SUPREME COURT OF QUEENSLAND

CITATION:	*R v Doran; R v Zevenbergen; R v Butler; R v Sealey* [2023] QCA 177
PARTIES:	**In CA No 4 of 2022:** **R** **v** **DORAN, James Gareth** (appellant) **In CA No 12 of 2022:** **R** **v** **ZEVENBERGEN, Steven** (appellant) **In CA No 13 of 2022:** **R** **v** **BUTLER, Joshua Bruce** (appellant) **In CA No 14 of 2022:** **R** **v** **SEALEY, Leon James** (appellant)
FILE NO/S:	CA No 4 of 2022 CA No 12 of 2022 CA No 13 of 2022 CA No 14 of 2022 DC No 138 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Convictions
ORIGINATING COURT:	Date of Conviction: 13 December 2021 (Loury KC DCJ)
DELIVERED ON:	1 September 2023
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2023
JUDGES:	Morrison and Dalton JJA and Wilson J
ORDERS:	**1. In CA No 4 of 2022, appeal dismissed.** **2. In CA No 12 of 2022, appeal dismissed.**

3. In CA No 13 of 2022, appeal dismissed.

4. In CA No 14 of 2022, appeal dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellants were convicted on multiple counts where each had raped the complainant, and aided or encouraged during the acts of rape engaged in by the others – where three of the four appellants contended that the verdicts were unreasonable – where the principal evidence was that of the complainant, and there was also evidence of photographs, diagrams, recorded interviews, admissions, and a Snapchat video – where, save for one of the appellants, the only issue was that of consent – where the complainant had engaged in paid sex work, but her evidence was that this had occurred after the incident constituting the offending – where the complainant had a history of drug use – where the events took place in a motel where the appellants and the complainant were consuming drugs and alcohol – whether the verdict was unreasonable or could not be supported having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant Zevenbergen contended that there was a misdirection as to the use to which exculpatory statements in his police interview could be used – where the appellant Butler submitted that there was a misdirection to the jury in respect of the complainant's criminal history – where the appellant Sealey contended that there was a misdirection by reason of the failure to direct the jury not to use questions asked by police officers during his police interview, particularly questions which put the complainant's version of events to him, and due to the failure to direct, with sufficient detail, how the records of interview with the appellant Zevenbergen could be used – whether there was a misdirection or misdirections

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant Zevenbergen submitted that evidence of his two police interviews conducted the day after the incident should have been excluded – whether the trial judge erred in admitting the evidence

Police Powers and Responsibilities Act 2000 (Qld), s 418, s 423

Police Powers and Responsibilities Regulation 2012 (Qld), Sch 9, s 23

Dansie v The Queen (2022) 96 ALJR 728; [2022] HCA 25, applied
De Silva v The Queen (2019) 268 CLR 57; [2019] HCA 48, cited
Duke v The Queen (1989) 180 CLR 508; [1989] HCA 1, cited
Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, applied
R v Beck [1990] 1 Qd R 30, cited
R v Buckett (1995) 126 FLR 435, cited
R v Butler & Lawson & Marshall [2011] QCA 265, cited
R v Coyne [2021] QCA 110, cited
R v Dalton (2020) 3 QR 273; [2020] QCA 13, cited
R v Ferguson; Ex parte Attorney-General (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, cited
R v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited
R v Kirkby [2000] 2 Qd R 57; [1998] QCA 445, cited
R v LR [2006] 1 Qd R 435; [2005] QCA 368, distinguished
R v Miller (2021) 8 QR 221; [2021] QCA 126, applied
R v Peter; R v Banu; R v Ingui [2023] QCA 1, cited
R v Zevenbergen [2021] QDCPR 79, related
Smith v Kelsey; Dalley v Kelsey (2020) 4 QR 1; [2020] QCA 55, cited

COUNSEL: S R Lewis for the appellant, Doran
N V Weston for the appellant, Zevenbergen
Y Chekirova for the appellant, Butler
C J Tessman for the appellant, Sealey
E L Kelso for the respondent

SOLICITORS: Legal Aid Queensland for the appellants, Doran and Zevenbergen
O'Sullivans Law Firm for the appellant, Butler
Dib & Associates for the appellant, Sealey
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** On 30 September 2018, the complainant and a man called Mr Y booked into a motel room at the Runaway Bay Motor Inn. During that day, the complainant and Mr Y consumed alcohol and methylamphetamine.

[2] Later that evening, the complainant wished to obtain further drugs and invited the appellant, Zevenbergen[1] to "[c]ome party".

[3] During the evening, Zevenbergen, the appellant Sealey, and the appellant Doran arrived at the motel room. At that time, Mr Y was still present. The group

[1] Known to her at that time as "Steve".

consumed methylamphetamine, alcohol, and the drug Fantasy.[2] At some point during the evening, the appellant Butler also arrived.

[4] At about 9.20 am on 1 October 2018, an unsuccessful attempt was made to book the motel room for an extra night. What followed was the subject of conflicting evidence at the trial.

[5] The complainant said she was raped by all four appellants. She said Zevenbergen and Doran restrained her, holding her down and covering her mouth. She said that Zevenbergen, Butler, and Sealey raped her by penetrating her vagina with their penises, and Doran raped her by placing his penis in her mouth and her vagina.

[6] The activity was interrupted when the motel staff knocked on the door. All of the appellants packed up their things and left. The complainant then went and had a had a shower. The complainant got out of the shower and went to the door, and found Mr Y and the motel manager. She told them that she had "basically just got raped". The police were called and she was taken to hospital, where she remained for three days.

[7] Arising out of those events, the appellants were each charged with five counts of rape (Counts 3–7). Zevenbergen was also charged with two counts of sexual assault: Count 1: touching the complainant on the vagina, without her consent, while in the spa; and Count 2: touching the complainant without her consent, on the bed.

[8] Each of Doran, Zevenbergen, and Butler were charged with other counts, unrelated to the events concerning the complainant. It is not presently necessary to deal with those other charges.

[9] Each of the appellants were convicted of rape, on all of Counts 3–7. They challenge their convictions on various grounds which can be summarised as set out below.

[10] Doran challenged his convictions on the sole ground that the verdicts were unreasonable and could not be supported by the evidence.[3]

[11] Zevenbergen's grounds of challenge[4] were that a miscarriage of justice occurred because:

(a) the trial judge failed to direct the jury as to the use to which exculpatory statements in his police interview could be used (a *Liberato* direction); and

(b) the trial judge refused to exclude the evidence of his two interviews with police, conducted on 2 October 2018.

[12] Butler's challenge to the verdicts was on two grounds:[5]

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2 Gamma-hydroxybutyrate, or GHB.

3 Doran also filed an application for leave to appeal against sentence, CA 141 of 2022. That was abandoned prior to the hearing of the appeal.

4 Zevenbergen also filed an application for leave to appeal against sentence, CA 88 of 2022. That was abandoned well prior to the hearing of the appeal.

5 Butler also filed an application for leave to appeal against sentence, CA 76 of 2022. That was abandoned at the hearing of the appeal.

(a) the verdicts in respects of Counts 3–7 were unreasonable and could not be supported by the evidence; and

(b) the trial judge's direction to the jury in respect of the complainant's criminal history was inadequate.

[13] Sealey challenges his convictions on three grounds:

(a) the verdicts were unreasonable or cannot be supported having regard to the evidence;

(b) a miscarriage of justice occurred by reason of the failure of the trial judge to direct the jury not to use, as evidence, questions asked by police officers during the appellant's record of interview, and in particular questions which put the complainant's version of events to the appellant; and

(c) a miscarriage of justice occurred by reason of the failure of the trial judge to direct, with sufficient detail, how the records of interview with Zevenbergen could be used.

The rape counts – principal and parties

[14] The way in which the rape counts were framed were a combination of principal offender and party offenders. They can be summarised as set out below.

Count 3 – Rape

[15] Zevenbergen penetrated the complainant's vagina with his penis. Zevenbergen was aided and/or encouraged by:

(a) Doran: by putting his hand over the complainant's mouth, and/or inserting his penis into her mouth (Count 4), and/or his continued and deliberate presence during the rape;

(b) Butler: through his continued and deliberate presence during the rape; and

(c) Sealey: through his continued and deliberate presence during the rape.

Count 4 – Rape

[16] Doran penetrated the complainant's mouth with his penis. Doran was aided and/or encouraged by:

(a) Zevenbergen: by his act in Count 3, and/or by holding onto the complainant and/or his deliberate or continued presence during Doran's act;

(b) Butler: through his deliberate and continued presence during Doran's act; and

(c) Sealey: through his deliberate and continued presence during Doran's act.

Count 5 – Rape

[17] Butler penetrated the complainant's vagina with his penis. Butler was aided and/or encouraged by:

(a) Doran: by his act in Count 3 and/or his deliberate and continued presence during Butler's act;

(b) Zevenbergen: by his act in Count 3 and/or his deliberate and continued presence during Butler's act; and

(c) Sealey: through his deliberate and continued presence during Butler's act.

Count 6 – Rape

[18] Doran penetrated the complainant's vagina with his penis. Doran was aided and/or encouraged by:

(a) Zevenbergen: by his act in Count 3, and/or by holding onto the complainant and/or his deliberate and continued presence during Doran's act;

(b) Butler: through his deliberate and continued presence during Doran's act, or by his own act of rape that occurred immediately before it; and

(c) Sealey: through his deliberate and continued presence during Doran's act.

Count 7 – Rape

[19] Sealey penetrated the complainant's vagina with his penis. Sealey was aided and/or encouraged by:

(a) Doran: by his previous act(s) of rape and/or his deliberate and continued presence during Sealey's act;

(b) Zevenbergen: by his act in Count 3 and/or by his deliberate and continued presence during Sealey's act; and

(c) Butler: through his deliberate and continued presence during Sealey's act, or by his own act of rape that had occurred immediately before it.

Approach to the grounds of appeal

[20] As each appellant raises a ground of appeal contending that the verdicts were unreasonable or cannot be supported having regard to the evidence, it is convenient to commence with those grounds first. Success on that ground would lead to verdicts of acquittal.

Unreasonable verdicts – legal principles

[21] The legal principles applicable where the ground is that the verdict was unreasonable are well known. They were recently restated in *Dansie v The Queen*.[6] *Dansie* reaffirmed the approach set out in *M v The Queen*:[7]

[22] The Court reaffirmed the relevant task as being that laid down in *M v The Queen*:[8]

> "[8] That understanding of the function to be performed by a court of criminal appeal in determining an appeal on the unreasonable verdict ground of a common form criminal appeal statute was settled by this Court in *M*. The reasoning in the joint judgment in that case establishes that 'the question which the court must ask itself' when performing that function

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6 (2022) 96 ALJR 728; [2022] HCA 25.
7 (1994) 181 CLR 487; [1994] HCA 63.
8 *Dansie* at [8]–[9]. Citations omitted.

is 'whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty', that question being 'one of fact which the court must decide by making its own independent assessment of the evidence'.

[9] The joint judgment in *M* made clear that 'in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses'. The joint judgment equally made clear how those considerations are to impact on the court's independent assessment of the evidence. That was the point of the carefully crafted passage in which their Honours stated:

> 'It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred [on the unreasonable verdict ground]. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by a jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'"

[23] The High Court also said:[9]

> "[12] The authoritative guidance to be gained from the joint judgment in *M* has not diminished with time. *M* was unanimously affirmed in *MFA v The Queen* and again in *SKA v The Queen*, where it was spelt out that the 'test set down in *M*' required a court of criminal appeal to undertake an 'independent assessment of the evidence, both as to its sufficiency and its quality' and that consideration of what might be labelled 'jury' questions does not lie beyond the scope of that assessment. *Coughlan v The Queen* illustrates that an independent assessment of the evidence in a case in

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9 *Dansie* at [12]. Citations omitted.

> which the evidence at trial was substantially circumstantial requires the court of criminal appeal itself 'to weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard' and in so doing to form its own judgment as to whether 'the prosecution has failed to exclude an inference consistent with innocence that was reasonably open'."

[24] In *Pell v The Queen*,[10] the Hight Court said:

> "[39] The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt."

[25] In *R v Miller*,[11] this Court said:

> "[18] An appellant who contends that the verdict of the jury was unreasonable or that it was unsupported by the evidence must identify the weaknesses in the evidence and *must then also* demonstrate that these weaknesses reduced the probative value of the evidence *in such a way* that the appellate court ought to conclude that *even making full allowance for the advantages enjoyed by the jury* there is a *significant possibility* that an innocent person has been convicted. The mere identification of weaknesses in the prosecution case is not enough to sustain the ground. As Brennan J said in *M v The Queen*, and as criminal practitioners and trial judges know very well, it is a sad but salutary experience of counsel for the defence that the prosecution's 'weak point' is often brushed aside dismissively by a jury satisfied of the honesty of the prosecution witness."

The evidence at the trial

[26] The principle evidence at the trial was given by the complainant. In addition, the motel manager was called to give evidence about the events on the morning, and a guest was called to give evidence about what was heard in the early hours of 1 October 2018.

[27] Apart from those witnesses, the bulk of the evidence came from police investigators dealing with the recorded interviews with Zevenbergen and Sealey, forensic testing and DNA results, and other products of the investigations such as CCTV.

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10 (2020) 268 CLR 123; [2020] HCA 12 at [39]. Citations omitted.

11 (2021) 8 QR 221; [2021] QCA 126 at [18]. Citations omitted. Emphasis in original.

[28] A large number of photographs of various items in the motel room were tendered, together with photographs of the complainant when she was in hospital, and diagrams associated with the layout of the room.

[29] The recorded interviews with Zevenbergen were played to the jury, as was the recorded interview with Sealey.

[30] In addition, there were two sets of formal admissions.

[31] A Snapchat video recording was also tendered in evidence. This was taken on the night and shows the complainant asleep in bed while three of the four appellants (Doran, Zevenbergen, and Butler) are visible in the recording.

The complainant's evidence

[32] The complainant was 18 years and 9 months at the date of the events the subject of the trial. She had met Mr Y only shortly before and booked into a motel room paid by him because she had nowhere else to go. She and Mr Y had a few drinks and engaged in consensual sex.

[33] She described the room in the motel as having a queen bed or double bed in the middle of the room, a lounge area next to that, a kitchen area with a bathroom, and a spa inside.

[34] She identified a number of photographs of the inside and outside of the room.[12]

[35] She and Mr Y were drinking and smoking methylamphetamine. She could not recall how many cans of Bundaberg rum she had. Nor could she recall how much methylamphetamine she had during that day. She said she was tired because she had been awake (she thought) for a few days beforehand.[13]

[36] She said the sexual intercourse she had with Mr Y did not leave any bruises or marks on her body, nor did it leave her with vaginal pain.[14]

[37] During the course of the evening, she wanted to get some drugs, particularly Fantasy, and so she communicated with the person known to her as "Steve", telling him to "[c]ome party". At the trial, she identified "Steve" as Zevenbergen.[15]

[38] Zevenbergen, Doran, and Sealey arrived together, after dark. The complainant identified herself and those three appellants on CCTV footage.[16] She also identified the four appellants on CCTV footage showing them leaving on 1 October 2018.[17]

[39] Dealing with the sequence of events in the motel room, the complainant's evidence in chief contained these elements:

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12 Exhibits 1–10.
13 AB 519, lines 31–32.
14 AB 518–519.
15 AB 520, line 10.
16 Exhibit 11.
17 Exhibit 12.

(a) when Zevenbergen, Doran, and Sealey arrived, Mr Y was still there; they were all smoking methylamphetamine, drinking alcohol, and consuming Fantasy;[18]

(b) the drugs were brought to the motel room by Zevenbergen;

(c) she remembered feeling tired, but did not think that the Fantasy had affected her much at all;[19]

(d) the complainant, Zevenbergen, and Sealey got in the spa; Doran was sitting near the spa; while in the spa, Zevenbergen "came up to [the complainant] and, like, rubbed [her] vagina"; he rubbed her vagina on the outside of the bikini she was wearing;[20] she told him to "fuck off", and he went away;[21]

(e) at the time that happened, Sealey was still in the spa; the complainant got out and went into the shower, where she showered in her bikini; she was alone until Sealey joined her (uninvited), but there was no physical contact;[22]

(f) when she got out of the shower, she changed into a shirt and underwear and got onto the bed; she identified the shirt and underwear from photographs;[23]

(g) when she got out of the shower, she noticed another person there, who was introduced to her as "Blaine";[24] that was Butler;[25] she had not invited him to the motel and had no further interaction with him at that point;

(h) when she got onto the bed, there was no one on the bed with her; the four appellants were in the kitchen area, standing around, talking;[26]

(i) the next thing she recalled was waking up at about 9 am or 9.30 am, and Zevenbergen was next to her, asleep on the bed;[27] Zevenbergen rubbed her vagina again using his hand over the outside of her underwear; she tried to brush him away by grabbing his hand and pushing it away;[28]

(j) the complainant was "freaking out a bit" because she had to call Mr Y and see if she could stay another night "because [she] had nowhere else to go and he wasn't there";[29]

(k) at that time, all four appellants were in the room, in the kitchen area;[30]

(l) when she finished the phone call with Mr Y, she was lying on her stomach; Zevenbergen came up behind her, grabbed the back of her legs and turned her over onto her back; at that point, the other three men were in the room;[31]

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18 AB 525.
19 AB 526, lines 8–17.
20 AB 526, lines 35–46.
21 AB 527, lines 3–7.
22 AB 527, lines 20–47.
23 AB 528–529; exhibits 13 and 14.
24 AB 529, lines 16–23.
25 AB 621, lines 29–39.
26 AB 529, lines 39–45.
27 AB 530, lines 1–12.
28 AB 530, lines 16–31.
29 AB 531, lines 1–4.
30 AB 531, lines 12–16.
31 AB 531, lines 20–26.

(m) Zevenbergen ripped her underwear off and, when she tried to wriggle away, Doran "came up to [her] and he put his hand over [her] mouth"; while Doran had his hand over her mouth, Zevenbergen started putting his penis in her vagina; Doran was holding her down while Zevenbergen had sex with her; Doran's hands were on her shoulders and arms; Sealey and Butler were still in the motel room, though she could not see them;[32]

(n) while Zevenbergen was putting his penis in the complainant's vagina, Doran put his penis in her mouth; while that occurred, Zevenbergen "came around and came on [her] face"; at that particular point, Doran did not have his penis in the complainant's mouth, having taken it out;[33]

(o) once Zevenbergen had removed his penis from her vagina and Doran had removed his penis from her mouth, Butler "put his penis in [her] vagina"; asked how long that occurred for, she said it "wasn't that long, but he really hurt [her] … [l]ike [her] vagina hurt";[34]

(p) while Butler was having sex with her, the complainant said that the other men were still in the room, close to the bed, and "just watching"; but, while Butler was having sex with her, Zevenbergen was holding her down;[35]

(q) when Butler eventually took his penis out of her vagina, the complainant said that Doran jumped in front of her and put his penis in her vagina;[36]

(r) she described what had occurred in these terms:[37]

> "Did that cause you any pain?---Not really. [Butler] caused me a lot of pain – is what I remember - - -
>
> …
>
> When [Doran] was having sex with you, do you remember where the other men were?---[Zevenbergen] was holding me down while [Doran] was having sex with me, and I can't remember where the other people were, but they were in the room.
>
> All right. In the room – you mean in the sort of bed area?---Yes.
>
> Once [Doran] – or did [Doran] take his penis out of you?---Yes.
>
> And what happened after that?---And then [Sealey].
>
> What did [Sealey] do?---Put his penis in my vagina.
>
> Did you give [Sealey] any consent to do that?---No.
>
> Do you remember what the other men were doing while [Sealey] was having sex with you?---Watching.

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32 AB 532, lines 24–45.
33 AB 533, lines 6–28.
34 AB 533, lines 30–46.
35 AB 534, lines 3–17.
36 AB 534, lines 19–24.
37 AB 534, line 33 to AB 435, line 9.

> And was anyone else touching you?---I can't remember. I was just looking at the ceiling thinking I was going to die."

(s) the complainant said she was trying to tell the four men to stop, but she couldn't "'cause they had their hand over [her] mouth"; she said both Doran and Zevenbergen did that, "[p]retty much the whole time"; as well, Doran gagged her with a sock at the start;[38]

(t) the complainant said that Sealey did not have sex with her for long, because someone was knocking at the door;[39]

(u) during the course of the incident, the complainant said "someone was holding down [her] legs", though she could not remember who it was; they were using their hands to hold her legs down; no one was saying anything and no one used a condom;[40]

(v) while Sealey was still having sex with her someone knocked on the door; all four appellants started packing up their things to get out of there; the complainant said she was in shock and didn't know what to do, but then she jumped in the shower, crying and in a lot of pain in her vagina;[41]

(w) before she got in the shower, Zevenbergen told her, "[d]on't fucking say anything";[42]

(x) when she got out of the shower, she answered the door, and Mr Y and the motel manager were there;

(y) she recalled that Doran took a photograph of her ID; that happened before she fell asleep;[43]

(z) the complainant told Mr Y that she had "basically just got raped", and the police were called;

(aa) the complainant described her injuries in this way: "My vagina was torn and I had bruises … [l]ike, my knee area and my … all down, like, my legs"; asked if she had bruises elsewhere, the complainant said "[m]y arms";[44]

(bb) when she woke up, the complainant saw that Butler had drawn on her arm and her leg with a Sharpie pen; it was only when she was in hospital that she noticed that there were also drawings on her stomach;[45] the complainant identified photographs of the markings that had been drawn on her.[46]

[40] The complainant was taken to hospital where she stayed for several days. She said she was bleeding and in pain. She identified photographs of herself while in hospital, showing the bruises on her legs and arms.[47] She said she did not have those bruises before the four appellants had sex with her.

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38 AB 535, lines 11–26.
39 AB 535, lines 31–32.
40 AB 535, line 37 to AB 536, line 1.
41 AB 536, lines 3–19.
42 AB 536, lines 26–27.
43 AB 536, lines 30–38.
44 AB 537, lines 7–13.
45 AB 537, lines 15–21.
46 Exhibits 15–18.
47 Exhibits 19–24.

[41] The complainant also identified what could be seen in the Snapchat video, namely herself asleep on the bed, Doran filming it, and Butler and Zevenbergen in the background.[48]

Cross-examination of the complainant

[42] It is convenient to deal with the cross-examination of the complainant in several compartments. She was cross-examined by counsel for each appellant. Each followed some similar areas, with some areas individual to each appellant. One central feature that was common to all was the cross-examination concerning the complainant's drug history, drug use, and personal background. It is to that area that I turn first.

Complainant's background

[43] The complainant was cross-examined about the fact that she had an account on a website called Locanto. As the complainant explained, it was a website for people to pay other people for sex. The appellant explained that she advertised personal services, but "that was after everything happened with this, yes".[49] As to that, the complainant accepted:

(a) she advertised sexual services on that website;[50]

(b) one of the persons she had been communicating with on Locanto was a man called Mr S, who told her that he wanted to be part of a threesome; she met Mr S at the house of a friend of her then boyfriend, Mr N, and introduced Mr N as her brother;[51]

(c) Mr S came to pick the complainant up. Both Mr N and the complainant got into Mr S's car. Mr N originally asked to be taken to a service station to meet some friends. When those friends did not arrive, Mr N requested to go back to Mr S's residence to which Mr S agreed; they all went to the Helensvale Tavern to play pokies and then back to Mr S's house; at the house, the complainant and Mr N smoked methylamphetamine together; the complainant asked Mr S if he wanted to have sex with her; she explained that she was "really bad on drugs back then … and in a very abusive relationship"; she produced a knife which she pointed at Mr S, and Mr N produced a gun; they then searched the bedroom for items of value, stabbed holes in the bed linen, and caused a wound across Mr S's arm with the knife; the complainant and Mr N then took Mr S's personal property and demanded eight hundred dollars from him; Mr S was put in the front passenger seat of his own car and, still brandishing the handgun, Mr N drove while the complainant was seated behind Mr S holding a knife to the back of his neck; Mr N forcibly removed a CB radio set from the car and at one point threatened Mr S with the firearm; they travelled back to where the complainant had been picked up and made further demands for eight hundred dollars; Mr N threatened Mr S and warned him against going to the police;[52]

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48 AB 544–545; Exhibit 27.
49 AB 547, lines 43–47.
50 AB 548, lines 1–29.
51 AB 557–558.
52 AB 558–561.

(d) on another occasion, the complainant connected with a person called Mr M, via Locanto; she stayed one or two nights with him at a motel in Surfers Paradise following which they both checked into another motel; the arrangement the complainant had with Mr M was for the provision of sexual services; while Mr M went to play the poker machines, the complainant contacted two men, via the Locanto site, asking them to come over; the two men were friends of the complainant; the friends eventually left and then Mr M returned; Mr M emptied her handbag onto the bed and discovered that the complainant was carrying a knife in it; he started throwing the complainant around the room so she grabbed the knife and accidently slit him on the hand; Mr M was being abusive towards her and was going to lock her in the room, so she took his wallet and car keys; though she was not aware of it at the time, the wallet contained four thousand dollars in cash and a TOB chip for two thousand two hundred dollars; Mr M did not get the money back;[53]

(e) the complainant was cross-examined about her criminal history which extended to New South Wales and Queensland, and included a conviction for dishonesty and for offences of violence;[54] the complainant agreed that she had committed criminal offences when she was using drugs, and had had a drug habit since she was 16;[55]

(f) some of the offences that she was cross-examined about included drug related offences,[56] negligent driving, and not paying for petrol;[57]

(g) other offences included fraud in respect of a client from the Locanto website,[58] unlawful wounding and stealing property, and armed robbery in company; sentences were imposed against the complainant in respect of those events, which concerned Mr M and Mr S;[59]

(h) the complainant agreed she had been under the care of psychologists for many years, from the age of 5;[60]

(i) as to the events on 30 September and 1 October 2018, the complainant accepted she was, at that time, a heavy user of both drugs and alcohol, but mostly drugs, and had built up a tolerance to drugs; in the lead up to those events, she had been smoking a lot of methylamphetamine over the previous day or so;[61]

(j) in the period after the events in question, the complainant saw a psychologist; she told the psychologist she wanted to stop frequent high risk unprotected sexual activity; she meant that she had had sex with people when she was intoxicated;[62]

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53 AB 561–563; AB 570.
54 AB 548–549.
55 AB 549, lines 11–17.
56 Such as driving with an illicit substance in the blood, possession of prohibited drugs, and possession of utensils or pipes used for the consumption of drugs.
57 AB 549–553.
58 Taking part of the negotiated price for services and then leaving.
59 AB 557–558.
60 AB 578, lines 7–12.
61 AB 601, lines 27–47.
62 AB 636, line 37 to AB 637, line 16.

(k) the complainant agreed she had attended drug rehabilitation on two occasions, and had been kicked out once;[63] she said she had been kicked out because she and another person were flirting and that was making other people feel uncomfortable;[64]

(l) in terms of her criminal history, the complainant was asked about an occasion where she and Mr N met the person Mr S; she agreed that they tied Mr S's hands together;[65]

(m) the complainant accepted that she was using the Locanto service, at least in part, to rip people off;[66] and

(n) the complainant accepted that when she was interviewed by police after the incident involving Mr M, she agreed with them that she had a tolerance for methylamphetamine; she said at that time she was "very bad on drugs".[67]

[44] Cross-examination on behalf of Butler returned to the complainant's use of the Locanto website. The complainant was asked about the occasion when she left having taken some money from a client, and she agreed that she had pleaded guilty to those offences, and that they involved ripping off people she had met through Locanto.[68] She explained that occasion in this way:[69]

> "Can I just say that I was in a very, very abusive relationship. It was a drug-fuelled relationship and he used to sell me off to these guys and that's why I went to jail with a black eye – you can even look up the photo – because he was – yeah. … So I didn't really have a choice in the matter but to rip ... people off and get money for him. Yep."

[45] The complainant accepted that when she had earlier said she only had one offence of dishonesty, that was not true, now it was put that way. However, she reiterated that she did not really have a choice.[70]

[46] She was cross-examined about the incident with Mr M and accepted that she had stolen his wallet, but reiterated that she did not realise it had any money in it at all.[71] She accepted that she had pleaded guilty to having stolen the cash in the wallet.

[47] She was then cross-examined further about the incident with Mr S. When it was put to her that a gun had produced, she disagreed saying it was a "gel blaster".[72] Once again, she accepted that she had pleaded guilty to the charges. She explained the use of false names for herself and Mr N, and said that "we never used our – I never used my real name ever … even just working, actually working, I never used my real name".[73]

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63 AB 637, lines 37–42.
64 AB 638, lines 1–4.
65 AB 638, lines 6–21.
66 AB 638, lines 27–28.
67 AB 641, line 44 to AB 642, line 20.
68 AB 645, lines 39–45.
69 AB 645, lines 30–39.
70 AB 646, lines 1–18.
71 AB 646, lines 20–25.
72 AB 647, lines 3–4.
73 AB 648, lines 22–24.

[48] She accepted that a review of the occasions on which she had gone to court and pleaded guilty revealed about thirteen offences, five drug related, one breach of trust, two frauds, a robbery, a stealing, a deprivation of liberty, an unlawful use of a motor vehicle, an unlawful wounding, and a further stealing of property.[74] She also accepted that, in New South Wales, there were seven offences including twice driving with illicit drugs in the blood, and two charges of possession of a prohibited drug.[75]

[49] The complainant agreed that her background included:

(a) she ran away from home when she was 13;

(b) she began smoking cigarettes and drinking alcohol when she was about 13;

(c) she commenced smoking cannabis at 13;

(d) from about 16 she commenced with methylamphetamine; thereafter she became addicted;

(e) she had a car accident when she was about 19;[76]

(f) from about 5 years of age, she was seeing psychologists and counsellors;

(g) as a consequence of the car accident, she experienced flashbacks; she was able to move past them with the help of a psychologist.[77]

[50] The complainant was cross-examined about her knowledge of Mr Y and Zevenbergen. It was suggested that she had only known Mr Y for a short period of time, and that she did not even know his last name, and she agreed. She said that she did know Zevenbergen's last name.[78] She said of Mr Y that he had given her a lift to get her things from Toowoomba, then booked a motel room for her because she had nowhere to go. She accepted that she was in a "pretty bad way" in terms of her own personal circumstances at that time. When she booked into the motel, all her worldly-possessions were packed up in five bags.[79]

[51] She accepted that she was on a methylamphetamine "bender", but it was not as long as a week, but only "for a few days".[80]

[52] In re-examination, the complainant was asked to clarify some parts of her evidence concerning her background and some of the offences she was involved in. Relevant points made were as follows:

(a) when she said she carried a knife "after it all happened", she said that meant after the four appellants had raped her; she explained she was "scared to meet up with other guys and … scared it was going to happen again. So [she] always carried a knife";[81]

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74 AB 648, lines 31–43.
75 AB 648, line 45 to AB 649, line 14.
76 AB 649–650.
77 AB 652.
78 AB 655.
79 AB 655–656.
80 AB 656, line 29 to AB 657, line 9.
81 AB 677, lines 34–41.

(b) the thirteen offences she had in Queensland were all subsequent to the events in which the four appellants were involved;[82]

(c) all of the New South Wales offences were related to drug offending and driving with drugs, and four of them occurred on the one date (27 June 2018), with the remainder having been committed after the events concerning the appellants;[83]

(d) as to the occasion when she left having taken money from a Locanto sourced client, she explained that Mr N was waiting for her in the carpark the whole time, and it was Mr N with whom she had a domestic violence relationship; she explained that it was Mr N's idea to scam and rip people off, and he was the one who created her Locanto account; explaining why she agreed to do those things with Mr N, she said, "I don't know … I thought I loved him. I don't know, I was just stuffed up on drugs, I suppose";[84]

(e) in relation to the incident involving Mr M, she explained that, prior to him being cut with the knife, he was throwing her around the room, emptied out her handbag on the bed, grabbed her and pushed her on the bed, and that was "how [she] grabbed the knife in the first place"; she went on, that Mr M "came up behind [her] trying to grab [the knife] off [her], and that's how he cut himself"; she gave the wallet back to the police, but agreed she spent the money;[85] and

(f) in relation to her drug addiction, the complainant said she was in a worse position when she committed the offences than she was in October 2018; she said she "was worse after all of that happened"; asked if there was something in her life which she could pinpoint that had increased her drug use and addiction, she said "[d]efinitely what happened with those guys and my car accident".[86]

Cross-examination – Events at the motel

[53] The sequence in which the complainant was cross-examined (by a reference to the appellants) was: Zevenbergen, Doran, Butler and then Sealey. Cross-examination occupied more than 130 pages of transcript over two days, commencing at 11.48 am on day two and finishing at about 1.20 pm on day three.

Cross-examination for Zevenbergen

[54] The complainant said that, when she spoke to police outside the motel and at the hospital later that day, her memory was clear and she "knew exactly what had just happened to [her]".[87] She said she was not affected by drugs at that point because she had just slept.

[55] She explained that her responses to the police while seated in Mr Y's car outside[88] were because she was not comfortable with telling someone she had just met what

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82 AB 678, line 46 to AB 679, line 1.
83 AB 679, lines 3–11.
84 AB 679, line 25 to AB 680, line 2.
85 AB 680, lines 14–33.
86 AB 681, lines 4–17.
87 AB 580, lines 20–32.
88 That she only remembered "[a] little bit" of what happened.

had happened to her. She said she "wasn't comfortable talking about it to anyone".[89]

[56] The complainant denied that, at that time, her short-term memory was affected, saying "if anything, it was [her] long-term memory".[90] She explained her reluctance to speak to the police officer while she was in the car was because she had just met that person, and she was really traumatised about what had just happened, "[i]t was probably not even half an hour after. It just happened".[91]

[57] The complainant was cross-examined about her response to the police officer outside. When asked by the police officer if she had been sexually assaulted, she replied no. When asked further by the police officer if she wanted to talk about it, she responded no. She responded to counsel's line of questioning in these terms:[92]

> "Why would I admit myself to a hospital, then, and why did – why did all my – yeah, everything, like, was torn and all the rest of it and – you know?"

[58] Still being questioned about her memory and whether it was affected by drug use, the complainant explained she was not on drugs at the time she was giving evidence, having ceased a few weeks beforehand. She was asked about a comment she made to the prosecutor that she had experienced a lot of dreams and flashbacks. The complainant agreed she said that. The exchange continued:[93]

> "Dreams about what?---What had just happened.
>
> What had – what was it that had just happened?---Being brutally raped by four guys.
>
> It's not the case that your drug use over many years has affected your memory?---No.
>
> Does the use of methylamphetamine cause you to have dreams and flashbacks?---No.
>
> Does the use of GHB – Fantasy, Frank, ecstasy - - -?---I don't even – when I was on it, I did not even use it that often, no."

[59] The complainant explained why she disagreed that she had a poor memory as to the particular events:[94]

> "You've got a poor memory, haven't you?---Yes, I do have a poor memory when it comes to certain things, but not things like that.
>
> And your poor memory is consistent with your long-term drug use?---Probably, but I remember traumatic things that happened to me."

[60] The complainant was cross-examined about clothing that was found near the spa and the absence of any sign of a bikini. She explained that when Zevenbergen was leaving the motel, he had a bag full of her clothing and "everything was missing

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89 AB 581, lines 21–27.
90 AB 582, lines 19–22.
91 AB 583, lines 3–12.
92 AB 582, lines 42–44.
93 AB 584, lines 25–35.
94 AB 585, lines 5–9.

after they left".[95] She denied the propositions that, when she was in the spa bath with Zevenbergen, she was not in a swimsuit, but rather in a bra and underwear, and that when Zevenbergen went to touch her vagina, she stood up and removed her underpants before throwing them over the side of the spa.[96]

[61] The complainant agreed that, when she invited Zevenbergen over, she was running low on methylamphetamine, and Zevenbergen brought methylamphetamine and the Fantasy. She denied that the Fantasy was produced by herself.[97]

[62] The complainant agreed that, when she got in the spa, it was with Sealey and Zevenbergen.[98] Mr Y left at about the same time. The complainant denied the proposition that, when Mr Y left the apartment, she removed her underwear, saying she disagreed "a hundred-and-ten per cent".[99]

[63] The complainant denied the proposition that, whilst in the spa, she was tracing the tattoos on Zevenbergen's chest and torso.[100]

[64] The complainant said that all of the assaults on her (with the exception of those which occurred in the spa) occurred in the period between when she woke about 9.30 am and when someone banged on the door at about 10 am.[101] When the knock came on the door, the appellants were still in the room. It was the knocking on the door that "made them stop".[102]

[65] A number of propositions were put to the complainant on behalf of Zevenbergen, and the complainant responded to them:

(a) when there was knocking on the door, Mr Y started yelling out; the complainant disagreed with that saying she just remembered the knocking, "really loud knocking";[103]

(b) it was suggested that a telephone call had been made to motel reception at about 8 am or shortly thereafter from the room she was in, but she did not remember that occurring; she denied that she asked Zevenbergen to check to see if the room could be extended;[104] she also denied that Zevenbergen called reception;

(c) she disagreed that Zevenbergen and the other appellants left after Mr Y and the motel manager appeared at the door, saying they left before that;[105]

(d) she said that they were all gone when she got out of the shower, and denied the proposition that, when she opened the door to Mr Y, the appellants "piled out", and that Mr Y was upset to see them still in the room;[106]

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95 AB 579, lines 42–46; AB 587, lines 5–8.
96 AB 587, lines 17–23.
97 AB 588, lines 21–38.
98 AB 589, lines 31–35.
99 AB 589, lines 40–44.
100 AB 589, line 46 to AB 590, line 7.
101 AB 590–591.
102 AB 592, lines 9–14.
103 AB 593, lines 40–44.
104 AB 594, lines 23–33.
105 AB 594, lines 35–47.
106 AB 595, lines 1–5.

(e) she agreed that she invited Zevenbergen over for the purposes of bringing methylamphetamine because she was in the middle of a methylamphetamine bender and was running low; Zevenbergen said he was with a friend, and the complainant said that was fine; then Zevenbergen "rocked up with two guys … then when [she] got out of the shower, after the spa, there was a third guy";[107]

(f) it was put to her that she did not go to the police and did not want to make any drama out of what had occurred; she replied: "Yeah, but I wouldn't be here today … there's no way … [i]t's not that I didn't want to. I found it very, very, very hard to be here today";[108]

(g) the complainant was questioned as to why she had missed going to court on a previous date, and explained:[109]

> "Well, there's a lot of reasons why I didn't show up. I haven't seen my family for over a year because of the border closures. I just got out of jail. I just got kicked out of my house. Lucky enough, I have a really good friend with me right now that actually cares enough, like, as much as my family does. And so – yeah. I'm here now because I have support and – to get through this, you know? I can't get through this by myself. There's no way."

(h) the complainant denied, when it was put to her, that sexual activity with Zevenbergen was consensual, that he climbed into bed beside her and masturbated her to orgasm, that she performed oral sex on Zevenbergen in the morning and he had sexual intercourse with her, that he was not the first person to have sexual intercourse with her that morning, and at no point did he ejaculate on her;[110]

(i) the complainant explained that, when Zevenbergen ejaculated onto her face, she did not wipe it off because she "was being held down. [She] was being held down and gagged";[111]

(j) the complainant denied, when it was put to her, that at no point did either Zevenbergen or anybody else apply a gag to her;[112] and

(k) the complainant denied the propositions put to her that there was no sexual assault, that everything had happened with her consent, and that the sexual activity had begun much earlier than she said, namely just after the sun came up.[113]

Cross-examination for Doran

[66] In reviewing this area of the case, I intend only to deal with points that are additional to, or different from, those dealt with in respect of the cross-examination for Zevenbergen.

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107 AB 595, lines 7–28.
108 AB 595, line 45 to AB 596, line 4.
109 AB 596, line 44 to AB 597, line 3.
110 AB 597, line 30 to AB 598, line 5.
111 AB 598, lines 19–20, AB 600, lines 29–40.
112 AB 600, lines 42–46.
113 AB 601, lines 1–10.

[67] The complainant agreed that she was a heavy user of drugs as at the date of the events, and had built up a tolerance to them, but she was still capable of making her own decisions and, whilst she had tolerance, that did not mean that the drugs had no effect on her.[114]

[68] The complainant was asked about a statement she made to police that "[o]ver the last couple of days [she] probably smoked a ball of meth". She did not deny telling that to police, but said, "I don't know how much meth I smoked back then".[115] She agreed that she had quite a bit of methylamphetamine with Mr Y on the evening in question.

[69] It was put to her that, around 3 am, she would have been out on the balcony. She replied, "I don't know. I'm sure that I was asleep by … 3 am".[116] She disagreed with the proposition that, at about 3 am, she would have been in the spa, talking loudly, and listening to music.[117]

[70] It was suggested to the complainant that she must have promised something to Mr Y in return for him picking her up, taking her from the Gold Coast to Toowoomba and back, and then renting the motel room with one bed. The complainant denied that, saying, "[n]o, it wasn't like that at all. He was just being kind because I had nowhere to go".[118] She denied the proposition that her consumption of drugs increased her desire to want to have sex with Mr Y. She accepted that she had at least three pipes of methylamphetamine with her, that she was in the mood to party that afternoon, and that it was probably correct that she had sex with Mr Y at about 7 pm.[119] The complainant said that, during the sex with Mr Y, he did not have hold of her legs or arms.

[71] She denied the proposition that some of the bruises she had were from the sex with Mr Y, and denied that she had sex with anyone else in the two days prior to the events in question.[120]

[72] It was put to her that, when she spoke to Zevenbergen, she knew that one of the friends coming with him was Doran. The complainant disagreed. She also disagreed that she had been messaging Doran on Facebook on the night of 30 September 2018, even though they were Facebook friends.[121]

[73] The complainant said that Zevenbergen simply said he was with a friend, and she did not know who that friend was until they arrived and Doran introduced himself.[122]

[74] The complainant was cross-examined about her knowledge of Fantasy. It was suggested that it was a drug she had had before, that it was a party drug, and that it

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114 AB 601, lines 27–39.
115 AB 603, lines 15–21.
116 AB 604, lines 41–46.
117 AB 605, lines 1–2.
118 AB 607, lines 26–30.
119 AB 607, line 35 to AB 608, line 13.
120 AB 608, lines 15–43.
121 AB 610, lines 19–30.
122 AB 611, lines 1–3.

can increase sex drive.[123] It was also suggested that she wanted to feel those effects on that night, and she responded:[124]

> "No. I didn't want to feel those effects. I just took it in this instant [sic].
>
> Well, you knew what the drug did. You wouldn't have taken it if you didn't want the drug to have that effect on you, isn't that right?--
> -I didn't ask for any of what happened to me to happen to me. And by taking a – by taking a little bit of Frank, I didn't ask for anything of that to happen to me."

[75] The complainant denied the proposition that Doran did not have any of the Fantasy.[125] The complainant agreed she felt energised and happy after taking the Fantasy and that was consistent with the effect she had experienced from it in the past.[126]

[76] The complainant agreed that Doran sat on a chair outside the spa and did not actually get in. She also agreed that she was telling him he should come in.[127] However, she denied the propositions that she really wanted him to get in the spa, that she was flirting with him, and that she was keen on him.[128]

[77] The complainant denied the proposition that Doran asked, "at first jokingly", whether the complainant would sleep with him, and that she said she would.[129]

[78] As to the incident in which Zevenbergen touched the complainant in the spa, she was asked whether she was suggesting that she got out of the spa because Zevenbergen had touched her. The complainant said that was what she was suggesting.[130]

[79] The complainant denied the proposition that, having got out of the spa, she got back in a second time with Zevenbergen and Sealey.[131] When it was put to her that, on the second occasion, she took her "bottoms off" and only had her top on, she denied that proposition.[132]

[80] As to the presence of Butler, the complainant said that the others did not say anything about bringing anyone, nor that Butler was a tattoo artist. However, she could remember Butler saying that he was a tattooist. She denied saying in the conversation that she was interested in getting a tattoo herself.[133]

[81] The complainant denied that she was asked if Butler could come around, that she was told his nickname, that she was happy for him to come over, and that at some point Doran referred to Butler being there and left the unit. She said that when she

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123 AB 612, lines 1–15.
124 AB 612, lines 20–26.
125 AB 612, lines 40–41.
126 AB 612, line 43 to AB 613, line 3.
127 AB 613, lines 40–44.
128 AB 614, lines 1–6; AB 619, lines 3–5.
129 AB 619, lines 7–11.
130 AB 620, lines 4–21.
131 AB 620, lines 40–47.
132 AB 621, lines 1–3.
133 AB 621, lines 16–39.

got out of the shower, Butler was there and she "didn't have a choice in the matter".[134]

[82] The complainant accepted that she told police that she had been in the shower with Sealey for 15 minutes, because she "had a very clear memory back then because it had just happened, so".[135] However, she accepted that she told police that, when Butler arrived, she greeted him, saying: "Hi, I'm [the complainant]. Nice to meet you".[136]

[83] A number of propositions were put on behalf of Doran, and denied by the complainant, including that:[137]

(a) after Butler arrived, she continued to smoke methylamphetamine with the other three;

(b) she did not go to bed straight away and stayed up;

(c) Doran fell asleep on a dining chair in the kitchen;

(d) the drawings on her leg were done whilst she was awake, but Doran was asleep;

(e) at the moment Zevenbergen and the complainant were having sex, Doran was not in the room, and only came into the room after sex between the complainant and Zevenbergen had started;

(f) the complainant and Zevenbergen were both on their sides on the bed, and the complainant was moaning in pleasure;

(g) Doran then made a smartass comment like, "I thought you were going to sleep with me";

(h) the complainant replied that she would;

(i) she then consensually sucked Doran's penis;

(j) she then consensually engaged in vaginal sexual intercourse with Doran;

(k) Doran was nowhere near the bed when she engaged in sexual activity with Butler;

(l) after all the sex finished, she announced she was going to contact Mr Y to see if she could get the room for another night;

(m) Doran never took a picture of the complainant's ID;

(n) Doran never put his hand over her mouth or a sock in her mouth;

(o) Doran never held her down; and

(p) Sealey never had sex with her.

[84] Counsel put to the complainant that Doran never threatened her in any way. Her response was that, "[a]fter it all finished [Zevenbergen] was the only [one] who threatened [her]".

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134 AB 621, line 38 to AB 622, line 16.
135 AB 622, lines 22–33.
136 AB 623, lines 18–23.
137 AB 624–627.

[85] The complainant reiterated her evidence that she was being raped by Sealey when the knocking on the door commenced.[138] The complainant accepted that she could have told a paramedic that morning that she had been vaginally raped by four men.[139]

[86] It was put to the complainant that Mr Y suggested she make a false rape complainant because of the state of the room and the fact that the police had already been called. She disagreed. She denied that she had made a false rape complainant so that she might have somewhere else to go, and denied the suggestion that sexual activity with Doran "and in his presence" occurred with her consent.[140]

[87] It was put to the complainant that, on the night in question, she had taken intoxicants, already slept with Mr Y, then wanted to keep partying, willingly had sex with Doran, and engaged in sexual activity with others. The complainant answered: "Absolutely not. I think I've made it very clear that I consensually had sex with [Mr Y] and did not consent to any of those men even touching me".[141]

Cross-examination for Butler

[88] As indicated before, when reviewing this cross-examination, I intend only to deal with points that add to or depart from what has been reviewed earlier.

[89] The complainant agreed that once she woke up and told Zevenbergen to "fuck off out of bed", the sequence of events involving the four appellants must have happened within about 20 to 30 minutes.[142]

[90] The complainant accepted that, when she had a conference with the prosecutors in July 2020, she told them that she did not have a good memory of what had happened on the night in question.[143] She was then asked whether she had read her statement to refresh her memory and she answered:[144]

> "Do I take it that you had to read your statement a day or two ago to refresh your memory?---To refresh my memory about, like, little things and stuff, you know. Obviously I know exactly what happened – what – the reason why we're here today. Obviously that's not a blur. Never will be. So - - -
>
> Well?---But I'm just – yeah.
>
> It – it's not a blur?---Like, timelines and things like that, because – yeah.
>
> All right. But one of the things you told [those in the conference] was that – you said this in relation to your memory: you can't remember a lot; that your memory was, in fact, blurry?---Yeah. I meant of things that didn't matter as much."

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138 AB 628, lines 17–18.
139 AB 628, lines 44–46.
140 AB 636, lines 17–32.
141 AB 637, lines 31–35.
142 AB 661, lines 4–20.
143 AB 663, lines 9–27.
144 AB 663, line 38 to AB 664, line 3.

[91] A series of propositions were put to the complainant on behalf of Butler, and she disagreed with them, occasionally adding a comment:[145]

(a) when Butler arrived, he was introduced as a tattooist;

(b) she started talking to Butler about getting a tattoo;

(c) the drawings on her leg were done while she was awake; she answered by saying "[s]trongly disagree … [t]hat's not the truth at all … I don't see a reason why I would want someone to draw all over me like that. Especially all the dicks on my stomach";

(d) when she woke up, she spoke to Zevenbergen about trying to get the room for another night;

(e) there was "a series of events which occurred with these men that were consensual"; she responded by saying: "That's not the truth. That's not the truth. … Wouldn't be here today if it was consensual";

(f) that, while she was lying in the bed, she motioned Butler to come to the bed; she responded: "Disagree. … That's not the truth at all. ... That is not the truth at all";

(g) she told Butler that she wanted to have sex;

(h) he lied on the bed and each of them started rubbing each other; she responded: "Disagree. That's all a lie";

(i) she was rubbing his penis but he could not get an erection;

(j) Butler went outside and came back a few minutes later to where she was, and she grabbed his penis through his pants;

(k) he was having trouble getting an erection;

(l) he then pulled his penis out and started masturbating and, as a result, ejaculated over her face; and

(m) at no stage did Butler hold her down.

Cross-examination for Sealey

[92] The same approach is taken in respect of this cross-examination as with the others.

[93] The complainant agreed that she had a particular mobile phone number on the night in question. She had never met Sealey before. She had never spoken to him, nor did she know anything about him. While she could not remember the conversation she had with him, she did sit down and have conversations with everyone there.

[94] She denied the proposition that Sealey got out of the spa before her, then getting into the shower where the complainant joined him.[146] However, she agreed that whilst they were in the shower, there was no inappropriate or sexualised behaviour by him.[147]

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145 AB 664, line 19 to AB 667, line 26.
146 AB 670, lines 37–39.
147 AB 670, line 41; AB 671, lines 4–7.

[95] The complainant denied telling Sealey that Mr Y considered that he owned her, and that Mr Y considered that the complainant was "his thing". She responded that she was attracted to Mr Y and that was why she slept with him.[148] She denied telling Sealey that she did not want to be there but had nowhere to go, and that the only reason she was there was because Mr Y was paying.[149]

[96] The complainant denied that Sealey had said that he and the complainant could leave and he would help pack her gear. She also denied that she gave Sealey her mobile phone number and that she had a text conversation with him. That passage included this exchange:[150]

> "All right. I suggest to you that you provided ... Sealey with your mobile phone number?---No.
>
> And I suggest to you that you had a – a text conversation with him. What do you say about that?---Why would I have a text conversation with him when he was right there.
>
> I suggest that he was typing to get you to leave and he didn't want the others to know?---That didn't happen.
>
> Didn't happen?---No."

[97] The complainant was then shown a document containing text messages.[151] She was directed to the telephone number at the top, being the telephone number she had already agreed was her own. She then denied that that was her number.[152]

[98] A number of propositions were then put to the complainant and she disagreed with them:[153]

(a) Sealey helped her put her belongings in bags, and put them near the TV; the complainant added that, in the Snapchat video, "you can clearly see [Zevenbergen] packing up all my bags … while I was asleep";

(b) Sealey came and laid beside her on the bed; she added, "I just remember falling asleep. I never invited anyone into the bed. I never wanted anyone in the bed";

(c) Sealey asked her if it was okay to lie down before he got in the bed;

(d) she asked one of the other men to draw on her leg because she was considering getting a tattoo; and

(e) in the Snapchat video, Sealey was in the bed next to her, under the covers.

[99] The complainant was asked about where Sealey was whilst the other men were having sexual intercourse with her in the following exchange:[154]

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148 AB 671, lines 38–44.
149 AB 672, lines 1–5.
150 AB 672, lines 10–25.
151 MFI #B.
152 AB 672, lines 34–47.
153 AB 673–675.
154 AB 675, line 40 to AB 676, line 32.

> "Now, at the time that the other three men were having sexual intercourse with you, or dealing with you in a sexual way, do you know where ... Sealey was?---They were all there.
>
> What was ... Sealey doing?---Watching.
>
> Where was he standing in the room?---On the bed.
>
> He was on the bed?---They were all on the bed, yes.
>
> All on the bed. All right. Can I – you can't place him in any particular position?---I didn't really take attention to detail. I was just staring at the sealing [sic] thinking I was going to die, to be honest.
>
> All right. And when ... Sealey was having intercourse with you his face would have been close to your face; is that correct?---Yes.
>
> You would have been able to see his face, wouldn't you?---I was trying not to look at him.
>
> …
>
> What I'm going to ask you is, did you see anything drawn with a black sharpie on Mr Sealey's face, whilst he was on top of you?---No."

[100] The complainant denied that Sealey was asleep in bed at any time that anyone else was having sexual interaction with the complainant. She denied that Sealey was asleep in bed at any time that anyone else was having any type of sexual interaction with the complainant. She denied that he did not get on top of her and denied that he never had sexual intercourse with her.[155]

Evidence of the motel manager

[101] The motel manager said she received a phone call from someone in the complainant's room at about 9.20 am. The call was from a male person who did not identify himself, but asked if that room could be booked for an additional night. She told him that the room was already booked and they would have to leave by 10 am.[156]

[102] At about 9.50 am, she spoke to Mr Y who said he could not get access to the room. The manager went to the front door and knocked several times, probably about five or six knocks. There was no response, so she knocked again another five or six times, still getting no response.[157]

[103] She went to an adjoining unit and looked over to the complainant's room. She saw three or four men in the rear courtyard area. She told one of them that the man who had booked the room wanted to gain access. The response from one of the men was that "the girl was in the shower and that they would only be about another five minutes". She told them they had fifteen minutes and then she would call the police.[158]

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155 AB 677, lines 1–8.
156 AB 685.
157 AB 685–686.
158 AB 686, lines 4–24.

[104] She went back and spoke to Mr Y where the decision was made to call the police. That only took a few minutes. She then saw three of the men, and then a fourth, coming out of the room.[159]

[105] When she eventually entered the unit, she saw a girl sitting on the floor packing her belongings into a bag.

[106] Counsel for Doran cross-examined the motel manager. It was put to the motel manager that she was still on the phone with the police when she walked to the front of the room and spoke to the female inside. The motel manager disagreed.[160] She was pressed that she might be mistaken and had truly been on the triple 000 phone call when she went into the room. She responded:[161]

> "Well, no. I – I can't see how I could possibly be. But I don't see how I could be because the police just – when I was on the phone to the police, they just asked me to follow – just see what direction the gentlemen were heading in to see whether they were hopping into a vehicle or whether they were on foot. And then after that, … well, this is what I thought had happened – was that we had hung up from the call and that I then went back to unit 6 to hand [Mr Y] back his phone."

[107] Counsel continued to press that she had the sequence the wrong way round. Eventually, the motel manager said that she could not remember because it was three years ago.[162]

[108] It was put to the motel manager that she did not see the complainant crying. The motel manager said she did, but it was later, outside the unit.[163]

Police evidence

[109] The first police witness was the senior constable who spoke with the complainant while she was sitting in the passagenger seat of a car outside the motel at about 10.20 am. She said she had seen the four appellants and stopped and took their names. As she was speaking to them, she noticed that Sealey's face had some black ink on the righthand side of it in the shape of a penis. She described it as quite a large drawing, extending from around the corner of his right eye down to the corner of his mouth.[164] At that point, she had not been told that there was a rape complaint.

[110] Having arrived at the motel, she had a conversation with the complainant. She described the complainant as "shaking, physically shaking, and … terrified", and said she was crying.[165] The conversation she had with the complainant was recorded on her body worn camera. That recording became exhibit 28. A transcript was provided to the jury and became MFI #C.[166] In the course of that interview, the complainant said:

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159 AB 686, lines 29–38.
160 AB 687, lines 34–41.
161 AB 688, lines 11–17.
162 AB 688, lines 27–28; AB 689, lines 16–18.
163 AB 689, lines 28–31.
164 AB 691, lines 11–23.
165 AB 691, lines 44–47.
166 The jury were directed that the transcript was merely for assistance and was not the evidence.

(a) that things had been done to her without her consent by all of the four appellants; she did not want to get into trouble with the appellants;

(b) they forced her to have sex with them;

(c) she was not consensually sleeping with any of them;

(d) all of them forced themselves onto her;

(e) all of them were holding her at the same time;

(f) they penetrated her vagina, but not her anus;

(g) they had things towards her mouth;

(h) she had been in the shower since;

(i) they had ejaculated on her face;

(j) asked if she was thinking of making a complaint to police, the complainant said she was "not sure yet";

(k) that it "really hurts", her vagina was very sore and the four of them were involved;

(l) asked if the pain down below felt like cuts or stinging, she answered yes;

(m) one of them had taken a photo of her licence, to obtain her address, and "if I make a complaint, they will maybe go to my house or something, I don't know"; and

(n) that she had put on different underwear from those she was wearing when she was raped, and the ones she had been wearing had not been washed and were in her bag.

[111] In cross-examination, the officer agreed that all four appellants had stopped when asked, had given their names, and admitted they had come from the motel.

[112] When she spoke to the four appellants, Sealey reacted in a surprise manner when he found out he had a drawing of a penis on his face, and it was the cause of laughter, not only for the police, but also the other three appellants.

Evidence of the motel guest

[113] A person who was staying the night at the motel on 30 September 2018 said that, at 3 am, she was woken up by noises coming through her bathroom and kitchen window on the second level. The noises sounded like there was a bit of a party happening, with music and people talking and the sound of spa jets going. She could hear three males and a female. She did not hear any noises of distress and it sounded like a party.

Other police witnesses

[114] Senior Constable Lilley was made available for cross-examination. He attended at the motel on the morning of 1 October 2018 and spoke with Mr Y and another man who was with Mr Y. He said Mr Y was forthcoming with information at that time.

[115] Mr Trezise, a former plainclothes constable, was part of the team who attended at the motel in the afternoon on 1 October 2018 to collect and take photographs of

various items, including pillowcases, pillow, cans, and underwear.[167] Mr Trezise was involved in interviewing Sealey. In the course of that interview, he obtained pictures of messages on Sealey's phone, being messages between Sealey and the complainant. That was tendered into evidence.[168]

[116] In Zevenbergen's bag, he found two black Sharpie marker pens.[169] On Zevenbergen's phone, he located a photograph of the complainant's driver's licence.[170]

[117] He said police had attempted to gain a statement from Mr Y, but Mr Y was unwilling to assist.

[118] In cross-examination, Mr Trezise said, that as part of the search of the room, he found a broken glass pipe which was the sort of implement used to smoke methylamphetamine.[171]

[119] Mr Trezise explained the steps that were taken to attempt to get a statement from the man who was with Mr Y on the morning after.

[120] Senior Sergeant Thompson was a police officer who was part of the scientific section in 2018. She was provided with a number of the items which police had seized from the motel including sheets, a bed cover, pillowcases, and items of clothing worn by the complainant. She tested those items to identify if seminal fluid was present. In her evidence, she explained the process by which that is done. By reference to photographs, she explained how pieces of the material were excised so they could be tested, and how that was determined by the positive chemical reaction revealed by initial testing. She also did some of the tape-lifts that were used for DNA testing.

[121] Ms Lloyd, a senior scientist working at Forensic DNA Analysis, gave evidence as to the results of DNA testing on various objects. She explained a number of aspects of DNA: (i) what DNA is; (ii) where it is found on the human body; (iii) how it can be transferred between persons;[172] (iv) that the DNA in seminal fluid or semen comes from the spermatozoa or cellular material from the penis; (v) DNA can be left by skin cells shedding, and fabric can be more likely to retain cellular material than a smooth surface; (vi) activities can affect how much cellular material is left, e.g if the body is hot and sweaty, it is likely to leave more than when sitting comfortably; (vii) washing, particularly with detergents, can remove DNA, as would vigorous rubbing with a towel rather than patting; and (viii) that a DNA likelihood ratio was a measure of the weight one gives to whether a certain person has potentially provided their DNA to a particular crime scene DNA profile, and how likely that profile is to have occurred if that particular person has given their DNA to it.

[122] She explained the scale applicable to the likelihood ratio:[173]

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167 Exhibits 30–40.
168 Exhibit 41.
169 A photograph of them became Exhibit 42.
170 AB 712, lines 19–20.
171 AB 714, lines 9–13.
172 Direct transfer by leaving DNA on an object; secondary transfer, e.g. by someone else touching an object which has another person's DNA on it already; and tertiary transfer, where a third person is involved.
173 AB 734, lines 10–30.

> "Okay. We … it's like a seesaw. When we have a profile and ... we are inconclusive or we can't tell whether someone has contributed DNA or if they haven't, we'll give them a likelihood ratio of one, which is inconclusive. And we use that as the apex of that seesaw. Now, on one hand, we will have all the numbers from one up to 100 billion, and that will be favouring contribution. So that – the crime scene DNA profile is up to 100 billion times more likely to have occurred if the person of interest has contributed their DNA to that profile. On the other hand of the seesaw, we go from one down to 100 billion, but in the opposite direction. So that DNA profile is up to 100 billion times more likely to have occurred if that person of interest has not contributed their DNA. So a seesaw.
>
> All right. So if we consider that seesaw, one is the middle?---Yes.
>
> And then up to 100 billion, in terms of support for contribution?---Yes.
>
> All right. And on the other side, down to 100 billion, but support for non-contribution?---That's correct.
>
> So support for contribution, that's a positive result that it's more likely they've contributed DNA to that profile?---Yes."

[123] Then, by reference to some examples in Exhibit 52, the DNA Table, she explained how to read the results.

[124] In cross-examination for Zevenbergen, Ms Lloyd agreed that the DNA Table did not show any DNA profile for Zevenbergen from spermatozoa. She explained that there were several possible reasons for that: that he did not ejaculate, or not many spermatozoa were found in that particular ejaculate, or the differential lysis process has not been quite effective in that case.[174]

[125] In cross-examination for Butler, Ms Lloyd agreed that the results for the complainant's vaginal, vulval, and peri-anal swabs excluded Butler as a contributor.[175] His DNA was found on her face swabs and shirt, and that could be explained by his ejaculating on her face and onto the shirt.[176]

[126] DSC Harnden said he was aware of attempts to contact Mr Y to get a statement, that they were unsuccessful, and that Mr Y had indicated he now had no memory of the events.

[127] DSC Imhoff was made available for cross-examination. Counsel for Doran established that Doran had identified a mobile phone to the police, provided the number, and volunteered the passcode.

[128] The Forensic Medical Officer who examined the complainant at hospital explained her qualifications and experience. By reference to her notes and a diagram she made (Exhibit 61), she gave evidence as to what her examination revealed. Relevant points included:

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174 AB 740, lines 16–30.
175 AB 741, lines 1–14.
176 AB 741, line 20 to AB 742 line 6.

(a) several small split lacerations between the urethra and the clitoris; the lacerations were due to blunt force trauma; "the skin basically just splits because the elasticity of the skin cannot keep up with the force of the blunt trauma";[177]

(b) several, small, split lacerations to the posterior fourchette; the fourchette is the area towards the anal area below the base of the vaginal opening;[178]

(c) abrasions on vaginal wall at 10 o'clock; these were caused by blunt force trauma, such as a penis;[179]

(d) injuries can occur in both consensual and non-consensual sexual intercourse, and in many instances, there may be no injuries in both consensual and non-consensual sexual intercourse;[180]

(e) it was not possible to put a speculum into the complainant's vagina because she was experiencing significant pain;[181]

(f) as to the bruising on the legs, many of them were very small, circular, 1cm in diameter; there was also a pattern injury on her left lower leg, which consisted of four oval bruises which were around 1.5 to 3cm long, and just under a centimetre wide; these were arranged in parallel; in this instance, where there may have been touching or holding, one explanation for that sort of pattern, is being held by a hand; so bruises due to fingers applying pressure to that leg; on the back of her right thigh, there were three similar bruises, also about 1.5 to 3cm in length and just under a centimetre wide, also roughly arranged in parallel;[182]

(g) it was not possible to age the bruises except that, if a bruise was yellow, that meant it was at least 18 hours old; there was no yellow bruising;[183] and

(h) there was no bruising to the complainant's shoulders.

Admissions

[129] Several sets of formal admissions were made.

[130] The first concerned forensic results:

(a) while at the hospital on 1 October 2018, the following areas of the complainant's body were swabbed: two face swabs, one wet and one dry; one mouth swab; one vulval swab; two high vaginal swabs; and one perianal swab;

(b) the swabs were taken from the hospital by police to Southport Police Station and securely stored until analysis occurred;

(c) each appellant and the complainant provided DNA reference samples which were taken by police and securely stored until analysis occurred;

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177 AB 766, lines 29–30.
178 AB 768, line 43 to AB 769, line 6.
179 AB 769, lines 11–27.
180 AB 769, lines 29–32.
181 AB 679, lines 34–45.
182 AB 770, lines 9–24.
183 AB 770, lines 37–46.

(d) police seized items from the motel, including two bed sheets, the bedcover, five pillowcases, and the items of clothing depicted in exhibits 13, 14, and 26; these items were securely stored until forensic examination occurred; and

(e) an analysis of the reference samples provided, along with samples from the swabs and items seized from the motel, was conducted at Queensland Health Forensic Scientific Services; the results of that analysis are set out in the table tendered as an exhibit and labelled DNA table.[184]

[131] The second was a three-page document (Exhibit 60) containing 21 admissions relating to various matters:

Medical

(a) On 1 October 2018, the complainant attended at the Gold Coast University Hospital, where she was examined by a forensic medical officer at approximately 3 pm.

(b) Upon examination, the doctor observed bruising on the back of her arms, the front of both legs, and the back and inside of her right thigh. The doctor noted the following about the bruising:

(i) most bruises on the front of the complainant's lower legs were around 1cm, circular, and red-brown in colour.

(ii) there was a pattern injury on her left lower leg consisting of four brown bruises which were roughly parallel, just under 1cm wide, and 1.5 to 3cm long.

(iii) there was a similar pattern injury of three parallel bruises, just under 1cm wide and 1.5 to 3cm long, on the back of her right thigh.

(iv) on the front of her left shin, there was a small, dry, 1cm abrasion surrounded by bruising.

(v) there were bruises on the outside of her right leg near the knee, and on the inside of the same leg – one on the inner thigh and two just below the knee.

(vi) there were three bruises on the back of her left arm; a roughly circular 2cm blue bruise above the elbow; and two faint brown bruises on the back (or top) of the forearm. The latter were just under 2 by 1cm in size.

(vii) on the back (or top) of her right forearm, there was a 3 by 3cm brown bruise with an indistinct edge.

(viii) she had a small, scabbed injury on her right middle finger.

(c) Photographs of the complainant's bruises were taken at approximately 3.45 pm.

(d) The complainant did not have any visible injuries to her mouth.

(e) A number of genital injuries were observed. The doctor noted the following about the genital injuries:

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184 Exhibit 52, AB 831.

(i) There were several small, shallow, 'split' lacerations between the urethral opening and the clitoris, as well as in the posterior fourchette.

(ii) There was an abrasion on the vaginal wall at 10 o'clock. The position of the injury had been described from the perspective of the examiner viewing the genitalia when a woman is examined whilst lying on her back with her hips and knees flexed, and externally rotated.

(iii) There was swelling of the labia minora, hymen, and the vaginal wall anterior to the hymen.

Fingerprints

(f) On 1 October 2018, a Scenes of Crimes officer attended the motor inn. She conducted a forensic examination on the unit, including locating fingerprints and taking photographs of them. Those photographs were forwarded to the police Fingerprint Bureau, to allow for comparison against known fingerprint impressions. That analysis was done by a fingerprint expert.

(g) In addition to Doran's fingerprints being found on some cans of Bundaberg Rum, his left ring-finger and left palm were located on the mirror in the room. The location of his fingerprint is next to the barcode labelled '1' and the location of his palm print is next to the barcode labelled '2' in exhibit 35.

(h) Butler's fingerprint was located on a can of Bundaberg Rum.

(i) Fingerprints cannot be dated, meaning an expert cannot tell when the surface where the fingerprint was left was touched. It is not possible to determine how long a person contacted the surface for when leaving a fingerprint. It is possible to touch a surface and not leave a fingerprint.

Phone Evidence

(j) On 1 October 2018, police obtained Zevenbergen's phone. There was a 'Snapchat' video that had been received to his phone. Police recorded the video, and that recording by police is tendered as exhibit 27 in the trial. The time the video was taken cannot be determined.

(k) The phone number[185] was registered to a person with a surname matching the complainant's between 13 July 2016 and 17 April 2019. Zevenbergen had the same number saved in his phone under an abbreviation of the complainant's name.

Previous Statements by the complainant

(l) Just after midday on 1 October 2018, at the Gold Coast University Hospital, the complainant told a police officer, that:

(i) She had consumed ice and added, "the tiniest little bit, though" and, "just a couple of puffs".

(ii) she thought it was going to be just Zevenbergen coming over.

(iii) she knew Doran's surname.

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185 The phone number referred to in paragraphs [93] and [97], above.

(m) On the afternoon of 2 October 2018, at the Gold Coast University Hospital, the complainant told a Detective Senior Constable that she was not sure who took the photo of her licence.

(n) In her first typed statement, dated 3 October 2018, the complainant told police Doran's given name and his surname.

(o) In a statement to police dated 14 August 2019, the complainant told police, "I remember we took a couple of photos with my polaroid camera".

(p) When giving evidence in court on 14 August 2019, it was suggested to the complainant that she cleaned up the unit for about 10 minutes after Mr Y arrived on the morning of 1 October 2018; she replied, "Yeah".

(q) On 12 January 2021, the complainant participated in an interview with police about the incident at The Island, the previous day. In the course of that interview, the complainant told police:

(i) the two males who came to The Island were customers from Locanto;

(ii) the men were trying to organise a threesome (or "3-way"); and

(iii) she had identified those two males to Mr M as her mates.

(r) On 12 August 2021, the complainant told an employee from the Office of the Director of Public Prosecutions that she had not slept for "about a week or so" prior to 1 October 2018.

Queensland Ambulance Service Notes

(s) The ambulance officer who spoke to the complainant on the way to the hospital made notes which included the following:

> "Pt stated that she was woken from her sleep to find 4 males standing over with 1 male on the bed rubbing her leg, pt stated that she was then held down, with each male person sexually assaulting her. Pt disclosed to QAS and QPS that she personally knew one of the offenders, the other 3 male persons are unknown to her. Pt stated that each Male persons undertook penile penetration, pt further stating that she was gagged with a sock at one point, then removed after she had difficulty breathing. Pt also stating that each male persons undertook penile penetration orally. Pt stated that she had a shower post assault. Pt denied any bleeding or vaginal bleeding post assault."

(t) These notes were commenced in the ambulance and finished shortly after 12.30 pm on 1 October 2018. The officer was monitoring the complainant's vitals and performing patient care at the time of the conversation. It is not known when the portion of the note contained in admission 19 was written.

000 call

(u) The manager of the Runaway Bay Motor Inn was still on the phone call with the 000 operator when she attended the front door of the unit and spoke to the complainant.

[132] There were formal admissions that Zevenbergen was twice interviewed by police on 2 October 2018, and the interviews were recorded. They became Exhibits 53 and 54, and the transcripts, MFI #F and MFI #G. The recordings were played to the jury. Formal admissions were also made as to: (i) Zevenbergen having drawn a diagram during the police interview, relating to the motel room, which became Exhibit 55; (ii) his having been shown photographs during the interview, which became Exhibits 56–59.

[133] The DNA table, Exhibit 52, established that each of Doran, Butler, and Zevenbergen had contributed DNA[186] to:

(a) onto areas on the complainant's body (Doran and Butler, each by spermatozoa);

(b) on the bed sheets (Zevenbergen and Butler, each by spermatozoa and epithelial cells);

(c) on pillowcases (Zevenbergen and Sealey by epithelial cells);

(d) on the complainant's t-shirt (Butler by spermatozoa and epithelial cells); and

(e) on the complainant's underpants (Doran by spermatozoa and epithelial cells; Zevenbergen by epithelial cells).

Zevenbergen's interviews

[134] Zevenbergen was interviewed twice on 2 October 2018. There are aspects of the interviews that are the subject of his specific grounds of appeal. I will deal with them when those grounds are examined. For present purposes, what he said about the events at the motel room are relevant. Of course, they were admissible only against him. Pertinent matters included:

(a) at the start of the first interview, Zevenbergen was given cautions as to his right to remain silent,[187] the right to telephone and speak to a friend or relative and to arrange to have them present,[188] and the right to phone a lawyer and have them present;[189]

(b) Zevenbergen was asked whether he was under the influence of drugs or alcohol, and he replied "just some medication".[190] He identified the medication as Lyrica and Paxam. He said they were for the pain in his back and anxiety. Asked about the affect of the medication, he said it "makes me feel buzzy", and "a bit light in the head";[191]

(c) Zevenbergen was asked whether it affected his understanding of what was going on, and he said "no". He was then asked if he understood what was happening and "all your cautions" and he said: "Yeah". He also agreed that he had his faculties about him;[192]

(d) as to events on the night in question, he said:

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186 The likelihood being expressed in the "100 billion times more likely" mode.
187 AB 954, lines 57–58.
188 AB 955, lines 19–22.
189 AB 955, lines 26–34.
190 AB 955, line 52.
191 AB 956, lines 25–35.
192 AB 956, lines 41–57.

(i) the complainant had asked he and Doran over to the motel to "kick back, you know, relax";[193]

(ii) when explaining how they got to the motel, one police interviewer commented "your memory seems a bit fuzzy, why is that?", and Zevenbergen answered that it was from his medication;[194]

(iii) asked if that affected his memory, Zevenbergen said yes, adding: "like I'm not on point today … I'm a bit slow";[195]

(iv) the interviewer then asked whether he was "still understanding what we're doing"; Zevenbergen answered in the affirmative, saying that he was not suffering from memory lapses, but it was a bit hard for him because he was "freakin' out";[196]

(v) when they arrived, the complainant was "playin' around";

(vi) when they got to the hotel, the complainant was playing around, "on the gear" and having a party;[197]

(vii) Mr Y left a couple of hours after Zevenbergen and the others arrived;

(viii) he and Sealey were in the spa;[198]

(ix) everyone was just sitting around, "gettin' on the gear and smoking and … drinkin'";[199]

(x) he described the complainant as "just tartin' around … changin' and … like being real … very flirtatious";[200]

(xi) he explained that to mean that she was "pretty much gettin' naked and walkin' around … like gettin' changed";[201]

(xii) he said the complainant went to sleep with Sealey, but the others stayed up all night;[202]

(xiii) when he saw Sealey and the complainant in the bed, he was not sure if they were awake or not, but they were under the blankets;[203]

(xiv) he described what happened when the sun came up:[204]

> "The sun comes up and yeah … well I give her. Yeah, we, that was it, you know, jumped into bed and everythink [sic]. She woke like was gettin' flirtatious and yeah, got fuckin', yeah.
>
> ...

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193 AB 967, line 52.
194 AB 969, line 20–24.
195 AB 969, lines 30–44.
196 AB 969, line 50 to AB 970, line 11.
197 AB 971, lines 20–26.
198 AB 972–973.
199 AB 974, lines 5–6.
200 AB 974, lines 19–21.
201 AB 974, lines 33–44.
202 AB 974, line 57 to AB 975, line 29.
203 AB 976, line 49 to AB 977, line 9.
204 AB 977, lines 41–51.

> ... We started gettin' a bit like into it, you know, and … [s]he didn't say like no, no, no, no, no, like you know more like pulled her, you know what I mean. And then yeah, that was it."

(xv) Sealey was asleep at the time;[205]

(xvi) in the course of the description of what happened, Zevenbergen said "I would prefer to do this interview when I'm not so, like so … in the … influence of my medication";[206] asked if he was affected by his medication at that time, Zevenbergen answered: "Yeah"; when reminded that initially he had said he was okay, he answered: "Oh well I know. Like I am fucked, you know I'm fucked on … medication … [y]ou can probably see that";[207] asked if he was saying that he did not understand what was going on, Zevenbergen said: "I do understand what's goin' on … [i]n a way like we're getting' interviewed about fuckin' somethin' that's bullshit" … "and that shit did not happen";[208]

(xvii) at that point, the police interviewer said that they would end the recording, "given that you're saying now that … you'd prefer … to speak with us … when you're not as under the influence of … drugs"; he added that Zevenbergen had indicated that he understood what was going on, but asked him: "are you saying that ... your memory's affected by this"; Zevenbergen answered in the affirmative.[209]

[135] The first interview finished at 2.39 pm, having lasted 28 minutes. The second interview commenced the same day at 8.29 pm and concluded at 10.16 pm. There were different interviewing officers asking questions of Zevenbergen in the second interview.

[136] At the commencement of the second interview, Zevenbergen was reminded that he was then under arrest and could not leave, and was reminded of his right to remain silent.[210] No other caution was given.

[137] Zevenbergen was asked whether he was suffering from any illness or injury, and he replied "[j]ust an addiction" to drugs. He was also asked how he was feeling, and answered "not too bad … [b]etter than I was this mornin'".[211]

[138] Zevenbergen was reminded of his right to remain silent;[212] when asked if he was on any medication, drugs, or alcohol, he said it was only his "normal medication … Lyrica ... Zanax [sic]" and another that he could not recall. He said one was for epilepsy, another for severe backpain, and the third for anxiety.[213]

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205 AB 978, lines 3–11.
206 AB 979, lines 8–10.
207 AB 979, lines 21–24.
208 AB 979, lines 35–54.
209 AB 980.
210 AB 985.
211 AB 989, line 49 to AB 990, line 5.
212 AB 990, lines 23–24.
213 AB 990, lines 33–54.

[139] He was asked how the medication affected him, and he answered "drowsy" and "sometimes … like it forgets all the memory".[214] He said he had been on that medication for about a month and, notwithstanding the medication, he managed to get through each day, communicate with people, and manage his affairs.[215]

[140] Zevenbergen was reminded that the previous interview had stopped because he felt affected by his medication, and was asked how he was feeling at the time of second interview. Zevenbergen responded "I'm feelin' yeah, right … [b]ut still a bit drowsy but yeah, a bit better".[216] He said he was happy to go ahead with the interview.[217]

[141] As to the events on the night, Zevenbergen said:

(a) the complainant had invited Zevenbergen and his mates around; they were on Fantasy, and Zevenbergen said they had methylamphetamine which they offered to bring;[218]

(b) Zevenbergen got in the spa with the complainant;[219]

(c) he described the complainant as "flirtin' around, very flirtatious … drunk, she's on a fanner, we're all fuckin' pissed";[220]

(d) the complainant went to bed; later, Zevenbergen came in and cuddled her and "got a bit intimate"; at that point, "one thing led to another … and we were … havin' sex … and that was consensual … like fuckin' hundred percent it was consensual";[221]

(e) he said it was an open room, and "the other boys and that said oh fuck … I've got and then finished and then … they've had a go"; he added: "So it was just like that and it was all consensual like fuckin' she, she, she agreed to it. She loved it, you know what I mean? And then by then … this about 10.30 and the … morning, and the manager's bangin' on the door, goin' you've gotta get outa the room you know";[222]

(f) he said they were then all rushing to get out of the door and the apartment was a mess from the night before;

(g) Zevenbergen drew a diagram of the motel unit;[223]

(h) when they got in the spa, Zevenbergen said they were "playin' around with each other", which he explained to mean "[l]ike playin' around, flirtin' and touchin' each other … like sexually … [s]exually touchin' her, you know. Like consensually … like havin' fun";[224]

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214 AB 991, lines 17–28.
215 AB 991, line 50 to AB 992, line 31.
216 AB 998, lines 33–55.
217 AB 999, lines 1–3.
218 AB 1000, lines 19–29.
219 AB 1000, lines 51–56.
220 AB 1001, lines 1–6.
221 AB 1001, lines 6–12.
222 AB 1001, lines 12–20.
223 AB 851, Exhibit 55.
224 AB 1016, lines 16–33.

(i) he said he was touching the complainant on her vagina while in the spa;[225]

(j) Zevenbergen said that the complainant "just loved it", and when asked how it was he could say that, he answered: "Oh well she's didn't say nothin', she was just you know …didn't go, push me hand away or nothin'";[226]

(k) when they were in the spa, Zevenbergen said there was a "little bit" of talk of a sexual nature, which he explained as being "just … flirtatious", and "wouldn't mind fuckin' ya and that"; he described the complainant as being "very … promiscuous" which he explained as being "[q]uite tartish"; he said he used that phrase because she was in the spa "half naked" and "you can see her pussy and that you know hangin' out you know";[227]

(l) he explained a second time why it was he thought the complainant was being a tart or promiscuous by saying, "what was it? Oh everything … what she was wearing, from what she's sayin', what and how I was touchin' her, you know and she, she's touchin' me";[228]

(m) when they got out of the spa, he said the complainant got changed in front of everyone, in the bathroom with the door half opened; Zevenbergen said, "we're all there … I think I'm out here, … gettin' dried and smokin' some more rock";[229]

(n) after that, the group was sitting on the bed and the couch, and smoking more methylamphetamine; Zevenbergen said he was not flirting with the complainant at that point, but "the other boys are havin' a flirt with her"; he explained that the complainant was saying "I'd fuck all of youse right now for fuckin' rock", and then she laughed and said "just joking";[230]

(o) Zevenbergen explained his own thinking at the complainant's comments:[231]

> "That no, she's … sayin' that as a joke but I know that she's meanin' it, you know what I mean, like 'cause of her, she's done it before with other blokes, you know what I mean.
>
> …
>
> 'Cause we've heard stories, you know what I mean";[232]

(p) at that stage of the evening, there were two men on the bed and two men on the couch;[233] they were still smoking methylamphetamine, taking "fanta", and drinking Bundy rums;[234]

(q) after that, the complainant lay on the bed; one of the other men also laid on the bed and "tried to get with her"; she said no to him;[235]

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225 AB 1016, lines 35–38.
226 AB 1016, line 50 to AB 1017, line 2.
227 AB 1020, line 38 to AB 1021, line 31.
228 AB 1022, lines 1–4.
229 AB 1023, lines 8–37.
230 AB 1026, line 51 to AB 1028, line 13.
231 AB 1029, lines 2–9.
232 AB 1029, lines 1–9.
233 AB 1030, lines 24–32.
234 AB 1030, line 34 to AB 1031, line 50.
235 AB 1032, line 42 to AB 1033, line 2.

(r) Zevenbergen said he knew that the person on the bed must have got "knocked back" because, "[y]ou know well really just nothin' happened, ah nothin' was happenin' you know … [j]ust occasionally we'd walk back in and nothin' was goin' on you know";[236]

(s) the man in the bed fell asleep, and Zevenbergen thought that the complainant had fallen asleep also; at this point, it was about 4 or 5 in the morning; he jumped on the bed and they "started cuddlin' and snugglin' you know … spoonin'";[237]

(t) he said he and the complainant then "get intimate … kissin' and that"; the complainant kissed him "[l]ike returning it"; she did not turn around;[238]

(u) he said he was rubbing the complainant's vagina and "[s]he's like you know gettin' off on it … she's enjoying it"; then she said stop and "[y]ou know, like I think that she comed";[239]

(v) at that point, he left the bed to go to the toilet and have another smoke;

(w) Zevenbergen then walked back inside and told the complainant that it was getting pretty late, and asked her if she was going to rebook the room;[240]

(x) she suggested he ring up and rebook the room for the man who had been there (Mr Y); he rang reception but they said that the room was already taken; the management also said there was another room they could have;[241]

(y) by then, it was about 8.00 am; he said his "other mates" came in and asked the complainant what was going on; he then explained the sequence:[242]

  (i) one snuggled up to her and, when they all walked in, that person had sex with her;

  (ii) he dropped his shorts and started masturbating;

  (iii) the other man finished having intercourse with her and he said to the complainant "you want this", to which she replied "fuck, yes";

  (iv) he and the complainant had sex;

  (v) while he was having sex with the complainant, another man came over, pulled his penis out, and the complainant starting sucking it;

  (vi) that involved three of the appellants, but the fourth one did not engage, "he just kicked back";

(z) Zevenbergen then identified who the men were in sequence; Butler was the person who was having sex with the complainant when Zevenbergen starting masturbating and asked the complainant "do you want this?"; while Zevenbergen had sex with her, Doran "pulled out his dick and she's bang, she starts suckin' it";[243]

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236 AB 1035, lines 19–28.
237 AB 1035, line 50 to AB 1036, line 21; AB 1036, line 42 to AB 1037, line 15.
238 AB 1037, line 35 to AB 1038, line 5.
239 AB 1038, lines 9–51.
240 AB 1039, lines 18–22.
241 AB 1039.
242 AB 1040, line 50 to AB 1041, line 31.
243 AB 1047, line 19 to AB 1048, line 19.

(aa) Zevenbergen said that, when he had sex with the complainant, they were in "doggie position"; he added, "and then … she's turned, like she was, flipped her around so now she's like that and so she's bang, like she's suckin' old mate off and I'm … [t]hat way you know";[244]

(bb) he said by then the people were knocking on the door, and the manager was saying that they had to move out; they grabbed their bags, packed up, and left;

(cc) prior to leaving, the complainant had a shower, and Zevenbergen had a shower with her at the same time; by the time he dried himself, the others had already packed up and "like pretty much left maybe a minute before me";[245]

(dd) Zevenbergen said that Sealey was the person sleeping next to her in the bed, and who did nothing; Sealey was the one who "had a crack and she said no";[246]

(ee) Zevenbergen said that he stopped having intercourse with the complainant because the managers were banging on the door;[247]

(ff) Zevenbergen explained that he was leaving because "[l]ike they're gonna come in soon … [a]nd … it's not really a good look … me and two blokes sittin' on a bed ... [r]ootin' a girl you know";[248]

(gg) Zevenbergen said it was Butler who drew the drawing on the complainant's leg.[249]

[142] Zevenbergen admitted that he took a photograph of the complainant's ID. He explained it by saying it was green and he had never seen one of them before and he didn't know her last name.[250]

Text messages between Sealey and the complainant

[143] During the course of his interview with the police, Sealey showed the officers a series of text messages on his phone. They were between Sealey and the complainant on 1 October 2018. The first message was at 1.23 am and the last at 5.55 am. There were then four unanswered messages from Sealey on 2 October 2018 between 4.20 pm and the following day at 5.05 am.

[144] The texts on 1 October 2018 are:[251]

Sender	Time	Message
Sealey	1.23 am	Whats we doin
Sealey	1.24 am	R u gna come with me
Complainant	1.24 am	Who's picking us up And what's the plan I literally have 5 bags of clothes
Sealey	1.24 am	Dunw but im gna wait here Til there done and come bk

244 AB 1048, lines 32–42.
245 AB 1049.
246 AB 1050.
247 AB 1051, lines 32–35.
248 AB 1051, lines 40–58.
249 AB 1055.
250 AB 1065.
251 Adopting the actual text of the messages without correction.

Sealey	1.26 am	Come with me home
Sealey	1.32 am	Yes or no
Sealey	1.36 am	I gta job il look after you don't show rhese guys
Sealey	1.41 am	For real
Complainant	1.41 am	Don't show them what
Sealey	1.42 am	Our txt
Sealey	2.30 am	Dead set do u wanna come with me
Complainant	5.55 am	Yes

[145] There are some matters that the jury could have inferred from those texts.

[146] First, the opening two texts seem to follow on from a conversation already started. The question "are you going to come with me?" suggests that either that question had already been asked, or Sealey had already said he was leaving.

[147] Secondly, whatever plan was in Sealey's mind, it was not well developed. When asked what it was, he did not know, but said "I'm going to wait here until they're done and come back". Waiting until the other three were gone seems inconsistent with him saying he would "come back". For him to come back, it seems he might have meant he would leave with the others.

[148] Thirdly, when the complainant asked what he meant by "don't show these guys", he explained it meant don't show them the texts. The jury might have asked themselves, why not? None of the appellants had met the complainant before that night, nor were they connected with the complainant in any way other than sharing drugs and alcohol that night. Mr Y, who was the complainant's boyfriend,[252] had left, come back, and left again.[253] So far as Sealey had been told, Mr Y "owned" the complainant, "that was his thing and she didn't want to be in that situation", she "didn't even wanna be there but she couldn't go anywhere, he was gonna pay for".[254] He offered to help her get out of there, helped her pack up her clothes into her five bags, and they were stacked near the TV.[255] They exchanged phone numbers. Sealey said in the interview he was going to leave at 12 o'clock.[256] He said, "I didn't ... want those other boys to know what was goin' on. I just wanted to get outa there myself".[257]

[149] Sealey said:[258]

> "… I was wanting to take her outa the situation of what she was saying that this guy was doing. And I said you know well I could, you can go if you want but you know you can come and have all, come with me, I'm goin' up here. … 'Cause ah I've been in the same situation as that before, like not this whole situation but of being controlled by somebody and it's not a nice situation to be in."

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252 He said he was told that by the complainant: AB 905 line 17.
253 AB 905, lines 18–24.
254 AB 905, lines 25–31.
255 AB 905, lines 36–44.
256 AB 905, lines 48–49. He had even asked Mr Y for a ride back to Pimpama but Mr Y declined as he did not wish to risk his licence: AB 914, lines 54–57; AB 921, lines 12–27.
257 AB 905, lines 53–58.
258 AB 937, lines 18–28.

[150] One possibility the jury may have considered was that Sealey did not want the others to know what he was doing because he was aware they had their own plans for the complainant, and her leaving would thwart them. The same applies to a consideration of Doran. Sealey had known him for about a year, as Doran's brother was a friend of Sealey.[259] Sealey said that the complainant was seemingly attracted to Doran.[260]

[151] Fourthly, Sealey said he would "look after" the complainant, a person he had met for the first time that night. That offer was not just to get her out of the motel and away from Mr Y. His offer was underpinned by the fact that he had a job and that was how he would look after her.

[152] Fifthly, as the times of the texts suggest, the complainant and Sealey were awake between 1.23 am and 1.42 am, and Sealey had woken up or was still awake at 2.30 am. The break between 2.30 am and 5.55 am might suggest that the complainant and Sealey were then asleep. Sealey said Butler had arrived before he (Sealey) went to sleep. He was still awake when Butler was drawing on the complainant's leg.[261]

[153] Sixthly, the final text from the complainant at 5.55 am might be seen to suggest that Sealey was then awake, or at least the complainant thought so. Certainly, she was then awake enough to send the text. As noted above, in his interview he said that he went to sleep as Butler was drawing on the complainant's leg.

Aspects of Sealey's interview

[154] The Snapchat video was relied upon at the trial to urge that Sealey must be under the covers. However, according to what he told police, he was never under the covers. He said the complainant "was under the blanket, I wasn't not [sic] under the blanket … I was on the bed but I was on top o' the blanket".[262]

[155] Sealey said he was on the side of the bed closest to the kitchen.[263]

[156] Sealey said he helped the complainant pack up all her five bags of belongings.[264] But, when the banging on the door woke him up, he saw "all her shit was scattered everywhere".[265] That caused him to think "fuck, these cunts must of went through all her shit".[266] As a result, he got up and searched for his own stuff. He "didn't give a fuck about anybody else, those other boys".[267]

[157] Sealey said he did not see any bruises on the complainant.[268] That was notwithstanding that he saw her in her bikini when they were in the spa and in the shower.[269]

Unreasonable verdict grounds – Doran, Butler, and Sealey

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259 AB 910, lines 7–23.
260 AB 919, lines 15–44; AB 932, line 16 to AB 933, line 1.
261 AB 906, lines 15–27; AB 922, lines 7–41; AB 925, lines 38–42; AB 946, lines 1–19.
262 AB 945, lines 18–37.
263 AB 923, lines 16–18; AB 945 lines 30–37.
264 AB 905, lines 36–44.
265 AB 948, lines 31–35.
266 AB 948, lines 39–40.
267 AB 948, lines 42–44.
268 AB 937, lines 30–34.
269 AB 919, lines 14–19; AB 920, line 42; AB 934, lines 1–53; AB 936, lines 19–28, 42–58.

[158] The cases for Doran, Butler, and Sealey[270] all broadly pointed to the same criticisms of the evidence in support of the contentions that the verdicts were unreasonable and not supported by the evidence. They were:

Doran

(a) the jury should have had a reasonable doubt about the guilt of Sealey; the conviction of Doran on being a party to the offence said to be committed by Sealey should be quashed; such a reasonable doubt should have carried through until the consideration of the case against Doran; in this respect, as Mr Lewis of Counsel for Doran accepted, the success of Doran's appeal on this ground depended upon what was concluded about the case for Sealey;

Sealey

(b) the complainant's reliability and credibility were so lacking that the jury must have had a reasonable doubt about guilt on each count;

(c) Sealey must have had a large drawing of a penis on his face when he had sexual intercourse with the complainant, but the complainant said she did not see it;

(d) the text messages exchanged between her and Sealey did not support her version of events; further, she first agreed the 122 phone number was hers, but then flatly denied it once presented with those messages;

(e) Sealey provided a version of events in his record of interview that was coherent and consistent with the other evidence; in particular, his falling asleep and not waking until there was banging on the door was consistent with the fact of, and his surprise at, there being a penis drawn on his face, and with his text messages to the complainant;

(f) there were a number of inconsistencies in the complainant's account: (i) about how many days she had gone without sleep; (ii) who she was in the spa with; (iii) why she got out of the spa; (iv) how long she was in the shower with Sealey; (v) when she went to bed; (vi) how many males engaged in oral penetration; (vii) her knowledge of who photographed her licence; (viii) her poor memory; and (ix) her criminal history of dishonesty;

Butler

(g) if there was a doubt about the guilt of Sealey, that doubt would carry through to the case against Butler;

(h) the complainant's evidence was incoherent; she accepted what was put to her in cross-examination only when challenged with the recorded prior inconsistent statements; however, even when challenged, the complainant's evidence was that she could not remember what she said previously; the complainant would often state that her memory at relevant times would have been affected by drugs;

(i) it is apparent that she was unreliable describing the subject events; she made inconsistent disclosures to the police on the scene and paramedics;

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270 Zevenbergen did not advance this ground.

(j) the complainant's evidence about physical injuries did not support her account of events and it was not supported by independent evidence; and

(k) DNA evidence is at odds with that of the complainant.

Approach taken by the defence

[159] All appellants attacked the credibility and reliability of the complainant, and thereby the foundation of her account. However, the defence cases varied in relation to the question of the sexual activity on the night.

[160] The case put for Doran was that the complainant was keen on him and flirting with him during the evening.[271] On his case, the complainant and Zevenbergen were already engaged in sexual intercourse when Doran came into the room, Doran commented that he thought the complainant was going to sleep with him, and the complainant said that she would.[272] Following that, Doran's case was that consensual sexual activity occurred with him in the form of sucking his penis and engaging in intercourse.[273] His case was that the sexual activity that took place with him occurred with the complainant's consent.[274]

[161] Butler's case was that "a series of events … occurred with these men that were consensual".[275] Specifically, his case was that the complainant motioned him to come over to the bed, told him that she wanted to have sex with him, he lay down and they rubbed against each other but he could not get an erection, and then he masturbated until ejaculating over her face.[276]

[162] The case for Zevenbergen was that, when Mr Y left the apartment, the complainant removed her underwear.[277] In the early daylight hours, Zevenbergen climbed into bed and masturbated the complainant to orgasm and then had consensual sexual intercourse.[278] Zevenbergen's case was that he was not the first person to have sexual intercourse with her that morning.[279] It was put to her that there was no unlawful sexual assault by any person that evening or morning, as "[e]verything that happened to [her] happened with [her] consent".[280]

[163] The case for Sealey was that, after Butler arrived, the complainant was lying on the bed. Sealey asked her if it was okay to lie down before he got into the bed.[281] Sealey laid down beside her.[282] Further, at any time when anyone was having any sort of sexual interaction with the complainant, Sealey was in the bed asleep, and never had sexual intercourse or any sexual contact with her.[283]

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271 AB 614, lines 3–4; AB 619, lines 3–9; AB 623, lines 7–9.
272 AB 624, lines 29–41.
273 AB 625, lines 31–35.
274 AB 636, lines 31–32.
275 AB 665, lines 1–3.
276 AB 666, lines 40 to AB 667, line 21.
277 AB 587, lines 21–23; AB 589, lines 40–44; AB 595, lines 40–43.
278 AB 597, lines 37–45.
279 AB 598, lines 1–2.
280 AB 601, lines 1–4.
281 AB 674, lines 3–4.
282 AB 673, lines 36–41.
283 AB 677, lines 1–8.

[164] As can be seen from the review above, there was no issue that each of Doran, Zevenbergen, and Butler had engaged in sexual activity, including intercourse, with the complainant on the morning of 1 October 2018. Each of them contended that whatever occurred was consensual. Sealey's case was that he was asleep at the time any sexual activity occurred, and he never had sexual contact with the complainant.

Approach of the defendants' cases re: drugs

[165] The complainant's evidence was that the presence of Doran, Zevenbergen, and Sealey was in order to bring and to use drugs. Specifically, the complainant said that she, Doran, Zevenbergen, and Sealey were smoking methylamphetamine, consuming Fantasy, and drinking alcohol. None of that evidence was challenged by any of Doran, Zevenbergen, or Sealey. Butler did not challenge that evidence either, though he arrived later than the other three appellants.

[166] Further, whatever the drug use during the course of the night, it was common ground that the sexual activity (at least in terms of Counts 3–7) occurred in the morning after the complainant had been asleep. There was no suggestion on the evidence of any party that, at that time, the consumption of drugs was continuing.

Consideration

[167] In assessing the evidence that was attacked by the three appellants who advanced this ground, it must be borne in mind that this Court does not substitute trial by it for the trial by the jury. The test is whether it was open to the jury to accept the evidence of the complainant (and any other relevant evidence), and thereby be satisfied of guilt. To succeed on the appeal, the appellant must show some reason why the jury could not have accepted the complainant's evidence.

[168] It is true to say that there were reasons to consider the complainant's evidence with some circumspection. For example:

(a) she had been a methylamphetamine addict since the age of 16; she had taken methylamphetamine and Fantasy that evening, and had been on a methylamphetamine bender for a couple of days, during which time she had not slept; that affected her memory of the events;

(b) in July 2020, when she had a conference with the prosecutors, she told them that she did not have a good memory of what had happened;

(c) she had an unenviable criminal history that included offences of dishonesty;

(d) she had worked providing sex for money and, in the course of those activities, engaged in deceiving some customers;

(e) the complainant said she did not see the drawing on Sealey's face, yet it must have been there;

(f) she initially told the police (at the scene) that she only remembered "[a] little bit" of what happened, that she had not been sexually assaulted, and did not know if she wanted to make a complaint;

(g) her account to the paramedics did not match what she said occurred;

(h) she said the drawing on her leg was done without her knowing about it, yet it extended up under her underwear; it was only when she was in hospital that she noticed that there were also drawings on her stomach;

(i) her memory was that the appellants left before Mr Y and the motel manager appeared at the door, whereas the motel manager said they were still in the room when the door opened;

(j) she denied that she gave Sealey her mobile phone number and that she had a text conversation with him; yet, the text messages existed; and, when shown the telephone number at the top of the text messages, being the telephone number she had already agreed was her own, she then denied that that was her number; and

(k) Butler's DNA was not found on her vaginal, vulval, and peri-anal areas; Sealey's DNA was not found anywhere; and Zevenbergen's DNA did not include any from spermatozoa.

[169] However, none of those matters, individually or collectively, were such that the jury were compelled to reject her evidence. There were explanations that the jury could accept.

[170] As the complainant said, whilst her memory was generally affected by drug use, that did not apply to the traumatic events on that occasion. She had a clear memory of those events, she said, and would not have engaged in the ordeal of the trial had they not been true. As she said in cross-examination:[284]

> "Do I take it that you had to read your statement a day or two ago to refresh your memory?---To refresh my memory about, like, little things and stuff, you know. Obviously I know exactly what happened – what – the reason why we're here today. Obviously that's not a blur. Never will be. So - - -
>
> Well?---But I'm just – yeah.
>
> It – it's not a blur?---Like, timelines and things like that, because – yeah.
>
> All right. But one of the things you told [those in the conference] was that – you said this in relation to your memory: you can't remember a lot; that your memory was, in fact, blurry?---Yeah. I meant of things that didn't matter as much."

[171] It is by no means clear that she must have seen the drawing on Sealey's face. She was not looking at him, but "at the ceiling thinking [she] was going to die". Sealey would not necessarily have been looking at her. If the drawing was on the other side of the face from the one towards her, she would not necessarily see it.

[172] A large part of her criminal activities were committed after the events in question. She explained that she was trapped in an abusive relationship with Mr N, who effectively forced her into those offences.

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284 AB 663, line 38 to AB 664, line 3.

[173] Her diffidence when first speaking to the police was because she was uncomfortable speaking about the events and, given her history and recent drug use, she was likely to have been generally reluctant to speak to police.

[174] Her early accounts to the police and paramedics revealed a level of consistency that supported her evidence. She told police she had been raped by all four men. She was being held at the time. They penetrated her vagina and mouth but not her anus. She had been in the shower since. She had experienced ejaculation onto her face. One of them had taken a photo of her licence, to obtain her address, and she was fearful of getting into trouble with the appellants. She was injured in the vaginal area, and it felt like cuts and stinging.

[175] The complainant said Zevenbergen told her "[d]on't fucking say anything". If so, that would tend to negate any suggestion of consensual activity between him and the complainant.

[176] When the police first spoke with the complainant, she was physically shaking, terrified, and crying.

[177] She told the paramedic that she was woken from her sleep to find four men standing over her. Each man raped her, by penile penetration as well as oral penetration. Further, she was gagged with a sock at one point. She had a shower after the assault.

[178] The bruising on her arms and legs supported her account. There was no rational basis to conclude that they were there before that night. The expert forensic evidence was that the bruising to the complainant's left leg and right thigh may have been due to fingers applying pressure. The jury could well conclude that they showed patterns consistent with her being held down.

[179] The jury could find that the drawings on her leg and stomach were unlikely to have been done with her knowledge, particularly the drawing of penises on her stomach. The jury could easily have accepted her protest, "I don't see a reason why I'd want someone to draw all over me like that. Especially all the dicks on my stomach".

[180] On most accounts,[285] the sexual activity occurred in the morning and after everyone knew that the room was not going to be extended. Only Zevenbergen put that it started in the early daylight hours. In my view, the jury could easily reject the notion that the complainant was then inviting vaginal and oral sexual intercourse with multiple men, when nothing of the kind had occurred or even been suggested during the previous evening.

[181] It must be recalled that the cases put for each of Zevenbergen, Doran, and Butler were that there was sexual activity between the complainant and all appellants except Sealey, but only in the morning:

(a) on Zevenbergen's case as put, it commenced in the early daylight hours when he masturbated the complainant and then had sexual intercourse with her, but he was not the first person to have sexual intercourse with her that morning;

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[285] Bearing in mind that Sealey's (account to the police) was only admissible against him. On his account, there had been no sexual activity by the time he fell asleep. Likewise, Zevenbergen's account was only admissible against him.

(b) on Doran's case as put, Zevenbergen was engaging in sexual intercourse with the complainant when Doran came into the room, following which Doran engaged in oral and vaginal sex; and

(c) on Butler's case as put, "a series of events … occurred with these men"; the complainant and he rubbed against each other, and then he masturbated until he ejaculated over her face.

[182] If the jury considered the case against Zevenbergen by reference to his account to the police,[286] all appellants (except Sealey) were involved in sexual activity in the presence of the others: see paragraphs [141](s) to [141](ee) above. As he colourfully put it: it was an open room and "the other boys and that said oh fuck … I've got and then finished and then … they've had a go".

[183] As for Sealey, there are reasons, in my view, why the jury could reject his account and accept that of the complainant as to his participation, and doing so in the presence of the others.

[184] Sealey showed an interest in the complainant during the evening when he texted saying that she should leave with him, and that he had a job and therefore would look after her. The jury could conclude that was a sexual interest. There was no satisfactory explanation as to why she should keep it secret from the others, unless he was doubtful about their response.

[185] On all accounts there was sexual activity between multiple people, on the bed in which he said he was sleeping. On the complainant's account, it was accompanied by some violence, with her being restrained and gagged. It was open to the jury to reject the suggestion that he was soundly asleep through that, only waking when the manager banged on the door.

[186] The complainant said Sealey joined in last. She saw and recognised him. If the jury believed her account otherwise, there was no logical reason to reject that part.

[187] There was no rational reason why the jury would have rejected the motel manager's evidence. The manager said she received a phone call from a man in the complainant's room at about 9.20 am. He asked if that room could be booked for an additional night, and she told him that the room was already booked and they would have to leave by 10 am. At about 9.50 am, she went to the front door and knocked about five or six times. She then went to an adjoining unit and looked over to the complainant's room where she saw three or four men in the rear courtyard area. She told one of them that the man who had booked the room wanted to gain access. The response from one of the men was that "the girl was in the shower and that they would only be about another five minutes".

[188] If that evidence was accepted, bearing in mind that the CCTV footage showed the appellants leaving together, then several things follow.

[189] The call at 9.20 am was not likely to have been made after the sexual activity had ceased, as the complainant said it stopped when someone started banging on the door.[287] That only occurred at about 9.50 am. The jury could therefore infer that

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286 Admissible only in the case against him.

287 So did Zevenbergen in his own case.

the sexual assaults occurred in the period between 9.20 am and 9.50 am.[288] Plainly, when the manager saw the men in the courtyard area, Sealey was one of them, and he was not rushing to leave as he said. He was still there when the complainant was in the shower. She only had a shower after the sexual assault stopped. Zevenbergen's threat[289] was made after the sexual assault stopped and before she got in the shower.

[190] As noted above, in *R v Miller*,[290] this Court said an appellant advancing this ground:

> "… must identify the weaknesses in the evidence and *must then also* demonstrate that these weaknesses reduced the probative value of the evidence *in such a way* that the appellate court ought to conclude that *even making full allowance for the advantages enjoyed by the jury* there is a *significant possibility* that an innocent person has been convicted. The mere identification of weaknesses in the prosecution case is not enough to sustain the ground."

[191] That is a test that the appellants have not been able to meet. Most of the points raised were attacks made on the complainant's credibility and reliability before the jury. The jury saw and heard the complainant, both in evidence-in-chief, but more importantly, in cross-examination. Moreover, the complainant was subjected to more intense and searching cross-examination than most witnesses, being cross-examined by four separate Counsel, who advanced independent attacks quite apart from having common ground in the background and character of the complainant. The great advantage that the jury had is not one that can be replicated by this Court. Nor should this Court disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses.

[192] In my view, it was open to the jury to accept the complainant's evidence against all appellants and be satisfied of their guilt. I am unable to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that innocent persons have been convicted.

[193] These grounds fail.

Sealey liability as a party to Counts 3–6

[194] The Crown case in respect of counts 3–6 was that Sealey, by his presence, aided the other appellants to rape the complainant.

[195] Count 3 involved Zevenbergen raping the complainant while Doran restrained her and put a hand over her mouth. The complainant identified that Sealey was in the room at the time.[291]

[196] Count 4 involved Doran putting his penis into the complainant's mouth, while Zevenbergen stopped putting his penis in her vagina and moved around to ejaculate

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288 In fact, that inference would have accorded with the complainant's evidence that the sexual assaults occurred between 9.30am and 10am: AB 590, lines 42–44; AB 661, lines 18–20.

289 "Don't fucking say anything": AB 536, lines 12–31.

290 (2021) 8 QR 221; [2021] QCA 126 at [18]. Citations omitted. Emphasis in original.

291 AB 532, line 24 to AB 533, line 4.

on her face. There was no separate identification of where Sealey was at that precise time.

[197] Count 5 involved Butler putting his penis into the complainant's vagina. The complainant said the other men were still in the room, close to the bed.[292]

[198] Count 6 involved Butler taking his penis out, and Doran commencing vaginal intercourse. Once again, the complainant identified that the other men were in the room, near the bed.[293]

[199] In cross-examination, the complainant was asked where Sealey was when the other three appellants were having sex with her. She answered, "[t]hey were all there"; he was "[w]atching… [standing] on the bed", "[t]hey were all on the bed, yes".[294]

[200] Mr Tessman, Counsel for Sealey, submitted that:

(a) Sealey was alleged to have aided by his presence, but mere presence is not enough to establish aiding; the jury must infer an accused's presence was intended to encourage, and did in fact support or assist, the principal offender on each respective count.[295]

(b) in examination-in-chief, each time the complainant was asked where the others are during Counts 3, 5, and 6, she said she could not remember; she accepted by leading questions that the others were in the room, but did not give details or explain how she knew that; she repeatedly said she did not know where in the bedroom they were; given all of the complainant's memory and reliability issues and the vagueness of this evidence, the evidence was not sufficient to establish, on any individual count, that Sealey was voluntarily and deliberately present in the complainant's proximity;

(c) it was accepted that later, in cross-examination, and without reference to a specific count, she said Sealey and the others were standing on the bed; however, it was not safe for a jury to act on this latter allegation given it was in direct contradiction to her examination-in-chief.

[201] The legal principles are not in doubt. In *R v Peter; R v Banu; R v Ingui*,[296] this Court adopted what was said by Chesterman JA in *R v Butler & Lawton & Marshall*:[297]

> "[68] Presence by itself is not enough to constitute aiding for the purposes of s 7(1)(c) of the *Criminal Code*. The law was explained by Macrossan CJ in *R v Beck* [1990] 1 Qd R 30 at 37 and 38. The Chief Justice said:
>
> > 'Intentional encouragement may come from expressions, gestures "or actions intended to signify approval".

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292 AB 534, lines 3–12.
293 AB 534, lines 19–42.
294 AB 675, line 44 to AB 676, line 11.
295 Reliance was placed on *R v Peter; R v Banu; R v Ingui* [2023] QCA 1 at [46], and the passages there cited from *R v Butler & Lawton & Marshall* [2011] QCA 265 at [67]–[71] and *R v Beck* [1990] 1 Qd R 30 at 37–38.
296 [2023] QCA 1 at [46]. Citations omitted. Emphasis added.
297 *R v Butler & Lawson & Marshall* [2011] QCA 265 at [68].

> Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding. It seems that all will depend on a scrutiny of the behaviour of the alleged aider and the principal offender and on the existence which might appear of a bond or connection between the two actors and their actions. The fortuitous and passive presence of a mere spectator can be an irrelevance so far as an active offender is concerned. But, on the other hand, a calculated presence … can project positive encouragement and support to a principal offender. The distinction between a neutral and a guilty presence of a person at the scene of a crime will be for the jury to assess. Proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no telltale acts are performed by the alleged aider but the intention behind and the effect of the presence of the additional person at the scene may be established by other evidence from which it is possible to say that a case of intentional encouragement or support of the principal offender is made out.
>
> …
>
> It is not possible to be an aider through an act which unwittingly provides some assistance to the offender in the commission of the offence and it is not possible to be an aider, whatever the intention, unless support for the commission of the offence is actually provided. In some cases … where positive intervening acts in support of the commission of the offence by the principal offender may not have occurred it has been natural to speak of encouragement and this will often be an appropriate word to convey, in the absence of direct physical involvement, the relevant active element in the aiding which has taken place.'"

[202] The complainant gave evidence that, at one stage, all four appellants were in the kitchen area, talking amongst themselves:[298]

> "All right. Were you still in the bed when you had that conversation with [Mr Y]?---Yeah.
>
> What happened once that phone call ended? Actually because I – I went through all that question, when you were having that phone call with [Mr Y], who was – who else was in the room?---**They were all in the room.**
>
> All right. All four men that you've told us about earlier?---Yeah, **in the kitchen area.**
>
> And what were they doing in the kitchen area?---I don't know.

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298 AB 531, lines 9–29. Emphasis added.

So when you finished the phone call with [Mr Y], what happened?---I remember I was laying on my belly and [Zevenbergen], like, came up behind me and he, like, grabbed the back of my legs and, like, turned me over, sort of thing.

Turned you over, so how were you lying once he turned you over?---On my back.

And where were the other three men when [Zevenbergen] was doing that?---**In the room**.

Can you be more specific about in the room in terms of proximity to the bed?---I can't remember because I was - - -"

[203] After a break, the complainant continued her evidence:[299]

"MS GALLAGHER: All right. [Complainant], where we left off, you said [Zevenbergen] had turned you over so you were lying on your back. Can you tell us what happened after that?---He ripped my underwear off.

And what did you do?---I was trying to wriggle away. And [Doran] came up to me and he put his hand over my mouth.

Where was – what was [Zevenbergen] doing while [Doran] had his hand over your mouth?---He started putting his – started putting his penis in my vagina.

Did you give him any consent to do that?---No.

Did that cause you any pain?---Yes.

What was [Doran] doing while [Zevenbergen] had his penis in your vagina?---He was holding me down.

Can you tell us how?---With his hands on my shoulders and my arms.

All right. Did you see where [Sealey] and [Butler] were at that stage?---No.

Were they still in the hotel room?---Yes.

Were they in the kitchen still or can you give – be more specific?---[indistinct] **in the bedroom**.

All right. Were they on the bed, or - - -?---I don't know."

[204] Then, when the complainant said what Butler had done, this was said:[300]

"When [Butler] was having sex with you, where were the other men?---I can't remember.

Do you remember they were still – if they were still in the hotel room?---Yeah, they were – definitely.

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299 AB 532, line 24 to AB 533 line 4. Emphasis added.

300 AB 534, lines 3–40. Emphasis added.

> Can you be more specific about where in the hotel room?---They were just – **they were just watching.**
>
> All right. **So close to the bed?---Yes.**
>
> All right.
>
> When [Butler] was having sex with you, was anyone still holding you down?---Yeah, **[Zevenbergen] was holding me down.**
>
> Did [Butler] eventually take his penis out of your vagina?---Yes.
>
> And what did he do after that?---I can't remember, **but then ... [Doran] jumped in front of me.**
>
> And **what did [Doran] do?---Put his penis in my vagina**.
>
> Did you give him any consent for him to put his penis in your vagina?---No. No.
>
> All right. How long did [Doran] have his penis in your vagina for?---I can't remember.
>
> Do you know if he ejaculated?---I can't remember.
>
> Did that cause you any pain?---Not really. [Butler] caused me a lot of pain – is what I remember - - -
>
> All right?--- - - - and [indistinct]
>
> **When [Doran] was having sex with you, do you remember where the other men were?---[Zevenbergen] was holding me down while [Doran]was having sex with me, and I can't remember where the other people were, but they were in the room.**"

[205] If the jury accepted the complainant's evidence and concluded that, in fact, Sealey was awake and did have sex with her, and he was the last one to have sex with her, the jury could infer that he did have a voluntary, deliberate, and encouraging presence. On that basis, the inference was open because:

(a) Sealey went to the motel as part of a group that included Zevenbergen and Doran;

(b) he joined in the group's activities, and encouraged a connection with the complainant that he declared to be one of support; in effect, he encouraged the complainant to trust him and not the others, including that she was safe from him even if he was on the bed;

(c) Sealey saw the sexual activity between the other three appellants and the complainant;

(d) he saw that the complainant had been gagged and held down;

(e) he saw that her legs had been forced open;

(f) he saw that somebody was having oral sex with her at the same time somebody else was having vaginal sex with her;

(g) he stayed on or nearby the bed while that sexual activity was occurring on the bed;

(h) he maintained his presence in the room;

(i) he waited until the other three appellants had finished what they were doing; and

(j) he followed what had been done by the other three appellants with his own act of rape.

[206] As was accepted in the passage cited above from *R v Peter; R v Banu; R v Ingui*, voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding. That is the case here. The evidence referred to above leads inevitably to the conclusion that Sealey could not have been unaware of what was happening to the complainant. The only way he could avoid those conclusions was if the jury accepted his evidence that he was fast asleep. If he was not asleep, then his presence in the bedroom was an encouragement as to what was occurring.

[207] This ground fails.

Sealey – Ground 2 – Police questions in Sealey's interview

[208] Ground 2 in Sealey's appeal concerns questions asked by the police in Sealey's interview. The submission made was that a miscarriage of justice occurred because much of the complainant's initial sworn statement was read out by a police officer in the last one-third of Sealey's interview, and the trial judge failed to direct the jury that the complainant's statement, when read out and not agreed by Sealey, cannot be used as evidence.

[209] Sealey's interview commenced at AB 898, and the section to which this ground was directed commenced at AB 934. The section commences with the police interviewer saying:[301]

> "Okay. Mate, so um so the young lady [sic] name, whose name's [complainant's name], alright? She's eighteen years old. She's made a complaint to police about rape. She's provided us with a sworn statement. I wanna [INDISTINCT] about that statement and ask you some questions, okay?"

[210] The section about which complaint is made continues until AB 942, at which point the police interviewer says: "Mate, so that's the allegations. Okay?".

[211] What is contained during that part of the interview consists of passages apparently read from the complainant's statement, each of them ending with a question such as "anything you can tell me about that?". In each case, there is a response of some sort from Sealey. In some cases, the response is in the negative; in other cases, the response includes some comment.

[212] During the course of that part, there were a number of times when Sealey was reminded that what was being said by the police interviewer were things said by the complainant, for example:

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301 AB 934, line 57 to AB 935, line 2.

(a) much of what was read was still in the first person, e.g. I did this, I had that, or that was done to me;[302] and

(b) phrases were used such as "she states that …"; or "she says".[303]

[213] The submission made was that the jury should have been warned that the police officer's questions, including allegations put to the complainant that were not agreed with, were not evidence and could not be used in that way. It was said that such directions are conventional when a record of interview is played, and are contained in Bench Book direction no. 36; specifically, the section on a "Defendant's out-of-court admissions or self-serving statements (usually in police interviews") at 36.4–36.5.

[214] What follows from that is that the jury would have understood that what the police were doing were simply putting the complainant's allegations to Sealey for his comment if he chose to make any.

[215] In that respect, there are a number of features of the summing up which are pertinent to the resolution of this issue:

(a) it was explained to the jury at the outset that their decision must be upon "the evidence and only on the evidence";[304]

(b) it was explained to the jury that the evidence was what the witnesses said in the witness box, exhibits, and the admissions in exhibits 51 and 20;

(c) they were also told what was not evidence; that included "statements, arguments, questions and comments by the lawyers", or a thing suggested by a lawyer such as a lawyer's question;[305]

(d) they were also told that the opening and closing address could be taken into account, but were not evidence themselves;[306]

(e) they were told that their assessment of the credibility and reliability of the complainant's evidence was critical to their deliberations;[307]

(f) as to the Sealey interview, the trial judge said:[308]

> "As I said, Mr Sealey's case is that he was asleep, and that evidence comes from his interview with Police on the 2nd of January 2019. If you believe his account in his interview with Police, you must find him not guilty of all charges. If you do not accept his account, but consider that it might be true, you would have to find him not guilty of all charges. If you do not believe his account in his interview, then you should put that interview aside, and ask yourselves whether the Prosecution, on the basis of the evidence that you do accept, has proved the guilt of Mr Sealey beyond reasonable doubt."

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302 AB 936, line 10; AB 937, lines 48 and 58; AB 938, lines 5, 7, 34, and 47–50; AB 939, lines 8–30; AB 940, lines 1–15, 26, and 41–43; AB 941, lines 6–39, and 57–58; AB 942, lines 1–6.
303 AB 935, lines 7 and 33; AB 937, line 46; AB 938, line 7; AB 941, line 4.
304 AB 134.
305 AB 134.
306 AB 135.
307 AB 136.
308 AB 172, lines 40–47.

(g) in relation to the preliminary complaint evidence (to the police officer at the motel and to the ambulance officer), that evidence could only be used in relation to the complainant's credibility, and "you cannot regard things said to [the police officer] or to the ambulance officer as proof of what actually happened";[309] the jury were specifically told that, while such evidence might bolster credit, "it does not independently prove anything".

[216] In my view, the jury would not have mistaken the fact that the impugned part of the interview was simply the police putting the complainant's statement to Sealey. Moreover, the jury would not have forgotten that the complainant's statement was simply a written version of her account. The evidence they had been directed to consider was her oral evidence in court.

[217] The whole of Bench Book direction 36 deals with a defendant's out-of-court admissions or self-serving statements. At 36.4 is a heading "Use of the questions asked during the interview". The suggested direction reads:

> "During the interview, a number of questions were asked by the police officers of the defendant. The same reasoning applies here as you were told about in relation to questions by counsel of a witness. If the defendant did not agree to or in some way accept the contents of a question asked of him/her, the proposition contained in the question cannot become any evidence against him/her.
>
> So, for example, the proposition was put to the defendant that [XXX]. He denied that proposition and clearly then there is no evidence from this interview that the proposition was correct. On the other hand, he answered the questions [XXX] with a 'Yes', and there is therefore evidence that he [XXX].
>
> If you accept that the statements made by the defendant during his/her interview, which are relied upon by the prosecution, were made by him/her, and that they were true, then it is up to you to decide what weight you give them, and what you think they prove."

[218] The Bench Book contains suggested directions, but the necessity for their use depends upon the circumstances. Here, the jury could have been in no doubt about the status of what the police put to Sealey. It was merely what the complainant alleged. It has not been demonstrated that the jury would have misused that part of the interview.

[219] On this issue, it is also important to bear in mind that no direction such as is now suggested was sought by experienced Counsel for Sealey. The risk now postulated was not one that appeared to Sealey's own Counsel, or the trial judge.

[220] This ground fails.

Sealey – Ground 3 – failure to direct on Zevenbergen's interview

[221] This ground turns upon what was directed by the trial judge as to the use of Zevenbergen's police interviews. At the trial, it was common ground that Zevenbergen's interviews were admissible only as against himself.

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309 AB 173.

[222] Directions were given as to the use of the interviews by Sealey and Zevenbergen during the course of the trial when they were viewed or tendered:

Sealey

> "Now, can I – we'll return to the interview that we were watching yesterday. I – what I should've told you at the commencement of that interview is that it's only admissible against Mr Sealey. So anything Mr Sealey says in that interview about the others is not admissible in the cases against them. It's only admissible against Mr Sealey."[310]

Zevenbergen

> "MR PEARCE: Again, your Honour, it's evidence against my client only.
>
> HER HONOUR: Yes. Thank you. Thank you for that, Mr Pearce. And as I indicated this morning, **this evidence is only admissible against Mr Zevenbergen** – Mr Zevenbergen. So anything that he might say about any of the other defendants is not admissible in the case against them. **So you can only use this evidence as it pertains to Mr Zevenbergen**."[311]
>
> "HER HONOUR: So we're about to watch another interview. And I'll just – you're about to be provided with the transcript, so I'll remind you once again that it is the – what you hear and see on the recording which is the evidence. The transcript is the aid. You will be permitted to take the transcripts with you, from here on in, into the jury room, but can you please bear in mind that warning that I've given you that it is the sounds on the recording which is the evidence, not the transcript. But it might be useful to you in order to find things on the recording, if you want to listen to parts of it again. **And this interview is only admissible against Mr Zevenbergen. So anything he says about the other three men in the interview is not admissible in the cases against the other three men; it's only admissible against Mr Zevenbergen**."[312]
>
> "HER HONOUR: Good morning, ladies and gentlemen. We're about to commence watching the interview between Mr Zevenbergen and the police on the 2nd of October 2018. Just remember what I told you last week; the transcript is an aid, the sounds you hear which is the evidence. **And this evidence is only admissible against Mr Zevenbergen**."[313]

[223] In the course of the summing, up the trial judge directed:[314]

> "Now, **I directed you during the trial that** Mr Sealey's interview with police was only admissible against Mr Sealey, and **Mr Zevenbergen's interviews with police are only admissible**

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310 AB 703, lines 33–37.
311 AB 744, line 46 to AB 745, line 5. Emphasis added.
312 AB 749, line 46 to AB 750, line 8. Emphasis added.
313 AB 757, lines 27–31. Emphasis added.
314 AB 137, line 45 to AB 138, line 5. Emphasis added.

> **against Mr Zevenbergen**. **Importantly, those interviews are not admissible against Mr Butler or Mr Doran or against each other**. Otherwise, the remainder of the evidence in the trial is admissible against each of the defendants. So you must return separate verdicts in respect of each defendant and separate verdicts on each charge. That means that you will be returning seven verdicts for Mr Zevenbergen and five verdicts for each of Mr Doran, Mr Butler and Mr Sealey."

[224] Just before the Jury Information Sheet[315] was given to the jury, the trial judge said this:[316]

> "Now, it will probably assist you to have a copy of exhibit A – which is the list of charges with the conduct alleged or the conduct relied upon by the prosecution to prove each of the charges – whilst I direct you about the elements. I will then move on to tie those general directions into the facts as you have heard them and direct you as to the real issues in the trial that you will need to consider**, and I will do that by reference to each defendant separately as you must consider the case against each of them separately and solely on the evidence admissible against that particular defendant**."

[225] Finally, when directing the jury as to individual liability, the trial judge again referred to the limited way in which the evidence could be used. When dealing with Doran, her Honour said: "You cannot have regard to anything that Mr Sealey or Mr Zevenbergen said about Mr Doran in their interviews with police".[317] When dealing with Butler, her Honour said: "You cannot have regard to anything that Mr Sealey or Mr Zevenbergen said to Police about Mr Butler's involvement."[318]

[226] The central submission here was that there was risk that the jury used Zevenbergen's (alleged) lies and other parts of his interview in support of the case against the other appellants on Count 3, and in support of what the jury thought about the complainant generally (i.e., in all four trials).

[227] Mr Tessman pointed to a number of circumstances which, he submitted, showed that what was directed was insufficient:

(a) while her Honour directed that the jury should give the cases against the accused separate consideration and return separate verdicts, her Honour did not clearly direct that the evidence in relation to the separate offences is different, and so the verdicts need not be the same;

(b) the interview contained material which risks impermissible prejudice from the jury, potentially against all accused; in particular, it contained evidence that Zevenbergen had a tattoo of a swastika on his arm;

(c) further, the Crown suggested in closing that Zevenbergen's interview has examples of a man "caught out in his lies and then continues to evolve his version to the police", and that there were a number of reasons the jury might

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315 MFI #I.
316 AB 138, lines 12–19. Emphasis added.
317 AB 171, lines 10–12.
318 AB 172, lines 4–5.

think he was dishonest in the interview; despite asserting lies, neither the Crown nor trial judge explained how these lies could be permissibly used; for example, no *Zoneff* direction was given warning them not to reason that because a person is shown to have told a lie about something, that is evidence of guilt;

(d) there was therefore a risk the jury might have used the interview not simply to reject Zevenbergen's account, but to find him guilty;

(e) the first element of count 3 against Sealey was that Zevenbergen raped the complainant; her Honour did not specifically direct that Zevenbergen's interviews could not be used in support of proving this element against Sealey;

(f) separately, a clear distinction between the use to which Zevenbergen's interview might be put, and the evidence admissible against the other three appellants, was not maintained; in closing, the Crown Prosecutor dealt with the interviews together to an extent, and when discussing Zevenbergen's interview, the Crown Prosecutor likened aspects of it to Sealey's; the Crown Prosecutor referred to things said in Zevenbergen's interview when providing reasons why the complainant should be believed (in the trial as a whole); when the trial judge warned the jury about reasoning the appellants were guilty because of the use offensive matters, she included reference to the Zevenbergen's own swastika, which was evidence that was only admissible against him.

[228] In the above circumstances, it was submitted, the trial judge's brief directions, that Zevenbergen's interview was only admissible against him, were not sufficient to guard against these risks – in particular, the risk that the jury would use his evidence to bolster the complainant's credibility and reliability in all four trials.

[229] In oral address, the point was clarified to a degree by explaining that there were three steps to the argument:

(a) the trial judge did not sufficiently explain that satisfaction that Zevenbergen committed rape when considering the case against him as a principal (Count 3) could not be used to therefore reason and find automatic satisfaction of the first element of Count 3 against Sealey; that first element of Count 3 against Sealey is that Zevenbergen, indeed, raped the complainant;

(b) the jury may have used Sealey's record of interview to reason towards guilt against Zevenbergen on Count 3; and

(c) Zevenbergen's interview may have improperly informed the jury's conclusion about the first element of Count 3 against Sealey; the jury should therefore have been directed that not only was Zevenbergen's interview not admissible against the other accused, but when they come to consider element 1 of Count 3 against Sealey, that is, that Zevenbergen raped the complainant, they had to put that to one side to be satisfied on the remainder of the evidence that that element was proven.

[230] In my view, that submission should be rejected.

[231] Sealey's criminal responsibility by aiding the rape by Zevenbergen (Count 3) required proof of the first element, namely that Zevenbergen raped the complainant. That was what the jury were instructed on the information sheet given to them

without complaint.[319] It may be accepted, in that case, that Zevenbergen raped the complainant was a fact to be established only by evidence admissible against Sealey.[320] That did not include the Zevenbergen interviews.

[232] However, as can be seen from the directions set out in paragraphs [222]–[225] above, the jury were directed on no less than five occasions that Zevenbergen's interviews were admissible only against him, and not against Sealey. The trial judge was very clear in this respect. Courts will assume jurors obey directions.[321] In *Smith v Kelsey*,[322] *R v Ferguson; Ex Parte Attorney-General (Qld)*,[323] this Court accepted that it "should proceed on the basis that the jury will follow the directions they are given." That principle is applicable here. I am not prepared to assume that the jury disobeyed the clear directions they were given as to the status of Zevenbergen's interviews.

[233] This ground fails.

Butler – Ground 2 – misdirection as to the complainant's criminal history

[234] The essence of this ground of appeal is that, whilst the trial judge directed as to the complainant's criminal history in accordance with the Bench Book, that was inadequate in the circumstances.

[235] Counsel for Butler sought that the trial judge give an extended direction, rather than the standard bad character direction.[324] By that, he meant a direction that the kind of offences of which she had been convicted meant the jury should keep in mind the dangers in accepting her as a truthful witness and exercise caution before acting on her evidence. The prosecutor objected, and the trial judge declined to do so.[325]

[236] The jury were directed as follows:[326]

> "Now, you have heard through the cross-examination of [the complainant] that she has been previously convicted of driving offences, drug offences, fraud, stealing, and armed robbery and wounding. That is something that you can take into account when considering her credibility and the weight that you should give to her evidence. The fact that [the complainant] has previous convictions does not necessarily mean her evidence has to be rejected out of hand. It is a matter for you what weight you give to the fact that she has been previously convicted. In deciding that, you look at the rest of the evidence including any evidence that supports her evidence independently and weigh her evidence and the fact she has convictions in that context.

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319 AB 1073.

320 *R v Buckett* (1995) 126 FLR 435; *R v Kirkby* [2000] 2 Qd R 57 at [13]–[14], [40], [69], [82]; [1995] QCA 445; *R v Dalton* (2020) 3 QR 273; [2020] QCA 13 at [96]–[102].

321 *Smith v Kelsey; Dalley v Kelsey* (2020) 4 QR 1; [2020] QCA 55 at [98] and [105].

322 *Smith v Kelsey ; Dalley v Kelsey* (2020) 4 QR 1; [2020] QCA 55 at [92], citing *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483; [2008] QCA 227.

323 (2008) 186 A Crim R 483; [2008] QCA 227. See also *R v Glennon* (1992) 173 CLR 592 at 603; [1992] HCA 16.

324 AB 777, line 21 to AB 779, line 2.

325 AB 779, lines 6–28.

326 AB 137.

> I will mention the evidence that is capable of supporting her account shortly. If after you have done that, you are satisfied that she is a truthful and accurate witness, you can act on her evidence notwithstanding that she has previous convictions."

[237] The trial judge mentioned the complainant's convictions in another part of the summing up when directing that the jury should scrutinise her evidence. As one of the reasons they should do so, the trial judge directed:[327]

> "Now, the evidence of [the complainant] is critical to the prosecution's case against each of the four [appellants]. There are a number of reasons why you must cautiously scrutinise her evidence. Those reasons are these. … You also know that [the complainant] has a number of criminal convictions for driving offences, dishonesty, and for violence.
>
> Some of those convictions involve her acting in a dishonest way and that may impact on the weight that you are willing to give her evidence."

[238] I do not accept the submission that the directions were inadequate.

[239] First, the jury had heard the complainant cross-examined at length over her criminal history. That history was emphasised by the closing addresses of four separate defence Counsel. The jury would have been well aware of the need to be cautious in assessing her evidence. They were directed to scrutinise her evidence for that very reason. A more explicit warning was not required.

[240] Secondly, many of the convictions arose subsequently to the charged acts which were the subject of the trial. The complainant almost immediately made a complaint about what had occurred and revealed the substance of what she later said in evidence, relevant to the rapes, the participation of all appellants, the physical restraints, and the injuries. Further, she revealed from the start her drug addiction and the drug related reasons for meeting in the room the night before. Therefore, whilst the convictions warranted the standard direction to take them into account, more was not required in the circumstances.

[241] This ground fails.

Zevenbergen – Ground 1 – failure to give a *Liberato* direction

[242] This ground concerns the trial judge's failure to give a direction as to the way in which the exculpatory statements in the interviews could be used. In particular, the jury were not directed that, if they rejected Zevenbergen's account, they could not then assume that the prosecution had established guilt. In other words, the failure to give a *Liberato* direction.[328]

[243] The submission was, in essence:

(a) the issues in the trial were narrow in compass, and the Crown case largely came down to an acceptance of the complainant's evidence; that being so, the

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327 AB 177, lines 15–26.

328 Drawn from *Liberato v The Queen* (1985) 159 CLR 507; [1985] HCA 66.

out-of-court statements made by Zevenbergen in the interviews (and led in the Crown case) assumed particular significance;

(b) in the present case, where the only real issue was consent, there was a real risk that the jury would reason that, if they rejected Zevenbergen's account in his interviews, they could then proceed to convict without properly scrutinising the prosecution case;

(c) in the absence of a *Liberato* direction, there was nothing to prevent the jury, "incorrectly jumping to a conclusion that an accused person is guilty merely because the jury prefers the evidence of the complainant to the evidence of the accused person, or the jury rejects the evidence of the accused person";[329]

(d) the risk was magnified by the closing address of the Prosecutor in which she attacked Zevenbergen's credibility by accusing him of having been dishonest in his interview; one submission was that it was an example of a man "who has been caught out in his lies and then continues to evolve his version to the police..."; another was that he had "changed his tune", changed his story, and that "his story evolved"; and

(e) the Prosecutor thus suggested that Zevenbergen was dishonest, had lied, and had changed his account once he had been caught out in his lies; by contrast, the Prosecutor submitted that the complainant was an honest, credible, and reliable witness; the credibility of Zevenbergen was therefore at the forefront of the prosecution case.

Consideration

[244] Before the addresses were given, there was a discussion between the trial judge and Counsel for all parties as to the directions that might be required. Counsel for Sealey sought a *Liberato* direction in respect of his client's interview.[330] The topic was then raised with Counsel for Zevenbergen:[331]

> "HER HONOUR: Well, I don't know that it replies [sic] with respect to your case - - -
>
> MR PEARCE: No it doesn't, your Honour, with respect.
>
> HER HONOUR: - - - Mr Pearce. Great. And in particular, what are you relying upon, from Mr Zevenbergen's interview?
>
> MS GALLAGHER: Well, his admissions as to the actual sexual conduct.
>
> HER HONOUR: Yes.
>
> MS GALLAGHER: Obviously - - -
>
> HER HONOUR: And his presence during the others, I assume?
>
> MS GALLAGHER: Yes. Yes.
>
> HER HONOUR: Except for Mr Sealey.

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329 Referring to *R v Coyne* [2021] QCA 110 at [25].
330 AB 788, lines 27–38.
331 AB 788, line 40 to AB 789, line 35.

MS GALLAGHER: Yes.

HER HONOUR: All right. And your counter argument is that, if they accept that was all consensual, or they have a doubt about it, then he's not guilty?

MR PEARCE: That's so, your Honour. Yes. That's the most - - -

HER HONOUR: So you're not arguing that he didn't make the statements, or the statements mean something else?

MR PEARCE: No.

HER HONOUR: It's that - - -

MR PEARCE: It's the two bob each way argument - - -

HER HONOUR: Yes.

MR PEARCE: - - - as I described it the other day, your Honour.

HER HONOUR: In context, yes.

MR PEARCE: Yes.

HER HONOUR: He's not guilty. All right. I understand. Is there anything else?"

[245] After addresses, the summing up contained these directions concerning Zevenbergen's interviews:[332]

> "In its case against Mr Zevenbergen, the prosecution relies on statements that he made to police in interviews with them as supporting its case against him. The prosecution in particular rely on his statements as to the nature of the sexual activity that took place and his admission to being present when Mr Doran and Mr Butler engaged in sexual activity with her in support of its case against him. They argue that he has admitted that he had sexual intercourse with [the complainant], that each of Mr Doran and Mr Butler had sexual intercourse with her whilst he was present in the vicinity, and that Mr Doran put his penis in [the complainant]'s mouth.
>
> As against that, Mr Pearce argues that you would have to consider what Mr Zevenbergen said in its full context. All he was saying was that whilst there was sexual activity between himself and [the complainant] and between Mr Doran and Mr Butler and [the complainant] respectively, it was all consensual. Further, he cannot have aided Mr Sealey to rape [the complainant] if Mr Sealey did not have sexual intercourse with her at all as he says. Mr Zevenbergen can be seen to have given answers which you might view as indicating his innocence. You are entitled to have regard to those answers if you accept them and to give them whatever weight you think appropriate.

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332 AB 169, line 32 to AB 170, line 6.

> In relation to both the answers that the prosecution relies on as supporting its case and those which point to innocence, it is entirely up to you what use you make of them and what weight you give to them."

[246] Then, when discussing Sealey's interview, her Honour directed the jury in the terms discussed with Sealey's Counsel:[333]

> "As I said, Mr Sealey's case is that he was asleep, and that evidence comes from his interview with Police on the 2nd of January 2019. If you believe his account in his interview with Police, you must find him not guilty of all charges. If you do not accept his account, but consider that it might be true, you would have to find him not guilty of all charges. If you do not believe his account in his interview, then you should put that interview aside, and ask yourselves whether the Prosecution, on the basis of the evidence that you do accept, has proved the guilt of Mr Sealey beyond reasonable doubt."

[247] In my view, there a number of reasons why the submissions should be rejected.

[248] First, Zevenbergen's experienced Counsel expressly declined the chance to have such a direction given. He did so, describing his approach as the "two bob each way" argument. That is, as reflected by the trial judge during that discussion, "if they accept that was all consensual, or they have a doubt about it, then he's not guilty".

[249] That approach can be seen as a rational forensic decision. To seek the *Liberato* direction would be to have the judge raise with the jury the possibility that they might doubt Zevenbergen's account. Counsel did not want that done. The reason becomes clear when one considers the way Zevenbergen's Counsel addressed. Given that Zevenbergen accepted that sexual intercourse had occurred, and even that the complainant had been restrained, the central issue was his account of her consent. Counsel used what Zevenbergen said in his interviews as the basis to try to persuade the jury they Zevenbergen's account should be believed; that account being that the events did in fact happen, but totally consensually.

[250] Secondly, I would reject the proposition that anything said in the prosecutor's address changed things markedly from the position that defence Counsel for Zevenbergen must have anticipated at the time of the discussion set out in paragraph [244] above. Not only was a *Liberato* direction declined at that point, no such direction was sought after the prosecutor's address, nor during the summing up.

[251] Thirdly, Zevenbergen's account was quite different from Sealey's account. Sealey said he was asleep and never took part in any form of sexual contact. Zevenbergen admitted sexual intercourse, but said it was consensual. Thus, on Sealey's case, there was the risk that the jury might see their consideration of the evidence as a simple choice between the complainant and Zevenbergen, in the way articulated by Brennan J in *Liberato*:[334]

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333 AB 172, lines 40–47.

334 *Liberato* at 515.

> "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make that clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is 'a gross simplification'."

[252] The same "choice" did not attend Zevenbergen's case, as the real difference between them was as to consent. Therefore, in this case, the necessity for a *Liberato* direction did not arise.

[253] Fourthly, in the present case, the trial judge gave very clear and repeated directions as to both the onus of proof and the standard of proof. The jury would not have been left with the understanding or invitation that their verdicts turned on a choice between the complainant's evidence and Zevenbergen's account in his interview, nor did those directions alter the prosecution's onus of proof.

[254] In *De Silva* v *The Queen*,[335] the court discussed the necessity for a *Liberato* direction where the accused's account was in an interview. The High Court observed:[336]

> "The *Liberato* direction is addressed, in terms, to a trial at which there is conflicting sworn evidence. Intermediate appellate courts have expressed differing views as to whether a *Liberato* direction is appropriate in a case in which the conflicting defence version of events is not given on oath, but is before the jury, typically in the accused's answers in a record of interview. If the trial judge perceives that there is a real risk that the jury will reason that the accused's answers in his or her record of interview can only give rise to a reasonable doubt if they believe them, or that a preference for the evidence of the complainant over the accused's account in a record of interview suffices to establish guilt, a *Liberato* direction should be given. Where the risk of reasoning to guilt in either of these ways is present, whether the accused's version is on oath or in the form of answers given in a record of interview, the *Liberato* direction is necessary to avoid a perceptible risk of miscarriage of justice. When an accused gives, or calls, evidence there is a natural tendency for the focus to shift from the assessment

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335 (2019) 268 CLR 57; [2019] HCA 48.

336 *De Silva* at 63, [11]. Citations omitted.

> of the capacity of the prosecution case to establish guilt to an assessment of the perceived strengths or weaknesses of the defence case. Recognition of this forensic reality suggests that the risk that the jury will reason in either of these ways is more likely to arise in a trial in which the conflicting defence account is on oath."

[255] Fifthly, when directing the jury, the trial judge referred to their task when it came to the case against Zevenbergen:[337]

> "Mr Zevenbergen's case is that whilst there was sexual activity between himself and [the complainant] and sexual activity between Mr Doran and Mr Butler and [the complainant], that she gave her consent to each of them to engage in sexual intercourse with her and, indeed, in oral sex. On his case, as revealed in his interview with police, she enthusiastically consented to all of the sexual activity that took place with himself, with Mr Doran and with Mr Butler. He is, therefore, not guilty of counts 1 to 6 because [the complainant] consented to all of that sexual activity. Mr Zevenbergen's case is that he is not guilty of count 7 because Mr Sealey did not have sexual intercourse with [the complainant] at all, so he cannot have aided in the commission of count 7.
>
> The first of the issues that you will need to consider with respect to the case against Mr Zevenbergen is whether you are satisfied beyond reasonable doubt on the evidence of [the complainant] that she did not give her consent to him to touch her on the vagina in the spa and in the bed or engage in sexual intercourse. That will require [you] to assess the credibility and reliability of her evidence and determine for yourselves what the facts are. If you are not satisfied beyond reasonable doubt that she did not give her consent to Mr Zevenbergen to touch her on the vagina or have sexual intercourse with her, your verdicts would be not guilty. If you have a doubt as to whether she did or did not give her consent to the sexual activity, your verdicts would be not guilty. That is because Mr Zevenbergen is entitled to the benefit of any reasonable doubt left in your minds at the end of your deliberations."

[256] In a contest where the only relevant difference between the accounts of the complainant and Zevenbergen was the issue of consent, that direction effectively told the jury to go to the complainant's evidence, but if after doing so they had a reasonable doubt about the issue of consent then Zevenbergen was entitled to the benefit of that doubt.

[257] When coupled with the directions otherwise as to the onus of proof and standard of proof, that was, in my view, sufficient to guard against the risk that the jury might reason that Zevenbergen's answers in the interviews could only give rise to a reasonable doubt if they believed them.

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337 AB 168, lines 10–31.

[258] Sixthly, during the course of summarising the arguments for each side, the trial judge referred to the prosecutor's address when she raised the various reasons why the jury would reject Zevenbergen's account, and said:[338]

> "As a consequence of these features, you cannot accept his account, she argues, that the sexual activity was consensual, **and again, you would put his account to one side. When you return to the evidence of [the complainant]**, she argued that she gave an honest and reliable account of having been raped by four men."

[259] The combination of the matters referred to above are such that I do not consider that a *Liberato* direction was required, and its absence did not cause a miscarriage of justice.

[260] This ground fails.

Zevenbergen – Ground 2 – failure to exclude the interviews

[261] This ground contends that both of the interviews should have been excluded from the evidence. The basis for contending that they should have been excluded is that the interviewing police did not comply with s 418 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA).

[262] It is therefore necessary to consider the pre-trial ruling where that issue was dealt with.[339]

[263] As to the first interview, it was contended that there were two breaches by the police. One was that, while Zevenbergen was given the relevant cautions, s 23 of the *Responsibilities Code* was not complied with in relation to his right to communicate with a friend, relative, or lawyer. The appellant was not asked if there was anyone to whom he wished to telephone or speak.

[264] The second was that Zevenbergen's intoxication at the time of the first interview was apparent, and he should not have been interviewed at that time, a breach of s 423 of the *PPRA*. It was argued that his intoxication must have been apparent from the way he appeared during the first interview, but expressly when he told police that he had taken medication which made him feel "buzzy" and "a bit light in the head".[340]

[265] As to the second interview, which occurred six hours after the first, the contention was that no cautions as to rights were given at all. The Crown accepted that was so, but contended it was not unfair to admit the interview in the circumstances. There was no suggestion that the interview on this second occasion was involuntary. Her Honour found that the interviews were separate, but that Zevenbergen could not have been wholly unaware of his right to ask for a lawyer or support person. Support for that conclusion appeared from a response by Zevenbergen to police, "I never even do these fuckin' interviews you know…".[341]

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338 AB 184, lines 14–18. Emphasis added.

339 *R v Zevenbergen* [2021] QDCPR 79. The judge on the pre-trial application (Dann DCJ) was not the same judge who conducted the trial (Loury KC DCJ).

340 AB 956.

341 It is apparent that this phrase was before Dann DCJ when her Honour ruled on the pre-trial application: *R v Zevenbergen* [2021] QDCPR 79 at [48](c). The transcript which went to the jury did

[266] Subject to redactions, the interviews were held admissible. The application to exclude them was not renewed at the trial.

[267] Before this Court, the position changed somewhat. The submission was, in essence:

(a) the requirement to give the cautions and rights under s 418 was one that had to be followed strictly: *R v LR*;[342]

(b) that requirement had been breached before each interview;

(c) in the circumstances, the discretion miscarried, and both interviews should have been excluded;

(d) that was particularly so in the case of the second interview, which had been conducted after Zevenbergen had been in custody for some six hours; there was no reference at all to s 418 before the interview commenced, even though it was a separate and distinct exercise to the first interview; and

(e) as a consequence, it was unfair to admit the interviews as they contained self-serving parts where Zevenbergen said that the intercourse was consensual, but also contained matters which were used by the Crown to cast doubt upon him and which could have been used adversely against him by a jury.

The approach of the pre-trial hearing judge

[268] The pre-trial hearing judge noted the relevant requirements of the *PPRA* on the interviewing police, which may be summarised in this way:

(a) by s 418(1), before the questioning started, to inform the applicant that he may:

(i) telephone or speak to a friend or relative to inform the person of his whereabouts and ask the person to be present during questioning; and

(ii) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning;

(b) by s 418(2), to delay the questioning for a reasonable time to allow the person to telephone or speak to such a person;

(c) to delay the questioning for a reasonable time to allow the other person to arrive, where the applicant arranged for someone to be present; and

(d) to caution the applicant in the way required under the *Responsibilities Code*.

[269] Her Honour then set out the relevant provisions of s 23 of the *Responsibilities Code*:

> "(1) If a police officer is required to inform a relevant person of the matters mentioned in section 418(1)(a) or (b) of the Act, the police officer must inform the person in a way substantially complying with the following—

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not include this phrase: AB 1047 lines 13–25. It is relevant to consider the material before Dann DCJ as that is the material on which her Honour made the pre-trial decision.

342 [2006] 1 Qd R 435; [2005] QCA 368.

> 'You have the right to telephone or speak to a friend or relative to inform that person where you are and to ask him or her to be present during questioning.
>
> You also have the right to telephone or speak to a lawyer of your choice to inform the lawyer where you are and to arrange or attempt to arrange for the lawyer to be present during questioning.
>
> If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.
>
> Is there anyone you wish to telephone or speak to?'.
>
> …
>
> (4) If the relevant person wants to speak to a lawyer, the police officer must, without unreasonable delay, make available to the person—
>
> (a) if the police officer has available a list of lawyers for the region and the person has not asked to speak to a particular lawyer—the list; or
>
> (b) a telephone directory for the region."

[270] In the first interview, the police informed Zevenbergen of his right to silence, and that the interview was recorded. They then advised him of his right to telephone or speak to a friend, relative, or lawyer. The police failed to ask him if there was anyone he wished to telephone or speak to. However, Zevenbergen was also told that if he did not have a lawyer that police could find one for him.

[271] Her Honour determined, in respect of the first interview, that there was compliance with s 418 of the *PPRA*, and substantial compliance with the requirements of s 23 of the *Responsibilities Code*.

[272] In respect of the first interview (or part of it), there was also a complaint that s 423 had been breached. It provides that, where a police officer wants to question or to continue to question a person such as Zevenbergen, who is apparently under the influence of liquor or a drug, the police officer must delay the questioning until reasonably satisfied the influence no longer affects the person's ability to understand his rights and to decide whether or not to answer questions.

[273] The competing positions before the pre-trial hearing judge can be summarised as follows:

(a) the Crown submitted that, taking the first interview in total, after Zevenbergen discussed his medication at the outset, he continued to participate, and was able to provide background details about the lead up to the offending; he first raised the issue about medication affecting his memory when he was queried about how he arrived at the location where the offending occurred, and he changed his version; at that point, he said he was "freakin' out" due to the allegations; after further discussion about the offending, he told the police interviewers he was "fucked" because of his

medication; that represented a significant change in his position compared to earlier in the interview, and police stopped the interview shortly thereafter; consequently, there was no relevant unfairness;

(b) Counsel for Zevenbergen submitted it was apparent from the recordings he was clearly more affected by drugs in the first interview than he was in the second; his mannerisms and behaviour suggested a state of drug induced intoxication; whilst the police asked him if he understood his cautions, and he said he did, they did not test that in the form of a statement such as, "*Can you use your own words now and tell me what I mean by ...*"; further, it was also contended that, at points in the first interview involving statements such as, "*It's important to tell the truth ...*", the questioning was improper, and perhaps in the form of a direction.

[274] The pre-trial hearing judge's description of the first interview, which her Honour had viewed at the request of the parties, was:[343]

> "[27] Having watched the first interview, I observe that the applicant was mostly looking at the police. He was hunched over in his seat. His speech was, on occasion, indistinct, through mumbling. He said he understood what was going on. He was generally responsive to questions (although his answers were often vague and cast in imprecise and crude language). He was clearly following the questions the police were asking. He was sometimes slow to respond. On occasion, he asked the police to repeat the question. His demeanour at the outset of the interview (particularly where the police were administering the cautions), coupled with the answers he was giving to questions, suggests he was fully comprehending what was occurring. Accepting those observations, there was nothing in his presentation per se, to my mind, to have put the police on alert at the start of the first interview, that he was under the 'apparently influence of medication' such that the first interview should not have proceeded at that time.
>
> [28] Working from the transcript of the first interview at page 17, after a particularly vague answer to the simple question of how the applicant got to the location where the complainant was the night before, the police officer said to the applicant "Mate your memory seems a bit fuzzy, why is that ?" Thus it can be seen that it is the police who first introduce the subject of the memory difficulties. The applicant replied "It's from my medication. I've had a lot o' medication this morning" and he says that it affects his memory "Like I'm not on point today, you know, I'm a bit slow". He confirms he understands what the police are doing. When the officer said "You're just having a bit memory lapses" he responded " …not memory lapses, ...like it's a bit hard for me to like… well I someone, I'm freakin' out, like going what the f***, you know what I mean as well like". The questioning and answering continued for about another eight pages, where the topics covered are

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343 *R v Zevenbergen* [2021] QDCPR 79 at [27]–[29]. Citations omitted.

how they arrived at the complainant's location, what happened when they got to the complainant's location, what the complainant was doing, and the turn of events the night took.

[29] The interview then got to the point of when the applicant got into bed with the complainant. I infer from the entire transcript of both interviews that this is the point in the first interview which precedes and is proximate to the events the subject of the rape counts. At that point, the police officer conducting the questions said it was important that they were very clear on what he was saying. In response, the applicant said to the police that he would prefer to do the interview when he's not so much under the influence of his mediation. That appears at the top of page 27 of the 32 page transcript of the interview, that is substantially after the bulk of the matters in the interview have been provided. In that passage he again confirms that "I was like, I do understand what's goin' on you know… In a way like we're gettin' interviewed about fuckin' somethin' that's bullshit … You know what I mean. A complaint … and it's fuckin', and that shit did not happen mate, you know". He confirms further to police that he understands what's going on and he then goes on to answer some more simple questions about the offending and is plainly able to give an account differentiating between the points in time as to when he had sex with the complainant."

[275] I have watched the first interview as well. I respectfully agree with the description above. I also agree with her Honour's findings as to what Zevenbergen's position was in that interview:[344]

"[31] In my assessment:

(a) the applicant was oriented as to time, place and circumstance when the first interview started;

(b) whilst the police failed to ask him whether there was someone he wanted to talk to, this is somewhat ameliorated by the fact they said they could arrange someone if he didn't have someone. This statement should have assisted the applicant to understand he could have someone present if he wanted;

(c) he explained that he was on medication but he said that he understood what was occurring. His general ability to follow the police questions and answer them suggests that he understood what was occurring;

(d) the questioning on the occasion when the police officer said to him it is important to be one hundred percent honest is not improper. It arose after an answer which was improbably vague. The questioning was cast in terms of the importance of getting the best detail possible; and

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344 *R v Zevenbergen* [2021] QDCPR 79 at [31]. Citations omitted.

> (e) he was able to say to the police that he wished to stop answering questions, by reason of his medication. Whilst my assessment is that he continued following what was going on, in view of the indication he gave, at that point (being the point jointly agreed by the parties) the interview should have stopped."

[276] Having watched both interviews, her Honour further found that s 423 had no application until Zevenbergen indicated that he no longer wished to answer questions until he felt he was no longer under the influence of his medication.[345] As a consequence, the pre-trial hearing judge redacted various parts of the first interview but otherwise ruled it admissible.

[277] In my respectful view, no error has been established in relation to the pre-trial hearing judge's conclusion as to the first interview. No relevant unfairness was created by the failure to adhere strictly to s 418 of the *PPRA* or s 23 of the *Responsibilities Code*.

[278] The second interview commenced at about 8.30 pm and lasted for about one hour and 45 minutes. It was conducted by two interviewers, only one of whom was present at the first interview.

[279] Counsel for Zevenbergen accepted below that it was apparent from watching and listening to this interview that Zevenbergen was no longer affected by whatever medication or drugs he had taken. However, he submitted that, because Zevenbergen was not asked or tested on his recollection of what he had been told at the first interview about the cautions and rights, the pre-trial hearing judge could not know what understanding he had of his rights while in the second interview.

[280] The submission continued that, whilst the account Zevenbergen gave to the police in the interview would be entirely consistent with the conduct of his defence at trial,[346] the unfairness arose from the context in which the interview was conducted, the language he used,[347] and observing that he presented as arrogant, sexist, and obnoxious. It was submitted that the second interview would not be well received by a jury. Therefore, he would be prejudiced if the jury heard what he said and how he said it.

[281] The Crown's submissions on the second interview accepted that the police did not comply with the requirements in s 418 of the *PPRA* or s 23 of the *Responsibilities Code*, and thereby that the discretion to exclude the interview was enlivened. However, it pointed to the fact that the interview was voluntary, and submitted that the question governing whether such evidence would be excluded for unfairness is the effect of the unlawful conduct on the defendant. It was submitted there was no link between the unlawful conduct,[348] and what the complaint was, namely how Zevenbergen presented in the interview. Relying on *R v LR*,[349] the Crown

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345 *R v Zevenbergen* [2021] QDCPR 79 at [32].

346 Supplementary AB 2, Zevenbergen's outline in pre-trial hearing, paragraph [3]; Supplementary AB 11, lines 7–9.

347 This was explained as being "not so much what he says but how he says it".

348 The failure to give him the information required in s 418 of the *PPRA*.

349 [2006] 1 Qd R 435; [2005] QCA 368 at [51].

submitted that non-compliance did not of itself mean the interview should be excluded.

[282] The second interview commenced with the police administering some of the required cautions, namely: (i) that there was no threat or promise to participate in the interview; and (ii) that he had the right to remain silent.[350] The interviewer then recounted some of the events surrounding the first interview, and that it was stopped because of how Zevenbergen was feeling due to the medication he took. Zevenbergen agreed with what was said, saying he had nothing to add to that.

[283] He was then asked how he was feeling now:

> "CON TREZISE: How are you feelin' right now?
>
> ZEVENBERGEN: I'm feeling' yeah, right.
>
> CON TREZISE: You.
>
> ZEVENBERGEN: But still a bit drowsy but yeah, a bit better.
>
> CON TREZISE: Yep.
>
> ZEVENBERGEN: A bit better.
>
> CON TREZISE: Are you happy to go ahead?
>
> ZEVENBERGEN: Yeah, yeah, yeah."

[284] As the interview continued, Zevenbergen appeared eager to put forward his account of the events, and particularly that the complainant was a willing participant in all sexual contact and even the initiator of some. That was the conclusion reached by the pre-trial hearing judge, and one that I have come to as well by both reading the transcript and viewing the recording.

[285] At one point Zevenbergen said, "… can I just explain this whole situation …",[351] and then did so without interruption by the police.[352] He explained why he wanted to speak up:[353]

> "… I never even do these fuckin' interviews you know but I wanna get this story straight so I can get my point across to youse to what has happened. It's not you know. … So you can fully understand ... what's happened that night you know. So … well, my recollection of what has happened that night."

[286] Zevenbergen ended the interview maintaining that all the sexual contact was fully consensual and the allegations were "absolutely bullshit".[354]

[287] Notwithstanding his eagerness to explain his account, Zevenbergen declined to answer some questions, particularly those that would give the names of the other appellants.[355]

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350 He was asked to explain what that meant, and he did, saying "*Anything I say can be used as evidence*", and he confirmed that he did not have to answer any of the police questions.

351 AB 1000, lines 9–11.

352 AB 1000, line 19 to AB 1001, line 39.

353 See above at footnote 342.

354 AB 1069, lines 45–46.

355 AB 1005, lines 15–36; AB 1046, lines 37–39; AB 1047, lines 9–12.

[288] The situation then was that:

(a) at the first interview, Zevenbergen had been given a substantial part of the information required under s 23 of the *Responsibilities Code*, and even though it was not repeated, he was reminded of that at the start of the second interview;

(b) he was not affected by his medication to the extent evident at the first interview;

(c) he was willing to proceed with the interview even though he knew he was not obliged to do so; his history was "I never even do these fuckin' interviews", a comment which, in context, could only mean that he normally did not participate in police questioning;

(d) he was willing to proceed with the interview even though he knew he was not obliged to answer questions, and that his answers could be used as evidence against him;

(e) he exercised the right to refuse to answer questions when he so chose;

(f) he was eager to explain his version of the events, particularly that all acts were consensual; and

(g) he wanted to emphasise that the complainant's allegations were "bullshit".

[289] They are conclusions which I hold as a result of reading and watching the interview. In large part, they are conclusions which the pre-trial hearing judge reached as well.[356]

[290] Those circumstances mean that Zevenbergen's case is, as the pre-trial hearing judge found, well removed from that in *R v LR*. There, the defendant was seriously affected by alcohol but the interview was not delayed, the defendant's ability to understand his rights and decide whether to answer questions was affected, the police ignored the defendant's father's attempts to have a solicitor present, the interview content went well beyond–and contradicted–the complainant's evidence, and the defendant at one point invited police to "[j]ust fucking lock me up".[357]

[291] In *R v LR*, Keane JA said:[358]

> "[51] The circumstance that the record of interview was obtained in contravention of the PPR Act does not of itself mean that it should have been excluded by the learned trial judge. Illegality or impropriety on the part of law enforcement officers that results in the making of a confession merely enlivens a discretion to exclude the confession on the grounds of unfairness. The provisions of the PPR Act to which I have referred do not purport expressly to govern the admissibility of evidence, but the authorities suggest that they are to be 'regarded as a yardstick against which issues of unfairness (and impropriety) may be measured'.

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356 *R v Zevenbergen* [2021] QDCPR 79 at [48].
357 *R v LR* at [33], [39]–[40], [53]–[54].
358 *R v LR* at [51]–[52]. Citations omitted.

> [52] The decision of the High Court in *The Queen v. Swaffield*, and in particular the joint judgment of Toohey, Gaudron and Gummow JJ., requires that the discretion to exclude confessional evidence should be exercised, where voluntariness is not in issue, by reference to considerations of reliability and respect for the right of an accused to stay silent. As their Honours said:
>
> > '… the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.'"

[292] The central consideration of the reliability of the admission is also to be seen from what Brennan J said in *Duke v The Queen*:[359]

> "The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. Trickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification – to name but some improprieties – may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent. The fact that an impropriety occurred does not by itself carry the consequence that evidence of a voluntary confession procured in the course of the investigation must be excluded. The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."

[293] The present case is one where voluntariness is not in issue. Considerations of reliability and respect for the right of an accused to stay silent are the two matters that should govern the question of whether to exclude the evidence in the interviews. In my view, neither call for exclusion here. Zevenbergen was well aware of his right to silence and exercised it when he wished to do so. His condition did not call into question his reliability, given the first interview stopped short of the critical events, and he was relevantly unaffected by medication when those matters were discussed in the second interview. His responses were accepted to be entirely consistent with the way his defence was to be conducted. This is a case where, notwithstanding that the admissions by Zevenbergen to sexual

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359 (1989) 180 CLR 508 at 513; [1989] HCA 1.

intercourse with the complainant were obtained in breach of the requirements of the *PPRA*, there is no real reason to doubt that he was willing and able to give a reliable account of events.[360]

[294] As to the question concerning Zevenbergen's language and the observation that he presented as arrogant, sexist, and obnoxious, that does not, in my view, impact upon the issue of reliability. In any event, the jury were given the standard directions to decide only on the evidence, approach their duty dispassionately, and to put aside any prejudices they had.[361] There is no basis to think they did not do so. Further, the Prosecutor's address also told the jury that, if they considered that Zevenbergen "did not present as a particularly pleasant person", then they could not "jump straight to the idea that he must be guilty of these offences. Because it doesn't work like that, obviously".[362]

[295] I do not accept the submission that the failure to comply with the *PPRA* or the *Responsibilities Code* is made more serious, and the exercise of the discretion against exclusion is made unsustainable, because by the time of the second interview Zevenbergen was then under arrest. Whilst that fact highlights the need for the cautions under the *PPRA* and *Responsibilities Code*, breach of those requirements enlivens the same discretion which is governed by the same considerations of fairness and (in this case) the reliability of what was said. Where what was said was conceded to be entirely in conformity with the case to be put to the complainant,[363] and no question of voluntariness arises, the discretion fell to be exercised by the same considerations as would be the case prior to arrest.

[296] In my respectful view, the pre-trial hearing judge was right not to exclude the interviews from evidence.

[297] As to whether the inclusion of the record of interview caused a miscarriage of justice, it is, in my view, right to conclude that Zevenbergen's prospects of an acquittal were not adversely affected in a material way by the decision to allow the records of interview into evidence. The records of interview were, it was accepted, entirely consistent with the case put on Zevenbergen's behalf to the complainant. The admission of the interviews into evidence was not likely to have deprived him of a fair chance of an acquittal.

[298] The second aspect of unfairness raised before this Court was that the interviews contained material that the Prosecutor used to cast doubt upon Zevenbergen, and which could have been used adversely against him by the jury. This was a reference to what was said in the closing address, that there were reasons why the jury might think he was dishonest in his interview:[364]

(a) he was "working hard to present [the complainant] as someone who was overly flirtatious and keen to hook up with all those men";

(b) he did not "present particularly as forthcoming about his involvement", particularly as to the names of the others;

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360 *R v LR* at [55].

361 AB 134, lines 24–26, AB 136, lines 8–11.

362 AB 59, line 45 to AB 60, line 3.

363 As was accepted during the appeal, the only difference between the accounts of Zevenbergen and the complainant was the issue of consent: appeal transcript 1–15, line 27 to 1–16, line 4.

364 AB 60, line 5 to AB, 63 line 4. In each case, examples were given to the jury.

(c) in the first interview, he did not mention the interaction between himself and the complainant in the spa, whereas he did in the second; and

(d) in the second interview, he was giving an evolving version of events; "the way that his story evolved was consistent with him making things up as he went along to the police".

[299] The first matter to observe is that this point was not raised as part of the application before the pre-trial hearing judge to exclude the interviews. Nor was it raised in the written outline on the appeal. Nor is it comprehended in the formulation of the ground of appeal concerning the admission of the interviews.

[300] Therefore, if any relevant point arises, it must be that the use of the interviews was unfair so as to cause a miscarriage of justice, not that they were improperly admitted. For the reasons which follow, I reject that submission.

[301] In that part of the address, the prosecutor was urging that the jury might think that Zevenbergen was not an honest witness in his account. There is nothing unfair or objectionable in that approach. Given that the only real difference between his account and that of the complainant was the issue of consent, it was always likely that his account on that score would be attacked as not honest. He was asserting the same thing to the police in respect of the complainant's account that it was non-consensual, namely that it was untrue and "bullshit".

[302] There was only one statement in that part of the address where the Prosecutor used the term "lies". That concerned the fact that, during the interview, Zevenbergen first said Butler drew the penis/swastika image on the complainant's stomach, then conceded that he drew one part of it. The prosecutor said of that, "You might think that's an example of a man who has been caught out in his lies and then continues to evolve his version to the police".[365] I do not consider that one reference alone renders the admission of the second interview unfair. It was said in the context of an overall submission that there were reasons to doubt that he gave an honest account of the events. Further, that part of the address was preceded by the Prosecutor's explanation of what she was about to say:[366]

> "I want to move on now from that cross-examination that we heard to two of the interviews that we heard in this case. So we heard from Mr Sealey and Mr Zevenbergen. And if, having listened to those interviews, you're left with the impression that both of them were honest people and that they were honest about what they told the police happened in the room, well, then you might think you can just acquit those defendants immediately. If you believe what they told you, then you could acquit them. But if you don't, I suggest to you that you put those interviews to the side and you come back to all the evidence in this case. The other evidence. And examine that."

[303] In the circumstances, there was no relevant unfairness such as would warrant the conclusion that a miscarriage of justice had occurred.

[304] This ground fails.

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365 AB 62, lines 26–27.

366 AB 56, line 46 to AB 57, line 7.

Conclusion

[305] For the reasons set out above, all grounds of appeal have failed. I propose the following orders:

1. In CA No 4 of 2022, appeal dismissed.
2. In CA No 12 of 2022, appeal dismissed.
3. In CA No 13 of 2022, appeal dismissed.
4. In CA No 14 of 2022, appeal dismissed.

[306] **DALTON JA:** I agree with the orders proposed by Morrison JA and with his reasons.

[307] **WILSON J:** I agree with the reasons and orders as set out by Morrison JA.