had two purposes, both self gratification and genuine therapy. The trial was conducted on the basis that he had one and only one of those purposes.

[8] SH, DH, BH, JHB and IH.

[24] Mrs H (who had worked for a chiropractor for quite a few years) led the appellant and JHB to the bathroom. In the presence of her mother he proceeded to probe JHB 's back and the top of her chest with his fingers. He said at one point that he was going to check her alignment by feeling her vertebrae. He told JHB and Mrs H that he could feel a lot of tension in the muscles in her back. He felt her upper chest just above the sternum and said that her sternum was "out", that there was some sort of compression and lump, that the compression was causing the left breast to point to one side, and that he could correct it. He spoke of the importance of pressure points. He asked her to take off her shirt and bra, which she did; as Mrs H testified without objection, "… she sort of looked at me and sort of the impression that BAS had given us and the way he spoke with such authority and professionalism, that we just did as he said." He left the room while JHB did this. She lay down on a towel on her back. The appellant then probed around the sides of her breasts with his finger for about five minutes. He said that her sternum was out on alignment and she must have had a hit in the chest or a fall or something for this to have happened. That was the conduct charged as count one (not guilty).

[25] The appellant then asked her to stand in front of the mirror. With one hand he probed her back and with two fingers of the other he pushed in the side of her breasts with a circular motion. That was the basis for count two (guilty). He said he was doing this because her left breast was, as she recounted it, "going out to the left side and also my left hip bone stuck out and my left collarbone stuck out higher." He said the effect of what he was doing would help even out her body and that either of them could do it to help fix the problems. Mrs H then joined in the rubbing process, she rubbing on one side while he rubbed on the other. JHB started to giggle in embarrassment because her breasts were "jiggling around a bit." He told them (as JHB put it) "that God gives us different gifts and his was healing". That meant something to JHB, who described herself as "a religious person" who believed "that we are given different gifts". For about five minutes the appellant placed the palm of his hand over her stomach, moving it up her chest, and said that he could tell what was going on inside her, referring also to her menstrual cycle. He invited Mrs H to feel the heat coming out of his hand on her arm. JHB's sister SH, who was pregnant, walked into the bathroom. After some conversation with her, the appellant placed the palm of his hand over her stomach and said that he could tell she was pregnant even though she was not then showing. Someone told the appellant that she was not keeping food down. He told her to get green vegetables, wrap them in Glad Wrap and tie them to her wrist; that would substitute for eating.

[26] Seven to ten days later, after a business meeting with Mr H, the appellant told Mrs H that he had time to treat JHB. He went with JHB and Mrs H into the office, which adjoined the H's bedroom. JHB thought her father was in the office using the computer. She lay fully dressed on her back on the family massage table. The appellant manipulated her ribs and back, crossing her legs over and pushing from behind her with one hand on her hip and the other on her bent knee. In the course of this process she felt his penis hard against her backside. After some time her father left the room. Thereafter, in the presence, JHB thought, of her mother, the appellant asked her to take her shirt and bra off. She did so and lay back on the massage table, and the appellant probed the sides of her breasts for about five minutes and rubbed what he said were pressure points in her chest. That was the conduct relied on for count three (guilty). Thereafter he probed her stomach "just above the undy line", undoing her pants for the purpose and saying that he could feel that her tubes were twisted. Then he did her pants back up and helped her replace her bra.

[27] About a week later the appellant again visited the H's house. He met JHB in the hallway and asked whether her sternum was still sticking out. When she replied that it was he offered to see how the problem with the sternum and ribs was progressing and went with her to the bathroom, closing the door. Holding her back, he probed the top of her chest through her clothing. That founded count five (guilty). He then asked her to take off her shirt and bra and also her pants, which she did. He remained in the room. Then JHB heard her mother come home and said, "Mum must be home." The appellant told her to get dressed and left the room.

[28] The events giving rise to count six (guilty) took place in the office. JHB's memory of the sequence of events was confused. She thought this occasion might have been preceded by manipulation of her back while she was lying fully clothed on the floor of the adjoining bedroom. She remembered walking into the office with the appellant where her brother DH was using the computer. The appellant proceeded to manipulate JHB's neck. DH did not watch what happened, although he was only a matter of a metre or so away. On JHB's account the appellant got her to unclip her bra. He put his hand up her shirt and rubbed around the sides of her breast, pushing in with his fingers. This continued for a couple of minutes. Her somewhat uncertain account in evidence in chief (or so it reads in the transcript) was accepted in cross-examination. Indeed, it was reinforced:

> "Yes, and it was after he'd worked on your back and your neck that he then started working on the pressure points on your chest area; is that correct?-- Yes.
>
> And, again, there was nothing especially different to this treatment as opposed to previous treatments when he is working on your chest area?-- No.
>
> Again, it's the same thing, isn't it; he is applying particular pressure for up to 30 seconds on an area and rubbing around and around on that area?-- Yeah.
>
> He worked on particular points on both sides of your chest, didn't he?-- Yeah."

There was no challenge to JHB's evidence about the undoing of her bra and rubbing the sides of her breast.

[29] The next event of touching occurred as the appellant was leaving the H's home on a date before Christmas 2001. The appellant had been doing some exercise routines with JHB's brother IH. JHB and her mother "were walking him out". Just outside the back door the appellant started to massage around the front part of JHB's chest; he applied pressure to parts of her back, side and chest. With one hand he probed the side of her breasts at the top, not only from outside her clothing but also going under her bra. This continued for several minutes. While it happened the appellant and Mrs H continued a conversation about something else. This event was the subject of count seven (guilty).

[30] One feature distinguished count eight (not guilty) from all of the others involving JHB. That was that the appellant completely denied the occurrence of the event. JHB testified that sometime before Christmas 2001 (she was unable to recall where in the sequence of events) the appellant took her into the office and got her to undo

her bra. Using his fingertips he rubbed her nipple in a circular motion. She asked him what he was doing and he said that he was checking something; after a while he said, "Oh, okay" and stopped. No other treatment occurred on that occasion. It was suggested to her in cross-examination that no such event occurred; she denied the suggestion. In evidence the appellant testified that none of his massage techniques involved touching the nipple and that if her nipple had ever been touched it would only have been inadvertently, in the course of the treatment the subject of count nine.

[31] That count (guilty) referred to conduct which took place in January 2002, during the Christmas holidays. On the relevant day JHB was with her brothers DH and B, one of their friends, and two of her (female) friends. DH lay down and she saw the appellant use an electrical machine on his shoulder. She described the machine as a rod with an electrical knob at the end. The appellant used the machine on DH for about 10 minutes. He also had another machine, a black box with knobs on it and pads with wires attached at the ends. He said that it was called a TENS machine and that he wanted each of them to try it out to see what they thought of it. He said that once they had learned how to use it they would be able to apply it to themselves on their own. He asked JHB to follow him to her bedroom, which she did. None of the others was present. At his request she removed her shirt and bra. He placed two pads on either side of her chest above the breasts and a further two on her back, turned the machine on and told her to adjust it "to where it was okay for me because it was kind of giving me little shocks". He told her to move the pads down on her chest after every 10 minutes for 30 minutes and then left. Through the open bedroom door one of her friends asked what the device was. She explained that it was being used to help strengthen her back and her chest, and that it might also help to fix the alignment problem that she had with her shoulders.

[32] After about 30 minutes the appellant returned and took the pads off her. He asked her to change from her bike shorts to the bottom of her swimsuit and to get some talcum powder or some cornflour. She went to the bathroom, changed her clothes and returned with some powder. At his request she removed her shirt and lay on her back on the bed, covering herself with a towel. The appellant removed the towel, sprinkled talcum powder over her chest and stomach and quickly spread it with his hands. He told her never to use powder as a lubricant because it could give her cancer. He proceeded to massage her breasts (count 9 - guilty):

> "He was using his thumbs and pushing down and rubbing upwards and like, the top side of my breasts too. He said that I had lumps in my breasts and he was rubbing them out."

[33] At about this time Mrs H entered the room. According to JHB the appellant explained to her what he was doing; she commented that she had had her lumps checked and that the doctor said that it was just a fatty tissue buildup; but JHB conceded that she might have been confusing the talk about lumps with talk about unblocking lymphatic blockages and duct blockages. (Mrs H's memory of these events was very vague.) The appellant asked Mrs H to get a bowl of warm water and put salt in it. He said that he wanted to check whether JHB had any liver problems because she was always feeling sick. After Mrs H left the room he said to JHB that he had to send her out of the room because he could feel "that she was getting uptight with him treating" her. When Mrs H returned with the salt water he asked JHB to lie on her stomach and put some of the water on her lower back. He

said that if the salt dissolved she had a liver problem. She thought he also said that the salt did dissolve.

[34] He then asked JHB to lie on her back and proceeded to use the electric rod which he had used on DH. He placed the rod on her exposed breasts and moved it around the nipple area, although not on the actual nipple, in a circular motion. The machine was making zapping noises. When he first put it on her it gave her an electric shock and if he touched her while it was in use it would shock her. He said he was doing this to get rid of her stretch marks. The process took five or 10 minutes on each breast. That conduct formed the gist of count 10 (guilty).

[35] Next the appellant asked JHB to lie on her side. He moved the towel up so that it covered her chest and began applying the machine to the top of her thigh. It is convenient to set out JHB's account of what followed verbatim:

> "Well, was anything said to you whilst he was doing this?-- He was talking to me about courses that he attended where they had nude people out the front and the people in his class didn't know where to look because their minds were perverted, but he was fine with the whole situation and was okay with it.
>
> I see. Sorry, were you going to say something else?-- He said that he was okay with it.
>
> Did he mention anything else apart from this thing you have just mentioned and the classes or courses?-- Yeah, and then he went on to say how Adam and Eve in the garden they didn't wear any clothes and it wasn't until after Eve partook of the fruit that their minds became perverted and that's why they began wearing clothes.
>
> I see. Did you respond to any of this that he was saying?-- No.
>
> Did he mention anything further about anything else whilst he was doing this to you?-- He also was telling me that he taught couples how to become more affectionate to each other and that they not only needed to speak, but to touch each other.
>
> And in relation to when he was touching you with that machine on your leg, after that finished did anything else further happen between you and him physically?-- Yeah, he - he turned the machine off and then put the towel back over my legs and he was showing me what he used to teach the couples. He used to - he got his hands and was rubbing it over my stomach, over my breasts and then down my arms.
>
> So he was rubbing it over your stomach, over your breasts?-- Yeah, my arms - down my arms.
>
> Down your arms, and how did that feel physically to you?-- It just felt like a lot of hands going over me.
>
> And how long did he do this for?-- About a minute, couple of minutes.

> And then after he finished doing that did he touch any other part of your body?-- He - he also just said that couples needed to kiss each other up the legs and the arms, but he was just using his fingers and, like, pushing it on my legs.
>
> I see. Well, after he did that was any further conversation had or any further touching had between you and him on this occasion?-- Yeah, he - he was - just started, like, massaging my breasts again, probing them and he asked me - he said that he knew that in some churches they taught not to masturbate, but he wanted to know whether I masturbated and that he needed to know.
>
> Did you respond to him?-- Yeah, I said that I didn't and I didn't even know what to do.
>
> And did that cause him to respond to you?-- Yeah, he said that sometimes girls didn't want to answer because their parents were in the room or they were embarrassed, but he needed to know and then again I just said no and then he continued to go on and tell me that I needed to use two hands - two fingers and put them up inside of me and push on my right side.
>
> You say push up inside of you. Did he mention what part of your body he was talking about?-- Inside my vagina.
>
> Did he say why you need to do that at all?-- Because of the hormones. If it - it released some hormones and it would get rid of the lumps in my breasts.
>
> Did he say anything about how often you should do this?-- He said in the morning and the night just a couple of times a week.
>
> Did he mention anything further about that issue?-- No.
>
> Did he say anything else to you on this occasion?-- He just - he said that anything that we said to keep between us and that he wouldn't share it with anyone else."

That further massaging of her breasts was the basis for count 11 (guilty).

AS – counts 23-27

[36] I have referred above to the treatment given by the appellant to Mr and Mrs S in their home.[9] The appellant met AS on an occasion when he was giving treatment to Mr S. She testified that having seen him fix her father's neck, she volunteered that hers was also sore. As a result the appellant rubbed her neck also. That led to some discussion of a problem with her adenoids and to the appellant squeezing her neck just beneath her ears by way of treatment. No charge arose from this conduct. In early 2002, before the resumption of school, AS was involved in another incident at the S's home. The appellant went with AS into her sister BS's room. He

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[9] Paragraph [21].

manipulated her back until it "clicked". He also asked her to remove her top (she was not wearing a bra). He placed his finger and thumb at the top of and underneath her breast respectively, and squeezed for a couple of seconds. According to AS, he said that he was getting a knot of some kind out. Mrs S testified that he explained to her that he was massaging April's breasts and that her nipples didn't point straight out. He repeated the process for the other breast. That was the gravamen of count 24 (guilty). Either on that day or on another occasion the appellant stood AS in front of a mirror, asked her to lift her top, and when she did, said that as she got older her breasts would become bigger.

[37] On a subsequent occasion the appellant came to AS's room with her mother while she was asleep. They had a TENS machine with them; it is unclear whether it was the one owned by the family. AS was woken and the appellant placed two of the pads at the top and bottom of one of her breasts. The machine was presumably switched on. Ten minutes later they came back and the appellant placed the pads on the sides of the breast. Subsequently he did the same thing to the other breast. Mrs S was present on each occasion. These four occasions constituted counts 24 to 27 (not guilty on each).

Contemporaneous statements of the appellant

[38] The appellant made a number of statements to JHB tending to support the inference that his purpose on the occasions when he dealt with her was indecent. Some are embodied in the passage quoted above. They are: his justification of nudity, his approbation of touching and body kissing as a sign of affection, his request to know whether she masturbated and his attempt to encourage her to masturbate. The request for secrecy at the end of that passage makes the inference even easier. In addition, the jury was entitled to regard some of the explanations which the appellant gave for his actions as being so far fetched as to be incredible and dishonest; and to infer from that dishonesty an indecent purpose. Statements in that category are his claim that by moving his hand over JHB's stomach he could tell what was going on inside her; his assertion to JHB's sister SH that tying green vegetables to her wrist would substitute for eating; and his different explanations to AS and her mother for why he was massaging A's breasts. In that context it should also be noted that AS had made no complaint about her breasts when the appellant asked her to remove her top.

Contemporaneous conduct of the appellant

[39] The manner in which the appellant administered his "treatments" and his conduct at the time provide in some cases further circumstantial evidence to support the inference of a malign purpose. It is difficult to imagine genuine therapy being administered by standing JHB in front of a mirror and having two people rub her breasts to the point that they jiggled so much as to make her giggle with embarrassment. Second, fearing Mrs H was becoming concerned about his massaging JHB's breasts (count nine), he devised a subterfuge involving salt water to get her out of the room. Third, he stood AS in front of a mirror and had her expose her breasts while commenting on their size - conduct which might be regarded as an attempt to sexualise her. Finally, after offering to see how the problem with JHB's sternum and ribs was progressing, he went with her alone to the bathroom, closed the door and after probing the top of her chest through her

clothing asked her to take off all of her clothes; then, when she said "Mum must be home" he told her to get dressed.

Admissions

[40] The Crown submitted that a number of admissions were made by the appellant at a meeting with Mr H, Mr S and another man in March 2002. In my judgment, when the appellant's statements are read as a whole the suggested admissions are so ambiguous as to be of little value. However Mr H gave evidence of a conversation after the meeting:

> "Once we left the meeting both my wife and I spoke to him [the appellant] and we both gave him a hug, because we said, 'You've got a problem and this problem needs to be resolved and if you can resolve it, we will be with you, we'll help you.' And then later on he rang me, I am not sure exactly when he rang me, to say that he would never ever break my trust again."

The admission implicit in that statement is another circumstance supporting the jury's verdicts.

Indecent dealing: conclusion on indecency

[41] The jury could return a verdict of guilty only if satisfied beyond reasonable doubt that the appellant's purpose in acting as he did was self gratification. I have referred above to evidence relevant to purpose only in so far as it related directly to JHB and AS. However the jury was entitled to take into account the evidence referred to below relating to other family members. It was entirely a matter for the jury to determine whether and to what extent it accepted that evidence, just as it was to determine whether and to what extent it accepted the evidence of the appellant on the topic. If it rejected the latter and accepted the former, the only conclusion reasonably open was that the accused's purpose was self gratification. On the directions given and on the evidence, the jury was reasonably entitled to find indecency in relation to the charges of indecent dealing. Ground 2A(a) and, in relation to the charges of indecent dealing, ground 1A in the amended notice of appeal must be rejected.

Indecent dealing: s 24 of the *Criminal Code*

[42] The appellant also submitted that the judge should have directed the jury on s 24 of the Criminal Code in relation to the offences of indecent dealing. His Honour gave no directions on that section and the reason for this is apparent from a discussion which he had with counsel then appearing for the appellant, immediately before addressing the jury:

> "MR WHITBREAD: Just - I suppose, at abundance, of course, on that point, is - just one minute, my learned friend's going to raise this. He hasn't yet. But is section 24 an issue, your Honour?
>
> HIS HONOUR: I don't think.
>
> MR WHITBREAD: I wouldn't think - I wouldn't think so.
>
> HIS HONOUR: No. He's - no, he's not making a - I mean, as far as he's concerned, it's not a question of - as he's being, an honest reasonable belief. It's a question of his honesty.

MR COUSINS: Yes.

HIS HONOUR: So, I mean, his beliefs could be unreasonable. But as long as they're honest-----

MR COUSINS: And they can't be fraudulent.

HIS HONOUR: -----the Crown's got to prove that they're – he's being dishonest-----

MR COUSINS: Yes.

HIS HONOUR: -----not being unreasonable.

MR COUSINS: I had-----

MR WHITBREAD: Sorry.

HIS HONOUR: I think - in other words, what I'm saying is that I think that section 24 would be a more difficult burden for your client than just plain dishonesty.

MR COUSINS: Exactly. I was going to refer to it very briefly in passing when I'm just explaining the context of the various different sections of the law and as a little bit of background in explaining the context of the section-----

HIS HONOUR: See, it's not a question of - look, the question is, when he did these things, what was his purpose?

MR COUSINS: It was either an honest purpose or a dishonest purpose.

HIS HONOUR: It was either an honest purpose or - well, not quite that - either he implied or said that it was for a purpose which was not a true purpose, that is, to affect a cure - to act as a therapist or the real reason was that he wanted to - for lewd or sexual reasons, to get his hands on these young women. I don't think that the introduction of section 24 would be - would be fair to client for him *[sic]*.

MR COUSINS: No, I'm not proposing that that be the basis on which he's judged. All right. Thank you.

MR WHITBREAD: Well, if that's the basis, I question any need to - for my learned friend to go into that area.

HIS HONOUR: What area? Well, look, if you raise section 24 in your address, I might have to - see - yes, thank you. Well, I – it's a matter for you. I mean, your – it's your case.

MR COUSINS: I wasn't going to be-----

HIS HONOUR: But-----

MR COUSINS: -----so formal as to say, section 24 of the Criminal Code-----

HIS HONOUR: No, but no. But if you start talking about the honest and reasonableness of his conduct, then, I'll have to tell them about section 24 because you're raising it and if you're raise - if you - if you talk about the reasonable, then it becomes an issue because the section simply requires for the Crown to prove that he was - that he

> was dishonest. Now, he could be totally unreasonable in his beliefs, yet be-----
>
> MR COUSINS: Honest.
>
> HIS HONOUR: Be honest. Once you raise section 24, you introduce this concept of reasonableness into it.
>
> MR COUSINS: Alright. I'll not refer to it then.
>
> HIS HONOUR: That's my view. I mean you might take a different - I mean, that's my view, Mr Cousins. And I don't think that the section requires him to be reasonable. All it says is that the Crown's got to prove that he was dishonest.
>
> MR COUSINS: That's right. Yes.
>
> MR WHITBREAD: I raised it because I understand my learned friend might be going to say something along the lines of honest and genuine, which in my view brings up the same issue.
>
> HIS HONOUR: Well, see, look, again. Look - look. I'll just put this - perhaps I'd better read to you what I intend to say at the end of each - I think - I think that to talk about genuine therapy is - genuine is a very ambiguous term. The question is, was he attempting to effect a cure? Was he - was he providing therapy as a natural - natural alternative medicine therapist? That's the question. And the Crown has to show that he wasn't, to the standard beyond reasonable doubt.
>
> So just looking at the indecent dealing counts - this is what I'm going to say at the end of it: "In relation to each of the 15 indecent counts in the indictment, before you can convict the accused you must be satisfied beyond reasonable doubt that the touchings of the breasts of the two complainants were not done for a therapeutic purpose, that the touchings were done for a prurient purpose, that is for sexual gratification of some kind." That's the issue.
>
> MR COUSINS: Thank you."

[43] In my judgment, his Honour's approach was correct. To have introduced s 24 would have been confusing to the jury and detrimental to the appellant's chances of an acquittal. Consideration of that section could not have improved the appellant's position. In the profounder regions of abstract philosophy it may be possible to envisage a person who honestly and reasonably, but mistakenly, forms a belief as to his own purpose in carrying out certain acts; but not even the appellant suggested that such a proposition ought to have been left to the jury in this case. Instead the submission on appeal was:

> "On the directions given to the jury, if they were satisfied that the acts were not legitimate therapies then they would be satisfied that the acts were indecent and they would convict. What was clearly open though was that if the jury found that the therapies were not legitimate they could still be left in reasonable doubt as to whether the appellant honestly and reasonably thought that they were legitimate and thereby acquit him."

[44] That submission does not reflect the directions which his Honour gave. His Honour did not tell the jury that it could find indecency on the basis of the nature of the therapy or whether it was in fact "legitimate therapy". He told it if the actions were done for what the appellant *believed* were genuine therapeutic reasons it would be neither unlawful nor indecent. He further told it that it must be satisfied beyond reasonable doubt that the touching was done for a prurient reason, that is, for sexual gratification of some kind. The jurors would have been in no doubt about what the Crown had to prove, nor as to where the onus of proof lay.

[45] Ground 2A(b) of the amended notice of appeal must therefore be rejected. It is unnecessary to consider whether it was open to the appellant to rely on this ground, having regard to the tactical decision made by his counsel at the trial.

Ground 1A: rape and sexual assault

[46] The factual issues raised by ground 1A in relation to rape and sexual assault are similar, both to each other and to those already discussed. They are not precisely the issues referred to in the ground of appeal. First it is convenient to refer to the relevant statutory provisions and to his Honour's summing up.

Rape

[47] The charges of rape against the appellant were of statutory rape, not rape in the ordinary sense of the word. The relevant statutory provisions[10] (and those relating to sexual assault, which it is also convenient to set out at this point) are as follows:

> "**CHAPTER 32 — RAPE AND SEXUAL ASSAULTS**
>
> **347 Definitions for ch 32**
>
> In this chapter—
> "consent" see section 348.
> "penetrate" does not include penetrate for a proper medical, hygienic or law enforcement purpose only.
>
> **348 Meaning of "consent"**
>
> (1) In this chapter, "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
>
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
>
> …
>
> (e) by false and fraudulent representations about the nature or purpose of the act … .
>
> **349 Rape**
>
> (1) Any person who rapes another person is guilty of a crime.
>
> Maximum penalty—life imprisonment.
>
> (2) A person rapes another person if—
> …

[10] See also s 1 "consent".

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with … a part of the person's body that is not a penis without the other person's consent.

352 Sexual assaults

(1) Any person who—

(a) unlawfully and indecently assaults another person … is guilty of a crime.

Maximum penalty—10 years imprisonment.

CHAPTER 26 — ASSAULTS AND VIOLENCE TO THE PERSON GENERALLY — JUSTIFICATION AND EXCUSE

245 Definition of "assault"

(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, … is said to assault that other person, and the act is called an "assault".

(2) In this section—
"applies force" includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

246 Assaults unlawful

(1) An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.

(2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person."

[48] The Crown case in support of the six counts of rape asserted manual or digital penetration of the vaginas of BS, JHA and MS, consent in each case having been obtained by false and fraudulent representations about the nature or purpose of the act. As I have already noted, his Honour's summing up extended over two days. So far as is relevant for present purposes, he directed the jury as follows:

> "'Penetrate', in the section of the Criminal Code dealing with rape, does not include penetration for a proper medical purpose only. 'Proper medical purpose' includes a natural or alternative medical purpose.
>
> In order to prove rape in each of the counts alleging digital rape, the Crown must establish to your satisfaction beyond reasonable doubt that at the time and place alleged in the indictment, the accused 1) penetrated the complainant's vulva or vagina, 2) with his finger or fingers, 3) that the penetration of the complainant's vagina was not

> for a proper medical purpose, 4) without the consent of the complainant.
>
> Our law provides that consent means consent freely and voluntarily given by a person. A person's consent to an act is not freely and voluntarily given if it is obtained by false and fraudulent representations about the nature or purpose of the act.
>
> In essence, it is the Crown case that you will be satisfied beyond reasonable doubt that the accused is guilty of the rape counts because you will be satisfied that the consent by the complainants to his penetrating their vaginas with his fingers was not given freely and voluntarily because it was obtained by false and fraudulent representations made by the accused about the nature or purpose of the acts of digital penetration.
>
> The Crown says that consent to digital penetration of the complainants was obtained by a false and fraudulent representation by the accused to the complainants that he was placing his fingers into their vaginas for a therapeutic purpose.
>
> Now, if you are satisfied beyond reasonable doubt that the consent was obtained by fraud on the part of the accused – and I am about to explain that to you – then you may be satisfied that there was no consent by the complainants to the digital penetration".

After giving a hypothetical example of consent obtained by fraud, his Honour continued:

> "Fraud is an intentional, dishonest act done with a purpose of deceiving. I will say that again. Fraud is an intentional, dishonest act done with a purpose of deceiving. To show that the consent was obtained by fraud, the Crown must show in each case that the consent of the woman was obtained by fraud and that the fraud related to the nature or purpose of the act being carried out by the accused on the complainant.
>
> The Crown says that the nature or purpose of the acts of digital penetration was not for genuine therapeutic purposes but that the nature or purpose of the acts of digital penetration was to enable the accused to obtain sexual gratification of some kind.
>
> The Crown says that on each rape count, you will be satisfied that the consent was obtained by fraud because of false and misleading statements made dishonestly by the accused as to the nature or purpose of the act of inserting his fingers into the complainants' vaginas, that is, that he told them falsely that he was inserting his fingers into their vaginas for a therapeutic purpose, when his real purpose was to obtain sexual gratification of some kind for himself.
>
> It is the defence case that the accused did not obtain the consent of the complainants to his placing his fingers into their vaginas by dishonesty, that he did not make false or misleading representations about the nature or purpose of his acts of digital penetration. The accused says that when he told the complainants that what he was

> doing was for therapeutic purposes, he was telling the truth and he believed that he was telling the truth.
>
> Before you can convict the accused of any of the rape counts in the indictment, you will have to be satisfied beyond reasonable doubt that the accused was dishonest, was lying when he told the various complainants or implied to the various complainants that the insertion of his finger or fingers into their vaginas was done for therapeutic purposes".

On the following morning his Honour summarised those directions. For present purposes it is unnecessary to set out that summary; it was not materially different from what is set out above.

[49] Two features of those directions merit comment. First, I am inclined to doubt whether his Honour was correct in saying (in effect) that penetration for an "alternative medical purpose" fell within the expression "penetrate for a proper medical … purpose" in s 347. It is however unnecessary to consider the point; if his Honour erred it was an error in the appellant's favour. Second, in summarising the parties' cases his Honour on three occasions referred to representations about the *nature or* purpose of the relevant acts. In so doing his Honour was no doubt prompted by the language of the Code. However, although the Crown (without objection) called evidence from a physiotherapist about the therapeutic value of much of the appellant's conduct, e.g. inserting fingers into a vagina, it was not the Crown case that the appellant expressly or impliedly made false representations about the therapeutic nature of his actions. The relevant false representation on the Crown case, as left to the jury, was that the appellant was placing his fingers into the women's vaginas for a therapeutic purpose. As counsel for the appellant said, "[I]t was really never a case where there was a confusion about the nature of the act [; that] was obvious to all. The issue was the underlying purpose ….". What the jury had to consider was whether the Crown had proved beyond reasonable doubt the appellant's purpose was not therapeutic. I do not think that, in context, the words "nature or" would have confused it.

Sexual assault

[50] Evidence about whether the acts done by the appellant were therapeutic and whether he believed that they were therapeutic was relevant to two separate issues in relation to the charges of sexual assault. First, it was relevant to the question of indecency, in the same way as such evidence was relevant to indecency on the charges of indecent dealing. The judge's directions on that question substantially adopted or repeated what he had said about indecency in the context of the indecent dealing charges, and it is unnecessary to set them out. In accordance with them the jury had to consider the appellant's purpose. Second, it was relevant to the issue of fraud. The Crown case was that the victims' consent to the appellant's actions was obtained by fraud.

[51] Until the question was raised in the course of argument on this appeal, it seems to have been assumed that issues of consent and fraud in relation to the offence created by s 352(1)(a) arose under s 347 and s 348. In my judgment that assumption was incorrect. Section 352(1)(a) applies to any person who unlawfully and indecently assaults another person. The provision does not use the words "consent" or "fraud". Its requirements are satisfied by the commission of an unlawful and indecent assault

on another person. Section 348 provides an exclusive definition of the word "consent", but the defined meaning is for "consent" "in this chapter". The section does not purport to provide a definition for "consent" when that word is used in other chapters of the Code. It cannot be used to import concepts of consent and fraud into s 352(1)(a).

[52] That conclusion is consistent with the structure of the Code. Chapter 26 defines assault, makes it unlawful unless authorised, justified or excused by law and sets out the circumstances of justification and excuse. It does so for the purposes of the Code generally and applies to a number of offences, scattered throughout the Code, of which assault is an element. The definition of assault (s 245) deals with the question of consent: consent (or more precisely, absence of consent) is an element of the definition. Of course, assault is not an element of rape; that offence has always had its own explication of the relevance of consent. Until the 2000 amendments came into force, the same was true of the offence of procuring a person to commit or witness an act of gross indecency. From its introduction into the Code in 1989 until 2000 that offence was co-located with indecent assault in s 337, originally under the heading "Indecent assaults" and from 1997 under the heading "Sexual assaults". When both offences were relocated to chapter 32 (s 352) that explication was deleted in favour of the definition provided for in that chapter (s 348). The ambit of the new definition was carefully limited. For example, it did not and does not extend to s 210(6) or s 216(5), notwithstanding the obvious similarities of subject matter. I shall revert to the question of consent below.[11] The point now under consideration is fraud. The definition in s 245 is satisfied either by absence of consent or if any consent was obtained by fraud. It was the latter which was in question in the present case.

[53] On that question his Honour directed the jury that it was the Crown case that the consent:

> "was obtained by false and fraudulent representations made by the accused about the nature or purpose of the acts of touching with hands or mouth or with the electronic device.
>
> The Crown says that the nature or purpose of the act of touching was not for a genuine therapeutic purpose, but that the nature or purpose of the act of touching was to enable the accused to obtain sexual gratification of some kind.
>
> As with the rape counts, the Crown says that in the indecent assault counts there was no consent because in each case the apparent consent of the complainant was obtained by fraud.
>
> Now, if you are satisfied beyond reasonable doubt that the consent was obtained by fraud on the part of the accused, and again I will explain that to you, then you may be satisfied that there was no consent by the complainants to the application of force in the indecent assault counts.
>
> …
>
> I repeat, fraud is an intentional, dishonest act done with a purpose of deceiving. To show that the consent was obtained by fraud, the

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11 Paragraph [84].

> Crown must show in each case, in each count that the consent of a woman was obtained by fraud, and the fraud related to the nature or purpose of the act being carried out by the accused on the complainant. The Crown says that in each indecent assault count you will be satisfied that the consent was obtained by fraud because of the false and misleading statements made dishonestly by the accused as to the nature or purpose of the act.
>
> … It is the consent to the application of force which is in question. Such a consent demands a perception as to what is about to take place, as to the nature or purpose of what the accused is doing. That is what is involved in consent being obtained by fraud. And the Crown says that that is the case in relation to each of the assaults, and you will be satisfied that the consent was obtained by fraud.
>
> It is the defence case that the accused did not obtain consent by dishonesty; that he did not make false or misleading representations to the complainants about the nature or purpose of his acts. The accused says that when he told the complainants that what he was doing was for therapeutic purposes, he was telling the truth and he believed that he was telling the truth. Before you can convict the accused of the indecent assault counts, you must be satisfied beyond a reasonable doubt that the accused was dishonest, was lying when he told the complainants, or implied that the touching of their breasts with his hands, mouth or a TENS device, was for therapeutic purposes."

[54] In that passage his Honour used the expression "nature or purpose of the act". It was inaccurate to describe the Crown case in those terms. The point upon which issue was joined was whether the appellant's representation was false and dishonest. That is apparent from his Honour's summary of the defence case. It is also apparent from the terms in which his Honour directed the jury when he summarised his directions the following morning:

> "The Crown says the consent was obtained by fraud; that he held himself out to be a person who was doing these things for therapeutic reasons, genuine therapeutic reasons. The Crown says that he was lying when he did that, deceiving the complainants. The defence case, as I have told you, is that he believed that what he was doing would be beneficial and he was applying what he genuinely believed to be genuine treatments and I repeat that fraud is an intentional dishonest act done with a purpose of deceiving."

[55] In summary, the issue of fact left for the jury to decide was whether the Crown had proved beyond reasonable doubt that the appellant's purpose in performing his actions was not therapeutic. On the directions given, determination of that question would resolve the issues of falsity and dishonesty in relation to both rape and sexual assault and the issue of indecency in relation to sexual assault. The Crown sought to satisfy the burden upon it by proving that the appellant's purpose was prurient, to obtain self gratification. Both parties conducted the case on the basis that the appellant had one purpose or the other. The evidence referred to in ground 1A went to this issue.

Rape and sexual assault: the evidence as to the appellant's purpose

[56] I shall refer to the evidence in relation to each complainant in turn. However it must be remembered that the appellant's dealings with the complainants all occurred within the same time span. The events were closely related. There is no suggestion that the jury was not entitled to use the evidence relating to the appellant's purpose with respect to one complainant in forming an assessment of his purpose in relation to another.

BS

[57] I have described above[12] how the appellant came to be treating Mr and Mrs S. In about October 2001 the appellant went to the S's home for business discussions with Mr S. In the course of that visit he was introduced to BS (as she then was). She was 17 years of age. Mrs S told the appellant of BS's problems with headaches, a sore neck and breathing. He asked BS about having a sore neck and she told him that she did. As a result the appellant started to massage BS's neck, applying pressure also to her back and the upper area of her chest. He purported to explain to Mrs S what he was doing and the possible benefits it might bring. No charge was brought in respect of this conduct.

[58] Several weeks later the appellant came to the S's house and stayed for dinner. He brought with him a TENS machine and there was a discussion about his intention to treat BS's chest area with it. The appellant asked her to put on her swimmers, which she did. They went into the bathroom and the appellant attached two pads to the top of her back and two to the top of her chest, just below the collarbone. The machine was switched on and they then joined the family for dinner. Ten minutes later they again went to the bathroom where the appellant moved the pads down onto her breasts. They returned to the table and continued the meal. Ten minutes later they returned to the bathroom and the appellant placed the pads on the bottom of her breasts. Again they returned to the dining table. After a further 10 minutes the pads were removed and the appellant drew a diagram for Mrs S, demonstrating what he had done and recommended that they get a machine. That was the conduct which constituted count 12 (guilty).

[59] The next incident occurred one Saturday afternoon in November or December 2001. The appellant brought a massage table to the S's house and Mrs S told him to set it up in A's bedroom. She (Mrs S) got onto the table and the appellant massaged her back and perhaps "a little bit" on her abdomen for an estimated 20 to 30 minutes. Thereafter either she or the appellant asked BS to go into the room.[13] The appellant asked BS to take her shirt off and lie on the table. This she did, lying on her front. The appellant removed her bra and placed a towel over her. He then massaged her back. Next he got her to turn over and pushed on the sides of her back from underneath. During this period her mother was in and out of the room a few times. The towel remained over her. Then at his request she removed her jeans and he pressed the area of her stomach and lower abdomen and in the crease where her legs joined her body, proximate to her vagina. At that point she started laughing – at the trial she could not remember why. Mrs S said she heard a shriek. The appellant came out and asked her to go into the room and talk to BS. He said that there was

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12 Paragraph [21].

13 It is unclear whether some treatment was given to AS before BS entered the room. BS thought it was but neither AS nor Mrs S gave evidence of such an event at that time.

something deeply emotional there and that what he had done had triggered other emotion to come out; and that BS needed to talk about it. She found BS "between laughing and crying a bit" - going from one emotion to the other. The appellant left the room and Mrs S talked to BS. It took her quite a while to settle down. The appellant returned and sometime later Mrs S left. The appellant and BS continued to talk for a while about what she described as "some emotional issues"; she cried for a while; he tickled her, then massaged her back a little; and after that she got dressed. No charge was brought in respect of this conduct.

[60] Counts 13 and 14 arose from the one series of acts. Sometime before Christmas 2001 the appellant was at the S's home. BS saw him working on her father's neck. Thereafter he asked her to go into her bedroom with him. With the door closed he asked her to take all her clothes off and lie on the floor on her back. He said he needed to treat her and that if he asked her, it was okay by God. She could not remember his saying to her that there were pressure points just inside the vagina. It seems that he asked if he could go inside her and show her where the pressure points were, and that she responded, "Whatever". He then said that it would have to be "yes" or "no", not "whatever"; so she said "yes". He said words to the effect that he would have to go inside to treat her. He pushed on her stomach and then around the outside of her vagina, pressing with his fingers; then inserted his fingers and pressed around on the walls. Touching the outside of the vagina constituted count 13 (sexual assault - not guilty) and inserting his fingers count 14 (rape - guilty). His fingers remained inside her for some seconds. Thereafter there may have been a little more massage of her stomach, and then she got dressed.

[61] After that experience BS tried to avoid contact with the appellant by going out or staying in her room. In January or February 2002 he came to the house around lunchtime. BS, her sister MS and MS's friend MM (who was living with the Ss) were at home. BS stayed in her room for some time but eventually went out to get a drink. When she did so she observed MM on the appellant's massage table and the appellant showing MS different ways to treat MM. He had a machine with pads like the TENS machine. After she returned to her room the appellant came in to talk to her, bringing the machine with him. He said that he could tell she was uncomfortable with what happened the last time that he treated her, and that she had to understand the difference between the medical and the sexual. At his request she removed her clothes and lay on her back on her bed. He got her to roll on her side, placed one pad on her back and the other between her vagina and her anus (sexual assault, count 15 - guilty). He may have explained what he was doing. After switching the machine on he left the room for about half an hour. When he returned he removed the pads and, according to BS (it was clearly put in cross examination that this did not happen), put his fingers in her vagina again and pressed around for a little while (rape, count 16 - not guilty). Then he said he was done and told her to get dressed and have a sleep. When she awoke she went out to the lounge room and saw MM on the massage table, naked with a towel over her. BS returned to her room.

[62] BS's next encounter with the appellant was in February 2002. On that occasion he was treating MS. He suggested that BS hook herself up to the machine again. She said it wasn't a good time of the month and went to her room, remaining there until he left.

[63] The last occasion on which the appellant had dealings with BS was about 7 March 2002. Mrs S told him that BS had been suffering from headaches for two days. He asked where she was and on being told, went to MM's room where BS was watching television. He had a TENS machine with him. He asked BS to undress and he left the room while she did so. She lay on MS's bed with a towel over her. The appellant returned to the room and began to touch her, but she could not remember what he did first. She testified:

> "… he put his fingers in my vagina again and I was kind of on my stomach, but kind of leaning on my hands and my knees a little bit, and then my dad was coming down the hall and - and BAS took his fingers out."

She said that as on the other occasions, he pushed his fingers around on the walls of her vagina. That conduct constituted count 17 (rape - not guilty). The appellant in his evidence flatly denied penetrating her with his fingers on any but the first occasion.

[64] While the appellant was dealing with BS Mr S came into the room briefly, then left. At that stage she was on her stomach, covered by a towel. The appellant then placed the pads of the TENS machine on her body, one on her back and one between her vagina and her anus, and switched the machine on (sexual assault, count 18 - guilty). Meanwhile Mr S, who was most upset, told his wife that she needed to go back to the room. She did so and found BS lying on her back with a towel over her. The machine was connected to her. The appellant rolled her on to her side. Mrs S observed pads on B's back but not, apparently, between her vagina and anus. The appellant explained that the treatment "had to do with energy flow" and said that the headaches were being caused by the herpes virus deposited in the lower back and that the treatment would move it out of the spinal area. Mrs S and the appellant left the room and some time later the appellant returned, switched off the machine and removed the pads. A little later Mrs S entered and on the appellant's directions used another machine (one with glass attachments) for a while on BS's back. After that BS dressed and went into the dining room where the appellant massaged her neck while she was lying on the massage table.

KS

[65] KS, aged 21, first met the appellant as he was leaving her parents' home around Christmas 2001. She was not living at home but knew that he had been treating her parents and some of her sisters. They had a brief conversation about her weight and he said he would be able to help her with any health problems she was having.

[66] About a month later the appellant was again at the house, giving treatment to various family members. His massage table was set up in the living room. The appellant asked her to lie on her back on the table and produced the machine with the glass bulb. He asked Mr S to get some cornflour which he spread on her neck and chest without disturbing her V-neck shirt. He then used the device on her neck for about five minutes and on her chest for the same time. According to KS he then pulled back her shirt and bra and left his hand resting on her breast while he used the device on the top part of the left breast. This treatment continued for about five minutes; then he moved to the other side of the table. She assumed this was to go on to the other breast so she pulled back the clothing herself. He applied the machine to the breast without touching her with his hand. Then he asked her to

remove her bra which she did and he applied the machine to the side of the breast and beneath it. For reasons which were not explained, the Crown particularised the conduct as "static instrument on neck whilst hand resting on breast". That was the conduct alleged to constitute count 19 (sexual assault - not guilty). He switched off the machine and started to massage under her arm and the side of her breast. Then he asked her mother to come over and feel a lump. He said that her lymphatic system was blocked and that he'd have to do a lymphatic drainage and that she would have to know how to do that because it had to be done every day. He massaged underneath the top of her arm and down the right side on her breast for about five minutes; then did the same thing to the other side. At that point the treatment was suspended because KS had to take her sister somewhere.

[67] Upon her return the appellant took her to the bathroom and shut the door. He asked her to take her shirt and bra off so that he could check her alignment. At that stage she was standing in front of the mirror. She removed her shirt, unclipped her bra and the appellant took the straps and drew it down over her arms. He then lifted her right arm above her head and massaged from just above the elbow to the shoulder under the arm and down the right side of her breast, touching most of the side of the breast. That process took between five and 10 minutes. He repeated it on the other side of her body. That constituted count 20 (sexual assault - guilty). By then she felt as if she was going to pass out. She told him this and he sat her on the edge of the bath, got her a glass of water and asked her to put her shirt back on. When she felt well enough she went back to the lounge room. Thereafter the appellant repeated the process on one side to show her mother what to do, but KS felt unwell and sat on the couch. He continued the process for a couple of minutes and she briefly passed out. That was the substance of count 21 (sexual assault - guilty).

[68] About two weeks later the appellant came to the house and treated a number of family members. KS was treated in her sister's bedroom. At the appellant's request she lay flat on her back on the bed and he put two fingers from each hand near her spine and pushed. He repeated that process for the length of her back. After that he pulled her shorts down to just below her hips and pushed around her stomach and pelvic area. He said that her lymph nodes were blocked and they'd have to be unblocked, and to do that she would have to place her hand inside her vagina and massage the nodes from the inside and the outside. He said that he could do that for her at that time but then she would have to do it every day until he saw her again. She declined his offer to do that, saying she could do it herself. He then repeated the process described in the preceding paragraph. While he was doing that he again offered to show her "how to do it", but again she declined the offer. When the process was complete she felt a bit woozy and had a drink of water. He then sat on the edge of the bed and had her stand in front of him. He lifted her shirt to just above her breasts and said that he had to do a weight test. He then took hold of both breasts between his thumbs and index fingers about 1 cm above and below the nipples, saying that he would have to "hold it for 20 seconds because otherwise the brain wouldn't register that there was a problem". During that 20 seconds footsteps were heard and he used his other fingers to pull her shirt down, but he did not let go until he had counted to 20. Holding her breasts was the conduct relied on by the Crown to prove count 22 (sexual assault - guilty).

MM

[69] MM, aged 21, was a friend of MS and was living with the S family in 2002. She and MS were injured in a car accident in mid-2001. In early 2002 her broken collarbone was causing her discomfort. Mr S suggested that she see the appellant about it. She did so; she thought in February 2002. Only BS, MS and she were at home. On the Crown case this was the same day described by BS.[14] The appellant asked if she wanted to be treated by him and she said yes. He then had some discussion with her about her personal and family life and he said that he could tell she had been abused when younger. She denied any physical abuse, telling him just verbal abuse from siblings and nothing major; but he told her that if she wished he could refer her to a friend who was a counsellor. They discussed diet and motivation and he asked if she was a member of the church. She wanted to get her left shoulder treated. The appellant told her she would need to remove her shirt, bra and pants and lie on the massage table. She removed her shirt and bra, but not her pants (she was having her period) and lay on her stomach. The appellant put powder over her back and showed MS how to use the machine with a glass bulb. He then left the room for about 10 minutes while MS applied the machine to MM's back. He returned and showed MS how to do the legs, then left the room again. He returned a little later. MM was "flipped over" and the appellant applied powder to her chest from the neck to the naval. In the process he rubbed powder on to all parts of the breast except the nipple. This was the conduct relied upon for count 33 (sexual assault - guilty). At one point he pinched the side of one of the breasts and said that he was checking for fat content. He then left the room while MS used the machine on her chest. She found it warm and relaxing. When that was finished the appellant returned and began pressing around her abdomen. He said that her liver had been damaged, which did not surprise her because she had previously had a severe bout of glandular fever. After that the appellant told her to have a shower and get all the powder off her body, which she did. When she returned she observed MS lying on her back on the table with her breasts exposed. The appellant was massaging her chest. MM then went and had a sleep.

MS

[70] MS, aged 20, met the appellant at her parents' home around the end of 2001. She was aware that he was treating her mother and possibly her sister Ks. No physical contact occurred until a subsequent occasion. As the appellant was leaving the house Mrs S spoke about MS's shoulder, injured in the car accident. The appellant took hold of the shoulder and pushed in a couple of spots under her bra, on the outside of her clothing. He said he was doing this to cause a release of tension and MS thought that it did. It seemed to her that he definitely knew what he was doing and had a great knowledge of the human body and how it worked.

[71] The first time he treated her was the occasion in January or February 2002 when he also treated BS and MM. MS testified that after MM went to have a sleep she removed her top and bra at the appellant's request and lay on her back on the massage table. The appellant poured cooking oil onto her breasts and massaged them. He said he was doing that to clear out all the toxins that build up in them; and that the breasts should be massaged because women get breast cancer and the massage helps to flush out all the stuff collecting there. He rubbed to the sides and the bottom of the breasts, but not the nipple, kneading with his thumbs for about five minutes on each breast. That was the basis for count 34 (sexual assault -

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[14] Paragraph [61].

guilty). At that point B's fiancee and another male arrived and MS and the appellant moved with the massage table to the parents' bedroom.

[72] After she remounted the table MS told the appellant that she had a problem in her groin area because, as she put it, "it often locks up". The appellant removed her shorts and, as she described it, was stretching her legs. While doing that he pulled aside her underwear and inserted some fingers into her vagina. He pushed against three points internally, one at a time, while stretching her leg toward her chest. He said this was to relieve tension. That process continued for about five minutes. He told her to tell him if it got uncomfortable. At one point she did so; but there was no change to the procedure. She then rolled on to her stomach and he again placed his finger in her vagina, again for about five minutes. Those actions formed the basis of count 35 (rape - guilty). He said that she should do this herself two to three times a week to keep the tension out of the groin area. He commented that she had a nice looking body and backside.

[73] Next MS rolled onto her back again. Cupping his mouth over her stomach the appellant blew lightly against her body. He did this on two areas of her stomach and one on the outside of her breast. He gave an explanation for this rather odd procedure but she could not remember what it was. This conduct founded count 36 (sexual assault - guilty).[15]

[74] The appellant treated MS on one other occasion, on 28 February 2002. The treatment that day took place in her parents' room, with no one else present. As on the previous occasion he spoke about clearing blockages in the lymph glands. He did not discuss in advance exactly what he intended to do, but MS expected from the previous occasion that he would be massaging the side of her breasts. She removed her shirt and bra and lay facing upwards on the edge of her parents' bed. The appellant got out the device with a glass bulb, applied powder to her neck and used the device on it. He said this was because she had the flu. After that he got out some oil and again massaged one or both of her breasts. That continued for about five minutes. This was the basis for count 37 (sexual assault - guilty). MS had an insect bite on her left breast just under the nipple, quite red and inflamed. She mentioned it to the appellant, he looked at it and then applied the glass instrument to it. He went to remove her pants but she told him that she was having her period. Consequently he restricted himself to massaging her groin area.

[75] Then the appellant commented that she had a good looking body and that she should show it off more. She had a tendency to hunch her shoulders and the appellant said she should stand with her shoulders back more. They went into her parents' ensuite and he stood her in front of the mirror and pulled her shoulders back, showing how her breasts looked when that was done. In the course of that he put his hand under the bottom of her breast and lifted it up a bit. He did not touch her any further on that occasion. That was the basis for count 38, particularised as "holding breasts in front of mirror" (sexual assault - not guilty).

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15 The question whether this conduct constituted an assault within the meaning of s 245 of the Code was raised during the hearing of the appeal, but no application to amend the notice of appeal was made, nor was the point adopted by the appellant.

JHA

[76] Before her marriage to SH, JHA worked as a flight attendant. On 16 January 2002 she became ill on a flight and was sent home. Before going she called in to her prospective parents-in-law's residence. There she found the appellant showing IH how to do some exercises for his swimming. JHA told Mrs H how she had fainted on descent and had a sore jaw and the appellant joined in the discussion. They spoke about her diet and how she did not eat properly because she had shift work and he said he could help her. She told him that some months earlier she had experienced pains in the stomach and been in hospital because she had thought that she had appendicitis. She told him of her difficulties in sleeping and her feelings of lethargy. She thought he must have been a doctor or a masseur because he was helping IH with strengthening exercises. Later that day, over lunch, Mrs H told JHA that it would be a good idea if she saw the appellant because he had helped other people in the family. She had a discussion with him about what was wrong with her and he said that after lunch he would come and work on her.

[77] In due course they went to JHB's bedroom where a massage table was set up with towels on it. JHA stripped to her underwear and lay on her back on the table. The appellant massaged her ribs, pressing at specific points with his fingers, down to her calves with his hand beneath her back. After he had massaged the backs of her thighs he massaged each side of her body. Throughout this process the appellant made small talk, in the course of which he revealed that he did not earn his living as a masseur. In the course of conversation she told him that her breasts were sore because she'd been on the pill and it had made them really hard. He said that he could help relieve a bit of that pain. He tried to remove her bra, had difficulty and asked her to remove it, which she did. Using a lubricant he then massaged the sides of her breasts, pushing hard with his fingertips, without touching her nipples, for about 10 minutes on each side. This conduct constituted count 28 (sexual assault - guilty). At one point he asked if her breasts were fake because they were pretty hard. He also claimed to have helped a lady from the church who had cancer which doctors could not fix. He said that he had shown the lady's husband how to massage particular pressure points and he could show SH. JHA was aware that he was treating JHB in relation to her breasts.

[78] After he finished massaging her breasts with his hand, the appellant said that putting carbon dioxide on the breast would help the blood circulate. He placed his mouth on her breast and exhaled through his nose "like blowing a raspberry with no noise". The process lasted a few seconds and was performed twice on each breast. Then he did it on her thighs. This conduct constituted count 29 (sexual assault - guilty).

[79] At some point JHA told the appellant that she had previously had problems in her groin area. The appellant began to push her abdomen just above her underpants. Then "he kind of pulled them down a little bit just where your glands are". Saying that her undies were getting in the way he removed them and threw them on to her pile of clothes. He kept pushing toward her lymph nodes and commented on the fact that she had waxed off her pubic hair. He asked whether SH was hairy or whether he got waxed. He moved his hands to the outer lips of her vagina and then slowly inwards. He asked her if she had been injured when she was little because, he said, she had blocked tubes. With his fingers inside her he started "tapping" on her clitoris, saying that because she had been on the pill her libido had gone. She

had told him that she was getting married in a couple of months and he said that he needed to work on that. He increased the number of fingers inside her vagina and told her that she should masturbate up to five times a day with her feet in a bucket of cold water and with him in the room; or else if she felt uncomfortable doing that he could wait outside; or she could have sex with SH and he would wait outside and then he'd be happy to work on her. She told him it was hurting and he said that it had to hurt to get better. Giving evidence, JHA estimated that the appellant had his fingers in her vagina for about an hour. She said that when she observed to the appellant that it was getting dark and SH would probably be home soon, he stopped. That conduct constituted count 30 (rape - guilty).

[80] After that the appellant placed the machine with the glass bulb on her cheek and jaw for about five minutes. Then he said he would crack her back. Still naked, she stood up to enable this to be done. As he was doing this, or getting ready to do it, SH knocked on the door and entered the room. The appellant reached over the table and pushed the door shut in his face. He told JHA he would like to see her again so that all his good work would not be undone. She then got dressed. He told her his fee would be $40.

[81] Two days later the appellant telephoned JHA at her home at about 10 am He urged that she have another treatment. She said she couldn't because she had an appointment at midday. He said that if he did not treat her immediately all his work would be undone. In the end they arranged for him to come to her home forthwith. He arrived about 10:30 am. He brought with him the massage table and a couple of boxes. He asked her to take her clothes off and hop back onto the table, which she did, lying on her back. He repeated the treatment to her face with the instrument with the glass bulb. Then, using lubricant he massaged both breasts for about five or eight minutes. It (the procedure) was, he said, like milking a cow. That was count 31 (sexual assault - not guilty). Then he asked her to roll onto her stomach and put one foot on the back of the other knee, so that her legs were open. She did so and, according to her testimony, he then put lubricant on his hand and, it felt, put his whole fist inside her vagina. That hurt, and she jerked away, telling him that it hurt. He said that it had to hurt for it to get better. He did not say what needed to get better nor how this treatment might help her. She said a few times that she had an appointment and had to go but he kept saying no, he just had a little more to do. He continued to move his hand in and out of her vagina for about half an hour. That constituted count 32 (rape - not guilty). He asked her if she had masturbated and she thought about it and said no and that she would not do it. After he finished he told her that the fee would be another $40 and she went upstairs, got $80 and gave it to him.

The appellant's state of mind

[82] Was it open to the jury to find beyond reasonable doubt that the appellant's purpose (at least in relation to those counts upon which they convicted) was not therapeutic? In reaching a conclusion the jurors could take into account the evidence referred to above in relation to JHB and AS.[16] They could take into account his comment to MS that she had a nice looking body and backside and his later comment that she had a good-looking body and should show it off more. They could take into account his conduct in touching JHA on her clitoris and commenting on her loss of

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16 Paragraphs [23] - [37].

libido. They could take into account his statement that exhaling carbon dioxide on to her breast would help her blood circulate. They could take into account the fact that he told her to masturbate up to five times a day with her feet in a bucket of cold water. They could take into account the fact that he did not desist from probing inside her vagina with his fingers for about an hour, notwithstanding being told that it was hurting; yet stopped as soon as she said that her boyfriend would soon be home. Most importantly, they could take into account the appellant's explanations for what he did and his demeanour while giving evidence. The appellant gave extensive evidence about what he did to the various complainants. He told the jury what he claimed was his purpose in respect of each piece of impugned conduct. In each case he asserted, in effect, that his purpose was therapeutic. It was open to the jury to believe him. It was equally open to it to disbelieve him. Evidently that is what it did.

Rape and sexual assault: conclusion on indecency and falsity and dishonesty

[83] The defendant's purpose was a fact in issue. The onus lay upon the prosecution to prove beyond reasonable doubt that his purpose in relation to each count was not therapeutic. The question was to be determined on all the evidence, not simply on the evidence as it stood at the close of the Crown case. Once the appellant's evidence was disbelieved, there was in the circumstances of this case, no middle ground: a finding against him as to his purpose to the requisite standard was inevitable. It follows that in relation to the convictions for rape and sexual assault, ground 1A of the amended notice of appeal must be rejected.

Ground 2(a): Evidence regarding consent

[84] Ground 2 relates to the issue of consent in relation to the convictions for rape and sexual assault. The case for the Crown was that the appellant was guilty of the various offences because in each case that consent was vitiated or obtained by fraud. In the case of the rapes the Crown alleged that the appellant obtained consent by a false and fraudulent representation that the purpose of his conduct was therapeutic. Success in proving that fact would mean that the consent was not freely and voluntarily given and therefore was not "consent" within the meaning of s 349 of the Criminal Code. Proof of that fact in relation to the counts of sexual assault would mean that consent was obtained by fraud within the meaning of s 245 of the Code. In that way important elements of the offences defined in ss 349 and 352 would be established.

[85] The appellant placed particular reliance upon the following passage from a judgment of the Court of Criminal Appeal in 1987:

> "What the Crown had to prove beyond reasonable doubt in relation to each charge was the making of the relevant representation; that the representation was false; that the appellant knew that it was false; that the representation was made by the appellant with the intention that it should be acted on by the representee, that is that the representee would be induced by the representation to give a consent which would not otherwise have been given; and that the representee was in fact thus induced to give the consent.
>
> There are some matters which must be borne in mind in relation to proof of these matters. The relevant representation must be capable

> of formulation with reasonable precision and of course it must be satisfactorily proved. An inquiry into states of mind is involved, whether the representation is made by words or, as it may be made, by conduct. The representation, whether by words or conduct, must be made deliberately with the relevant intent and with knowledge of its falsity. The representee must recognise the representation as a representation and be induced by it to give the relevant consent".[17]

[86] In the present appeal, counsel for the respondent submitted that to the extent that this decision might be said to insist on the dissection (of the evidence) demanded by the appellant, the principles involved have been modified by the decision of the Court of Appeal in *R v I A Shaw*[18]. Alternatively he submitted that *R v Veltheim* was wrongly decided. Neither submission should be accepted. As I read the judgment in *Veltheim* the court was not purporting to set out a principle of universal application in cases where consent is alleged to have been obtained by fraud. It is unlikely that the court would have taken such a step without any reference to authority. That is particularly true when the step in question might involve the importation into the criminal law of concepts originally developed by the common law for the quite different purposes of the tort of deceit. In my judgment the Court of Criminal Appeal was simply stating what the Crown had to prove in the circumstances of that case. It is true that there was nothing particularly remarkable about the case; what the court said would be applicable in most cases where consent is alleged to have been obtained by fraud. It applies in the present case. It is unnecessary to speculate about circumstances to which the passage might not apply. *I A Shaw* was concerned with a different point: whether it was necessary for a jury to be directed to decide first whether the complainant consented and then if she did, whether her consent was obtained by a vitiating factor. The factors involved in that case were threats and intimidation, and the evidence on that aspect was substantially the same as the evidence on the question of consent or no consent. In those circumstances, there was "no occasion for the judge to burden the jury with philosophical discussions of the conceptual differences, if any, between not consenting to sexual intercourse, and consenting to it only because of the effect of threats or intimidation …"[19].

Rape

[87] The definition of consent in s 348 has some unique features. It was inserted in 2000 after the report of the Task Force on Women and the Criminal Code was tabled in Parliament. The objective of the amendment bill was to amend the Criminal Code and certain other legislation in accordance with the recommendations of the Task Force.[20] The amendment implemented (among others) a recommendation of the Task Force that the list of circumstances vitiating consent be enlarged by the addition of a false and fraudulent representation as to the purpose of the act.[21] It is not clear whether under s 348(2)(e) an act may have a purpose distinct from the

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17 *R v Veltheim* [1987] CCA 135; CA 120 of 1987, 18 August 1987, pp 2-3.
18 [1996] 1 Qd R 641.
19 *Ibid*, pp 646-7, per Davies and McPherson JJA.
20 Queensland Explanatory Notes 2000, vol 2, p 1588.
21 http://www.qldwoman.qld.gov.au/Docs/Women_and_the_Criminal_Code/Recommendations.pdf, p 14, recommendation 64.2. The appellant could not have been convicted had his conduct occurred before the amendment came into force: *Papadimitropoulos v R* (1957) 98 CLR 249; *R v Mobilio* [1991] 1 VR 339.

purpose of the actor[22]; but in the present case that problem does not arise. The purposes of the appellant's acts must have been his purposes in performing them. More importantly, the amendment in 2000 changed the effect of fraud (and other "vitiating" factors) in the context of rape. Under the amended provisions, consent is given an artificial definition. The presence of one of the vitiating factors prevents what would otherwise be consent[23] from having the qualities necessary to satisfy that definition.[24] Although this might be thought in grammatical terms to make the vitiating factors exceptions to the general rule, it could not be argued that this brought about any change in the onus of proof. If the Crown relies upon one of these factors it must prove the existence of that factor beyond reasonable doubt.

[88] In the present case the Crown set out to prove that consent to digital penetration (in the statutory sense of "consent") was absent because the consent (in the colloquial sense) which was given was obtained by a false and fraudulent representation about the purpose of the penetration, viz that the purpose was therapeutic. For the reasons discussed above it was open to the jury to conclude that the appellant's purpose was not therapeutic but was his own gratification. The question raised by ground 2(a) of the amended notice of appeal is whether there was evidence that the appellant made a representation that his purpose was therapeutic; and if so whether the complainant's consent was obtained "by" that representation. If those questions be resolved adversely to the appellant there was abundant evidence to support a conclusion that any representation was dishonest and fraudulent.

[89] A representation within the meaning of s 348(2)(e) of the Code does not have to be explicit; it may be implicit in words or conduct or a combination of both. When words are involved the implication need not be a semantic one; it is not necessary that it follow as a logical consequence from the words in question. In the present case there was no evidence that the appellant said that his purpose was therapeutic, using those words; nor was there evidence that he used words which necessarily had that the meaning. The Crown argued however that the entire tenor of the appellant's conduct was consistent with an implied assertion that this was his purpose.

Sexual assault

[90] There are some structural similarities between the definition of assault in s 245 of the Code and the definition of rape as it stood until 2000. Relevantly, the terms of the definition are satisfied if the act constituting the alleged assault occurred either without the consent of the person assaulted or with that consent if it was obtained by fraud. The effect of fraud is not to negate the existence of consent, but to render its existence irrelevant.[25] There is no definition of "fraud" for the purposes of s 245 and a reference to sections of the Code dealing with fraud is of no direct assistance. Whether fraud for these purposes is the same as "false and fraudulent representations about the nature or purpose of the act" is a question which may be determined on another occasion, if it ever arises for decision. Conventional

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22 A similar problem arises in determining the purpose of a procedure under s 323A(3).

23 To avoid circularity (or more accurately, recursiveness), "consent" must be given its ordinary meaning in s 348 when not enclosed by inverted commas.

24 Under the previous law be the presence of a vitiating factor rendered the issue of consent irrelevant; it did not negate consent: *R v I A Shaw* [1996] 1 Qd R 641 at p 644.

25 I see no reason to extend to the interpretation of s 245 the approach to the previous s 347 adopted by the majority in *R v Pryor* (2001) 124 A Crim R 22.

analyses of fraud postulate the existence of a dishonest misrepresentation and for present purposes that suffices.

Evidence of representation

[91] For simplicity I shall refer only to the evidence in relation to each complainant at the time of the first offence against her and also to the position at the time of the alleged rapes. That is sufficient to demonstrate the existence of evidence to support a finding that the representation was made and maintained. It is unnecessary to consider the position at the time of each other individual offence. It was not suggested that if it was open to the jury to make the finding, some other part of the evidence nevertheless compelled a different conclusion.

[92] In relation to BS the evidence was:

(a) the evidence set out at paras [57]-[64] above;
(b) bringing a TENS machine to the S's residence;
(c) discussing his intention to *treat* BS's chest area (my emphasis);
(d) carrying out the treatment in front of Mrs S;
(e) drawing a diagram for Mrs S and recommending the acquisition of a machine.

By the time of the digital penetration, several other matters had occurred which strengthened it:

(f) massaging Mr S's neck (to B's knowledge);
(g) stating on the occasion of the alleged rape that he needed to *treat* BS (my emphasis);
(h) stating on the same occasion that he would have to go inside to *treat* her (my emphasis).

[93] In relation to KS the evidence was:

(a) on the occasion of their first meeting telling KS that he would be able to help her with any health problems she was having;
(b) saying this after he had been treating other members of the S family;
(c) bringing a massage table to the S's house;
(d) inviting KS to lie on the table and producing an electrically powered instrument for use on her.

[94] In relation to JHA the evidence was:

(a) participating in a discussion about JHA's sore jaw and her fainting;
(b) telling JHA he could help her;
(c) later, discussing with JHA what was wrong with her and offering to work on her;
(d) saying to JHA that he could help relieve the pain in her hard breasts.

Before the digital penetration took place:

(e) saying that blowing carbon dioxide on her body would help the blood to circulate;
(f) asking if she had been injured when she was little, because she had blocked tubes.

[95] In relation to MM the evidence was:

(a) asking MM if she wanted to be *treated* by him (my emphasis);
(b) bringing a massage table to the S's house;

(c) asking MS to use a machine on MM and providing the machine to be used;
(d) saying that MM's liver had been damaged.

[96] In relation to MS the evidence was:
(a) pushing on MS's shoulder after her mother told him of the injury to it;
(b) bringing a massage table to the S's house;
(c) asking MM in front of MS if she wanted to be *treated* by him (my emphasis);
(d) asking MS to use a machine on MM and providing the machine to be used;
(e) saying in front of MS that MM's liver had been damaged;
(f) saying that he was massaging MS's breasts to clear the toxins out of them;
(g) telling MS that breasts should be massaged because women get breast cancer and the massage helps to flush out all the stuff collecting there.

Before digital penetration took place:
(h) telling MS that the process of stretching her leg and inserting his fingers in her vagina was to relieve tension and that she should do this herself.

[97] In each case it was open to the jury to conclude beyond reasonable doubt that at the relevant time the appellant had represented to the relevant complainant that what he was doing at that time was for a therapeutic purpose.

"… obtained by"

[98] There is no doubt that the appellant obtained the consent of the complainants to his actions. The question is whether there was evidence that he obtained that consent "by" the representation already discussed. That involves an inquiry into whether there is evidence of a causal link between the representation and the obtaining. As Mason CJ observed of the word "by" (albeit in a different context), "[It] clearly expresses the notion of causation without defining or elucidating it."[26] The task of definition and elucidation is notoriously complex and problematic. The submissions in the present appeal eschewed such an approach. The appellant's written outline did not mention the matter and the oral submissions were limited to the proposition that it was necessary for the trial judge to identify the reliance, i.e. the link between the representation and the consent. The respondent's submissions were also brief. It would therefore be inappropriate to embark in these reasons upon an examination of the concept of causation in the context of s 348 and s 245 of the Code. Issues such as the relevance of gross carelessness on the part of the complainant, whether causation may be proved by demonstrating that reliance upon the representation by another person has led to the consent of the complainant and whether (quite apart from defences which might arise under chapter 5 of the Code) the terms of the sections are satisfied by a fraudulent representation made by a person other than the one to whom the consent is given may be left until they are squarely raised.[27] I must however disclose the basis upon which I approach the present case. First, the law does not require the representation to be the sole cause of the obtaining of consent; it is sufficient if it plays a substantial (i.e. more than trivial) part in that process. Second, (without determining whether the reasoning in *March v E & M H*

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26 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at p 525.

27 Some of the bizarre factual circumstances which can arise are demonstrated by cases referred to in *R v Mobilio* [1991] 1 VR 339.

Stramare Pty Ltd[28] can be applied in the present context) the concept of causation in this context is one of practical or commonsense causation and for that reason, particularly suited to determination by a jury. What was said of negligence in *Bennett v Minister of Community Welfare* is applicable here: "In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of common sense."[29] Third, that being so, when a material representation is made which is calculated to induce the representee to give consent and that person in fact gives consent, it is open to the jury to infer that she was induced to do so by the representation.[30] In practice I do not think that proposition involves any reversal of the onus of proof. The jury will always be deciding the question in a context; whether they draw the inference will depend upon the context.

[99] In the present case the direct evidence on the question left something to be desired. Neither side paid it much attention. As will be seen, the prosecutor failed to focus precisely on the question while defence counsel, doubtless for tactical reasons, seemed tacitly to concede it.

[100] BS was the first witness with whom the question was raised. Toward the end of her evidence-in-chief, the Crown prosecutor asked, "If you had known or understood that the treatments that were performed on you were not legitimate treatments, would you have allowed BAS to perform them on you?" Unsurprisingly, she answered in the negative. That question was the model for similar questions to MM and MS. It is defective in that not only does it fail to address the precise issue (the appellant's purpose in performing the treatments) but also it raises the uncertain description "legitimate". I am however satisfied that neither the witness nor the jury would have understood the question to be one seeking the witnesses' opinion on a matter of law. They would I think have taken the words "not legitimate" to mean "improper". So understood, the answer provides some evidence relevant to the question of the appellant's purpose. The question was deliberately wide - it applied to each and every one of the treatments, and it was answered compendiously. There was no objection to this course.

[101] When it came to KS, the Crown prosecutor phrased the question slightly differently:

> "Now, in relation to what he did to you, if at the time he was doing those things to you or you were aware or you had been informed that those things were not, in fact, genuine therapeutic treatment would you have allowed him to touch you in that manner and to treat you in that manner? -- No."

While that question does not directly address the relevant issue, it does provide some basis for drawing an inference.

[102] In the case of JHA the Crown prosecutor's question related specifically to the massaging of her breasts (count 28):

> "And is the reason you allow him to do this because you thought it was a genuine therapeutic treatment? -- Yeah, it was.
>
> MR COUSINS: Well, that's a leading question and I object to it.
>
> HIS HONOUR: That's leading, yes. That is leading.

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28 (1991) 171 CLR 506.

29 (1992) 176 CLR 408 at pp 412-13.

30 Compare *Gould v Vaggelas* (1985) 157 CLR 215 at p 236 per Wilson J.

MR WHITBREAD: It isn't leading.

MR COUSINS: It is.

HIS HONOUR: It's a leading question, Mr-----

MR WHITBREAD: Well, would you allow him do this, if you were advised that the treatment was not genuine therapeutic treatment? -- No."

However the ambit was later expanded:

"And in respect of the things that occurred to you between you and DS, the things you've spoken about, would you have allowed those things to occur if you' re aware that the things he was doing to you were not genuine therapeutic treatments? -- No, definitely not."

[103] There was little cross-examination of the complainants on the question of causation. Such as there was tended either to support the view that consent was obtained by the conduct constituting the representation or to suggest other possible factors which may also have induced it. For example BS was asked:

"And you assumed that because your mother was there and watching what was happening that it was okay for you to let BAS do this to you? -- Yes."

Toward the end of the cross-examination the following exchange occurred:

"One of the reasons you let him treat you is because you knew he had been treating other members of your family? -- It didn't really have anything to do with it.

Another reason why you let him treat you is because it appeared that your mother was supportive of such treatment taking place? -- Maybe. I know that because I'd been to the doctor and no-one could figure out why I had this breathing problem and he seemed to have figured something out and she was happy about that.

All right. Well, would you agree with me, then, that one of the reasons why you let him treat you is because your mother seemed to be happy that he had maybe identified the reason for the breathing problem? -- Possibly, yes.

Another reason why you let him treat you is because you seemed to be happy that he had perhaps found out the reason for your breathing problem? -- I don't know.

Do you agree with me another reason why you let him treat you is because, starting from the very first time he treated you in the kitchen, he appeared to know what he was doing? -- Yes.

And he appeared to know what he was talking about? -- Yes.

And he appeared to be able to explain what he was doing and why he was doing it? -- Yes.

Yes, and do you agree with me that another reason why you let him continue to treat you is because you thought that the ongoing treatments might be of help to you? -- I don't know.

> You don't know. Do you agree with me that another reason why you let the treatments to be ongoing is because you thought your mother was hopeful that these ongoing treatments would help you? -- I guess so."

[104] Early in the cross-examination of KS the following exchange occurred:

> "No, but you were aware at that time, weren't you, that BAS had been treating other members of your family? -- Yes.
>
> And you assumed because of that that he had some knowledge of what he was doing? -- Yes.
>
> I suppose you assumed that if other members of your family had allowed him to treat them then it must be okay? -- Yes.
>
> …
>
> You just assumed because of what you'd learnt about him treating your family that it was okay for him to treat you? -- Yes. I trust my parents so I trusted their judgment.
>
> All right. So would it be fair enough to say that it wasn't so much a case of trusting BAS, it was a matter of trusting your parents? -- Yes.
>
> And if it was okay by them then it should be okay by you? -- Yes."

Later in the cross-examination it became clear that it was not the position, nor was it being suggested, that trust in her parents was the only factor inducing her consent:

> "You let him treat you because you understood he was treating your parents? -- Yes.
>
> You let him treat you because you assumed that if it was okay for him to treat your parents it would be okay for him to treat you? -- Yes.
>
> You let him treat you because you assumed that he must have known what he was doing? -- Yes.
>
> You let him treat you because you gathered, from the way he talked, that he had some knowledge about what he was doing? -- I guess, yes.
>
> You let him treat you because - well, you let him treat you after the first time, in other words, there was the first treatment, but you let him do subsequent treatments, because, as a result of the first treatment, it seemed that he was applying some sort of real therapeutic technique to you? -- I actually told my mum that I felt uncomfortable about him treating me the second time and she said not to worry about it, that it would be okay, but I hadn't told her specifically what had happened the last time."

[105] A similar approach was taken in the cross-examination of JHA, with similar results:

> "You let him treat you because your mother-in-law recommended him? – That's the main - main reason.
>
> That's the-----?-- Main reason.

> Another reason you let him treat is because you knew he had been treating other members of the family? -- Yes.
>
> You let him treat [sic] you because you assumed from what he was talking about that he had some sort of experience in massage? -- No, not massage.
>
> You assumed that he had some sort of treatment experience? -- As a doctor I assumed.
>
> As a doctor you assumed. And do you accept now that all the facts are out that your assumption was a wrong assumption? -- Not really, I still think he said things to make me think that-----
>
> You still think he said things to you, is that what you said? -- Yeah, to make me believe that he was."

[106] The cross-examination of MM was briefer but produced a similar mix of factors:

> "I suppose it gave you some comfort or reassurance that the father had suggested that maybe you let him have a look at your shoulder? -- Yes.
>
> All right. I suppose it was also reassuring to you that when he actually turned up MS was basically present at all times when he was with you? -- Yes.
>
> It was reassuring to you that he was not just talking to you, but he was also talking to MS? -- True.
>
> It was reassuring to you that he was letting MS do a good part of the treatment by explaining to her what to do and how to do it? -- I don't know about that one. I thought it was strange that he got her to do it, but just didn't think anything of it."

[107] Finally, MS:

> "Now, one reason why you let BAS treat you is because you knew he had been treating other members of your family? -- Yes.
>
> Another reason why you let him treat you is because you assumed from his general conversation that he had some knowledge about the human body and anatomy? -- True.
>
> Another reason why you allowed him to treat you is because - well, is because you had seen him first treat MM and give the explanations to you and MM as to what was happening and why it was happening? -- Yes.
>
> Another reason why you let him treat you, for in particular the first occasion, is because you assumed that it would be much the same as what you had just seen happening to MM? -- I think on the first occasion I just let him treat me because everybody else was getting treated, so it was just like I was next in line."

[108] In my judgment nothing in the evidence to which I have referred weakens the inference that in every instance the complainant's consent was obtained by the appellant's representation as to his purpose. On the contrary it reinforces that inference. And little reinforcement is needed. These young women believed that

the appellant's purpose was therapeutic. His case at trial was that this belief was correct. It was not suggested to any witness that she gained the slightest pleasure from the appellant's actions; that could not account for the consent which they gave. There was evidence to support the proposition that they believed this because of his representation to that effect. The jury was entitled to conclude that their consent was obtained by the representation.

[109] It follows that ground 2(a) of the amended grounds of appeal must be rejected.

Ground 2(b): Directions on consent

[110] The appellant submitted that this was a case where it was necessary for the trial judge to identify carefully the evidence upon which it was said that the consent was vitiated. That requirement was said to be consistent with the approach in *R v P S Shaw [No 1]*, where McPherson JA wrote:

> "The case plainly called for a precise and detailed explanation to the jury, with particular reference to the facts, of the element of consent, or its absence, in the offence of rape; as well as reference to the fact that the Crown was alleging that the complainant's consent to the act of sexual intercourse with the appellant had been obtained by means of threats or intimidation. It was essential to identify the evidence said to prove the threats or intimidation and that the complainant's consent was obtained by means of it".[31]

It was submitted that it was necessary for the trial judge to (using the words of the submission):

(a) identify each act underpinning each count;
(b) identify whether the alleged "representation" was an express representation or one implied by conduct;
(c) if any representations were implied then a direction should have been given on the issues of implied representations and representations by silence. In many instances the women seemed to believe that treatment was going to be administered in the course of things said to others;
(d) if an express representation, then the jury should have been referred to the evidence;
(e) if an implied representation, then the jury should have been directed to the evidence said to give rise to the implication.

No such redirections were sought at trial.

[111] Throughout the case the defence accepted that the complainants believed that the appellant was acting for therapeutic purposes. That is clear from the cross-examination of the Crown witnesses. There was no attempt in cross-examination to suggest that this belief was not induced by anything said or done by the appellant. On the contrary, the defence accepted that most of the acts and statements founding the implied representation were done and made. It was not suggested to any witness that it was unreasonable to imply from those acts and words that the appellant was acting for therapeutic purposes. An attempt was made to have the rape and sexual assault counts dismissed on the basis that the Crown could not point "to any specific representation made on any specific occasion to any specific person" which the appellant knew to be false. That submission was rightly dismissed, his Honour

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[31] [1993] QCA 459; CA No 117 of 1993, 10 November 1993.

pointing out that the Crown case was, "when you look at everything that he did … the jury would be satisfied at the end of the day that he represented that he was treating them for a therapeutic purpose, but that was untrue." After the submission was rejected the appellant gave evidence. His counsel opened his case and his evidence and in the course of doing so said:

> "Now, you might have gathered from the way the defence has been conducted and in particular the way that I've cross-examined the female complainants that as a general rule there is no real dispute that the treatments as described by the complainants did happen. This is not one of those cases where the defendant says, 'I didn't do it.'
>
> To a very large extent, this is one of those I think rare cases where the defendant says, 'I did do it and I did it with her consent.' There will be a couple of minor factual issues where some dispute is taken but nothing which will probably concern you greatly. Fundamentally, BAS will tell you that in respect of every single one of these complainants, JHB , BS, KS, AS, JHA, MM and MS, that he honestly and genuinely believed he was providing a legitimate therapeutic treatment to each of these people.
>
> He will tell you that there was no other reason or purpose for him to provide these treatments other than thinking that they were genuine treatments that might provide genuinely good results for them. In particular, he had no ulterior rude, or sexual, or indecent motive in performing these treatments. He'll tell you that there was no reason or purpose other than providing genuine treatment that he believed was valid and genuine and might have valid and genuine results.
>
> …
>
> But the bottom line, quite simply, is this: I expect he will make it clear to you, over and over again, that he honestly and genuinely believed, through his experience, that what he was providing was a legitimate form of therapeutic treatment. He had no other purpose or motivation to provide these treatments other than for providing legitimate therapy."

The defence subsequently developed its case accordingly.

[112] The summing up fairly reflected the defence case. The judge identified the alleged misrepresentation and focused the jury's attention upon the issues which arose in relation to it. He dealt with the evidence relied upon by each side. Perhaps he might have done so at somewhat greater length and with a more focused identification of the issues to which each piece of evidence was relevant, but there are many ways of structuring a summing up. Had there been any genuine issue about whether it was open on the evidence to imply the representation it would no doubt have been necessary for his Honour to refer to the evidence in more detail and with greater precision. There was no such issue. His Honour's directions were adequate in the circumstances.

[113] In theory it might have been possible for the defence to have challenged the contention that the appellant's words and conduct amounted to a representation. It might also have been possible to suggest that the appellant's words and conduct did not convey the meaning for which the Crown contended. It might have been

possible to develop a case that even if the words and conduct constituted a representation as alleged by the Crown, that representation was not perceived or understood by one or more of the complainants, or that if it was, the complainants did not turn their minds to the substance of the implication. Depending upon the appellant's instructions, other lines of defence might have been developed. Adopting any such defence would no doubt have carried its own risks. It would also have been possible for the defence to have requested in advance particulars from the Crown identifying the representations alleged, when, how and to whom they were made and perhaps other matters. Many would think this ought to have been done. On the other hand, it is notorious that requests for particulars often serve to focus and improve an opponent's case. Whether to serve such a request is one of the tactical decisions which counsel has to make. Criminal trials are conducted pursuant to our adversarial system. In the course of the trial many things are done for tactical reasons. Choices are made about what evidence to lead or ignore, what questions to ask or not ask and what issues to contest or not contest. If the outcome is adverse it is always possible to argue that a different outcome might have been achieved had a different choice been made.

[114] Counsel for the appellant at trial made no request for particulars of any of these matters. The tactics which the defence adopted rendered them unnecessary. Shortly before the close of the Crown case the judge, of his own motion, asked the Crown prosecutor to identify for him what representations the accused was alleged to have made. The prosecutor undertook to do this, but it was never done. Shortly afterwards counsel for the appellant made his submission of no case to answer. That submission centred around the proposition that nothing said by the appellant could be held beyond reasonable doubt to have been dishonest. On counsel's submission the Crown could not point to any specific representation which had that quality. There was no suggestion that this submission was in any way inhibited by the absence of particulars, nor did counsel seek to delay making it until the Crown prosecutor should have complied with the judge's request. Counsel did not seek the particulars before his closing address, nor was any request was made for redirections.

[115] There is no reason to think that the tactics adopted by defence counsel were anything but the most appropriate on his instructions. Even if there were, that would not sustain criticism of the judge's summing up. The case falls squarely within the description given by Jerrard JA in *R v Glattback*[32]:

> "The lack of any application for directions about the evidence of the parties' relationship means that this appeal falls within that class described in the joint judgment of McHugh and Gummow JJ in *Dhanhoa v R* (2003) 199 ALR 547 at 555. Their Honours wrote there that when no redirection concerning evidence is sought at a criminal trial, and where a convicted person then seeks to quash a conviction on the ground that the trial judge failed to direct the jury concerning some part of the evidence, that appellant could only rely on a failure to direct the jury if he or she established that that failure constituted a miscarriage of justice. None would have occurred unless that appellant demonstrated that the directions should have been given, and that it was reasonably possible that the failure to direct the jury may have affected the verdict."

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32 [2004] QCA 356; CA No 53 of 2004, 1 October 2004 at p 15.

No such reasonable possibility has been demonstrated in this case.

[116] It follows that ground 2(b) of the amended grounds of appeal must be rejected.

Ground 2(c): Unsafe and unsatisfactory to find lack of consent

[117] It will be apparent from what I have written above that in my judgment the jury was entitled, on the evidence and on the directions given, to find a lack of consent. This ground also must be rejected.

Grounds 4-7: Inconsistency of verdicts

[118] The appellant relied upon two propositions cited from the decision of the High Court in *MacKenzie v The Queen*:[33]

> "3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:
>
> > 'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.'
>
> …
>
> 5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. 'It all depends upon the facts of the case'."

The obligation to establish the inconsistency lies upon the appellant. He must satisfy the court that the convictions are unsafe or unsatisfactory by reason of the inconsistency.

Ground 4: JHB

[119] The appellant submitted that the acquittal on count one was inconsistent with convictions on the other counts relating to JHB. He submitted that the acts in count one were of the same nature as the acts in the other counts; that the performance of the acts was admitted; and that consequently the only issue could possibly have been whether the acts constituting count one were therapeutic in purpose. That was exactly the same question as would have had to have been answered in respect of

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[33] (1996) 190 CLR 348 at pp 366, 368.

the other counts; but the answer was different. In particular counts two and three occurred on the same occasion in the same bedroom in the presence of Mrs H. (On that point the submission is in error in relation to count three. It was alleged to have occurred some seven to 10 days after the events constituting counts one and two .)

[120] The trial judge instructed the jury that they were obliged to consider each count separately on the evidence relating to that count. That meant that the jury had to consider the issue of indecency separately in respect of each count. As the appellant's submission recognises, that issue depended upon the appellant's purpose at the time of the touching. The evidence about that purpose differed from count to count. The conduct described by JHB and her mother constituting count one was different conduct from that constituting count two. The evidence of the appellant explaining that conduct was different. The conduct alleged to constitute count one involved touching the sides of the breast in the course of treatment to her back, treatment which the jury might have thought was not dissimilar from treatment which the appellant had only just finished giving to her brothers. The conduct alleged to constitute count two involved standing JHB in front of the mirror and rubbing in such a way as to cause her breasts to jiggle. A juror might rationally have had a doubt about the inferring indecency on the basis of the conduct constituting count one, but no doubt about that constituting count two. It is a fortiori in respect of events which happened on other occasions and in other circumstances.

[121] No submissions were made in respect of inconsistency in relation to the verdict on count eight. The obvious difference is that the defendant denied the occurrence of the events upon which the count was based.

Ground 5: BS

[122] The acquittals on counts 16 and 17 are explicable on the basis that the appellant denied the conduct alleged, and no submissions were advanced in relation to inconsistency of the verdicts on those counts. It was submitted that the acquittal on count 13 was inconsistent with the convictions on counts 12, 14, 15 and 18 on the basis that the conduct in question was admitted; and logically the only basis for differentiation was in relation to whether the appellant had a therapeutic purpose at the relevant time; and there was no sensible basis to differentiate the findings on that issue.

[123] It is not correct to say that the conduct in question was admitted. The complainant said in her evidence-in-chief that the appellant touched her on the outside of the lips of her vagina. However the appellant testified that he touched her in the crease of the groin, by which he meant the point where the leg joins the abdomen. The jury may have been left with a reasonable doubt about whether the complainant was touched as alleged by the Crown in count 13. Moreover in cross-examination the complainant conceded that the touching was immediately followed by the insertion of fingers into the vagina (count 14) and admitted that it was all part of the one incident. The jury may have been in doubt as to whether a separate incident as alleged in count 13 occurred. There was no inconsistency.

Ground 5A: KS

[124] The appellant submitted that the verdicts of guilty on counts 20, 21 and 22 were inconsistent with the acquittal on count 19, again on the basis that the relevant acts

were admitted and there was no basis for differentiating a finding as to his purpose. Again, however, the relevant act was not admitted; indeed it was denied. The Crown alleged that the appellant rested his hand on the complainant's breast while using an instrument in the other hand. The appellant denied doing this, though he conceded that while he was pulling back her shirt, his knuckles may have touched her breast. The judge referred to his version (albeit a little inaccurately) in his charge to the jury. The jury was entitled to hold a reasonable doubt about this count while convicting on the others.

JHA

[125] The appellant submitted that there was no basis upon which digital penetration in count 30 could have been found not to be for therapeutic purposes but some doubt could exist in relation to the digital penetration in count 32. The submission adopted essentially the same reasoning as that already referred to. I do not agree. JHA's evidence in relation to count 32 was that the appellant inserted his fist or his whole hand. That was denied by the appellant and was vigorously challenged in cross-examination. The jury may have rejected that evidence and, having rejected it, not been satisfied beyond reasonable doubt that the description of the incident given by the complainant was sufficiently accurate to support an inference as to the appellant's purpose on that day. It is worth noting that the appellant's counsel at trial was able to cast some doubt on the accuracy of the complainant's evidence by demonstrating previous inconsistent statements by her on the subject of what he told her about his training. There was also conflict between his evidence and that of the complainant in relation to Exhibit 22.

[126] With some hesitation I have come to the conclusion that the verdicts of guilty on counts 28, 29 and 30 are not unsafe or unsatisfactory by reason of inconsistency with the acquittals on counts 31 and 32.

MS

[127] The appellant submitted that the acquittal on count 38 was inconsistent with convictions on counts 34-37. That submission had particular relevance to count 37 which related to events on the same day. Again the submission proceeded on the basis that the appellant admitted touching the complainant's breasts on the occasion referred to in count 38. That submission accords with the judge's summation of the evidence. His Honour told the jury, "[The appellant] accepted that he put his hand on the side of her breasts while she was facing the mirror." Unfortunately I am unable to find such an acceptance in the appellant's evidence. Asked in his evidence-in-chief about count 38, the appellant said that he grabbed her shoulders and rolled them back and that this caused the breasts to be raised. He did not say that he raised them by touching them and in cross-examination he denied that explicit suggestion.

[128] There is therefore no inconsistency between his acquittal on that count and his conviction on the others relating to the same complainant.

Ground 3: Unsafe and unsatisfactory generally

[129] This ground does not comply with r 66(2)(b) of the *Criminal Practice Rules* 1999 (Qld) in that it does not state a ground of appeal precisely. Ordinarily I would propose that it be struck out. Counsel for the appellant said that he relied upon it

only to support a submission that all convictions (not just those referred to in grounds 4-7) should be set aside because of inconsistencies. There was no objection to this course. In the event counsel made submissions only in relation to the verdict in respect of AS. No submission was advanced in respect of the one count involving MM.

[130] In the absence of an objection the court allowed counsel to take this course. It is not a course to be encouraged. The notice of appeal should never have included a ground in breach of the rules; and if the appellant wished to argue additional grounds, the appropriate amendment should have been formulated and an application for leave to amend made. The course taken was sloppy and unprofessional. The quaint notion that rules of procedure do not matter on the criminal side should be dispelled.

AS

[131] The appellant conceded that there was no inconsistency between the conviction on count 23 and the acquittals on counts 24-27. The judge had directed the jury that if they did not accept that the acts involved in those counts occurred over the period stated by the complainant, they should acquit. The appellant submitted that the conviction was inconsistent with the acquittals of the other complainants on some charges.

[132] As the foregoing analysis shows, those acquittals are all capable of rational explanation. There is no substance to this submission.

Grounds 3-7: Conclusion on inconsistency

[133] The appellant has not demonstrated that any of the convictions is unsafe or unsatisfactory by reason of inconsistency of verdicts.

Attorney-General's appeal against sentence

[134] The trial judge sentenced the appellant[34] to imprisonment for five years in respect of the three counts of rape and to imprisonment for two years on each of the other counts, such sentences to be served concurrently and to be suspended after 18 months for an operational period of five years. The Attorney-General has appealed, although it is unclear from the notice of appeal whether the appeal is against all of the sentences or only the sentences for rape. Having regard to the wording of the notice of appeal and to the submissions advanced, the latter would appear to be the correct interpretation. On the view which I take of the appeal, it is unnecessary to resolve the point.

[135] The judge rightly observed that the sentence which he imposed must reflect the overall criminality of the appellant's conduct. He expressed the view that the most serious counts were those of digital rape, correctly pointing out, "Clearly, the legislature views digital penetration of a woman without her consent as being very serious." He could not, of course, mitigate the sentence by reason of a demonstrated willingness to assist in the administration of justice by means of a plea of guilty; but he took into account the fact that the jury acquitted the appellant

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[34] I shall continue to refer to him as the appellant notwithstanding that he is the respondent to the Attorney-General's appeal against sentence.

of some of the counts on the indictment. He took into account the appellant's outstanding army record, his obvious dedication to volunteer work in the community and the fact that he had no previous convictions. These matters led him to suspend the sentence after approximately one third of it was served.

[136] The ground of appeal is as follows:

> "The sentence imposed is manifestly inadequate for the following reasons:
> (a) It fails to reflect the gravity of the offence generally and in this case in particular;
> (b) It failed to take sufficiently into account the aspect of general deterrence; and
> (c) The sentencing judge gave too much weight to factors going to mitigation."

The Attorney-General submitted that a head sentence in the order of six years imprisonment should be imposed without any suspension or recommendation for post-prison community-based release. He did not submit that the judge made any error of fact or law, or took into account any irrelevant circumstance or failed to take into account any relevant circumstance; nor did counsel for the appellant make any such submission. I note however that his Honour did say (speaking about digital rape):

> "Some years ago, not so long ago, an offence of this kind was characterised as an indecent assault. The legislature has seen fit to make what was once indecent assault the serious count of rape, offence of rape."

[137] If by that passage his Honour meant that the renaming of the offence was intended by the legislature to make the offence into a more serious one, he was in my judgment in error. The renaming of the offence took place to implement one of the recommendations of a majority of the Task Force on Women and the Criminal Law.[35] That recommendation was made in accordance with the majority of the submissions received by the Task Force.[36] The report discussed digital penetration[37] and noted that, like rape, it carried a maximum penalty of life imprisonment[38]. There is no suggestion in the report that the recommendation for the change of name was intended to increase penalties imposed for the offence, nor is it possible to glean any such intention from the explanatory notes or the Minister's second reading speech. In the absence of any clear indication that this was his Honour's view, we should not assume that it had an inflationary effect upon the sentence imposed.

[138] No submissions were advanced on behalf of the Attorney-General to support the proposition that the sentence failed to take sufficiently into account the aspect of general deterrence. Doubtless this reflected the unusual circumstances of the case (although I note that in *R v Austerberry*, Boulton DCJ said in effect that the case

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35 http://www.qldwoman.qld.gov.au/Docs/Women_and_the_Criminal_Code/Recommendations.pdf, p 14, recommendation 60.

36 http://www.qldwoman.qld.gov.au/Docs/Women_and_the_Criminal_Code/Chapter_7.pdf, p 9.

37 *Ibid*, p 6.

38 *Ibid*, p 1.

before him was not the first occasion he had encountered in which offences of this kind were committed by alleged therapists).[39]

[139] In my judgment it cannot be said that the sentence of imprisonment for five years was so low that it did not reflect the gravity of the offence generally and in this case in particular. These were not events of violent penetration and they caused no immediate distress to the complainants. On the other hand when the complainants realised that they had been duped they suffered considerably; and the concurrent sentences must reflect the overall criminality of the conduct. The only comparable cases cited to us were *Austerberry* and *R v Williams*[40], a decision of the Court of Criminal Appeal of New South Wales. (I do not think the decision of the Court of Appeal of Victoria in *R v Sheriff*[41] is comparable). *Austerberry* shows that the sentence in the present case was not at the top of the range, but does not demonstrate its manifest insufficiency. *Williams* is of little assistance. The question on appeal in that case was limited to the very narrow issue of whether an offence of aggravated sexual intercourse committed by licking the vagina of a 15 year old client (of a masseur) for several seconds was excessively punished by a sentence of three years and nine months with a non-parole period of two years. The court held the sentence was not excessive.

[140] As to the weight given by the sentencing judge to factors going to mitigation, the Crown submitted that there was no basis to suspend any part of the sentence. I reject that submission. The appellant had unusually impressive references tendered on his behalf, no previous convictions and what the judge described as "obvious dedication to volunteer work in the community". The judge was entitled (although not obliged) in the exercise of his discretion to mitigate the sentence by suspending a substantial part of it. The appellant may be described as fortunate in receiving the sentence which was imposed; but it was not in my judgment manifestly insufficient.

Orders

[141] I would make the following orders:

1. CA No 212 of 2004 dismissed
2. CA No 249 of 2004 dismissed

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39 Unreported, District Court No 664 of 2003, 6 June 2003.

40 [2002] NSWCCA 458; CCA No 60412 of 2002, 15 November 2002.

41 [1998] VICSC 36; No 204 of 1997, 19 March 1998.