SUPREME COURT OF QUEENSLAND

CITATION:	*R v MAP* [2006] QCA 220
PARTIES:	**R** **v** **MAP** (applicant/appellant)
FILE NO/S:	CA No 324 of 2005 DC No 94 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	Orders delivered ex tempore 30 May 2006 Reasons delivered 21 June 2006
DELIVERED AT:	Orders delivered at Townsville Reasons delivered at Brisbane
HEARING DATE:	30 May 2006
JUDGES:	McMurdo P, Keane JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - INFORMATION, INDICTMENT OR PRESENTMENT - JOINDER - OF COUNTS - BY STATUTE - SAME FACTS OR SERIES OF OFFENCES OF SAME OR SIMILAR CHARACTER - appellant convicted by jury of the rape of one complainant and acquitted on a charge of raping a different complainant - learned primary judge refused an application by counsel for the appellant for separate trials of the two charges - learned primary judge concluded that similarities in evidence relevant to each complainant were sufficient to take evidence of similar facts beyond proof of propensity - where learned primary judge emphasised the improbability that both complainants could have lied, or been otherwise unreliable, in their evidence - whether separate trials should have been ordered CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE - GENERALLY - appellant convicted by jury of the rape of one complainant (S) and acquitted on a charge of raping a different complainant (W) -

appellant's counsel did not put it to S that the appellant did not digitally penetrate S - primary judge made reference, before the jury, to the failure of the appellant's counsel to do so - whether the comment of the learned primary judge was justified

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - GENERAL PRINCIPLES - evidence was before the jury that appellant had been in a sexual relationship with a girl under the age of 16 at the time of the events the subject of the charges - appellant argued before this Court that this evidence should not have been admitted and that the jury should have been discharged - learned primary judge gave instructions on the use of this evidence - whether the evidence should have been admitted and whether the instructions were sufficient

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - POWER TO DISMISS APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE - GENERAL PRINCIPLES - respondent argued before this Court that no substantial miscarriage of justice had occurred - whether a substantial miscarriage of justice occurred

Criminal Code 1899 (Qld), s 567, s 597A, s 668E

Browne v Dunn (1893) 6 R 67, considered
Crofts v The Queen (1996) 186 CLR 427, cited
De Jesus v The Queen (1986) 61 ALJR 1, cited
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
Hoch v The Queen (1988) 165 CLR 292, applied
MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, followed
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 3, cited
Phillips v The Queen (2006) 224 ALR 216; [2006] HCA 4, considered
R v Boardman [1975] AC 421, cited
R v DAK [2005] QCA 211; CA No 45 of 2005, 17 June 2005, cited
R v Davidson [2000] QCA 39; CA No 369 of 1999, 28 July 2000, cited
R v Robinson [1977] Qd R 387, followed
R v Sims [1946] KB 531, cited
R v Weiss [2004] 8 VR 388, considered
Weiss v The Queen (2005) 223 ALR 662; [2005] HCA 81, applied

COUNSEL: G P Lynham for the appellant
J A Greggery for the respondent

SOLICITORS: Giudes & Elliott for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Keane JA.

[2] **KEANE JA:** On 8 November 2005, the appellant was convicted upon the verdict of a jury of the rape of the complainant Ms S. He was acquitted of another charge of raping Ms W. The appellant was sentenced on 2 December 2005 to imprisonment for three years. A period of 24 days presentence custody was declared to be time already served under the sentence which was imposed. The appellant sought to appeal against both the conviction and the sentence. After hearing argument on 30 May 2006, this Court upheld the appeal against conviction. I now set out the reasons for my conclusion that the appeal against conviction should be allowed.

[3] In relation to the conviction, the grounds of appeal may be summarised as follows:

(a) the learned trial judge should have ordered separate trials in relation to the two charges against the appellant;
(b) the judge erred in admitting evidence that the appellant had a sexual relationship with Ms K;
(c) the judge erred in failing to discharge the jury after evidence of a sexual relationship between Ms K and the appellant was admitted into evidence;
(d) the judge erred in commenting to the jury upon the fact that counsel for the appellant had not suggested to the complainant, Ms S, that the appellant had not digitally penetrated her;
(e) the judge erred in not discharging the jury following the playing of the appellant's record of interview with the police in which he was asked why the complainants would make false allegations against him.

[4] The only ground of appeal which the appellant agitates in support of his application for leave to appeal against sentence is that the sentence was manifestly excessive.

[5] I will discuss the appellant's grounds of appeal after summarising the course of the trial.

The course of the trial

[6] The count of rape in relation to Ms S alleged that the offence occurred at Alva Beach on a date unknown between 1 May 2003 and 31 October 2003. Ms S was 15 years old at the time, having been born in March 1988. The appellant was about 18 years of age at that time, having been born in May 1985. The count of rape in relation to Ms W alleged that the offence occurred at Alva Beach on 22 June 2004. Ms W was 15 years of age at the time, having been born in September 1988.

[7] The matter first came on for trial on 1 September 2005. On that occasion, the trial was aborted, but, before that occurred, the trial judge refused an application by counsel for the defence for separate trials of the two charges. The matter ultimately came on for trial before the same judge.

[8] The Crown case was that each complainant was digitally raped by the appellant. The rapes occurred on two separate occasions. On each occasion, the appellant was staying at Alva Beach, at the home of the mother of his girlfriend, Ms K. Each of the complainants knew the appellant and Ms K. Another friend of Ms K was Ms F.

[9] In relation to the first count, the Crown case was that, during a night in the school holidays in mid-2003, while the appellant, Ms K, Ms W, Ms S and Ms F were sleeping on mattresses on the floor of the same room in the home of Ms K's mother, the appellant inserted his fingers in Ms S's vagina while she was sleeping.

[10] In relation to the second count, the Crown case was that, during a night in the school holidays in mid-2004, while the appellant, Ms K and Ms W were sleeping on mattresses on the floor of the same room, the appellant inserted his fingers in Ms W's vagina while she was sleeping.

[11] The trial judge had concluded that the evidence in relation to each count was probative of the guilt of the appellant on the other count and was, therefore, admissible. At the hearing on 1 September 2005, his Honour said:

> "The probative value of the evidence of one on the other lies in its ability to support or confirm the direct evidence, supported by the admissions of the accused, of each complainant.
>
> The material fact in issue so far as each offence is concerned is whether the accused placed his finger or fingers in the vagina of each complainant. That involves an issue of whether the complainant in each is telling the truth in describing the offence. There is, in my view, an objective improbability of the complainant in count 1 telling a similar lie to the account given by the complainant in count 2 and the same applies to the complainant in count 2 telling a similar lie to the complainant in count 1."

His Honour refused the application for an order for separate trials.

[12] The complainants, Ms S and Ms W, were school friends who lived in south-east Queensland. Ms W's parents owned a holiday home at Alva Beach.

[13] In relation to the first incident, during the school holidays in mid-2003, Ms S accompanied Ms W and her family on a holiday to Alva Beach. Ms K lived with her mother in a house at Alva Beach around the corner from Ms W's family's holiday home. The appellant was living with Ms K in her mother's house.

[14] According to Ms S, a couple of days before she and Ms W's family were due to return home at the end of the holiday, Ms S and Ms W arranged to sleep over at Ms K's house. During the afternoon of the sleepover, they were joined by Ms F. There were different versions of what occurred during the evening.

[15] According to Ms S, all of the girls watched television and drank alcohol in the lounge room of the house before she retired to bed at about 10.30 pm. She said that she had between four and six cans of rum and cola between 7.00 pm and 10.30 pm. She said that she was not intoxicated. She acknowledged that, at the committal hearing, she had said that she drank six cans of rum and cola.

[16] Ms W said that Ms S and Ms F did not drink any alcohol during the evening. Ms W said that she had two or three cans of alcoholic drink, and that Ms K was drinking as

was the appellant. She said that they were "down the shed" outside the house for about "an hour and a half".

[17] Ms K was called by the defence. I will deal more fully with her evidence, but for present purposes, it is sufficient to note that she said that everyone, including the appellant, was drinking alcohol in the shed, "five or six drinks each", and that the other girls and the appellant were all smoking marijuana, "over 10 cones each", obtained from the back yard and dried out on a stove by the appellant and the other girls.

[18] Ms S said that she did not see the appellant that evening, and that she retired to Ms K's bedroom and that the others followed later, after she had gone to sleep. Ms W said that all the girls and the appellant stayed up until 2.00 am, and that the four girls sat up talking for a while before they fell asleep. Both Ms S and Ms W denied that they had behaved in a sexually provocative manner towards the appellant during the course of the evening.

[19] Ms S said that some time during the night, she was awakened by something brushing against her leg. She dozed off back to sleep, but awoke again to find the appellant "curved around [her] body" with one of his hands up her pants and inserting his fingers inside her vagina. As he was doing this, he asked her "a couple of times" to "come outside". She said that she "froze" and said nothing, but was then able to push the appellant away from her. He got up and walked out of the room. She remained in bed until the next morning when Ms W awoke.

[20] Ms S said that she and Ms W went into the lounge room where Ms S told Ms W what the appellant had done to her during the night. Ms S was crying at the time. They both then left the house and returned to Ms W's family's house. A couple of days later they returned home to south-east Queensland.

[21] Ms W said that the next morning Ms S, Ms F and she were watching television in the lounge room when Ms S began crying. When they asked Ms S what was wrong, she would not tell them. Ms W said that she and Ms S then walked down to the surf lifesaving club where they had a discussion in which Ms S complained about the appellant having molested her.

[22] In relation to the second count on the indictment, Ms W said that, during the June 2004 school holidays, Ms W again travelled to Alva Beach with her parents. She stayed at Ms K's mother's house on the night of 22 June 2004. Ms K and the appellant were also there. The three of them watched TV until about 10.00 pm to 10.30 pm. She then went to bed in Ms K's bedroom. There were two double mattresses on the floor. Ms W slept on one of them. Ms W later heard Ms K come into the bedroom, and, later still, she heard the appellant come into the bedroom and lay down.

[23] Ms W said that she fell asleep, but was awakened by the appellant with his hand up her skirt. She pushed his hand away, but the appellant then placed his hand over her mouth, and, by placing his other hand back under her skirt, inserted his fingers into her vagina. He did this for about a minute, and, when he had finished, he placed something sharp to Ms W's throat and warned her that if she told his girlfriend or anyone else, he would slice her throat.

[24] Ms W stayed at the house that night. Next day, she went home. She telephoned Ms S and told her what had happened.

[25] In cross-examination, Ms S accepted that she had spoken to Ms W about the 2003 incident on "quite a number of occasions" after they returned to south-east Queensland. Ms W denied that they had discussed that incident except on the day following the incident.

[26] Ms S gave evidence that, in June 2004, she received a text message from Ms W asking her to call her. When she did so, Ms W told her that "[the appellant] did the same thing to me basically last night as well" and that she had been threatened by him. Ms S then went shopping with her mother. She became distressed, and, when asked by her mother about what was troubling her, made a complaint of the appellant's conduct in the previous year.

[27] Ms S's mother gave evidence which supported Ms S's evidence of a complaint in June 2004 about the incident of the previous year.

[28] As I have said, Ms K gave evidence for the appellant. She said that Ms S and Ms W had both stayed over at her house on several occasions during the school holidays in 2003. She said that, on the occasion in 2003, both Ms S and Ms W had behaved in a sexually provocative manner towards the appellant while they were drinking alcohol and smoking marijuana in the shed. Ms K said that Ms F retired to bed first at around 10.30 pm to 11.00 pm. The rest of the group went to bed at about midnight. In her bedroom, she and the appellant slept on one mattress, Ms S and Ms W slept on another mattress and Ms F slept on a single mattress. Ms K said that the girls talked for a while before falling asleep. She heard nothing that attracted her attention during the night. When she awoke, at between 8.00 am and 9.00 am, the other three girls were still lying down, and the appellant was in the lounge room watching television. She said that all of the girls got up and watched television for a while before going for a walk. She denied that Ms S seemed distressed, and said that Ms S appeared to interact normally with the appellant.

[29] In Ms K's evidence-in-chief, she said that she and the appellant had been in an "on and off" relationship and that the appellant had been living in her mother's home. In cross-examination, she admitted that this relationship had, at times, included a sexual relationship, but was not specific as to when this was so. At this point, counsel for the appellant sought to have the jury discharged on the basis that the prejudicial effect of this evidence upon the defence would outweigh any legitimate effect of this evidence on Ms K's credibility as a witness. In the course of making her objection, counsel for the appellant asserted that Ms K was 14½ years old at the time relevant to Ms S's complaint. It does not appear that Ms K's age was otherwise in evidence. Ms K said that her relationship with the appellant was brought to an end because her family did not like the appellant.

[30] The learned trial judge refused that application.

[31] The appellant did not give evidence, but in a record of interview with the police on 6 July 2004, the appellant admitted that, on an occasion at the "last Christmas holidays" while the above-described group was sleeping in the same room, he tapped Ms S on the foot, and rubbed her foot "to see if she was - wanted to do anything or not with me. And just nothing happened and then she just pulled her foot away. So I just - fuck it, rolled over … I didn't stick my finger in her vagina."

He said that, on this occasion, the girls and he had been drinking before they went to bed. He said that Ms S and Ms W had behaved towards him in a sexually taunting manner.

[32] In relation to the 2004 charge involving Ms W, the appellant admitted that there was a further sleepover at the beach house of Ms K's parents at Alva Beach a week or two prior to the date of the interview. Present in the room on this occasion were Ms K, Ms W and the appellant. He denied that he had inserted his finger into the complainant's vagina. He admitted that he may have touched her on the leg with his foot to see if she was awake. He denied inserting his finger into the complainant's vagina. He also denied threatening Ms W or holding anything to her throat. As to this occasion, he said that only a little alcohol was consumed, and no-one was drunk.

[33] In the record of interview, the appellant was asked whether he knew why each complainant would have made her complaint against him. He replied in each case to the effect that he did not.

[34] In the course of the cross-examination of Ms S, defence counsel did not put to Ms S that the appellant had not, in fact, inserted his fingers into her vagina. In the course of his directions to the jury, the trial judge said:

> "I have already mentioned that changes in versions and evidence on different aspects are relevant to the credit of the witness but the crucial aspects of each offence are whether digital penetration occurred without consent. And whilst it was suggested to [Ms W] in her cross-examination, it was not suggested in cross-examination of [Ms S] that the accused did not digitally penetrate her. There is though, his denial in the [record of] interview of doing that."

Should there have been separate trials?

[35] I turn to consider the first of the grounds of appeal summarised at the outset. In this regard, s 567 of the *Criminal Code* (Qld) contemplates that charges for one or more indictable offences may be joined in the one indictment against the same person only if "those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose".

[36] Under s 597A(1) of the *Criminal Code*, the court may order a separate trial of any count or counts in the indictment where, before or during a trial, the court is of the opinion that the accused person may be prejudiced in the person's defence by reason of the person's being charged with more than one offence in the same indictment. In this regard, s 597A(1AA) provides that:

> "[i]n considering potential prejudice … in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion."

[37] If the evidence of each complainant was admissible on the charge relating to the incident alleged by the other complainant, then the offences charged against the appellant would form a series for the purposes of s 567 of the *Criminal Code*. If that evidence were not admissible, then there would not be a series of offences, and,

furthermore, the appellant would have been unduly prejudiced in his defence within the meaning of s 597A of the *Criminal Code*.

[38] Whether the evidence relating to the complaint by Ms S was admissible in the Crown case relating to the complaint by Ms W, and vice versa, is to be determined in accordance with the principles stated by the High Court of Australia in *Pfennig v The Queen*[1] and *Phillips v The Queen*.[2]

[39] In *Phillips v The Queen*, the High Court reaffirmed that similar fact evidence is, prima facie, inadmissible because of its prejudicial effect. Their Honours said:[3]

> "The 'admission of similar fact evidence … is exceptional and requires a strong degree of probative force' (*R v Boardman* [1975] AC 421 at 444; [1974] 3 All ER 887 at 897–8 per Lord Wilberforce, approved in *Markby v R* (1978) 140 CLR 108 at 117; 21 ALR 448 at 455 per Gibbs ACJ, Stephen, Jacobs and Aickin JJ concurring; *Perry v R* (1982) 150 CLR 580 at 586, 589; 44 ALR 449 at 453–4, 456 per Gibbs CJ; *Sutton v R* (1984) 152 CLR 528 at 533; 51 ALR 435 at 438 per Gibbs CJ; *Pfennig v R* (1995) 182 CLR 461 at 481; 127 ALR 99 at 113; [1995] HCA 7 per Mason CJ, Deane and Dawson JJ). It must have 'a really material bearing on the issues to be decided' (*R v Boardman* [1975] AC 421 at 439; [1974] 3 All ER 887 at 893 per Lord Morris of Borth-y-Gest, approved in *Markby v R* (1978) 140 CLR 108 at 117; 21 ALR 448 at 455 per Gibbs ACJ, Stephen, Jacobs and Aickin JJ concurring). It is only admissible where its probative force 'clearly transcends its merely prejudicial effect' (*Perry v R* (1982) 150 CLR 580 at 609; 44 ALR 449 at 472–3 per Brennan J; *Sutton v R* (1984) 152 CLR 528 at 548–9; 51 ALR 435 at 450–2 per Brennan J, CLR 560; ALR 460 per Deane J, CLR 565; ALR 464 per Dawson J; *Harriman v R* (1989) 167 CLR 590 at 633; 88 ALR 161 at 192–3 per McHugh J; *Pfennig v R* (1995) 182 CLR 461 at 481; 127 ALR 99 at 113; [1995] HCA 7 per Mason CJ, Deane and Dawson JJ). '[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind.' (*Sutton v R* (1984) 152 CLR 528 at 534; 51 ALR 435 at 439 per Gibbs CJ). The criterion of admissibility for similar fact evidence is 'the strength of its probative force' (*Hoch v R* (1988) 165 CLR 292 at 294-5; 81 ALR 225 at 226-7 per Mason CJ, Wilson and Gaudron JJ). It is necessary to find 'a sufficient nexus' between the primary evidence on a particular charge and the similar fact evidence (*Hoch v R* (1988) 165 CLR 292 at 301; 81 ALR 225 at 231–2 per Brennan and Dawson JJ, approving words of Lord Hailsham of St Marylebone LC in *R v Kilbourne* [1973] AC 729 at 749; [1973] 1 All ER 440 at 454–5). The probative force must be 'sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused' (*Director of Public Prosecutions v P* [1991] 2 AC 447 at 460; [1991] 3 All ER 337 at 346 per Lord Mackay of Clashfern LC). Admissible similar fact evidence must have 'some specific connexion with or relation to the issues for

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1 (1995) 182 CLR 461; [1995] HCA 3.

2 (2006) 224 ALR 216; [2006] HCA 4.

3 (2006) 224 ALR 216 at 229 - 230; [2006] HCA 4 at [54] (citations footnoted in original).

> decision in the subject case' (*Pfennig v R* (1995) 182 CLR 461 at 483; 127 ALR 99 at 114-15; [1995] HCA 7 per Mason CJ, Deane and Dawson JJ). As explained in *Pfennig v R*: ((1995) 182 CLR 461 at 485; 127 ALR 99 at 116; [1995] HCA 7 per Mason CJ, Deane and Dawson JJ.)
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> > '[T]he evidence of propensity needs to have a specific connexion with the commission of the offence charged, a connexion which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.'"

[40] In the present case, the trial judge was of the view that the evidence of each complainant had a relevance in relation to the case concerning the complaint by the other which went beyond the demonstration of a propensity in the appellant to seek non-consensual sexual gratification from young women. In his Honour's view, the similarities between the evidence of each of the complainants were apt to demonstrate a pattern of conduct on the appellant's part connecting the two offences. In this regard, each offence occurred in the home of the mother of his girlfriend, Ms K. Indeed, the offences allegedly took place in the same room. Each offence was alleged to have been committed on a teenage girl, and each complainant was known to both Ms K and the appellant. Each complainant was sleeping at the time. Each offence involved some preliminary touching of the girl. Each offence involved digital penetration only. Importantly, each offence occurred while Ms K was sleeping nearby.

[41] His Honour also recognised that there were dissimilarities in the evidence relevant to each complainant. In the case of Ms S, there was an invitation to "come outside" but no threat by the appellant, there were more people in the room, and the complainant and the appellant had been drinking heavily. Nevertheless, his Honour concluded that the similarities were sufficient to take the evidence of similar facts beyond proof of propensity, in that they served to render each complaint more credible because of the improbability that both girls would lie or be otherwise mistaken about what the appellant did to them. As Mason CJ, Wilson and Gaudron JJ said in *Hoch v The Queen*,[4] the basis for the admission of the evidence of similar misconduct on the part of an accused:

> "lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged."

[42] The trial judge concluded that the evidence of each complainant was admissible in the case concerning the other, not because it demonstrated a propensity on the part of the appellant to digital rape, but because of the improbability that both complainants could have lied, or been otherwise unreliable, in their evidence as to what transpired while sleeping in the same room with the appellant and Ms K.

[43] The trial in this matter preceded the decision of the High Court in *Phillips v The Queen*. In that case, the High Court made it clear that the improbability that complainants would tell similar lies on the issue of consent to sexual activity was not a basis for displacing the exclusionary rule against the admission of similar fact

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4 (1988) 165 CLR 292 at 294.

evidence.[5] The High Court accepted that the exclusionary rule might be displaced by reason of the probative value of the improbability of similar lies by complainants where the evidence went to proof of the issue whether the accused had done the acts of which the complainants complained. In such a case, the High Court emphasised the continuing necessity for a "strong degree of probative force" if the exclusionary rule is to be displaced and that "striking similarity" will usually be necessary if the evidence of similar facts is to have a sufficiently strong degree of probative force to displace the exclusionary rule.[6]

[44] In this latter regard, it is significant for the proper determination of this appeal that the High Court in *Phillips v The Queen*[7] specifically regarded as insufficient for this purpose similar fact evidence indicative of an accused's "recklessness in persisting with [offending] conduct near other people who might be attracted by vocal protests". On the approach taken by the High Court in *Phillips v The Queen*, the brazen opportunism in which the appellant engaged in this case, if the complainants are to be believed, would be characterised as "unremarkable and not uncommon"[8] for the purpose of determining whether this evidence had sufficient probative force to displace the exclusionary rule.

[45] Furthermore, the dissimilarities in the present case are relevant to this assessment. Especially strong in this regard are the circumstances that Ms S and the appellant had been drinking heavily, the appellant's alleged misconduct with Ms S was associated with an invitation to "come outside" and that the appellant physically threatened the safety of Ms W. In these circumstances, it is not possible to sustain the conclusion that there was an underlying pattern to the appellant's alleged attack on each of Ms S and Ms W. In one case, there was an act of digital rape which involved an invitation to a further sexual encounter by one young person affected by alcohol to another young person who was also so affected. In the other case, there was a sober act of digital rape accompanied by physical threats.

[46] For these reasons, I conclude that the appellant's first ground of appeal must be upheld.

Should the trial judge have discharged the jury by reason of the disclosure of the sexual relationship between the appellant and Ms K?

[47] The appellant's next two grounds of appeal may be dealt with together. They involve the contentions that the trial judge erred in admitting evidence of the sexual nature of the relationship between Ms K and the appellant, and in failing to accede to the application by counsel for the appellant to discharge the jury when the Crown Prosecutor elicited from Ms K the evidence that her relationship with the appellant involved consensual sexual intercourse between Ms K and the appellant.

[48] That Ms K was not 16 years old in mid-2003 was in evidence before the jury: Ms W had said that Ms K was 15 years of age in May 2005. The appellant argues that, because Ms K was not 16 years of age at the time, this evidence tended to show that the appellant had committed the offence of having unlawful carnal knowledge with Ms K.[9] It is said that this evidence was likely to occasion a degree of prejudice to

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5 (2006) 224 ALR 216 at 228 - 229; [2006] HCA 4 at [46] - [50].
6 (2006) 224 ALR 216 at 229 - 231; [2006] HCA 4 at [51] - [56].
7 (2006) 224 ALR 216 at 231; [2006] HCA 4 at [56].
8 (2006) 224 ALR 216 at 231; [2006] HCA 4 at [56].
9 See s 215 of the *Criminal Code 1899* (Qld).

the appellant by presenting him as a person of bad character, which could not be overcome by judicial direction to the jury.

[49] It is not at all clear that, in the context of this case, this evidence was likely to prejudice the appellant's defence in the way or to the extent suggested by the appellant. It was abundantly clear to the jury, before Ms K expressly revealed the sexual nature of her relationship with the appellant, that the appellant and Ms K were in a relationship of boyfriend and girlfriend. In the defence case, the appellant's trial counsel led evidence from Ms K that the appellant was Ms K's live-in boyfriend. The jurors may well have come to the view that there was a sexual element to that relationship. It is clear that the contrary could not have been suggested to the jury. Furthermore, the defence had advanced the proposition that the appellant had helped to provide the complainants, who were children, with illegal drugs. Evidence which confirmed that the relationship of girlfriend and boyfriend between the appellant and Ms K, who were apparently in the habit of sleeping together, actually involved consensual sexual intercourse was unlikely to have caused the jury to think less of him in any way which was significant for his prospects of an acquittal.

[50] More importantly, the fact that the appellant had consensual sex with Ms K had no rational bearing on the crucial question, which was whether he sought non-consensual sex with the complainants. The jury were so instructed by the trial judge. His Honour said:

> "… I should mention an aspect of the evidence of [Ms K]. Her evidence of her relationship, such as it was, with the accused, including her prior sexual relations with him, is not probative of either offence. It does not go to prove either of these offences. You are not to reason that because he may have had an intimate relationship with [Ms K] that means he committed the present offences or was more likely to or had a propensity to do so. The evidence is only relevant to the credit of [Ms K] as a witness by reason of the fact that she was in a close relationship at one stage with the accused."

There is no reason to think that the jury would not have understood and acted upon this clear direction. Indeed, it is well-established by authority that the jury may be taken to have understood and acted upon the directions they were given.[10]

[51] The appellant seeks to rely upon the decision in *R v Weiss*[11] in the Victorian Court of Appeal in support of his submission that any value the evidence of the sexual aspect of the relationship may have had as bearing on Ms K's credibility was outweighed by its prejudicial quality. In this regard, it is to be emphasised that, in *R v Weiss*, the evidence to which objection was taken was evidence of the age of the young woman with whom the accused was involved. The basis on which that evidence had been allowed at trial was that it was said to bolster the credit of a former sexual partner of the accused because it showed why she was angry with the accused and had, as a result, decided to inform the police that an alibi she had previously given the accused was false. It was held on appeal that the evidence of

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10 *Crofts v The Queen* (1996) 186 CLR 427 at 440 - 441; *Gilbert v The Queen* [2000] HCA 15 at [13] and [31]; (2000) 201 CLR 414 at 420 and 425; *R v Davidson* [2000] QCA 39; CA No 369 of 1999, 28 July 2000 at [13]; *R v DAK* [2005] QCA 211; CA No 45 of 2005, 17 June 2005 at [17].

11 [2004] 8 VR 388 esp at 396 - 397 [59] - [60]. See also *Weiss v The Queen* (2005) 223 ALR 662 at 663 [4].

the child's age was not relevant to any issue in the trial, could not be used to bolster the credit of another witness, and was outweighed by its prejudicial quality in that the jury thereby became aware that the accused had had carnal knowledge of a girl under the age of consent.

[52] In the present case, the question to which objection was taken did not relate to the age of Ms K: that had already been established. To the extent that the jury may have realised that she must have been under the age of consent, they may also have already inferred that there was a sexual element to the relationship between the appellant and Ms K. The evidence went to Ms K's credibility, not that of some other person. It was clear that the evidence could not be used to prove that the appellant committed either offence: the jury were clearly instructed to that effect by the trial judge.

[53] In my opinion, these grounds of appeal must fail.

The cross-examination of Ms S

[54] The appellant submits that the trial judge erred in referring to the failure of the appellant's counsel at trial to put to Ms S the proposition that the appellant had not inserted his fingers in her vagina because that reference may have been taken by the jury as an invitation to conclude that the appellant was not challenging the allegation of digital penetration. The appellant has formulated his contention in relation to this ground of appeal on the basis that the trial judge misapplied the rule in *Browne v Dunn*.

[55] While this formulation of the argument may not be entirely appropriate, the comment made by the trial judge is troubling. The High Court has recently emphasised the need for care on the part of a trial judge in directing a jury to attribute significance to the failure of counsel to put an aspect of his or her client's case to a witness on the other side, especially where it is otherwise apparent that the proposition which was not put is in issue. In *MWJ v The Queen*, Gummow, Kirby and Callinan JJ said:[12]

> "We should next say something about the rule in *Browne v Dunn*, which, in substance, both the trial judge and the Chief Justice thought should be applied here against the appellant, its application in criminal cases generally, and his Honour, the Chief Justice's reference to the appellant's counsel's failure to seek to have the complainant recalled for further cross-examination. The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit.
>
> One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her. An offer to tender a witness

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12 (2005) 80 ALJR 329; [2005] HCA 74 at 339 - 340 [38] - [41].

for further cross-examination will however, in many cases suffice to meet, or blunt a complaint of surprise or prejudice resulting from a failure to put a matter in earlier cross-examination. In this case, the appellant was confronted with a forensic dilemma: whether to seek to have the mother's evidence of her daughter's assertions of repeated misconduct at Sutcliffe Street excluded by reason of its prejudicial effect, or deliberately to leave it untouched to provide a basis for a submission that a fundamental inconsistency tainted the whole case. In the event the appellant chose the former. In that endeavour he failed, but was still able, albeit unsuccessfully, to rely on it as setting up a significant inconsistency. On no view was the appellant obliged however to seek to have the complainant recalled as a condition of his reliance upon the inconsistency which had emerged in the case for the prosecution.

Reliance on the rule in *Browne v Dunn* can be both misplaced and overstated. If the evidence in the case has not been completed, a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put. In criminal cases, in many jurisdictions, the salutary practice of excusing witnesses temporarily only, and on the understanding that they must make themselves available to be recalled if necessary at any time before a verdict is given, is adopted. There may be some circumstances in which it could be unfair to permit the recalling of a witness, but in general, subject to the obligation of the prosecution not to split its case, and to present or make available all of the relevant evidence to an accused, the course that we have suggested is one that should be able to be adopted on most occasions without injustice.

The obligation of the prosecution to present its whole case in chief and the existence of the unavoidable burden of proof carried by the prosecution are of particular relevance here. Doyle CJ was critical of the appellant for not putting the inconsistency between the complainant and her mother, in turn giving rise to an internal inconsistency in the complainant's account, to the complainant. The criticism does not give due weight to the obligations of the prosecution to which we have referred. It is not for the defence to clear up, or resolve inconsistencies in the case for the prosecution. As soon as the inconsistency emerged, and the trial judge rejected the appellant's objection to the evidence intended to be adduced from the complainant's mother, it was open for the prosecution to offer to tender the complainant for further cross-examination. Had that happened it would then, and only then have been for the appellant, to decide whether to embrace the offer or not. If he had not, then and only then would the criticism that the Court of Criminal Appeal made of his conduct have been valid. The position of an accused who bears no burden of proof in a criminal trial cannot be equated with the position of a defendant in civil proceedings. The rule in *Browne v Dunn* can no more be applied, or applied without serious qualification, to an accused in a criminal trial than can the not

> dissimilar rule in *Jones v Dunkel* ((1959) 101 CLR 298 … See the discussion of this case in *RPS v The Queen* (2000) 199 CLR 620 at [27]-[29]; 74 ALJR 449 and *Dyers v The Queen* (2002) 210 CLR 285 at [120]-[123]; 76 ALJR 1552). In each case it is necessary to consider the applicability of the rule (if any) having regard to the essential accusatory character of the criminal trial in this country."

[56] In the present case, his Honour's comment could have been understood as an invitation to the jury to draw an inference adverse to the appellant on a crucial issue, namely, the fact of digital penetration of Ms S. The judge's comment could well have led the jury to conclude that the appellant, in his instructions to his counsel, had accepted the proposition crucial to the complainant by Ms S, and that he had instructed his counsel to contest that proposition in the case by Ms W. It may well be that it was this direction which explains the different verdicts. It is clear from the passage which I have set out from *MWJ v The Queen* that the rule in *Browne v Dunn* afforded no basis for the judge's comment. The issue is whether there was some other basis for the trial judge's comment.

[57] It is well established that the terms in which a party's counsel cross-examines a witness for the opposite side may be taken by the jury to reveal the version of events with which the party has instructed that party's counsel. In *R v Robinson*,[13] Dunn J, with whom Wanstall ACJ and Douglas J agreed, said:

> "… cross-examining counsel is concerned with primary facts. His instructions are as to primary facts, and it is his obligation - a strict obligation - that, if he 'puts' occurrences to witnesses, he 'put' them in accordance with his instructions. This being so, the instructions may be inferred from the questions. If there is a discrepancy in a significant particular (I do not mean a minor or explicable discrepancy, for whilst perfection in communication between client and legal adviser is aimed at, it is not always achieved) between questions based on instructions as inferred and the evidence of the person from whom the instructions must be taken to have come, it seems to me to be quite permissable [sic] for a judge to ask the jury to have regard to the discrepancy in evaluating the evidence.
>
> The truth is, I think, that whilst in a strict sense questions are not evidence, questions asked (and indeed questions unasked) form part of the conduct of his client's case by counsel. The conduct of the case is something from which the jury may be asked to draw inferences, so long as due regard is had to the requirement of fairness and the possibility of human error (especially in relation to peripheral matters)."

[58] As this passage confirms, care needs to be taken to ensure that this approach is not applied mechanically, especially where the circumstances suggest that one cannot safely and fairly infer that the cross-examination is an accurate reflection of the party's instructions. In the present case, the appellant's plea of not guilty put the elements of the charge in issue, and the Crown itself tendered a record of interview containing an express denial of the act of digital penetration of Ms S. The trial judge, during the course of the trial, frequently voiced criticisms of the conduct of the trial by counsel for the defence - who was not, I hasten to mention, the counsel

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13 [1977] Qd R 387 at 394.

who represented the appellant on the appeal in this Court. At one point, his Honour admonished defence counsel that if she did not have the competence to deal with serious trials, she "shouldn't be doing them". At another point, his Honour's exasperation with what he perceived to be the incompetence of the appellant's counsel moved him to say that he "felt sorry" for her client. It was readily apparent that the proposition that there had been no digital penetration of Ms W by the appellant was only put to her by the appellant's then counsel in her pre-recorded evidence after the appellant's counsel had been prompted to do so. None of the lawyers involved in the trial can have been in any real doubt that the appellant's case was that he denied the digital penetration of Ms S. The jury, however, were not warned that a reason (and indeed a likely reason in the circumstances) which might explain why this aspect of the appellant's case was not put to Ms S was that counsel for the appellant had simply overlooked the point.[14]

[59] There were, therefore, strong considerations of fairness which militated against an invitation to the jury to infer a tacit acceptance by the appellant that he had digitally penetrated the complainant, Ms S, from the manner in which his counsel had conducted the cross-examination of Ms S.

[60] In my view, his Honour should have refrained from commenting to the jury in the terms in which he did. There was no good reason for his Honour's prejudicial intrusion into the functions of the jury.

[61] In my view, the appellant has made out this ground of appeal.

The proviso

[62] The question which then arises is whether s 668E(1A) of the *Criminal Code* should be applied. That provision permits this Court to dismiss the appeal, notwithstanding the irregularity in the trial "if it considers that no substantial miscarriage of justice has actually occurred".

[63] The decision of the High Court in *Weiss v The Queen*[15] makes it clear that this Court cannot apply s 668E(1A) unless this Court is "persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty". In my view, this Court cannot be so persuaded.

[64] I have concluded that the evidence in the case relating to Ms W's complaint was not admissible in the case relating to Ms S's complaint. Accordingly, the trial judge erred in failing to order that there should be separate trials. The respondent argues that the trial judge's directions to the jury were apt to cure any prejudice which might have arisen from the failure to have two counts tried separately. In this regard, the learned trial judge had directed the jury:

> "Now, if you think that any similarity is explained by coincidence, or any other reason consistent with innocence, or any other reason than that the accused committed both sets of offences, then you should not use the evidence relating to one complainant in the case against the other, otherwise you may use it."

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14 Cf *R v Manunta* (1989) 54 SASR 17 at 23; *R v Foley* [2000] 1 Qd R 290 at 292.

15 (2005) 223 ALR 662 at 674; [2005] HCA 81 at [44].

[65] Counsel for the respondent argues that the verdict of acquittal on the count relating to Ms W, taken together with this direction, suggests that because the jury acquitted the appellant of the count relating to Ms W, they must necessarily be taken not to have used the evidence in the case relating to Ms W in their consideration of the charge relating to Ms S.

[66] The first point to be made here is that the direction by the trial judge was necessary only because the two counts were not tried separately. In such a case, there is authority which supports the view that "[s]exual cases … are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard",[16] and that "it is asking too much of any jury to tell them to perform mental gymnastics of this sort".[17]

[67] Next, it is argued by the respondent that the verdict of acquittal on the charge relating to Ms W indicates that the jury did not accept her evidence, and that the appellant was, as a result, not prejudiced by the evidence of Ms W in relation to the complaint of Ms S. It cannot be assumed, however, that some jurors were not influenced by the evidence of Ms W to convict the appellant on the complaint relating to Ms S. There is a real risk that the evidence relating to Ms W's complaint had such an effect on some jurors who might otherwise have been disposed to doubt the appellant's guilt of the charge relating to Ms S.

[68] Furthermore, as I have noted above, the irregularity in the trial judge's direction in relation to the cross-examination of Ms S may explain the different verdicts.

[69] This Court is not in a position to act upon the evidence of Ms S as persuading it of the appellant's guilt beyond reasonable doubt. The version of events prior to the alleged offence given by Ms S was contradicted in significant respects by the evidence of Ms W and Ms K. Ms S's own evidence of alcohol consumption was also a matter of some concern at trial in relation to her reliability. It may well be that the advantage of seeing Ms S give evidence would be sufficient to resolve these concerns in her favour. But that advantage is not available to this Court.

[70] In the upshot, I conclude that this Court is not in a position to conclude that no substantial miscarriage of justice has occurred. The proviso should not be applied.

[71] Accordingly, it is unnecessary to consider the appellant's remaining ground of appeal, or the appellant's application for leave to appeal against sentence. For the sake of completeness, however, I should say as to the last ground of appeal against the conviction referred to in paragraph [3](e) above, it is clear that the evidence of these questions and the appellant's responses should not have been put before the jury. Nevertheless, the trial judge gave a strong direction to the jury which would have prevented any prejudice to the appellant from the questions which the appellant should not have been asked. This ground alone would not have constituted a sufficient basis on which to quash the conviction.

Conclusion and orders

[72] For these reasons, I concluded that the appeal should be allowed, the conviction quashed, and that there should be a new trial of the count involving Ms S. There is

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16 *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; see also at 7 and 9 - 10.

17 *R v Boardman* [1975] AC 421 at 459; see also *R v Sims* [1946] KB 531 at 536; *De Jesus v The Queen* (1986) 61 ALJR 1 at 2.

no need to deal with the application for leave to appeal against sentence, and, in my view, this Court should refrain from unnecessary comment upon the arguments which were agitated in relation to that application.

[73] **JONES J:** I agree with the reasons stated by Keane JA and the orders proposed.