SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCS; R v AAZ* [2018] QCA 184
PARTIES:	**In CA No 312 of 2017** **R** **v** **MCS** (appellant) **In CA No 317 of 2017** **R** **v** **AAZ** (appellant)
FILE NO/S:	CA No 312 of 2017 CA No 317 of 2017 DC No 2138 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 December 2017 (Devereaux SC DCJ)
DELIVERED ON:	7 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2018
JUDGES:	Sofronoff P and Fraser JA and Atkinson J
ORDERS:	**In CA No 312 of 2017** **1. The appeal against conviction is dismissed.** **In CA No 317 of 2017** **2. The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellants were convicted of two counts of rape and acquitted on one count of rape and one count of sexual assault – where the appellants were charged on an indictment with another person – where the trial against that person was adjourned after it was found that an interview with the person had been translated wrongly – where the wrong translation inserted that the person had said they intended to take the complainant somewhere "and do something bad" – where the appellant in CA 312 of 2017 argued that there was a miscarriage of justice where the trial against the appellant was not also adjourned – whether there

was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellant in CA 312 of 2017 argued that there was a miscarriage of justice in the failure to adequately direct the jury about the use of circumstantial evidence, in the failure to adequately direct the jury after the evidence of that appellant was replayed at the request of the jury, and globally in the conduct of the trial – whether there was, individually or cumulatively, a miscarriage of justice arising from these events

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where each appellant appealed on the basis of inconsistent verdicts – where each appellant was acquitted of one other count of rape and one other count of sexual assault – where these other two counts were reported later than the counts on which the appellants were convicted – whether the verdicts of guilty on counts 3 and 4 were reasonable because they were inconsistent with the acquittals on counts 1 and 2

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – MENS REA, HONEST AND REASONABLE MISTAKE AND RECKLESSNESS – where the appellants appeal the convictions on the basis of honest and reasonable, but mistaken, belief – whether the defence of honest and reasonable mistake was enlivened

Criminal Code (Qld), s 7, s 24
Jury Act 1995 (Qld), s 60

Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Conn; *R v Conn*; *Ex parte Attorney-General (Qld)* [2017] QCA 220, cited
R v Fanning [2017] QCA 244, cited
R v GAW [2015] QCA 166, cited
R v Kirkman (1987) 44 SASR 591, approved
R v LAK [2018] QCA 30, distinguished
R v McLucas [2017] QCA 262, cited
R v MCQ [2018] QCA 160, approved
R v Mrzljak [2005] 1 Qd R 308; [2004] QCA 420, approved
R v Rope [2010] QCA 194, cited
R v Wilson [2009] 1 Qd R 476; [2008] QCA 349, cited

COUNSEL: C K Copley for the appellant, MCS
J P Crowley for the appellant, AAZ

C N Marco for the respondent

SOLICITORS: Harris Sushames for the appellant, MCS
Fisher Dore for the appellant, AAZ
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Atkinson J and the orders her Honour proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Atkinson J and the orders proposed by her Honour.

[3] **ATKINSON J:** On 1 December 2017 after a ten day trial in the District Court both appellants were convicted of two counts of rape (counts 3 and 4). Each was also acquitted on one count of sexual assault and one count of rape involving AAZ as the principal and MCS as party (counts 1 and 2). Both appellants appeal against their convictions.

[4] The sole ground of appeal argued by AAZ was that "the verdict is unreasonable or cannot be supported having regard to the evidence."

[5] Leave was given at the hearing of the appeal to amend MCS's Notice of Appeal so that the following were his grounds of appeal:

1. The verdicts on counts 3 and 4 were unreasonable and/or cannot be supported by the evidence;
2. The verdicts on counts 3 and 4 were unreasonable, being inconsistent with the verdicts on counts 1 and 2;
3. In respect of count 3, the learned trial judge failed to adequately direct the jury about the use to be made of circumstantial evidence, resulting in a miscarriage of justice;
4. The learned trial judge failed to discharge the jury after the playing of an inadmissible recording, resulting in a miscarriage of justice;
5. The learned trial judge failed to warn the jury not to give undue weight to excerpts from a recording replayed on a redirection, resulting in a miscarriage of justice; and
6. The aggregate of errors made during the trial resulted in a miscarriage of justice.

Background

[6] The prosecution at trial alleged that in the early hours of Saturday, 7 March 2015, the complainant willingly got into a car driven by RTG at or near the Woodridge Railway Station. The appellants, MCS and AAZ, were also present in the car. MCS sat in the front passenger's seat and AAZ sat in the rear seat next to the complainant. The prosecution alleged in its particulars that there was inferentially a common unlawful purpose to take the complainant to an isolated location and rape and sexually assault her.

[7] The facts which were alleged to constitute count 1, sexual assault, were that while in RTG's vehicle, AAZ forced the complainant to touch his penis without the complainant's consent. Both RTG and MCS were alleged to be parties to that offence under s 7(1)(b) and s 7(1)(c) of the *Criminal Code* (Qld): in RTG's case because he aided and/or encouraged by driving the car, ignoring the complainant's request to go home; and in MCS's case in that he aided and/or encouraged by being in the car, ignoring the complainant's request to go home.

[8] The facts which were alleged to constitute count 2, rape, were that while in the vehicle AAZ penetrated the mouth of the complainant with his penis without the complainant's consent. RTG was alleged to be a party to that offence again pursuant to s 7(1)(b) and s 7(1)(c) of the *Criminal Code* in that he aided and/or encouraged by driving to an isolated location, ignoring the complainant's request to go home, getting out of the vehicle to enable AAZ to commit the offence, and allowing AAZ to commit the offence in his vehicle. MCS was alleged to be a party in that he aided and/or encouraged by being in the car, ignoring the complainant's request to go home, and getting out of the vehicle to enable AAZ to commit the offence.

[9] Both appellants were acquitted of counts 1 and 2. The case against RTG did not go to verdict for reasons that will be explained later.

[10] The facts which were alleged to constitute count 3, rape, were against AAZ, as a principal offender, that on 7 March 2015 while in RTG's vehicle, AAZ inserted his penis into the complainant's vagina without her consent. MCS was alleged to be a party to the offence committed by AAZ under s 7(1)(b) and s 7(1)(c) of the *Criminal Code* in that he aided and/or encouraged by being in the car, ignoring the complainant's request to go home, and getting out of the vehicle to enable AAZ to commit the offence. RTG was also alleged to have been a party to this offence as before.

[11] Both AAZ and MCS were convicted of this offence.

[12] The facts that were alleged to constitute count 4, rape, were against MCS, as a principal offender, that while in the vehicle he inserted his penis into the complainant's vagina without her consent. AAZ was alleged to have been a party to the offence committed by MCS under s 7(1)(b) and s 7(1)(c) of the *Criminal Code* in that he aided and/or encouraged by being in the car, ignoring the complainant's request to go home, and getting out of the vehicle to enable MCS to commit the offence. RTG was also alleged to have been a party as set out before.

[13] Both MCS and AAZ were convicted of this offence.

[14] On the sixth day of the trial, the trial against RTG was adjourned and the jury were discharged from giving a verdict in his case.

The conduct of the trial

[15] As this was a joint trial, the judge warned the jury in his opening remarks that some of the evidence that they would hear would not be admissible against all of the defendants saying:

> "[M]ore than one person is being tried. The separate cases against each of them need be decided solely on evidence admissible against that defendant. Some evidence might be admissible against just one or one or more of them and not against all of them, and I will give you detailed directions about that later."

[16] The complainant's evidence was given by way of a pre-recording pursuant to s 21A of the *Evidence Act* 1977 (Qld). The pre-recording also included a rigorous cross-examination by each of the three defence counsel which took place over three days. Her evidence was that at about 2.00 pm on Friday 6 March 2015 she went to her brother's unit in Station Road, Woodridge to drop off her son. While she was there she had three or four drinks with her brother and her cousin. She stayed there until about 6.00 pm and then went to a friend's house in Underwood. She again had a couple of drinks and stayed there until about 8.00 or 8.30 pm. From there she went to a bowls club with her friend and then to Logan Diggers, another club. At both of those clubs she had another couple of drinks. She left Logan Diggers alone to walk to her brother's home. She first walked towards a café/takeaway shop that was in the opposite direction. She agreed in cross-examination that she was "pretty drunk" by then. She accepted under cross-examination that she told police in her written statement that she had five drinks at her brother's house, two or three drinks at the bowls club and that she was buying bottles of wine with her friend at the Logan Diggers Club.

[17] While on her way to her brother's home, she spoke to a man who was joined by two other men who had been in a takeaway shop. It is common ground on the appeal that they were the three defendants in the trial. She spoke to them for about 20 minutes. The complainant's evidence was that they told her that they were going to drop her off at her brother's house so she got into the back seat on the passenger side of the car with the three men. CCTV footage was played at the trial of her speaking to the men and then getting into the car. As the car drove off she told them that she wanted to get out but there was no reply. She said that she was scared and said "Let me the fuck out" two or three times. She said the three men just ignored her and continued speaking to each other in a foreign language that she did not understand.

[18] Her evidence was that while the vehicle was still driving the man seated next to her in the back seat lent over and grabbed her left arm and said "Give me a hand job or hell's going to break loose." This man was the appellant, AAZ. He then put her hand on his penis and moved her hand up and down with his hand. Her evidence was that she did not want to do it. She said she told him that she just wanted to go home. She said it a couple of times and said it loudly. No one responded to her and the three men continued to talk to each other in a foreign language. These allegations constituted the particulars of count 1 of which MCS and AAZ were acquitted. Under cross-examination the complainant conceded that she had not mentioned this allegation to the police until the week before she gave evidence.

[19] The complainant described the car being driven down a bumpy dirt road to a dark bush area. The vehicle stopped and the driver and front passenger got out of the car and she said she "had to give the fella in the back seat a head job." She did not recall what he said but she said "I wanted to go the fuck home." She then said that all she remembered is the same man (AAZ) pushing her head down and she had to give him a head job. He put his penis in her mouth and she continued to say that she wanted "to go the fuck home". He kept his hand on top of her head pushing her head down. She agreed in cross-examination that she did not make a complaint about this to police until about a year after it was alleged to have happened and that was first recorded in the complainant's third statement to police. It should, however, be noted that she did refer to it when she was first spoken to by police immediately afterwards. MCS and AAZ were also acquitted of this count, count 2.

[20] The complainant's evidence was that after that finished the same man (AAZ) moved her legs onto the seat and took her shorts off and lay on top of her. She said to him that she wanted "to go the fuck home." She said her voice was loud and angry but that he then put his penis inside her vagina. He was moving up and down and she said to him that it hurt and to stop. She pushed him on his chest. She did not know if he was wearing a condom or if he ejaculated. The two other men were outside of the car but the back passenger side door was open. AAZ was convicted of this offence, count 3, as a principal offender and MCS was convicted as a party to the offence.

[21] The complainant said that that man (AAZ) got out of the car and then a second man (MCS) entered the car on the passenger side in the back, got on top of her and put his penis inside her vagina. She said to him more than once "I want to go the fuck home." She is not sure whether he ejaculated or used a condom. He had been the person sitting in the front passenger seat when they were driving to that isolated location. MCS was convicted of this offence, count 4, as a principal offender and AAZ was convicted as a party.

[22] After that incident the driver told her to put her clothes on and get into the front seat of the car. He was going to take her home. She agreed in cross-examination that the driver told the others to stop and said, "That's enough" and that when she got into the front seat he said to her, "You're safe now." She was dropped at the front of her brother's unit and her cousin came to the door. She told her cousin and her brother that she had been raped. She then rang 000 and reported that she had been raped.

[23] The police came, she was taken to the police station and then she underwent a forensic examination at the hospital. She was uncertain whether she had showered first. Three days later the complainant identified MCS from a photo board as the second man to rape her. She was unable to identify AAZ or RTG from photo boards.

[24] In cross-examination by counsel for AAZ, as well as the matters to which I have referred, the complainant accepted that her recollection was more reliable closer to the event and that her memory of the events was not "great at this moment". She said that her recollection of the events had been affected by the medication she was taking.

[25] She agreed that she had previously described being "pushed into the car" to the police and that she had said something similar to her cousin. The change in her evidence was not attributable to having since seen the CCTV footage. The complainant recalled that the car turned left on Station Road but in her statement she said that it turned right.

[26] She agreed that prior to getting into the car she spoke mostly to the man who got into the front passenger seat of the car. She agreed that she told police in her written statement that she entered through the door at the back of the driver's seat of the car. She did not recall the car stopping at any point. She did not agree that the man in the back provided her with his name. She was not sure if the statement that all hell would break loose was made both before the masturbation and the oral sex.

[27] She agreed that she told police in her statement that she had her eyes closed while the first man was having sex with her and opened them when the second man was on top of her so she did not see them swap over. She also accepted that she had told the prosecutor in conference the week before the trial that she had seen the first man

masturbating outside the car but agreed that she could not have seen that if her eyes had been closed the whole time.

[28] The complainant could not recall how her bra came to be removed but accepted that she told police on one occasion that it was removed before intercourse and on another occasion that it was removed during intercourse.

[29] The complainant accepted that she had previously told the police that her legs were near the driver's side door of the back seat and that she had previously told police that neither of the men had used condoms. The complainant was unable to recall where she told her brother and her cousin that she had been dropped off. She agreed that she had previously told police that the two men who had sexual intercourse with her did not get back into the car. She did not accept when cross-examined by AAZ's counsel that he had alighted the vehicle after driving for about 10 minutes and that it was possible that a new third man got into the car at some point. She agreed that she had told the prosecutor in conference about a fortnight before the trial that all of the men got out of the car initially when they arrived at the bush area before the first man re-entered the car.

[30] When cross-examined by counsel for RTG the complainant confirmed that he was not present during the commission of either counts 2, 3 or 4 and that she did not see him. She agreed that the driver kept telling the other men to stop and whispering to her that he was going to help her. She was unsure whether he was wearing earphones in the car and she was unsure whether he was involved in the conversation in the car. She agreed that the driver did not do anything or say anything while she was masturbating the man in the back seat. She did not know if the driver understood or spoke English. She agreed that when the second man got into the car with her, the car door was closed again.

[31] Finally, she was cross-examined by MCS's counsel. She could not explain why she walked to the café which was in the opposite direction to her brother's house after leaving the Logan Diggers Club. She thought that she talked to the two men about giving her a lift to her brother's house. She agreed that her brother's house was about five minutes away from the takeaway store. She agreed that nothing was said to her about the second man having sex with her after the first man had sex with her. She did not accept that when she told the second man that she wanted to go home he stopped having sex with her. She did not recall whether the second man used a condom but said that she did not assist in putting the condom on his penis. She said she told her brother that she was dropped at the train station because she knew what he was like.

[32] The complainant's cousin gave evidence that at about 3.00 or 3.30 in the morning of 7 March 2015, he heard the complainant crying outside her brother's house. The cousin was asleep at the time. He opened the door and the complainant came in and spoke to him and her brother. She told them that she had been raped by three men. She told them that she had been kidnapped by three men and taken in a car out into bush where she was raped. They then dropped her off in front of the Woodridge Train Station. The complainant had explained in cross-examination that she did not tell them she had just been dropped off in front of the house because she feared what her brother and her cousin would do to the offenders. The cousin's evidence was that she was distraught and constantly crying.

[33] Her brother's evidence was similar except that he said that she came home before daylight so he estimated that it was about 4.30 or 5.00 in the morning. Her brother said he did not ask the complainant for many details because he was getting pretty angry. Her brother described her as crying, shuddering and frightened. He had never seen her like that before.

[34] The complainant's mother and sister gave evidence of how frightened, withdrawn and distressed the complainant was during the following days.

[35] Police officers also gave evidence of the distressed state of the complainant when she first spoke to police. Recordings of what she told them were played to the jury. She told the police that she was pushed into the car, that it drove over a bumpy track, there were three men in the car, the one in the back seat made her give him a head job saying that if she didn't, all hell would break loose. She said that the three men were talking to each other in a foreign language and then the one in the back seat.

> "[H]e come in and he goes, okay, open wide. And I was like, why? And he goes, I'm gonna fuck ya. I was like, no, I wanna go home, and yeah, he done what he did and then he stopped, oh, my mate wants to have a go. Then his mate come in, had a go, mm, the driver, they said, oh, he wants to have a go, and the driver's like, no, I don't wanna have a go, all I wanna do is take her home. 'Cause by this time I was like, I was fucked, I didn't want nothing else, just wanted to go home."

She said the driver took her home to her brother's house.

[36] The police said the purpose of that interview was to try to quickly identify the car, the place where she got into the car and the men involved so they could secure CCTV footage and do further investigations rather than to get the full and complete story from the complainant.

[37] The next witness, on the third day of the trial, was YDS. He had been requested to attend the police station on 11 March 2015 as MCS wanted him to be his support person. He was present for MCS's interview with the police. His evidence concerned conversations he had with MCS after the interview. His evidence was that two or three days after the interview, he drove MCS to school. MCS said to him, "I told everything to the police is the truth, but one thing I didn't tell them [indistinct] I did sex with the lady". He also said that the three of them, himself, AAZ and RTG "did the sex with the lady". MCS told YDS that they were drunk and had driven from the city to Woodridge railway station, went to Kingston Park, did the sex in the back of the car and "she want – the lady to – want sex with them".

[38] MCS later changed his story to YDS and said that only AAZ and RTG had sex and he did not. A couple of days later, YDS said MCS said he would tell the police "all the truth". A few days later, YDS got MCS to swear on the Koran and he repeated "I did sex with the lady".

[39] YDS said he also had a conversation in MCS's presence with AAZ who said to him, "Yeah. We was drunk, and we did, all of us, sex with the lady. And I know it was a mistake, but yeah, we did. Three of us."

[40] Immediately after YDS's evidence in chief was finished, the trial judge gave the jury clear directions about the admissibility of this evidence saying to the prosecutor:

> "Now, before you go further, I want to be clear about something, first, with you Ms Whelan. Insofar as this witness speaks about a discussion he had with Mr MCS, that evidence is only relevant against Mr MCS. […] And when he gives evidence about speaking to Mr AAZ, that evidence is only relevant against Mr AAZ."

[41] The prosecutor agreed. The learned trial judge then said to the jury:

> "So, members of the jury, I'll remind you of this later, but early in the trial, I said some evidence might be relevant only against one person. In other words, what the witness can say about what somebody told him is only to be used against the person who was speaking to him. All right. We'll come to that again later."

[42] YDS was effectively cross-examined by MCS's counsel about differences between the statement that he first gave to the police and his evidence but was adamant that although MCS changed his story a member of number of times, he did admit to YDS that he had sex with "the lady". He agreed that both MCS and AAZ told him that "the lady needed it".

[43] There were numerous delays during the trial, albeit each relatively short, for legal argument and for the editing of records of interview to be played to the jury. The progress of the trial was also necessarily slowed by the need for each of the defendants to have an interpreter.

[44] On the fifth day, the arresting officer gave evidence, the CCTV footage was played and maps of the area tendered. The arresting officer gave evidence that the complainant was able to identify MCS from a photo board but not AAZ or RTG. She tendered various photos including one of a photo ID card of the complainant found in RTG's car as well as documents from the car belonging to RTG and MCS. The 000 call made by the complainant, which showed her distressed condition as well as the terms of her first statement to emergency services about what had happened, was played. The arresting officer also tendered photographs of clothing found at the appellants' homes which matched the clothing seen on the men depicted on the CCTV footage. The arresting officer gave evidence that there were two police interviews with MCS, an interview with RTG and an interview with AAZ. The first interview played to the jury was that with AAZ.

[45] AAZ was interviewed on 2 April 2015 by two police officers. Also present were an interpreter and AAZ's mother as a support person. AAZ was 15 years old at the time of the interview. AAZ told the police that on the night in question he was talking to MCS who was going to talk to a lady. AAZ said he wanted to go home. He got into the car in the back seat next to the lady and he asked the driver to take him home. The driver took him home and he did not know where the other three went. He said his mother was angry with him for being late home.

[46] AAZ was then asked further questions. He said that RTG was driving and noticed a woman in the street so he braked and whistled to get her attention. She responded by asking what he wanted. AAZ said that he asked to be taken home before "you

can allow" her to get in the car. AAZ said he was driven to the train station and he got out of the car and then MCS said he wanted to tell him something so he went with MCS, walking towards the station. He said that MCS then started talking to the woman who said something about a child or children. RTG then drove up to them and when the woman asked where they were going, MCS said to her to come with them as they were just going to drive around for a while. She agreed. AAZ said he asked RTG to drive him home and he did.

[47] AAZ said he had never seen the woman before, that she was very fat with black hair. She sat in the back seat, as did AAZ. He said that RTG at first went in a different direction and then when AAZ reminded him that he wanted to go home, RTG turned around and took him home. He said that when he got home, his mother slapped him for being late. He said he was only in the car with the woman for five or ten minutes and the only conversation was to ask each other's name. He said that RTG put on the music so loud it was not possible to have a conversation.

[48] Dr Lincoln who conducted the forensic examination of the complainant on 7 March 2015 gave evidence on the fifth morning of the trial. Dr Lincoln was interposed during the playing of RTG's record of interview. She found no visible injuries but noted marked tenderness in the upper vagina and lower abdomen of the complainant. She tested her blood alcohol level and estimated from that level that the complainant's blood alcohol level between 2.00 am and 4.00 am that morning would have been in the range of 0.12 per cent to 0.36 per cent. She agreed that the level of intoxication could have affected the higher parts of the brain including judgment and memory and that this would lead to fragmented memory but not reconstruction.

[49] About an hour of RTG's record of interview had been played before Dr Lincoln gave evidence and the jury resumed listening to the record of interview for about an hour after her evidence was given.

[50] Immediately after the luncheon adjournment on the fifth day of trial, before the jury had heard all of RTG's record of interview with police, his counsel raised with the judge in the absence of the jury, that he had been informed by AAZ's interpreter during lunch that there were inaccuracies in the interpretation and translation of the police interview with RTG. RTG's interpreter at the trial was said to be less certain about whether there were the alleged inaccuracies. At the request of RTG's counsel, the judge adjourned the trial for the day without taking any further evidence so that RTG's counsel could arrange for an independent interpreter to listen to the tape of his client's record of interview and examine the accuracy of the transcript.

[51] On the sixth day, the court did not resume till mid-morning. AAZ's counsel informed the court that his client was unwell and wished to be excused for the day. He was excused. A *voir dire* was then conducted about the accuracy of the interpretation and translation of RTG's police interview. An independent interpreter had listened to the interview and interpolated corrections into the transcript of the interview which had been before the jury while they were listening to the interview.

[52] There are a number of instances where the interpreter giving evidence on the *voir dire* disagreed with the interpretation given during the police interview as recorded in the transcript. Many of them were of little consequence. However, there was one where the difference between the interpreters was significant given that the Crown

case against RTG was not that he was a principal offender in any of the counts of rape or sexual assault, but rather that he was part of a common unlawful purpose to take the complainant to an isolated location and rape and sexually assault her.

[53] Counsel for RTG asked for his trial to be adjourned because of the prejudicial nature of what appeared to be mistakes made by the interpreter in the police record of interview. AAZ's counsel did not seek an adjournment, but rather that AAZ's trial proceed. MCS's counsel sought an adjournment of his trial because he wished to investigate the accuracy of the transcript of his police record of interview and because the jury had already heard the interview with RTG.

[54] After the luncheon adjournment on the sixth day of the trial, the learned trial judge made the following ruling:

> "The primary issue is that I accept evidence that was led on a voir dire today that the interpreter with Mr RTG and the police made significant errors in the interpretation, and, in the circumstances, the best move is to adjourn RTG's trial and discharge the jury from giving a verdict in his case.
>
> There is then the position of the others to consider, particularly [MCS's counsel], who has applied for an adjournment, if this happens, of MCS's trial. I don't accept that argument. I am quite happy that there has been no miscarriage of MCS's trial as a result of any evidence led in RTG's trial. The jury have already been directed that anything that came from that interview is not evidence against MCS, and I'll repeat that. In any case, with Mr RTG's physical absence and [his counsel's] physical absence from the trial, there will be no need for any further discussion about what happened in that interview. I don't think that discharging the jury from giving a verdict against RTG causes a miscarriage of MCS's trial."

[55] The learned trial judge then called the jury back into the Court and informed them that AAZ was not present because he was unwell and had been excused from attending the trial on that day; but that AAZ still had his legal representatives there to protect his interests should any issues arise. He also informed the jury that they were at the moment listening to interviews between the police and other accused persons which have no relevance to the trial against AAZ so there was not anything really important for AAZ's trial happening on that day so that made it easy to excuse him.

[56] He then told them about the problem with the record of interview with RTG and that his trial would be adjourned:

> "The next thing that's developed is that I've received some evidence this morning from – not somebody who's a witness in this trial but another interpreter – which satisfied me that there were certain things in the interpretation of Mr RTG's police interview which were inaccurate, and that has led me to conclude that Mr RTG's trial should be adjourned away so that can all be fixed up and taken care of.
>
> What that means is that I will be discharging you from giving a verdict in his case. All right? And, in fact, I will formally do that now. I formally discharge you, members of the jury, from returning verdicts in the charges brought against RTG …

…

> Now what that means, members of the jury, is that only two people – we will continue the trial with the other two, because I have decided that, although there was a problem in Mr RTG's trial because of the interpretation of his interview with the police, that, of course, doesn't affect the other trials, because, as I said to you, what each accused person says to the police is only relevant to the case against him. Nothing that one of them has said to the police helps you decide the case against one of the others. All right. So that means we won't continue to hear RTG's interviews with the police. We'll move on to the next one, and we're ready to do that now."

[57] Unfortunately, by this time, a large part of RTG's interview with police had been played to the jury.

[58] It is, therefore, necessary for the purpose of considering the grounds of appeal that reference be made to what the jury actually heard in the record of interview with RTG which would, if they had not followed the judge's instructions that it was only admissible against RTG, have affected their assessment of the prosecution case against AAZ and MCS.

[59] The record of interview that the jury heard played between the police and RTG took place on 13 March 2015 in the presence of an interpreter who described himself as a "voluntary professional translator". RTG was told that the police were investigating a complaint about a rape that was alleged to have taken place between 1.00 am and 5.00 am on Saturday, 7 March 2015. He was asked to describe his movements from 6.00 pm on 6 March 2015 to 6.00 am on 7 March 2015.

[60] RTG told police he picked up his friends AAZ and MCS in his car about 7.30 pm. He picked them up from near the Woodridge Railway Station. He said he drove them to Surfers Paradise and later drove them back to Woodridge. He said they drove to a park and were there between about 3.30 am and 5.00 am. After that he dropped his friends at the Woodridge Railway Station and then slept in his car for 20-30 minutes. His friend MCS then called him and he saw MCS with a lady who was "fat age I cannot tell exactly but between thirty and forty".

[61] He thought a taxi driver was taking pictures of them with his mobile phone. RTG said that MCS came to him in the car and said he wanted to get the woman in the car and RTG said that he said no. When asked his exact words, he said according to the interpreter:

> "[MCS] came and said this is my friend I'd like you to please give us a lift to somewhere but I said no I'm not going to do that because it might actually cause trouble for me in fact like exactly what's happening right now."

[62] He said that the others got into the car and asked to be dropped at a certain place. He knew that the woman got into the back but he could not remember which of MCS and AAZ sat in the front and which sat in the back. The interpreter records RTG as saying that basically what they meant was "let's go with this lady somewhere and do something bad" and that was the bit that RTG refused. The

independent interpreter said that the word "bad" was not used. The police officer repeated to RTG:

> "So let's go with this lady somewhere and do something is that right?"

[63] RTG is recorded as having said through the interpreter:

> "Yes they meant basically to go and to have sex with her, he, meant not, they, they offered to me to go have sex and I said no because first of all I don't want this sort of thing and secondly that if I was going to do this sort of thing she's almost as old as my mother and I'm not going to do that for."

[64] The independent interpreter said that RTG in fact said:

> "I think he meant (or implied) take me somewhere so it's possible to do something with this lady and I said no, I'm not doing that."

[65] The independent interpreter said that when the police officer said to RTG:

> "So let's go with this lady somewhere and do something is that right?"

The interpreter said:

> "So you mean let's go somewhere and sleep with her?"

RTG said:

> "Yes, that's what he meant and I said no because I'm not into that kind of stuff and if I was going to do it, I wouldn't do it with her she's old enough to be my mother."

[66] RTG said the woman said something about her child having been lost and it was apparent to RTG that she was drunk and a little bit unwell. It was reported that it was MCS who said:

> "Let's go and have sex with her."

[67] RTG then is reported as saying that the lady said "let's go to my place and have sex". RTG said he did not do it. Instead, he says that he just went to drop the complainant and MCS and that AAZ stayed in the car. RTG said that he and AAZ then slept in the car until he woke up. They then washed their hands and faces and he took AAZ home.

[68] There is no need to refer to what RTG said at the end of the interview because it appears that the end of the interview was not reached.

[69] The trial then continued with the playing of the records of interview with MCS. There appear to have been two police interviews of MCS. The first was on 11 March 2015 and the second on 30 March 2015. Both interviews were conducted with the assistance of an interpreter, FBQ. He was the same interpreter used for the interview for AAZ. Unlike the interpreter used in RTG's interview, he was a level 3 professional translator and interpreter. When MCS was told that he could have a friend present, he asked to have YDS present. MCS was 18 years old. The

interview was suspended and YDS was brought into the interview as a support person. That is the same YDS who gave evidence on the third day of the trial.

[70] The police told MCS that they were investigating an offence of rape and wanted to ask about his movements from 3.00 pm on Friday, 6 March 2015 until 9.00 pm on Saturday, 7 March 2015. MCS said that after school he went to the Ewing Road Park with his family and then went to the Woodridge Railway Station where he met two friends. He then went on a train to Southbank with his friend NCD. He said they walked around the beach area at Southbank and then over towards the casino and then walked around the city and at about 11.00 pm after his mother had called him and told them to come home, they caught the bus home. He and his companion walked to Trinder Park together and then they separated and MCS said he walked to Woodridge Station where he said he saw a woman standing beside a man with a blue Hyundai car. He said the man said to him that the lady was available and asked if he would like to go with her and MCS said no. He asked a friend if he would give him a lift home because it was getting late and his mother had called him. He said that his friend gave him a lift home. The woman sat in the car with them as well. MCS was dropped at home and he did not know where they went. MCS said that when his friend said that the lady was "available" and "let's go together", he said that he was not going to come because he did not like to do that sort of thing. However, he did ask for a lift home, and he was taken home by that friend. MCS said that the first person he saw there was AAZ and the man in the car was RTG.

[71] When asked to describe the woman, MCS said she was fat and rather old and she was saying that her child was lost. MCS said that RTG offered to MCS that he go with them but MCS said no, that he just wanted a lift home and that they could go wherever they wanted to. He said that RTG then dropped him home and he does not know what they did afterwards. MCS said he was home by 11.40 pm. MCS said that RTG said that this woman was a loose type of woman and that he had been trying to convince her to come with them but that she had not yet agreed. He said that RTG said that now that she had seen AAZ and MCS, she had "kind of changed her mind and said maybe I will do it". MCS said that he said to RTG that his mother had called him and she was going to be very angry and he just wanted a lift home. He said that RTG told him that this woman was ready to have sex and they should go together and have fun. He said that he got into the front passenger seat of the car and his friend AAZ got into the back passenger seat.

[72] MCS said that the woman who got into the car looked like she was Aboriginal. He thought she would have weighed about 90 kilos and was between 35 and 40 years old. He said that she said that she was alone, had nowhere to go and that she had three sons.

[73] MCS said that on the way to his home, nobody spoke. He said that AAZ also got out of the car. He said that AAZ told him he was going to the food shop.

[74] A second record of interview with MCS took place on 30 March 2015, again with Mr FBQ as the translator. MCS did not ask to have a support person present during the second interview. MCS said he would like to add something regarding his sleeping with the lady, which did not come out the last time he spoke to the police. He said that AAZ asked her first if she wanted to have sex. He said he did not know

exactly what transpired in that conversation but the two of them then went into the car. When they finished, AAZ came out and said:

> "'I'm done, ah, you can go now.' So I went into the car and I swear to god, I asked the, the woman do you want to you, are you ag-, are you agreeing to have sex with me? Do you want to have sex with me? And she said, yes."

[75] MCS said it only took a few minutes and he did not finish properly and she seemed happy and was not objecting to it. He then said that when he came out RTG was going to go into the car and do it but it appeared to be too late so he did not. He said they dropped the woman at Trinder Park in Woodridge. He said he was then driven home and got home about 1.30 am. He said that night he was a little drunk and so was the woman. He said it was RTG who invited him to go with them in the car. He said:

> "[T]he woman was okay with it, was happy, she did not say what, she did object, there was no, no objection."

[76] MCS said where they went was a drive of about 15 to 20 mins in a forested area. He said:

> "Um, regarding the location, [RTG] told me that [indistinct] brought, brought a few other women here too, ah, that whoever I bring here that they will, they, they're bound to comply with having sex. They, they, they will have to have it."

[77] When he was asked what he meant by "bound to comply", he said:

> "I don't know, maybe he meant that they would be afraid and they would have to do it. Sorry, when I say I don't know, that's what he said."

[78] When he was asked what RTG's exact words to him were:

> "Ah, regarding this woman, said that she will definitely have sex here because she will be afraid."

[79] He then said: "But when I talked, asked the woman, are you okay having sex with me? She said, yes." He said she was not afraid. He said there was no word of fear and that he asked her if she wanted to have sex with him and she said yes. RTG had said to him that woman will definitely have sex at that place because they would be frightened into having sex. He said that on the way there, the woman and AAZ in the back were kissing and she "seemed willing to have sex". MCS said he was unable to talk to her because he does not speak English very well. He heard AAZ talking to her but he did not understand what they were saying. He said the only conversation he had with her was as they were about to have sex when he got in the car and he asked her "okay to have sex with me?" and she said yes. He then added that she said "yes, I'm happy".

[80] He said that when he said he wanted to go outside of the car after he finished she said she wanted to do it with him again but he said no. He said when he finished, he found out that RTG was angry and he did not know why and he said, "let's go, I'm gonna drop you all home and [indistinct] leave".

[81] He said that RTG had given AAZ some condoms before he had sex with the woman. He said when AAZ and the woman were in the back of the car "a bit of kissing and rubbing was happening". He said that he and RTG got out of the car so that AAZ and the woman could have sex together. And that when AAZ got out of the car, he said to MCS, "I am finished, do you want to go?"

[82] MCS said that RTG was drunk and the woman smelled of alcohol, but AAZ was not drunk. He said that RTG gave him a condom before he got in the car and the woman put it on him. He said that when he asked her if it was okay to have sex with him, she said yes and she took her underpants off. He then said they were already off. He said her body was positioned leaning back with her legs slightly opened and she was sort of limp and drunk. He said she pulled him towards her and took his clothes off and then put the condom on him. It was the first time he had ever had sexual intercourse. He did it for a couple of minutes and then he was bored and pulled out and said he wanted to go. He put on his clothes and she put on her clothes and she sat in the front seat next to RTG.

[83] MCS said that initially the woman refused to get into the car with them but later she walked towards them and approached them. He said he did not tell the truth on the previous occasion when he was interviewed by the police about what time he got home because he was afraid to say that he had had sex.

[84] After part of the interview with MCS was played his counsel raised certain problems he saw with the interpretation during the interview as recorded in the transcript. The learned trial judge accordingly gave directions to the jury to be careful in assessing what was said in that some times what was attributed to the interpreter might be a comment by the interpreter rather than strictly an interpretation and so they had to be careful that sometimes an interpretation is not meant necessarily to be an exact translation. It is meant to be an interpretation from one language to the other. He also told the jury that they should note that sometimes MCS is saying what RTG said about the woman not opinions that MCS himself had about the woman.

[85] The next witness who was called on the eighth day of the trial was a forensic scientist who gave evidence about DNA. The most significant evidence was with regard to his test on fabric from the front right side of the white shorts that had been worn by the complainant. He was able to determine that on one point in the shorts there was a mixed DNA profile from three contributors one of whom could be the complainant. There was no match with either of the appellants.

[86] The Crown closed its case and each defendant exercised his right neither to give nor call evidence.

The judge's summing up

[87] There are a number of aspects of the summing up which are relevant to the grounds of appeal.

<u>Evidence admissible only against RTG</u>

[88] In addition to the directions given by the judge during the trial, the judge's summing up referred to the police record of interview with RTG in this way:

> "And I remind you at this point that the interview between the police and RTG, whose trial has been adjourned, and the drawings made by him and a photograph taken of his clothing are no longer exhibits and are no longer part of the evidence, too, so you will not have those. That follows, of course, members of the jury, from what I said and what I will repeat later. Certain parts of what you have heard are evidence only in the case of one accused and you do not consider it outside that case."

[89] This was in the context of directions about the requirements of separate verdicts in trials of each accused:

> "You must consider each charge separately, evaluating the evidence related to that particular charge to decide whether you are satisfied beyond reasonable doubt that the Prosecution has provided the essential elements. You will return separate verdicts for each charge. The evidence in relation to the separate offences is different, in the sense that each count relies on a different act or occasion and so your verdicts need not be the same. The elements of the offences are different; even though three of them are counts of rape, one is a certain type of rape and the others are different. And, of course, there is a different kind of charge – the sexual assault. So, again, your verdicts need not be the same.
>
> Evidence of – for example, how the accused and the complainant came to be in the car and evidence of intoxication or statements made by the complainant in the car – this kind of evidence might be relevant to all of the charges, but with respect to each charge is the evidence of a particular act relating to the charge. And so, in that sense, you consider the evidence relating to each charge separately. There is some evidence that might be of use for all of them, but you have to consider whether you are satisfied beyond reasonable doubt that the acts alleged in respect of each charge were committed with the essential feature that the complainant did not consent to the act and that the accused did not act under an honest and reasonable, but mistaken, belief that she was consenting. So the point I am trying to be clear about here, members of the jury, is there are separate charges. To some degree, the evidence about them is different and you have to consider the evidence relevant just to each charge before you can be satisfied beyond reasonable doubt and convict. To some degree, there is evidence which is relevant to all the charges.
>
> …
>
> What I've said so far is about the fact that there are different charges and you must separately consider each charge. Of course, in this trial there are also two defendants and you must give the cases against and for each of them separate considerations. That means you separately consider the evidence admitted against each defendant. In respect of each charge, each defendant is entitled to have the case decided on the evidence and on the law that applies to him and as it relates to each particular charge. I have already covered this to some

> degree because the law is different because of the basis on which each is charged with each offence.
>
> Some evidence is generally admissible. As I've already outlined, you might think that the evidence about how the evening commenced, how the car journey commenced, what happened in the car might be admissible against all accused. Other evidence is admissible only against him. The police interview, for example, which each took part in, is admitted only in the prosecution case against each – that accused. So anything one says to the police cannot be used against the other. That is to say, any statement made by each accused to the police is relied on by the prosecution only to prove that accused guilty.
>
> So, members of the jury, you return separate verdicts in respect of each defendant and separate verdicts on each charge. As the evidence is different in relation to the separate cases and in respect of different offences, your verdicts need not be the same, whether in respect of the charges or the defendants."

[90] His Honour gave the usual directions about the use that could be made of the police records of interview with AAZ and with MCS. He also gave appropriate directions about the use that could be made of YDS's evidence in the case against each appellant.

Use of circumstantial evidence

[91] With regard to the drawing of inferences and the use of circumstantial evidence the judge gave the following directions to the jury:

> "Now, I want to speak briefly about what lawyers call direct evidence and circumstantial evidence. Direct evidence proves a thing directly where a person saw or heard or did something, touched or tasted, and then comes along to Court and tells you what they saw, what they experienced. And, also, the exhibits, like a photograph or a drawing or a video can directly prove things. You can see the colour of something or the action somebody takes. But in addition to facts directly proved you may also draw inferences, and by that I just mean a deduction or a conclusion from facts that you find to be proved in the evidence. For example, to take a case outside this – to take an example outside the case, if you go to sleep at night and it is dry outside but you wake up in the morning and there is water on the ground, from those two bare facts you might infer that it has rained when you were asleep. That is just a slightly silly, perhaps, example from life about drawing an inference.
>
> And drawing inferences is something we do all the time, members of the jury, but in this case you are acting in a criminal trial. You may only draw reasonable inferences. Inferences based on facts you find proved in the evidence where there is a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or guessing. I will come back to that question of drawing inferences in a minute."

[92] Later he added:

> "I have already mentioned direct evidence and drawing inferences, so-called circumstantial evidence. To bring in a verdict of guilty based substantially on circumstantial evidence, it is necessary that guilt should not only be a rational inference but that it should be the only rational inference that could be drawn from the circumstances. I raise this now, and I will come back to it later, because in this case you are asked to rely on a body of direct evidence which you can see in videos or exhibits and what witnesses have told you that they saw or experienced – particularly, what the complainant experienced; that is direct evidence. But in significant ways in this trial, you are asked to draw inferences – particularly, where an accused person is charged with an offence where the acts were actually committed by somebody else you need to be satisfied of certain things – certain knowledge in the mind of the accused. And, of course, that requires the drawing of an inference in most cases.
>
> So I will come back to it later when I am talking about the specific legal ingredients of charges. But it is used for – to put this on the table now, to bring in a verdict based entirely or substantial on – substantially on circumstantial evidence, it is necessary that guilt should be not just a rational inference, but should be the only rational inference that could be drawn from the circumstances. If there is a reasonable possibility consistent with innocence, it is your duty to find the defendant not guilty. And that follows from the requirement that guilt must be established beyond reasonable doubt. Said slightly differently, if there is a reasonable inference open which is against the defendant and an inference in his favour, you can only draw the inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.
>
> To go back to my rainwater example, suppose that it was the essential matter to be decided – whether it had rained and the only facts you had were that it was dry last night and there is water on the grass this morning – that it rained is an inference you might draw, but that might depend on all of the other circumstances whether you would be satisfied to the high degree of beyond reasonable doubt that it rained. If you lived in an area where there is a high dew – heavy dew or there is a sprinkler system that might have come on or any other number of things that – might take into account, you might be less likely to be satisfied beyond reasonable doubt that it rained overnight. I am using that example simply to show that – whereas you are entitled to draw inferences from facts you find in the evidence, where the inference you are being asked [to] draw is an essential one that goes directly to proof of guilt, it must be the only available reasonable inference and that is consistent with the rule that you may only find a person guilty beyond reasonable doubt. If there is an alternative reasonable hypothesis which you do not exclude, then you are not satisfied beyond reasonable doubt."

Honest and reasonable but mistaken belief

[93] At the beginning of his summing up the judge referred to the fact that he had just received a note from the jury and that he wanted to tell them that he would be discussing the issue of honest and reasonable but mistaken belief as to consent during the summing up. He informed the jury that as well as proving every element of the offence beyond reasonable doubt the prosecution must also exclude other matters like mistake of fact, where they arise.

[94] Later in the summing up, he expanded on that as follows:

> "The next topic to cover is what has been referred to as a mistake of fact. If you are satisfied beyond reasonable doubt that the complainant did not consent to any particular act which comprises a charge, then you must consider this matter. The law provides that a person who [does an act] under an honest and reasonable, but mistaken, belief in the existence of the state of – of the state of things is not criminally responsible for his act to any greater extent than if the real state of things had been as he believed to exist. Again, that is a mouthful.
>
> And I repeat that this issue only arises if you are satisfied beyond reasonable doubt the complainant did not consent to the act that you are considering with a particular charge; because if you are in doubt about whether the complainant did not consent, you would acquit the accused – you would find the accused not guilty of that charge and you would not have to go and to consider the issue. In the context of this case, it means that you must consider, even though you have found the complainant was not consenting, did the defendant, in the circumstances, honestly and reasonably believe the complainant was consenting?
>
> Now, some of the relevant circumstances in this case include the way the complainant may be seen to be getting into the car after what appears to be some discussion on the street. And you might think of other relevant circumstances. There is evidence about what that discussion was, to some degree. So you take into account all of the circumstances. A mere mistake is not enough; a mistake – a mistaken belief in consent must have been both honest and reasonable. And honest belief is one genuinely held by the defendant. To be reasonable, the belief must be one held by the defendant in these particular circumstances on reasonable grounds. So when you are assessing this – any evidence of belief, you must take into – you must consider whether it is honest and whether it is reasonable. And reasonable means in the circumstances that the defendant finds himself, are there reasonable grounds for his belief?
>
> The complainant says in her evidence she did not consent and that she made it clear in certain respects, to the extent – for example, that she protested that she wanted to go home. If you accept that part of the complainant's evidence, that might affect your assessment of whether a defendant could have honestly and reasonably believe[d] the complainant was consenting at the particular time relevant to the charge you are considering. But remember the onus of proof – it is not for an accused person to prove that he honestly and reasonably

believed the complainant was consenting; the Prosecution must prove beyond reasonable doubt that he did not honestly and reasonably believe the complainant was consenting.

So if, in fact, the complainant was not consenting – if you have found that, you must ask yourself, 'Can I be satisfied beyond reasonable doubt that the defendant did not have an honest and reasonable belief that she was consenting?' If the Prosecution has satisfied you beyond reasonable doubt that the defendant did not have such a belief, you would find him guilty of the particular charge you are then considering. If you are not satisfied, even though the complainant was consenting, you must find the defendant not guilty. Just before I go on, that matter of mistake applies – possibly, I mean. May apply to each accused for each charge."

Liability as principal offender or party

[95] The judge summed up to the jury in this way:

"Now, you will have noticed that for each charge the Prosecution relies on evidence of the acts of one accused in counts 1 to 3, that is, acts of Mr AAZ. For count 4, the act is of Mr MCS. But both accused are charged with each offence, so when is one person criminally liable for the acts of another? The criminal law provides this. I am going to read it to you. Do not write it down because I am going to go over it and it is a mouthful but I trust that you will find that it makes perfect sense when you have the opportunity to digest it:

> *When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it. That is to say (a) every person who actually does the act which constitutes the offence, (b) every person who does an act for the purpose of enabling or aiding another to commit the offence and (c) every person who aides another person in committing the offence.*

There are more in the law but they are the ones that are called into play in this case. So here the law makes each of the following persons guilty of an offence. The person who actually does the act which constitutes the offence, each person who does an act for the purpose of aiding or enabling the offence to be committed, and each person who aids another person to commit the offence. So it is not only the person who actually does a criminal act who may be found guilty of it. Anyone who aids, which just means what it means, assists or helps or actively encourages that person to do it may also be guilty of the offence. That is the basis on which the defendant, Mr MCS, is charged with counts 1, 2 and 3, and on which Mr AAZ is charged with count 4.

The Prosecution argues that where it was not the defendant who actually committed the offence, he is also guilty of that offence because he aided the other to commit it. Proof of aiding involves proof of acts or omissions intentionally directed towards the

commission of the offence by the other person. I trust that this all just makes sense. To aid something you must intentionally aid it, meaning you must be aware of what is going on, and proof that the defendant was, as I say, aware of, at least, the essential matters that constitute a crime being committed. To aid means to assist or to help. The Prosecution must prove, where the case [is] that an accused is guilty because of somebody else's acts – the Prosecution must prove that the defendant knew that the type of offence which was, in fact, committed was intended, not necessarily that the particular act – that the type of offence would be committed. It is not enough for the Prosecution to prove that the defendant only knew of a possibility that an offence might be committed.

Before you may find a defendant guilty of an offence on the basis that he aided another in committing the offence or that he did an act to enable the other to commit the offence, the Prosecution must prove beyond reasonable doubt the four things and here is really just a repeat of what I have been saying but it is a further analysis. First, that the offence was committed, that there is an offence, because remember, the first of the law is when an offence is committed that an offence was committed by another person, that is, another person committed the acts making up the offence.

So, for example, for count 1, that there was a sexual assault by the complainant – sorry, of the complainant, by an indecent application of force without her consent, that that occurred. Second, that the defendant either in some way assisted the other person to commit the offence or did an act with the purpose of assisting or enabling him to commit the offence or did an act with the purpose of assisting or enabling him to commit the offence. Third, that he assisted or did that act with the intention of helping the other person commit the offence. And, fourth, that when he assisted, he knew that the other person intended to do the things which would be an offence. So, for example, for count 2, that he knew that MCS, for whom this applies for count 2, knew that AAZ would do the acts which compromise count 2, the penis in the mouth.

I have said, members of the jury, that to assist or aid and be guilty of a charge even though the person did not do the acts which comprise the charge, a person has to help, physically assist or, at least, actively encourage. It follows that it is not necessary for the Prosecution to show actual physical assistance. Wilful encouragement can be enough but it must be wilful encouragement. Certainly, if the defendant intended that the other person should have an expectation made from the defendant in the commission of the offence, where the Prosecution alleges aiding by encouragement such as from the presence of the person charged at the commission of the offence, the Prosecution must prove both the person charged and an aider did actually encourage the perpetrator to commit the offence such as by presence at the scene, but also that the person charged intended to encourage the commission of the offence by his presence. If all of that is established, voluntary and deliberate presence during the

commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding."

[96] With regard to counts 3 and 4 the judge instructed the jury:

> "Count 3, a case of rape – penis in the vagina. As to count 3, the case against Mr AAZ is that he is guilty because he did certain acts in the car when it was stopped; he put his penis into the vagina of the complainant without her consent and he did not act on honest and reasonable, but mistaken, belief that she consented. So before you could convict him, you must be satisfied of those things – that he was there, he did it, he penetrated her vagina without her consent and without the honest and reasonable, but mistaken, belief that she was consenting beyond reasonable doubt.
>
> The case against Mr MCS for count 3 is rather similar to the case for count 2; that he is guilty because he aided AAZ in the commission of count 3 by not being there. In effect, by – in all of the circumstances, where the parties were, by getting out of the car and not being there.[1] So, again, before you could convict MCS of count 3, you must be satisfied that the offence was committed and that he aided it by – although he did not do anything physical to aid it, he aided it by encouraging actively. And you have to be satisfied of that beyond reasonable doubt before you could convict. That was count 3.
>
> Count 4. It is the Prosecution case against Mr MCS this time, that he is guilty because he did certain acts in the back of the car when it was parked, namely, penetrated the vagina of the complainant without her consent and that he did so not only without her consent, but without any honest and reasonable, mistaken belief that she was consenting. Before you could find MCS guilty of count 4, you have to be satisfied that he did that – sexual intercourse without consent and no honest and reasonable mistake about it beyond reasonable doubt.
>
> The case against Mr AAZ for count 4 is that he is guilty because he aided MCS in the commission of count 4 by, in effect, getting out of the car – enable to – to enable MCS to get in the car and commit the offence. And I have given you all the detail[s] of aiding. You would [have] to be satisfied beyond reasonable doubt that AAZ aided, by getting out of the car, allowing MCS, with the expectation and knowledge that MCS was going to have sexual intercourse against – without consent and without a reasonable belief of consent. So, members of the jury, what I have done now is given you the legal ingredients of each charge, which are very brief, and what I understand to be the essential factual matters relied on in support and, in a real nutshell, what I understand to be the Prosecution case against each accused for each charge."

---

[1] When directing with regard to count 2, his Honour told the jury that the case against MCS was that he aided AAZ in its commission by getting out of the car, in circumstances where he knew from RTG that a woman would be bound to have sex at this spot and would be afraid at this spot.

[97] His Honour later drew together the directions with regard to circumstantial evidence and with regard to aiding:

> "Members of the jury, because AAZ and MCS are charged on the basis of aiding or enabling the other to commit an offence, the knowledge required in proof of that charge calls for an inference. I want to go back to the circumstantial evidence direction, the knowledge being that the defendant knew or was aware of the commission of the offence by the other, otherwise, how can you be guilty of aiding? And given that that's the basis for liability in those cases, it's for the prosecution to persuade you to draw an inference – an ultimate inference too. So just remember what I said about circumstantial evidence.
>
> To bring a verdict based on circumstantial evidence, it's necessary that guilt should be the only rational inference. Not only a rational inference, but the only rational inference to draw. And if there's a reasonable possibility consistent with innocence, your duty is to find the accused not guilty on that charge. In other words, if there's an inference reasonably open which is against the defendant and one open in his favour, you only draw the inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.
>
> I don't want to go back over the charges all over again, but you can see how this might apply where – choose any of the charges you wish, whether your allegation is that one person did an act of assault or penetration, sometimes not even in the presence of the other, the prosecution case must be that there was aiding, and I've done what I can to articulate the prosecution case, knowing the commission of the offence. In other words, intentionally aiding. And largely the prosecution requires you to draw an inference there, and that's why it's important to understand that before you could convict on that basis it must be the only rational inference.
>
> To go back to the – I know it's not a very clever analogy but – or example, but the rainwater case. If you live in an area where you've got a high – heavy dew or if you have a sprinkler system that comes on at 6 o'clock in the morning, then just from the fact that there's water on the ground in the morning might not persuade you to a degree that it has rained, because there is another reasonable inference open. But if you're not in a high dew area and you don't have a sprinkler and the water's gushing off the roof of your house as well as running down the street, if you had all of those circumstances – all those base facts, then you might be able to exclude any other reasonable inference, and say, 'Yes, I'm satisfied completely that it's rained overnight'."

Jury questions

[98] The jury retired to consider their verdicts at lunch time on the ninth day of the trial. The judge determined to send them home for the day late in the afternoon of that day. Just before the court adjourned, the jury sent a note to the judge:

> "At some point in the trial, evidence was given that the defendants asked the complainant if she wanted to have sex with them prior to getting into the vehicle. Can we please have clear identification as to where, if at all, this evidence is given, ie, direct us to it so we can review it."

[99] A detailed discussion took place between the judge and counsel both that afternoon and the next morning as to the relevant passages for the jury to satisfy that request which I will refer to as the jury's first request.

[100] During the discussion on the following morning the judge informed counsel that he had just been given some more information about another request made by the jury ("the jury's second request"). He informed counsel that the jury's second request was not apparently for the field interview with the complainant which was in evidence but for any interview with the complainant which happened at the police station after that. He said that that would be the complainant's formal written statement which was not in evidence.

[101] A number of recordings were played in court in the absence of the jury in an endeavour to find all of the passages from the appellant's interview that might be relevant to the jury's first request. All of those recordings had been made exhibits and were with the jury in the jury room. The transcripts which had been made available to the jury during the playing of those recordings during the trial but were not tendered as exhibits were again to be made available to the jury during the playing of the relevant recordings. For that reason I will refer to what is set out in the transcripts of the recordings. The passages played to the jury were all of those that the judge, with the concurrence of counsel, regarded as relevant to the jury's first request.

[102] The first excerpt was from the police interview of MCS conducted on 11 March 2015. The judge put the part of the recording played to the jury in context by referring to a response given by MCS to an offer made to him by RTG which was "His offer to me that, let's go with her and that she's, you know, this, she's, this is what she does. But, I understood that, I heard that ah, she was talking about having lost her child, and then um, that's all I understood, but I notice that she sat in his car willingly."

[103] The police officer then said to MCS "Okay, um, now I'd like to know more about um, when you said that [RTG] has offered um, for you to go with her. What do you mean by that?" It was his responses that were played to the jury. The passage in the transcript shows the difficulty that the interpreter, Mr FBQ, was having with translating the words in Farsi correctly into English. The relevant parts of the transcript provide as follows:

> "FBQ: Okay, so, he says that ah, he called me over, he said that this lady is this sort of lady, but I've been trying to convince her to come with us, she has not yet agreed. Now that she's seen you guys, kind of changed her mind and said maybe I will do it. Um, there was a word ah, used there as like, I, I, I asked what did he say, or di, did you hear it. There was no conversation between her and him. And then, ah, but, but, [RTG] was translating for me that this woman has three sons um, and so the whole thing just sounded so off to me that I said no, just give us the lift home.

CON TRUDGIAN: Okay, so um, [RTG] has said um, let's go with her. And, he's called her this sort of lady?

FBQ: He basically intimated that she - -

FBQ: Basically, int-, yes, that this, this is this sort of [indistinct] not the names, the word prostitute, but saying basically this is the type of person that she is, we can, you know - -

FBQ: Go with her.

CON TRUDGIAN: Can you remember the exact words that [RTG] said to you?

FBQ: I cannot [indistinct] say this first, 'cause then I'll have to explain.

FBQ: The word he keeps on using for this woman is not the word prostitute, it's a it's, in [indistinct] Persian is a woman who's this bad type of woman who does this sort of thing. It's a very vague adjective, it's, it's not ah, translatable in other thing except a, a, loose kind of woman for example.

CON TRUDGIAN: Okay, so a w-, so not a prostitute but a loose type of woman?

FBQ: A, a woman who does sleep with people, around.

FBQ: But in [indistinct] is still, still means towards, it goes more towards professional than - -

FBQ: Yeah.

FBQ: Doesn't, doesn't mean loose morals, it means ready to go - -

CON TRUDGIAN: Loose, ready to go?

FBQ: Yeah.

CON TRUDGIAN: Okay, so, when you say um, do you remember exactly what you and [RTZ] have said?

FBQ: What I said to him was that, my oh, my mother has called me and she's gonna tell me off, she's gonna be very angry, just please give me a lift - -

FBQ: Home and from there you guys can go wherever you wanna go.

CON TRUDGIAN: Okay, and what did you say, what did [RTG] say about the woman?

CON TRUDGIAN: He um, you said, she's that type of woman, um, what did you understand that to be?

FBQ: I understand to mean that she, she's not a good woman.

FBQ: She can do this sort of thing, that he can sleep with her but I don't know what else he, he, he would have meant initially, yeah.

CON TRUDGIAN: Okay, so, not, by not a good woman, what do you mean exactly by that?

FBQ: Basically a prostitute.

CON TRUDGIAN: Right? Yep, okay, and by a prostitute, what do you m-, have mean, like, what's your understanding of that?

FBQ: A person who sleeps with people for clients and so forth.

CON TRUDGIAN: And when you say, ah, people who sleep with people, w- , what do you mean by that?

FBQ: This might be my fault for not translating- -

CON TRUDGIAN: Okay, no, that's okay - -

FBQ: Because he was very, he was very clear in a pers - -

CON TRUDGIAN: Yep?

FBQ: A person who sleeps for money, with, with people.

FBQ: That he says and I translate to sleep in, in person means having sex.

CON TRUDGIAN: Having sex, okay, alright. Okay, and how did you get this um, thought about her being a person who has sex with people?

FBQ: Well, from what he told me, he s-, he said to me that this is, this woman [indistinct] ready to have sex with her, or shall we go together and have fun. I said no.

FBQ: And, and he added that um, she's, you know, has got sons and everything, um, and then I said no.

CON TRUDGIAN: Okay, so, [RTG] has said to you that the woman was ready to have sex, um, and he has extended that offer to you, is that right?

FBQ: Yes.

CON TRUDGIAN: And how did he make that offer to you?

FBQ: He told me in Farsi, she's ready to have sex, let's go together, come with, with us.

CON TRUDGIAN: Come with us? Okay, um, did you have any discussions with the woman in relation to having sex?

FBQ: No, I didn't and my English is not at the level that I could talk to her about anything like that.

CON TRUDGIAN: In the car? Okay. At what part um, through your conversation with [RTG] about the woman, um, did you get into the car?

FBQ: I don't know what conversation has happened before my arrival [indistinct] but as I arrived the same thing happened as I told you, he offered me the come with them, because - -

FBQ: Ah, it could happen. And I said no, please give me a lift, so sat in the car and gave me a lift."

[104] The next passage the judge played to jury was from an excerpt from MCS's second interview with the police which took place on 30 March 2015. The transcript of that recording relevantly provided:

"SGT EGGERT: Yep. And what was the nature of the conversation that you had with [RTG], [RTG] about, about meeting up?

FBQ: Said to me, there's gonna be a girl, just gonna go for a drive around, and I said okay, we'll do that.

SG EGGERT: So, [RTG] was already with the girl when you met with him?

FBQ: When I first saw them, [RTG] was in the car and the woman was outside the car, but I saw them to-, I spotted them together, I don't know whether they were at that moment when I spotted them I don't know - -

FBQ: I don't know at that moment whether they were talking to each other or not, but in any case, when he had called me he said there will be a woman.

SGT EGGERT: And where were you coming from to meet with [RTG]?

FBQ: We were coming from the city.

FBQ: I saw [AAZ] at the train station, he whistled and we drove in there, whistled at me to call my attention.

FBQ: During that.

FBQ: So [indistinct] together not to be alone.

FBQ: Then we saw [RTG] at that time and he talked to the woman and then the woman got into the car."

[105] The next relevant passage in the transcript is as follows:

"SGT EGGERT: How'd [RTG] meet this lady, this woman?

FBA: As [AAZ] and I came from station and saw [RTZ] over there and we saw the woman um, when we got there, [RTG] said to [AAZ], go and ask this woman if she's willing to come with us. [AAZ] went to the woman and asked if she was willing to come. Initially, apparently, she said no, so [AAZ] came back and we all went to get into the car and then, but then she walked towards us and approached us.

FBQ: And [RTG] told us that about half an hour ago he had already seen this woman with another man.

> FBQ: But as they were arguing, um, arguing together, the, the woman and the man. Ah - -
>
> FBQ: Um, so then after that we got in the car, all of us, and drove away."

[106] The judge reminded the jury that these passages were only relevant to the case against MCI.

[107] The judge then referred to the jury's second request. He said to the jury that he had received another note from them requesting to view a recording of the police interview with the complainant. He reminded them that they had the field interview, which was exhibit 1, with them which they could play at their leisure but that it appeared that they wanted another interview, the interview between the police and the complainant at the police station. He explained to the jury that that was not part of the evidence and was therefore not available to them. He told the jury that that was part of the way in which the police take a statement from someone and a statement is not tendered rather the complainant came to the court and gave oral evidence during the trial.

AAZ's appeal

[108] AAZ's sole ground of appeal was that the verdict was unreasonable or could not be supported having regard to the evidence. His submissions showed that this ground was essentially based on inconsistency of verdicts. I shall therefore deal with that ground when I consider that ground of MCS's appeal.

MCS's appeal

[109] I shall deal with each of MCS's grounds of appeal in what seems to me to be a logical order although that is not the order in which they appear in the amended notice of appeal.

Ground 4 of MCS's appeal

[110] This ground of appeal was that there was a miscarriage of justice occasioned by the judge's failure to discharge the jury after the video recording of the police interview with RTG was played. AAZ did not appeal on this ground.

MCS's submissions

[111] MCS submitted that a miscarriage of justice flowed from the judge's decision not to discharge the jury, taken alone, or with the other grounds set out in the submissions on the appeal. It was submitted that RTG's trial was adjourned just after the jury had heard his interview. Immediately after they were discharged from giving a verdict on his trial, the jury heard MCS's interview, it was submitted that immediate comparison loomed, despite his Honour's warning. It was submitted that although his Honour directed the jury that evidence against one accused was not cross-admissible, no direction could have prevented the impugned evidence from having an effect on the jury when they considered MCS's state of mind: that is, at least, concerning whether he believed there was consent on count 4 and, generally, as a party on count 3. It was submitted that the weight of the impugned evidence would have displaced the effect of any warning. Indeed it was submitted it may

have increased as a result of the warning given immediately after the jury's discharge in RTG's case.

[112] It was submitted, in the alternative, that the judge's non-exercise of the discretion to discharge the jury miscarried on the principles set out in *House v The King*.[2] It was said that his Honour made findings as to the quality of the evidence that were correctly applied to RTG's matter but failed to give those findings sufficient weight when considering the appellant MCS's matter, and failed to give sufficient consideration to the prospect that, despite warnings, the prejudicial effect in MCS's case was at least as strong as in RTG's case and arguably worse, given that the evidence was not admissible, and could never have been led, in the appellant's case.

The respondent's submissions

[113] The respondent submitted that the evidence in question, whether accurately interpreted or not, was not admissible against MCS. MCS did not bring an application to sever his charges from those of RTG at any point of the prosecution, much less prior to the interview being played which contained the damaging assertion that was now said not to be able to be removed from the jury's mind even with a specific direction. When it is considered however that any statement made by RTG in his police record of interview was not admissible against MCS in any event, no unfairness or prejudice could be said to flow. The jury should be assumed to have acted in accordance with that direction.

Consideration

[114] The judge's decision to discharge the jury was made within his inherent jurisdiction to ensure a fair trial and also in accordance with the powers given by s 60 of the *Jury Act* 1995 (Qld) which provides:

> "**60 Jury may be discharged from giving verdict**
>
> (1) If a jury can not agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict, the judge may discharge the jury without giving a verdict.
>
> (2) If proceedings before a jury are to be discontinued because the trial is adjourned, the judge may discharge the jury.
>
> (3) A decision of a judge under this section is not subject to appeal."

[115] On this occasion the proceedings against RTG before the jury were to be discontinued because his trial was adjourned and the judge therefore exercised his discretion to discharge the jury.

[116] Without RTG as a defendant, his record of interview was not admissible at all. Even with RTG as a defendant, it was only admissible against him and not admissible against the other defendants.

[117] In a joint trial it is critical to the fairness of the trial that the jury is carefully informed by the judge of the use that may be made of any evidence that is

---

2 (1936) 55 CLR 499 at 504-505.

admissible against one or more, but not all, of the defendants. A defendant's record of interview with the police is an obvious example of evidence that is admissible only against that defendant. The experienced trial judge had alerted the jury to that in his opening remarks.

[118] The judge repeated the warning about admissibility of evidence immediately after the evidence-in-chief of YDS, reminding them that some evidence may be admissible only against one of the defendants. When the judge discharged the jury from returning a verdict against RTG he told them the reason – that certain parts of the interpretation of his police interview were inaccurate – and reminded them, when telling the jury that the trial would continue against the other two that "what each accused person says to the police is only relevant to the case against him." And further that "[n]othing that one of them has said to the police helps you decide the case against one of the others."

[119] I have already set out the detailed instructions that the judge gave in his final summing up to the jury about the effect on the admissible evidence of the adjournment of RTG's trial, the need to give separate consideration to the evidence relevant only to each of the appellants and in particular to the use that could be made of their records of interview with the police. In doing so, the judge struck the appropriate balance between thoroughly instructing the jury and not over-emphasising the point. His directions were clear and not cloaked in complex language. While RTG's record of interview was, as it transpired, not admissible at all, one must assume that the jury followed the judge's instructions and did not misuse RTG's record of interview. That assumption, as McHugh J observed in *Gilbert v The Queen*[3] is fundamental to the criminal jury trial. As His Honour said:

> "Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."

[120] It follows that this ground of appeal cannot be successful.

Ground 3 of MCS's appeal

[121] This ground of appeal concerned count 3. The appellant submitted that there was a miscarriage of justice occasioned by the failure of the trial judge to adequately direct the jury about the use to be made of circumstantial evidence.

MCS's submissions

[122] It was submitted on behalf of MCS that, given the evidence relied upon by the prosecution, the learned trial judge's directions regarding circumstantial evidence were not adequate. It was submitted that they were somewhat piecemeal and provided in a vacuum. It was also further submitted that neither the learned trial judge nor the Crown appeared to have set out for the jury, in a clear fashion, the basis upon which either knowledge or aiding or encouragement were said to have been circumstantially proved. It was submitted that the Crown's address on the topic was given in a conglomerate manner and was apt to confuse.

The respondent's submissions

---

[3] (2000) 201 CLR 414 at 425 [31].

[123] The respondent submitted that the directions given to the jury by the judge contained all of the essential elements. In addition the trial judge drew the jury's attention to the reliance by the prosecution on circumstantial evidence to prove specifically that each appellant was a party to the other appellant's act of rape. It was submitted that contrary to the submissions on behalf of MCS, the evidence upon which the prosecution relied to prove that he was guilty of each of the counts to which he was said to be a party was outlined by the trial judge to the jury. The trial judge then reminded the jury again of the prosecution's reliance on circumstantial evidence to prove that each appellant was a party to the other appellant's act and what they must be satisfied of because it depended on circumstantial evidence and inferences which needed to be drawn. It was also submitted that in summarising the rival contentions the trial judge reminded the jury of MCS's counsel's submission that he got out of the car to allow AAZ and the complainant to engage in consensual sexual intercourse in privacy. The prosecution case on count 3 did not rely only on the appellant removing himself from the vehicle to prove that he was a party to the offence.

[124] The appellant's counsel at trial did not seek any redirection.

Consideration

[125] The learned trial judge's summing up dealt comprehensively with the use of circumstantial evidence both generally as it applies to any criminal trial which relies wholly or substantially on circumstantial evidence and also as it applied in the evidence in this case. His Honour first explained the difference between direct and circumstantial evidence and how circumstantial evidence depended on the finding of reasonable, and only reasonable, inferences from facts proved by the evidence. He later instructed the jury that in order to bring in a verdict of guilty based substantially on circumstantial evidence not only must the inference be reasonable or rational but it must be the only rational inference that could be drawn in the circumstances. He instructed them that if there was a reasonable possibility consistent with innocence the defendant must be found not guilty.

[126] His Honour then related the directions on circumstantial evidence to the facts of this case. He told them that in order to prove aiding another to commit an offence the prosecution must prove that the aider knew or was aware of the commission of the offence, that this knowledge could only be proved by asking the jury to draw an inference as to his state of mind and the relevant inference had to be the only rational inference open. His Honour also went through the facts and circumstances for each count from which the prosecution submitted that the jury would find that guilt as a party was the only rational inference open.

[127] It follows that the judge adequately directed the jury about the use to be made of circumstantial evidence and this ground is without merit.

Ground 5 of MCS's appeal

[128] This ground of appeal was that there was a miscarriage of justice occasioned by the trial judge's failure to warn the jury not to give undue weight to the excerpts from a recording replayed on a redirection.

MCS's submissions

[129] MCS submitted that the learned trial judge did not warn the jury not to give undue weight to excerpts from the replayed recording, resulting in a miscarriage of justice. Further, it was submitted, his Honour did not remind the jury that there was other evidence that went to the issues of consent and mistake, nor what the evidence was, for example MCS's repeated assertion during the second police interview that he had asked whether the complainant would have sex with him. Reference was made to the decision of the Court of Appeal in *R v LAK*.[4]

Respondent's submissions

[130] The respondent submitted that the statements of principle in *R v LAK* relate to replaying the evidence of a complainant child in a sex offence case. The evidence of such a complainant is not admitted as an exhibit and is not provided to the jury during deliberations. A recording of an accused with police is admitted as an exhibit and provided to the jury during deliberations. It was submitted that fairness and balance require particular caution to be given to the replaying of the evidence of a complainant child due to the great potential for prejudice. It was submitted that whether a warning of the kind submitted was required in this case or whether the jury ought to have been reminded of other evidence and went to consent a mistake of fact, depended upon the particular circumstances of the case and whether fairness and balance are required so the trial of the accused is not prejudiced.

[131] In this case the appellant's counsel at trial did not request that the warning contended for on appeal be given or that the jury should be reminded of the remaining evidence on the issues. It was submitted that the evidence replayed to the jury was all favourable to the appellant. The other evidence that was relevant to consent and mistake of fact was the complainant's evidence and other passages of the appellant's interviews with police. The jury had access to the appellant's interview with the police in the jury room. It was submitted that a warning not to place undue weight on the evidence replayed would not have been favourable to MCS because the evidence replayed suggested that the complainant consented and/or provided evidence of MCS's honest and reasonable belief as to consent. It was therefore submitted that the failure to remind the jury about the other evidence, which would include the evidence of the complainant, did not give rise to an unfairness to the accused which resulted in a miscarriage of justice.

Consideration

[132] The first submission by the appellant was that the learned trial judge did not warn the jury not to give undue weight to the excerpts which were replayed to the jury resulting in a miscarriage of justice. While such a complaint may be apt to apply to excerpts from evidence led by the prosecution from a complainant's pre-recorded interview, it is not apt to apply to excerpts played from an accused's record of interview in these circumstances. With the assistance of counsel the learned trial judge selected all of the excerpts from the interview which were relevant to the jury's first request including, of course, all of the exculpatory material. It would have been inappropriate in those circumstances for the trial judge to warn the jury not to place undue weight upon that evidence, given that it included all of the exculpatory evidence relevant to the jury's first request.

---

4 [2018] QCA 30.

[133] The second complaint under this ground of appeal appears to be that the judge did not draw the attention of the jury to evidence which was not relevant to their request which was a request by the jury to be directed to any evidence given by the defendants of asking the complainant if she wanted to have sex with them prior to getting into the vehicle. There was no other evidence inculpatory or exculpatory of MCS which was relevant to that jury request apart from the excerpts replayed to them.

[134] This ground of appeal must also fail.

Ground 6 of MCS's appeal

[135] This ground of appeal was that there was a miscarriage of justice occasioned by the aggregate of errors made during the trial.

MCS's submissions

[136] MCS submitted that the errors referred to in grounds 3 to 5 together with what was said to be concession by the Crown about the accuracy of the translation of MCS's interview and the repeated issues with interpreters meant that the trial miscarried.

The respondent's submissions

[137] The respondent submitted that as MCS had failed to demonstrate that any individual complaint amounted to error or gave rise to a miscarriage of justice and the combination of the circumstances or factors was also not such to give rise to a miscarriage of justice. With reference to the two additional factors raised by MCS in a footnote, that is the concession by the Crown and issues with interpreters, the respondent drew attention to what in fact happened during the trial which was only a qualified concession and the fact that the alleged "repeated issues with the interpreters" was not further elaborated upon and would not be accepted as constituting a miscarriage of justice in combination with other factors.

Consideration

[138] Since none of the individual grounds of appeal referred to had any merit there is nothing in the suggestion that the aggregate caused the trial to miscarry.

[139] It is necessary to deal with the additional two matters mentioned briefly in the written submissions by way of footnote. The first is that it is wrong to characterise what was said by the prosecutor as the concession about the accuracy of the translation of the MCS's interview. All that the prosecutor said was that it was not known how inaccurate the translation of MCS's record of interview may or may not be. However it should be noted that the interpreter used in the interviews with MCS and AAZ was a professional level 3 interpreter not the "voluntary" translator used in the interview with RTG. Further the judge gave directions to the jury about the question. The judge directed the jury that if they heard the interpreter qualify his interpretation they should be careful before they acted with any certainty on the basis that it was actually the appellant using precisely any particular word but that sometimes it was simply in the nature of an interpretation of what was said that is an interpretation not an exact translation.

[140] It appears that the interpreters in the interviews with AAZ and MCS and throughout the trial were doing the best they could in often difficult circumstances. The fact that there may not be a word which exactly translates from Farsi, the language of the appellants, and English caused difficulties but it would cause difficulties in any trial where an interpreter was required. I am satisfied that in this case the interpreters were doing their professional best both in the interviews with the police and in the trial itself to provide adequate and accurate translations from the language used by the appellants and from English into the language used by the appellants and that no miscarriage of justice arose from using MCS's record of interview or from the use of interpreters during the trial.

Inconsistent verdicts

[141] MCS's second ground of appeal was that the verdicts on counts 3 and 4 were unreasonable as they were inconsistent with the verdicts on counts 1 and 2.

[142] This was consistent with the sole ground of AAZ's appeal. As these grounds of appeal were similar it is useful to consider them together.

AAZ's submissions

[143] Although the ground of appeal was not framed as such, AAZ's submissions were that the verdicts of the jury were inconsistent with one another as the quality of the evidence given by the complainant was not sufficient to justify the conviction on counts 3 and 4 but not on counts 1 and 2.

[144] AAZ submitted that the evidence of the complainant was inconsistent and therefore unreliable. In support of that submission, he pointed to her intoxication on the night, her admission of having a poor memory and her contradictory account of certain details. It was submitted that if the jury was not satisfied to the requisite standard in relation to counts 1 and 2 then the evidence of intoxication and unreliability of the complainant should have caused the jury to find AAZ not guilty of counts 3 and 4 as well.

[145] AAZ also submitted that other evidence contradicted the complainant's version and therefore undermined her credibility. The examples given included that her initial version to her cousin and police was that she was forced into the car whereas CCTV footage showed her getting into the car of her own volition; that there was none of AAZ's DNA found and that the complainant did not identify him from a photo board. It was submitted that it was open to the court to find that the contradictory evidence went beyond mere discrepancy that was explicable but rather warranted a doubt that undermined the credibility of the complainant such that the verdicts of guilty on counts 3 and 4 could not be reconciled with the verdicts of not guilty on counts 1 and 2.

[146] AAZ submitted that while the complainant's version as to the presence of AAZ in the car was corroborated by MCS in his second record of interview, MCS denied non-consensual sex with the complainant and did not hear or see what occurred between AAZ and the complainant. The only evidence of lack of consent to count 3 was given by the complainant.

[147] AAZ conceded that the verdicts may have fallen into the category of merciful verdicts nevertheless they should be regarded as inconsistent based on the poor quality of the evidence. On an independent assessment of the evidence this court

would, it was submitted, find that the complainant's evidence was unreliable and inconsistent and that the verdicts on count 1 and 2 were inconsistent with the verdicts on counts 3 and 4 and so the verdicts on counts 3 and 4 should be set aside and verdicts of acquittal entered.

MCS's submissions

[148] In addition, MCS submitted that the complainant's credibility was the central issue. The acquittals on counts 1 and 2 could not be explained merely by a want of reliability, the jury must have rejected the complainant's version about counts 1 and 2 because they did not believe her as a witness of truth. As the complainant's credit was the central issue in the matter, there was manifest inconsistency in the jury's having rejected her as a witness of truth in one respect, and having accepted her in the same mode in other respects.

The respondent's submissions

[149] The jury were instructed to consider each charge separately and told their verdicts need not be the same on each charge. The jury were told that a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one count or more should be taken into account assessing her truthfulness and reliability generally or in respect of other counts. The appellant's counsel did not seek any further direction or re-direction and no complaint is made on this appeal concerning the directions given by the judge. The appellants failed to demonstrate that the differing verdicts were inconsistent.

Consideration

[150] The inconsistency is said to arise in this case because an acquittal on counts 1 and 2 is inconsistent with the verdicts of guilty on counts 3 and 4. The test is, as the High Court held in *MacKenzie v The Queen*,[5] one of "logic and reasonableness".[6] The verdicts must be such that it is inexplicable how a jury, acting reasonably, could have come to the different verdicts. There are several factors to be considered when deciding whether the verdicts are truly, in the relevant sense, inconsistent.

[151] The first factor to consider is that the onus is on the party who seeks to demonstrate that the verdicts are inconsistent, to do so.[7]

[152] The second factor is that in a trial where there is more than one defendant or more than one offence charged, or both, juries are always instructed by the judge that they must give each charge against each defendant separate consideration. That was done in this case and in particular the jury was instructed that they had to consider whether they were satisfied beyond reasonable doubt that the act alleged in respect of that charge was committed with the essential feature that the complainant did not consent to the act and that the accused did not act under an honest and reasonable but mistaken belief that she was consenting.

---

5 (1996) 190 CLR 348 at 368.

6 See *R v MCQ* [2018] QCA 160 at [82]-[83], citing *R v McLucas* [2017] QCA 262 at [65]-[67]; *R v GAW* [2015] QCA 166 at [19]-[22]; *R v Conn*; *R v Conn*; *Ex parte Attorney-General (Qld)* [2017] QCA 220 at [44], [45], [71]; *R v Fanning* [2017] QCA 244 at [21].

7 *R v Stone*, unreported, 13 December 1954, per Devlin J cited in *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

[153] The judge in this case gave the usual and conventionally appropriate direction that their verdicts need not be the same, whether in respect of the charges or the defendants.

[154] The third factor is that if there is a proper way in which an appellate court can reconcile the verdicts, allowing the appellate court to conclude that the jury performed their functions in accordance with the instructions given to them then that conclusion will generally be accepted.

[155] A fourth, rather different, factor is that an appellate court might form the view that they jury took a merciful view of the facts on one count and did not convict, notwithstanding the defendant's guilt had been technically proved. This is, as was observed by the Supreme Court of South Australia in *R v Kirkman*[8] cited with approval by the High Court in *MacKenzie v The Queen*[9] "part and parcel of the administration of justice by juries". As King CJ said in *Kirkman*:

> "Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty."

[156] It is the third factor, referred to above, which is decisive in this case. In this case, AAZ admitted that he got into the car and sat in the back seat next to the complainant. The jury must have rejected AAZ's evidence that he did nothing at all with the complainant and was taken immediately home by RTG. The complainant's evidence was that she did not consent to any of the sexual activity constituting counts 1 to 3 said to have been committed by AAZ. Consent according to the definition found in s 348 of the *Criminal Code*, must be freely and voluntarily given by a person with cognitive capacity to give the consent. Relevant to this case, consent is not freely and voluntarily given if it is obtained by threat or intimidation or fear of bodily harm

[157] However that still leaves the question of honest and reasonable, but mistaken, belief under s 24(1) of the *Criminal Code*, which provides:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

[158] Section 24 requires there to have been a 'subjectively honest and objectively reasonable' mistaken belief.[10] The authorities show that this view must have been actually held by the accused, rather than merely that a hypothetical reasonable person in the accused's position could have held that mistaken belief.

> "Before it exonerates an accused from criminal liability, s 24 requires two things (1) a belief in a state of fact actually held by the accused and (2) the belief is reasonable. It does not require … a

---

8 (1987) 44 SASR 591 at 593.
9 (1996) 190 CLR 348 at 367-368.
10 *R v Mrzljak* [2005] 1 Qd R 308, 312 [21] (McMurdo P).

> reasonable person in the circumstances of the accused to make an honest mistake; or a belief that a reasonable man would entertain."[11]
>
> "It is clear from its terms that s 24 requires a consideration of whether there were reasonable grounds for the accused person's belief as to a state of things, not … whether a theoretical, ordinary, reasonable person would or should have made the mistake. The belief must be both subjectively honest and objectively reasonable but it is the accused person's belief which is of central relevance. An accused person may hold an honest and reasonable but mistaken belief as to a state of things even though another ordinary, reasonable person may not have made that mistake."[12]

[159] The logical explanation for the difference in the verdicts in this case is explicable when the defence of honest and reasonable but mistaken belief that she was consenting is considered. The onus is on the Crown to negative that defence. The evidence as to her communication of her lack of consent to the act of sexual intercourse, the subject of count 3, was clear and unambiguous. If that evidence were accepted, as it must have been, AAZ could not have formed an honest and reasonable belief that she was freely and voluntarily consenting to sexual intercourse.

[160] Her evidence was that when AAZ took her shorts off and lay on top of her she said in a loud and angry voice that she "wanted to go the fuck home". When he then put his penis into her vagina she told him that it hurt and to stop. She pushed him on the chest. Unsurprisingly the jury were satisfied beyond reasonable doubt not only that she did not consent but also that AAZ did not act under an honest and reasonable but mistaken belief that she was consenting.

[161] The complainant's evidence with regard to counts 1 and 2 was not so clear. Firstly there was her concession under cross-examination that she did not report the act of masturbation, the subject of count 1, to the prosecution until the week before she gave evidence. She also conceded that she did not disclose the act of oral sex, the subject of count 3, until she gave her third statement to the police. That concession was wrongly made as she did in fact tell the police when she first spoke to them although they did not record it in the first written statement they took from her. Perhaps more significantly her evidence was that she articulated her lack of consent by saying she "wanted to go the fuck home." That was not as unambiguous as her telling him to stop and pushing him on the chest as she did with count 3. She conceded under cross-examination that she might not at that stage made her lack of consent clear. That difference in the evidence explains why this jury although they were satisfied beyond reasonable doubt she did not consent to the acts the subject of counts 1 and 2, they were not able to be satisfied with regards to those counts that AAZ was not acting under an honest and reasonable, albeit mistaken, belief that she was consenting.

[162] With regard to MCS, the complainant's evidence was that she did not consent to the act of sexual intercourse, the subject of count 4 but rather told him in no uncertain terms that she wanted to go home. The jury must have rejected the version that he gave in his second record of interview that he asked her "okay to have sex with

---

11 *R v Rope* [2010] QCA 194 at [47] (Chesterman JA, with whom Holmes CJ and Fraser JA agreed).

12 *R v Wilson* [2008] QCA 349 at [20] (McMurdo P).

me?" and that she agreed and said she was happy. In fact that exchange was not put to her in cross-examination. If they rejected that evidence that she actually consented, then they were left with his statements against interest that he was told by RTG that she would be bound to comply with having sex in the isolated place she was driven to because she would be afraid and her evidence that she did not consent and told him in no uncertain terms that she wanted to go home. Such evidence reasonably negated a defence of honest and reasonable but mistaken belief that she was consenting.

Ground 1 of MCS's appeal

[163] This ground of appeal was that the verdicts on counts 3 and 4 were unreasonable and/or could not be supported by the evidence. That raises the question of whether the quality of the evidence is such that it was not open on the whole of the evidence for the jury to be satisfied beyond reasonable doubt that the appellants were guilty of counts 3 and 4.

MCS's submissions

[164] MCS submitted that the verdicts on count 3 and 4 were unreasonable and/or could not be supported by the evidence. He submitted that upon an independent review of the evidence as a whole, this court would experience a doubt about MCS's guilt both as a party to count 3 and as principal on count 4 and that while mindful of the primacy of the jury, it followed that such a doubt should have been one that the jury ought to have experienced. It was submitted that credibility was the central issue. MCS's submissions drew attention to a number of inconsistencies in the complainant's evidence, both admitted in her evidence-in-chief and drawn out in cross-examination as well as her memory issues caused by her intoxication. The submissions also referred to MCS's admissions in his second record of interview that he had sex with the complainant and asked her before intercourse if she wanted sex. As to mistake of fact, MCS's submissions drew attention to the fact that his English was not good, he was 18 and according to his interview had never had sex prior to the incident and was intoxicated. On his version the complainant was happy in the car and kissing AAZ. His evidence was that he only entered the vehicle after the complainant and AAZ had had sex and he said that he did not hear or see what transpired between AAZ and the complainant.

[165] More specifically, on count 3, it was submitted that the evidence established neither knowledge, nor acts or omissions amounting to aiding or encouragement by the appellant as a party beyond a reasonable doubt. It was submitted that the evidence contained discrepancies, inadequacies and deficiencies in probative force by virtue of which it would be dangerous to allow the verdicts of guilty to stand. It was submitted that there is a significant possibility that an innocent person had been convicted.

The respondent's submissions

[166] The respondent submitted that the verdicts of the jury on counts 3 and 4 were not unreasonable and could be supported having regard to the whole of the evidence. The primary issue for the jury in the case against MCS on count 3 was when the prosecution proved that he was a party to the offence; and for count 4, when the prosecution proved the complainant did not consent and had negatived mistake of fact concerning consent.

[167] The complainant identified MCS from a photo board as the second man who had sex with her. He admitted to YDS and to police in the second interview that he had sex with the complainant. He did not conduct his case on the basis that his identification was incorrect but rather that sexual intercourse was consensual.

[168] All of the inconsistencies in the complainant's evidence were specifically raised for the jury to consider. The jury could well have accepted that it did not otherwise affect their assessment of the truthfulness or accuracy of her evidence because she had not been deliberately untruthful. In this case where the primary issue from MCS turned on consent or mistake of fact, the fact that the complainant voluntarily got into the car, may not have carried great weight in light of what happened in the car and where she was taken, in terms of resolving the issues. The complainant's intoxication, the passage of time and the number of accounts the complainant provided were matters for the jury to assess. Notwithstanding the inconsistencies and alleged improbabilities, the evidence was sufficient to convict MCS. The prosecution submitted that this is not a case where the discrepancies are such as to leave this court to conclude that there is a significant possibility that an innocent person has been convicted.

Consideration

[169] The evidence of the complainant showed that she was inebriated at the time of the offences and that her memory of what occurred had suffered because of that. There were a number of inconsistencies between what she told police and others when she first reported what had happened and gave a written statement to the police and her evidence in court. She was not able to give a satisfactory explanation for all of those inconsistences and she was very effectively cross-examined about those discrepancies by three skilled and experienced counsel. Nevertheless, with regard to the counts on which the appellants were convicted as principal offenders she was adamant that sexual intercourse had taken place, that she did not consent to it and that her words and actions meant that neither of the appellants could have believed that she was consenting, nor could they have entertained an honest and reasonable belief that she was consenting.

[170] As to count 3, of which MCS was convicted as aiding AAZ's commission of the offence of rape, the jury were specifically instructed that to convict they had to be satisfied beyond reasonable doubt that MCS aided AAZ in its commission by getting out of the car, in circumstances where he had been told by RTG that a woman would be bound to have sex at this spot and would be afraid at this spot. The reference to this spot was the isolated place where the car had been driven down a bumpy road. The evidence was capable of showing, and I am satisfied did show, that MCS got out of the car so that AAZ could have sexual intercourse with the complainant without the others being present. In the circumstances, he knew that she had not consented and believed from what he had been told by RTG that she would be bound to have sex because she would be afraid in such an isolated place negating any defence of honest and reasonable but mistaken belief.

Conclusion

[171] In the circumstances I am satisfied that it was open to the jury to be satisfied beyond reasonable doubt of the appellants' guilt. My independent assessment of the

evidence does not lead me to conclude that there is any reason by the jury verdicts should not stand.