AM v The Queen [2006] NTCCA 18

PARTIES:	AM v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 12/2005 & CA 16/2005 (20317496)
DELIVERED:	13 September 2006
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JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ
APPEAL FROM:	Northern Territory Supreme Court, 20317496, 15 June 2005

CATCHWORDS:

CRIMINAL LAW – Appeal – Appeal against conviction – inconsistent verdicts – verdict not unreasonable – duplicity – evidence incorrectly excluded – appeal allowed – conviction set aside – retrial ordered.

Legislation:

Northern Territory Criminal Code, s 192, s 411.
Sexual Offences (Evidence and Procedure) Act, s 4.

Authorities:

Crampton v The Queen (2000) 206 CLR 161; *M v The Queen* (1994) 181 CLR 487; *MacKenzie v The Queen* (1996) 190 CLR 348; *R v Kirkham* (1987) 44 SASR 491; *R v Whittington* [2006] NTCCA 4, considered.

MFA v The Queen (2002) 213 CLR 606; *R v Tyson* [2005] NTCCA 9, followed.

R v Markuleski (2001) 52 NSWLR 82, doubted.

R v PMT (2003) 5 VR 50, applied.

REPRESENTATION:

Counsel:

Appellant:	P Priest QC, M Croucher
Respondent:	D Lewis, S Geary

Solicitors:

Appellant:	Pipers, Barristers & Solicitors
Respondent:	Office of the Director of Public Prosecutions

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

AM v The Queen [2006] NTCCA 18
No. CA 12 of 2005 & CA 16 of 2005 (20317496)

BETWEEN:

AM
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 13 September 2006)

Martin (BR) CJ:

Introduction

[1] The appellant was charged with one count of Indecent Assault and three counts of Gross Indecency. A jury convicted the appellant of one count of Gross Indecency, being count 2 on the Indictment, and acquitted the appellant of the remaining counts. The appellant appeals against his conviction on a number of grounds which require this Court to give detailed consideration to the evidence. Should the appeal against conviction be dismissed, the appellant appeals against the sentence of two years

imprisonment, suspended after the appellant serves four months, on the basis that the sentence is manifestly excessive.

Background

[2] In 2002 both the appellant and the complainant were teachers at a high school in Darwin. A close friendship developed which the complainant described as a very close and caring relationship. The appellant gave evidence that he and the complainant had a sexual relationship, but the complainant denied the existence of a sexual relationship. The complainant said it was clearly established between her and the appellant in 2001 that they would never have a relationship beyond being close friends.

[3] In May 2002 the appellant moved into a house owned by the complainant and occupied one of the three bedrooms. The complainant gave evidence that she was comfortable with the appellant sharing her home because she believed they had established the limits of their relationship very clearly. In stark contrast to the complainant's evidence, the appellant gave evidence that in April 2002, after a wedding at which he and the complainant attended, they had sexual intercourse in her bedroom. He said that after he moved into the complainant's home he sometimes slept with her in her bedroom and occasionally they had sexual intercourse. According to the appellant, he and the complainant were inseparable, but he did not consider that they were lovers.

[4] In October 2002 the complainant's home was damaged by fire. Through arrangements with the insurance company the complainant took alternative accommodation in a townhouse at the Mirambeena Resort. The appellant shared that accommodation with the complainant.

[5] According to the evidence of the complainant, she was suffering depression and taking antidepressant medication. A friend of the complainant, Ms O'Donohue, gave evidence of observing that when the complainant was on the medication and consumed alcohol, the effects of alcohol hit quickly and she became very drunk.

[6] On the Crown case the offence of Gross Indecency charged in count 2, of which the appellant was convicted, occurred during the evening of 25 August 2002. While the complainant was in a heavy drunken sleep, the appellant interfered with her left breast and genitalia and took photographs of those areas. The complainant gave evidence that she was unaware that the photographs had been taken until they came to light during the course of a subsequent police investigation following a complaint by the complainant later in 2002.

[7] The complaint to police followed events that occurred during the evening of 13 November 2002. A group of persons, including the complainant and the appellant, dined at a restaurant in the Mirambeena Resort. A quantity of wine was consumed. After the complainant and the appellant returned to the townhouse, the appellant gave the complainant a massage. According to the

complainant, she went to sleep during the massage and woke later in the night to find that her underpants had been removed. The removal of the complainant's underpants by the appellant was the subject of the first count on the indictment, being the charge of Indecent Assault, of which the appellant was acquitted.

[8] The complainant gave evidence that when she awoke without her underpants she saw a camera set up nearby. In a state of shock she went into the bathroom to check whether there was any semen on her legs, but did not find any. When she returned to her bed the camera was gone.

[9] The complainant said she felt uncomfortable and considered that the friendship with the appellant was over. Subsequently when she confronted the appellant he admitted removing her underpants and told her he was sorry and embarrassed, but denied taking any photographs. The complainant said she told the appellant she did not believe him and asked him to delete every photo he had taken to which he replied "Don't worry. I will".

[10] The complainant subsequently spoke to police who carried out investigations and seized the appellant's computer equipment. A number of photographs of the complainant's genitalia were recovered from the computer hard drive and a floppy disk through the use of a program which has the capability of recovering deleted files. It was agreed at trial that the appellant had taken photographs and subsequently deleted them from the computer and disk.

[11] As I have said, count 1 on the indictment of indecent assault was based upon the removal of the complainant's underpants. The remaining counts, all charging acts of gross indecency, were founded on the photographs recovered from the appellant's computer hard drive and the floppy disk. It was the Crown case that the photographs were taken when the appellant was either asleep or in such a drunken condition that she was not aware of the photographing. The complainant gave evidence that she was never aware of the taking of any of the photographs and did not consent to such photographs being taken. The appellant gave evidence that the photographs were taken with the positive consent of the complainant.

[12] The primary issues at the trial centred on the nature of the relationship between the appellant and the complainant and the circumstances in which the complainant's underpants were removed and the photographs were taken. In particular, the critical issue was whether the Crown had proved that the complainant did not consent because she was asleep or in such a condition that she was unaware of the removal of the underpants and the taking of photographs.

Conviction – Count 2

[13] In respect of count 2 of which the appellant was convicted, the Crown relied upon two photographs. The first depicted the complainant lying on her back on a couch in the lounge room of her house with her eyes shut and her left

breast exposed. The second depicted the complainant's shorts and underpants pulled to one side exposing her genitalia.

[14] The photograph depicting the complainant's breast was the only photograph in which the complainant's face and clothing were visible. It was the only photograph about which the complainant was able to give evidence as to the timing. By reason of the clothing and a lei around the complainant's neck, she was able to say that the photograph must have been taken during the evening of 25 August 2002 being the night after she had given a "tropical oasis" party. According to the complainant and Ms O'Donohue, the complainant got drunk at the party and continued drinking during the following day in what was described as the "clean-up" party. The complainant again became significantly affected by alcohol. She said she was very tired and fell asleep on the couch. She was unaware that the photographs relating to count 2 were taken.

[15] The appellant denied taking the photographs relating to count 2 on the occasion described by the complainant. He said that on the occasion identified by the complainant as the day of the clean-up party he worked during the day and left work at about 8.20 – 8.45pm. He said that when he arrived home shortly after 9pm the complainant was not on the couch and he went to bed without seeing or speaking to her.

[16] According to the appellant, the photographs relating to count 2 were taken approximately one month before the clean-up party during an evening when

he and the complainant consumed sufficient alcohol to become drunk. They were having fun getting dressed up and had sexual intercourse. During the sexual activities, but separated by a short period, the appellant took the photographs with the consent of the complainant. The appellant said that the complainant removed her breast from her clothing for the purposes of the photograph and suggested that he take a photograph of her vaginal region.

Grounds 1 and 2 – Unreasonable Verdict

[17] The appellant complains that the verdict of guilty with respect to count 2 is inconsistent with the acquittals on the other counts and that by reason of the doubt experienced with respect to the complainant's evidence concerning the counts on which the appellant was acquitted, the jury should have had a doubt about the appellant's guilt with respect to count 2. The appellant argued that the verdict with respect to count 2 was unreasonable and that "there is a significant possibility that an innocent person has been convicted": *M v The Queen* (1994) 181 CLR 487 at 494.

Principles

[18] The principles are not in doubt. Although the appellant relies upon inconsistency between the verdicts, the test to be applied by this Court is whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence: s 411 of the Criminal Code; *MFA v The Queen* (2002) 213 CLR 606. In determining whether the

verdict was unreasonable, "the court must ask itself … whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty": *M v The Queen* (1994) 181 CLR 487 at 493.

[19] Where, as in this case, it is suggested that the inconsistency between the verdicts is of significance to the question of whether the verdict of guilty was unreasonable, "the test is one of logic and reasonableness": *MacKenzie v The Queen* (1996) 190 CLR 348 at 366. In a joint judgment in *MacKenzie* Gaudron, Gummow and Kirby JJ cited with approval the remarks of Devlin J in *R v Stone* (unreported, 13 December 1954) as stating the test:

> "He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand."

[20] Later in their judgment, having approved of the remarks of King CJ in *R v Kirkman* (1987) 44 SASR 591 at 593 in which his Honour expressed the view that appellate courts "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", their Honours said (368):

> "Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an

> affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. … It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. 'It all depends upon the facts of the case'". (citations omitted)

[21] In *MFA*, in a joint judgment Gleeson CJ, Hayne and Callinan JJ identified a number of features emphasised in *MacKenzie*:

> "34. Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that system. A number of features of that context were emphasised in *MacKenzie*. They include the following. First, as in the present case, where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count. This will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part. Secondly, emphasis will invariably be placed upon the onus of proof borne by the prosecution. In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail,

> or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others. Thirdly, there is the consideration stated by King CJ in *R v Kirkman* (1987) 44 SASR 591 at 593, and referred to in later cases eg *MacKenzie v The Queen* (1996) 190 CLR 348 at 367-368: it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only. And there may be an interaction between this consideration and the two matters earlier discussed."

[22] It is also appropriate to bear in mind that their Honours rejected the view that where multiple offences are alleged involving the one complainant, verdicts of not guilty on some counts "necessarily reflect a view that the complainant was untruthful or unreliable, and that an appellate court should consider the reasonableness of guilty verdicts on the basis that the complainant is a person of damaged credibility" (618). Their Honours emphasised the need to consider the facts of the individual case.

Basis of Verdicts – inconsistency - unreasonableness

[23] In my opinion, a number of factors combine to demonstrate that the different verdicts can stand together and do not represent "an affront to logic and commonsense".

[24] First, the jury was given the usual direction concerning the burden of proof resting on the prosecution. In particular, the trial Judge emphasised that it was for the Crown to prove both lack of consent and that the appellant knew the complainant was not consenting to the particular act or might not be consenting and proceeded nevertheless. In that context her Honour directed the jury that the Crown was required to negative a mistaken belief by the

appellant that the complainant was consenting. The jury was instructed that a mistaken belief does not have to be based on reasonable grounds.

[25] Secondly, the jury was instructed that they were required to consider each charge separately. The Judge emphasised that it was important in the jury's consideration of the evidence with respect to each count that each count was to be considered as a "completely separate and individual" charge.

[26] Thirdly, the jury was given the usual instruction that they were free to accept part of the evidence of a witness and reject other parts. Her Honour directed the jury to assess the evidence of the appellant in the same way as assessing the evidence of all other witnesses. In particular the jury was instructed that like any other piece of evidence, it was a matter for the jury whether the jury accepted or rejected the evidence of the appellant in whole or in part. The trial Judge emphasised that if the jury disbelieved the appellant with respect to the question of consent, they could not use that rejection as positive evidence that the appellant knew the complainant was not consenting or may not have been consenting and it remained necessary for the jury to be satisfied from other evidence that the complainant was not consenting.

[27] Thirdly, and significantly, in respect of those counts on which the appellant was acquitted, the evidence of the complainant that she was asleep at the relevant times stood alone. The photographs that were the subject of the counts on which the appellant was acquitted did not depict the complaint's

face. The complainant was unable to say when those photographs were taken. It was not possible for the jury to draw any inference from those photographs as to whether the complainant was asleep or otherwise.

[28] In contrast to the lack of evidence in support of the complainant with respect to the counts on which the appellant was acquitted, the evidence of the complainant concerning the circumstances surrounding count 2 was supported in significant respects by the photographs and evidence of other witnesses. As I have said, the photograph depicting the exposed breast showed the complainant's face and clothing together with the couch on which she was lying. By reason of the clothing and the identification of the couch, the complainant was able to identify the occasion as the evening she fell asleep after the clean-up party. Evidence independent of the complainant concerning the tropical oasis and clean-up parties and the clothes worn by the complainant at those parties supported the complainant's evidence.

[29] The evidence of the complainant that she became significantly intoxicated on the occasion of the clean-up party was supported by other evidence. Ms O'Donohue gave evidence that she left the clean-up party just on dark and, at that time, the complainant was drunk. Ms O'Donohue used the expressions "certainly quite drunk", "very drunk" and "pretty drunk". In Ms O'Donohue's words, "it was seven o'clock and had been a big day plus a big night the night before".

[30] As mentioned, the complainant gave evidence that she fell asleep on the couch. The evidence of the complainant's drunkenness was relevant to the likelihood that the complainant would fall asleep. In this context, evidence concerning the complainant's intoxication was to be considered in conjunction with the evidence of Ms O'Donohue about the effects of alcohol upon the complainant when consumed in conjunction with the anti-depressant medication.

[31] The evidence of the complainant that she fell asleep on the couch was directly supported by the evidence of Ms Kermond who attended at the complainant's home early in the evening of the day of the clean-up party. Ms Kermond and a friend observed the complainant asleep on the couch. It was not in dispute that the couch was the couch on which the complainant was lying when the photographs relating to count 2 were taken.

[32] Ms Kermond said that she and her friend attended at the complainant's home at "sixish". No one else was present. It was open to the jury to find that Ms Kermond arrived after Ms O'Donohue had left the premises.

[33] Ms Kermond said that she and her friend knocked several times on the front glass sliding door and called out. She could see the complainant asleep on the couch. Having observed the complainant asleep, Ms Kermond and her friend knocked a bit louder and started calling out. As there was no response, they walked to the rear of the premises, opened the unlocked rear security door and called out something like "Hello, hello is anyone there?"

Again there was no response. Ms Kermond and her friend entered the kitchen and lounge, still calling out, and looked for a CD before leaving. The complainant remained asleep.

[34] In addition to the combination of evidence supporting the complainant's evidence that she fell into a drunken sleep, the photographs that were the subject of count 2 also provided significant support for the evidence of the complainant. The photograph depicting the complainant's breast shows the complainant lying flat on her back with her right arm extended upwards and her hand in the vicinity of the top of her head. The complainant's eyes are closed and her mouth is open in a manner highly suggestive of the complainant being asleep.

[35] The second photograph that was the subject of count 2 does not depict the complainant's face, but the complainant's right arm is partially visible and appears to be in a position similar to the position in which it is depicted in the other photograph. The camera was positioned between the complainant's legs very close to the surface of the couch on which the complainant was lying. By reason of the angle and the focus of the camera on the genitalia, the top half of the complainant's body is not visible. A hand other than the complainant's hand is visible pulling aside the complainant's shorts and underpants for the purposes of taking the photograph.

[36] Finally with specific reference to the evidence concerning count 2, as I have said the appellant gave evidence that when he arrived home shortly after 9pm the complainant was not on the couch and he went to bed without seeing or speaking to her. The jury rejected that part of the appellant's evidence. Having done so, the jury was left with the finding that the complainant was in a drunken sleep on the couch when the appellant arrived home and he had falsely denied in evidence that the complainant was asleep on the couch. Given the independent support for the complainant's evidence and those findings, and notwithstanding that the jury were not satisfied beyond reasonable doubt in respect of other counts, it is not surprising that the jury found that the photographs were taken on that occasion and accepted the complainant's evidence that she was asleep when the photographs were taken. In those circumstances it was open to the jury to accept the complainant's evidence that she did not consent to the taking of the photographs or the physical acts required to expose her beast and to pull her clothing to one side exposing her genitalia. In addition, in those circumstances it is not surprising that the jury were satisfied that the appellant knew that the complainant was not consenting or realised she might not be consenting and proceeded nevertheless. Whatever view the jury took of the relationship between the complainant and the appellant and of the evidence relating to the other counts, the findings that the complainant was asleep and that the appellant falsely denied that she was

asleep on the couch would almost inevitably have led to such conclusions as to lack of consent and the appellant's state of mind.

[37] As to the remaining counts on which the appellant was acquitted, to adapt the wording of their Honours in *MFA* to which I have referred, the acquittals might simply reflect a cautious approach to the discharge of a heavy responsibility, particularly in the context of evidence concerning the relationship between the appellant and the respondent. It was open to the jury to conclude that the boundaries of the relationship were, at the least, blurred. This bore directly upon the appellant's state of mind and belief. The jury heard uncontested evidence of the very close relationship which included evidence from the complainant that about once a month she permitted the appellant to share her bed. In this context Ms O'Donohue gave evidence that she thought the appellant had a crush on the complainant and that there had been "some sort of misunderstanding" in connection with the events at the Mirambeena involving the removal of the complainant's underpants as charged in count 1.

[38] In all the circumstances I am satisfied that there is a logical and reasonable basis for the jury having returned different verdicts. In my view it was open to the jury to be satisfied of the appellant's guilt with respect to count 2.

Ground 3 – absence of direction – complainant's credibility

[39] In conjunction with the complaint concerning the inconsistency between the verdicts, the appellant submitted that the trial Judge erred as a matter of law

in failing to give a direction in the form of a warning "along the lines that if they had a reasonable doubt about the complainant's credibility on one count, it might be difficult to see how the evidence of the complainant could be accepted in relation to other counts." Particular reliance was placed upon the decision of the New South Wales Court of Criminal Appeal in *R v Markuleski* (2001) 52 NSWLR 82.

[40] The failure to give a direction of the type suggested is not an error of law. Whether such a direction is required or appropriate must be determined according to the facts of the individual case. In this area, the authorities are far from unanimous as to the circumstances in which such a direction should be given. Doubts have been expressed about the approach suggested in *Markuleski*: *R v Trainor* [2003] VS CA 200; *R v PMT* (2003) 8 VR 50; *Lefroy v R* (2004) 150 A Crim R 82; *R v LR* (2005) 156 A Crim R 354. Included in the reasons for those doubts is concern that such a direction would detract from the fundamental direction that the jury is required to consider each count separately and that it could, in some circumstances, open the way for propensity reasoning.

[41] It is unnecessary to discuss the numerous authorities that have grappled with this question. Nor is it necessary to endeavour to resolve the divergences of opinion. Speaking generally, in my view it is desirable to remind a jury that if they are not prepared to accept the evidence of any witness, including a complainant, with respect to a particular matter or count, their doubt in that regard should be taken into account in determining whether they are

prepared to accept that person's evidence on other matters or counts. Such a direction can be given in conjunction with the standard direction that the jury is entitled to accept or reject all or part of any witness's evidence. Depending on the circumstances, it may be appropriate to give a stronger warning that if the jury reject the evidence of a witness in respect of particular matters, they should approach the balance of the contested parts of that witness's evidence with particular care and exercise additional caution before acting on it. The directions required must be tailored to meet the facts of the particular case.

[42] In the matter under consideration, while it would have been preferable for the Judge to have given a general direction along the lines I have suggested, in the particular circumstances the failure to give a direction did not give rise to a miscarriage of justice. The jury was instructed that it was a matter for the jury whether the evidence of a particular witness was accepted in its entirety or in part. It is not peculiarly within the knowledge or experience of Judges that a doubt about one aspect of a witness's evidence might reflect upon the reliability of that witness's evidence in respect of other issues. In particular, it is not peculiarly within the knowledge of Judges that if a doubt exists as to the reliability of the complainant's evidence about events that are the subject of one count, a doubt in that regard should be taken into account in assessing the reliability of the complainant's evidence concerning other events that are the subject of other charges. These processes of reasoning are matters of commonsense that would be perfectly obvious to

juries generally and to the particular jury in the appellant's trial: *PMT* at [5] and [32].

[43] I have dealt with grounds 1 - 3 in respect of which leave to appeal was granted by a single Judge. Leave to appeal was refused with respect to ground 4. The appellant seeks the leave of this Court to pursue ground 4 and to add grounds 5 – 9. The Court heard full argument with respect to all grounds requiring leave.

Ground 4 - Video

[44] The appellant sought to introduce into evidence a video recording of the complainant engaging in sexual activities with a boyfriend while on holiday. The video was made a few months prior to the events that were the subject of the Indictment.

[45] The trial Judge ruled that the evidence was inadmissible. Her Honour's reasons were as follows:

> "Counsel for the defence, Mr Hartnett, has sought to tender on the voir dire a tape which I am informed shows sexual acts between the complainant and her boyfriend, and shows the complainant with her eyes closed and behaving in a certain way which indicates she has previously consented to such an act.
>
> Assuming the tape does demonstrate the complainant's behaviour with respect to certain sexual acts with her boyfriend, including her appearance of being asleep, I do not consider this as relevant to the issue of whether she consented to the acts of the defendant which are the basis of the four counts on indictment.

> I agree with the objection of the Crown to the tender of the tape on the voir dire, and I am not persuaded by counsel for the defence that it is necessary for me to view the tape.
>
> The second way in which the defence counsel say this tape is relevant is that the defence assert the complainant showed the tape to the accused and this precipitated subsequent actions by the accused.
>
> Again I do not consider this is relevant to the issue of consent and that it is inadmissible under the provisions of s 4(1) and (2) of the Sexual Offences Evidence and Procedure Act.
>
> I do not consider that the showing of the tape has been shown to be contemporaneous or that it is part of a sequence of acts or events that explain the circumstances in which the alleged offence was committed.
>
> I do not consider it as being shown to have substantial relevance to the facts in issue.
>
> For these reasons, the application for leave to show the tape to the complainant and/or ask questions about the tape is refused."

[46] The proposed evidence would necessarily amount to evidence relating to the complainant's sexual activities with a person other than the appellant. Section 4 of the Sexual Offences (Evidence and Procedure) Act prohibits the admission of such evidence without the leave of the court. In common with legislation throughout Australia, s 4 is intended to prevent cross-examination of complainants as to their chastity or sexual activities with persons other than the accused unless conditions of relevance are satisfied. The relevant part of s 4 is as follows:

> "4. **Rules of evidence in relation to sexual offences**

> (1) In an examination of witnesses or a trial, whether or not it relates also to a charge of an offence other than a sexual offence against the same or another defendant, except with the leave of the court, evidence shall not be elicited or led, whether by examination in chief, cross-examination or re-examination, relating to –
>
> (a) the complainant's general reputation as to chastity; or
>
> (b) the complainant's sexual activities with any other person,
>
> and the leave of the court shall not be granted unless the court is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue."

[47] Before leave can be granted pursuant to s 4, the court must be "satisfied" that the evidence has "substantial relevance to the facts in issue". This requirement placed a responsibility on counsel for the appellant to clearly identify for the trial Judge the nature of the evidence and how it possessed substantial relevance. If counsel was to adequately discharge this responsibility, it was necessary for counsel to clearly state how the video, in itself, possessed substantial relevance. Alternatively, if the relevance was found in events or conversations that occurred between the appellant and the complainant in relation to or in connection with the video, it was incumbent upon counsel to identify his instructions as to the events and to clearly identify how those events bore upon the issues at trial.

[48] Unfortunately, it must be said that the manner of presentation of the application to the Judge was less than satisfactory. The basis of the

application changed on a number of occasions. Submissions of behalf of the appellant were confusing and prolix.

[49] At the outset of submissions, counsel embarked upon a course that was bound to create confusion. Counsel did not explain the defence case as to relevance to the Judge. Nor was the Judge informed of counsel's instructions as to the involvement of the appellant in relation to the video. Rather, having indirectly indicated the application concerned cross-examination of the complainant with respect to her sexual activities with another person, counsel then referred to cross-examination of the complainant at the preliminary examination. That cross-examination centred on the complainant having taken a video camera on holiday and subsequently enlisting the aid of the appellant in transferring the contents of tapes recorded while on holiday onto a normal video camera cassette.

[50] After a lengthy discussion about s 4, counsel identified a number of questions which he would seek to ask the complainant. Presumably counsel expected the Judge to infer that he had instructions as to certain events that provided the basis for the questions.

[51] Having had the benefit of perusing the transcript of submissions at relative leisure, an opportunity not available to the trial Judge, it appears that counsel was seeking to ask the following questions; whether:

- the complainant sought the assistance of the appellant in transferring on to a single VHS cassette the contents of three small tapes of recordings

made of sexual activities between the complainant and another person while on holidays (the complainant's evidence at the preliminary examination suggests she would have answered in the affirmative);

- the appellant assisted in that process and, while the transfer was occurring, went for a bike ride with a friend;
- on return from the bike ride the transfer to the VHS had finished and whether the appellant helped pack it up;
- the complainant asked the appellant if he wanted to watch the video;
- three days later the appellant, in company with the complainant, watched the video and the complainant asked him to edit it;
- the video viewed by the appellant contained scenes of sexual activity between the complainant and another person;
- after watching the video the complainant and the appellant had sexual intercourse;
- at a later time a further discussion about the video occurred between the complainant and the appellant and, on that occasion, photographs of a sexual nature were taken of the complainant by the appellant;
- the viewing of the video together led to the taking of photographs of a sexual nature with the consent of the complainant;

- during the viewing of the video, sexually explicit photographs of the complainant taken during the same holiday were also shown to the appellant;

- the sexually explicit photographs taken of the complainant by the appellant were taken "in the context of speaking about the edited video and the sex scenes" (it is not entirely clear, but it appears that counsel might have been speaking of the photographs that were the subject of count 2).

[52] At no time during this lengthy submission did counsel for the appellant specifically inform the Judge that he had instructions that events occurred which underlay the proposed questions. Eventually counsel for the Crown informed the Judge that if asked the complainant would say that she and her boyfriend had rented a houseboat on the River Murray and taken a video which included film of each other. On her return to Darwin she needed assistance to transfer the film to a normal tape and the appellant assisted her in that exercise.

[53] Again with the benefit of detailed consideration of the transcript, I extract the following propositions put to the trial Judge by counsel for the appellant:

- The critical issue in the trial was the question of the complainant's consent.

- The “prime purpose” of the proposed evidence was not directed to the chastity of the complainant, “but rather to the activity of watching the video and the effect that that has on my client and that that leading to having sex later.”

- The proposed evidence showed the complainant engaging in consensual sexual activity while awake but appearing to be asleep.

- The video included explicit photography of the complainant’s genitalia.

- At the invitation of the complainant, the appellant not only dubbed the film onto a VHS cassette, but later watched the film in the company of the complainant.

- The sexually explicit scenes in the film were subsequently the subject of discussion between the appellant and the complainant in a context of consensual sexual activity between them and also in the context of the taking of photographs that were the subject of at least one of the charges.

- The fact that the complainant invited the appellant to watch the film with her, and that it was the subject of later discussion, bore directly upon the nature of the relationship between the complainant and the appellant which, in turn, was relevant to the question of consent:

> “[the proposed evidence was] directly relevant to the question of a relationship with the accused person and the fact that they have watched this video and what was on the video and that it gave rise to them having sexual activity and then later, your Honour, at a later time taking photos.”

[54] From my reading of the transcript, counsel did not put to the Judge that the proposed evidence was relevant to the appellant's state of mind concerning the complainant's consent or otherwise.

[55] I have viewed most of the video. To say the least, it is distasteful in the extreme. Speaking generally, it is precisely the type of evidence which could give rise to inferences as to the complainant's general disposition and which the Northern Territory Legislature, in common with Legislatures throughout Australia, has determined should not be admitted unless the evidence has substantial relevance to the facts in issue for some reason other than inferences the evidence might raise as to general disposition.

[56] It is readily apparent that during some of the recording the complainant was significantly intoxicated by alcohol, or affected by another drug, and that she was either asleep or in such a condition as to be incapable of making rational decisions. Various sexual activities are depicted which appear to have occurred on different occasions. At times the complainant closed her eyes during sexual activities. Some of the filming is directed to the complainant's genitalia in a manner similar to the photographs that were the subject of counts 2 – 4.

[57] In this Court, counsel for the appellant submitted that the video was of substantial relevance to the critical issue of consent. Counsel identified the relevance as having two aspects. First, that the complainant appeared to be asleep in the video when involved in consensual sexual activity. Counsel

contended that the video demonstrated that closing her eyes was a "characteristic" of the complainant's consensual sexual behaviour. This "characteristic", so it was said, contradicted the Crown case that the jury could infer from the closed eyes in the photograph that the complainant was asleep. In essence, this basis of admissibility was directed to the question whether the jury could rely on the photograph as evidence that the complainant was asleep or unconscious.

[58] Secondly, counsel submitted that the video was relevant to consent because it demonstrated that the complainant was prepared to have her genitalia filmed or photographed in a manner similar to the photographs relating to counts 2 – 4. In essence it was submitted that the Crown had advanced an argument to the jury that the complainant was unlikely to behave in this manner and, for that reason, the video possessed substantial relevance.

[59] As to the primary contention that the video established a "characteristic" which rebutted the Crown case of inference from the photograph that the complainant was asleep, in my opinion the fact that the complainant closed her eyes in the circumstances depicted in the video does not endow the video with substantial relevance to the facts in issue. The video depicts the complainant with her eyes closed during consensual sexual activity, but the fact that the complainant closed her eyes on the occasion filmed does not establish the existence of a "characteristic". The fact that the complainant closed her eyes during sexual activities with her boyfriend on an earlier and unrelated occasion does not possess substantial relevance by way of

assisting the jury in the interpretation of the photograph that is the subject of count 2.

[60] One area of potential relevance that has troubled me concerns the raising of an inference as to the willingness of the complainant to permit photography of her genitalia in a particular manner. On more than occasion the video depicts the complainant's genitalia in a manner similar to the photograph that is the subject of count 2 and to other photographs that were the subject of other counts. On one view, photography of genitalia in the manner disclosed by the video and the photographs, albeit during consensual sexual activity with a boyfriend, is an unusual occurrence accompanying sexual activity and the unusual nature of that occurrence is capable of giving rise to an inference that the complainant possesses a general disposition to permit such photography. On this view, the evidence is capable of bearing upon the likelihood that the complainant would consent to such photography by the appellant. Underpinning that line of reasoning is the assumption that such photography is not an activity that "usually" or "normally" accompanies consensual sexual activity and, in the absence of the video, would unfairly raise in the mind of the jury a serious question as to whether the complainant would be likely to permit herself to be photographed in such a position and manner.

[61] The alternative view is that there is no basis for an assumption that such activity is unusual and likely to raise such a question in the minds of the jury. On this view, the attempt to use the video evidence in this way bears a

remarkable similarity to the prohibited line of reasoning previously permitted in rape cases that a complainant's prior sexual activities with persons other than an accused were relevant to the likelihood that she would consent to sexual activity with the accused.

[62] As I am of the opinion that the video was admissible for other reasons, it is unnecessary for me to explore this line of reasoning further. Nor is it necessary for me to determine whether this process of reasoning would fall foul of s 4(2)(a) because, on this basis, the evidence could only have substantial relevance by reason of an inference it might raise as to "general disposition". In addition, whether on this basis the evidence would possess "substantial relevance" for the purposes of s 4 is a difficult question which need not be finally determined.

[63] Before leaving the line of reasoning based upon the suggestion that permitting such photography is an unusual activity, it is appropriate to consider the impact of the Crown prosecutor's final address to the jury. Underpinning a significant part of that address was the proposition that in endeavouring to create a fictitious story the appellant could only bring to bear his personal experience or information gained from reading adult magazines or watching movies. Counsel put to the jury that the version given by the appellant was "not the sort of thing that you might think that a person who really understood or had some knowledge of the relationship between men and women would come out with". In connection with one of the photographs of the genitalia, counsel reminded the jury of the

appellant's evidence that the complainant decided she would like a photograph of her private region and he decided he would like to get his face into that part of the short as well. Counsel continued:

> "Well Ladies and Gentlemen, you might have some difficult believing that that's how a person might act in those circumstances."

[64] A reading of those passages and the prosecutor's address in its entirety has left me with the impression that counsel was putting to the jury that people simply do not behave in the way suggested by the appellant by permitting photography of the type carried out by the appellant. This was allied with the proposition that the appellant did not understand that people did not behave in this way and this explained why the fiction he created lacked credibility.

[65] In my view, at the least the approach of the Crown prosecutor in his final address came perilously close to creating substantial relevance in the video. Again, it is unnecessary for me to finally determine the impact of that approach.

Relationship

[66] On the appeal counsel for the appellant emphasised the matters to which I have referred and did not pursue a submission that the video was relevant to the nature of the relationship between the appellant and the complainant. As mentioned, however, counsel at the trial identified the video evidence as bearing directly upon the nature of that relationship. At trial, but not on the

appeal, this contention was advanced in conjunction with the submission that the joint watching of the video and discussion about it gave rise to consensual activity between the complainant and the appellant, which consensual activity included the taking of photographs that were either the subject of at least one of the counts or of a similar nature.

[67] Although the case was presented to the jury on the basis that the critical issue was one of consent, underpinning the debate about consent was the conflicting evidence as to the nature of the relationship between the complainant and the appellant. As mentioned, the complainant maintained that the boundaries of their friendship were well established as friendship only that did not involve sex. According to the appellant, the friendship extended to a sexual relationship. The nature of the relationship was, therefore, a central feature of the trial that was directly relevant to the likelihood of the complainant consenting to the appellant taking the photographs that were the subject of counts 2 – 4. The nature of the relationship bore directly upon the question of consent and also upon the appellant's state of mind as to whether the complainant was consenting.

[68] If, as it appears from the questions that counsel at the trial said he wanted to ask the complainant, it was the defence case that the complainant had, in effect, invited the appellant to view the video, that fact was directly relevant to the nature of the relationship. It would also bear upon the credibility of the complainant's evidence that she would never consent to the appellant taking such photographs and that the boundaries of their relationship were

clearly established as being friendship only. Finally, if as it appears from the proposed questions, it was the defence case that having viewed the video together, the subsequent taking of some of the photographs that were the subject of the charges or photographs of a similar nature followed immediately upon discussion of the contents of the video, a directly relevant link would exist between the video and the offences under consideration by the jury.

[69] As mentioned, notwithstanding a question from this Court as to whether the proposed evidence was relevant to the relationship between the complainant and the appellant, counsel for the appellant did not pursue this issue. In these circumstances, counsel were invited to present additional submissions on this issue.

[70] In response to the invitation by this Court, the appellant disclosed in further written submissions that at trial counsel for the appellant was acting on instructions relating to events that were the foundation of the questions counsel sought to put to the complainant. The proposed questions reflected the instructions from the appellant as to those events. As I have said, those events would establish a direct link between the video and the taking of photographs and were directly relevant to the nature of the relationship between the appellant and the complainant. For these reasons, the contents of the video possessed substantial relevance to the primary facts in issue, namely, the complainant's consent and the appellant's state of mind.

[71] The video possessing substantial relevance to the facts in issue, and there being no basis upon which, notwithstanding that relevance, the video could reasonably have been excluded, it follows that the trial Judge erred in rejecting evidence relating to the video. Given the potential significance of the evidence, as a consequence of the wrongful rejection the trial miscarried and the conviction cannot stand. In the circumstances, it is appropriate to set aside the conviction and order a retrial.

[72] Having determined that the video is admissible and that a retrial should occur because the trial miscarried, a further issue should be mentioned. It concerns the proper approach at trial to the admission of the video into evidence.

[73] During submissions on the appeal, counsel for the appellant suggested that, at the outset, the video could be played to the complainant in front of the jury and the complainant asked to confirm that she appears in the video. In my view, that course should not be permitted.

[74] The video possesses no relevance merely because it is apparent that it is a film of the complainant. Unless relevant, the video is inadmissible. The video can only possess relevance if there is evidence that the complainant willingly showed the contents to the appellant. It is the willingness of the complainant to show the contents to the appellant that bears directly upon the nature of their relationship and upon the appellant's state of mind.

[75] Until relevance is established and the video is admitted into evidence, it is not appropriate to identify the contents of the video in the presence of the jury. It is a matter for counsel how the issue is approached, but until the complainant gives evidence that establishes the necessary relevance of the video such as acknowledging that she willingly permitted the appellant to view it, the contents should not be disclosed to the jury. Alternatively, for example, if the complainant denies willingly permitting the appellant to view the contents, the video will remain inadmissible, and its contents should not be revealed to the jury, until evidence from the appellant or some other source establishes relevance.

Ground 5 – Latent Duplicity

[76] As noted earlier in these reasons, on the Crown case the complainant was asleep when the offence of gross indecency charged in count 2 was committed. The Crown relied upon the photographs to prove the offence. The difficulty that is now said to have arisen is that the jury were given no assistance as to the act or acts that were the foundation of count 2 and were left to their own devices in determining which facts, or combination of facts, could support a conviction. Counsel for the appellant suggested that four possibilities were left, at least tacitly, to the jury:

(i) The removal by the appellant of the complainant's breast from her clothing (which in itself could involve a question as to whether such an act is grossly indecent as opposed to indecent).

(ii) The act of photographing the breast after removal from the complainant's clothing.

(iii) Moving aside the shorts and underwear to expose the complainant's genitalia.

(iv) The act of photographing the complainant's genitalia while the clothing was being held aside.

[77] Counsel for the Crown emphasised the way in which the trial was conducted, namely, on the basis that the sole issue to be determined by the jury was one of consent. However, while the issue of consent was a critical issue for ultimate determination by the jury, other significant issues emerged during the trial including the nature of the relationship between the appellant and complainant and the identification of the occasion on which the photographs that were the subject of count 2 were taken.

[78] Against the background of the way in which the case was conducted, counsel for the Crown contended that it was always the Crown case that the act of gross indecency charged in count 2 was a composite activity or course of conduct involving the removal of the breast and the pulling of the shorts and underwear aside to expose the genitalia, coupled with the taking of the two photographs. Counsel submitted that the jury was never advised that the acts of photography alone would be sufficient to found a conviction.

[79] It is necessary to have regard to the way in which the case was presented to the jury. In opening, counsel for the prosecution emphasised that the issue in the case was whether or not the complainant "consented to these things happening". Specifically, counsel said that counts 2 - 4 "related" to photographs. Counsel informed the jury that it was not in issue that the appellant took the photographs and continued by saying:

> "The issue is whether or not [the complainant] consented to them being taken".

[80] In his final address, counsel for the prosecution referred to the second, third and fourth counts charging gross indecency and identified each count as related to particular photographs. He continued by saying that the "single issue" was whether or not the complainant consented to the photographs being taken. The address of counsel concentrated on inferences to be drawn from the photographs and what counsel urged was a lack of credibility attaching to the appellant's version.

[81] Counsel for the appellant also put to the jury that counts 2, 3 and 4 related to the "taking of the photographs". Counsel also identified the central issue as whether the Crown had proved that the complainant was not consenting.

[82] Neither counsel spoke of the acts of removing the complainant's breast and pulling aside her clothing to expose her genitalia as part of the "act" of gross indecency. Those physical acts were not mentioned.

[83] At the outset of her summing up, the trial Judge identified the essence of each charge. Having dealt with count 1 relating to the removal of the complainant's underpants while she was asleep, her Honour continued:

> "I will in a few minutes be taking you through the elements of each of the offences, so I will explain that again in a bit more detail. Now count 2 is a charge of gross indecency without the consent of [the complainant] and *count 2 relates to the photos* that are in exhibit P9 and count 2 are the photos that appear on the first page of exhibit P9 and they have been referred to in the Crown allegation as photos that were taken by [AM] on the night of the clean up. What he is been referred to as a clean up party after the Hawaiian party in August.
>
> Count 3 is a count of gross indecency without the consent of [the complainant] and on the photo on the second page of P9 is *the photo that relates to count 3 and that is the allegation of taking the photograph* that is depicted there without the consent of [the complainant] at the Mirambeena Resort in November 2002.
>
> And finally, count 4 is a charge of gross indecency without the consent of [the complainant]. That count *relates to the photographs* that are set out on page 3 of the exhibit P9 and the Crown are not able to say when or where those photos were taken, other than it occurred sometime between 1 March 2002 and 1 December 2002. However, the *Crown allegation is of course that these photos were taken without the consent of [the complainant]*." (my emphasis).

[84] In giving subsequent directions as to the elements of the offence of gross indecency, the trial Judge spoke of the Crown being required to prove that the appellant "committed an act of gross indecency". However, her Honour did not give any direction as to the "act" that was the subject of each of counts 2, 3 and 4. Her Honour did not mention the physical acts of removing the complainant's breast and pulling aside her clothing.

[85] In my opinion, from the way the case was conducted, including the remarks of counsel and the directions given by the Judge, the jury would have been left with the clear impression that the "act" of gross indecency charged in count 2 was the taking of the two photographs. The jury might have convicted on the basis of the act of taking either or both of the photographs. Alternatively, without direction, the jury might have relied on the act of removing the breast from the clothing or the pulling aside of the shorts and underwear. The jury might have relied upon a combination of such acts.

[86] At trial counsel for the appellant did not raise any concern about the possibility of duplicity attending count 2. Nor did counsel raise any concern about the lack of particularity in the Crown presentation of its case with respect to count 2. Both counsel, and as a consequence of the conduct of both counsel, the trial Judge approached the trial on the basis that if the Crown proved that the complainant was asleep and did not consent to the taking of the photographs, and if the Crown proved that the appellant possessed the necessary state of mind, the Crown had proved the charges of gross indecency. There was never any question, for example, that the act of removing the complainant's breast from her clothing and photographing the breast might not amount to an act of gross indecency as opposed to being indecent. There was never any attempt to dissect the activities that were the subject of count 2.

[87] It is not difficult to appreciate why the trial was conducted in the manner described. No doubt counsel for the appellant wished to concentrate on

what he perceived was the critical issue. It appears likely that counsel did not perceive an advantage to the appellant by raising issues of a legal or factual nature which were peripheral to the critical issues to be determined by the jury. If counsel had complained about the lack of particularity or the possibility of duplicity, the Crown response might have been to split count 2 into two offences based on the individual photographs. There may have been other reasons "based upon confidential information and an appreciation of tactical considerations" unknown to this Court: *Crampton v The Queen* (2000) 206 CLR 161 per Gleeson CJ [17].

[88] Notwithstanding that it might have suited both the Crown and the appellant to proceed with count 2 based on more than one physical act and to conduct the trial in a way which concentrated upon the critical issues, there were difficulties attached to presenting the jury with one count based upon two separate episodes. Although the events that were the subject of count 2 occurred during a single period after the clean-up party while the complainant was asleep, those events involved separate physical acts of a different nature. The removal of the complainant's breast from her clothing was a separate physical act from the act of pulling aside of the shorts and underwear. Although the Crown was unable to identify what period intervened between those acts, it appears likely that they were separated by at least an act of photography. The distinct and separate acts, if done without the consent of the complainant and with knowledge of a lack of consent, amounted to separate offences. These circumstances are to be

contrasted with a single uninterrupted sexual assault comprised of touching various parts of the body or repeated acts of stabbing or shooting that culminate in the death of the victim and result in a single charge of murder: *R v Whittington* [2006] NTCCA 04. The circumstances are closer to the separate acts of intercourse that required separate counts in *R v Tyson* [2005] NTCCA 9.

[89] The importance of the rule against duplicitous counts in an Indictment cannot be doubted: *S v The Queen* (1989) 168 CLR 266 per Gaudron and McHugh JJ at 284; *Walsh v Tattersall* (1996) 188 CLR 77 per Kirby J at 104 – 112. Significant difficulties frequently arise, however, in the application of the rule and in determining whether multiple acts committed in a short space of time comprise a single crime. It appears that the High Court has adopted a stricter approached in this regard than courts in England and New Zealand: Kirby J at 109. Doyle CJ favoured a practical approach in *R v GNN* (2000) 78 SASR 293 centred on a number of factors including avoiding unfairness at trial, enabling a jury to be properly directed and avoiding uncertainty as to the basis upon which an offender has been convicted and is to be sentenced.

[90] In my opinion, while the individual physical act of interference and subsequent taking of a photograph can be regarded as a single act, the appellant should have been charged with separate counts relating to each of the events that subsequently became the subject of the photographs depicting the complainant's breast and genitalia. The charging of one count

has led to a level of uncertainty as to the basis upon which the jury convicted the appellant. In practical terms, however, the charging of one count did not cause any unfairness to the appellant. In addition, as the trial was fought solely on the basis of consent and there was no dispute that the appellant removed the breast, pulled the clothing aside and took the photographs, there is no reason to doubt that the jury proceeded on the basis that there was no dispute that the acts occurred and found against the appellant on the question of consent.

[91] In these circumstances, I am satisfied that no miscarriage of justice occurred by reason of the charging of a single offence based upon two acts which, individually, amounted to separate offences. The difficult question is whether in such circumstances the proviso can be applied, or whether the trial was "fundamentally flawed" and the proviso has no application because the defect "goes to the root of the proceedings": *Wilde v The Queen* (1988) 164 CLR 365 at 373. A decision in this regard would require a detailed examination of the authorities which, as I have decided the appeal should be allowed on another ground, is unnecessary.

Gross Indecency "upon"

[92] In the context of the jury being left with the impression that they could convict the appellant of gross indecency charged in count 2 on the basis of the act of taking either or both photographs, counsel for the appellant submitted that the mere act of taking a photograph could not amount to the

crime of gross indecency. Counsel contended that the wording of the crime of gross indecency found in s 192(4) requires physical contact between the offender and the victim.

[93] Section 192(4) is in the following terms:

> "(4) Any person who commits an act of gross indecency upon another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for 14 years."

[94] Having regard to the wide variety of meanings attaching to the word "upon", including "against", "in the direction of" and "towards", and bearing in mind the purpose of the legislative scheme and the context of the provision under consideration, I tend to the view that physical contact is not an essential feature of the offence. However, as the Court did not have the benefit of full submissions with reference to authority, it is not appropriate to finally determine this question.

Remaining Grounds

[95] Grounds 6 – 9 are complaints about directions or failure to give directions. At trial the alleged failure and impugned directions were not the subject of any comment by counsel for the appellant.

[96] Ground 6 is a complaint that the trial Judge erred in failing to direct the jury that evidence led in support of one count could not be used with respect to other counts. Ground 7 complains that the trial Judge erred in failing to

give any or a sufficient warning against propensity reasoning. In my view there is no substance in these grounds and it is unnecessary to discuss them.

[97] Ground 8 complains that the directions of the Judge as to the element of "gross indecency" were inadequate. In particular, the appellant submitted that the directions failed to instruct the jury properly as to the meaning of "indecent" and "gross". In my opinion, it would have been preferable for her Honour to have avoided reference to the Oxford Dictionary and to have given the jury additional assistance as to the meaning of the adjective "gross". However, as the trial was conducted on the basis that the conduct relied upon in each of counts 2 – 4, if it occurred without the complainant's consent, was grossly indecent, the directions were adequate and no miscarriage occurred by reason of the lack of additional assistance.

[98] Finally, ground 9 concerns the directions as to the "recent complaint" made by the complainant to a friend. The Judge gave a brief but adequate directions that the complaint could be used for the limited purpose of assessing the consistency of conduct of the complainant and her credibility. Although it would have been preferable to inform the jury that the complaint was not evidence of the truth of what was asserted, bearing in mind the nature of the complaint and the issues at trial, in my view the direction was adequate.

[99] Leave to appeal on ground 4 should be given. Leave to add ground 5 should be granted, but leave to add grounds 6 – 9 should be refused. For the reasons I have given in relation to ground 4, the appeal should be allowed.

[100] The convictions should be set aside and a retrial ordered. On the retrial either the Crown should elect which of the acts of removing the breast or pulling aside the clothing (plus photography in each instance) is relied upon, or the Crown should file a fresh Indictment charging separate offences.

Angel J:

[101] In my view leave to appeal on Ground 4 should be granted, the appeal should be allowed on that ground, the conviction on count 2 should be set aside and a retrial should be ordered on that count.

[102] I agree that the trial judge erred in preventing counsel for the appellant from questioning the complainant about the video and introducing the video into evidence. I agree with the Chief Justice that the trial judge ought to have received greater assistance from counsel who made submissions which confused rather than clarified the appellant's case and the real relevance of the video.

[103] It was the appellant's case that the complainant showed him the video which apparently depicts the complainant engaged in sexual activity with a former boyfriend. It apparently depicts the complainant at times with her eyes closed, seemingly asleep whilst in fact awake during sexual activity. On the appellant's case the video was watched by the appellant and the complainant

as a prelude to sexual activity which included, inter alia, the appellant taking photographs of the complainant's exposed genitalia.

[104] Given the appellant's case the video was admissible into evidence. Contrary to counsel's submission it was not admissible to demonstrate the possibility the complainant was not asleep when photographed by the appellant with her eyes closed. That possibility is evident upon viewing the appellant's photograph of the complainant – not viewing the complainant's activity on another occasion elsewhere with another. It is not the contents of the video in isolation which are admissible but the video in combination with the appellant's evidence of it being shown to him as a prelude to consensual sexual activity including his photographing the complainant. The video is admissible not to prove the truth of its contents but as an item of real evidence constituting what the appellant says was shown to him by the complainant as one of a sequence of events which included the disputed taking of photographs. Had the complainant shown the appellant a pornographic video from an "adult sex shop" such a video would be admissible on a like basis. It is the depiction of the complainant in the video which attracts the application of s 4 Sexual Offences (Evidence & Procedure) Act (NT) and the need for "substantial relevance to the facts in issue". It is the depiction of the complainant in the video and the showing of it to the appellant that in addition sheds light on the relationship between the complainant and the appellant – a relationship which the complainant asserts and the appellant denies – was platonic.

[105] The video was admissible into evidence on two different bases: it comprised an item of real evidence, the subject of an event – the complainant showing it to the appellant – which was one of a sequence of events explaining the circumstances in which an alleged offence was committed and it was also admissible because it was substantially relevant to the relationship between the parties.

[106] As we are ordering a retrial on count 2 I prefer not to discuss the other grounds of appeal and the further proposed grounds of appeal.

[107] I agree with the Chief Justice that on the retrial the Crown should either elect as to which act is said to constitute the act of gross indecency or file a fresh indictment.

Southwood J:

[108] I have had the advantage of reading the Reasons for Decision of Martin CJ. I agree with his Honour's opinions as follows.

[109] First, the different verdicts of the jury can stand together and do not represent an affront to logic and commonsense. I agree with his Honour's reasoning that as to those counts on which the appellant was acquitted, the evidence of the complainant that she was asleep stood alone. In contrast the evidence of the complainant about count 2 was supported by the photograph of the complainant which shows her breast to be exposed and the evidence of other witnesses including Ms O'Donohoe and Ms Kermond. In the

circumstances it would have been logical for the jury to have found that the prosecution only proved count 2 beyond reasonable doubt.

[110] Secondly, while it would have been preferable for the trial judge to have given the jury a direction along the lines of that considered by the New South Wales Court of Criminal Appeal in *R v Markuleski* (2001) 52 NSWLR 82, the failure of the trial judge to give such a direction did not amount to a miscarriage of justice.

[111] Thirdly, the trial of the appellant miscarried because the trial judge erred in rejecting the tender of the video which depicts the complainant engaging in sexual activity with a former boyfriend. The video of the complainant was substantially relevant to the questions of the complainant's consent and the appellant's state of mind. The video was relevant to the appellant's evidence about the relationship between the parties and the sequence of events culminating in the sexual acts which are the subject of count 2. The appellant said that the video was shown to him by the complainant prior to them engaging in consensual sexual activity which included the appellant photographing the complainant. However, the video is not relevant merely because it depicts the complainant. The video can only be relevant if there is some evidence at the trial that the complainant willingly showed the video to the appellant.

[112] Fourthly, the appellant should have been charged with separate counts relating to each of the specific events that are the subject of count 2:

R v Tyson [2005] NTCCA 9; *R v GNN* (2000) 78 SASR 293. Such a pleading avoids uncertainty and facilitates appropriate directions being given to the jury. However, given the manner in which the trial was conducted and the directions of the trial judge, it would have been clear to the jury that the act of gross indecency charged in count 2 and alleged by the prosecution was the taking of the two photographs.

[113] Fifthly, for the reasons given by Martin CJ which I adopt, there is no substance in proposed grounds 6 to 9 of the appeal.

[114] In my opinion the court should grant leave to appeal on ground 4 and leave to add ground 5. The court should refuse leave to add grounds 6 to 9. The appeal should be allowed on ground 4 and the conviction of the appellant on ground 2 should be set aside and a retrial ordered. On the retrial the prosecution should be required to elect which act is said to constitute the act of gross indecency or a fresh indictment should be filed.

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