SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kay* [2006] QCA 302
PARTIES:	**R** **v** **KAY, Brian James** (appellant/applicant)
FILE NO/S:	CA No 316 of 2005 DC No 248 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	22 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2006
JUDGES:	McMurdo P, Fryberg and Douglas JJ Joint reasons for judgment of McMurdo P and Douglas J; separate reasons of Fryberg J, concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW - MISDIRECTION AND NONDIRECTION - GENERAL PRINCIPLES - where appellant was convicted of five counts of unlawfully and indecently dealing with a child - where the counts were based on complaints by two complainant children - whether appellant's legal representatives conducted his trial in such a way that a miscarriage of justice has occurred - whether appellant's legal representatives should have applied for a separate trial in relation to the complaints - whether trial judge erred in directing jury as to the use that could be made of one child's evidence in relation to charges relating to conduct against the other - whether trial judge erred in directing jury in relation to motives that complainant children may have had to make false allegations CRIMINAL LAW - APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - GENERALLY - where applicant was sentenced to two years imprisonment - where applicant did not press his application for leave to appeal against sentence if his appeal against conviction were to fail - whether his application for leave to appeal against sentence should be allowed

Mraz v The Queen (1955) 93 CLR 493, cited
Nudd v The Queen (2006) 225 ALR 161, considered
Palmer v The Queen (1998) 193 CLR 1, applied
Pfennig v The Queen (1995) 182 CLR 461, applied
Phillips v The Queen (2006) 224 ALR 216, applied
R v E (1996) 39 NSWLR 450, distinguished
R v G [1994] 1 Qd R 540, distinguished
R v O'Keefe [2000] 1 Qd R 564, cited
R v SAP; Ex parte A-G (Qld) [2005] QCA 284; CA No 51 of 2005, 12 August 2005, applied

COUNSEL: G P Long for appellant/applicant
T A Fuller for respondent

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

[1] **McMURDO P and DOUGLAS J:** The appellant was convicted on 28 October 2005 of five counts of unlawfully and indecently dealing with a child. The first three counts related to a girl aged under 12 years while the fourth and fifth counts related to her older sister, a child then aged under 16 years. There was an additional circumstance of aggravation in respect of count 1, namely that the younger child was under the appellant's care at the time of the offence.

Background facts

[2] The evidence on the first count was of an allegation that the appellant had put his hand down the front of the younger girl's pants when she was sitting on his lap on a chair at a computer screen at his residence. Her parents, who were friends of the appellant and his then wife, were not present but the appellant's daughter who was the same age as the complainant was in the same room at the time but playing at a computer on the other side of the room with her back to the complainant and the appellant. The complainant's evidence was that he put his hands "on the vagina area" but it is not clear from her evidence whether he put his hand under her clothing on this occasion or at some other time. There was also some inconsistency in her evidence about what year she was in at school when this event occurred.

[3] Count 2 related to an allegation that the appellant rubbed the complainant's chest area under her shirt one or two weeks after the incident referred to in count 1. Count 3 deals with an allegation that the appellant called the complainant into a room where she lay down on a bed next to him and he rubbed her chest area under her clothing. Again there were inconsistencies in the evidence about which year at school she was in when this event occurred. It was said to be after the incidents referred to in counts 1 and 2 and may have occurred on the same night as a New

Year's Eve street party. The complainant in respect of these first three counts was aged between eight and 10 during the period covered in the indictment. There was also evidence from this complainant which was the subject of a direction by the trial judge as to "uncharged acts".

[4] Counts 4 and 5 dealt with allegations by the second complainant, the older sister of the first complainant, of two occasions when the appellant rubbed first her chest and then her vagina. Each incident occurred when she was lying on a mattress in the room in which she was to sleep when her family were visiting the appellant's family over Christmas school holidays between 1999 and 2000 at one town and between 2000 and 2001 at another. On the first occasion the touching was on the outside of her clothes and on the second occasion under her clothing.

[5] The allegations came to light in 2004 when the first complainant spoke to her older sister, the second complainant, and both shortly afterwards told their mother.

[6] The second complainant telephoned the appellant on 1 August 2004 in a "pretext" call. During that call she asked the appellant why he touched her. The appellant made no admission of touching her, said that it should not be discussed over the phone and said that it was terrible that she felt so upset with it and suggested that she speak to her parents, which she had already done. He offered to speak to the complainant and her parents together.

[7] There were, however, admissions made to a witness who knew the appellant because his family sailed at the sailing club where her family sailed. He had lost the Blue Card qualifying him as suitable to work with children because of the allegations the subject of this case, told the witness of that and then went on to say that his loss of the card had nothing to do with the sailing club but that it happened about five years before. The woman's evidence was that he said these events happened in Townsville but the older complainant, about whose complaint the appellant seems to have been speaking, said that, although the complainants lived in Townsville, the offences occurred when the complainant's family was on holiday at the appellant's family residence at two separate towns distant from Townsville. The woman's recollection may have been confused about that detail, something that the appellant's counsel at the trial relied on to criticise her evidence generally. The witness's evidence was that he went on to say to her: "I've got a moral dilemma. I have to plead not guilty", to which the witness said something like, "Oh, you need to get counselling", and the appellant said something about, "Oh, there wasn't - there wasn't any penetration, just inappropriate touching". That description of the events was consistent with the complainants' evidence about what had happened.

[8] He also told this witness that the event had happened five years before and the girl was 17 now. That was then the age of the second complainant. He also described her as a friend of the family and said to the witness that "he had been waiting for a knock on the door for the last four years". He also said to her that "he had checked it out on the internet and that he'd found some information that said it was hard-wired into you" and he said that he thought his father had had the problem.

[9] In an interview with police the appellant admitted the association between his family and the complainants' family but denied any inappropriate touching of either girl but did say that he had "given them a pat on the backside" and "given them a cuddle". A passage of that interview went into evidence where he was asked why

the girls would make these allegations and he gave a speculative answer saying "there is a separation involved here" referring to his own separation from his wife. It was submitted that the admission of this evidence offended the decisions in *Palmer v The Queen* (1998) 193 CLR 1 and *R v SAP; Ex parte A-G (Qld)* [2005] QCA 284 at [14] and [29].

[10] The appellant gave evidence and challenged the accuracy of the witness who knew him through the sailing club by saying that she had taken things out of context, and specifically denied some aspects of her evidence. He only gave this evidence after the trial judge had pointed out to his counsel that he had failed to address that issue in the questions he asked in examination in chief.

Grounds of appeal

[11] The grounds of appeal argued included whether there had been a miscarriage of justice caused by the failure of the appellant's trial counsel to object to the joinder of counts 1 to 3 with counts 4 and 5 with the consequence that the jury were given directions that they could use the evidence of either complainant as "similar fact" evidence. The appellant's counsel's submission was that there should have been separate trials in respect of the allegations of each complainant.

[12] He also submitted there were several other errors by both trial counsel and the trial judge which, in combination, had caused a miscarriage of justice. The errors argued to have occurred were as follows:

- having cross-examined to challenge the specifics of the conversation alleged by the lady from the sailing club trial counsel erred by not leading any evidence from the appellant as to the conversations with that witness until prompted to do so by her Honour and even then only did so in a minimalist way which could only have created a poor impression with the jury as to the appellant's evidence;
- the trial judge gave directions to the jury which allowed (if not invited) them to reason on the basis that the appellant must have said something incriminatory to that witness for her to give the evidence she had given without identifying any particular statement and the basis upon which it could amount to an admission;
- the trial judge erred in instructing the jury that the evidence of that witness applied to both sets of charges when they were clearly referable only to the older sister;
- the trial judge erred by not giving emphatic directions to the jury about the need to be satisfied that that witness had reliably recalled precise detail, particularly in the light of her insistence that she recalled the appellant saying that it had happened in Townsville and her change of evidence about when her notes were made.

[13] The failure to excise the passage from the record of interview with the police dealing with what motive the appellant may have had to commit such offences was also criticised in conjunction with the direction by the trial judge dealing with that issue. We shall refer to it later.

[14] The "similar facts" direction given by the judge was also criticised. Again we shall return to it later.

Joinder of the two sets of charges

[15] In our view the charges were properly joined and the evidence of the complainants was cross-admissible. To adapt the language of the High Court in the recent decision of *Phillips v The Queen* (2006) 224 ALR 216 at [56], the similarities relied on for the joinder, which was not challenged below, were both striking and remarkable. The striking or remarkable features were that the accused was a friend of the complainants' parents, each complainant was a close friend of one of the appellant's daughters of a similar age and the accused touched the complainants in a non-penetrative fashion when another child was either in the room or, in respect of count 3, very close by.

[16] The behaviour of male teenagers, described in *Phillips* as "unremarkable", is a world away from the behaviour expected of a family friend who also, unusually, courted the risk of his behaviour being exposed, both because the complainants were known to him as the children of friends and by his fondling of the complainants in the vicinity of other children. The appellant's counsel characterised it as conduct which would lead the jury to doubt the sanity of the person doing it and asked them to compare that behaviour with the appellant's evidence in his police interview and in the court, inferentially on the basis that his behaviour in those circumstances suggested that he was a person unlikely to behave in this fashion: see the supplementary record, SR 78 ll. 1 - 26 and SR 81 ll. 1 - 26.

[17] In our view his behaviour, as described by the complainants, possessed underlying unity and formed a specific connexion with the offences charged because of the real risk that the appellant ran of his conduct being revealed in unusual circumstances, a pattern of behaviour which gave significant cogency to the prosecution case: see *Pfennig v The Queen* (1995) 182 CLR 461, 485 and *Phillips* at [54]. The plausibility of the complainants' stories was in issue because of the unusual circumstances in which the offences were said to have happened. The conduct of the defence case contributed to making it an issue. The fact that each complainant's evidence was similar in respect of that issue, the presence or propinquity of other children, was relevant to the probability of the complainant indecently dealing with a child while another child was nearby.

[18] It is also the case that the appellant's counsel at the trial raised the allegations by each sister in cross-examination of the other: see AR 162 ll. 4 - 60 and SR 39 l. 50 - 40 l.3. In his address to the jury he suggested the risk of the girls' stories having been similar because of the circumstances that they told each other about what had happened to them and then followed that up with the police afterwards: SR 67 ll. 1 - 10. See also her Honour's comments to the jury in her summing up at AR 119 l. 40 and AR 121 ll. 20 - 30. In those circumstances the conduct of the defence supports the view that the failure to object to the joinder may have been a tactical decision and that no miscarriage of justice resulted.

[19] Another issue was raised in respect of the question whether there had been a miscarriage of justice caused by the joinder of the charges. The evidence of the younger complainant was criticised for its lack of specificity, particularly in respect of her age and the year at school she was in when the events occurred. There was some inconsistency in her evidence in respect of those issues. She also gave evidence of "uncharged acts" which was made the subject of a direction by her Honour. Because the evidence of the younger complainant was less particular than that of the older complainant, whose evidence was also supported by the admissions

to the lady at the sailing club, it was argued that this was a basis for separating the hearing of the charges.

[20] Where the younger complainant was a young child at the time of the alleged offences, the problem of lack of particularity is not unusual. In our view, however, it was one that the jury was capable of handling and a matter for them; the judge warned them of the particular difficulties consequent on the delay in reporting the allegations and that it would be dangerous to convict upon the testimony of either claimant alone unless after scrutinizing their evidence with great care in the light of the delay and the fact that they were children they were satisfied of its truth and accuracy. Where the charges were otherwise properly joined it was not a reason for severing the charges.

[21] One other feature of that issue was that the period during which the first three counts were alleged to have occurred was narrower than the evidence proved to be at the trial. It was submitted that, in the absence of an amendment to the particulars in the indicted charges as to time, her Honour glossed over these problems in her directions to the jury. Nothing was made of the issue at the trial and it seems clear that it would have been open to amend those particulars at any time and that no miscarriage of justice has occurred by reason simply of the failure to apply for such an amendment.

The "similar fact" direction

[22] Her Honour's "similar fact" direction read as follows:

> "Normally, they [the charges involving the two complainants] wouldn't be heard together; they would be two different trials, but they're allowed to be drawn together because the prosecution say that there is a striking similarity between the offences alleged against [the two complainants]. They say that the similarities are, they both had the same sort of relationship with the accused and that he was a friend of the father. They both occurred when the children were visiting the house. The prosecution say the nature of the touching is very similar in that it is, in both cases, non-penetrative, it's just touching on the outside; and that, I think on every occasion, it is alleged that there was some other child in the room, some other child or children in the room.
>
> And so, the way in which it can be used is this. I'll deal with [the younger complainant's] charges first. If you accept the evidence of [the older complainant] beyond reasonable doubt, what happened to her on the occasions she alleges, and if you are satisfied that the conduct is strikingly similar, so strikingly similar, that as a matter of common sense, standing back and looking objectively at it, the only reasonable inference is that the same sequence of events occurred on the occasions [the younger complainant] talks about. If you are satisfied of that then you might proceed on the basis that there is no other reasonable inference other than that he committed the offences on [the younger complainant].
>
> And it works the other way. If you find that the offences in [the older complainant's] case, that the things [the younger complainant] talked about happening to her, were so strikingly similar that it's a matter of standing back and looking at it objectively and the only

> reasonable inference to be drawn is that he committed the offences on [the older complainant].
>
> So, the qualification is you have got to find that they are strikingly similar on the basis of the things the Crown has pointed out and accept the evidence, beyond reasonable doubt, the evidence of the particular child. That is the way you can use it.
>
> What you must not do is say, 'Well, there's two of them making the allegation, therefore, it must be true.' It is not as simple as that. And that is why the cases are generally not heard together, so that that reasoning does not occur. So, that is impermissible reasoning."

[23] That direction was criticised as capable of suggesting that there was something special or exceptional about this evidence because the prosecution says there is a striking similarity and the submission was made that such an introduction is not part of the model direction in the Benchbook No 50.2. Counsel for the appellant also submitted that her Honour erred by failing to give a direction, in this context, warning against mere propensity reasoning and as to the need to ignore the evidence unless satisfied that "the only reasonable inference is that the same sequence of events has occurred on the other occasions".

[24] Although the model direction in the Benchbook does not include an introduction of the type criticised, it is not inaccurate or impermissible to say that the prosecution claimed there was a striking similarity between the two sets of offences. It is not a ground for allowing the appeal.

[25] There was also a direction against mere propensity reasoning given in the last two paragraphs extracted above. Her Honour did not use the words of the model direction: "If you are not satisfied of that, you should put the evidence out of your mind. It would be entirely irrelevant to this case and it would be wrong to use it against the defendant." She did instruct the jury in respect of each complainant, however, that, if they were satisfied that the conduct was so strikingly similar that the only reasonable inference was that the same sequence of events occurred in respect of the other complainant, then they might proceed on the basis that there was no other reasonable inference than that the appellant committed the other offences. Her Honour also said that the jury had to accept "the evidence of the particular child" beyond reasonable doubt.

[26] It has to be borne in mind that the model direction in the Benchbook is said to be based on the decision of this Court in *R v O'Keefe* [2000] 1 Qd R 564. That decision's departure from the reasons of the High Court in *Pfennig* was criticised by the High Court in *Phillips* at [59] - [64]. When one examines *Pfennig* at 482 - 485 it is clear that the majority decision of the Court focuses on the admissibility of propensity evidence as a special class of circumstantial evidence and requires the judge when considering its admissibility to apply the same test as the jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused: see at 482 - 483 in particular.

[27] Her Honour's direction requiring the jury to examine whether the only reasonable inference is that the same sequence of events occurred in respect of the other complainant is consistent with the normal test for a jury's use of circumstantial evidence. She also told the jury that it was impermissible reasoning to say "[w]ell,

there's two of them making the allegation, therefore, it must be true". It seems to us that the effect of that statement is similar to the prescription in the Benchbook that the jury must not proceed on the basis that if they thought the accused had committed the other offences he was being generally the sort of person who might or even would commit this event. Her Honour also warned the jury to take care not to be prejudiced by the nature of the allegations (sexual offences against children) which naturally excite emotion and to approach their task analytically and dispassionately. These directions were reinforced by additional directions of her Honour to the effect that if they had a reasonable doubt concerning the truthfulness or reliability of one complainant's evidence on one or more counts, that must be taken into account in assessing the truthfulness or reliability of her evidence on the other counts and generally.

[28] There does not seem to us to be a miscarriage of justice stemming from this part of her Honour's direction to the jury.

Admissions to the lady from the sailing club

[29] The intervention by her Honour to ensure that defence counsel led evidence of the defendant's version of the conversation with the lady from the sailing club is unlikely, in our view, to have led to a miscarriage of justice. In the record, AR 62 ll.17 - 28, the following passage appears:

> "Her Honour: Well, what about the rest of her evidence? Did you say the things she said you said to her? Not a Browne and Dunne here?
> Mr Farrell: Yes, all right.
> Her Honour: What do you say about the rest of her evidence? Is that accurate? -- Oh, certainly - look - some - look, everything was taken out of context. Or in - at different times, and she's put it together in different places. It doesn't make sense, at all."

[30] Defence counsel then began to ask questions about the conversation which consisted essentially of the appellant denying the incriminating statements alleged against him. There is no miscarriage of justice in that sequence of events. It could have been better handled by the defence counsel but her Honour's intervention rapidly overcame the problem.

[31] Her Honour's direction to the jury quoted the relevant evidence of the lady from the sailing club which included the relevant admission of inappropriate touching of the older complainant in a form that was quite explicit enough not to require further identification by her Honour.

[32] Her Honour, initially, at AR 92 l. 40, said that the evidence of this witness applied to both sets of charges but later, at AR 117 l. 49, corrected herself in a way that made it clear that the lady's evidence must have referred to the older complainant. Her Honour's directions about this witness's evidence also emphasised that the jury needed to be satisfied about its reliability and accuracy and she reminded them of defence counsel's criticism of her recollection and the fact that the notes that she relied upon to assist her memory were made two months after the events: AR 107 ll. 20 - 40 and AR 118 - 119.

Evidence of motive

[33] The respondent conceded that the trial counsel erred in allowing the passage at AR 205 l. 49–AR 206 l. 5 into evidence. That was the passage where the investigating police officer asked the appellant: "Why would the girls make these allegations? Have you got any reason you can think of, why they've made them?" If an admission is made in answer to such a question then the question and answer may be admissible: *R v SAP; Ex parte A-G (Qld)* at [14] - [18], [19] - [20]. In the absence of such an admission, however, the question and answer are irrelevant as not probative of an issue and inadmissible as having a prejudicial tendency to confuse the jury about the onus of proof: see *Palmer* and *R v SAP; Ex parte A-G (Qld)* at [13].

[34] Here no relevant admission was made in answer to the police officer's question. The full passage reads as follows:

> "Why would the girls make these allegations? Have you got any reason you can think of, why they've made them? -- They're - look, they're good kids. They're a lovely family. I couldn't - look - but there is a separation involved here. I'm not saying there's any cause or - I don't think there's any bitterness, but - you know. I don't know, I don't know.
> What separation are we talking about here? -- My wife and I. You know, they're -----
> How does that relate to the question I asked you? -- I don't know, I'm not sure. I don't know. I would have to be stabbing in the dark. I would have to be stabbing in the dark."

[35] Defence counsel however made no application to exclude this evidence. The trial judge therefore made no ruling and so has not erred in law. This ground of appeal will only be successful if the admission of the evidence has resulted in a miscarriage of justice. That passage was a very brief interval in an interview of about 45 minutes. In the videotape of the interview there is no significant difference in the appellant's presentation when answering those questions compared to other questions he answered. Generally speaking the appellant presented as calm and co-operative if slightly hesitant or subdued from time to time. The question is whether her Honour's direction to the jury was sufficient to neutralise the issue and "prevent the impropriety of asking the question from causing justice to miscarry": see *Palmer* at 9, [8]. This is what her Honour said on the topic:

> "He said his client is unable to point to a motive. Now, this is true, because motives are in somebody else's head. But even if you think that no motive for these two girls to come and make false allegations has been made out, you do not go from there and leap to an immediate conclusion of guilt. You have got to look at the evidence to decide."

[36] The submission was that that direction should not have been given but rather the trial judge should have given a clear and emphatic direction that such considerations were completely irrelevant and that she should have emphasised the onus of proof on the prosecution by reference to *R v G* [1994] 1 Qd R 540.

[37] Here, unlike the situation in *Palmer*, the question and answer were said in an out of court interview recorded on videotape played to the jury. They were not part of any

other evidence, including cross-examination. They were, in fact, only referred to by defence counsel in his address at SR 65 l. 35 - SR 66 l. 13 where he said:

> "Now, one of the questions that was asked by the police officer in the record of interview - and I'm not purporting to give his words exactly - but it was words to this effect, 'Why would the children say this if it's not right?' Why indeed? Members of the jury, one can only, in my submission, reply in this way, who'd know? People do things for any number of reasons, or without a discernable reason. We don't always know why people have done things.
>
> However, the important thing to remember about a question of that nature is this, there is no onus on [the appellant] to explain why the children have said it. The fact that [the appellant] doesn't even attempt to explain why the children might say it, you may recall that he was stumbling for words when he was asked that by the police officer in the record of interview. He was unable - he - unable to put forward any reasonable answer as to why the children might say it. And how would he be able to? He can't get inside their minds, he can't know why they've said something. All he can say is what he said, 'I don't really know why they'd say it' whether it's - if it's not true.
>
> So, members of the jury, I'd ask you, please, to not hold anything of that nature against [the appellant]. The fact that he can't give any sort of response as to why the children might say it if it's not right. (1) he's not obliged to; (2) he could hardly be expected to; and (3) the fact that he can't doesn't add, in my submission, to the veracity or believability of what the children are saying. How would he know? He wouldn't know. There may not be a reason and if there is, he's certainly not going to know it or know it with any degree of accuracy. He can only surmise, that's about all he could really do, you might think, members of the jury, if he was to make any sort of reply to the police officer in regard to a question like that."

[38] Her Honour's direction did not misstate the onus or highlight the issue, unlike the situation in *R v G* or *R v E* (1996) 39 NSWLR 450. Rather, she told them that: "even if you think that no motive for these two girls to come and make false allegations has been made out, you do not go from there and leap to an immediate conclusion of guilt. You have got to look at the evidence to decide."

[39] Those words should have focussed the enquiry back to the evidence of the conduct alleged against the accused but it is troubling that no clearer direction about the irrelevance of the evidence of lack of motive was given. Defence counsel in his address did, however, point out that he was not obliged to provide any response and that he could not be expected to do so. The prosecutor in his address did not place any reliance on the complainants' absence of motive to make false allegations against the appellant.

[40] In the context set by her Honour's earlier, orthodox directions about the onus of proof at AR 92 - 94, 97 - 100 and 114 - 117, however, and concerning the elements of the offences that required such proof, the lack of cross-examination or reliance by the prosecutor on the passage in his address and the submissions made by the defence counsel about how it should be treated, there is little to support the view that a miscarriage of justice occurred because of the admission of the evidence.

[41] Apart from the evidence of the two complainants, the case was strengthened significantly by the nature of the appellant's admissions to the lady from the sailing club. She was an independent witness who did not know the complainants but her evidence was essentially consistent with the nature of the elder complainant's evidence with one divergence in respect of the location of the relevant events that, in the circumstances, would have been an understandable mistake.

[42] Here it can be said that the inclusion of this question and answer meant that the trial was not one where the rules of evidence were strictly followed: see *Mraz v The Queen* (1955) 93 CLR 493, 514. That failure has not deprived this Court of its capacity to assess the strength of the case against the appellant. The evidence was admitted without objection. The brevity of the passage in the trial, the direction about it by the learned trial judge, coupled with the submission in respect of how it should be treated by defence counsel, the absence of reliance on it by the prosecution and the many other careful and balanced judicial directions lead us to the view that the appellant has not thereby lost a chance which was fairly open to him of being acquitted: see *Nudd v The Queen* (2006) 225 ALR 161 at [6], [24] and cf. [83] - [87] and [100]. Nor is it our view that counsel's failure to object to this evidence was such an error or evidence of incompetence as to amount, without more, to a miscarriage of justice or a conviction that is unsafe when seen in the context of the treatment of the evidence otherwise in the trial.

Other matters

[43] Two other curious features of the hearing were that the defence counsel was absent on the first day of the hearing when recorded evidence was played to the jury. The appellant appears to have been represented by other counsel, however, and there was little need for him to speak during that first day.

[44] Also, the prosecutor did not cross-examine the appellant when he gave evidence, an unusual feature of the case perhaps prompted by the fact that the appellant had already, in his evidence in chief, denied matters that might have been put to him by the prosecutor. No attempt was made by the defence counsel to seize on that omission to argue to the jury that the prosecution must, therefore, have accepted the appellant's evidence. Nor was anything said about it by the trial judge in her directions to the jury. It seems to us that this feature of the case can only have worked to the advantage of the appellant and does not, in itself, provide a reason for concluding that a miscarriage of justice occurred.

[45] The matters raised by the appellant, alone or collectively, do not warrant the allowing of this appeal against conviction.

Orders

[46] The appellant did not press his application for leave to appeal against sentence should the appeal against all his convictions fail. In our view, therefore, the appeal against conviction should be dismissed and the application for leave to appeal against sentence refused.

[47] **FRYBERG J:** The first ground argued by the appellant was:

> "2. By reason of the failure of the appellant's legal representatives to make application for a separate trial, a miscarriage of justice has occurred."

The appellant did not specify at what stage of the trial the legal representatives should have made the application, but from the tenor of the argument on the appeal, I infer it was at the start of the trial. The miscarriage identified by the appellant was "that the jury were given directions that they could use the evidence of either complainant as 'similar fact' evidence and in this way, as being probative of the allegations made by the other complainant". The giving of that direction was said to be consequent upon the failure to make application for a separate trial. It was submitted that any such application would have been granted because it was not open to the jury to use the evidence in this way.[1]

[48] I am content to assume that if it was not open to the jury so to use the evidence, separate trials would have been ordered if sought. However for the reasons advanced by my colleagues, I am satisfied that it was proper to use the evidence of each complainant in relation to the charges laid in respect of the other complainant. Consequently, ground 2 must be rejected.

[49] I prefer to express no concluded opinion on the question whether there would have been a miscarriage of justice had I been of a different view regarding the "similar fact" evidence. As my colleagues have observed, it is possible to discern some tactical advantages which accrued to the appellant as a result of the joinder of the charges. It is debatable whether the facts that those advantages existed and were exploited are sufficient by themselves to found an inference that their existence was the reason why no application was made. However it should be noted that the appellant made no allegation of incompetence on the part of his trial barrister (he submitted only that an incorrect decision had been made); and he made no attempt to lead evidence from that barrister on the appeal to demonstrate that the barrister had no reasonable basis for his decision. In such circumstances, a finding that there had been a miscarriage of justice would be unlikely, even if it were found that an application for separate trials should, if made, have been granted. (I would reject the appellant's submission that this approach is inconsistent with the decision of the High Court in *Nudd v The Queen.*[2])

[50] The appellant advanced an alternative argument in relation to ground 2. He submitted

> "that it is now apparent that the Trial Judge should have ruled that the evidence of the complainants was not cross-admissible and ordered separate trials in respect of the allegations of each complainant pursuant to s 597A of the Code."

The judge raised the question of what ruling she should give with counsel after the evidence had closed. Counsel for the Crown submitted that the question of cross-admissibility should be addressed and (in effect) that the evidence was cross-admissible as similar fact evidence. Her Honour said that the jury would still have to be directed that before they could use the evidence of either complainant in relation to the charges relating to the other, they would have to accept the evidence of the former beyond reasonable doubt. Both counsel expressly agreed. Defence counsel did not submit that the evidence was not cross-admissible, nor did he seek any such redirection after the summing up.

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1 See *De Jesus v The Queen* (1986) 68 ALR 1; (1986) 22 A Crim R 375, and *Hoch v The Queen* (1988) 165 CLR 292.

2 (2006) 225 ALR 161; [2006] HCA 9.

[51] Again, it is unnecessary to consider what would have been the position had the evidence not been cross-admissible. The conclusion that it was disposes of this argument. I note however that it would not be possible to argue that counsel's failure to challenge the use to be made of the evidence could not in this case be explained as a deliberate decision in furtherance of the tactical advantages referred to above. By this stage of the trial, the advantages had already accrued; an objection would not have negated them.

[52] By ground 3 the appellant challenged the terms of the direction given by the judge. I agree with the reasons and conclusions of my colleagues on this ground, although I think the direction would have been improved had the judge told the jury they must not proceed on the basis that if they thought the accused had committed the other offences, he was generally the sort of person who might or even would commit this offence.

[53] As to the appellant's criticism of her Honour's comments regarding the evidence of the lady from the yacht club, I agree with my colleagues that her Honour said all that was necessary. In view of the somewhat dogmatic flavour of the lady's evidence, a slightly stronger observation would have been open; but the precise phraseology was a matter of judgment and style. Her Honour made no error.

[54] In relation to all other grounds of appeal, I agree with the reasons of my colleagues. I also agree with the orders which they propose.