SUPREME COURT OF QUEENSLAND

CITATION:	*R v SDA* [2018] QCA 155
PARTIES:	**R** **v** **SDA** (appellant)
FILE NO/S:	CA No 211 of 2017 DC No 2391 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 29 August 2017 (Martin SC DCJ)
DELIVERED ON:	6 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2018
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was found guilty of 12 counts of domestic violence offending against his former partner, including two counts of rape – where the appellant applied to have the complainant's evidence that he previously violently raped her in Victoria in 2011 excluded – where the learned pre-trial hearing judge considered the evidence to be relevant to rebutting a defence of mistake of fact as to consent – where the learned pre-trial hearing judge considered the evidence to be "discreditable conduct" evidence consisting of sexual acts directed towards the same complainant – where the learned pre-trial hearing judge refused to exclude the evidence – where the evidence was left to the jury on a basis different to the bases contemplated by the learned pre-trial hearing judge – whether the learned pre-trial hearing judge erred in refusing to exclude the evidence of the uncharged rape *Evidence Act* 1977 (Qld), s 130, s 132B *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16, followed *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7,

considered

COUNSEL: G McGuire for the appellant
S Dennis for the respondent

SOLICITORS: Guest Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** On 29 August 2017 at a trial in the District Court at Brisbane, the appellant, SDA, was found guilty of 12 counts of domestic violence offending. All counts alleged offending against the same female complainant, the appellant's former partner, Ms NK. The offending was alleged to have occurred variously at Margate, Narangba and elsewhere in Queensland. The offences alleged in the respective counts were:

Counts 1, 9	offences of assault occasioning bodily harm (between 31 December 2011 and 1 January 2013, and on 21 February 2015);[1]
Counts 3, 5	offences of rape (between 31 January 2014 and 31 March 2014);[2]
Counts 4, 6, 7	offences of common assault (between 31 January 2014 and 31 March 2014, and on 1 September 2014 and 21 February 2015);[3]
Count 8	an offence of extortion with intent to gain benefit with threat of detriment (on 21 February 2015);[4]
Counts 10, 16	unlawful stalking (between 28 May 2015 and 31 July 2015, and between 27 November 2015 and 7 January 2016);[5] and
Counts 13, 14	offences of wilful damage (on 14 October 2015).[6]

[3] At the same time, the appellant was found not guilty of an offence of assault occasioning bodily harm (Count 2), and two offences of stealing (Counts 12 and 15). Those counts involved the same complainant. Count 2 was alleged to have taken place on 30 June 2012 in Margate, whereas Counts 12 and 15 were alleged to have taken place on 14 October 2015 in Narangba.

[4] Additionally, during the course of the trial, the Crown entered *nolle prosequis* with respect to an offence of common assault (Count 11), and two offences of

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1 *Criminal Code Act* 1899 (Qld) sch 1 ("*Criminal Code*") s 339(1).
2 Ibid s 349.
3 Ibid s 335.
4 Ibid s 415(1)(a)(i).
5 Ibid s 359E(1). Count 10 had the circumstance of aggravation that the appellant used or intentionally threatened to use violence against the complainant: s 359(3)(a). Counts 10 and 16 were amended during the course of the trial to remove the circumstance of aggravation that the appellant's acts contravened an order made by the Magistrates Court at Caboolture on 24 February 2015.
6 Ibid s 469(1).

contravening a domestic violence order (Counts 17 and 18). Count 11 was alleged to have taken place on 1 June 2015 at Narangba, and Counts 17 and 18 were alleged to have taken place on 1 January 2016 and 6 January 2016 respectively at Margate or elsewhere in Queensland.

[5] On 13 September 2017, prior to sentence being passed on 24 November 2017,[7] the appellant filed a Form 26 notice of appeal against his convictions.[8] The appeal was heard on 6 March 2018.

Circumstances of the alleged offending

[6] The offending charged in Counts 1 and 2 was alleged to have occurred at the appellant's parents' residence.[9] Count 1 alleged that the appellant, in the course of an argument, punched the complainant in the face and held a hot iron near her face.[10] The complainant suffered a black eye. The allegation in Count 2 was that the appellant head-butted the complainant with such force that the brim of the baseball cap he was wearing left a mark across the bridge of her nose.[11]

[7] Of particular significance with respect to this appeal are Counts 3 to 5. Those counts related to an incident at the complainant's residence at Narangba.[12] Count 3 alleged that the appellant penetrated the complainant's vagina with his penis from behind while she was asleep on her side.[13] She awoke and verbally and physically resisted, but the penetration continued.[14] Eventually, she pushed her hip out so that she rolled onto her back, causing the appellant's penis to fall out of her vagina.[15]

[8] The appellant responded by putting his knees on the inside of her thighs and applying pressure so that she spread her legs.[16] He tried to re-insert his penis into her vagina but she moved up the bed.[17] He grabbed her arms, held her down and re-penetrated her vagina with his penis (Count 5).[18] She said "[p]lease stop", but he did not, so she spat in his face.[19] He laughed, wiped away the spittle, and punched her in the face (Count 4).[20] She stopped outwardly resisting.[21] She described the penetration as "really forceful" and "really painful".[22] When the appellant eventually stopped, she went to the toilet and there was blood and semen in her vaginal area.[23] She became pregnant as a result of the alleged rapes.[24]

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7 Appeal Book ('AB') 10.
8 AB621-623.
9 AB48 Tr1-16 l47; AB61 Tr1-29 ll43-47; AB78 Tr1 ll35-40; AB84 Tr1-52 ll25-32.
10 AB80 Tr1-48 ll21-34.
11 AB81 Tr1-49 ll27-40.
12 AB86 Tr1-54 ll27-41.
13 AB87 Tr1-55 l36 – AB88 Tr1-56 l2.
14 AB88 Tr1-56 ll5-13.
15 AB88 Tr1-56 ll13-14.
16 AB88 Tr1-56 ll16-21.
17 AB88 Tr1-56 ll21-26.
18 AB88 Tr1-56 ll26-31.
19 AB88 Tr1-56 ll31-32.
20 AB88 Tr1-56 ll34-36.
21 AB88 Tr1-56 ll36-47.
22 AB89 Tr1-57 ll1-2.
23 AB89 Tr1-57 ll15-19, 38-41.
24 AB89 Tr1-57 ll43-45.

[9] Count 6 concerned conduct on the part of the appellant that occurred after he had been aggressive towards the complainant when they were picking up their children from school.[25] When they arrived at the complainant's residence, she said that someone would call the police.[26] He "got really mad" and threw her to the floor in her bedroom. She was pregnant at the time.[27]

[10] Counts 7 and 8 related to an incident in which the appellant asked the complainant for $7,000 from an inheritance she had recently received to buy a car.[28] She declined to give him the money because she was keeping it for the children. He became "really angry", grabbed her hair, threw her into a wall and punched her in the stomach (Count 7).[29] He threatened her, including by saying "I'll just fucking kill you and I'll take the money because they're my kids so that money will come to me". The complainant was "scared for [her] life".[30] She transferred the money to the appellant (Count 8).[31]

[11] The conduct alleged in Count 9 was that, on that same evening, the appellant choked the complainant until she became unconscious.[32] She urinated involuntarily and suffered red marks to her neck.[33]

[12] Counts 10 and 16 both alleged that the appellant sent the complainant a series of threatening and harassing messages via social media.[34] The former also alleged that he made two threatening telephone calls to her to stop her from attending court to pursue the variation of a domestic violence protection order against him.[35] The latter alleged that he had also sent messages via friends, including threats to reveal naked photographs of the complainant to others,[36] and that he had behaved in an intimidating manner towards her at a court attendance for the domestic violence protection order.[37]

[13] The allegation in Count 12 was that the appellant stole $2,000 from the complainant's bedside drawer;[38] in Count 15, it was that he stole her Microsoft Surface Pro tablet computer;[39] and in Count 14, that he "keyed" her motorbike.[40] The last, Count 13, alleged that he broke the complainant's phone, her son's remote control car and her GHD hair straightener, and that he kicked her couch and broke one of the joiners.[41]

The pre-trial ruling

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25 AB100 Tr2-9 ll2-18.
26 AB100 Tr2-9 ll19-20, 33-35.
27 AB99 Tr1-8 l47 – AB100 Tr2-9 l1.
28 AB102 Tr2-11 ll36-41.
29 AB103 Tr2-12 ll37-41.
30 AB103 Tr2-12 ll41-45.
31 AB103 Tr2-12 ll45-46; AB504: Exhibit 4.
32 AB105 Tr2-14 ll23-36; AB107 Tr2-16 ll1-8.
33 AB108 Tr2-17 ll10-26; Exhibit 5.
34 In respect of Count 10, see AB505-515: Exhibit 6; AB516: Exhibit 7; AB517: Exhibit 8 and AB534-541: Exhibit 23. In respect of Count 16, see AB518-524: Exhibit 10.
35 AB129 Tr2-38 ll1-30. He told her that if she went to court, he would have people there waiting for her.
36 AB141 Tr2-51 l14 – AB142 Tr2-51 l47; AB296 Tr4-9 l20 – AB307 Tr4-20 l21. See also AB528: Exhibit 16; AB529: Exhibit 17; AB530-531: Exhibit 18.
37 AB143 Tr2-52 l4 – AB146 Tr2-55 l17.
38 AB117 Tr2-26 ll11-20.
39 AB133 Tr2-42 ll17-30.
40 AB131 Tr2-40 l43 – AB132 Tr2-41 l16; AB133 Tr2-42 ll9-14.
41 AB131 Tr2-40 ll33-38; Exhibit 9.

[14] The appellant applied, pursuant to s 590AA of the *Criminal Code* (Qld), to have certain evidence excluded from his trial. The evidence concerned an allegation by the complainant that the appellant had previously violently raped her in Victoria in 2011. The allegation was, of course, not a charged act in the proceeding under appeal.

[15] The application was heard on 23 June 2017 by a judge of the District Court, who did not become the trial judge. His Honour refused the application.[42] In reasoning to that result, he held that the evidence was admissible in respect of the offences of violence as evidence of the circumstances of the domestic relationship under s 132B of the *Evidence Act* 1977 (Qld).[43] That section applies only to offences defined in Chapters 28 to 30 of the *Criminal Code*, so it could not render the evidence admissible in respect of the counts of rape.[44]

[16] Notwithstanding this, his Honour considered that the evidence was relevant to the counts of rape on two bases. First, he held that it could be used by the Crown to exclude a defence that the appellant had an honest but mistaken belief as to consent.[45] Second, he considered the evidence to be "discreditable conduct" evidence consisting of sexual acts directed towards the same complainant. For the reasons articulated by Hayne J in *HML v The Queen*,[46] he considered that the evidence would "almost inevitably" satisfy the test for admissibility expressed in *Pfennig v The Queen*.[47] A "striking similarity" did not need to be proved.[48]

[17] His Honour then proceeded to consider whether the evidence should be excluded as a matter of the discretion encapsulated in s 130 of the *Evidence Act*.[49] He noted that if it was appropriate to exclude the evidence for the counts of rape, it may be appropriate to exclude it in relation to the counts of assault.[50] He considered defence counsel's arguments concerning the absence of a prompt complaint and confirming medical evidence to be matters of weight for a jury, rather than issues going to the admissibility of the evidence.[51] He was not persuaded that the appellant would be prejudiced as a result of any outstanding prosecution in Victoria,[52] nor that the violence associated with the 2011 rape was "so significantly more serious" than that involved in the counts charged as to justify its exclusion.[53]

[18] He concluded that, on balance, the relevance of the evidence of the rape outweighed its prejudicial value.[54] In dismissing the application, he said:[55]

> "I am not persuaded that the evidence is either inadmissible in relation to counts 3 and 5 or that it should be excluded as a matter of discretion under section 130. In my view, it is relevant and admissible, and it is appropriate for the jury to hear the evidence, so

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42 AB32 Tr1-4 l31.
43 AB30 Tr1-2 ll17-24.
44 The offence of rape is defined in s 349 in Chapter 32 of the *Criminal Code* (Qld).
45 AB30 Tr1-2 ll30-48; AB30 Tr1-3 ll10-23.
46 (2008) 235 CLR 334; [2008] HCA 16 at [107], [171].
47 (1995) 182 CLR 461; [1995] HCA 7.
48 AB30 Tr1-2 l48 – AB31 Tr1-3 l23.
49 AB30 Tr1-2 ll26-31.
50 Ibid.
51 AB31 Tr1-3 ll25-32.
52 AB31 Tr1-3 l34 – AB32 Tr1-4 l4.
53 AB32 Tr1-4 ll6-13.
54 AB32 Tr1-4 ll15-16.
55 AB32 Tr1-4 ll25-29.

as to obtain a proper understanding of at least what the complainant says is the true nature of the pre-existing relationship between them."

Evidence at trial

[19] In the course of her evidence in chief, the complainant gave the following account in relation to her alleged rape by the appellant in Victoria in 2011 and the circumstances leading up to it:[56]

"MR HANNA: Now, was there a time in 2011 when you were living in Ballarat that the police were called?---Yes.

Can you tell us what happened that day?---I was – I was only about six – six or seven – I think I was seven weeks pregnant. I was really, really sick with the flu. I could barely get out of bed. My whole body hurt. And he – he got really angry. There was a disagreement. I can't recall what the disagreement was about. And he said that he didn't want the baby anymore, and he punched me in the stomach. And the police were called that night.

All right. And who called the police?---I did.

Okay. And I take it you told them what happened?---Yes.

And did – SDA was aware that you called the police?---Yes.

…

Eventually, he got back to the house, did he?---Yes.

All right. What, if any, was the discussion between the two of you after you both got back?---He – the discussion was about how poorly they treated him - - -

All right?--- - - - at the police station. And there was no real mention of why he actually went to the police station. It was – it was just surrounding his treatment at the police station, and I felt really guilty.

Okay. And how was it – so he was talking about the police, but how was he towards you?---He was quite off with me, but there was no – it was a – it was – at that stage, it was kind of centred around him wanting to stay in my home and – well, he had – that he had to stay in my home until the police matters had been dealt with. And – and I – I did. I felt guilty, because he – he didn't have – I mean, he was in Victoria and his home was in Queensland. And so - - -

When you said he was off with you, what do you mean?---He was just very short at that stage. This is just directly after – I mean, he – he was – yeah.

All right. And what about in the days following?---Well, the days following, he was quite nice. He was helpful around the house just with little things, and yeah, he was – he was quite nice.

Did that change?---Yes. A couple of nights later, I was still very sick with the flu, and that's when – do I go in – do I - - -

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56 AB75 Tr1-43 ll32-46; AB76 Tr1-44 l45 – AB77 Tr1-45 l47; AB78 Tr1-46 ll14-16.

Yes. So how did – yes. Please just tell us what happened?---I – I went – I went to bed quite early that night, because I was still really sick with the flu. And – and I woke up – and I woke up to him doing things to me. He – he – he was trying to initiate sex, and I – I was really sick. And he – he – he – he pinned me down on the bed and straddled me, and – and raped me with his fist in my anus and my vagina. And I was begging with him to stop and I was screaming out to the neighbours to please call the police, but nobody ever did. And it was like he was living out some movie. He was saying, "The louder you scream the harder I'll go". And – and I was saying anything I could to try and make him stop. I was saying, "Please, you're going to hurt the baby." And eventually he stopped, and I – I went – I went to the toilet and there was blood everywhere and I thought I was having a miscarriage. But it – and the pain was just horrendous. I just – it felt like I'd ripped in two. I can't even describe the pain. And – but the blood was coming from my anus, not vagina. But it was a steady flow. And I was sitting on the toilet and he came in and then he – and I was just terrified. And he tried to – because I was at that height because I was sitting down, he tried to put his penis in my mouth, and I – I said no and I kind of scrambled up, and I stood as far back on the wall as I could. And then he just walked off and went to bed. And I just – I don't know how long I stayed in there. I just kind of stayed in there for a while. But the – I just – I didn't – as he walked off, he said something along the lines of, "This is – this is what you get if you go to the cops about me". And I really belie – I didn't know what to do. I thought if I – if I called the cops – I was terrified at that stage that maybe a neighbour had called the cops by then, and I didn't know what to do. So the next morning, I put a pad on because I was still bleeding about 6 am the next morning, and I walked around to my friend's house. And I told her what had happened, and she was saying, "You need to go to the police". But I just – I was terrified.

Did you ever go to the police at that time? Did you get any medical attention? Now, just to take you back, just---

HIS HONOUR: Sorry, you'll articulate an answer?---Yes.

Did you go to the police?---No.

Did you have any medical attention?---No.

Yes, thank you. All right.

MR [HANNA]: Now, just to go back and – I'm sorry – just to ask you some more details about it, to go back to the beginning, you said that you woke to him initiating sex?---Yep.

Can you tell us what he did or what you felt him do when you first woke up?---He was touching me – he was putting his fingers inside me while playing with himself.

And just to be clear, what part of you was he putting his fingers in?---My vagina.

> And what part of him was he playing with?---His penis.
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> And was he – when you woke up, did he say anything to you?---I don't recall.
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> …
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> All right. What – where there any ongoing – you've mentioned the bleeding. Where there any ongoing physical effects on you from that incident?---Yes, I have a prolapsed rectum, which makes bowel movement difficult."

[20] Notably, the evidence was left to the jury not on one of the bases contemplated by the learned pre-trial hearing judge, but rather as a possible explanation for the complainant's failure to make a prompt complaint to the police regarding the acts giving rise to Counts 3 and 5. In his directions to the jury, the learned trial judge said:[57]

> "If you do accept this evidence of what occurred in Victoria in relation to the rapes, it can be used by you in relation to the consideration and determination of counts 3 and 5, and it can only be used in this way: the evidence may only be used by you in your consideration of why the complainant did not make a complaint about the episode comprising counts 3 and 5 in a timely fashion, that is, it could be used by you to consider why there was delay in making a complainant (sic) about these rapes. The prosecution argues that the incident in Victoria explains the complainant's reluctance to complain to the police about the serious offences of rape committed in Queensland. The prosecution argues that her reluctance must be understood in the context of her general state of fear in relation to the accused. It was argued that, whilst she was prepared to seek help from police on some occasions in relation to the immediate and comparatively minor instances of assault against her, the incident in Victoria and the consequential threats from the accused had such a significant impact upon her, she was too scared to make the complaints of rape in respect of counts 3 and 5.
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> It was only when she finally got away from the accused, to a location unknown, apparently somewhere outside Toowoomba, a location unknown to the accused, and when, finally, she felt that a police officer would truly listen to her and assist her in controlling the accused, it was only then that she felt sufficiently safe to tell police of the rape offences. So that's the prosecution argument, and the use to be sought to be made in respect of the rape offences in Victoria."

Ground of appeal

[21] The sole ground of appeal is that the learned pre-trial hearing judge erred in ruling that the evidence of the uncharged rape was admissible, and that this error led to a miscarriage of justice at trial.

[22] Importantly, the success of this ground of appeal is contingent upon a finding of error in the pre-trial ruling. There is no ground of appeal against the way that the

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57 AB436 Tr15 l42 – AB437 Tr16 l9.

evidence was used at trial, nor arising out of directions at trial with respect to it. Accordingly, if no error in the pre-trial ruling is made out, it will not be necessary for this Court to evaluate the use that was ultimately made of the evidence at trial. The appellant's and respondent's submissions on the soundness of the pre-trial ruling are set out below.

[23] **Appellant's submissions:** The appellant submits that, in respect of counts 3 and 5, the learned pre-trial hearing judge ruled that the evidence of the uncharged rape was admissible on the basis that it was relevant to rebutting a defence of mistake of fact as to consent.[58] That defence, he argues, could never have been a live issue at his trial. The jury could not have accepted the complainant's evidence that she was raped while verbally and physically resisting and yet simultaneously have determined that the appellant had an honest but mistaken belief as to consent.[59]

[24] Even if such a defence was a live issue, the appellant argues that the evidence of the uncharged rape was of no probative value in rebutting it. This is because the appellant and the complainant had re-established a consensual sexual relationship between the uncharged rape in 2011 and the acts giving rise to Counts 3 and 5 in 2014. Accordingly, evidence of the earlier uncharged rape could do nothing to demonstrate that the appellant ought to have known that the complainant was not consenting to the acts charged.[60]

[25] For these reasons, the appellant submits that the learned pre-trial hearing judge erred in finding that the evidence was admissible for the purpose of rebutting such a defence. The appropriate course, he argues, was to exclude the evidence altogether, notwithstanding its being admissible for some counts by virtue of s 132B of the *Evidence Act*.[61]

[26] **Respondent's submissions:** The respondent submits that the fact the evidence of the uncharged rape was ultimately left to the jury on a basis that was different to the bases contemplated by the learned pre-trial hearing judge does not, and cannot, retrospectively demonstrate an error in his Honour's dismissal of the application. It notes that the appellant made submissions, both written and oral, at the pre-trial hearing that recognised that the defence of mistake of fact was a live issue for his trial. The mere fact he did not ultimately pursue the defence at his trial does not disclose an error in the pre-trial ruling.[62]

[27] The respondent further notes that the relevance of the evidence to excluding the defence of mistake of fact was not the only basis upon which the learned pre-trial hearing judge ruled the evidence to be admissible.[63] Moreover, defence counsel made no application to re-visit the pre-trial ruling, nor an application for a mistrial after the jury had heard the evidence; to the contrary, he sought to take forensic advantage of the complainant's evidence of the uncharged rape by referring to the

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58 The appellant recognises that his Honour referred to the remarks of Hayne J in *HML v The Queen*, but contends that he "did not seem to admit the evidence as general propensity evidence, as envisaged by Hayne J": Appellant's Outline of Submissions ("AOS") at [23].

59 AOS at [17]-[18].

60 AOS at [19]-[21].

61 AOS at [22], [24].

62 Respondent's Outline of Submissions ("ROS") at [27].

63 See [15], [16] above.

absence of medical evidence.[64] It is submitted that, in these respects, the appellant is therefore bound by the conduct of his trial counsel.[65]

[28] **Discussion:** The appellant's submission that a defence of mistake of fact could never have been a live issue at his trial is at odds with the written and oral submissions made by his pre-trial counsel at the s 590AA hearing. As the learned pre-trial hearing judge observed, the appellant, in his written outline, relied upon a proposition that "because there had been a sexual relationship between the [appellant] and the complainant in the past, … it was open for the jury to conclude that there was … an honest but mistaken belief in March 2014 that the complainant was consenting".[66] The appellant's counsel acknowledged this in oral argument,[67] and also conceded, on numerous occasions, that the impugned evidence was relevant to rebutting such a defence.[68] It was also conceded that the Crown's position on the application was "very strong",[69] and that it would not be easy for the appellant to succeed in having the evidence excluded.[70]

[29] Given these submissions, the learned pre-trial hearing judge was clearly right to have proceeded upon a basis that a defence of mistake of fact was to be a live issue at the trial. The impugned evidence was relevant to the Crown's case in excluding such a defence, and was admissible consistently with the observations of Hayne J in *HML*, to which I shall return. As the respondent correctly observes, the mere fact the defence was not ultimately agitated at trial does not disclose an error in the pre-trial ruling. This is particularly so where, as here, defence counsel did not object to the evidence being led, nor attempt to review the ruling. There was no application for a mistrial, nor a request for specific directions to address any purported prejudice arising from the use that was made of the evidence.[71]

[30] The appellant's contention that the pre-trial hearing judge merely referred to Hayne J's observations, without ruling the evidence to be admissible on that basis, must also be rejected. As noted earlier in these reasons, his Honour expressly stated that the evidence was "discreditable conduct" evidence consisting of sexual acts directed towards the **same** complainant, and that, for the reasons given by Hayne J, it would satisfy the test in *Pfennig*.[72] It was on the footing of Hayne J's observations that his Honour concluded there was no need to prove a "striking similarity" between the acts in question.

[31] His Honour made express reference to paragraphs 107 and 171 of Hayne J's reasons.[73] Those paragraphs, which are beneath headings of "Relevance and admissibility" and "Applying *Pfennig*" respectively, are set out in context below:

> "[104] The question of admissibility of the evidence of other sexual acts directed at the complainant by the accused is to be resolved by first recognising that the evidence, if accepted, proves acts of the accused which are not the subject of a

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64 ROS at [29], citing AB404.
65 ROS at [30].
66 AB21 Tr1-5 ll6-11.
67 AB21 Tr1-5 l13.
68 See, for example, AB21 Tr1-5 ll15-33 and AB22 Tr1-6 ll6-12.
69 AB28 Tr1-12 l5.
70 AB22 Tr1-6 ll29-31. See also AB21 Tr1-5 ll41-44; AB27 Tr1-11 ll28-30, 46; AB28 Tr1-12 ll3-5.
71 Appeal Transcript ("AT") 1-5 l44 – AT1-6 l47.
72 See [16] above, citing AB30 Tr1-2 l48 – AB31 Tr1-3 l23.
73 AB26 Tr1-10 ll1-30; AB31 Tr1-3 ll1-5.

charge being tried but which are at least discreditable to the accused. In many cases the evidence, if accepted, would show not just discreditable conduct, it would show the commission of other offences.

[105] Because the evidence shows other discreditable conduct, or in many cases the commission of other offences, it is generally inadmissible. The prosecution cannot "adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried".[74] But that rule is not absolute.

[106] Admissibility of evidence of other sexual acts directed at the complainant by the accused, which are not acts the subject of charges being tried, is to be determined by applying the test stated in *Pfennig v The Queen*.[75] …

[107] Evidence of other sexual conduct which would constitute an offence by the accused against the complainant will usually satisfy the test stated in *Pfennig*. It will usually satisfy that test because, in the context of the prosecution case, there will usually be no reasonable view of the evidence, if it is accepted,[76] which would be consistent with innocence. That is, there will usually be no reasonable view of the evidence of other sexual conduct which would constitute an offence by the accused against the complainant other than as supporting an inference that the accused is guilty of the offence charged.

…

[171] When such a test is applied to evidence of sexual *offences* committed by an accused against the complainant (other than the offences being tried) the test stated in *Pfennig* will usually, if not invariably, be satisfied. Seldom, if ever, would evidence of the commission of generally similar sexual offences *against the complainant* other than those charged, when viewed in the context of the prosecution case, be consistent with innocence. Or, as the plurality reasons in *Pfennig* put the same point[77] (by reference to *Hoch v The Queen*)[78], "the objective improbability of its [the evidence in question] having some innocent explanation is such that there is no reasonable view of it *other than as supporting an inference that the accused is guilty of the offence charged*" (emphasis added). …"

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74 *Makin v Attorney-General (NSW)* [1894] AC 57 at 65.
75 (1995) 182 CLR 461.
76 *Phillips v The Queen* (2006) 225 CLR 303 at 323–324 [63].
77 (1995) 182 CLR 461 at 481–482.
78 (1988) 165 CLR 292 at 294–295 per Mason CJ, Wilson and Gaudron JJ.

[32] If accepted by the jury, as it may well have been, the complainant's evidence of the uncharged rapes in Victoria in 2011 would have shown not just discreditable conduct by the appellant, but also the commission of other offences. The admissibility of such evidence must be determined by applying the test in *Pfennig*. The learned pre-trial judge was correct to adopt the observations of Hayne J that the *Pfennig* test will "almost inevitably" be satisfied when applied to evidence of uncharged sexual offences by an accused against the same complainant. The evidence was properly admissible on that basis.

[33] The only question that remains is whether it ought to have been excluded by virtue of the discretion granted by s 130 of the *Evidence Act*. I agree with his Honour that factors such as the absence of medical evidence or of a prompt complaint are matters of weight for a jury, rather than issues going to admissibility.[79] I also agree that the violence associated with the 2011 rape was not "so significantly more serious" than that involved in the counts charged as to warrant the evidence's exclusion.[80] The danger of it being used as mere propensity evidence could be avoided by a warning against such reasoning. The appellant has failed to establish that the learned pre-trial judge's decision not to exercise the discretion was vitiated by any error of the kind described in *House v The King*.[81]

[34] The learned pre-trial hearing judge did not err in refusing to exclude the evidence and, accordingly, no miscarriage of justice was occasioned by virtue of its having been adduced at trial consistently with the ruling. The ground of appeal cannot succeed. Although it is unnecessary for me to consider the use that was ultimately made of the evidence, I note, for the sake of completeness, that appropriate directions were given by the trial learned judge in respect of that.[82]

Disposition

[35] The sole ground of appeal has not succeeded. It follows that this appeal must be dismissed.

Order

[36] I would propose the following order:

1. Appeal dismissed.

[37] **MORRISON JA:** I agree with the reasons of Gotterson JA and the order his Honour proposes.

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79 AB31 Tr1-3 ll25-32.

80 AB32 Tr1-4 ll6-13.

81 (1936) 55 CLR 499 at 505; [1936] HCA 40 per Dixon, Evatt and McTiernan JJ.

82 Specifically, his Honour directed the jury that they must accept the evidence beyond a reasonable doubt before they could use it; that non-acceptance of it might have a bearing upon the complainant's credibility, and that it might only be used in considering why there was a delay in her complaints about counts 3 and 5: AB436 Tr15 l29 – AB436 Tr16 l9. A specific warning against propensity reasoning was also given about the use of the evidence in proof of those counts: AB439 Tr18 ll32-43.