Osadebay v The Queen [2014] NTCCA 6

PARTIES:	**OSADEBAY, Dennis Charles**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 8 of 2012 (21204605)
DELIVERED:	13 March 2014
HEARING DATES:	20 May 2013, 9 September 2013
JUDGMENT OF:	SOUTHWOOD, BARR AND HILEY JJ
APPEALED FROM:	RILEY CJ

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – unlawful sexual intercourse – trial judge erred in his direction to the jury that evidence of injury and damaged bangles could amount to corroboration at law – erroneous direction significantly nullified by further directions – no substantial miscarriage of justice – proviso in s 411(2) *Criminal Code* (NT) applied.

CRIMINAL LAW – Appeal against conviction – unlawful sexual intercourse – lies told in record of interview - whether trial judge erred in his direction on the question of lies by the appellant – whether more emphasis on caution should have been applied – trial judge's direction complied with the requirements in *Edwards v The Queen* – ground dismissed.

CRIMINAL LAW – Appeal against conviction – unlawful sexual intercourse – whether it was open to the jury to be satisfied of the appellant's guilt

beyond reasonable doubt – whether the state of the evidence would preclude the jury acting reasonably from being satisfied of guilt beyond reasonable doubt – ground dismissed.

CRIMINAL LAW – Appeal against finding of guilt at trial and conviction – unlawful sexual intercourse – application to tender additional evidence on appeal – statutory interpretation – s 419 of the Criminal Code (NT) – s 419 to be interpreted in a manner that is consistent with the principles established at common law – no reason not to apply the common law principles about "new" evidence in this case - "new" evidence held to be of little or no consequence – evidence did not demonstrate innocence or cause a reasonable doubt as to guilt – additional evidence rejected.

Craig v R (1933) 49 CLR 429, *Gallagher v R* (1986) 160 CLR 392, *Eade v The King* (1924) 32 CLR 154, *Ratten v R* (1974) 131 CLR 510, *Weiss v R* (2005) 224 CLR 300, *Edwards v The Queen* (1993) 178 CLR 193, *M v R* (1994) 181 CLR 487, *Libke v R* (2007) 230 CLR 559, *R v Nguyen* (2010) 242 CLR 491, followed

R v Abou-Chabake (2004) 149 A Crim R 417, applied

REPRESENTATION:

Counsel:

Appellant:	J B Lawrence SC
Respondent:	M Nathan

Solicitors:

Appellant:	Ward Keller
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Bar1402
Number of pages:	53

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Osadebay v The Queen [2013] NTCCA 6
No. CCA 8 of 2012 (21204605)

BETWEEN:

DENNIS CHARLES OSADEBAY
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD, BARR AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 13 March 2014)

The Court

[1] Dennis Charles Osadebay (the appellant) has appealed and sought leave to appeal against his convictions in the Supreme Court of two counts of unlawful sexual intercourse.

[2] The grounds (and proposed ground) of appeal are as follows:

(1) The learned trial judge erred in placing before the jury evidence of injury and damaged bangles as being evidence capable of corroborating the evidence of the prosecutrix.

(2) The learned trial judge erred in his directions to the jury on the question of lies by the appellant.

(3) On all of the trial evidence, it was not open to the jury to be satisfied beyond reasonable doubt on either of the two counts.

[3] Under s 410(b) *Criminal Code*, leave to appeal is required for ground 3 because it involves a question of mixed law and fact.

[4] The appellant has also sought leave to re-open the appeal to add a proposed ground 4: "that a miscarriage of justice resulted from the absence at the trial of new evidence". The new evidence relied on was further DNA evidence which the appellant sought leave to tender.

[5] Both the amended notice of appeal dated 9 November 2012 and the further amended notice of appeal dated 30 May 2013 sought verdicts of not guilty and this remained the appellant's position.

[6] It is convenient to examine the course of the trial, and summarize the evidence before the jury, before dealing with the grounds and proposed grounds of appeal.

The prosecution evidence at trial

[7] The prosecution case relied heavily on the evidence of the complainant, and the narrative set out at [8] to [36] is taken substantially from the complainant's evidence.

[8] The complainant met the appellant in 2010 through an internet dating site. Within a very short time, they entered into a sexual relationship. Between the time they met and mid-November 2011 they lived together for about 4 months, on and off. The relationship was volatile. There were many arguments and disagreements and ultimately they separated. The complainant was particularly concerned about the appellant's infidelity. After they separated, the complainant went to live in the Darwin suburb of Coconut Grove. The appellant remained living in the Metro Apartments in Darwin City. Although they were living apart and did not regard themselves as being in a relationship, they continued to have consensual sex. The appellant would often attend at the complainant's home, knock on the door and be invited in for sex. This happened once or twice a week.[1] The complainant's evidence was that these casual encounters ended on Friday 27 January 2012, when she informed the appellant that would be the last time he would see her with no clothes on. She said that she ended the sexual relationship and told the appellant that she did not want to be involved with him anymore. The complainant then did not have contact with the appellant until (she said) the day before the alleged offending when he sent her a text message inviting her to the movies.

[9] Shortly before 4 February 2012, the complainant met another man "on the internet". This man, HO, had travelled to Darwin from interstate and was staying with the complainant at her Coconut Grove home.

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[1] AB 110.1.

[10] In the evening of Saturday 4 February the complainant arranged to go out with HO and a female work colleague. The complainant drove HO into town and dropped him off at Monsoons Nightclub. She then waited for her work colleague to arrive and the two of them went into Monsoons but were unable to find HO. However, the complainant saw the appellant and another man standing at the bar together. The other man was a person with whom the complainant had a "casual fling"[2] after she broke up with the appellant.

[11] The complainant was wearing long black tights, a long leopard skin print blouse, a G-string, three gold bangles and a chain. She was not wearing a bra.

[12] While the complainant was at Monsoons, the appellant sent her a number of text messages, to which she replied. In fact, the appellant had been sending messages since about 5.00 pm that day. At 5.33 pm the appellant had sent a message saying, "I love u". The complainant had replied, "Good for u. I will never give my love to u or anyone."

[13] The text messages sent by the appellant to the complainant after 11.00 pm in the evening of 4 February[3] included the following:

> "Fuck u m. fuck off", sent at 11.38 pm;
>
> "Slut dirty whore", sent at 11.38 pm;
>
> "I respect u but u don't respect yourself bitch", sent at 11.40pm;

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[2] AB 35.7 – complainant's evidence in chief.
[3] Exhibit P5, AB 326-329.

"Someone serious boyfriend … pls go fuck urs", sent at 11.42 pm;

"Santi santi love u n stop playing stupid with me n this nite will b d last nite n day I dennis Charles Osadebay will ever abuse or say anything nasty to u n I'm sorry for tonite", sent at 12.14 am

"Come on …. I'm sorry", sent at 12.17 am on 5 February;

"I won't marry anyone but U", sent at 12.20 am;

"Where ru? Bring your pretty face back here", sent at 12.22 am;

"Come here n let b adults n dance it over pls", sent at 12.23 am.

[14] The tone of the appellant's messages thus evolved from abusive to conciliatory. At 12.25 am, the complainant responded and sent the appellant a text message that she was in the Bounce Nightclub. The appellant invited her to come to Monsoons. At 12.26 am the appellant sent her a text message that he was "coming over" and he asked the complainant to come outside. She asked him to let her know when he was outside. At 12.29 am the appellant sent the complainant another text message which asked her to join him outside.

[15] The complainant had driven HO home sometime around 11.30 pm.

[16] The complainant said in her evidence-in-chief that she waited outside Bounce Nightclub for the appellant to walk down from Monsoons. The appellant approached and beckoned her to cross the road towards him. She complied. He then asked her to go for a walk, saying that he wanted to go and change his shoes (at his apartment). The appellant told the complainant that he wanted her back and he didn't care who she was sleeping with. The

complainant said that she would never go back to the appellant, because, she said, she had made a decision that she would never go back. The appellant nonetheless managed to persuade the complainant to drive him to the Metro Apartments so that he could change his shoes. When they arrived at the doorway of the Metro Apartments, the appellant got out of the complainant's car and asked her to come with him. She said 'no'. However, the appellant grabbed her keys from the ignition switch and walked towards his apartment. The complainant then yelled out that her window was still open and the appellant returned to the driver's side of her vehicle, inserted the ignition key and wound up the electric windows. The complainant, still sitting in the driver's seat, unsuccessfully tried to retrieve her keys. At or about the same time, the appellant took hold of the complainant's clutch purse which was underneath her legs. Her phone and money were in the purse.

[17] The appellant then walked into the Metro Apartments building, followed by the complainant. She asked him to give her back her keys and her bag and contents. Film footage obtained from a camera set up in a shop at street level shows the appellant carrying the complainant's clutch bag, with the complainant following behind.[4]

[18] The appellant got into a lift at the Metro Apartments and the complainant followed. While they were in the lift together he tried to kiss her but she pushed him away and he desisted.

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[4] Exhibit P2.

[19] When the lift arrived at the 10th floor, the appellant got out of the lift and walked to his apartment, unit 158, with the complainant still following behind. She said:

> "… I really didn't want to be there, but I just ended up going there because obviously I got nowhere to go. I got no bags, no keys and all that, so I just followed in hoping that, you know, he wouldn't do anything to me, so I did, I went – I went inside – inside his apartment."[5]

[20] Once inside, the appellant grabbed the complainant's shoulder and pulled her into his bedroom. He then pushed her onto the bed where she landed on her back. He got on top of the complainant, and pulled off her tights, G-string and shoes, leaving her naked from the waist down.

[21] The complainant protested, telling the appellant to stop, saying, "I don't want to do this", to which the appellant replied that he loved her. He said to her, "Come back home, come back home, this is where you belong". The complainant replied, "No, I don't want to be with you any more … I don't love you any more".[6]

[22] The appellant removed his jeans and boxer shorts and then went to close the curtains of his bedroom. The complainant tried to get her clothes and run away, but the appellant pushed her and dragged her towards the bed so that she was once again lying on her back, naked from the waist down.[7]

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5 AB 55.9.
6 AB 59.1.
7 AB 61.4.

[23] The appellant grabbed one of the complainant's hands and put it behind her head. He was on top of her and was pinning her down. She could not move. The complainant kept kicking the appellant and telling him to stop. She said to him, "Stop it Dennis, stop it, you're hurting me" and "I don't want to do this".[8]

[24] Meanwhile, the appellant was attempting to insert his penis into the complainant's vagina. The complainant urged him to stop, told him that he was hurting her, and said to him, "This is rape and if you don't stop I'm going to report you", to which the appellant replied, "It's not, you're my girlfriend". He did not desist.

[25] The complainant said that she was screaming and yelling at the appellant to stop, whereupon the appellant told her not to scream, because she was disturbing the neighbours. He slapped her. They struggled; she hit him and kicked him. Eventually he "locked" the complainant's legs so that she could no longer move. When the complainant screamed louder, the appellant said to her, "Be quiet, you're disturbing the neighbours", before attempting to punch her to the face. The complainant said that she blocked his punch with her left hand. The punch struck her on the back of her left hand.[9]

[26] The appellant said that he would not let go of the complainant until she made love to him "for the last time".[10]

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8 AB 62.
9 AB 63.4.
10 AB 63.5.

[27] There was an interruption to events while the appellant answered a call on his mobile phone. The complainant tried to crawl away, but the appellant grabbed her again and pulled her back onto the bed so that she was on her stomach, and subsequently on her side. He then put two fingers inside her vagina.[11] That act of digital penetration constituted one of the counts of unlawful sexual intercourse. The complainant asked him to stop, because he was hurting her, and he withdrew his fingers. The complainant was vigorously protesting, screaming for help and trying to fight off the appellant. He was in turn trying to stop the complainant from kicking and punching him. The appellant and the complainant struggled for some time until she gave in and submitted to an act of penile/vaginal sexual intercourse. That act constituted the second count of unlawful sexual intercourse. The complainant said that she could not resist further, and she was upset because no-one could hear her screams for help.[12] She said she cried because she was unable to do anything to stop the appellant.[13]

[28] After the appellant had finished he got up from the bed and went back to the lounge room. The complainant followed him, intending to leave in her semi-naked state, but the appellant stood in front of the door and told her to put on her G-string, tights and shoes. He also asked the complainant to give him a hug, which she did (she said) in order to be permitted to leave.[14] The times

[11] AB 72.5.
[12] AB 74.6.
[13] AB 75.7.
[14] AB 76.6.

recorded on the camera referred to at [17] indicate that the complainant was upstairs in the building for about 50 minutes.[15]

[29] The prosecution tendered a number of photos of the complainant in the course of her evidence-in-chief. The photos showed a small bruise on her left forearm, swelling or bruising on one of her fingers and further bruising to her body.[16] The complainant gave evidence that she sustained the bruising when she tried to get away from the appellant. The bruising or swelling to one of her fingers was also the result of blocking a punch struck by the appellant.[17]

[30] Dr Tracey Johns also gave evidence about the bruising identified by the complainant. She stated that she examined the complainant at the Sexual Assault Referral Centre at about 9.30 am on 5 February 2012, at which time she noted that the complainant had three circular bruises in a line, one on her right clavicle and two below the clavicle. Dr Johns also noted swelling and bruising of the inner area of the complainant's left hand between thumb and index finger.[18]

[31] The prosecution also tendered bangles which the complainant said she was wearing on the night she said she was raped. The complainant gave evidence that the bangles were "round" before she went to the appellant's apartment

[15] Appeal Transcript, 20 May 2013, p 14.
[16] AB 83; photos 21 - 23 at AB 307 - 8.
[17] AB 82.9 to 83.
[18] AB 155.9: evidence of Dr Johns.

but the bangles were "just all bent" from her struggle with the appellant.[19] Dr Johns said in evidence that she was given three gold bracelets by the complainant in the course of her examination of the complainant at the Sexual Assault Referral Centre. She said that the bracelets were removed from the complainant's right arm and they were all misshapen.[20]

[32] After the complainant gave the appellant the farewell hug referred to at [28], she left the appellant's apartment, went downstairs in the lift, walked to her car and made a telephone call to a female work colleague, PC. Ms C could not hear very well, because of background noise. The complainant then drove her vehicle to the car park in front of Bounce Nightclub where she had parked her car earlier that evening. There she met Ms C. The complainant told her colleague that she was very upset and could not talk, but in response to a question from Ms C replied, "Dennis just raped me".

[33] Ms C gave evidence that she was at Monsoons Nightclub when she received a phone call from the complainant. She distinctly remembered that the complainant said that Dennis had raped her.[21] After the phone call, Ms C walked straight to the Bounce Nightclub, where she found the complainant sitting in her parked car. Her evidence as to what then happened was as follows:[22]

> What did you do?—As soon as I noticed that it was her car, I got straight in the passenger seat.

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[19] AB 77.5.
[20] AB 156.8: evidence of Dr Johns.
[21] AB 118.9.
[22] AB 136-137.

Anyone else in the car?—No.

What was said between the two of you?—Well she was pretty much balling her eyes out and as soon as I got in I asked her what happened and she said that, 'Dennis had raped me', that he slapped her, that he said it was okay because she was his girlfriend and then she sort of just went through the motions of what had happened.

What did she tell you about what happened?—She told me that her, the he'd held her, held her arms up and he pulled her pants and knickers down and forced himself into her.

And when she's telling you this, how was she emotionally?—I'd never seen anything like it. She had make up, tears, she was like wailing to a point that some things that she was saying was unrecognisable.

Did she describe in any other detail what had happened to her?—She said that when – when she – not particularly, but she – when she said that she'd – that he had slapped her ….

Did she say anything else?—She said that he came inside of her, pretty much all that I've said before.

And did she indicate where it happened?—She said in his house, but I didn't know where that was.

[34] The complainant said in her evidence that she then returned to her home in Coconut Grove, where she woke HO and complained to him that the appellant had just raped her. On the complainant's evidence, HO appeared somewhat disbelieving, and told her to have a shower. The complainant was upset, and was unsure what she should do. After resting on the couch for an hour and a half, or more, she drove to work at the Darwin Airport. She had changed clothes but she had not taken a shower. As soon as she arrived at

the airport she made a complaint to the Federal Police. It was an admitted fact that this complaint was made at 5.20 am.[23]

[35] HO gave evidence at trial by video link from Innsbruck, Austria. He said that he was woken in the early morning of 5 February when the complainant came home and turned on the lights. She was crying. She told him that Dennis had raped her. However, he could not see any scratches or ripped clothing, and in the absence of evidence of a physical fight, he was suspicious. He told the complainant to shower and clean up. She was still crying, and became angry. She told HO that she was going to work and that she would then go to the police.[24]

[36] HO was cross-examined about what the complainant said to him. He told the jury that the complainant said that, while she was dancing, Dennis took her purse or wallet. Dennis then said, "I want to have a chat with you", and went outside. The complainant went with Dennis to his car and Dennis locked her in the car and forced her to have sex with him. When HO asked the complainant why she did not run away, she said that Dennis was too strong for her, that she couldn't struggle with Dennis when he was having sex with her in the car. She said that she did not want to have sex but that Dennis had hit her. Dennis said that she belonged to him. In answer to a question from defence counsel, HO said that he asked the complainant how she was able to

[23] Exhibit P6, par 2.
[24] AB 168.9 – 170.

have sex in Dennis's car given that she was wearing tight jeans, but the complainant was angry and crying and did not give any explanation.

The evidence of complaint

[37] The evidence of complaint given by Ms C was entirely consistent with the complainant's evidence, whereas the evidence of complaint given by HO was only partially consistent with her evidence. Although HO said that the complainant told him she had been raped by the appellant, his evidence was that the complainant said that the rape took place in the appellant's car and that the appellant had taken the complainant's purse at the nightclub in order to persuade her to go outside with him.

[38] Senior counsel for the appellant submitted that the evidence of Ms C and HO established that the complainant had given different accounts to different people about what the appellant had done to her. This demonstrated that she was not a credible witness and her evidence should be rejected. Senior counsel for the appellant submitted that the complaints made by the complainant to Ms C and HO were "different in such graphic and significant detail … seriously different versions of history given to two witnesses proximate to the prosecutrix, one her best friend and the other one her then boyfriend", suggesting to the jury "unreliability inadequacy and inconsistency to the mainstay of the prosecution case …".

[39] In our opinion, Ms C's evidence gave considerable support to the credit of the complainant. The jury was entitled to reject the evidence of HO to the

extent that it was inconsistent with the evidence of complaint given by Ms C. There were obvious grounds to do so. The complainant denied that she gave a different version of events to HO and Ms C. The version HO gave of the complaint appeared to be a somewhat jumbled. He may have conflated the complainant's story about travelling in the car to the appellant's apartment and the actual incident of unlawful sexual intercourse. The complaint was made to HO in the early hours of the morning, in circumstances where the complainant came into the room where he was sleeping, turned on the light and woke him. He may not have been fully awake and alert and may have not heard or comprehended some parts of what the complainant was telling him. His evidence also suggested that he was not sympathetic to the complainant; that he was suspicious as to the truth of her complaint. The jury might have rejected the evidence of HO on the basis that he had not clearly understood what was said to him by the complainant, and had not sought to clarify precisely what the complainant claimed had happened to her; or that he had wrongly assessed or pre-judged the events complained of; or that, with the passing of time, he had not accurately recalled what the complainant had said. The jury may have rejected the evidence of HO, in whole or in part, on the basis that the evidence was inconsistent with other evidence which they accepted as reliable.[25] They may have also rejected the evidence of complaint given by HO on the basis that it lacked the ring of reality. The appellant's

[25] Witness reliability in relation to HO was the subject of comment by the learned trial judge in his summing up to the jury at AB 484.

submissions accept that the complainant gave Ms C a version of events that was consistent with her evidence. There is no reason why the complainant would have given a radically different version of events in such a short time.

Cross-examination of the complainant

[40] Initially, cross-examination of the complainant was directed at a series of hostile e-mail and mobile phone text messages which she had sent to the appellant in late 2011. The complainant admitted to having sent extremely offensive and abusive e-mails to the appellant "plenty of times".[26] In seeking to prove the intensity and the volatility of the relationship between the parties, the appellant's trial counsel cross-examined the complainant about one particularly obscene, spiteful and vengeful e-mail sent by her to the appellant on 25 October 2011,[27] which was in contrast to an e-mail she sent on 16 November 2011, addressed to "My Prince Dennis", in which she articulated the many reasons she loved the appellant.[28] The complainant was also taken to her profile on the internet dating site "Plenty of Fish" in which she had included the following description: "I am very down to earth and sometimes crazy. But I am a kind hearted person until you really piss me off, then I turn evil".

[41] The appellant's trial counsel put to the complainant that her allegations about the appellant raping her in his unit were a lie. The complainant denied any lie. It was put to her that she had fabricated the allegation of unlawful

[26] AB 97.1.
[27] AB 97.8 – 98; Exhibit D1, AB 309.
[28] AB 105 – 106.

sexual intercourse to teach the appellant a lesson, which she denied.[29] It was also put to her that she had been stalking the appellant's girlfriend, which she denied.

[42] The appellant's counsel then put to the complainant an allegation that she and the appellant had consensual sex in her car on the way from Bounce Nightclub to the Metro Apartments. This was a somewhat surprising allegation, given the statements made and answers given by the appellant in the course of his police interview, particularly those summarised at [49]. It was the first time that such an allegation had been made by the defence. The complainant vigorously denied the suggestion, saying "My God, no, I didn't. No, I didn't. I did not have sex with him in a car at all."[30] Different variants of the allegation were put (including reference to a "quickie" on the way to the Metro), all of which the complainant denied. She maintained that she drove straight from the club to the Metro Apartments.[31] At a slightly later stage of the cross-examination it was put to the complainant that the injuries she received to her left index finger and to her knuckle, described by defence counsel as "minor bumps and bruises", might have been caused by having consensual sex in the vehicle, which she denied.[32]

[43] Defence counsel also cross-examined the complainant about her evidence, referred to at [25] and [27], that she had screamed and yelled for help, at the top of her voice, for about half an hour or so, all the while punching and

[29] AB 108.
[30] AB 112.
[31] AB 117.6.
[32] AB 121.4.

kicking the appellant in an attempt to make him let her go.[33] The complainant insisted that she had done all these things.

[44] It was subsequently put to the complainant that she had an unhealthy obsession, a love/hate relationship, and (again) that she had fabricated the rape allegation to teach the appellant a lesson. The complainant denied these suggestions very strongly.[34]

The appellant's police interview

[45] The appellant participated in a formal interview with investigating police starting at 6.36 pm on 5 February 2012. The electronic record of the interview was tendered in evidence by the prosecution for the purpose of establishing that the appellant had told lies which demonstrated a consciousness of guilt.

[46] During the interview the appellant stated the following. He said that during the ups and downs of his 18-month relationship with the complainant, she was the more aggressive and abusive (of the two of them) and that she often threatened that she would go to the police, to destroy him and send him to jail.[35] He denied that he had ever bashed or abused the complainant.[36]

[47] The appellant admitted that the complainant had been at his apartment the previous evening. He claimed that she wanted to have sex with him, that they argued about his many other women friends, and that she hit him, not

[33] AB 120.
[34] AB 121.6.
[35] AB 363.
[36] AB 364.

aggressively but passionately[37] but he denied having sex with her at all that night.

[48] A significant issue at trial was that the appellant in his police interview, when asked directly, denied having sexual intercourse with the complainant the previous night.[38] In fact, he went further: he said to the police that he had refused to have sex with the complainant, even though she wanted to have sex with him.[39] He said that the complainant was "really into me", that she would drag him to have sex anywhere,[40] and that she loved having sex with him, but he told the complainant that he did not approve of the fact that she used him as a sex toy.[41] He simply did not want to have sex with the complainant the previous evening and she became upset because she did not get her way.[42] He reiterated on several occasions during the long interview that the relationship was such that he did not need to force himself onto the complainant. He also told the police that the complainant created a scene and became loudly argumentative because he was talking to HO on his mobile phone.[43] He claimed that when the complainant realised that he was ringing HO, she "snapped".[44] The appellant said that the complainant had significant anger issues.

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37 AB 402.5
38 AB 426.9.
39 AB 398.
40 AB 395.7.
41 AB 403.6.
42 AB 403.8.
43 AB 384.5
44 AB 399.1

[49] The appellant not only denied having had sex with the complainant on the previous evening, but, relevant to another significant trial issue, he did not mention to police that anything significant happened on the short car trip between Bounce Nightclub and the Metro Apartments. He was specifically asked to tell the interviewing police officers about the trip and the conversation which took place in the car.[45] He replied that he and the complainant talked, without arguing, although there was "anger in her voice".[46] At a slightly later point in his interview, when asked whether anything else happened in the car, he replied 'no', and went on to explain that there was no aggression.[47]

[50] The appellant suggested to police that the complainant was motivated by a desire for revenge as a result of his having refused to have sex with her the previous evening;[48] further, that she had previously threatened that, if the appellant left her, she would do something to make him regret it for the rest of his life.[49]

Other evidence in the prosecution case

[51] PB, a resident of a nearby unit on the 10th floor to that occupied by the appellant, was spoken to by investigating police officers in the early afternoon of 5 February 2012. Mr B lived in unit 153, opposite the lift doors. The appellant lived in unit 158, at the far end of the hallway from

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45 AB 378.7.
46 AB 379.1; 380.5.
47 AB 380.8.
48 AB 381.4, 423.
49 AB 415.2, 416.8, 417.4 and 430.

Mr B's unit. There were three units in a cluster at the far end: units 158, 159 and 160.[50]

[52] Mr B's evidence was as follows. He had drifted off to sleep late at night on 4 February but woke at about 1.00 am (in the early morning of 5 February) when he heard lift doors open and what sounded like two people walking out of the lift and then walking down the hallway. He heard muffled crying or muffled laughing; he was not sure which. Initially he thought it was a crying noise.[51] He said that it sounded to him "like the female was crying and there was a male voice with her."[52] He heard a door close to a unit down the hallway, but after that he did not hear anything else. In cross-examination, he agreed that acoustic insulation in the building was "pretty average", in particular as between adjoining units. He was then asked some questions about his ability to hear things "at the far end" of the hallway on the 10th floor. He said he might not hear if there were a party going on at the far end, but that he would probably hear if someone were screaming. Likewise, he would probably hear if someone were screaming and yelling for half an hour or 45 minutes.[53]

[53] Police investigators attended at the Metro Apartments in the afternoon of 5 February 2012 to make 'door knock enquiries' of residents of the 10th floor and also the ninth floor. Police spoke to residents who answered their doors and noted their responses. Some days later, Constable Carter, the

[50] AB 184.2; exhibit P9, photographs 3 and 4, AB 343.
[51] AB 152.2.
[52] AB 153.7.
[53] AB 154.3.

officer in charge of the investigation, left business cards at all the remaining units on Level 9 and Level 10, requesting that occupants contact the police if they had heard or seen anything on the night/early morning of the alleged offending. The evidence of Constable Carter was as follows:[54]

> Now you also as a part of your investigation went to the Metro Apartments and left your business card for people to contact you if they heard or saw anything on this particular occasion? --- Yes, I did.
>
> And that was on 10 February, is that correct? --- That's correct.
>
> Did you get any responses? --- I did, yes.
>
> And that that was just specifically in relation to Level 10 or other floors? --- Yes, predominantly Level 10, but Level 9 was also doorknocked as well.
>
> And you received calls from people? --- I did, yes.
>
> And there was nothing that anyone could tell you about that they had a recollection of or heard? --- There was not, no.

[54] Constable Carter confirmed in cross-examination that all persons who contacted her, from both Levels 9 and 10, said that they had seen and heard nothing.[55]

[55] As to unit 160, one of the three units situated at the far end of the hallway, Constable Carter said in evidence that enquiries revealed the unit was vacant at all material times.[56] She had received no contact from any occupant. As to unit 159, immediately next door to unit 158, Detective Sergeant Borton gave

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[54] AB 158.7.
[55] AB 188.2.
[56] AB 184.3.

evidence with reference to a police case note entry[57] that the occupant, G, was "home but asleep at the time and heard nothing".

The appellant's evidence at trial

[56] By the time the appellant gave evidence, he had formally made a number of significant admissions in a document which had been tendered.[58] In that document the appellant admitted that, sometime in the early hours of the morning on 5 February 2012, he had had sexual intercourse with the complainant. He had also admitted that forensic scientific testing of samples taken from the complainant by Dr Johns on 5 February 2012 established that the appellant's sperm was present inside the complainant's vagina.[59]

[57] The appellant said in evidence at trial that he did not tell police about having sex in the appellant's car because he had panicked.[60] He acknowledged that he had lied to police about not having sex with the complainant the previous evening.[61] He nonetheless maintained that he had told police the truth about the complainant's angry outburst in his apartment when he refused to have sex with her, claiming that she was a "very sex addicted person" who became angry with the appellant because he did not want to have *repeat* sex with her after the earlier sex in the car.[62]

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57 AB 346, exhibit D7.
58 AB 330 - 334; exhibit P6.
59 Dr Johns said in evidence that her examination of the complainant, during which she took vaginal samples, had had taken place at approximately 9.30 am on 5 February. Although this time was not part of the formal admission, there was no challenge to the evidence.
60 AB 226.9; 272.3.
61 AB 272.4.
62 AB 274.3: "Of course, [she] always is a very sexy person, we had sex in the car and I didn't want to have sex again, that's what I'm saying".

[58] Relevant to the evidence of the complainant and the camera footage referred to in [17] above, the appellant said that the complainant had given him her purse to carry because that was "something we always did". He further claimed that, when he went to help the complainant out of the car, she gave her car keys to him. He said, "She always gave me the keys and her purse to carry".[63]

[59] Relevant to the complainant's evidence about her screaming and yelling in the appellant's apartment and the appellant telling her to be quiet because she was disturbing the neighbours, the appellant gave the following evidence. During the period of some 45 to 60 minutes that the complainant was at his apartment, she became "more grumpy and angry" about the fact that he had had sex with "too many women" in his apartment. He said that "it was getting very intense" just before he rang HO, to let him know that the complainant was at his apartment. He said that the complainant by this stage was very agitated, and that when she became aware he was ringing HO, she snapped and became more angry, more bitter and more abusive. His evidence was then as follows:[64]

> What tone of voice did she use, was she? --- Well, she was extremely, she was bit - I mean a bit upset, she was hitting her face and she was like, you know, 'How could you do this to me?' And I said to her, 'No, you're disturbing the neighbours because this is in the middle of the morning hour and people can hear you from the next door neighbour and I don't want this sort of scenario in my apartment.

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[63] AB 227.5.
[64] AB 230.3.

He went on to say that the complainant became very abusive, violent and aggressive and she was crying.

Additional evidence

[60] The appellant applied to tender additional evidence on the hearing of the appeal, specifically the "Statement of Preliminary Findings" of Kate Frances Cheong-Wing, forensic scientist, dated 2 April 2012, and the Statement of Julie Ann Murakami, forensic scientist, dated 5 June 2012.[65] This evidence is new evidence and forms the basis of the appellant's application for leave to appeal and to rely on proposed ground of appeal 4. Both the Crown and the defence had this evidence in their possession at trial and Mr Lawrence SC conceded the additional evidence was "new" evidence (as distinct from "fresh" evidence).

[61] The Court of Criminal Appeal has the power in appeal proceedings to receive additional evidence. Section 419 of the *Criminal Code* states:

> (1) The Court may, if it thinks it necessary or expedient in the interests of justice:
>
> (a) …
>
> (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any person appointed by the Court for the purpose and admit any depositions so taken as evidence"

[65] Respectively annexures "GVP3" and "GVP4" to the affidavit of Gregory Vincent Phelps sworn 28 May 2013.

[62] While the power conferred by s 419(1)(b) is exercisable whenever the Court "thinks it necessary or expedient in the interests of justice", [66] it is likely that the legislature intended that s 419 would reflect the common law principles which have been developed over many years in order to meet the ends of justice.[67] The considerations giving rise to those principles will be material to determining what is necessary and expedient in a particular case. It has been the practice of this Court to apply those principles.[68] Further, "while the common law principles touching upon the distinction between new and fresh evidence are not necessarily determinative of the manner of the exercise of the statutory discretion, the considerations giving rise to those principles will ordinarily be weighty [*in determining what is necessary and expedient*], so much so that it will be a rare case in which an exercise of the statutory discretion produces a different outcome to that produced by the application of the common law principles."[69]

[63] At common law, evidence which was not known to the appellant at the time of trial and which could not have been discovered by him with reasonable diligence is known as "fresh" evidence, in contradistinction to "new"

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66 *Watt v R* [1999] NTSCCA 81 per Mildren J at [46]; *Leach v R* (2005) 16 NTLR per Riley J at [44].
67 *Rinaldi v The State of Western Australia* [2007] WASCA 53 per Steytler P at [44]; *Ark v The State of Western Australia* [2014] WASCA 45 at per Buss JA at [135].
68 *Mosely v The Queen* [2012] NTCCA 11 at [27].
69 *Rinaldi v The State of Western Australia* [2007] WASCA 53 per Steytler P at [84].

evidence, that is, evidence which was either available or could with reasonable diligence have been discovered before trial.[70]

[64] The common law principles to be applied in a case like this were very usefully summarized by Kirby J in *R v Abou-Chabake*[71] as follows:

- First, a distinction is made between "new evidence" and "fresh evidence". Fresh evidence is evidence not available to the accused at the time of the trial, actually or constructively. Evidence is constructively available if it could have been discovered, or available at the trial by the exercise of due diligence.

- Second, great latitude must be extended to an accused in determining what evidence, by reasonable diligence, could have been available at his trial (*Ratten v The Queen* (1974) 131 CLR 510 at 512 per Barwick CJ).

- Third, the court is ultimately concerned with whether there has been a miscarriage of justice. The rationale for setting aside a conviction on the basis of new evidence or fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice. That evidence must be examined in the context of the evidence given at the trial (*Mickelberg v R* (1989) 167 CLR 259 at 301; 43 A Crim R 182 at 210 per Toohey and Gaudron JJ).

- Fourth, the issue of whether there has been a miscarriage is to be approached on a number of levels, depending upon the order sought (whether a verdict of acquittal or a new trial), and the capacity of the new or fresh evidence to sustain the order sought.

- Fifth, where a verdict of acquittal is sought and the new evidence is of such cogency that innocence is shown to the court's satisfaction, or the court entertains a reasonable doubt

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[70] *Ratten v The Queen* (1974) 131 CLR 510 at 517; *Lawless v The Queen* (1979) 142 CLR 659 at 675 - 676; *Gallagher v The Queen* (1986) 160 CLR 392 at 402; and *Mickelberg v The Queen* (1989) 167 CLR 259 at 301.

[71] (2004) 149 A Crim R 417 at p 427 – 428.

as to guilt, the guilty verdict will be quashed and the appellant discharged. In such circumstances, it does not matter whether the evidence is fresh or simply new (*Ratten v R* (at 518–519) per Barwick CJ; cf Gibbs CJ in *Gallagher v R* (1986) 160 CLR 392 at 398–399; 20 A Crim R 244 at 248–249).

- Sixth, where the evidence does not have that quality, or where a new trial is sought, a number of issues arise. The verdict will be quashed and a new trial ordered only where the following questions are answered affirmatively:

    (a) Is the evidence fresh?

    (b) If it is, is it "credible" or at least capable of belief (*Gallagher v R* (at 395; 246) per Gibbs CJ), or "plausible" (*Mickelberg v R* (1989) 167 CLR 259 at 301; 43 A Crim R 182 at 210 per Toohey and Gaudron JJ)?

    (c) If it is, would that evidence, in the context of the evidence given at trial, have been likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused (*Gallagher v R* (at 140; 257) per Brennan J) or, if there is a practical difference, is there a significant possibility that the jury, acting reasonably, would have acquitted the accused (*Gallagher v R* (at 402; 251) per Mason and Deane JJ)? See *Mickelberg v R* (at 301–302; 210–211) per Toohey and Gaudron JJ.

- Seventh, the concept of a miscarriage of justice is not an abstract investigation of truth (cf an Inquiry under s 474D Crimes Act 1900). It is an investigation in the context of the adversarial nature of a criminal trial. Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked rather better (*Ratten v The Queen* at 517).

[65] There is nothing in this appeal to persuade the Court that the common law principles should not be applied. The questions for the Court to determine are: is the new evidence of such cogency that innocence of the accused is shown to the Court's satisfaction, or does the court entertain a reasonable doubt as to guilt of the accused?

[66] There is no issue as to the credibility of the evidence referred to in [60] above, but it is necessary to say something about its relevance, and, in particular, to determine what that evidence adds to the DNA evidence admitted at trial.

[67] The DNA evidence at trial was contained in a document setting out admitted facts, signed by the accused.[72] The admissions were thus sufficient proof of the facts without other evidence.[73] The admissions relevant to DNA were as follows:[74]

> (8) On the 6th February 2012 at 1:40am while Dennis Osadebay was in police custody, police lawfully obtained biological samples from him for the purpose of analysis by the police forensic section.
>
> (9) Samples taken by Dr Tracey Johns on the 5/2/12 during a medical examination of [*the complainant*] were analysed by a forensic scientist along with the samples collected from Dennis Osadebay which are referred to in paragraph (8). The result of that analysis was that Dennis Osadebay's sperm was found to be present inside [*the complainant's*] vagina.

[72] AB 331 - 334, exhibit P6.
[73] S 379(1) *Criminal Code*.
[74] AB 332 - 333, exhibit P6, par 8 and par 9.

(10) Dennis Osadebay's DNA was found to be present on samples taken from [*the complainant's*] left and right breasts.

(11) An analysis of [*the complainant's*] clothing revealed that Dennis Osadebay's sperm was found on the inside crotch area and sides of her underwear.

(12) An analysis of the fingernail swabs taken from [*the complainant*] reveal that there was a mixed DNA from two individuals but the samples were not sufficient to identify anyone specifically.

[68] The Statement of Preliminary Findings of Ms Cheong-Wing does not contain any evidence which adds anything relevant to the above admitted facts or which supports or weakens the case of either the Crown or the appellant at trial. Most of the tests had not been completed at the date of her report, and the results obtained for many of the samples were described as "presumptive positive" only.

[69] The Statement of Julie Ann Murakami contains the following evidence:

- A finding that the wet left breast and right breast swabs taken from the complainant by Dr Johns tested positive to the presumptive test for salivary amylase. The saliva was not attributed to any person.

- A mixed DNA profile from at least three individuals was obtained from a vaginal swab of the complainant, and from the complainant's underwear. There were two male contributors:

the appellant and HO, and one female contributor: the complainant herself.

- Mixed DNA profiles from at least two and possibly three individuals were obtained from the pooled wet and dry left hand, the wet and dry right fingernails and the wet and dry right wrist swabs. The major DNA components identified could be attributed to the complainant. However, due to the nature of the remaining minor DNA components, Ms Murakami was unable to conclusively assign any of the DNA components to any individual/s. She could not say whether or not the appellant was a contributor to the DNA found on the complainant's left hand, right fingernails and right wrist.

[70] The evidence referred to in the second dot point at [69] above was not relied on by the appellant. It adds nothing to either the defence case or the Crown case as the appellant admitted that he had sexual intercourse with the complainant.

[71] Mr Lawrence SC relied on the other evidence contained in the Statement of Julie Ann Murakami to make the following submissions. First, although the traces of saliva found on the complainant's left and right breasts were not attributed to any person, it is a reasonable possibility that the saliva was the appellant's, given that the appellant's DNA was found to be present on samples taken from the complainant's left and right breasts. Both the DNA

evidence and the finding of the saliva on the complainant's breasts was evidence, independent of the appellant, which supported the appellant's evidence that he and the complainant had consensual sex in her car on the way from Bounce Nightclub to the Metro Apartments. The appellant gave evidence that he touched the complainant's breasts with his hands under her blouse and sucked her breasts before bending her over to have sex with her.[75] Further, the traces of saliva found on the complainant's breasts buttressed the credibility of the appellant and discredited the complainant's evidence. The complainant gave no evidence about the appellant touching and sucking her breasts. Her evidence was inconsistent with these objective facts.

[72] Second, Mr Lawrence SC submitted that the absence of the appellant's DNA on the wrists of the complainant casts doubt over the complainant's evidence that the appellant pinned her down on his bed as she struggled during the alleged protracted sexual assault. The complainant said in her evidence that the appellant physically restrained her by grabbing her hand and putting her hand behind her head; further, when he was on top of her, his hand was pinning down her hand to prevent her from moving.[76] She also said that, when the appellant attempted to punch her to the face, she blocked the punch with her left hand, such that the punch struck her on the back of that hand.[77] If the complainant's description of what occurred was accurate, the

[75] AB 225.4.
[76] AB 61.5 - 62.2.
[77] AB 63.4.

appellant's DNA would have been found on her wrists. If DNA was found on the complainant's breasts then it should have been found on her wrists.

[73] In our opinion, the submissions of Mr Lawrence SC cannot be sustained. None of the new evidence is of such cogency as to show the innocence of the accused and it does not cause us to entertain a reasonable doubt. In the context of the trial evidence overall, we consider that the additional evidence sought to be tendered on appeal is of little or no consequence.

[74] The new evidence that saliva was found on the complainant's breasts does not, of itself, establish that the complainant consented to having sexual intercourse with the appellant, or even make her consent more probable, and it does not support the assertion that the sexual intercourse took place in the car. It simply supports the fact that there was an act of sexual intercourse and there was no dispute about that fact. Nor is the evidence of such cogency that it is capable of resurrecting the appellant's credibility.

[75] Further, the complainant denied having had consensual sex with the appellant in her car. The complainant was a credible witness. She was not cross-examined about the manner in which the appellant claimed to have had consensual sex with her in her car. If she was cross-examined, she may well have said that the appellant engaged in those activities while they were in his apartment. The evidence does not make it more likely that these acts occurred in her car. It is only the appellant who says that these acts occurred in the complainant's car and his credit is irreparably damaged as a result of

the extensive lies that he told the police during his formal interview. His evidence during the trial had all of the hallmarks of recent invention, it was inherently inconsistent and it lacked the ring of truth and reality.

[76] As to Mr Lawrence SC's second submission, the fact is that mixed DNA profiles were found from the wet and dry swabs taken from the complainant's wrist. The fact that Ms Murakami could not identify the contributors to the DNA is not a "powerful potential forensic point". There is no expert evidence that sufficient DNA to identify the appellant should have been found on the complainant's wrist given the complainant's description of what happened to her. While the complainant did not have a shower before the DNA samples were taken, it is likely that she would have washed her hands and wrists at some time between having sexual intercourse with the appellant and 9.30 am in the morning of 5 February, when Dr Johns examined her and took swabs for forensic testing. If she washed her hands, then this would be an explanation of the small amount of minor DNA found on her wrist. Likewise, the bangles on the complainant's right wrist may have also created problems for the collection of a sufficient sample of DNA from the wrist. Whether the complainant washed her hands or not, there *was* mixed DNA on the complainant's wrists, although the contributors to the minor components of that mixed DNA could not be identified. The proposed new evidence is therefore of a neutral quality. It does not prove or disprove anything.

[77] The Crown case was a strong case. The complainant was a credible witness who gave detailed evidence. She made an early complaint to Ms C that she had been raped by the accused. Ms C gave evidence that the complainant was very distressed at the time of complaint. The evidence of the complainant was supported in material respects by the email she sent at 5.33 pm on 4 February stating that she would never give her love to the appellant, the camera film footage which showed that the appellant had taken the complainant's bag when they got out of her car at the front of his apartment, the evidence from Dr Johns about the injuries to the complainant and the damage to her jewellery. It is highly unlikely that the complainant would have gone out wearing damaged jewellery. Moreover, the accused in his formal police interview had falsely denied having sexual intercourse with the complainant, and the Crown relied on that lie as evidence of consciousness of guilt.

[78] It follows that the additional evidence must be rejected. The proposed ground of appeal which depends on that evidence would thus fail. Leave to further amend the notice of appeal to add proposed ground 4 is therefore refused.

[79] A further reason as to why the new evidence should be rejected is that the appellant through his counsel made a deliberate tactical decision to limit the extent to which DNA evidence was introduced at the trial. The reason for this was to try to avoid too much emphasis being placed on the DNA evidence so as to minimise the fact that the appellant had at first denied that

he had sexual intercourse with the complainant and thereby not cause the jury to give a great deal of consideration to the possibility that the appellant may have changed his story after being "found out" as a result of the DNA evidence. "Where deliberate tactical decisions are made on the part of the accused as to evidence that should or should not be called there will be no miscarriage, in holding the accused to such decisions, even though it is conceivable that other decisions or something else may have worked better."[78]

[80] We now turn to consider the grounds of appeal and proposed ground of appeal identified at [2] above.

Ground 1 – corroboration

[81] The first ground of appeal seeks to attack the trial judge's direction to the jury as to whether the injuries to the complainant and damage to her property was capable of corroborating her evidence of non-consensual sexual intercourse with the appellant in his apartment.

[82] The complainant's evidence in relation to her injuries, by reference to photographic evidence, is summarised in [27] above. The injuries noted by Dr Tracey Johns are set out in [30]. The damage to the complainant's bangles is described in [31].

[83] The learned trial judge said this to the jury about corroboration:

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[78] *Ratten v The Queen* (1974) 131 CLR 510 at 517; *R v Abou-Chabake* (2004) 149 A Crim R 417 at 428.

… You must remember that Mr Osadebay does not have to prove anything. So it is not a question of saying, 'who do I believe most'? It's a question of whether the Crown has established the case against the accused man to that level of beyond reasonable doubt.

So for the Crown to succeed, for you to bring in a conviction, a finding of guilt, the Crown has to satisfy you of the truth and reliability of the complainant, that is, of the evidence of the complainant. And in those circumstances where we have this difficult situation that only two people are present, there is a rule of law that says you should look for corroboration of her evidence in other evidence.

Now, corroboration is evidence from a source independent of [*the complainant*] in this case, which supports her story, both that a crime was committed and that it was committed by the accused man, Mr Osadebay.

I have the role of telling you whether there is any evidence capable of amounting to corroboration and identifying that for you, and when I do that, you then have the role of determining, firstly, whether you accept that evidence, and secondly, if you do, whether it does amount to corroboration or whether it can be explained away.

Now if there is no corroboration of her evidence, so her evidence really is just her complaining, then there is a rule that you must - well I will put it this way, that it is dangerous for you to convict on her evidence and her evidence alone if that evidence is uncorroborated and you cannot convict or should not convict without first giving her evidence close and careful scrutiny. So you need to look at it very closely and very carefully.

If, having done that, you are satisfied that she is telling the truth and you are satisfied to that level of beyond reasonable doubt, then your duty would be to find him guilty. But before doing so, you must give her evidence close and careful scrutiny.

In this case, there are two groups of evidence that I am telling you are capable of amounting to corroboration and I expect that you are aware of these already. The first is the bruising and swelling to her fingers or the area between the fingers and thumb, and you have the photographs or you will have the photographs of those.

If your conclusion is that those came in the course of an attack upon her in the manner that she describes, being forced to have sexual

> intercourse while she was resisting, then that could amount to corroboration. The question for you is, firstly, whether you accept that that was where those injuries arose and whether in fact they arose in that circumstance. Okay, so if you do find those things then you can treat those as amounting to corroboration and again, it's a matter for you whether that is so or not.
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> The second lot is similar and that is the bangles. Mr Maley talked about those at the end. He said that could have happened anywhere. If you think that that could have happened anywhere, then of course it would not amount to corroboration. On the other hand, if you think that they were twisted in the manner that they were twisted in the course of a violent attack designed to have her submit to sexual intercourse, then it can amount to corroboration in those circumstances.
>
> So if you find that that evidence does corroborate, then you can take that into account in determining whether to find him guilty or not guilty. On the other hand, if you find that that evidence either does not support the case or does not really go one way or the other, then you will bear in mind that direction I gave you, that is, before you can find him guilty of any offence, you must subject her evidence to close and careful scrutiny and it will only be after so doing, if you are still convinced beyond reasonable doubt, then you would be able to find him guilty. [79]
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> Dr Tracey Johns … she was the doctor who examined [*the complainant*] … She told you she saw the swelling and bruising on the finger and thumb area of the left hand and you have had the photographs of that. She described the bruising as appearing to be from blunt trauma. And again, I say to you that you need to think about whether that supports [*the complainant's*] story or it does not.[80]

[84] The learned trial judge went on to refer the jury to the defence submission that the injuries to the complainant were minor, inconsistent with a violent struggle and may have been caused in some other way, even in consensual sex in the back of a vehicle.[81]

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[79] AB 485.8 - 487.2.
[80] AB 499.4.
[81] AB 506.8.

[85] It is for the trial judge to identify evidence which may, at law, be capable of amounting to corroboration, but whether it is corroborative is a question of fact for the jury.[82] In the present case, the learned trial judge was not correct in directing the jury that "… there is a rule of law that says you should look for corroboration of her evidence in other evidence". There was no such rule, and corroboration was not essential as a matter of law. However, the error, such as it was, did not disadvantage the appellant. The trial judge was properly able to alert the jury to the desirability of looking for evidence capable of amounting to corroboration.

[86] At trial, the central issue was consent. That issue was confused by the fact that the appellant, having initially denied having had sex with the complainant, subsequently gave evidence that he had had sex with the complainant, but said that the sex was consensual and had taken place in a different location to that alleged by the complainant. Notwithstanding that alternative version of events, the issue of consent remained the central issue.

[87] We have already summarised at [20] to [27] the evidence of the complainant about the significant physical force which she said the appellant had used during the protracted sexual assault upon her and the significant degree of resistance she offered. Evidence of bruising and swelling, and of damage to bangles, could support the oral evidence of the complainant and make more probable her evidence that she did not consent to sexual intercourse with the

[82] *Eade v The King* (1924) 34 CLR 154 at 157.5.

appellant; that she vigorously resisted; and that she was physically overborne.

[88] There are difficulties, however, in characterising the evidence of physical bruising and swelling, and of damage to bangles, as "corroborative" in the strict sense referred to in the authorities, because that evidence does not implicate the appellant as perpetrator.[83] Mr Nathan submitted that the purpose for which the evidence is led (namely non-consent) should be taken into account to determine the whether the evidence on that issue is independent of the witness whose evidence is sought to be corroborated. He argued that the photographs and evidence of injuries given by Dr Tracey Johns, including Dr Johns' opinion that one of the injuries was caused by blunt trauma, was evidence independent of the complainant's evidence. It was evidence of what Dr Johns observed when she examined the complainant. As a result, he argued, that evidence was capable of corroborating a material particular of the complainant's account as to the issue of consent, namely the evidence that she sustained injuries of a specific kind, to specific parts of her body, in the course of resisting the appellant. However, it does not, as Mr Nathan conceded, corroborate the complainant's evidence as to *the appellant having caused the injuries*. His argument was essentially the same in relation to evidence of damage to the

[83] See, for example, *R v Baskerville* [1916] 12 Cr App R 81 at 91; *Reg v Kilbourne* [1973] AC 729 at 758, per Lord Simon of Glaisdale; *Doney v The Queen* (1990) 171 CLR 207 at 211; *R v Rayner* [1998] 4 VR 818 at 851, per Brooking J; *R v Taylor* (2003) 8 VR 213 at 221, per Winnecke P.

complainant's bangles.[84] In the alternative, if the evidence were to fail the test for 'corroboration' in the sense required by the authorities, Mr Nathan submitted that the evidence could be properly taken into account by the jury as circumstantial evidence tending to support the credit of the complainant and part of her evidence, hence making it more probable that her evidence was true.

[89] The difficulty for the respondent, which Mr Nathan's submission does not resolve, is that the trial judge explained the legal concept of corroboration to the jury in 'classic' terms:[85]

> "… corroboration is evidence from a source independent of [the complainant] in this case, which supports her story, both that a crime was committed and that it was committed by the accused man, Mr Osadebay."

[90] His Honour then informed the jury[86] that if there were no corroboration of the evidence of the complainant, it would be dangerous for the jury to convict on her evidence alone, and that the jury should not convict, in the absence of corroboration, without first giving the complainant's evidence close and careful scrutiny.

[91] His Honour did not tell the jury that they should give the complainant's evidence close and careful scrutiny in any event, whether it was corroborated or not. The implication of the trial judge's direction was that,

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[84] Appeal transcript 20/05/2013, p.91.
[85] See, for example, *Doney v The Queen* (1990) 171 CLR 207 at 211.
[86] See the extracted passage from the trial judge's directions at [87] above, the paragraph commencing "Now if there is no corroboration of her evidence …".

if the jury found that there was corroboration of the complainant's evidence, they did not need to give her evidence as close and careful scrutiny as was required in its absence.

[92] His Honour then proceeded to tell the jury that the evidence of physical bruising and swelling, and of damage to the complainant's bangles, was capable of amounting to corroboration. His Honour erred in this part of his direction. He attributed a greater 'status' to the evidence than it deserved. We refer to our observations at [88] above to the effect that the evidence did not implicate the appellant as perpetrator. His Honour's direction that the "two groups of evidence" were capable of amounting to corroboration was wrong as a matter of law. Further in that respect, it did not satisfy the criteria for corroboration stated by his Honour to the jury a short while earlier; in particular it did not support the complainant's evidence that a crime had been committed *by the appellant*. Given the implication in the trial judge's direction referred to at [91] above, that, if the jury found that there was corroboration of the complainant's evidence, they did not need to give her evidence as close and careful scrutiny as they otherwise might, there is a risk that the erroneous direction, taken on its own, could have misled the jury into not closely and carefully scrutinising the complainant's evidence. That is so, even though his Honour then continued by telling the jury that they first needed to conclude that the injuries and damage respectively arose in the manner described by the complainant.

[93] Our conclusion in relation to the first ground is that, although the evidence itself was properly admitted, as circumstantial evidence tending to support the complainant's credit and certain parts of her evidence and therefore the probability that her version of events was true, the learned trial judge erred in his direction to the jury that such evidence could amount to corroboration at law.

[94] However, the nature of the error was such that we believe we should apply the proviso contained in s 411(2) of the *Criminal Code*.[87] Having reviewed the whole of the evidence and the record of the trial, and having made due allowance for the natural limitations that exist in the case of appellate proceedings, we are left with no reasonable doubt as to the appellant's guilt of both of the offences on which the jury returned their verdicts of guilty. We consider that no substantial miscarriage of justice has actually occurred as a result of the trial Judge's misdirection about corroboration, for reasons we now explain.

[95] First, the implication in the erroneous direction, discussed at [91] and [92] above, was such that it becomes apparent only on careful analysis of the transcript of the direction in context. The implication was not immediately clear or obvious. In contrast, the trial judge made it very clear in his directions to the jury that the Crown needed to establish the case against the appellant beyond reasonable doubt. That is apparent not only in the extract

[87] See also *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35] and 315 [39].

of the trial judge's directions in [83], but throughout his Honour's charge to the jury.[88] His Honour even told the jury at one point:

> If you think she [*the complainant*] was lying about the crucial matters, but then of course you would find him not guilty because there would be a reasonable doubt. …[89]

[96] Further, his Honour nullified the error in his corroboration direction to a significant extent when he informed the jury that they should not accept the evidence of physical injuries or the evidence of damage to the bangles as corroboration unless in either case they accepted the complainant's evidence as to how her physical injuries or the damage to her bangles was caused.

[97] As we have stated at [77] above, the Crown case was a strong case and the appellant's evidence lacked credibility. The evidence in respect of which the learned trial judge erred in his corroboration direction was powerful circumstantial evidence which supported the complainant's version of events as to what she said had happened to her in the appellant's apartment. We are persuaded that the evidence properly admitted at trial proved the accused's guilt of the two offences beyond reasonable doubt.[90] In those circumstances, it would not be appropriate to order a retrial.

[98] In the circumstances, we do not allow the appeal on this ground even though we have found it to be made out.

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[88] See AB 482.5; 485.9; 488.4; 489.8; 491.1; 501.5.
[89] AB 488.5.
[90] *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

Ground 2 – direction as to lies

[99] The second ground asserts that the learned trial judge erred in his directions to the jury on the question of lies by the appellant. There was no issue that the appellant had lied in the course of his police interview, as referred to in [48] above, in that, when asked directly, he denied having had sexual intercourse with the complainant the previous night. The appellant acknowledged that lie in his evidence in chief, claiming that he had panicked when being interviewed by the police.[91]

[100] In the course of his charge to the jury,[92] the trial judge gave the following instruction:

> … a lie is a deliberate untruth. It requires, on the part of the witness, a deliberate, conscious decision to say something to you which the witness knows is untrue. That is what a lie is. It is not a mistake, it is not being confused, it is telling a deliberate, conscious untruth. And as I have said to you before, just because a witness's evidence is not accepted by you does not mean that the witness is lying. It can be not accepted for many, many reasons.
>
> There are a few things I want to say about lies. The first thing is that if you find that Mr Osadebay lied, and indeed he acknowledged that he did lie in relation to his interview with police when he said, "I did not have sex with her that night", and it is an admission before you that he did have sex with her that night, you cannot turn a statement such as that necessarily into an admission of guilt. It must depend upon all of the surrounding circumstances.
>
> The only way that you could use a lie such as that as support of finding of guilt would be that if you thought that the witness was telling a lie because he knew that to do otherwise would show he was guilty, so that it was a lie that an innocent man would not tell.

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[91] AB 272.4.
[92] AB 487.

> So you can tell untruths inadvertently and that would not be indicative of guilt. But if you tell a lie where it is explicable only on the basis that the truth would implicate the accused man in the offence, then you may use that as evidence going towards a finding of guilt. In this case you need to think about the lie that has been told and whether it does fall into that category of a lie being told because the accused man thought that if he did not tell a lie he would be found guilty, he would be admitting guilt.
>
> What he says to you of course is that he panicked. And Mr Maley says to you, "Well look at the video. You can see him panicking." And indeed, Mr Osadebay himself said that: "You could see that I was uptight and I was panicking". And a serious allegation has been made by me, I am in an unfamiliar situation. Well, what if I say that I had sex with her in the car? Is that going to get me into trouble? No, I'm not going to tell them that. I will tell them a lie. That is one way of looking at it.
>
> The other way of looking at it is that he thought that if he told the truth there he would acknowledging that he did in fact commit an offence that night. So I will leave that with you but it is important to remember that a mere fact that a lie has been told does not mean that the opposite position of the lie is the truth, it doesn't mean that an offence has been committed because it can be explained in any number of ways, as Mr Maley sought to do.

[101] Mr Lawrence SC contended in written submissions that the trial judge's directions in relation to lies were "on the issues and evidence of this case, inadequate".[93] At the appeal hearing, Mr Lawrence acknowledged that there was no legal error in the directions but maintained that they were inadequate. He argued that "more circumspection and caution should have been applied". When asked what the appropriate direction should have been, Senior Counsel submitted: "… probably just more emphasis on caution". Mr Lawrence added, "I'm happy to concede it's not significant, but in the

[93] Supplementary document headed "Appellant's Outline of Submissions in relation to Ground 2".

way the case was balanced there should have been more said in that regard."[94]

[102] In our view, the direction was unexceptional. His Honour explained that a lie needed to be a deliberate untruth; he precisely identified the admitted lie; he carefully explained that telling a lie did not necessarily amount to an admission of guilt, depending on the surrounding circumstances; he explained that, before the jury could use the lie to support a finding of guilt, they needed to be satisfied that the appellant had told the lie because he thought that to tell the truth would show he was guilty of the offence. His Honour invited the jury to consider carefully whether the lie told by the accused was a lie which an innocent man would not tell, and in that context put to the jury the appellant's explanation that he told the lie because, at the time, he was uptight and panicking.

[103] The learned trial judge's direction complied with the requirements stated by the majority in *Edwards v The Queen*.[95] The jury was entitled to conclude that the lie was told out of consciousness of guilt.

[104] We therefore dismiss ground 2 of the appeal.

Ground 3 – 'unsafe and unsatisfactory'

[105] As mentioned in [2] above, the third ground of appeal asserts that: "On all of the trial evidence it was not open to the jury to be satisfied beyond reasonable doubt on either of the two counts."

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[94] Appeal transcript, 20/05/2013, p.54
[95] (1993) 178 CLR 193 at 209.2 and 211.3, per Deane, Dawson and Gaudron JJ.

[106] The question for this Court is whether it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt. In *M v The Queen*,[96] the majority of the Court said:

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

[107] It is not sufficient for the present appellant to show that there was material which the jury might have considered sufficient to preclude satisfaction of guilt beyond reasonable doubt. As Hayne J said in *Libke v The Queen* (Gleeson CJ and Heydon J agreeing):[97]

> …. the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt. … It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. In the present case, the … evidence did not require the conclusion that

[96] (1994) 181 CLR 487.
[97] (2007) 230 CLR 559 at [113].

> the jury should necessarily have entertained a doubt about the appellant's guilt.

[108] Therefore the question is whether the state of the evidence was such as to preclude a jury acting reasonably from being satisfied of guilt beyond reasonable doubt. In addressing this question, the appellate court must pay full regard to the fact that the jury has had the benefit of having seen and heard the witnesses.[98]

[109] Mr Lawrence directed the focus of his arguments at three aspects: (1) the discrepancy in the evidence of complaint; (2) the evidence which showed that the appellant's DNA was found on the complainant's breasts; and (3) the absence of evidence from neighbours in the Metro Apartments to support the complainant's evidence that she screamed or yelled while in the appellant's apartment. Mr Lawrence argued that the latter aspect would, on its own, compel a conclusion of reasonable doubt. We are unable to agree.

[110] We summarized the evidence of complaint and identified the discrepancies at [32] to [36] above. We set out the submissions of Mr Lawrence at [38], and analysed and discussed them at [39]. The discrepancy between the evidence of the complainant and Ms C, of the one part, and HO, of the other part, does not in our judgment raise any reasonable doubt because there were obvious grounds on which the jury could have rejected the evidence of HO.

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[98] *R v Nguyen* (2010) 242 CLR 491 at 499 [33].

[111] In relation to the DNA on the complainant's breasts Mr Lawrence contended that the presence of the appellant's DNA on both of the complainant's breasts was "not only inconsistent with any evidence the complainant gives but also entirely consistent with the appellant's evidence of consensual sex."[99] For the same reasons as those set out at [74], [75] and [77] above, we reject the submission that the presence of the appellant's DNA on both of the complainant's breasts is inconsistent with the complainant's evidence. It is no more than a detail which was absent from her evidence in chief and she was not asked about that when she was cross-examined. Further, although the DNA evidence may be consistent with the appellant's evidence about what he did while he was having sexual intercourse with the complainant, it is no more than consistent with that evidence. The evidence does not, of itself, establish that the complainant consented to the sexual intercourse, or even made her consent more probable, and it does not support the assertion that the sexual intercourse took place in the car. It simply supports the fact of sexual intercourse and there was no dispute about that fact. In any event, it was open to the jury to reject the appellant's evidence because of the prior inconsistent lies that he told to the police. We would regard the appellant's evidence of consensual sexual intercourse in the complainant's car at a point somewhere between Bounce Nightclub and the Metro Apartments as untruthful. It was a recent invention made to accommodate the appellant's sperm being found in the complainant's vagina. The fact that the DNA

[99] Appellant's Outline of Submissions, par 17.

evidence is consistent with the appellant's fanciful reconstruction does not in our judgment raise the prospect that the jury should necessarily have entertained a reasonable doubt about his guilt. There is nothing in the DNA evidence which would require the conclusion that the jury must have entertained a doubt about the appellant's guilt.

[112] We turn finally to the absence of evidence from neighbours in the Metro Apartment building to support the complainant's evidence that she screamed or yelled while in the appellant's apartment.

[113] There is objective evidence that the complainant was upstairs in the building for approximately 50 minutes. The evidence of both the appellant and the complainant is to the effect that the complainant spent all that time in the appellant's apartment on the 10th floor. On the complainant's evidence, she was screaming, yelling and struggling for much of the time she spent in the appellant's apartment. However, no one in the building heard the complainant, with the possible exception of PB, whose evidence is summarised at [51] and [52] above.

[114] Although it is possible that the complainant exaggerated, consciously or otherwise, the volume and persistence of her screaming and yelling, her evidence is corroborated to a significant extent by statements made to the police by the appellant and by the appellant's own evidence at trial. Thus, the complainant's evidence set out at [25] above that the appellant told her not to scream because she was disturbing the neighbours and, when she

screamed louder, that he said to her “Be quiet, you’re disturbing the neighbours” is consistent with statements made by the appellant to the police set out in [48] above that the complainant created a scene and became loudly argumentative at his apartment, and that she “snapped”. Moreover, the complainant’s evidence is supported by the evidence of the appellant at trial, set out at [59], that when the complainant became more angry and more abusive, he said to her “No, you’re disturbing the neighbours because this is in the middle of the morning hour and people can hear you from the next door neighbour…”. He said (or suggested) in his evidence that the complainant then became more violent and aggressive, abusive and crying.

[115] It can thus be seen from the evidence of the appellant that the complainant made a considerable amount of noise while she was in his apartment (even though it was noise for a different reason, on his account). In that evidentiary context, the fact that residents of the other occupied apartments on the 10th floor of the building did not hear or report any noise has considerably lessened significance.

[116] In our opinion, the absence of evidence of cries for help is not such as to preclude a jury acting reasonably from being satisfied of guilt beyond reasonable doubt. Indeed, having regard to all the evidence, the jury might legitimately not have attached much significance to the absence of such evidence.

[117] We therefore dismiss ground 3 of the appeal.

Conclusion

[118] The appeal and application for leave to appeal should be dismissed.
