SUPREME COURT OF QUEENSLAND

CITATION:	*R v HAC* [2006] QCA 291
PARTIES:	**R** **v** **HAC** **(appellant)**
FILE NO/S:	CA No 17 of 2006 DC No 645 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	11 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2006
JUDGES:	Williams, Jerrard and Holmes JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – MISDIRECTION AND NON-DIRECTION – GENERALLY – appellant convicted of torture, assault occasioning bodily harm and rape – sentenced to 10 years imprisonment for torture, two years imprisonment for assault occasioning bodily harm and five years for rape with serious violent offender declaration – whether trial judge misdirected jury on the torture count – whether misdirection on torture was sufficiently significant to justify overturning torture conviction *Criminal Code 1899* (Qld), s 320A *R v LM* [2004] QCA 192; CA No 246 of 2003 & 314 of 2003, 4 June 2004, considered *R v Ping* [2005] QCA 472; CA No 207 of 2005, 16 December 2005, considered *Weiss v R* (2006) 223 ALR 662 at [43]; [2005] HCA 81,

applied

COUNSEL: G P Long for the appellant
M J Copley for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I am content to adopt the statement of background facts detailed in the reasons for judgment of Jerrard JA which I have had the advantage of reading.

[2] The Crown correctly conceded that there was a misdirection in the summing up. The directions given by the learned trial judge effectively permitted the jury to convict of torture even though the jury might not have been unanimously satisfied as to which act or series of acts were intentionally inflicted to cause severe pain or suffering. The direction given was not in accord with what was said by this Court in *R v LM* [2004] QCA 192 at [94]; the relevant passage is fully quoted by Jerrard JA in his reasons. The real issue in the appeal therefore became whether or not this was an appropriate case for the application of the proviso; s 668E(1)A of the *Criminal Code 1899* (Qld). The High Court in *Darkan & Ors v The Queen* [2006] HCA 34 recognised that the proviso could be applied even where the error in question went to an element of the offence.

[3] My initial concern in relation to the possible application of the proviso was based on the fact that the jury acquitted the appellant of five counts of rape, counts 2, 3, 5, 6 and 9 on the indictment. The question was whether or not the return of those not guilty verdicts meant that there was a real issue as to what evidence the jury had accepted in convicting on the torture charge.

[4] Importantly the rape charges on which the appellant was acquitted, and counts 4 (assault occasioning bodily harm) and 7 (rape) on which convictions were recorded, were not relied upon as particulars of the torture charge. The prosecution deliberately particularised the torture count on conduct other than that which evidenced those other charges.

[5] Significantly there was no evidence supporting (or to use the more traditional term, corroborating) the five counts on which a verdict of not guilty was returned. Counts 2 and 3 alleged rape by the insertion of hot nails into the complainant's vagina. The appellant denied that conduct, and the medical evidence from two doctors indicated there was no scarring visible which would have been expected if hot nails had been inserted for a period of time. There were, perhaps understandably, no independent witnesses to the conduct in question.

[6] Counts 5 and 6 alleged anal intercourse whilst the parties were in a bathtub. The appellant denied such conduct, there were no independent witnesses, and no supporting medical evidence.

[7] The final count on which a verdict of not guilty was returned was count 9, which alleged the insertion of the wooden handle of a gaff hook into the complainant's anus. Count 7 on which a conviction was recorded alleged the insertion of the

handle of that gaff hook into the complainant's vagina. The appellant denied inserting that object into the complainant's anus, but his evidence was that he did insert it into the complainant's vagina but with her consent. The complainant denied consent, and her evidence was that penetration was effected only after a protruding nail was dug into her leg. There were no independent witnesses to the events alleged in counts 7 and 9, and no medical evidence supporting the complainant's evidence. Significantly the only issue with respect to count 7 was consent, and obviously the jury accepted beyond reasonable doubt the complainant's evidence that her consent was not forthcoming.

[8] On the other hand, so far as the evidence relied on by the prosecution to support the charge of torture is concerned, there was ample evidence supporting that of the complainant. Each of her daughters gave evidence of witnessing many of the acts relied on over the period of time as constituting torture. Indeed, the appellant in his evidence admitted most of the acts, and admitted that his conduct was intended to punish the complainant. Indeed, he went so far in his evidence as to admit to torturing her. I will not repeat the detailed analysis of the evidence made by Jerrard JA in his reasons which amply supports those conclusions.

[9] In those circumstances it would have been perverse of the jury not to have concluded that the offence of torture was made out. The jury obviously acquitted on those counts (2, 3, 5, 6 and 9) where the conduct was denied by the appellant and there was no supporting evidence. But where there was supporting evidence, particularly where the conduct was not disputed by the appellant, the jury was clearly prepared to accept and act upon the evidence of the complainant.

[10] Given that the appellant's evidence was that his conduct in question was intended to humiliate or punish the complainant it would have been perverse of the jury not to have concluded that the complainant was submitted to the acts in question with the intention on the part of the appellant to inflict severe pain and suffering on her. The evidence clearly established that requirement as explained by this court in *R v Ping* [2005] QCA 472.

[11] This is clearly a case for the application of the proviso. The offence of torture was clearly established beyond reasonable doubt by the evidence; the relevant particulars being the conduct sworn to by the complainant, supported by the evidence of her daughters, and admitted by the appellant.

[12] It follows that the appeal against conviction should be dismissed.

[13] **JERRARD JA**: On 8 December 2005 HAC was convicted by a jury of an offence of torture (count 1 on the indictment), an offence of assault occasioning bodily harm (count 4) and an offence of rape (count 7). He was sentenced to 10 years imprisonment for the offence of torture, two years imprisonment for assault occasioning bodily harm, and five years imprisonment for rape. The conviction for torture was declared to be one for a serious violent offence; the learned trial judge ordered that 451 days of pre-sentence custody be declared imprisonment already served under the sentence.

The appeal

[14] HAC got an extension of time within which to appeal against those convictions, originally on the ground that the verdicts were unreasonable, and that there had been a gross miscarriage of justice. The appeal was listed for hearing in May 2006, but adjourned when Mr M Copley, appearing for the respondent, drew the Court's attention – in his written submissions on the respondent's behalf – to arguable deficiencies in the directions given to the jury on the count of torture. Because HAC was then appearing for himself, the appeal was adjourned to enable him to seek legal representation. When the appeal was called on 14 July 2006 Mr G Long of counsel appeared and made submissions on the point raised for consideration by Mr Copley.

The prosecution case

[15] The prosecution case substantially depended on the evidence of the complainant woman in all counts, his ex-wife R H. Her evidence was supported from evidence from their daughters S and R, and evidence from a medical practitioner and neighbours. But essentially the case depended upon R H's account of a six month period between 1 June 2002 and 10 January 2003, in which HAC inflicted physical and other harm on her, which most members of the community would consider was fairly described as torture. The critical issue on the appeal is whether the directions the learned trial judge gave to the jury were sufficient to sustain the conviction for the offence with that name.

[16] HAC was acquitted on five counts of rape charged on the indictment, allegedly committed in that six month period (counts 2, 3, 5, 6, and 9), and the prosecution withdrew a further count of rape allegedly committed in that same period (count 8). The conduct relied on to constitute torture was separate from the conduct relied on to constitute each of the alleged counts of rape, and the count of assault occasioning bodily harm. That was done to avoid possible duplicity between the count for torture and the other counts of individual offences. R H had given evidence in support of those counts on which there were acquittals, so it follows that the jury did not accept that everything R H described happening to her had been established beyond reasonable doubt to be accurate.

Torture – the facts

The complainant's account

[17] The thrust of R H's evidence was as follows. She married HAC in 1983 in Western Australia, and they separated for approximately 12 months in 1985. She then moved to Queensland to rejoin HAC, and they moved from there to northern New South Wales, when R was four years old and S was two. Their son J was born in New South Wales and when he was 15 months old they moved to Queensland, where they settled in Millaa Millaa in early 2002. R H described the marriage as a very unhappy one, in which she experienced a lot of verbal and physical abuse, including what she said HAC called "tone taps". Those were punches to the side of the head if he did not like the way she spoke to him.

[18] Mr and Mrs H had a friend in Western Australia named B, who was part Aboriginal, and before the two parties separated in Western Australia for 12 months in the mid-1980s, HAC had accused R H of infidelity with B. On her evidence, when the marital relationship was resumed that matter was not brought up again until mid-

2002, when they were looking at some photographs, and saw one of HAC and B. R H smiled, and HAC wanted to know whether she was smiling at him or at B. HAC became very aggressive, and demanded that she tell him if she had slept with B. Her evidence was that she denied it, but that that was only the start of a longer dispute, and that:

> "He called me a slut and a whore and then he requested or told the children, all three children, which at the time my son was five years old, that he had to call – they all had to call me slut or whore and they weren't allowed to call me Mum anymore and they weren't allowed to kiss me or hug me and they weren't allowed told – tell me that they loved me either. Not at all."[1]

She swore that he called her a whore or a slut on a daily basis after than, and that while the two older children argued that they did not want to call her a whore or slut, he insisted they do; and so they did.

[19] She described HAC pressing her for details of what he believed had happened on a particular night between her and B in a caravan, and details of men with whom she had slept in the year of separation, those matters all being raised on a daily basis. He did not accept her answer that she had not slept with B, and that what she did when separated was not his concern. Whenever he thought she was lying in her answers he would force her to swallow chillies growing in their garden, which she had to pick, chew, and swallow in his presence. Her evidence described the usual number being 10, but that on one particular day there were 80 (apparently sets of 10 after each other). She said:

> "...so I'd have to run out and get another 10 and he – he'd make – he would say I had to come back within a certain amount of time, that's why I'd have to run out and be back – pick 10, then come back in and then chew the 10 and it was just – went on like that until I'd got to the 80."[2]

[20] On that occasion she actually vomited, and was then forced to lick her vomit up. She did that only after objecting, and after her two daughters had tried to persuade HAC not to make her do that, and that she did it because she was simply so scared of him, that he would do something worse if she did not. On other occasions if there were no chillies left on the bushes, he would make her get chilli powder, which she had to consume, or some chillies in a jar of vinegar in the fridge. She had to have a spoon full of that. On one occasion HAC had opened her mouth to force chilli powder into it, and when sitting on her stomach (she was on the floor) and when forcing the bottle against her mouth, it broke, and cut the underneath of her tongue. She is five foot two inches; he is six foot and strongly built.

[21] She swore that HAC – after June 2002 – began to tell mates of his who visited that "...my missus is a working girl now, she'll give you a head-job for 20 bucks"[3], over her protests. He said to her that she was to be a prostitute because she was nothing but one, that she liked "fucking", and that she might as well make money out of it.[4]

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1 At AR 37.
2 At AR 38.
3 At AR 43.
4 This evidence is at AR 43-44.

[22] All of this occurred in that six month period covered in the indictment. She described how in that period HAC wanted her to list everyone with whom she had slept when they had separated, their occupation, and other details about them. This request too was constantly made, and on one occasion of that interrogation when they were in their lounge room and it was winter, he made her remove her jeans and then burnt her on the upper thigh with a poker, which he had heated in a fire. She described still having the scar from that. She swore that on that same night he heated some three or four inch nails in the fire, forced her to remove her panties, and inserted a red hot nail into her vagina, causing an enormous degree of pain. That happened twice on the one night. Those alleged incidents of inserting the nail were counts two and three of rape, on which HAC was acquitted.[5]

[23] She swore that he pressed her to prostitute herself, and ultimately she did because she was scared for her life. The first time was when a friend L to whom (when so instructed by HAC) she had given a lift home when the men had been drinking, and who asked her for a "head-job", saying that her husband said she would give him one for $20. She refused. Next morning HAC remonstrated with her for that refusal, saying that she had made him look like a "fucking idiot" (apparently because she had contradicted him), and he insisted that "you go down there and give L what he fucking wants". Eventually she did, was paid $70, and HAC pocketed the money. A similar incident happened with another friend of his, and again HAC got the money.

[24] By the end of November 2002, when it was very windy where they were living, HAC forced her to sleep on a patio on a hessian bag, calling her a dog and a slut, and insisted that she could not have a jumper. On one of those occasions she slept in the back of one of their two cars, and thereafter HAC made sure that both were locked, and that the house was locked up and the windows shut, so that she could not get into it to sleep. She said that conduct happened over a two week period, and that on about half a dozen occasions (at about 6.00 am in the morning) HAC had come out and urinated on her. At that time her arm was in plaster, being broken (count 4 – the bodily harm count – related to his breaking her arm on or about 29 November 2002) and HAC would then squirt her with water from garden hose, because "you've got all piss on you". She said that at that time of the morning it was freezing[6], and that as this happened HAC insisted on discussing what he called her infidelity. On different occasions in that particular period he allowed her to sleep inside if she masturbated him or gave him a "head-job"; on some occasions she was allowed to sleep on a mattress in the laundry but on others made to stand beside the bed, and he punched or kicked her if she fell asleep.

[25] On other occasions in that six months, apparently not restricted to November or post-November 2002, he would insist on her cleaning what he thought was surface mould off the ceilings, and make her take the dogs for a walk, late at night and even around midnight. Other late night tasks included cleaning turkey droppings in the turkey yard; and other concerns about cleanliness resulted in HAC making her kill and eat any spider or cockroach he saw in the house. That happened on at least six occasions.

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5 At AR 289.

6 At AR 47.

[26] In that period earlier described in which she was not allowed to sleep in the house, she was also not allowed to use the toilet in the premises, because "I was a dog"; and was forced to urinate and defecate in a paddock, and use the garden hose for a shower. In what on her description was the same period in late November 2002 she walked, at HAC's insistence, six kilometres to the residence of a neighbour F, because HAC would not allow her to be around their house, and so she stayed at that neighbour's place all day and at night. The next morning F told her that HAC was coming over to kill her, so she hid in the bush, and HAC arrived by car. Eventually F located her and said that HAC had calmed down, but either on that day or not long thereafter, when being questioned as to whether she had had sexual dealings with F, and when her denials were disbelieved, HAC bent her arm behind her back so forcibly that it broke.[7]

[27] The assault occasioning bodily harm charge relates to that breaking of the arm, and HAC was convicted of that offence. R H's evidence included that she was further assaulted by HAC because of his belief that she had had intercourse with F, and that HAC insisted she complain to the police that F had raped her. She made the complaint, because HAC told her to, and she also alleged to the police that F had broken her arm; neither accusation was true. F did not rape her, and HAC broke her arm. The police did take her to the hospital, where her arm was put in plaster. The Crown called a Dr Hawkins, who described seeing R H on 29 November 2002, and discovering that R H's left ulna was fractured; the doctor put that in plaster. Dr Hawkins noticed bruising and minor abrasions under R H's right eye, around her cheek and nose, a red mark on her right upper lip, a bruise and minor abrasion her right jaw, bruising on her right hand, and swelling and deformity of her bruised left forearm, and bruising on her left lower leg. Her chest had bruises on the upper front, her abdomen had minor grazes, and she had what appeared to be possible bite marks on her back, as well as bruising and abrasions or grazes on the buttocks.[8] That evidence of her physical state gives a window into R H's life at that time.

[28] R H said that HAC would constantly clear his throat then spit in her face, or hair, an almost daily occurrence in that six month period, and sometimes would spit on the floor and make her lick it up. He was obsessively concerned with her tidying the house, and if she went out shopping and left any dishes on the sink, she would find them thrown on the back lawn when she returned. If she had not swept the floor or been tidy enough, HAC would smack her on the bottom with a wooden bed slab. This included the period in which she had one arm in plaster. Regarding the plaster, he would on occasions twist that and apparently try to break it; and in the period when she slept on the hessian bag, as well as urinating on the plaster, he would on occasions pour beer into it. That all resulted in the plaster becoming foul smelling, which in turn led to HAC locking her outside the house one night (complaining of the smell), and then forcing her to cut the plaster off with a broken hacksaw blade. That took her some three hours and resulted in a scar on the inside of her upper arm.

[29] On another occasion on which she was being hosed to clean her after being urinated on, he hit her with the hose, and the nozzle (which had struck her bottom) flew into the air and into an adjourning paddock. She was made to search for it for hours on differing days; if it was hot she had to wear two jumpers, and if it was cold she had to wear a T-shirt. She never found the nozzle.

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7 This description appears at AR 49-51.

8 AR 115–117.

[30] Other varieties of what would conventionally be regarded as that torture of her, included forcing her to drink tea into which he had poured a large quantity of salt; if she did not drink it he would throw it on her. HAC would also take long hot baths, and call R H into the bathroom to question her about her asserted infidelity. If he disliked her answers, he would splash her with water. In December 2002 an occasion occurred when he wanted to urinate when in the bath, and he required her to get him a glass from the kitchen, so that he could use it as a receptacle. When he had done that, he demanded she drink it, which she did because she was so frightened of him. He then insisted she get in the bath and give him a "head-job"[9], and he then had anal intercourse with her. The stated reason was that "your nothing but a dog but I don't want to fuck you or have sex with you, so I'm going to fuck you up the arse." She was trying to get away and fell; he held her head under the water and then had anal intercourse again. Those two occasions of alleged anal intercourse were counts 5 and 6 on the indictment, on which the jury acquitted.

[31] She described an occasion at the end of December 2002 when HAC was tidying some of his tools, and when her arm was still in plaster, and on which he threw a large brass object at her, which she could not catch quickly enough, and which struck her in the face. One tooth was chipped and one rendered loose, and she was in severe pain. On about 10 occasions thereafter HAC would "bash" that loose tooth back into its position with a plastic mallet or hammer, which she found extremely painful. Eventually she pulled the tooth out herself so that he would no longer do that.

[32] Another variety of injury inflicted on her was what she called "another stage" through which HAC passed, in which he would give her karate chops in the neck if he was unhappy, or for any other reason. Those resulted in her having a husky voice and sore throat. She said that HAC thought that was a "big joke", and would tell her that she had been giving "too many head-jobs."[10]

[33] She described two separate occasions on which HAC forced what he called his gaff hook, a piece of guava wood about 12 inches long and the thickness of a 20 cent piece at one end and larger at the other, into her vagina. The object had a sharpened nail at one end and was forced into her vagina in December 2002, when her arm was still in plaster, and when HAC was dissatisfied with or uninterested in the "oral sex" he had been receiving. Over her objections he inserted the object, digging the nail into her leg if she opposed it. The second such incident occurred about a week after the first. On one of those occasions he also inserted it into her anus.[11] Count 7, on which HAC was convicted, charged the insertion of that object into her vagina without her consent. Count 9, on which there was an acquittal, charged the insertion of the object into her anus. Count 8, which the Crown withdrew, charged the second occasion of vaginal insertion. Her evidence at the trial did not make clear whether there was a vaginal or an anal penetration on the second occasion.

[34] She described a night when he ordered her to go out of the house and masturbate a male dog they had, and when she refused, and over her objections, he made her remove her jeans and pants and kneel on the ground near the dog. No sexual encounter actually happened between her and the dog, but HAC was most amused.

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9 At AR 58.

10 This evidence is at AR 60.

11 This evidence is at AR 61-63.

On another occasion he expressed an interest in freezing a "dog's turd" with which he announced an intention to "fuck you",[12] although that did not happen. On another occasion, before shooting some birds with a rifle he kept under the lounge, he pointed it at her and asked her to name one good reason he should not pull the trigger. She responded that she was the mother of his babies; she swore that she was very scared at that moment, because he had already intimated that he was prepared to kill her.[13]

[35] On 10 January 2003, the day it all ended, he chased her on the lawn on his motor bike, threatening to kill her. She ran into a shed to escape, and her daughter S stood between her and HAC. R H was terrified she would be run over. When S stopped him, HAC said that he was going down to "L's place", and that when came back "You're dead, I'm going to kill you"[14], and he left. She took an overdose of tablets after he had left, because she believed that he was going to kill her, and she intended to deny him the satisfaction of doing that. She said in evidence that she felt then that she was worthless, because she was not "even a mum anymore", because "the kids couldn't even call me mum. I was just a thing"; she described how "[T]he fact of you being urinated on just made you feel so low because I've never heard of anyone ever doing that."[15] She said she was just totally humiliated, "and just so put down and hurt and ashamed", "very ashamed and hurt and not knowing what to do, and just so, yeah, unloved, uncared for." She woke up in the Cairns Base Hospital, and after her discharge had not seen HAC again.

Other medical evidence

[36] Medical evidence from Dr Hawkins, who examined R H in late November 2002, and treated her for the broken arm, included that that doctor had not found anything abnormal in the vagina, although she had noted a minor graze and bruising on the right labia manora. That doctor swore that if a heated nail been inserted as described, (R H said that each time it was to the depth of half a thumb) the doctor would not normally expect to find evidence of scaring or trauma, if the incident had occurred several months previously. However, the doctor's practice did not include any prior practice with burns in the vagina. Likewise regarding the fractured ulna, the doctor thought that twisting injuries tended to cause spiral fractures, and this one was not, but that it was probably beyond that doctor's area of expertise to say whether or not the broken arm was caused by twisting it. That evidence left open the possibility that the arm was broken as described.

[37] A different examination, done in September 2003 by a Dr Sadleir, relevantly included finding a one centimetre long scar diagonally across the base of the tongue and consistent with the stated history of it being cut with a broken glass; a broken and a missing tooth consistent with the stated history of an object thrown at R H and damaging the teeth; a scar on the left upper arm consistent with the stated history of being cut by a hacksaw blade; a scar on the right inner thigh consistent with being caused by a heated "tent peg" (presumably the poker)[16]; that doctor thought that if a hot nail was inserted into the vagina and full thickness burning occurred, some

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12 This is at AR 63.
13 At AR 64.
14 At AR 66.
15 At AR 67.
16 This evidence is at AR 125-126.

scarring would be expected. If not full thickness burning, scarring would not be. There was no vaginal scarring consistent with a (full thickness) burn.

Evidence from S and R

[38] As well as that medical evidence generally supporting R H's evidence, there was the evidence from her two daughters. S, who was 16 when called, described a home in which there was physical violence all the time, in which "Dad would hit Mum, kick her."[17] Regarding the last six months of co-habitation in Millaa Millaa, S said things "really got a lot worse", and her description of it included that HAC spat on R H, made her eat chillies, persistently quizzed her about whether she had slept with B, told the children not to call R H "Mum" and to call her "whore" in his presence, or "boong lover" or "slut". S also described how R H at first had to sleep on the floor in the children's room, and then on a hessian bag on a patio, often when only wearing a T-shirt. She described her mother attempting to placate HAC by saying "I've learnt my lesson, I've learnt my lesson."[18] S also described an occasion when her mother had been made to chew and eat a large quantity of chillies – S said the whole contents of a jar of them – and had vomited into a bucket. She swore that her father then made her mother drink the bucket of vomit, and that S saw that happen. S also described constant physical assaults upon R H, including by punching and kicking, and dragging R H around by the hair. She recalled her father telling them that her mother had gone to give "L" a "head-job", and that "If your going to act like a slut then you can go and get paid for it, and enjoy it".[19]

[39] She remembered her father twisting her mother's plastered arm; her mother doing all of the heavy work with her broken arm; seeing her mother's bruised mouth and loose teeth after an object hit her mouth, and her father threatening to pull the loose tooth out with a pair of pliers; hearing her father telling her mother to say that F had left bite marks on her; and the day when her father chased on a motorbike after her mother, who ran into a garage (and S stepped between them). Her evidence included that on that day, and after S frustrated the attempt to ride over her mother, HAC physically assaulted R H. S gave a description of how, on the occasions when HAC spat on R H, HAC would also invite S to do so, although S declined. He would make R H leave the spittle unwiped upon her person or clothes. She recalled HAC hitting both R H and R with the wooden slat, and how R H had taken an overdose of pills on the day her father attempted to ride a motorcycle into her. Her elder sister R called the hospital.

[40] R said generally of HAC he used to slap, spit on, and kick her mother, and recalled seeing her father spit on her mother's face. It appeared from her evidence that she was describing the last six months of 2002. She also described seeing her mother being hit with the wooden plank at least once a week, seeing R H eat chillies on her father's instructions if in his opinion R H had lied about B (this occurred at least twice a week), and an occasion when her mother's tongue was cut with the broken glass of a bottle of chilli powder. She recalled her mother sleeping outside on the cement on a few occasions on a hessian bag, not being allowed to call her mother "mum" or "hug or kiss her", her mother searching for hours for a lost hose nozzle on different days, her father pushing a loose tooth into her mother's mouth with a

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17 At AR 140.
18 At AR 142.
19 At AR 148.

pair of pliers (her mother wanted him to stop), and her father telling her mother to tell the police that F had broken her mother's arm and had raped her. She also saw her father pull the arm in plaster behind her mother's back. She described the final occasion when her father rode around on a motorcycle "trying to run the mum over", and that an ambulance came.

[41] The only actual challenge to S's evidence in cross-examination was when she somewhat reluctantly agreed that her statement to the police included the specific description that she had seen her mother cut the plaster off her arm with the hacksaw blade, and had seen that she did not cut herself. R was challenged on her description of using pliers to push the tooth in, and her description (at first) that it was chilli powder rather than chillies that was in the glass being pushed into her mother's mouth when her tongue was cut. Other than that, the evidence of the two daughters was not specifically challenged in cross-examination.

What HAC admitted

[42] That position really accorded with H's own evidence in chief and in cross-examination, in which he agreed R H was given chillies to eat if HAC considered she was telling lies, but said that this was something that applied to all the family, and that he himself had once eaten six chillies. He also agree that "quite late in the piece" he did make her sleep outside; that he had "kicked her in the arse" and said "get the fuck out"[20] on the occasion she went to F's place; that he had twisted her arm when in a rage (he denied breaking it); that he would not let her sleep in the car, giving her the choice of sleeping in a tent or sleeping outside; that he had sprayed her with water once or twice; that he would not let her use the toilet inside the house because he did not want her anywhere near it; that he had once poured beer down her cast; that he had tossed a fireman's hose nozzle at her which "copped her in the gob"[21]; that he had on occasions tapped the resulting loose tooth in her mouth back into position with a wire brush – perhaps on five or six occasions – in an attempt to stick the tooth in; that he had twisted her arm a couple of times when it was in the cast; that he had insisted the children call R H "whore", "slut", "moll", and not "mother" or "Mum"; that he had (accidentally) burnt her with a poker (and then said to her "you stupid bitch, what are you doing standing there?");[22] that he had used the gaff on her as a dildo on two occasions (he said that she consented); that he frequently spat in her face in the children's presence; that he hit R H with the slat on the bottom on numerous occasions; that he had pointed an (unloaded) rifle at her on one occasion; that he had suggested to the dog that it should complete "oral sex" in which he had been engaged[23], and that he had made her search for the hose nozzle when wearing Wellingtons and a jumper (because of snakes).

[43] HAC's evidence included that in his opinion R H had separated from him 1985 because she felt guilty because she was "caught having sex with somebody else"[24], but when they went to Millaa Millaa he realised her infidelity was not going to stop and that it was very bad for the children[25], and that he really had to harden his heart and say "No I don't want you in the house, I don't want you around the kids

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20 At AR 216.
21 At AR 220.
22 At AR 222.
23 At AR 225.
24 At AR 201.
25 At AR 213.

anymore."[26] He agreed he had been verbally and physically abusive to her, and said the reason was her infidelity.[27] He said that he tried to humiliate her in front of the children "to snap her out of what she was doing" but it did not work; and that he had wanted her "wake up to what she was doing. I didn't want to make her feel cheap, I was just showing the children what my wife was doing, her actions made her cheap."[28] A little later he explained that "I was trying to get her straight, yeah." Because "[W]ell, I had to look at the options. The options were leaving my children with a woman of very loose moral make up or setting the thing straight"[29]; later he agreed that he had caused R H a lot of suffering over those last six months, that that suffering was mental and physical and very intense.[30]

[44] He denied making her hoe or do gardening in hot clothes, or kicking her when she was on the ground (but admitted kicking her on occasions), denied making her eat her vomit, denied inserting a hot nail into her vagina on any occasion, and denied urinating in the glass or making her drink it. He denied making her eat cockroaches or spiders. He denied having anal intercourse on any occasion, or putting the gaff (the dildo) into her anus, denied breaking her arm, and denied forcing her to make a false complaint that F had either broken her arm or raped her. He said he was in a rage when he twisted her arm. He denied riding a motorcycle at her, or making her prostitute herself for money on his instructions. He admitted in cross-examination that on one occasion he had kicked her in the groin, which he said resulted from a miss when he intended to kick her on the bottom, and he agreed he pointed the motorcycle at her.

Torture – the law

[45] Section 320A of the *Criminal Code 1899* (Qld), defining the offence of torture, reads:

> "**320A(1)** A person who tortures another person commits a crime.
> Maximum penalty – 14 years imprisonment.
> (2) In this section –
> **"pain or suffering"** includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.
> **"Torture"** means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion."

The necessary directions

[46] In *R v LM* [2004] QCA 192[31] McMurdo P, giving the judgment of the court, wrote as follows:

> "Torture under s 320A of the *Criminal Code* is the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one or more than one occasion. To establish the offence of torture the prosecution must prove that the accused person intentionally inflicted severe pain or suffering on the complainant by

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26 At AR 219.
27 At AR 226.
28 At AR 234.
29 At AR 239.
30 At AR 245.
31 CA No 246 of 2003 and CA No 314 of 2003, 4 June 2004.

> at least one act. To convict the appellant, the jury must have been unanimously agreed beyond reasonable doubt that she did at least one of the particularised acts intending to inflict severe pain or suffering. [*Citations omitted*]. The re-direction given by the learned primary judge at the instigation of the prosecution was flawed in that it allowed the jury to convict if some jurors were satisfied that the appellant intentionally inflicted severe pain or suffering on D by administering laxatives, some by giving him insufficient nutrients or some by invasive medical procedures, without all jurors necessarily being satisfied of the intentional infliction of severe pain or suffering on the same particular occasion. To convict the appellant, there must have been unanimity as to the intentional infliction of severe pain or suffering on D on at least one particularised occasion. This error alone is sufficient to quash the verdict of guilty on the charge of torture."[32]

[47] That judgment makes it plain that where more than one act in a series is relied on as causing the intentionally inflicted severe pain or suffering that constitutes torture, the jury must be satisfied that the necessary level of pain or suffering was intentionally inflicted, and caused, by an act or acts, which the jury are unanimously satisfied did happen. It is not sufficient if different jurors convict on the basis of different acts, that is, if the jurors are not unanimously satisfied as to one or more acts by which the defendant intentionally inflicted severe pain or suffering on the complainant.

[48] The problem is compounded when the severe pain or suffering relied on is mental, psychological or emotional pain or suffering. This Court dealt with that situation in *R v Ping* [2005] QCA 472,[33] and Chesterman J, relevantly giving the judgment of the Court, held that to make out a case of torture the prosecution must prove beyond reasonable doubt that a defendant intended his or her acts to inflict severe pain and suffering on the victim; it was not enough that such suffering was a consequence of the acts, and that the acts were deliberate; the prosecution must prove an actual, subjective intention on the part of the accused to bring about the suffering by the conduct. The acts in question must have the object of the infliction of severe suffering – that must be their intended consequence. The judgment makes clear that where a series of acts are relied on the prosecution must prove that those acts were done as part of a purpose or design to bring about a state of severe (mental, psychological or emotional) pain or suffering; it had to prove the purpose of the acts was to inflict that suffering on the complainant and in order to cause that degree of distress or suffering. Nothing else would suffice.[34]

The directions given

[49] The learned judge gave the jurors different directions. Those were that:

> "The prosecution case in this case, as you've heard, is that there were a whole litany, a whole number of incidents that the prosecution argues inflicted severe pain and suffering on [RH]. Now, you don't

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32 [2004] QCA 192 at para [94].

33 CA No 207 of 2005, 2 December 2005.

34 *R v Ping* [2005] QCA 472 at [27], [29] and [84]. These observations appear at paragraphs [27] and [29] of that judgment; and [84].

> have to be satisfied of each one of those incidents. What you do have to be satisfied of is that over that six month period the total amount of behaviour amounted to something that was intentionally inflicted and did cause severe pain and suffering on [RH]."[35]

The judge added that the pain and suffering being described was not simply physical, but included mental, psychological or emotional pain and suffering, and which could be temporary, not permanent. Those directions would have been entirely correct if the learned judge had further added that while the jurors did not have to be satisfied that each one of those incidents the judge referred to did happen, they had to be unanimous about behaviour that was committed, and which resulted in a condition that was intentionally inflicted, of severe pain and suffering.

[50] The judge's directions continued:

> "The prosecution case in respect of torture is that [RH] was subjected for that whole six month period to essentially daily physical, mental, and emotional abuse. And the incidents that the prosecution relies on are things like the burning with the poker, punching, kicking, forcing to each chillies and chilli powder, the cutting of the tongue when the jar with the chilli powder was forced down her throat, the spitting on her, forcing her to sleep outside, to go to the toilet outside, the names and abuse that she was subjected to, the telling the children not to call her 'Mum', not allowing the children to give her hugs or kisses, making her eat spiders and cockroaches, forcing her to clean the house late at night, karate chops – you heard [RH's] evidence of karate chops to the neck – the incident with the dog, putting a gun to her head, and chasing her on the motorbike. There were other incidents too but those are the sorts of things that the prosecution is relying to found the charge of torture.
>
> As I said before, you don't have to find beyond reasonable doubt that each and every one of those incidents occurred, you simply have to be satisfied that the defendant did intentionally inflict severe pain and suffering on [RH]. Its the overall picture that you look at in that regard."[36]

[51] Attractive as that direction is, HAC had admitted some of the incidents or acts described in that direction, attempted to explain others away, and denied some.

Miscarriage of justice

While the jurors did not have to find beyond reasonable doubt that every incident had occurred, they did have to be unanimous as to the occurrence of the ones that did and by which severe pain and suffering was intentionally inflicted on R H. That means there was a significant misdirection on the count of torture. It is not possible that that error would have had no significance in determining the verdict of guilty.[37]

Possible bases for finding torture in this case

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35 At AR 302.

36 At AR 302-303.

37 *Weiss v R* (2006) 223 ALR 662 at [43]; [2005] HCA 81.

[52] The facts in this case were more than ample to support a number of convictions for torture. Some of the individual acts done on one occasion would be enough to satisfy the definition, if the jury accepted R H's evidence, and were satisfied the act was done with the intent of causing severe physical, or severe mental or emotional or psychological pain or suffering. Examples would include the admitted occasion when he kicked R H in the groin; the occasion if proven when he made R H eat so many chillies that she vomited and he then made her eat the vomit; the occasion, (although not included in the Crown case as part of the events alleged to constitute torture) when he twisted her arm behind her back so much that he broke it, the time when she was burnt with the poker; and when he pointed the gun at her.

[53] Then there were acts which the jury may have been satisfied were repeated, and done with the intention on each occasion of causing her severe physical or other varieties of suffering, and which in fact did so either on each occasion or cumulatively, such as making her eat chillies, making her eat spiders and cockroaches if any were found, administering karate chops to her neck, and preventing her children from calling her "Mum" or expressing affection to her. Likewise the jurors may have been satisfied that there were acts, if proven to be done, which were done with an intent to cause an overall or ultimate state of misery or despair, considered by HAC as deserved and done to punish R H for her believed infidelity, and which caused that overall level of misery and despair, just as HAC intended. That would or could include all of the last described acts, and many others, such as forcing R H to sleep outside and toilet outside; urinating on her; making her drink his urine; hosing her because she had urine on her; forcing her to clean the house late at night; to search for the garden objects, and the like. But the Crown had to specify what was the case of torture that it brought, and unfortunately no particulars were given to the jury about that.

[54] The directions the learned judge gave were consistent with a Crown case limited to and alleging torture based on the intended, overall, result of six months of the described conduct, namely that R H felt utterly worthless and degraded; and thereby suffered an intended severe psychological and emotional harm. In a case where all of the acts alleged to have been done to produce that result were known and described to the jury, proof that that condition of severe pain and suffering existed at the end of the six month period would not be enough. The jury could only convict of the torture the Crown case appeared to charge if also satisfied that acts about which they agreed had resulted in and were done for the purpose of causing that severe pain and suffering, and had done so.

Particularity in charges

[55] The Crown argued on the appeal that it could support the conviction on the basis of his forcing R H to eat chillies and then the vomit (with intent to cause both severe physical and emotional pain), or even on the basis of other individual acts, such as pointing the rifle at her to terrify her. It contended that the conviction could be upheld on those alternate bases, without the count being bad for duplicity. I disagree; the charge of torture would be bad for duplicity if there could be one conviction based on many different grounds. The learned trial judge was correct in putting the charge to the jury, as I consider the judge did, on the basis that the Crown alleged the torture was an overall result of six months of deliberately engaged in behaviour, deliberately done for the purpose of humiliating and degrading R H, and which did so. To justify convictions, for example, in respect of

the occasions when the rifle was pointed, or when both chillies and vomit were required to be consumed, required those to be charged as separate counts.

[56] It was important for sentence that the Crown specify in the usual way, namely by such different counts, whether the torture charged was the overall abject misery resulting from that six months of ill-treatment, as appeared to have been the case, or whether it was conduct on separate occasions, such as (for example) pointing the rifle at R H, or forcing her to eat hot chillies and then her vomit. If the torture included those individual occasions, then the intended severe pain and suffering thereby caused required identification.

[57] The directions the learned trial judge gave to the jury on the case that was put to them were deficient in not emphasising the need for the jurors to be unanimous as to acts by HAC, each committed for the purpose of inflicting severe mental, psychological or emotional pain or suffering on R H, and which did cause that intentionally inflicted severe pain or suffering by those acts. That is a demanding test, but in this case the jurors were in fact entitled to conclude that HAC had actually conceded in his evidence that the object or purpose of the acts he admitted doing had been to inflict that level of severe pain or suffering, and that R H had certainly had severe mental, psychological, and emotional pain and suffering inflicted on her, by those acts, as well as severe and obvious physical suffering. They were entitled to make the same finding about the acts he denied, or sought to excuse.

[58] That was because HAC admitted in cross-examination was that he had intentionally inflicted intense mental and physical suffering on his wife; and that it amounted to torture. He was asked:

> "You – you agree with me, do you not, that for whatever reason or reasons you may have done this but that you caused a lot of suffering to [RH] over those last six months? You agree with that; don't you? - - I agree with that fully. I agree with that fully. That's why I'm going to gaol.
>
> And ----- ? - - That's what I expect.
>
> ------ you agree that – that suffering that you inflicted for whatever reason or reasons was mental and physically; don't you? - - Yeah.
>
> And you agree with me that - - - - ? - - That – that's – I'm guilty of torture, yeah, I am.
>
> And that it was of a very - - - - ? - - I'm not doubting it.
>
> - - - - intense nature? It was very intense? - - It was, yes.
>
> I'm not suggesting every single thing was but there was very intense suffering; wasn't there? - - I think there was a culmination, yeah."[38]

He further admitted:

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[38] At AR 245.

> "If you're asking what I did constituted torture, let's cut to the chase; yes. That's what I did. Then I'm guilty of it. And so be it. So I'll be sentenced for it."[39]

[59] But to convict of torture the jury had to be satisfied that intentionally inflicted pain and suffering, sufficient to constitute torture, resulted from acts they were unanimously satisfied had happened. The jury must have been so satisfied about the matters HAC admitted but they may not have all have been satisfied that that was enough to prove the charge of torture, and some may have convicted relying on acts which were denied and which other jurors did not accept had happened.

[60] Despite the mis-direction, if the jurors rejected R H's account of some of the matters she described, or were not prepared to rely on all of them, as was probably the case, they could properly convict of torture on the basis of an overall state of misery produced by HAC's acts done to degrade and humiliate R H and sufficient to explain the state of despair she had reached by the end of 2002, provided they were satisfied about those acts. There was no doubt about the state of despair. It would not matter if they disagreed about other and further matters R H described. A person subjected to six months of cruel and unusual treatment could well be expected to demonstrate problems in giving exact and accurate accounts of everything done by a torturer.

[61] Because HAC admitted almost without qualification so much of what R H described and because of the supporting evidence – little challenged – of the daughters and the doctors, and because HAC admitted an overall purpose or object in his acts, the jury could be satisfied that HAC did commit the offence of torture, which I consider the learned trial judge put to the jury. The evidence proved beyond reasonable doubt that he committed that offence of torture,[40] namely that by various and numerous degrading acts separately and clearly proved he intentionally reduced R H to her described condition of feeling wretched, so wretched in fact that she tried to kill herself in preference to his doing that, as she believed he was about to do. There was no miscarriage of justice in the conviction for it, despite the error in the directions, but this Court should receive further written submissions on the sentence application. Those should be premised on the fact that the conviction is upheld on the basis of the acts admitted by HAC and those described by the daughters, and in the overall context of the medical evidence.

[62] There are no grounds for disturbing the rape or assault occasioning bodily harm convictions. It was certainly open to the jurors to be satisfied that it was HAC, who broke his wife's arm, which the evidence proved had been broken; and it was certainly open to the jurors to be satisfied beyond reasonable doubt that R H objected to, and did not consent to, the insertion of that object in her vagina. It was open to them to reject entirely HAC's claim that she invited him to do it. The jurors were properly directed about those counts and those convictions should stand.

[63] I would dismiss the appeal against conviction and invite further submissions on the sentence.

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39 At AR 257.

40 *Weiss v R* at [44].

[64] **HOLMES JA:** I have read the reasons for judgment of Williams and Jerrard JJA. Like them, I am satisfied that, although there was a misdirection in the summing up, no substantial miscarriage of justice has occurred, because the appellant's conviction of torture on the unchallenged evidence was inevitable. He had, on that evidence, committed a variety of painful and degrading abuses on his wife, with, as he conceded, the underlying intention to humiliate her; that intention gave those acts the character of a series. It is relatively clear, as Jerrard JA has outlined, which are the acts amounting to torture which were substantiated by unchallenged evidence from the appellant's daughters, or indeed, by evidence from the appellant himself. It is necessary that his sentence be considered afresh on that basis.

[65] Since there may be some room at the margins for argument about the list of acts on which this Court would be justified in sentencing the appellant, submissions should be received as to the acts which fall within that category and as to the sentence which should be imposed.