SUPREME COURT OF QUEENSLAND

CITATION:	*R v Winchester* [2011] QCA 374
PARTIES:	**R** **v** **WINCHESTER, Barry David** (applicant/appellant)
FILE NOS:	CA No 6 of 2011 CA No 74 of 2011 DC No 2641 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2011
JUDGES:	Muir and Chesterman JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction be allowed but only to the extent now specified.** **2. The convictions in respect of counts 5, 7, 8, 15, 17, 20 and 24 be set aside.** **3. There be a retrial of those counts.** **4. The application for leave to appeal against the sentence imposed for count 29 be allowed.** **5. The sentence imposed in respect of count 29 be set aside and the re-sentencing proceeding in respect of that count be remitted to the District Court to await the retrial of counts 5, 7, 8, 15, 17, 20 and 24 unless otherwise ordered by this Court or a judge of the District Court.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of 21 sexual offences against a female complainant child including six counts of rape and one count of maintaining a sexual relationship with a child – where the appellant was acquitted of eight sexual offences against the complainant including one count of rape – where the primary

judge attributed the jury's differing verdicts to their exercising caution where there was some evidence capable of casting doubt on the complainant's recollections – whether the verdicts of acquittal were inconsistent with the guilty verdicts

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – where the appellant raised additional matters on appeal which could have been, or were in fact, raised at trial – where the appellant argued that these additional matters established that the complainant's evidence lacked credibility – whether having regard to all of the evidence the jury could be satisfied beyond reasonable doubt of the appellant's guilt

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – CONSENT – GENERALLY – where the appellant on a number of occasions allegedly promised the complainant a horse in return for sexual intercourse – where there was evidence that the appellant threatened the complainant with violence on other occasions prior to intercourse – where the primary judge in his summing up directed the jury on the relevance of the threats and promises to the issue of consent – whether the primary judge erred in directing the jury on consent – whether the complainant's consent was freely and voluntarily given

Criminal Code 1899 (Qld), s 348, s 349, Ch 32, s 668E(1A)
Evidence Act 1977 (Qld), s 21AK, s 93A

Cleland v The Queen (1982) 151 CLR 1; [1982] HCA 67, cited
Collins v R (1980) 31 ALR 257; [1980] FCA 72, considered
Director of Public Prosecutions (NT) v WJI (2004) 219 CLR 43; [2004] HCA 47, cited
Holman v The Queen [1970] WAR 2, considered
Ibbs v The Queen [1988] WAR 91, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, considered
MacPherson v The Queen (1981) 147 CLR 512; [1981] HCA 46, cited
Meissner v The Queen (1994) 184 CLR 132; [1995] HCA 41, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, considered
Michael v The State of Western Australia (2008) 183 A Crim R 348; [2008] WASCA 66, considered
Papadimitropoulos v The Queen (1957) 98 CLR 249; [1957] HCA 74, considered
R v BAS [2005] QCA 97, considered

R v Clarence [1886-90] All ER Rep 133; (1888) 22 QBD 23, considered
R v Ford [2006] QCA 142, cited
R v Kirkman (1987) 44 SASR 591, considered
R v Lee (1950) 82 CLR 133; [1950] HCA 25, cited
R v Williams [1923] 1 KB 340, distinguished
Tonkiss & Anor v Graham & Ors [2002] NSWSC 891, considered

COUNSEL: The applicant/appellant appeared on his own behalf
B J Power for the respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA: Introduction** The appellant was convicted after a four day trial in the District Court of four counts of indecent treatment of a child under 16 (counts 4, 18, 23 and 25), two counts of unlawfully procuring a child under 16 to commit an indecent act (counts 3 and 10), six counts of rape (counts 5, 7, 8, 15, 20 and 24), two counts of common assault (counts 9 and 19), two counts of carnal knowledge of a child under 16 (counts 11 and 13), one count of attempted rape (count 17), three counts of attempting to unlawfully procure a child under 16 to commit an indecent act (counts 14, 26 and 28) and one count of maintaining a sexual relationship with a child (count 29).

[2] He was acquitted on two counts of unlawfully procuring a child under 16 to commit an indecent act (counts 1 and 12), three counts of unlawfully and indecently dealing with a child under the age of 16 years (counts 2, 6 and 16), one count of procuring a person not an adult to engage in carnal knowledge (count 21), one count of rape (count 22) and one count of wilfully exposing a child under 16 to an indecent video clip (count 27).

[3] The appellant was sentenced to 11 years and nine months imprisonment for count 29, to imprisonment for eight years for each of counts 5, 7, 8, 15, 20 and 24, five years for counts 3, 4, 10, 11, 13, 17, 18, 23 and 25, two years for counts 9 and 19 and three years imprisonment for counts 14, 26 and 28. All sentences were ordered to be served concurrently and 13 days spent in pre-sentence custody was declared time served under the sentences imposed. It was declared that the conviction for count 29 was a conviction for a serious violent offence.

[4] The appellant appealed against his convictions on the ground that, "The verdicts of acquittal and conviction are inconsistent between each other." In his outline of argument the appellant put forward a number of arguments outside that ground. They are addressed below. The appellant also seeks leave to appeal against the sentences on the grounds that they were manifestly excessive.

[5] The following table particularising the charges on the indictment was provided to the jury. The letters NG have been inserted to signify a verdict of not guilty.

Details of each charge

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Count	Date and Place	Offence	Comp Age	Details	Evidence
1 NG	On or about 9th January 2007	Indecently dealing with a child under 16 (procure)	12	The accused asked the complainant to "suck his dick" and she did so. This occurred at the stables.	Interview of complainant 15/08/08 Diary entry 9 January 2007
2 NG	On or about the 15th December 2007	Indecently dealing with a child under 16	13	On the way to the produce shop at Burpengary, the accused took photographs of the complainant child undressed and whipped her, and rubbed his penis on her back, and put his hand on her breasts.	interview of complainant 15/08/08 And interview of complainant 17/08/08 Diary entry 15 December 2007
3	On or about the 2nd February 2008.	Indecently dealing with a child under 16 (procure)	13	In the accused's car, parked near the beachfront near Brighton outside the Eventide Nursing Home. The accused told the complainant to play with his "private part" and she did so.	interview of complainant 17/08/08 Diary entry 2 February 2008
4	On or about the 5th February 2008.	Indecently dealing with a child under 16	13	At the accused's home, whilst watching television, the defendant started to put his hands down the complainant's pants. She told him to stop but he continued and rubbed her 'private part' with his hands and she pulled away.	interview of complainant 17/08/08 Diary entry 5 February 2008
5	On or about the 8th February 2008.	Rape	14	The complainant was at the defendants stables in Board Street, Deagon. He took her into the chaff room and made the complainant bend over while he put his 'dick' in her 'private part'. The	interview of complainant 17/08/08 Diary entry 8th February 2008

				defendant 'started moving his dick inside her'. The defendant hit the complainant across the face because she tried to move away.	
6 NG	On or about the 21st March 2008	Indecently dealing with a child under 16 (permit)	14	The complainant was at the defendants stables in Board Street, Deagon, in the chaff room. The defendant told the complainant to 'give him head' and she did so.	interview of complainant 17/08/08
7	On or about the 10th April 2008.	Rape	14	At the defendant's home, the defendant put the complainant on the bed and had sex with her.	interview of complainant 17/08/08 Diary entry 10th April 2008
8	On a date unknown between the 10/04/08 and the 14/04/08	Rape	14	The complainant stayed over at the defendants address for the weekend. The complainant watched television and was told by the defendant to go and lay on the spare bed. She went to sleep, and the accused later woke her up. He had sex with her using force.	interview of complainant 17/08/08 Interview of complainant 27/8/08
9 10	On a date unknown between 31/03/08 and the 30/04/08	Common assault Indecently dealing with a child under 16 (procure)	14	The defendant took the complainant out to Burpengary to visit a male named Steve. The defendant told the complainant to do a favour for Steve, and slapped her across the face. The defendant procured the complainant to touch Steve's "private part" a few times.	interview of complainant 15/08/08
11	Between 31/03/08 and the 30/04/08	Unlawful carnal knowledge	14	At the defendant's home, the defendant had sex with the complainant in the bed.	interview of complainant 15/08/08
12 NG	On or about 1st May 2008	Indecently dealing with a child under 16	14	The defendant picked the complainant up whilst she was waiting to go to	interview of complainant 9/8/08

		(procure)		school at the bus stop. He drove her to an area near Kallangur. He told her to "suck his dick" and she did so.	interview of complainant 15/08/08 interview of complainant 17/08/08 Diary entry 1 May 2008
13	On or about the 4th May 2008	Unlawful carnal knowledge	14	The complainant was at the defendant's stables in Broad Street, Deagon, in the chaff room. The defendant directed the complainant to undo her pants and pull them down, and to bend over and touch the ground with her hands. He put his 'dick' in her 'private part' and kept pushing.	interview of complainant 17/08/08 Diary entry 4 May 2008
14	On or about the 29th June 2008	Attempting to indecently deal with a child under 16 (procure)	14	The complainant was at the defendant's stables in Broad Street, Deagon. The defendant tried to kiss the complainant and tried putting his tongue in her mouth. He then pulled down his pants down and told the complainant to suck his 'private part'. He was wearing grey shorts and no shirt at the time.	interview of complainant 09/08/08 Diary entry 29 June 2008
15	On or about the 30th June 2008	Rape	14	The complainant was at the defendant's home. He threw her on the bed, pulled down his pants and pulled hers down too, and had sex with her using force.	interview of complainant 09/08/08 Diary entry 30 June 2008
16 NG	On or about 1st July 2008	Taking an indecent photograph of a child under 16	14	The defendant and his Phillipino girlfriend, Sam (complainant originally thought her name was Lynne), drove the complainant and another male, Liam out to the Burpengary District Riding School to do some photo work.	interview of complainant 09/08/08 Diary entry 1 July 2008

				The defendant and Liam told the complainant that they wanted to see some photos of her and Sam together. They suggested making a porno movie with Liam's video recorder and wanted the complainant to lick Sam's 'private part' and 'pash' her and 'finger' her. The complainant refused and the defendant told her she was so innocent. The defendant directed the complainant to take off her shirt and ride the horse topless. She refused initially but the defendant cut up her shirt with scissors so she complied. Numerous photos were taken of the complainant.	
17	On or about the 2nd July 2008	Attempted rape	14	The complainant went with the defendant to collect some horse feed. The defendant drove the [complainant] down the dirt track near the produce shop and stopped the car. He told the complainant to undress. He pushed her and put his private part near her front part for a minute, but could not achieve an erection.	interview of complainant 09/08/08 Diary entry 2 July 2008
18 19	On or about the 7th July 2008	Indecently dealing with a child under 16 Common	14	The complainant stayed the night at the defendant's home address. The complainant had fallen asleep on a bed in the spare room and woke to find the defendant touching her vagina under her underwear. She describes him as 'fingering her' on the top part of the vagina. She moved away. It was	interview of complainant 09/08/08 Diary entry 7 July 2008

		assault		1:00am and she couldn't go home. He got angry at her and punched her in the tummy. He kept trying to hug her.	
20		Rape	14	Later that night the complainant woke to find the defendant with his hands on her hips, his pants off and having sex with her from behind.	See above
21 NG	On or about the 11th July 2008	Procuring a person for carnal knowledge	14	The defendant took the complainant to the Gold Coast. He took her to Gary's house and told her that she had to do this favour. She was told to suck Gary's 'private part' which she did. She then allowed Gary to have sex with her without 'moving her legs or making him feel uncomfortable'. Whilst Gary was having sex with the complainant the defendant was in the room watching.	interview of complainant 17/08/08 Diary entry 11 July 2008
22 NG		Rape	14	After Gary had finished having sex with the complainant the defendant told her to lay down as it was his turn. The defendant put his 'dick' in her 'fanny', moved his hips up and down and told her that she better not 'f'ing' move or close her legs.	See above
23	On or about the 12th July 2008	Indecently dealing with a child under 16	14	The defendant put his hand up the complainant's shirt, felt her breasts and told her that they were a good shape and size.	interview of complainant 17/08/09 Diary entry 12 July 2008

24 25	Between 27/06/08 and 27/07/08	Rape Indecently dealing with a child under 16	14	The complainant was at the defendant's stables at 74 Board Street, Deagon, after she had been riding a horse 'Andriel', in the chaff cutting room. The defendant approached and put his 'dick' in her 'private part' and started to move back and forth. Some time either before or after this the complainant was in the chaff cutting room and the defendant entered and put his hand down her shirt and squeezed her breasts. He told her they were a good size and good shape.	interview of complainant 09/08/08 interview of complainant 17/08/08 Diary entry 4 July 2008
26	Between 27/06/08 and 09/08/08	Attempting to indecently deal with a child under 16 (procure)	14	The complainant was at Brighton beachfront where she intended to go for a swim. The defendant walked past and called her over. The complainant sat in the defendant's car on the passenger's side whilst the defendant sat on the driver's side. He grabbed her by the wrist and wanted her to feel his 'thing'. He moved her hand up to his groin and tried to get her to rub it.	interview of complainant 09/08/08 Diary entry 19 July 2008
27 NG	On a date unknown between the 31/12/06 and the 09/08/08	Wilfully exposing a child to an indecent video	12-14	The defendant showed a video clip on his phone to the complainant. The video clip consisted of an unknown female having sexual intercourse with a horse. The complainant said that the defendant also had photographs of strippers on his phone.	interview of complainant 17/08/08
28	On a date unknown between the	Attempting to indecently deal with a child under 16	12-14	The complainant was walking to Video 2000 to rent a DVD for either her mother or her brother. As	Drive around interview 23/08/08.

	31/12/06 and the 09/08/08	(procure)		she was walking past the Sandgate Bowls Club she saw the defendant and his friends drinking. The defendant told her to get in his car and he drove her down to the corner of Flinders Parade and Sixth Avenue. He asked her to suck his private part and she refused.	
29	Between the 31/12/06 and the 09/08/08	s 229B Maintaining a unlawful sexual relationship with a child	12-14	Between the 31st December 2006 and the 9th August 2008 the defendant maintained an unlawful sexual relationship with the complainant.	

The complainant's evidence

[6] The references to the diary in the particulars are to an exercise book[1] in which the complainant, who was born in February 1994, made handwritten entries, in respect of which she normally recorded a date. The diary was tendered during the evidence-in-chief of the complainant in a hearing under s 21AK of the *Evidence Act* 1977 (Qld).

[7] In the diary the complainant recorded in some detail dealings with the appellant. The first entry was 1 January 2007. The first entry alleging sexual misconduct was that of Tuesday, 9 January 2007. The other entries which record sexual conduct by the appellant in relation to the complainant were 15 December 2007,[2] 2 February 2008, 5 February 2008, 8 February 2008, 10 April 2008, 1 May 2008, 29 June 2008, 30 June 2008, 1 July 2008, 2 July 2008, 4 July 2008, 7 July 2008, 11 July 2008, 12 July 2008, 13 July 2008 and 19 July 2008.

[8] It seems unlikely that the diary entries were made contemporaneously. In a police interview on 27 August 2008 the complainant was asked why she made the entries. She said, "I don't know. 'Cos I was bored and [indistinct]." In response to another question by a police officer, "when did you write…in this diary", the complainant responded, "[a]ges ago…[c]an't remember". On another occasion she told a police officer that she kept the diary because of advice from someone that "maybe" she "should keep something about it so that [she] can remember." She also said at the time, "I did 'em because one day I was going to tell on Barry."

[9] The complainant's mother gave evidence to the effect that the diary entries were made by the complainant in August 2008[3] after police had visited her residence in connection with the theft by the complainant of some farrier's gear. She said that the complainant had told her, "Look, I'm doing this diary for the police."

[10] In the opinion of Mr Marheine, a forensic documents examiner, the diary was not written up on a daily basis but was probably written over a short period, say three to

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1 Record 1556.
2 Record 1567.
3 Record 264.

six days.[4] The entries for June 27 to July 2 were "consistent with being done at one writing session."

[11] Counsel for the appellant did not seek to have the diary excluded as the defence sought to discredit the complainant by demonstrating that some of the matters described by the complainant could not have happened on the diarised dates.

[12] The transcripts of five police interviews with the complainant were put in evidence under s 93A of the *Evidence Act* 1977 (Qld). They record detailed accounts of sexual acts allegedly perpetrated by the appellant on the complainant and support the allegations in the particulars.

[13] In the course of the five interviews, the complainant gave evidence that she met the appellant horse trainer when she "used to ride his horses for him down at the beachfront". The interviews are somewhat disjointed and it is difficult to put the incidents narrated by the complainant into any accurate sequence. In her first interview, the first act of sexual misconduct mentioned was an attempt by the appellant to get the complainant to "suck his private part". She said that she refused. She then spoke of an occasion on which the appellant made her lunch, threw her on the bed, pulled his pants down, took hers off and "hopped on" her. She said, "It really hurt" and that she, "started to bleed". On this occasion, according to the complainant, the appellant said that if she told anyone he had a gun and would kill her. He then, "started whipping the dog" with a stockwhip. That was not the only time, if the complainant's evidence is to be accepted, on which the appellant threatened her with dire consequences if she disclosed his wrongdoing. She said that on another occasion she was threatened with a whip when she refused to perform a sexual act and that on another she was actually whipped.

[14] The complainant spoke of occasions on which the appellant would become angry if she resisted his sexual demands. She said in her first interview that, "…if I didn't used to do the things he say he used to slap me round the face."

[15] On another occasion, the complainant said that when the appellant "yanked" her pants down she asked him to stop and he responded she wasn't going to stop him and that if she told anyone no one would believe her. The appellant then proceeded to have intercourse with her. She said, "…when I pull away he usually gets angry at me, I gave up." She spoke of another occasion on which when she woke up to find the appellant beside her feeling "her private part". When she moved away he "got angry…and punched [her] in the tummy." A little later in the same interview she said that she had gone to sleep again and, "Then I woke to him…[h]aving sex with me from behind."

[16] The foregoing should suffice to give something of the flavour of the complainant's account of her dealings with the appellant. The particulars contain an abbreviated summary of the acts relied on to support each count. Some of the circumstances relating to each count are discussed in more detail later.

The pretext telephone conversation

[17] In a pretext telephone conversation between the complainant and the appellant on 9 August 2008, the appellant said to the complainant words to the effect that he had sent his girlfriend, a young Philippino woman, home because the complainant was

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[4] Record 514 and 518.

going to come straight to his place. He said he wanted to be with the complainant. In response to the complainant's saying, "Because I'm a bit [too] young don't you reckon?", he said "Oh fuck. You know that didn't matter when we were having sex." The complainant said, "Pardon" and the appellant repeated his comment. The appellant had previously said:[5]

> "I was waiting for you yesterday honey";
> "Don't you want to be with me?"
> "Well, why don't you come here. Have you got a boyfriend?"
> "I have been waiting for you all this time";
> "Well don't you want to be my girl?"; and
> "Because I want to be with ya…because I bloody like ya. You know that."

The appellant's evidence

[18] The appellant gave evidence. He denied any sexual relationship or contact with the complainant. His evidence was to the following effect. He was a horse trainer by occupation. The first contact he had with the complainant was when she telephoned him to say she was "looking for work or looking to just be around horses". She said she was 22 years of age. She asked if she could come and have a look at the appellant's horses and she subsequently did that. The complainant asked if she could work for him and was told that she couldn't because he already had an employee. He said that on no occasion did the complainant ride his horse, Andriel, which the complainant claimed to have ridden, but that she turned up at the beach on one occasion and watched the horse being worked.

[19] The horse, Big Macca, which was referred to in the diaries, and significantly in the diary entry of 2 January 2007, was brought from Melbourne to Queensland by horse float on 24 March 2007. A copy of the invoice for the transportation costs was tendered. The appellant said he never promised Big Macca to the complainant. The horse was not his property. He acquired the red Fairlane referred to in the diary entry of 4 January 2007 on 24 December 2007. An invoice in respect of the purchase was tendered. He said that he did not meet the complainant until some time after 2 February 2007.

[20] In the course of the appellant's evidence, his wife's passport was tendered. It showed that she was a Philippino citizen who arrived in Australia on 29 April 2008 and departed Australia on 24 July 2008. He said in effect that when in Australia she barely left his side. He denied that the complainant had slept over at his house and that he had assaulted the complainant.

[21] He explained his damaging admissions in the pre-text telephone call as "just being stupid talk" because he had just finished celebrating at a hotel some winnings at the races.[6]

[22] The appellant's evidence that he saw the complainant only half a dozen or so times would appear to be inconsistent with this exchange in evidence-in-chief:[7]

> "All right. And just to give you an example of that, you said, 'I thought you wanted to be with me.'? – – [Complainant] – I said that. Explaining why, she was being severely beaten at home. She

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5 Record 1797 et seq.
6 Record, 453.
7 Record 450.

> often asked me if they could move in with me, she wanted to love me, she wanted to give me all the sex I wanted, she wanted to do this, do that, she just wanted to escape her home life...
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> I told her that this was not possible because I was in a relationship with Sam."

That evidence, although inconsistent with the complainant's rape allegations, could well have been regarded by the jury as supporting the complainant's evidence of regular sexual interaction. In so far as this evidence suggests that the complainant was infatuated with the appellant and anxious to leave home and reside with him, it was supported by the evidence of the complainant's mother.

[23] Ms O'Connor, a stable hand, gave evidence that she worked for the appellant in 2008 from early January to about mid-April. She said that she observed the horse, Anduril, doing track work every day and concluded that he was a "very difficult horse to ride". In her opinion an inexperienced person would not be permitted to ride the horse. She also said that she didn't see any young females coming to the stables from early January 2008 until some time in April 2008 or "over the Easter period" in that year.

[24] Mr Tidmarsh, a horse trainer, neighbour and good friend of the appellant gave evidence. Mr Tidmarsh spoke of an occasion on which he had invited the appellant to his house for an evening meal to celebrate a win at the races. He said that a young woman who he thought was aged "18 or 20, or so" came with the appellant and his son. He asked her where she worked and was told that, "She'd worked at a topless car wash and…a strip joint." Approximately three months after this occasion, he saw the same female sitting on the grass outside his house. Mr Tidmarsh said that it "would be criminal" to allow a person who wasn't a "very competent horseperson" to ride Anduril. It was not suggested by the prosecution that the young woman in question may not have been the complainant.

[25] The complainant's mother gave the following evidence. She was an experienced horsewoman who had won many prizes in riding competitions. The appellant went to riding school and "could hold her own" as a horsewoman but nevertheless was "in the beginners group" as a rider. She said that a person would need to be an experienced rider to ride a racehorse. The complainant informed her that she was in love with the appellant. "It was all over school books. And [she] would write notes that 'I love Barry' and so forth." The complainant told her that the appellant "was going to save her from her terrible life" and had said to her that, "Only she loved [the appellant]". The complainant had told her that the appellant had "taken her to the races and a promise of a Macca", explaining that Macca was a horse.

[26] The complainant's mother discussed with the complainant the entry in the diary:

> "Rape. Fuck everyone. I shall just kill myself, I'm no fucking good, just a fuck-up in the world."

[27] She said that the discussion was after the police had first spoken to the complainant and the complainant told her that it was none of her business, swore at her and said words to the effect, "I'm out of this shithole."

[28] The complainant's mother had a low opinion of her child's honesty and veracity. She said that she was "a liar" and had been expelled from one of her schools for stealing thirty mobile phones and $3,000 in foreign currency.

The primary judge's exploration of the differing verdicts

[29] In his sentencing remarks, the primary judge analysed as follows the reasons for the jury's failure to convict on some of the counts. Counts 1 and 2 were the earliest of the alleged offences. There was evidence, which the jury was entitled to accept, that the appellant did not have the horse Big Macca in his stables at the time of the offending conduct the subject of count 1. Consequently, the jury may not have accepted that the appellant promised the complainant the horse or that she had "developed a love for the horse at that time."

[30] There was also documentary evidence, which the jury was entitled to accept, that the appellant did not have the red Fairlane on 15 December 2007, the date on which the count 2 offence was alleged to have been committed.

[31] Counts 21 and 22 concerned an allegation of procuring the complainant for carnal knowledge at the Gold Coast and rape of the complainant by the appellant, also at the Gold Coast. There was documentary evidence that the appellant had attended the Magic Millions sales on the Gold Coast on the day in question, purchased horses and returned home in a vehicle driven by another race horse trainer. Those matters may have persuaded the jury that they could not be satisfied beyond reasonable doubt as to these offences. Consistent with the likely approach of the jury to counts 21 and 22, they did not convict on count 12 as, although the complainant alleged that she had been driven to the Caloundra races by the appellant, there was evidence that there was no race meeting at Caloundra on the alleged date of the offence.

[32] The primary judge said in relation to counts 1, 2, 21, 22 and 12:

> "In each case, the failure of the jury to convict is explicable by their exercising caution and acquitting when there was some evidence capable of casting doubt on her recollections."

[33] The acquittal on count 6 may have resulted from the absence of support for the alleged date of the offence in the complainant's diary entries and, because of uncertainty as to the date, the jury may have preferred to leave the subject conduct as conduct going to support the maintaining count.

[34] Counts 16 and 27 respectively concerned an indecent photograph taken of the complainant and exposing the complainant to an indecent video. No camera, photos or video clips were located at the appellant's residence when the police executed a search warrant on 9 August 2008. Nor did the police find any photos on the appellant's mobile phone or computer. The absence of such evidence was likely to have led to the acquittal on these counts.

The inconsistent verdicts ground – Consideration

[35] The contention advanced by the appellant was that, in effect, there can be no rational basis upon which the jury could have acquitted on the counts on which the appellant was acquitted while convicting on the remaining counts. Counsel for the respondent, who adopted the primary judge's reasoning, submitted that there was a clear difference in the evidence in respect of the two categories of offences. He referred to the following observations by the trial judge in his sentencing remarks:

> "Against this background, my view is that the jury generally did not accept your evidence and accepted beyond reasonable doubt the evidence of the complainant in relation to essential matters. However, in respect of counts 1 and 2, while they might have

> thought she was probably right about the nature of your conduct towards her, I consider they had a reasonable doubt about the conduct happening on or about the dates relied on by the Crown as particularised in the indictment. This is consistent with my view about other not guilty verdicts returned by the jury.
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> …
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> In each case, the failure of the jury to convict is explicable by their exercising caution and acquitting when there was some evidence capable of casting doubt on her recollections."

[36] After reviewing cases establishing principles applicable to inconsistent verdicts, Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*[8] extracted a number of general propositions, including the following:

> "3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:
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> > 'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.'
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> 4. Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries." (citations omitted)

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[8] (1996) 190 CLR 348 at 366-367.

[37] Their Honours then quoted, with approval, the following passage from the reasons of King CJ (Olsson and O'Loughlin JJ agreeing) in *R v Kirkman*:[9]

> "[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty."

[38] After quoting these remarks, their Honours said:

> "5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. 'It all depends upon the facts of the case.'
>
> 6. The obligation to establish inconsistency of verdicts rests upon the person making the submission." (citations omitted)

[39] The relevant principles were considered by the court in *MFA v The Queen* in which, after referring to *MacKenzie v The Queen*, Gleeson CJ, Hayne and Callinan JJ said:[10]

> "Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of

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9 (1987) 44 SASR 591 at 593.

10 (2002) 213 CLR 606 at 617.

> the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that system. A number of features of that context were emphasised in *MacKenzie*. They include the following. First, as in the present case, where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count. This will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part. Secondly, emphasis will invariably be placed upon the onus of proof borne by the prosecution. In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others. Thirdly, there is the consideration stated by King CJ in *R v Kirkman*, and referred to in later cases: it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only. And there may be an interaction between this consideration and the two matters earlier discussed." (citations omitted)

[40] For the reasons explained by the primary judge, the acquittal of the appellant on some counts and his conviction on others cannot be regarded as "an affront to logic and common sense" or indicative of confusion on the jury's part. As explained in the above discussion, acquittal on some counts does not indicate, necessarily, that the jury rejected the complainant's evidence. Also, each count involved a separate incident which was supported by an account or accounts given by the complainant in one or more of her police interviews. The jury were directed to consider each count separately and it would seem from their verdicts that they complied with the direction. The jury were entitled to consider some accounts of the complainant more compelling than others. For the reasons discussed below, the jury had good reason for rejecting the appellant's evidence as to the nature of his relationship with the complainant and for accepting her evidence of the existence of a sexual relationship. This ground of appeal was not made out.

The Appellant's further arguments

[41] Although the jury acquitted on counts 1 and 2 the appellant relied on the diary entries and other evidence of the complainant in respect of those counts in support of his argument that the complainant was lacking in credibility generally.

[42] The first reference in the diary to Big Macca was on 2 January 2007. There was a reference to the appellant becoming angry when the complainant "didn't do Big Macca's shoe right". The second reference to Big Macca was on "Tuesday 9th". The complainant wrote, "To day Barry told me to do him an favour for him and he promised me if I do Big Macca would be mine." The next reference to Big Macca was "April – 10th…let him do what he whant because Big Macca will be mine soon have sex again." The final reference to the horse was in the entry of "4 July". [2008] The first incident in relation to the horse, according to the diary, occurred before the horse's arrival in the stables, if the documentary evidence is to be accepted.

[43] The only reference to a "red fairlane" in the diary was in the entry of 4 January 2007 in which the complainant wrote, "bary asked if I would like to go to daybra with him in the Red fairlane when we got there we went down a bush rode and showed me the river that I had to go for an swim in while he took some photos…" The documentary evidence tends to show that the red Fairlane, which the complainant said was used on the trip to Dayboro, was acquired on 24 December 2007.[11] The count 2 offence was alleged to have been committed on or about 15 December 2007 and, of course, the diary entry assumed that the appellant was in possession of the car on 4 January 2007.

[44] The appellant raised the following additional matters which, for the most part, were matters which could have been raised on trial or which were, in fact, relied on by the appellant on the trial.

[45] In relation to count 15, which concerned a rape alleged to have occurred on 30 June 2008 at the appellant's house, the appellant drew attention to the complainant's evidence in her police interview of 9 August 2008. In the interview, the complainant spoke of an occasion on which the appellant took her to his house for lunch. She said that when he placed her on the bed, took down his and her pants and commenced to have intercourse with her, she complained that it was hurting but he persisted even though she had started to bleed. According to the complainant, the appellant "said something about virgins, you've got to love 'em." The complainant explained concerning this incident, "And it really hurt and I kept pushing [him] away and I told him not to…[a]nd he kept on doing it…[a]nd then I started to bleed…the blood went onto his bed or something and he called me a filthy bitch." In one of her interviews she said that she had been a virgin at the time. The incident was said by the complainant to have happened "probably a few weeks ago."[12]

[46] The diary entry of 30 June, which was linked with the incident in the particulars, relevantly states:

> "Went back to Bary's for lunch he pushed me on to his bed and undressed himself and took my pants and underwear off."

[47] The appellant queries how he could have had penile intercourse with the complainant on a number of earlier occasions as alleged if she was a virgin and

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11 Record 412.

12 Record, 1456.

bled, as she claimed, on 30 June 2008. The query has some substance. The complainant alleged at least four prior acts of rape or unlawful carnal knowledge and does not assert in respect of any of these that the intercourse resulted in bleeding. Whether such bleeding may have had a cause other than the tearing of the complainant's hymen was not explored with any witness but that explanation would seem unlikely having regard to the earlier acts of intercourse found by the jury to have taken place. Perhaps more importantly, the complaint's graphic accounts of this incident in her police interviews contrast with her matter of fact diary entry which does not even mention sexual intercourse.

[48] In relation to counts 18, 19 and 23, the appellant submitted that it was highly improbable that a young woman, maltreated as the complainant complained to have been, would continue returning to the person who perpetrated the maltreatment. He claimed also that the complainant's version of events in relation to count 26 was improbable. The offending conduct in respect of that count was alleged to have occurred on 19 July 2008, the date specified in the diary. In the complainant's interview of 9 August 2008, she said that she met the appellant when she was "down the beachfront going to go for a swim". The appellant called her over to his car, she got in and sat beside him. The appellant grabbed her hand and got her to rub "his private part". The appellant submitted that it was improbable that the complainant would be going for a swim on a mid-winter's day.

[49] Count 28 concerns an occasion on which, according to the complainant, when she was going to a video shop to pick up a video, she saw the appellant drinking with friends at a bowls club. The appellant drove her down to the beach where he asked her to suck his penis. She refused and was put out of the car. Her mother came and picked her up. The appellant submitted that the complainant's mother had no driver's licence or car thus falsifying the complainant's evidence. The complainant's mother was not asked in evidence-in-chief or cross-examination whether she had a car and/or a driver's licence. There was no evidence in that regard.

[50] The appellant complained that the primary judge would not permit the complainant to be made available for further cross-examination and thus denied him natural justice. During the cross-examination of the last prosecution witness, an issue arose as to whether the defence counsel should be permitted to cross-examine the witness, a detective who was the primary investigating officer in respect of the complainant's complaints, in relation to three matters:

- The complainant's involvement in the stalking of two women between 4 March 2009 and 29 July 2009 by the sending of inappropriate text messages and telephone calls;
- "General information" that the appellant had become fixated on a police officer from the Boondall Police Station and displayed what was described by defence counsel as behaviour similar to that displayed in relation to the appellant; and
- An allegation made to police by the complainant on 11 January 2010 that the appellant had seen her in the street, stopped his car in front of her, alighted and had taken photographs of her on his mobile flip phone. The police seized the phone and found no evidence of photographs on it. They did not pursue any further enquiries.

[51] The prosecutor did not oppose cross-examination in relation to the phone photographs incident. The primary judge accepted that the stalking incident was relevant to the complainant's credibility. However, his Honour did not accept that defence counsel had shown that the matter involving a Boondall police officer was relevant and ruled that no cross-examination on it was to be permitted.

[52] The primary judge did not make any ruling about the recalling of the complainant for further cross-examination. No request in that regard was made by defence counsel. There was some mention of the possibility of an application in that regard during argument in the course of which the primary judge observed that such an application would be "a difficult one to make". Defence counsel indicated his acceptance of that proposition. That exchange occurred in the context of an observation to the effect that a deliberate decision seemed to have been made not to cross-examine on the mobile phone picture incident prior to the pre-recording of the complainant's evidence.

The additional issues raised by the appellant in support of his appeal – Consideration

[53] Despite the primary judge's ruling, defence counsel did not cross-examine in relation to the stalking matter. He cross-examined briefly in relation to the mobile phone incident on 11 January 2010. There was no denial of natural justice or other error in relation to the disallowance of cross-examination on the topic of the complainant's alleged fixation on a police officer. It was not shown that the witness sought to be cross-examined, detective Bellotti, had personal knowledge of the matter and was capable of giving admissible evidence. No attempt was made to subpoena any other person to give evidence. Whether the matter had substance or relevance remains unknown.

[54] As the appellant pointed out, there are a significant number of matters which cast doubt on the accuracy of the complainant's evidence and on her credibility generally. According to her mother she was a thief and a liar. The complainant's evidence in relation to the diary entries was unsatisfactory. It is unlikely that the entries were made contemporaneously and it is likely that they were made in furtherance of an agenda: perhaps, as the complainant intimated on one occasion, to assist with a complaint against the appellant.

[55] The complainant stated in her interview of 17 August 2008 that she had been whipped so hard by the appellant using a little black whip "what they use to try and get the horses going" that she cried and her back bled. She said that she put cream on it at home but didn't tell anyone as she was scared. This incident was the basis of count 2. In her 15 August interview, she said that the appellant "got like a whip thing and he was tapping [her] on the back and stuff" and that he "whipped [her] back lightly." In the diary entry of 15 December, the complainant wrote "Bary pulled out a stock whip…made me undress and every time I said No He whipped me so hard my Back was Bleeding…" In these accounts the nature and severity of the whipping varied as did the instrument used to inflict it. It was thus not surprising that the jury acquitted on this count. The diary entry of 15 January 2007 also gives an implausible account of whippings with a stockwhip.

[56] There was no evidence that the complainant's back was scarred or marked in any way as a result of any whipping or from any other cause. Nor did a careful medical examination on 15 August 2008 reveal any trace of any wound or scarring resulting from the complainant's cutting of her "wrists with one of the blades that was sitting

next to" her. This was said in her interview of 9 August 2008 to have occurred after she rode Andriel on the beach and the appellant had had intercourse with her in the stables (count 24). Her evidence that she rode Andriel may also be thought unlikely having regard to the evidence that it was not only a racehorse but, according to Ms O'Connor, was a very difficult horse to ride. Ms O'Connor, an experienced stable hand, worked for the appellant from early January to about mid April 2008 when she looked after Andriel Monday to Saturday between 5.30 and 8 am. During that period she did not see any young female come to the stables.

[57] Some of the force of the appellant's complaints was dissipated by the jury's failure to accept him as a credible witness. The documentary evidence he produced in relation to when he first went to his training premises, the arrival of Big Macca and the acquisition of the red Fairlane is not conclusive in itself. The jury were entitled to conclude that the appellant's credibility had been destroyed by his explanations on oath of his admissions in the pretext telephone call. His assertions to and queries of the complainant in that conversation could be accepted by the jury as being frank and unguarded. They spoke eloquently of a sexual relationship which the appellant wished to continue.

[58] Conversely, when considering the complainant's evidence, the jury were entitled to conclude that her account of a history of sexual interaction with the appellant, including sexual intercourse, was strongly corroborated by the appellant's evidence. The complainant's evidence of being offered "Big Macca", implausible on the face of it, was corroborated by her mother's evidence. That the diary entries were unlikely to have been made contemporaneously, although calling into question the reliability of, particularly, the older entries, does not establish that what was entered was false. The jury were entitled to conclude that although the complainant was wrong in some matters of timing or detail, her account was fundamentally accurate. It was also open to them to reject all or part of the complainant's mother's evidence and, for that matter, to accept only part of the complainant's evidence.

[59] A particular matter which has caused me concern is whether the evidence was capable of establishing beyond reasonable doubt that the acts of sexual intercourse involved in the rape counts were non-consensual. The content of the pretext telephone call pointed to the existence of an established sexual relationship. If the evidence of the complainant's mother is accepted at face value, the complainant was either infatuated with the appellant or saw in him the prospect of her escape from an unhappy household. That would tend to suggest that the sexual activity, or at least some of it, was either consensual or that there was a possibility that the appellant may have mistakenly believed that the complainant was consenting.

[60] Although the diary entries contain references to threats by the appellant in the event that the complainant disclosed his misconduct and emotional distress on the part of the complainant resulting from her sexual activity with the appellant, there are few references to forced sexual acts. The entries do not contain clear assertions of compulsion or duress in relation to all of the incidents in which the rapes were alleged to have occurred.

[61] The diary entry of 9 January 2009 records the promise of Big Macca in return for the complainant's sucking the appellant's penis. The only threat referred to is a threat to kill the complainant if she told "the police or anyone". It would seem that the threat followed the sexual misconduct.

[62] The entry of 15 January 2007 records "…Bary pulled out a stockwhip and said he like…he made me undress and every time I said No He whiped me so hard my Back was Bleeding. So I undressed for him…" Here, the complainant alleges duress in the form of actual violence but the account is implausible.

[63] The entry of 5 February records "…He started to put his hands down my pants I told Him to stop but He did'nt, Why me All I want is to be with Horses I was thinking." The entry of 8 February records:

> "…He put his dick in my pravite part and stated movin his dick in side me then He hit me across the face because I moved away and said get fuck. I went Home."

[64] The entry on 10 April 2007 in its entirety is:

> "April – 10th went down to sandgate for mum – saw Barry in woolworths went back to his Place with him and let him do what he whant because Big macca will be mine soon have sex again."

[65] The entry of 4 May records: "locked in chaff room don't know why because I think I did not do what was asked of me to do." It is not apparent that this entry relates to any sexual activity.

[66] The entry of 29 June is:

> "Bary backed me up in Big Macca's stable and wanted me to suck his dick. I said no and he got Angry."

[67] The entry of 30 June, which is of relevance, has already been quoted. Other relevant entries are:

> "July 2nd went to pick up horse feed with Bary at Burbengary then have a bet on a horse he lost and got angry and took me down a dirt road and made me undress and bend off the car so he could take photos then He pused me in the bush and had sex with me and said Remember not to tell anyone or he would kill me because he is not one to fuck with
>
> …
>
> July 7th went down to stables and mucked out the stalls…woke up at barys house Bary was beside me trying to fell my pravite part But I got up and move away they Bary had sex with me from behind.
>
> July 11th – went whith bary to the Gold Coast he made me have sex with someone while He got money.
>
> 19th – saw bary down the beach tried to make me play with his dick"

[68] There is no reason to doubt that the jury was not alive to the evidentiary difficulties relied on by the appellant on appeal including the matters just discussed. Most of them were relied on by defence counsel. Some were referred to by the primary judge in his summing up.

[69] Having regard to the context of the pretext telephone call, a conviction on the maintaining count, the most serious of the counts, was almost inevitable. It seems from the acquittals that the jury approached their task conscientiously. Having regard to all of the evidence, I have concluded that, despite the unsatisfactory aspects of the complainant's evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

The summing up on consent

[70] One matter not raised by the appellant remains to be considered.

[71] After giving a conventional direction in relation to the meaning of "consent",[13] the primary judge told the jury:[14]

> "In this case the prosecution relies on evidence of the defendant using violence towards her on some occasions; of pushing her down, for example, on some occasions; by threatening her with death on some occasions; causing her fear in that way of bodily harm to her; by establishing control and authority over her; and by making false promises such as he would give her Big Macca if she complied with what he wanted her to do. The prosecution, of course, says it's irrelevant whether the defendant could give her Big Macca because he didn't own it. The point was he was promising that to her falsely to get her to comply with what he wanted her to do."

[72] The primary judge withdrew a direction given earlier that the requirements of s 348(2)(e) of the *Criminal Code* 1899 (Qld) would be satisfied by a promise to give the complainant Big Macca. In that regard, his Honour said:[15]

> "Now, on reflection, and having discussed the matter with counsel this morning, I've come to the conclusion that if you were to find beyond reasonable doubt that he did promise to give her Big Macca, that it is not something that comes within that particular paragraph, paragraph (e) that I just mentioned to you.
>
> *But the way in which you can regard that is this, given the way in which the Crown has put its case: that if you were satisfied beyond reasonable doubt that he promised to give her Big Macca and but for that promise she would not have consented to having carnal knowledge with him, or of him having carnal knowledge of her, then you would be entitled to conclude – it's a matter for you – that consent was not freely and voluntarily given*; or, given that the prosecution also puts its case, as you'll recall, that because of the combination of circumstances in the way in which he dealt with her by, for example, the allegations of slapping her and pushing her down and not accepting her when she said, 'No,' that that demonstrates that he was controlling her in such a way that her consent was not freely and voluntarily given.
>
> …
>
> In determining whether or not consent was freely or voluntarily given, you can look at issues about whether or not force was used, or there were threats or intimidation, or there was fear of bodily harm, or the exercise of authority over her, and you can also look at other circumstances, for example, did he act overall in such a way that he was seeking to exercise control over her, to the extent that any consent that she gave was not freely and voluntarily given, *and in considering whether the prosecution has proved whether consent was freely and voluntarily given, you can consider the claim that she*

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13 Record 878 and 879.
14 Record 879.
15 Record 918, 919 and 920.

> *makes that he promised her Big Macca if you're satisfied beyond reasonable doubt that he said that, and that but for the promise to give her Big Macca, she would not have given consent to anything that he did to her that involved having carnal knowledge of her*." (emphasis added)

[73] Later in his summing up, the primary judge returned to the effect of the promises given by the appellant to the complainant in respect of Big Macca. After referring to some of the complainant's evidence in that regard, his Honour said:[16]

> "The prosecution submits to you that he was saying these things to her so that he could gain her compliance in sexual acts that she would not otherwise have complied with. This is all part of the Crown's case that he was trying to exercise control over her to gain her compliance so that for that reason her consent to any acts that occurred was not free and voluntary.
>
> *As I have already said to you at the beginning of this morning, you would be entitled to take into account the alleged representation to her on a number of occasions about Big Macca if you were satisfied beyond reasonable doubt that that representation was made and you are also satisfied beyond reasonable doubt that if it was not for that promise she would not have complied with him to do the things that he wanted her to do, such as, for example, the events which are the subject of count 5 on the indictment*." (emphasis added)

That direction as to the relevance of promises in relation to Big Macca was repeated, in substance, subsequently.[17] On one of those occasions the jury were instructed as follows in relation to count 7:

> "As I say, you would also have to be satisfied beyond reasonable doubt that the prosecution has proved that if there was carnal knowledge it occurred without her consent freely and voluntary given and that they've negatived the defence of honest and reasonable but mistaken belief. When you consider that, you can take into account, specifically in relation to this matter, she says that she let him do it because he said if she did Big Macca would surely be hers. As I have said, you would have to be satisfied beyond reasonable doubt that he did say that to her and that if he did say that to her, that if it was not for this promise being made to her she would not have complied with his desire to have carnal knowledge of her on that occasion and to go along with that. He also said, according to her, if you accept this, not to pull away or push or close her legs on him, and that is also something you would be entitled to take into account."

[74] Section 348 of the *Criminal Code* 1899 (Qld) provides:

> "**348 Meaning of *consent***
>
> (1) In this chapter, ***consent*** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

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16 Record 981.

17 Record 984 and 990.

> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
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> (a) by force; or
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> (b) by threat or intimidation; or
>
> (c) by fear of bodily harm; or
>
> (d) by exercise of authority; or
>
> (e) by false and fraudulent representations about the nature or purpose of the act; or
>
> (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."

[75] For the purposes of Chapter 32 of the *Criminal Code* 1899 (Qld), "consent" means "consent freely and voluntarily given". A consent is deemed not to be freely and voluntarily given, and thus not to be a consent for the purposes of Chapter 32 of the *Code*, if obtained by one or more of the means or in one or more of the circumstances in s 348(2)(a) - (f). None of paragraphs (a) to (f), in which the Legislature has specified the more obvious matters which may interfere impermissibly with the giving of a consent, applies to the point under discussion, but subsection (2), which expressly provides that it does not limit subsection (1), does not purport to define exhaustively the circumstances in which a consent will be deemed not be free and voluntary.

[76] Counsel for the respondent argued, and I accept, that the words "freely and voluntarily" are everyday words of plain meaning. He submitted also that in each case it will be for the jury to decide on the evidence before them whether consent was "freely and voluntarily given". I also accept this proposition. I do not accept, however, and I did not understand that counsel for the respondent contended, that a consent would not be freely and voluntarily given, merely if it would not have been forthcoming were it not for the promise of a benefit or gift.

[77] In a discussion which I have found useful for present purposes, Campbell J in *Tonkiss & Anor v Graham & Ors*[18] collected a number of judicial discussions of the meaning of the words "freely and voluntarily". After referring to cases which considered the words "freely and voluntarily" in the context of: a confession in a criminal trial; a guilty plea; a solicitor's certificate completed on the signing of a guarantee and sexual offences, Campbell J observed:

> "Of course, given the vastly different contexts in which the judicial statements which I have just been quoting about when an act is free and voluntary have been made, one cannot expect to transfer those statements directly into the context of section 13 of the *Wills, Probate and Administration Act*. They serve, though, to remind one that the notion of acting *'freely and voluntary'* is one which has a relationship implicit in it. One acts *'freely and voluntarily'* when one acts free *from* circumstances constraining one's actions. The sort of circumstances which the cases I have quoted recognise as being ones which can, sometimes, result in action not being free and

[18] [2002] NSWSC 891 at paras [78], [79].

> voluntary included duress, intimidation, persistent importunity, sustained or undue insistence or pressure, harassment, force, threats, fear, fraud, being induced by a threat or promise or some offered advantage, undue influence, and being deprived of relevant information or advice. However, as the discussion and the quoted extract from *Meissner*[19] shows, the mere fact that an action occurs in a context where the actor is subject to one or more of these types of constraints, an action is not always sufficient, in itself, to lead to the conclusion that the actor has not acted freely and voluntar[ily]. One legal context in which one enquires whether an action is done *'freely and voluntarily'* might require the absence of a different range of constraining conditions to a different legal context in which one enquires whether an action is done *'freely and voluntarily'*. Or one such legal context might call for those factors to be weighted differently to the way they are weighted in a different legal context. Further, as the quoted extract from *Cleland* shows, whether an action is in fact not free and voluntary depends on the interaction of the constraining circumstances with the particular actor.
>
> As well, a person could fail to act *'freely and voluntarily'* for reasons which were to do with their own mental capacity or condition, rather than because of some constraining external circumstances. …"

[78] The point that it will be necessary in some circumstances to have regard to the particular characteristics of the person consenting to a sexual act, confessing or pleading guilty, as the case may be, was explained effectively by Brennan J in *Collins v R*:[20]

> "The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of the case upon the will of the particular accused."

[79] Those observations, although made by reference to confessions, appear to me to have general application to the question of whether a consent to sexual conduct was freely and voluntarily given. "Voluntarily" in the context of confessions has been equated with the exercise of free choice.[21] "Freely and voluntarily" has also been equated with the exercise of free choice in relation to pleas of guilty.[22]

[80] In *Meissner v The Queen*,[23] Brennan, Toohey and McHugh JJ, in discussing whether a guilty plea had been made freely and voluntarily, said:

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19 *Meissner v The Queen* (1994) 184 CLR 132.

20 (1980) 31 ALR 257 at 307.

21 *MacPherson v The Queen* (1981) 147 CLR 512 at 519, 520 per Gibbs CJ and Wilson J; *Cleland v The Queen* (1982) 151 CLR 1 at 5 per Gibbs CJ and *R v Lee* (1950) 82 CLR 133 at 149 per Latham CJ, McTiernan, Webb, Fullager and Kitto JJ.

22 *Meissner v The Queen* (1994) 184 CLR 132 at 142, 143, 159.

23 (1994) 184 CLR 132 at 143.

> "A plea made as a result of intimidation has not been made freely and voluntarily, and the court that acts on the plea has been misled and its proceedings have been rendered abortive, whether or not it ever becomes aware of the impropriety. For similar reasons, improper conduct of any kind that has the tendency to interfere with the accused person's right to make a free and voluntary decision to plead not guilty to a charge must be regarded as having a tendency to pervert the course of justice. ...
>
> It will often be difficult to determine whether conduct that falls short of intimidation but which has the tendency to induce an accused to plead guilty is improper conduct that interferes with the accused's free choice to plead guilty or not guilty. Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs.
>
> Conduct is likely to have the tendency to interfere with a person's free choice to plead not guilty, however, when the conduct consists of a promise or benefit that is offered in consideration of the accused pleading guilty. The difficulty in such cases is to draw the line between offers of assistance that improperly impact on the accused's freedom of choice and offers of assistance that are legitimate inducements. In most cases, that difficulty can be resolved by determining whether, in all the circumstances of the case, the offer could reasonably be regarded as intended to protect or advance the legitimate interests of the accused having regard to the threat to those interests that arises from the institution of the criminal prosecution."

[81] As the above discussion shows, not all pressure or inducements which influence an accused's decision to plead guilty may be unacceptable or illegitimate. There is no good reason to suppose that the position in relation to consenting to sexual conduct is different in this respect. Nor is there any reason to conclude that the words "freely and voluntarily" are not concerned with the exercise of free choice by the consenting person.

[82] Plainly, a person's giving or withholding consent to sexual conduct with another may be influenced by a great variety of factors and conduct on the part of that other person. A person's consent may be influenced, for example, by a belief engendered by words and/or conduct on the part of the other person that the other person is promising or offering: an enduring relationship; an engagement or marriage; jewellery; emotional support; a house for children of a previous marriage; financial assistance; a paid vacation; or a combination of those things. Putting aside the question of fraudulent promises, which does not arise having regard to the way the case was left for the jury, it cannot be supposed that, at least as a general proposition, there can be no free and voluntary consent where the consent is influenced by such a promise or offer which is part of normal social interaction.

[83] E M Heenan AJA in *Michael v The State of Western Australia*,[24] addressing a question of whether consent to sexual penetration induced by a fraudulent misrepresentation should not be regarded as "a consent freely and voluntarily given" for the purposes of the deprivation of consent in s 319(2) of the *Criminal Code* 1913 (WA), felicitously made a similar point:

> "Furthermore, it would be quixotic in the extreme for any person in the current age to ignore the inevitable, that there will always be, however unsatisfactory it may be from any moral viewpoint, many instances in which men or women engage in sexual intercourse with each other when that activity is preceded, and to an extent induced, by some form of deception such as 'I am not married'; 'I am not seeing anyone else'; or with false and exaggerated protestations of wealth, importance or status. Examples could be multiplied of promises being made which were never intended to be kept, and of facts or conditions concealed which, if revealed, would almost certainly lead to rejection. Conduct of this kind which I think can safely be said, has probably been common since the earliest times of recorded human history, however deplorable, has not previously been regarded as criminal, or at least so criminal as to justify a conviction for the most serious form of sexual offence prevailing from time to time. That is a powerful indication that such misconduct or deceit has not generally been regarded as criminal and it would be surprising indeed if, by such an indirect means, as the amendment to s 319(2) of the *Criminal Code*, Parliament had intended to effect such a far-reaching change to the law which is likely to affect and criminalise types of conduct which had not previously been treated as the most serious of the indictable sexual offences."

[84] The inducement arising from a promise or offer of the nature of those referred to in paragraph [82] above may be particularly strong, even, in a colloquial sense, irresistible, but, unlike the matters listed in s 348(2), the inducement would not normally be regarded as preventing the exercise by the promisee of free choice. It cannot be thought that Parliament, by the use of the innocuous language in s 348(1), intended to radically expand the circumstances in which very serious offences may be committed and to impose the severest of criminal sanctions in respect of such commonplace types of conduct.

[85] Whether the consent of a promisee entering into sexual relations after a promise or offer of the kind referred to in paragraph [82] above can be considered not to be "freely and voluntarily given" will depend on whether, having regard to the circumstances in which the promise or offer is made and characteristics of the offeree such as her intellect, maturity, psychological and/or emotional state, the offeree is to be regarded as not having exercised her free choice.

[86] In my respectful opinion, the vice in the primary judge's summing up was that it conveyed to the jury that they could find that the complainant's consent was not freely and voluntarily given if they found merely that the appellant promised the complainant the horse and, but for that promise, she would not have consented to his sexual conduct. The direction deflected the jury from giving due consideration to factors such as the surrounding circumstances, the complainant's age, maturity,

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[24] [2008] WASCA 66 at para 373.

mental acuteness and her psychological and emotional state, which might bear on whether a consent, which on the face of it and putting to one side the evidence of threats and violence was freely and voluntarily given, was not in fact so given.

[87] The summing up implicitly suggested to the jury that they should regard it as normal rather than exceptional that a promise of a gift or benefit in return for sexual favours would cause a consent induced thereby not to be freely and voluntarily given. In the circumstances of this case, it seems to me that the jury should have been instructed that the complainant's consent should not be regarded as not freely and voluntarily given, regardless of the strength of the inducement provided by the offer of the horse, unless in all the circumstances the complainant was rendered unable to exercise freedom of choice. It would have assisted had the jury been directed that in order to determine whether any consent was freely and voluntarily given, they had to focus on the effect of the promise or offer on the complainant's ability to exercise freedom of choice in circumstances in which the promise or offer was made and the offending conduct took place having regard to characteristics of the complainant such as those listed above.

[88] Focus on the matters I have mentioned was important also in the context of the consideration by the jury of whether the prosecution had negatived an honest and reasonable but mistaken belief on the part of the appellant that sexual intercourse was consensual. It is apparent that it will normally be more difficult for the prosecution to negative such a belief on the part of an accused where consent is alleged not to be free and voluntary because it was induced by a gift or the offer or promise of a benefit, than in the normal run of cases in which consent or its absence may be inferred from evidence of force, violence or intimidation, actual or threatened, or from evidence of a lack of physical or mental capacity.

[89] In respect of all of the rape counts (excluding counts 7 and 15) and the attempted rape count, there was evidence given by the complainant which, if accepted by the jury, would have entitled the jury to conclude that consent was not freely and voluntarily given. Even in the case of counts 7 and 15, the background to the offending conduct, including the respective ages of the complainant and the appellant, the evidence of the appellant's displays of anger, his making of threats and readiness to threaten may have been sufficient to enable the jury to conclude, as it did, beyond reasonable doubt without reliance on the promised gift of the horse.

[90] However, the basis upon which the jury's decision was reached on each of these counts is unknown. As earlier discussion shows, the complainant's evidence was not without its difficulties. The jury failed to accept the complainant's evidence on six counts as establishing guilt beyond reasonable doubt. Although, as the primary judge pointed out, the jury's rejection of some counts is capable, for the most part, of being explained by the existence of contradictory documentary evidence, there is evidence which calls into question the reliability of the complainant's version of events. That is particularly so in relation to the question of whether the acts of intercourse were consensual.

[91] Although it is perhaps unlikely, it is not possible to exclude the possibility that the jury based their findings of absence of free and voluntary consent on the directions in relation to the gift of the racehorse. That would have been a simple pathway to the verdicts of guilt on the rape counts which were returned after approximately four and a half hours deliberation at the end of a fourteen day trial in which the summing

up took in excess of three days. The guilty verdict in respect of count 20 is a possible exception to this conclusion. According to the complainant's evidence, penetration was effected when she was asleep. However, if there was an established sexual relationship in which consensual sex was taking place, the commencement of sexual intercourse in such circumstances may not require the conclusion that there was no free and voluntary consent. But, again, it is not possible for this Court to ascertain what parts of the complainant's evidence were accepted by the jury. This Court, not having seen or heard the witnesses, is not in a position to substitute its findings for those of the jury.

[92] For these reasons, the verdicts on the rape and attempted counts must be set aside.

[93] The verdict on the maintaining count is unaffected as the remaining guilty verdicts provide sufficient support for it. The sentence on the maintaining count, however, was based in part on the guilty verdicts on the rape counts and must be set aside. The appellant has appealed against sentence but his re-sentencing must await the outcome of further proceedings in respect of the rape counts.

[94] This is not a case in which it is appropriate to apply s 668E(1A) of the *Criminal Code*. I would order that:

(a) The appeal against conviction be allowed but only to the extent now specified;

(b) The convictions in respect of counts 5, 7, 8, 15, 17, 20 and 24 be set aside;

(c) There be a retrial of those counts;

(d) The application for leave to appeal against the sentence imposed for count 29 be allowed;

(d) The sentence imposed in respect of count 29 be set aside and the re-sentencing proceeding in respect of that count be remitted to the District Court to await the retrial of counts 5, 7, 8, 15, 17, 20 and 24 unless otherwise ordered by this Court or a judge of the District Court.

[95] **CHESTERMAN JA**: I agree with the orders proposed by Muir JA and with his Honour's reasons for dismissing the appeal against all convictions save those for rape. I agree generally with his Honour's reasons for allowing the appeal against those convictions but express some brief reasons of my own.

[96] Section 349 of the *Criminal Code Act* 1899 (Qld) ("Criminal Code") provides it is a crime for one person to rape another. By subsection 2:

> "A person rapes another person if –
>
> (a) the person has carnal knowledge with or of the other person without the other person's consent; or
>
> (b) … ."

[97] Section 348 defines consent. It means:

> "(1) … consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained –
> (a) by force; or
> (b) by threat or intimidation; or
> (c) by fear of bodily harm; or
> (d) by exercise of authority; or
> (e) by false and fraudulent representations about the nature or purpose of the act; or
> (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."

[98] The trial judge summed-up on the question of consent by reference to s 348, omitting s 348(2)(f) which was, of course, irrelevant. His Honour then noted:

> "So in order to prove … rape the prosecution must prove … that the defendant had carnal knowledge of (the complainant) … and … they must prove … that it was obtained without consent freely or voluntarily given … in that it was obtained by force or threats or intimidation, or by fear of bodily harm, or by the exercise of authority, or by false and fraudulent representations about the nature or purpose of the act.
>
> In this case the prosecution relies on evidence of the defendant using violence towards her on some occasions; of pushing her down … on some occasions; by threatening her with death on some occasions; causing her fear … of bodily harm … ; by establishing control and authority over her; and by making false promises such as he would give her Big Macca if she complied with what he wanted her to do. The prosecution … says it's irrelevant whether the defendant could give her Big Macca … . The point was he was promising that to her falsely to get to her to comply with what he wanted her to do."

[99] Counsel for the appellant sought a re-direction arguing that the case was not one in which consent could have been obtained by a misrepresentation as to the nature or purpose of the act of carnal knowledge and that it was confusing at best and wrong at worst to direct the jury's attention to s 348(2)(e). The trial judge accepted the submission and returned to the topic the next day. His Honour read s 348(2) and drew attention to paragraph (e). The summing-up continued:

> "Yesterday, I put to you that an example of (e) … was the promise to give the complainant Big Macca.
>
> Now, on reflection, and having discussed the matter with counsel … I've come to the conclusion that if you were to find beyond reasonable doubt that he did promise to give her Big Macca, that it is not something that comes within that particular paragraph, paragraph (e) … .
>
> But the way in which you can regard that is this, given the way in which the Crown has put its case: that if you were satisfied … that he promised to give her Big Macca and but for that promise she would not have consented to having carnal knowledge … then you would be entitled to conclude … that consent was not freely and voluntarily given … because of the combination of circumstances in the way in

> which he dealt with her by … the allegations of slapping … and pushing her down and not accepting … when she said, "No," that demonstrates that he was controlling her in such a way that her consent was not freely and voluntarily given.
>
> Again, you could take into account the promise in relation to Big Macca if you were satisfied … that but for that promise, she would not have consented in determining whether or not that was part of exercising some control over her … ."

[100] The trial judge later attempted a recapitulation of the topic of consent. In this passage the jury was directed that they could consider:

> "… the claim … that he promised her Big Macca … and that but for the promise … she would not have given consent to anything that he did to her."

[101] The initial direction was wrong. The complainant's consent to intercourse with the appellant, if she did give consent, would not have been vitiated if her consent was induced by the false promise, if it was false, to give her the horse. The only circumstance in which a false and fraudulent representation will vitiate consent is where the representation is "about the nature or purpose of the act" of carnal knowledge. The alleged false representation that the horse was his, or that he intended to make a gift of it, is not of that kind. Section 348(2)(e) could not operate to make the complainant's consent (assuming consent was given) something not freely and voluntarily given, and thus not consent as defined by s 348.

[102] Prior to July 1989 the definition of rape contained in the *Criminal Code* was:

> "Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by impersonating her husband, is guilty of a crime, which is called rape."

In 1989 the definition was amended to delete the requirement that the complainant not be the accused's wife, and "married woman" was defined to include a *de facto* wife. The section was again amended in 1997 to remove the requirement that the person carnally known without consent had to be female.

[103] In 2000 more substantial amendments were made to sections 348 and 349. For present purposes the more extensive changes were the requirement that consent had to be free and voluntary, and that the acts which could constitute rape were expanded beyond carnal knowledge.

[104] The effect of the amendments was to give "consent" a particular statutory definition different to everyday usage. Prior to the amendment consent to intercourse which was "hesitant, reluctant, grudging or tearful but … consciously permitted" was nevertheless consent which would prevent intercourse being rape. See *Holman v The Queen* [1970] WAR 2 at 6. Acquiescence or submission was tantamount to consent. The 2000 amendments to the *Criminal Code* requiring that consent be free and voluntary requires consent that is more than acquiescence and is not reluctant or grudging. See *Ibbs v The Queen* [1988] WAR 91; *Michael v The State of Western Australia* (2008) 183 A Crim R 348 at 360.

[105] In *R v BAS* [2005] QCA 97 Fryberg J (with whom McPherson and Davies JJA agreed) drew attention to the change to the concept of "consent" in the amended section. *BAS* was a case in which there were false and fraudulent representations about the purpose of the act in question, digital penetration. Fryberg J noted that:

> "[87] … [t]he amendment implemented … a recommendation of the Task Force (on women and the *Criminal Code*) [sic] that the list of circumstances vitiating consent be enlarged by the addition of a false and fraudulent representation as to the purpose of the act. … More importantly, the amendment … changed the effect of fraud … in the context of rape. Under the amended provisions, consent is given an artificial definition. The presence of one of the vitiating factors prevents what would otherwise be consent from the qualities necessary to satisfy that definition. … .
>
> …
>
> [90] There are some structural similarities between the definition of assault in s 245 of the Code and the definition of rape as it stood until 2000. Relevantly, the terms of the definition are satisfied if the act constituting the alleged assault occurred either without the consent of the person assaulted or with that consent if it was obtained by fraud. The effect of fraud is not to negate the existence of consent, but to render its existence irrelevant. … ."

[106] The common law and the Criminal Code as it was prior to 2000 drew a sharp distinction between the fact of consent and the motives for giving consent. Consent induced by fraud was regarded as consent. The only exception was where consent was induced by a fraudulent misrepresentation as to the nature of the act induced i.e. intercourse. The best known example is probably *R v Williams* [1923] 1 KB 340 in which a singing teacher induced an adolescent pupil to have intercourse by persuading her that the activity would improve her breathing and her voice projection.

[107] That part of the definition of rape which provided that consensual carnal knowledge was rape if the consent was obtained by false and fraudulent representations about the nature of the act remained untouched until the 2000 amendments which changed it only by adding "or purpose" to the subject matter of the representations which would make consent ineffective as a defence.

[108] The limited nature of the change to this aspect of consent was noted by McPherson JA in *BAS*. His Honour said:

> "[3] … By s 348(1), "consent" means consent freely and voluntarily given. Consent in this sense is excluded under s 348(2) if it is obtained:
>
> > "(e) by false and fraudulent representations about the nature or purpose of the act".
>
> This does not differ markedly from the original definition of rape in s 347 of the Code, which made it rape if the complainant's consent was obtained "by means of false and fraudulent representations as to the nature of the act". At the time the Code was enacted in 1900, there were already

> reported decisions on rape at common law in which the accused had succeeded in persuading a woman to consent to sexual intercourse by fraudulently representing that he was performing a medical operation or the like. … ."

[109] A good account of the prior law appears in the judgment of Steytler P in *Michael* at 361-2. His Honour referred at 323 to the judgments in *R v Clarence* (1888) 22 QBD 23 in which Wills J said (27):

> "If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."

In the same case Stephen J said (43-44):

> "… the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification … . Many seductions would be rapes, and so might acts of prostitution procured by fraud … . These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true … . The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done."

[110] The High Court took the same view in *Papadimitropoulos v The Queen* (1957) 98 CLR 249 in which the complainant woman (who spoke no English) consented to intercourse with the appellant having been persuaded by him that they had been married in the course of a visit to a Registry Office. The woman discovered they had not been married several days later when the appellant left. The man was convicted of rape but the convictions were quashed by the High Court. Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ said (260-261):

> "… the stress has been on the fraud. But that stress tends to distract the attention from the essential inquiry, namely, whether the consent is no consent because it is not directed to the nature and character of the act. The identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed. … It may well be true that the woman in the present case never intended to consent to the latter rerlationship. But, as was said before, the key to such a case as the present lies in remembering that it is the penetration of the woman's body without her consent to such penetration that makes the felony. The … felony was not directed to fraudulent conduct inducing her consent. Frauds of that kind must be punished under other heads of the criminal law or not at all: they are not rape. … To say that in having intercourse with him she supposed that she was concerned in a perfectly moral act is not to say that the intercourse was without her consent. To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical act of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape."

[111] The law as it was explained by the High Court in *Papadimitropoulos* was well known when s 348 was amended in 2000. Consent induced by fraud only vitiated the consent when the subject matter of the fraud was the nature of the act or the identity of the perpetrator. Ignoring the latter consideration, which is dealt with by s 348(2)(f), the only change made to the section was to add the "purpose" of the act to its "nature" as the subject matter of a misrepresentation which could render consent not free or voluntary. It did not otherwise change the law.

[112] Unless, therefore, consent to carnal knowledge was induced by a false and fraudulent representation as to the nature of the act, or its purpose, the fact that consent was induced by fraud will be irrelevant to the question of consent or no consent. The consent must have been free and voluntary but it will not be deprived of that characteristic because it was induced by fraud unless the subject matter of the fraud be that described in s 348(2)(e).

[113] Rape is a serious criminal offence the maximum penalty for which is life imprisonment. If the law is to be amended so as to expand the circumstances which are caught by the definition of rape the statute making the expansion must be clear and express in its terms. This point was made by Heenan AJA in his (dissenting) judgment in *Michael* at 372 referring to *Director of Public Prosecutions* (*NT) v WJI* (2004) 219 CLR 43 at 76. Section 348(2)(e) does not purport to alter the law save in the respect already noted.

[114] I do not overlook the requirement in s 348(1) that consent must be "freely and voluntarily given", or the circumstances enumerated in s 348(2) other than paragraph (e) the existence of which may deprive consent of the necessary character. I have limited my discussion to consent obtained by false and fraudulent representations because that is what is relevant in the present context.

[115] The particular definition of consent in the Criminal Code means that decisions on different statutory definitions are of limited, if any, assistance. The definition of consent found in s 319(2)(a) of the *Criminal Code* (WA) was:

> "… consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and involuntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means."

The definition gave rise to particular difficulty in *Michael* where the Court of Appeal was divided over whether the consent of two drug addicted prostitutes to intercourse with a man who falsely claimed to be a police officer and threatened them with arrest was freely and voluntarily given, or whether it had been obtained by deceit. The point required lengthy, indeed exhaustive, analysis and discussion. The case may properly be seen as one where the consent was not freely and voluntarily given because of threats and/or intimidation rather than deceit. The reasons contain much useful discussion but to the extent that the decision turned upon the concept of consent obtained by deceit it is unhelpful because of the specific, limited, role that fraud plays in affecting consent under s 348 of the *Criminal Code* (Qld).

[116] The first direction given by the trial judge was wrong. A false promise made by the appellant to give the complainant the horse Big Macca would not have rendered her consent to intercourse other than free and voluntary, if she had in fact given such consent. Having told the jury so, however, his Honour's second direction left the

jury with the same impression, the one he had tried to correct. The promise went only to motive and could only be indirectly relevant to finding whether the complainant consented to acts of carnal knowledge. The existence of a motive to consent may have lent weight to a finding that the complainant did consent. The evidence of the promise had no other relevance. The trial judge should have told the jury that in plain terms, if he thought the evidence of the promise should be mentioned at all. Instead he told them, wrongly, that the promise could make any consent which it induced other than "free and voluntary".

[117] The trial judge seems to have coupled the making of the promise with other, quite distinct, parts of s 348(2) and advised the jury to consider whether the combination may have made consent not free and voluntary. There was evidence that the appellant threatened the complainant with unpleasant consequences if she did not engage in sexual activity with him, and on occasions used or threatened force for the same purpose. Threats, intimidation and fear of bodily harm are factors which may deprive consent of its character as free and voluntary but it is impossible to see how the presence of a false promise of a gift can affect the existence and/or efficacy of those factors. Likewise, consent obtained by the exercise of authority may make consent not free and voluntary but it is equally difficult to see how the existence and/or efficacy of authority can be affected by the promise. On this point there was a further level of confusion. The trial judge spoke of "control" rather than "authority".

[118] The jury may well have been misled into thinking they could take the promise, if they thought it false, into account in determining whether the complainant's consent to acts of carnal knowledge was free and voluntary. That was wrong.

[119] I agree with Muir JA that there must be a re-trial on the counts of rape and that the sentence to be imposed from maintaining an unlawful sexual relationship must await the outcome of the retrial.

[120] **FRYBERG J:** I agree with what Muir JA has written in relation to the question of inconsistent verdicts. I find the explanation for the not guilty verdicts advanced by the judge at first instance convincing. This ground of appeal fails.

[121] The 12 verdicts of guilty returned by the jury must mean that the jurors disbelieved the appellant's evidence. In the light of his evidence regarding the pretext telephone call, that is not in the least surprising. They had been directed, correctly, that in such a situation the onus remained on the Crown to prove the appellant's guilt on each count beyond reasonable doubt. I agree with Muir JA that they seem to have approached their consideration of these questions conscientiously.

[122] Their task was not simple. There were serious grounds to question the accuracy of the complainant's evidence. However none of these grounds was fatal to the prosecution's case. The weight which they should be given in assessing the complainant's credibility was quintessentially a question for the jury. That is so even if the verdicts of not guilty reflected an inability on the part of the jury to be satisfied beyond reasonable doubt as to the complainant's credibility. The jury were directed that if they had a reasonable doubt concerning the truthfulness and reliability of her evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness and reliability of her evidence generally.[25]

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[25] *R v Markuleski* [2001] NSWCCA 290; (2001) 52 NSWLR 82; *R v Ford* [2006] QCA 142.

I agree with Muir JA that the additional issues raised by the appellant in the course of his submissions do not warrant reversing the jury's verdicts.

[123] I turn to the question of consent in relation to the rape charges. The amendments to ss 348 and 349 of the Criminal Code effected by the *Criminal Law Amendment Act 2000* effected structural changes to the law of rape in Queensland, particularly in relation to the concept of consent. As Chesterman JA has demonstrated, until 2000 rape was committed by a person who had carnal knowledge of a person either without consent or with consent if that consent was obtained by a prescribed means. Consent was not defined; the word was used in its ordinary sense in the English language. Effectively what amounted to consent was a question for the jury. There was no mechanism by which a court might control any tendency on the part of the jury to rely upon what came to be described as "rape myths".[26]

[124] The objective of the *Amendment Act* was "to amend the Criminal Code … in accordance with certain recommendations of the Taskforce on Women and the Criminal Code". That report was tabled in the Legislative Assembly on 14 March 2000. It expressly disapproved the direction in *Holman v The Queen*[27], the terms of which have been quoted by Chesterman JA[28], "regarding it as inappropriate, outdated and as having no place in contemporary society". Its recommendation was: "64.1 That 'consent' be defined in the Criminal Code in a way that focuses on the need for a free and voluntary agreement."[29] That recommendation reflected "majority support [for] a further definition of consent in terms of a free and voluntary agreement, or consent freely and voluntarily given".[30] It was implemented by the enactment of ss 348 and 349, the terms of which I need not repeat.

[125] The amendment simplified the statement of the offence of rape. Rape now occurred if a person had carnal knowledge of another without the other's consent. The concept of rape with the consent of the other when that consent was given in prescribed circumstances was abolished. But the prescribed circumstances did not disappear. They resurfaced in the definition of consent. Consent as now defined no longer carried its ordinary English meaning. For the purposes of ch 32 of the Code consent became a subset of consent as ordinarily understood. For those purposes, consent existed only if it was "freely and voluntarily given" by a person with the cognitive capacity to give it. The present appeal depends upon the phrase quoted.

[126] The most important word in the phrase is "given". It is arguable that by its very meaning, consent can have no existence unless it is given. Whether that be so or not, the Code now explicitly requires the giving of consent. Passive acquiescence or even a desire to participate are not enough. Consent must be *given*. It need not be given verbally, but given it must be. No longer may the ardent suitor sweep his coy beloved off her feet. Now she must somehow give her consent in advance, or at least concurrently. Autre temps, autre mœurs. The law no longer presumes the existence of demure damsels with Victorian modesty. Rather it assumes that

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26 Department of Equity and Fair Trading: *Report of the Taskforce on Women and the Criminal Code*, February 2000, pp 213-4.

27 [1970] WAR 2.

28 Paragraph [104].

29 Page 241.

30 Page 239.

modern females will speak up and speak their minds. There seems to be little reason to doubt the accuracy of the assumption.

[127] Consent must be "freely and voluntarily" given. This is not the place for a discussion of the philosophy of freedom or the semantics of volunteering. It is in my view undesirable to gloss the words of the Code. As Muir JA has held, they are everyday words of plain meaning. The question for this court is whether the trial judge misdirected the jury.

[128] On the second day of the summing up, his Honour said:

> "So consent means consent freely and voluntarily given. But a person's consent to an act is not freely and voluntarily given, if it is obtained by force, by threats or intimidation, by fear of bodily harm or by the exercise of authority, or by false or fraudulent representations about the nature or purpose of act. So in order to prove any charge of rape the prosecution must prove beyond reasonable doubt that the defendant had carnal knowledge of [the complainant] in the way that it's defined and, secondly, they must prove beyond reasonable doubt that it was obtained without consent freely or voluntarily given by her *in that it was obtained by force or threats or intimidation, or by fear of bodily harm, or by the exercise of authority, or by false and fraudulent representations about the nature or purpose of the act*."

He then continued:

> "In this case the prosecution relies on evidence of the defendant using violence towards her on some occasions; of pushing her down, for example, on some occasions; by threatening her with death on some occasions; causing her fear in that way of bodily harm to her; by establishing control and authority over her; and *by making false promises such as he would give her Big Macca if she complied with what he wanted her to do*. The prosecution, of course, says it's irrelevant whether the defendant could give her Big Macca because he didn't own it. The point was he was promising that to her falsely to get her to comply with what he wanted her to do."[31]

There were at least two problems with those directions.

[129] Firstly, the direction emphasised in the second passage quoted suggested that a false promise to give the complainant a horse if she complied with his wishes constituted a false and fraudulent representation about the nature or purpose of the act, so as to negate the existence of consent as defined in the Code.

[130] Secondly, the direction emphasised in the first passage quoted demanded proof by the Crown of at least one of the elements of s 348(2). If the Crown had limited its case to that subsection, there would have been no difficulty with that direction. However as will appear, the Crown also relied upon the general words of s 348(1). The direction was therefore unduly favourable to the appellant.

[131] At the start of the third day of the summing up counsel for the appellant drew the judge's attention to the first of those problems.[32] His Honour understood the force of the submission and discussed it with the Crown Prosecutor:

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31 AR 878-9 (emphasis added).

32 AR 907.

"HIS HONOUR: Does a promise to give her Big Macca if she goes along with him comfortably fit under that?
MR MINNERY: Well, your Honour-----
HIS HONOUR: You see, it may not need to fit comfortably under that because the definition of consent is a broad one. It means consent not freely and voluntarily given and subsection (1) is not limited by subsection (2).
MR MINNERY: Yes, your Honour. So, in my submission, where there is consent in that broad definition, it's been not given either freely or voluntarily because it was-----
HIS HONOUR: Obtained by virtue of a false representation that if she went along with him, that Big Macca would be hers?
MR MINNERY: Yes, your Honour, and it's that-----
HIS HONOUR: So, you're not really relying on (e) for that? I might have been wrong when I tried to rely upon - I tried to refer to (e) for that purpose.
…
HIS HONOUR: Hm-mmm. Well, you say, don't you, that by accumulation of all of the things that she alleges he did to her, if the jury are satisfied beyond reasonable doubt about that, that that demonstrates, say, the exercise of control over her so that as a consequence of that, her consent was not freely and voluntarily given?
MR MINNERY: Yes, your Honour.
HIS HONOUR: And you would say that as part of that is the false promise to give Big Macca to her either by itself or in conjunction with the other things that he allegedly did which established a control over her so that her consent was not free and voluntary?
MR MINNERY: Yes, your Honour.
HIS HONOUR: Hm-mmm.
MR MINNERY: And not that I'm trying to make myself sound smart, of course, but that's how I closed the case-----
HIS HONOUR: Mmm.
MR MINNERY: -----which is almost prophetic, I suppose.
HIS HONOUR: Well, that's how I always understood that that was at least part of your case.
MR MINNERY: Yes, your Honour."

[132] When the jury returned the judge gave them further directions regarding consent in accordance with that discussion. In short, he told the jury that they could take the promise of the horse into account either as a factor which, by itself, could negative the existence of free and voluntary consent, or as part of a course of conduct by which the appellant established control over the complainant and thereby could negative that consent. After reading s 348 to the jury, his Honour said:

> "Now, on reflection, and having discussed the matter with counsel this morning, I've come to the conclusion that if you were to find beyond reasonable doubt that he did promise to give her Big Macca, that it is not something that comes within that particular paragraph, paragraph (e) that I just mentioned to you.
>
> But the way in which you can regard that is this, given the way in which the Crown has put its case: that *if you were satisfied beyond*

> *reasonable doubt that he promised to give her Big Macca and but for that promise she would not have consented to having carnal knowledge with him, or of him having carnal knowledge of her, then you would be entitled to conclude - it's a matter for you - that consent was not freely and voluntarily given*; or, given that the prosecution also puts its case, as you'll recall, that because of the combination of circumstances in the way in which he dealt with her by, for example, the allegations of slapping her and pushing her down and not accepting her when she said, 'No,' that that demonstrates that he was controlling her in such a way that her consent was not freely and voluntarily given.
>
> Again, you could take into account the promise in relation to Big Macca if you were satisfied beyond reasonable doubt that but for that promise, she would not have consented in determining whether or not that was part of exercising some control over her so that her consent was not freely and voluntarily given.
>
> So, to start at the beginning, what consent means, and what the Crown must prove beyond reasonable doubt, as I've said, is that if he had carnal knowledge of her, it was without her consent in the sense that consent was not freely and voluntarily given.
>
> In determining whether or not consent was freely or voluntarily given, you can look at issues about whether or not force was used, or there were threats or intimidation, or there was fear of bodily harm, or the exercise of authority over her, and you can also look at other circumstances, for example, did he act overall in such a way that he was seeking to exercise control over her, to the extent that any consent that she gave was not freely and voluntarily given, and *in considering whether the prosecution has proved whether consent was freely and voluntarily given, you can consider the claim that she makes that he promised her Big Macca if you're satisfied beyond reasonable doubt that he said that, and that but for the promise to give her Big Macca, she would not have given consent to anything that he did to her that involved having carnal knowledge of her*."[33]

[133] All of that was said in the context of some general directions about consent in relation to rape. When his Honour came to deal with the circumstances of each of the rape charges in turn, there was some repetition of the directions.

[134] The words emphasised in the passage just quoted would have been understood by the jury in the sense in which the judge intended them, a sense apparent from his discussion with the Crown Prosecutor. In other words, the jury would have understood that without more, a promise to give the horse to the complainant if she complied with his wishes could negate the existence of free and voluntary consent, at least if the complainant would have refused him in the absence of the promise. In my judgment they amounted to a misdirection. In the ordinary course of human affairs a woman might find the promise of a gift of a horse an attractive inducement; but without more it could not be held to deprive her of the capacity to exercise her free will. Consent given in response to such an offer is, unless there are other relevant factors, free and voluntary consent.

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[33] AR 918-20 (emphasis added).

[135] On the other hand, I do not agree with the view that the promise could be relevant only to the existence of a motive to consent. The alternative use of the evidence advanced by the Crown and addressed by the judge in his charge to the jury was theoretically sound. It is quite possible for a woman to fall under the control of a man, both physical and psychological, to such an extent that consent given by her could not be described as free and voluntary consent. Cases involving the so-called battered woman syndrome demonstrate this. In such situations, the man frequently blows hot and cold. Episodes of extreme violence are interspersed with protestations of love. Deprivation is alleviated by occasional gifts, particularly of objects highly valued by the woman. In such a context the promise of a gift of a horse might be relevant to the question of whether consent was given freely and voluntarily.

[136] If the Crown sought to advance such a case it would be necessary for the judge to direct the jury to examine the whole of the woman's life in context and in detail. The jury would have to take into account the woman's age, her intelligence, her psychiatric health, her financial independence or otherwise, her emotional dependence on the accused if any, the proportion of her time spent with the accused, the other people and influences on her life, the history of the accused's conduct toward her and her explanation for any subordination of herself to him. No doubt other factors could be found which would also be relevant. A careful and lengthy direction would be required and in a case involving multiple charges over a period of time, the direction would have to be tailored to accord with the position at the date of each offence charged. The directions given regarding control in this case (i.e. the directions not emphasised above) would not be adequate.

[137] It is unnecessary to comment on the adequacy of the evidence in the present case to support convictions on any such basis.

[138] The convictions for rape and attempted rape should be set aside. Consequentially, so should the sentence on the maintaining count.

New trial

[139] With some hesitation I agree that this court should order a new trial on those counts. I shall not be surprised if, when the matter is considered by the Director of Public Prosecutions, it is decided that further proceedings are not in the public interest. A District Court judge should be empowered to resentence on the maintaining count at the appropriate time.

Orders

[140] I agree with the orders proposed by Muir JA.