SUPREME COURT OF QUEENSLAND

CITATION:	*R v Little* [2018] QCA 113
PARTIES:	**R** **v** **LITTLE, Mark** (appellant)
FILE NO/S:	CA No 169 of 2017 DC No 448 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 26 July 2017 (Morzone QC DCJ)
DELIVERED ON:	8 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2018
JUDGES:	Sofronoff P and Fraser JA and North J
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was found guilty of three counts of rape (counts 2-4) but not guilty of one count of entering a dwelling and stealing a Medicare card and two mobile telephones in the dwelling (count 1) – where the appellant argued that the verdicts were inconsistent as the stealing offences "bookended" the rape offences – where the respondent argued that the quality of the evidence of the stealing offences was lower than the evidence of the rape offences – whether the guilty verdicts on counts 2-4 should be set aside because they are inconsistent with the jury's acquittal on count 1 CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – EVIDENCE OF PRIOR CONVICTION – where a pre-trial ruling determined that three incidents of similar fact evidence were admissible – where the appellant argued that the probative value of the evidence was reduced by a lack of similarity between those three incidents and the offences at trial – where the trial judge made appropriate directions to the jury concerning their use of the similar fact evidence – whether the similar fact evidence was admissible notwithstanding the potentially prejudicial effect of that evidence – whether the

admission of the similar fact evidence resulted in a miscarriage of justice

Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, applied
R v Collins [2013] QCA 389, cited
R v Wallace (2008) 100 SASR 119; [2008] SASC 47, cited

COUNSEL: F D Richards for the appellant
N W Crane for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Fraser JA and the order his Honour proposes.

[2] **FRASER JA:** On the fourth day of a trial in the District Court, a jury found the appellant not guilty of entering a dwelling and stealing a Medicare card and two mobile telephones in the dwelling (count 1) and guilty of three counts of rape (counts 2 – 4). The appellant has appealed against the convictions on two grounds: the guilty verdicts are unreasonable as they are inconsistent with the not guilty verdict on count 1, and the admission of evidence of the appellant's previous sexual offending occasioned a miscarriage of justice.

The case at trial

[3] Shortly stated, the effect of the complainant's evidence at the trial was that the appellant forced his way into her hotel room, raped her three times, and stole her Medicare card and two mobile phones. It was put to the complainant in cross-examination, and she denied, that the complainant had consensual sex with the appellant in the hotel room in exchange for the appellant supplying amphetamines, after the sex the complainant injected the drugs and discovered that they were very poor quality, the complainant became very angry with the appellant when he told her that he had mixed the drug with Epsom salts, as a result the complainant threatened to tell police that the appellant had raped her, and the appellant then left the hotel room.

[4] The complainant gave evidence that she was a sex worker and was introduced to the appellant by a drug dealer. Over a period of about a week or two, the complainant had consensual sex with the appellant on a number of occasions in exchange for drugs. By 19 November 2015 the complainant had moved into the hotel room where the offences were alleged to have occurred. That morning the appellant and the complainant had an acrimonious exchange of text messages which ended their relationship. At night the complainant saw a client before having a sleep and then walking to a motel to eat. As she walked back to the hotel, and again after she had arrived at her room, someone calling himself Jimmy rang her asking if she was available. She explained that she did not take bookings from a telephone number which was not displayed on her mobile phone.

[5] The complainant undressed and went to bed whilst listening to music. She heard a knock on the door, got up, and looked through the peephole in the door. She could not see anyone. Thinking that people in the neighbouring room wanted to ask her to

turn the music down, she opened the security latch. A tall man wearing a balaclava, mirrored sunglasses, and black clothing with white print down the side of the sleeve suddenly came from the left hand side of the door and threw her across the room so that she was lying face down underneath the television. The man told her he that he had a knife, threatened that he would slice her throat if she screamed and would kill her. She could feel something at her throat. The man sat on top of her while she was face down and tied a gag into her mouth. He said in a husky, deep growl into her ear that she was to shut up and not say a word and if she made a sound he would slice her throat and kill her. He put a pillow case over the complainant's face, tied a blindfold over the pillow case behind her head, and tied her hands and legs together.

[6] Eventually the man told her that he was going to untie her, she was not to say a word or he would slice her throat and kill her, and she was to fellate him to ejaculation. The man knelt the complainant on a cushion he put on the floor, and gave her a drag of a cigarette and a glass of water. The complainant fellated the man and spat out the ejaculate. The man lifted the complainant from the floor and placed her on her stomach on the bed, untied her arms, rolled her over, undid her legs and raised them, and penetrated her vagina with his penis. The complainant thought that the man used a condom, because she had heard what sounded like the noise of a condom packet being undone. The man subsequently rolled the complainant over and penetrated her anus with his penis. It was painful and the complainant screamed out that it hurt her and asked him to stop, which he did.

[7] The complainant did not recognise the voice of the man but it became apparent to her from the man's moans and the way he had sex with her that it was the appellant. After the man stopped he fossicked through the complainant's bag next to her, told the complainant she was a junkie, and asked where her drugs were. The complainant replied that she did not have any. The man said that he had her Medicare card, he knew who she was, and he would kill her if she told anyone. He told her to wait 10 minutes from when he left before she moved. The complainant lay motionless waiting for the man to leave for possibly five or seven minutes. He said that he was leaving and repeated that the complainant was to wait 10 minutes before she moved and not to tell anyone. Before the man left he rolled the complainant to the side, took the sheet that was on the top of the bed out from underneath her, and put that into his bag. The complainant knew he put it in the bag because she heard a zipper. After the complainant was confident the man had left the room she untied the pillow case over her head and dropped it onto the bed.

[8] The complainant gave evidence that she subsequently stayed with a client in a different room and put the clothes she was wearing into the pillow case. She told a housekeeper that she had been raped and hid the pillow case behind a washing machine. She went to a different hotel and told an acquaintance she had been raped. She borrowed that man's phone and called a friend before being taken to the police station to file a complaint. She bought another mobile phone because, "he'd stolen my phones…I was trying to contact someone…don't really know, I was just panicking."[1] On the evening before the events she had two mobile phones and after the incident she noticed that both phones and her Medicare card were missing. She believed that she had one phone in her hand when she opened the door to the man and "I believe the second one was in my handbag, with my purse."[2] The complainant said that as

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1 Transcript 24 July 2017 1-46.

2 Transcript 24 July 2017 1-47.

a result of the offences she had a cut to her neck, a large bruise on her side, her mouth was torn up from where she'd been hit ("it was like I had been punched in the mouth"), a cut or a number of cuts on her chin, and a graze on her right elbow.

[9] The complainant was cross-examined extensively, in the course of which she made admissions which a jury reasonably could regard as bearing upon her credibility and the reliability of her evidence. She regularly used methylamphetamine, on many occasions she agreed to have sex with the appellant in exchange for that drug, she twice complained about the poor quality of the drug, she had been convicted and given a suspended sentence of imprisonment more than a decade earlier for an offence of conspiracy to cheat or defraud, and she had committed drug and traffic offences. The complainant also agreed that when she was in the hotel room she might have texted the appellant seeking his help because she was really sick, but she denied telling him her room number. She did not receive any calls or texts from the appellant's phone on the night of 19 November or the morning of 20 November 2015. She was very conscious of security and would give clients her room number only when they were at the hotel. She expected clients to knock soon after but otherwise would not have opened her door. She was pedantic about locking her doors and drawing curtains. The complainant also said that she must have been mistaken about the time of the calls from Jimmy and she agreed she was not bashed by her assailant. She denied the suggestion mentioned in [2] of these reasons.

[10] The housekeeper at the hotel gave evidence that on the morning of 20 November 2015 the complainant told her that she had been bashed and raped. The complainant seemed hysterical and very frightened. The complainant asked the housekeeper to hide a plastic shopping bag which the complainant said was the only evidence she had to catch the guy. The housekeeper gave evidence that the complainant said that the assailant had "hit – bashed my mouth". In cross-examination the housekeeper denied that the complainant had said that the assailant had bashed her in the mouth.

[11] The manager of a travel agency near the hotel where the offences were alleged to have occurred gave evidence that on the morning of 20 November 2015 the complainant came into the agency. The complainant seemed really agitated and was kicking speakers that sat on the floor. When the manager spoke to the complainant she broke down sobbing and seemed really stressed. He could barely understand what she said through her mumbling and sobbing and asked her to repeat it. The complainant said that she had been raped, she thought she knew the guy, she was scared for her life, and he had threatened to kill her. The complainant said that the man had come into the apartment, "I think, through the window", with a black bandana, put a pillow case over her head and gagged her mouth. The complainant described anal and vaginal penetration and said that the assailant did not use a condom and his semen would still be inside her. She had asked the cleaners at the hotel not to clean her room. He lent the complainant a phone. He heard her crying and saying twice to the person she spoke to that she had been raped. In cross-examination, he said he did not exactly know how the offender broke in, the complainant seemed hysterical, and he thought that the complainant said the window or it could have been the door, or both.

[12] A police officer conducted a search at the appellant's residence on 20 November 2015. The appellant was present. The officer found a black track suit with white writing on it. He did not find any other item of interest at the appellant's residence or on his person. There was no writing on the black hooded track suit top. The police officer gave

evidence that the mobile phones and the Medicare card were not found upon the search.[3] Another police officer gave evidence that the complainant had reported "her mobile phone stolen"[4] and neither of the mobile phones or the Medicare card was recovered.[5]

[13] A doctor gave evidence of injuries found upon an examination of the complainant on 20 November 2015: a linear scratch abrasion over the top of the left wrist, a scratch abrasion on the mid-point of the chin, a linear scratch abrasion on the right side of the thorax, and scratch abrasions inside the mouth. The doctor was referred to photographs of the complainant and described a scratch to her throat and a bruise to her torso, which the doctor had not noted upon the examination. In relation to that scratch, the doctor referred to the examination having been in the afternoon, the availability of light, and that the scratch was very superficial, whereas in the photograph there was a little bit of crusting on top of it, making it a little bit more obvious than it might have been 24 hours earlier. In relation to that bruise, the doctor referred to the difficulty of ageing bruises. The doctor considered that the scratch to the throat might be explained by a sharp object like the blade of a knife being held to the throat as one possible explanation, but it was a very non-specific injury. The doctor took swabs from the genitals and did not notice any injury. In cross-examination the doctor agreed that marks on the complainant's neck which the complainant identified as positions where the knife was held were not discernible. Another possible explanation of the marks shown on the photograph was that the injury was occasioned after the examination.

[14] Formal admissions were tendered in the Crown case that semen was not detected in the swabs from the complainant and that the appellant's DNA was detected on the pillow case and in mixed profiles in two of the swabs taken from the complainant. The formal admissions included reference to the appellant's movements on 19 and 20 November 2015. He was seen arriving at his address around 8.30 pm on 19 November 2015, he remained at the house for roughly 20 minutes before leaving in his car, and he was seen returning to the house again at around 11.30 pm but was not seen again that night. One of the occupants of the house woke up at about 8.00 am on 20 November 2015 and soon after saw the appellant, and they left the house together soon after that; before that occurred, the appellant hung out a pair of black track suit pants and a black jumper which police later found on the clothes line upon execution of the search warrant on the afternoon of 20 November 2015.

[15] There were also admissions of the facts of previous sexual offending on three occasions, of which the appellant had been convicted on his pleas of guilty. Those admissions are the subject of the second ground of appeal.

Ground 1: The guilty verdicts are unreasonable as they are inconsistent with the acquittal on count 1

[16] The applicant did not contend that it was not reasonably open to the jury upon the whole of the evidence to find that the appellant was guilty of counts 2 – 4. The evidence discussed in these reasons plainly demonstrates that such an argument could not succeed. Under ground 1, the appellant argued only that the guilty verdicts should be set aside because they are inconsistent with the acquittal on count 1. The acquittal was submitted to be particularly important because the forced entry to the

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3 Transcript 25 July 2017 2-27.
4 Transcript 25 July 2017 2-32.
5 Transcript 25 July 2017 2-34.

hotel room and the stealing of the Medicare card and the mobile phones accompanied by threats, which were the subject of count 1, "bookended" the complainant's evidence of the rapes; it was inexplicable that the jury would reject the complainant's evidence of the burglary and stealing while accepting the evidence of sudden forced entry to the hotel room, the complainant's restraint, the rapes, and the threats to kill. The appellant argued that the likely explanation for the acquittal on count 1 is that the jury doubted the complainant's evidence supporting that count, but that this evidence was intimately bound up with the remaining counts because count 1 was perpetrated to facilitate the rapes and to discourage the complainant from disclosing them. The appellant argued that the case therefore fell within the first of the two categories of cases described by McHugh J in *Osland v The Queen*:[6]

> "When an appellate court sets aside a jury's verdict of guilty on the ground that it is inconsistent with a verdict of acquittal, it usually does so for one of two reasons. First, the verdict of acquittal may necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty. Second, in acquitting the accused on one count, it may follow that the jury must have accepted evidence that required them to acquit on the count on which they convicted the accused."

[17] Contrary to the appellant's argument the acquittal on count 1 does not necessarily demonstrate that the jury did not accept evidence they had to accept before finding the appellant guilty of the other counts. As the respondent submitted, although the credibility of the complainant and the reliability of her account of the entry of the disguised intruder and his violence and threats are certainly relevant to the issue of consent in counts 2 – 4, the acquittal on count 1 is readily reconcilable with the convictions on the other accounts by reference to the trial judge's directions to the jury, differences in the nature and quality of the evidence concerning the different counts, and submissions to the jury.

[18] The trial judge gave conventional directions to the jury requiring the jury to consider each charge separately, to evaluate the evidence relating to the particular charge to decide whether the jury was satisfied beyond reasonable doubt that the prosecution had proved its essential elements. Importantly, the trial judge directed the jury that count 1 charged the appellant with the alleged entry and stealing of the Medicare card and mobile "phones".[7] In that context, the trial judge gave oral and written directions to the jury that the prosecution must prove beyond reasonable doubt the elements of the offence of stealing, including a taking by the defendant. The jury was not directed that it was sufficient for the prosecution to prove that any one of the three items, the Medicare card and the two mobile phones, was stolen. Thus the jury may well have considered that a verdict of acquittal should be returned on count 1 unless the jury was satisfied beyond reasonable doubt that the appellant stole the Medicare card and both mobile phones. The complainant did give evidence to that effect, but it was reasonably open to the jury to consider that the evidence that both mobile phones were stolen was markedly less persuasive than the evidence upon each of counts 2 – 4. The complainant gave graphic and detailed evidence of the sexual offending. It was reasonably open to the jury to consider that her credibility in that respect was supported by the evidence of her complaints given

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6 (1998) 197 CLR 316 at 356-357.

7 Transcript 26 July 2017, p 12; Final jury questions for identification, at p 2.

by the housekeeper and the manager of the travel agency, notwithstanding some inconsistencies arising from the particular terms of the complaints to which defence counsel directed the jury's attention. The jury also reasonably could consider that some support for the complainant's account of the sexual offending could be derived from the police officer's evidence of finding a black track suit with white writing on it at the appellant's residence on the day of the alleged offences and the doctor's evidence of injuries by the complainant.

[19] Conversely, there was no evidence of count 1 other than the evidence given by the complainant. Her evidence that the offender had stolen her phones was evidence only of a belief and it was given in the context of her statement that when she formed that belief she was panicking. She gave evidence that she noticed after the incident that both phones and the Medicare card were missing, but she was not asked whether or not she had conducted a search. In relation to what she described as the second mobile phone, her evidence was that she believed that it had been in her handbag. Furthermore, no mobile phone was found upon the police search of the appellant's residence and his person, and the trial judge's summing up indicates that defence counsel referred the jury to the lack of any investigation of the crime scene and that searches did not find "any or at least very little corroboration of the complainant's version".[8] (The jury also might have noticed that one of the police officers gave evidence that the complainant had reported that her "phone" – rather than her "phones" – had been stolen, but I put this to one side because it might merely reflect a slip or a minor transcription error).

[20] It therefore appears that the jury might have acquitted on count 1 merely because they considered that the evidence given by the complainant, although generally truthful and reliable, did not exclude a reasonable doubt about whether the appellant had taken both mobile phones. Although the acquittal on count 1 seems surprising in the context of the convictions on the other counts, this is not a case where there is an inconsistency between verdicts which "rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice";[9] rather, an examination of the record reveals that "there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required" and the view is open "that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt".[10] The appellant has not established that "no reasonable jury who had applied their mind properly to the facts in the case could have arrived at" the differential verdicts.[11] In reaching that conclusion, I have not taken into account the similar fact evidence which is the subject of the challenge in ground 2, but that evidence supplies additional support for the same conclusion.

Ground 2: The admission of evidence of the appellant's previous sexual offending occasioned a miscarriage of justice

[21] Before the trial the appellant applied under s 590AA(2)(e) of the *Criminal Code* 1899 (Qld) for a ruling excluding similar fact evidence the Crown proposed to

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8 Summing Up 26 July 2017 at p 11.

9 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

10 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367-368 (Gaudron, Gummow and Kirby JJ).

11 *R v Stone* unreported 13 December 1954 per Devlin J, quoted with approval by Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

adduce at the trial. That application was dismissed by Harrison DCJ. In conformity with the ruling, at the trial the appellant formally admitted the following facts:

> "The defendant was previously convicted on pleas of guilty to criminal offences arising out of the following incidents:
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> Incident 1: Around midnight on 2 November 1994 the complainant was woken by the defendant, who was wearing a balaclava and sitting on her stomach. He was holding a knife to her throat and said "Don't scream or I'll kill you". This occurred on a couch in the lounge room.
>
> The defendant told the complainant to go to the bedroom and lay on her stomach. She did so, with the defendant following her and continuing to press the knife to her throat. The defendant tied her hands together behind her back and placed material in her mouth, tying it behind her head. He again told her "Don't scream or I'll kill you".
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> The defendant briefly left the room before returning, naked. He removed the complainant's underwear and told her to roll over onto her back, which she did when he again picked up the knife. The defendant forced her legs apart and inserted his penis into her vagina. He continued having sex with her for between five and ten minutes, during which he at one point lifted her camisole up and touched her breast then kissed her on the neck.
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> After the defendant stopped having sex with the complainant he told her to roll onto her stomach again, which she did. He used a pillow case to bind her ankles together before getting off the bed and dressing himself. He told the complainant "don't do anything stupid, or I'll kill you" before leaving the house. The complainant managed to free her hand and feet from the ties before seeking assistance at a friend's house.
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> The defendant was unknown to the complainant and the knife used in the incident was the complainant's knife.
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> Incident 2: At approximately 6 a.m. on 12 November 1998 the complainant was asleep in her bed. Also in bed with her was her youngest son. She was woken by the defendant placing a gloved hand tightly across her mouth, opened her eyes and saw the defendant wearing a balaclava, standing over her. He told her "Don't move or I'll kill you" and was holding a knife.
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> The defendant took the child into a separate bedroom and returned to the complainant, demanding money from her. He removed his pants and told the complainant to suck his penis, threatening her with the knife if she refused. She complied and this continued until the defendant ejaculated into her mouth.
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> Following this the defendant told the complainant to roll onto her stomach, which she did, and tied her hands behind her back and her legs together. Before leaving the defendant cut the complainant's telephone cord and told her he wanted ten minutes to get out of the

> house. After he left the complainant freed herself from the ties, got dressed and sought assistance from neighbours.
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> The defendant was unknown to the complainant.
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> Incident 3: In the early hours of 10 February 1999 the complainant awoke kneeling beside her bed. The defendant was standing and pressing a knife against her throat. His other hand was held over her mouth. He was wearing a balaclava and gloves and threatened to cut her throat if she screamed.
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> The defendant dragged her up and onto her bed, demanding money. The knife remained against her throat while he did this. The complainant tried to push it away by taking hold of his wrist and the defendant told her to stop. When she didn't he punched her in the face a number of times.
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> The defendant told her to take her clothes off, which she refused to do, so he pulled the front of her nightie down. He grabbed her breast and told her to take her pants off, which she again refused to do. The defendant responded by hitting her again and she then removed her pants.
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> The defendant told her to spread her legs and began undoing his belt, placing the knife in his mouth while he did so. As he was doing this the complainant kicked him off her and ran out of the house, seeking assistance. The defendant left the area.
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> The defendant was unknown to the complainant."

[22] There was no evidence at the trial that the complainant had any knowledge of those incidents or any of the admitted facts relating to them. A suggestion to the effect that she did have some such knowledge was put to the complainant in cross-examination and she denied it. This ground of appeal falls to be decided upon the footing that the evidence did not reveal that the complainant might have known any of the admitted facts before she gave her account of the alleged offending.

[23] At the time of the pre-trial ruling it was not clear how the appellant was going to conduct his trial. Harrison DCJ found that the similar fact evidence was admissible for the purpose of identifying the appellant as the offender and as evidence of the state of mind of the appellant so far as that was relevant to any mistaken belief that the complainant consented in circumstances in which there had been a prior consensual sexual relationship. The respondent acknowledged that in the context of the conduct of the defence case the second aspect of the potential relevance of the evidence was not applicable at the trial.

[24] The appellant did not argue that the respondent had incorrectly described identification of the appellant as the offender as the issue to which the similar fact evidence related. It should be noted though that the identification of the appellant as the person who engaged in the specified sexual acts appears to have ceased to be a significant issue during the cross-examination of the complainant. Although the onus remained upon the Crown to prove beyond reasonable doubt each element of the offences charged in counts 2 – 4, at least by the time the cross-examination was complete it was apparent that there was no real issue that the appellant committed the alleged sexual acts, each of which would amount to rape if the complainant did not consent. Relevantly, there remained a factual issue whether the appellant's

sexual acts occurred in the circumstances and in the manner described by the complainant in her evidence, which the appellant challenged by defence counsel's cross-examination. The resolution of that factual issue was important for the resolution of the only real issue about the elements of these offences, namely, whether the Crown proved beyond reasonable doubt that the complainant did not consent to the appellant's sexual acts.

[25] The following reasons explain my conclusions that, both at the time of the pre-trial ruling and when the similar fact evidence was tendered at the trial, it was relevant and admissible for the purpose of proving that the appellant was the offender, and that the similar fact evidence was also relevant and admissible at the trial because of its probative force as support for the complainant's evidence that the appellant disguised himself, forced entry into the complainant's room, and assaulted, threatened, and bound the complainant to facilitate his sexual conduct. It appears from the trial judge's summing up that the prosecutor relied upon the evidence for just that purpose; the trial judge summarised a submission by the prosecutor that the "the previous offending [was] indicative of the defendant's modus operandi … you might think that the previous offending of the defendant was so strikingly similar in their details, their use of the …tying up of the victim and the like… she got a lot of details right."[12] The trial judge referred also, with appropriate brevity in the circumstances in which identity had ceased to be a real issue, to the relevance of the similar fact evidence to identification.

[26] At the pre-trial hearing, the prosecutor tabulated the similarities and differences amongst the offending alleged by the complainant and the offending in the three admitted incidents. I will reproduce the table, with some amendments to reflect the slightly different form of the admissions at the trial and to anonymise the complainants:

Feature	**Complainant**	**Incident 1 2 Nov 1994**	**Incident 3 10 Feb 1999**	**Incident 2 12 Nov 1998**
Time	Approx. 2 am	Around midnight	Early hours of morning	Approx. 6 am
Alone in home	Yes	Yes	Yes	No – 2 small children home
Known to each other	Yes	No	No	No
Balaclava	Yes	Yes	Yes	Yes
Gagged	Yes	Yes	Hand over mouth	No
Pillow case used	Yes	Yes	No	No
Presence of knife	Yes	Yes	Yes	Yes
Use of knife	Yes – to throat	Yes – to throat	Yes – to throat	Yes – pointed at her
Threats	Yes – threat to kill if she screamed	Yes – threat to kill if she screamed	Yes – threat to kill if she screamed	Yes – threat to kill if she moved
Hands restrained	Yes – tied behind back	Yes – tied behind back	No	Yes – tied behind back

12 Summing up 26 July 2017 at p 9.

				(after offences)
Feet restrained	Yes – feet tied together	Yes – feet tied together (after offences)	No	Yes – feet tied together (after offences)
Threats at conclusion of offending	Yes	Yes – threat to kill if she did anything stupid	No	No
Request for 10 mins to leave	Yes – told not to move for 10 mins	No	No	Yes – told that he needed 10 mins to leave the house

[27] The appellant argued that Harrison DCJ erred in concluding that the evidence fulfilled the requirements for admissibility expressed in the following passage in the judgment of Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ in *Phillips v The Queen*:[13]

> "The 'admission of similar fact evidence is exceptional and requires a strong degree of probative force'. It must have 'a really material bearing on the issues to be decided'. It is only admissible where its probative force 'clearly transcends its merely prejudicial effect'. '[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind.' The criterion of admissibility for similar fact evidence is 'the strength of its probative force'. It is necessary to find 'a sufficient nexus' between the primary evidence on a particular charge and the similar fact evidence. The probative force must be 'sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused'. Admissible similar fact evidence must have 'some specific connection with or relation to the issues for decision in the subject case.' As explained in *Pfennig v The Queen*:
>
> > '[T]he evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.'"

[28] It is necessary to refer to three further propositions confirmed in *Phillips*. First, similar fact evidence is inadmissible unless, viewed in the context of the Crown case, there is no reasonable view of the similar fact evidence consistent with the innocence of the accused.[14] (That is reflected in the exceptional requirements for admission of such evidence in the passage cited in the preceding paragraph.). Secondly, that requirement may be fulfilled either by evidence showing a "striking similarity, unusual features, underlying unity, system, pattern or signature" or by some other feature of the evidence revealing the required probative value.[15] Thirdly, in deciding the admissibility of similar fact evidence, and for that purpose comparing its probative effect with its prejudicial effect, it is necessary to view the similar fact evidence in the context of the Crown case and the test of admissibility must be applied on assumptions that the similar fact evidence would be accepted as

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13 (2006) 225 CLR 303 at [54]. I have omitted citations.
14 (2006) 225 CLR 303 at 308 [9].
15 (2006) 225 CLR 303 at 322 [58].

true and the Crown case may be accepted by the jury.[16] These topics have been revisited by the High Court more than once since *Phillips* (including in *HML v The Queen*[17]) but the more recent decisions do not qualify the law as stated in *Phillips*, or at least not in a way that is significant for this case. Neither party suggested that it was necessary to go beyond *Phillips*.

[29] The appellant argued that the probative value of the similar fact evidence was reduced because the context of the three incidents was distinctly different from the context of the offences alleged at trial and because at least one of three incidents was insufficiently similar to transcend its prejudicial effect. As to the context, the appellant particularly relied upon the circumstance that the three incidents involved strangers and the conduct of the appellant was obviously motivated by a wish to prevent the complainants in those incidents from being able to describe their assailant, whereas, on the Crown case in this matter the appellant knew the complainant and they had recently had many intimate encounters. This point was emphasised by reference to the evidence of the complainant that she recognised the appellant by his manner of having sex with her and the noises he made during the alleged offending. As to the suggested dissimilarity of the three incidents with the offending alleged in this case, whilst there were many points of similarity with Incident 1, there were only six (Incident 3) and eight (Incident 2) points of similarity with the other two Incidents. The appellant argued that the similarities with Incident 3 were insufficient for its probative value to transcend its prejudicial effect. The cumulative effect of the evidence of the three admitted offences of rape was submitted to overwhelm the capacity of the jury to carefully scrutinise the evidence of the complainant. The appellant also submitted that the admission of the similar fact evidence might explain the jury's willingness to convict the appellant of the rapes whilst acquitting the appellant of the alleged burglary and stealing.

[30] That argument is not persuasive. The following features are common to the three previous incidents and the offending alleged by the complainant: the offending occurred early in the morning; the victim of the offending was a woman who was the only adult in her own home; entry into the home was sexually motivated; the offender committed a sexual act upon the victim; the offender wore a balaclava; the offender was armed with a knife; and the offender threatened to kill the victim. That reveals a striking pattern of offending.

[31] Unlike the victims in the three previous incidents, the complainant knew the appellant. But upon the Crown case the appellant adopted a disguise, including a balaclava, as he had done in the three previous incidents. Whilst the fewer similarities between the offending alleged by the complainant and Incident 3 also must be taken into account, it must be borne in mind that the formal admissions about Incident 3 refer to that complainant resisting the appellant, refusing to comply with his demand to take her pants off, and kicking the appellant off and escaping from the house when the appellant began undoing his belt and had put the knife in his mouth after ordering that complainant to spread her legs, whereas the formal admissions about Incident 1 and Incident 2, and the account given by the complainant in this matter, all refer to the complainant complying with the offender's demands after the offender had threatened to kill them. In Incidents 1 and 2 the appellant bound the victims' feet together after committing the sexual

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16 (2006) 225 CLR 303 at 323-324 [63].

17 (2008) 235 CLR 334.

offences. The fewer similarities with Incident 3 might be largely attributable to the circumstance that the complainant in that incident successfully resisted and escaped from the appellant at a time before the appellant had fulfilled his evident intention to rape the victim.

[32] It is not ordinarily to be expected that a modus operandi will involve behaviour by an offender which is identical in every single respect upon each occasion of offending. Some changes are virtually inevitable as a result of differing circumstances, such as the unexpected behaviour of an intended victim as occurred in Incident 3. Despite the absence of some points of similarity, there remained very striking similarities between the offences alleged by the complainant and Incidents 1 and 2. Taking into account the stage which the offending reached in Incident 3, there also remained a striking similarity between the appellant's conduct in that incident and the conduct alleged by the complainant. The coincidence between the appellant's conduct in these three incidents and the complainant's account of his alleged conduct in this case added very real cogency both to the complainant's identification of the appellant as the offender and to her evidence that the appellant had disguised himself and engaged in violent, threatening, and dominating conduct before, during, and after committing the sexual acts.

[33] The admission of the previous incidents of sexual offending did have the potential to prejudice the appellant beyond the extent of the probative value of that evidence, but the trial judge appropriately directed the jury that the admissions were relied upon to establish the appellant's modus operandi and might be of no use to the jury unless the jury was satisfied that "there is so strong a pattern that the conduct on each occasion is so strikingly similar that, as a matter of common sense, and standing back looking objectively at it [the] only reasonable inference is that the same sequence of events occurred on this occasion";[18] if the jury was not satisfied of that, the jury should put that evidence out of mind for this purpose, and if the jury rejected that evidence it would be irrelevant to the case and wrong to use it against the appellant; and that the jury "certainly must not proceed on the basis that [because] the defendant pleaded guilty and was convicted to those other offences he was generally the sort of the person who might or even would commit" the offences the subject of the proceedings.[19] Those directions were not criticised by the appellant in any respect.

[34] When the similar fact evidence is considered in the context of the complainant's evidence in the Crown case and upon the assumptions that the similar fact evidence would be accepted as true and the Crown case may be accepted by the jury, it is abundantly clear that its probative force transcends its prejudicial effect. There is no reasonable view of the similar fact evidence, when it is considered in the context of the other evidence in the Crown case, which is consistent with the innocence of the appellant.

[35] The appellant did not argue that in the event of such a conclusion the similar fact evidence must be inadmissible merely because it bears upon the question whether the complainant consented to the sexual acts. In *Phillips*, the High Court held that evidence of allegedly similar offending by the defendant against other persons who allegedly did not consent was inadmissible for the purpose of proving only that the complainant had not consented to the defendant's sexual conduct. The Court found

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18 Summing up 26 July 2017 at p 18.

19 Summing up 26 July 2017 at p 18.

it "impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value"; that proved "only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her".[20] The Court concluded:[21]

> "Evidence by other complainants that they had not consented to the sexual acts allegedly performed on them by the appellant had no more probative value than evidence by them that they had not consented to the performance of sexual acts on them by persons other that the appellant. Like the evidence of the other complainants in this case, evidence of that kind may demonstrate some 'propensity' in particular complainants, but it demonstrates nothing about the appellant.
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> In short, as counsel for the appellant submitted, the evidence, tendered as it was on the issue of the consent of each complainant, was irrelevant to that issue. 'Evidence is relevant if it could rationally affect, directly or indirectly the assessment of the probability of the existence of a fact in issue in the proceeding'. Evidence that five complaints did not consent could not rationally affect the assessment of the probability that a sixth complainant did not consent."

[36] In that case, unlike in this case, the similar fact evidence was not tendered for the purpose of proving that the defendant engaged in any conduct. It appears that the similar fact evidence was tendered to prove only that the complainant did not consent to the sexual conduct. The issue arose in *Phillips* in the context, which is not the case here, that there was no "striking similarity, unusual features, underlying unity, system, pattern or signature",[22] or any other reason demonstrating that the similar fact evidence had a high probative value upon any issue in the trial. In this case the similar fact evidence demonstrates a pattern of conduct by a defendant which is of such high probative value as support for the complainant's evidence about how and the circumstances in which the defendant engaged in the offending conduct as to make it just to admit the evidence despite its potentially prejudicial effect. In these circumstances, the similar fact evidence is not rendered inadmissible merely because it indirectly proves that the complainant did not consent to sexual acts committed by the appellant. That conclusion finds support particularly in a decision of the Court of Criminal Appeal of the Supreme Court of South Australia, *R v Wallace*,[23] and also in this Court's decision in *R v Collins*.[24]

[37] The evidence of all three incidents was admissible. There was no miscarriage of justice.

Disposition and order

[38] Neither ground of appeal has been established. I would dismiss the appeal.

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20 (2006) 225 CLR 303 at 318 [47].
21 (2006) 225 CLR 303 at 319 [49]-[50]. The citation of authorities is omitted from the quote.
22 (2006) 225 CLR 303 at 322 [58].
23 (2008) 100 SASR 119 per Bleby J (Duggan J agreeing), esp. at [43], and per Vanstone J, esp. [94], [98].
24 [2013] QCA 389 per McMurdo P (myself and Henry J agreeing) at [34], [38], [40].

[39] **NORTH J:** I agree with the reasons of Fraser JA and the order proposed by his Honour.