Lo Castro v The Queen (No 2) [2013] NTCCA 15

PARTIES:	**LO CASTRO, Johann Sebastian** 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:	CA 9 of 2012 (20942611 and 20942617)
DELIVERED:	5 November 2013
HEARING DATES:	21–24 May, 17 July 2013
JUDGMENT OF:	RILEY CJ, SOUTHWOOD AND BARR JJ
APPEALED FROM:	MARTIN CJ

CATCHWORDS:

EVIDENCE — Sexual intercourse without consent — Uncharged acts and discreditable conduct — Relationship evidence— Propensity — Relevance — Admissibility — Jury directions — Evidence of uncharged sexual assault wrongly admitted at trial — Directions to jury regarding permissible uses insufficient — Other relationship evidence relevant and admissible.

EVIDENCE — Sexual intercourse without consent — Uncharged acts and discreditable conduct — Relationship evidence— Propensity — Relevance — Admissibility — Witness other than complainant gave evidence of relationship with accused in trial — Irrelevant to facts in issue.

CRIMINAL LAW — Delayed complaint — Forensic disadvantage — Jury warned in accordance with *Longman v The Queen*.

CRIMINAL LAW — Sexual intercourse without consent — Multiple counts — Accused acquitted where no corroboration — Verdicts not unreasonable, illogical or inconsistent.

CRIMINAL LAW — Credibility of complainant — Jury directions — Jury not directed in accordance with *R v Markuleski* — Word-on-word case — Direction necessary.

CRIMINAL LAW — Conduct of trial counsel — No failure to adduce evidence — Accused not called — No miscarriage of justice.

CRIMINAL LAW — Appeal against conviction — Guilty pleas — Circumstances of pleas — Will not overborne — Free and voluntary confession.

CRIMINAL LAW — Practice and procedure — Indictment — Multiple counts — Not calculated to prejudice or embarrass.

EVIDENCE — Corroboration — Photos taken by complainant — Not capable of corroborating complainant's evidence.

MFA v The Queen (2002) 213 CLR 606; *R v Markuleski* (2001) 52 NSWLR 171; *Roach v The Queen* (2011) 242 CLR 610; *TKWJ v The Queen* (2002) 212 CLR 124, applied.

R v Chiron [1980] 1 NSWLR 218, distinguished.

AM v The Queen (2006) 18 NTLR 110; *Chenhall v Mosel* [2013] NTCA 10; *DPP (Cth) v Hussein* (2003) 8 VR 92; *Griffiths v The Queen* (1977) 137 CLR 293; *HML v The Queen* (2008) 235 CLR 334; *KRM v The Queen* (2001) 206 CLR 221; *Liberti v The Queen* (1991) 55 A Crim R 120; *Longman v The Queen* (1989) 168 CLR 79; *M v The Queen* (1994) 181 CLR 487; *Maxwell v The Queen* (1996) 184 CLR 501; *R v Clark* (2001) 123 A Crim R 506; *R v Forde* [1923] 2 KB 400; *R v Frawley* (1993) 69 A Crim R 208; *R v Green* (1989) 95 FLR 301, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC with S Lee
Respondent:	P Usher

Solicitors:

Appellant:	Paul Walsh Barristers and Solicitors
Respondent:	Office of the Director of Public Prosecutions (NT)

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

Lo Castro v The Queen (No 2) [2013] NTCCA 15
No. CA 9 of 2012 (20942611 and 20942617)

BETWEEN:

JOHANN SEBASTIAN LO CASTRO
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 5 November 2013)

The Court:

[1] The applicant was accused of committing sexual and violent offences against two complainants. The offences were charged in two separate proceedings. In the first proceeding the applicant was found guilty by a jury in relation to eight of the 16 counts on the indictment. In the second proceeding, the applicant pleaded guilty to five counts. He was convicted and sentenced to a term of imprisonment in respect of both proceedings.

[2] On 18 February 2011 this Court dismissed an appeal against sentence by the applicant. He now seeks an extension of time and leave to appeal against

those convictions. Each proposed ground of appeal was argued in full before this Court.

[3] The first of the proceedings arose out of allegations of violence and sexual assault by the applicant upon Ms A in 2008 in the course of a relationship between them. The second proceeding arose out of allegations of violence and sexual assault by the applicant upon Ms B in 2009 in the course of a relationship between the applicant and Ms B.

[4] Following an eight-day trial, the applicant was found guilty by the jury of five counts of aggravated unlawful assault upon Ms A and three counts of having had sexual intercourse with Ms A without her consent. He was acquitted of two counts of assault and three counts of sexual intercourse without consent. The jury was unable to agree about two counts of sexual intercourse without consent and the applicant was discharged on those counts.

[5] While the jury was deliberating on the verdicts in the first trial, the trial concerning Ms B commenced. The applicant was arraigned, another jury was empanelled and the trial judge made some preliminary remarks. However, before the trial proceeded further, the applicant requested to be re-arraigned and, on 19 May 2010, he pleaded guilty to four counts of unlawful assault relating to Ms B and one count of attempting to have sexual intercourse with Ms B without her consent.

[6] The applicant was convicted on each count and was sentenced to a total period of imprisonment of 13 years with a non-parole period of eight years. The appeal against the sentence was principally based on the ground that the sentence was manifestly excessive. The Court dismissed the appeal.[1]

[7] The application for an extension of time to appeal against conviction was lodged with the Court on 8 October 2012 and was substantially out of time.

[8] In *R v Green,* Asche CJ considered a number of decided cases in search of the principles upon which an appeal court determines whether to grant an extension of time to appeal, and concluded with this statement:[2]

> Public policy balances the right of the applicant to appeal with the requirement that that right be exercised within a fixed time. That time may be extended in exceptional circumstances. In deciding whether the circumstances are exceptional the court will take into account the likelihood of an appeal succeeding. But the longer the delay the more exceptional the circumstances must be and the clearer it must become that an appeal would succeed. Where there has been extreme delay the point may be reached where only a manifest miscarriage of justice will justify the extension of time.

The proposed grounds of appeal

[9] The grounds of appeal which the applicant ultimately sought to pursue were as follows:

1. the trial judge erred in law in that he did not direct the jury as to the use to which the jury could put the evidence of uncharged acts of

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1 *Lo Castro v The Queen* [2011] NTCCA 1.
2 (1989) 95 FLR 301 at 304.

sexual misconduct, namely the events that are alleged to have occurred in Brisbane in January/February 2008;

2. the trial judge erred in law in that he failed to give a direction in accordance with the authority of *Longman v The Queen*[3] in respect of the delay between the uncharged acts of sexual intercourse and the complaint made by the complainant regarding those acts;

3. the convictions based on the verdicts of guilty delivered by the jury in the first trial were unsafe and unsatisfactory as the verdicts were inconsistent or illogical and therefore should be set aside;

4. the acts and omissions of counsel for the accused as particularised resulted in a miscarriage of justice by depriving the accused of a fair trial;

5. the trial judge's charge to the jury was so unbalanced in favour of the prosecution and/or the effect of judicial intervention during the first trial was such as to deprive the applicant of a fair trial, resulting in a miscarriage of justice;

6. the trial judge erred in allowing the evidence of the witness Ms B to be led in the first trial;

7. the pleas of guilty in the second trial should be set aside as they were entered in circumstances where they were not a free and voluntary

[3] (1989) 168 CLR 79.

confession and they were not attributable to a genuine consciousness of guilt; and further, the circumstances in which they were made affected the integrity of the plea as an admission of guilt;

8. as a result of an aggregate of errors as set out in the proposed grounds of appeal in combination with any one or more proposed grounds a miscarriage of justice has arisen that deprived the applicant of a fair and proper trial;

9. the trial judge erred in that he failed to direct the jury that in assessing the evidence of the complainant on any particular count they were to take into account any finding of lack of reliability or untruthfulness in the assessment of the reliability and/or truthfulness of the complainant on any other count and generally, with the result that the trial miscarried;

10. the evidence referred to by the learned trial judge as ‘relationship evidence’ ought not to have been admitted into evidence, with the result that the trial miscarried;

11. the indictment was unfairly pleaded against the applicant to the extent that it permitted irrelevant and prejudicial evidence to be introduced into the trial so as to bring about a miscarriage of justice;

12. the trial judge was in error in failing to direct the jury that photographs of injuries said by the complainant to be taken by her could [not] be

used by the jury as supporting the evidence of the complainant with the result that the trial miscarried.

The decision of the Court

[10] The Court has decided that the first trial miscarried. Consequently, the extension of time and leave to appeal should be granted and the appeal should be allowed on the grounds and for the reasons explained below. The convictions should be set aside and there should be a retrial of the counts involving Ms A.

[11] The applicant has failed to satisfy the Court that a miscarriage of justice occurred in the second trial. The applications for an extension of time and leave to appeal should be refused. The convictions and sentences for the offending against Ms B therefore stand. We explain our reasons below.

The first trial – Ms A

[12] Ms A, who was 25 at the time she gave evidence at the trial, met the applicant when she was 16 years old. She had a relationship with him at that time which lasted about four weeks. In December 2006, she commenced a further relationship with him. She was around 21 years old and the applicant was two years older. The relationship continued on and off, and finally ended in August 2009. The relationship was one of extremes in which the applicant was, at times, loving and affectionate but at other times obsessively jealous, suspicious, aggressive and very demeaning to Ms A in his words and actions.

[13] The evidence of Ms A was that two months or so into the relationship, the applicant began to exhibit controlling tendencies. He persistently telephoned Ms A at work. He would visit her workplace and interrogate her and make unfounded accusations about Ms A engaging in sexual relationships with her work colleagues. His language was crude and disrespectful. Ms A gave evidence that during the relationship the applicant committed a range of offences against her.

[14] The offences of which the applicant was found guilty by the jury were summarised in the appeal against sentence as follows:[4]

1. The first offence (Count 2) was an assault in which the applicant angrily confronted Ms A and held her arm, hurting her.

2. The second offence (Count 3) arose out of an angry confrontation with Ms A where the applicant punched a wall and pulled her down by her hair until she was nearly on the ground. He then let her go and spat in her face. Ms A suffered some pain and significant humiliation.

3. The third offence (Count 6) occurred when the applicant went to the home of Ms A. She had been in the shower and came to the door with a towel wrapped around her. The applicant grabbed her by her hair pulling her towards the ground. He then dragged her along the ground by her hair for a short distance. The towel was removed as she was

[4] *Lo Castro v The Queen* [2011] NTCCA 1 at [4]–[20].

dragged along the ground, leaving Ms A naked. The assault ended when others intervened.

4. The next offence (Count 9) was an assault which occurred on 2 November 2008. It was the first in a series of offences committed on that occasion. The sentencing judge described the events that followed as a 'sustained, violent and demeaning attack upon Ms A'. The applicant went to Ms A's home. He was unwelcome but gained entry by claiming to need to use the toilet. The applicant promised to then leave, however he did not do so. When he emerged from the toilet he did not replace his pants. He verbally abused Ms A. He dragged her to a bed and threw her upon it. She was kicking out and screaming. The applicant bit her on the right calf, causing pain, raised skin and bruising. He placed her head under a pillow and then punched her head through the pillow.

5. The applicant was intent on having sexual intercourse but Ms A resisted. The applicant turned her onto her stomach and succeeded in penetrating her anus with his penis to a small extent. This was the first offence of sexual intercourse without consent (Count 10).

6. The second offence of sexual intercourse without consent (Count 11) followed immediately upon the first. The victim was screaming out for the applicant to stop and he told her to 'shut up' and then forced his penis into her vagina.

7. On the same occasion the applicant grabbed Ms A around the throat and squeezed sufficiently hard to prevent her from breathing, causing her to make a gargling noise and leaving a mark on her throat (Count 12).

8. Finally, in relation to Ms A, the applicant was convicted of a further offence of sexual intercourse without consent (Count 15). Following the offending which has been described, the applicant left the room. The learned sentencing judge described this offence in the following terms:

> I accept that in some unknown way you forced her back into the bedroom and onto the bed where you committed the crime of sexual intercourse without consent charged in count 15 and of which the jury convicted you. After [Ms A] was on the bed, you behaved in a particularly insulting and demeaning way. Your penis was flaccid and you slapped it against [Ms A's] vagina saying 'See. You're such an ugly C', a four letter word, 'I can't get hard anyway'. After a couple of minutes, your penis began to get hard and you inserted it into [Ms A's] vagina. She was so exhausted that she could not fight you any more. She was telling you that she did not want intercourse and just to go, but you kept abusing her in a particularly crude and demeaning way.

Ground 1: The Brisbane incident

[15] In the course of the trial evidence was led of various incidents of 'discreditable conduct', including conduct which may have amounted to an offence but for which no charge had been laid. The identified basis of admissibility was that the evidence revealed the nature of the relationship. A particular focus before this Court was described as the 'Brisbane incident', evidence of which the trial judge ruled could be received 'as part of the ongoing relationship between the parties, to use that term very broadly'.

[16] Ms A gave evidence that, in January or February 2008, she had flown to Brisbane, where she was to meet the applicant the following day. When the applicant learned that she had gone to Brisbane a day earlier than planned, he accused Ms A of having sexual relations with various persons in Brisbane, and he renewed those accusations when he arrived in Brisbane the following day.

[17] Ms A then described an incident in Brisbane involving the applicant that included violence and sexual penetration with some characteristics similar to the offending the jury found to have occurred on 2 November 2008. The acts of the applicant complained of by Ms A included that he: smelt her for 'cum breath'; put his hands down her pants to feel her vagina to see if she smelt like 'cum'; ripped her dress off; head-butted her; placed his penis into her vagina; grabbed a pillow and shoved it over her head whilst pushing down on the pillow; bit her on the left cheek; and when she had a shower, he put his fingers 'up [her] vagina to wash [her] out'. During the course of the incident he accused her of 'fucking people'.

[18] No charge was laid against the applicant in relation to the Brisbane incident. Characteristics similar to the offending found by the jury to have occurred on 2 November 2008 included the denunciation of Ms A for 'fucking people', biting her, constantly telling her to 'shut up', placing a pillow over her head, and, when she took a shower the applicant 'washed [her] out with his fingers'.

[19] When the prosecutor addressed the jury in closing, he said:

> There is the evidence of the sexual assault in Brisbane, and again this isn't part of the charges, it occurred in Brisbane. I won't go into all the details but there is a sexual incident, an assault, without her consent, that occurs there, in very similar circumstances, you might think, to some of the charges in this matter. What does that tell you about him? And furthermore, there is evidence of her, that is, [Ms A], being called names such as fat slut and various versions of that.

[20] The applicant submitted that the question 'what does that tell you about him' was an invitation to the jury to conclude that the applicant was a man of bad character who had a propensity to rape women. The reference to the allegations involving 'very similar circumstances' equated the Brisbane incident with the later charged events. There was an invitation to the jury to reason that, if the applicant committed the offences in Brisbane, then he was more likely to have committed the offences on 2 November 2008 in Darwin. The applicant argued that the prosecutor impermissibly used the evidence as similar fact evidence and as propensity evidence.

[21] In his address to the jury the trial judge gave general directions regarding the use of relationship evidence but did not do so in the context of the Brisbane incident. The directions of the judge in relation to that incident were as follows:

> [Ms A] told you that this was the occasion when the accused used the pillow. Of course [Ms A] told you about the use of the pillow in Brisbane, but the events in Brisbane are not the subject of any charge. They are part of the evidence about the relationship and I will come back to that.

Later, his Honour did return to the incident and said:

> I only mentioned Brisbane briefly earlier but this was the occasion early in 2008 when, according to [Ms A], the accused was violent to her and sexually assaulted her. The Brisbane incident is not the subject of any charges and it goes to the general nature of the relationship, the accused's attitude to [Ms A] and her responses to his behaviour.

[22] The trial judge did not deal with the Brisbane incident in any greater detail. His Honour did not provide to the jury specific directions in relation to the incident. However, his Honour did make general remarks regarding incidents within the relationship which were described as 'discreditable conduct' on the part of the applicant. Those remarks extended to evidence of the relationship between Ms A and the applicant which 'includes violence and sexual assaults that are not the subject of charges'. The conduct said to constitute the Brisbane incident fits that description. The judge informed the jury that it could consider the nature of the relationship when assessing the likelihood or otherwise that Ms A 'would stay in the relationship, notwithstanding the behaviour of the [applicant] as she described it'. His Honour said in relation to the whole of the conduct described:

> So you only act on the evidence of matters going to relationship if you are satisfied that the evidence is both truthful and reliable. Further, having told you how you may use the evidence, it is necessary to emphasise how you may not use the evidence. The evidence discloses discreditable conduct and conduct which would amount to other offences which are not charged, but you must not reason that because the accused committed other offences or behaved in a discreditable way that he is the type of person who is likely to have committed the crimes charged and, therefore, he must be guilty.
>
> To reason this way would be both unfair and improper. You are entitled to use the evidence as relating to the relationship in the way I have described but not to reason that he is a man of bad character or

> a man of the type who is likely to commit these sorts of crimes and, therefore, he is guilty.

[23] It was submitted on behalf of the applicant that such a direction was insufficient to deal with the Brisbane incident. We agree. The direction was contextually removed from the discussion of that incident and did not make direct reference to the incident at all. The evidence of the incident was not admitted by the judge as similar fact or propensity evidence, although it was used in that way by the prosecutor. It was necessary for the judge to address that evidence and explain to the jury how it could and could not be used. His Honour should have drawn the attention of the jury to the remarks of the prosecutor and informed them they could not reason as implicitly suggested. The necessary warning was required to go beyond a warning in relation to relationship evidence. In particular, it was necessary to explain that evidence of the Brisbane incident could not be used as evidence of the charged offences of 2 November 2008. A propensity warning addressing the Brisbane incident and its inability to provide direct support for the prosecution case regarding the allegations of 2 November 2008 was required.

[24] The respondent submitted that the trial judge addressed the Brisbane incident as but one example of ‘discreditable conduct’ on the part of the applicant. It was submitted that his Honour dealt with the incident as going to the general nature of the relationship and serving to assist the jury to assess the state of mind of Ms A and her responses to the acts of violence as

she described them. The evidence could be used to assess the likelihood or otherwise that Ms A would stay in the relationship notwithstanding the behaviour of the applicant. Whilst that may be so, his Honour did not address the alternative use to which the evidence could have been put by the jury at the invitation of the prosecutor, being as similar fact or propensity evidence.

[25] The following observations of the High Court in *Roach v The Queen*[5] are pertinent:

> The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but they will need to consider whether it is true.

[26] Further, in our opinion, the evidence was not admissible as relationship evidence in any event. What took place in Brisbane, if accepted by the jury, was not evidence going to the nature of the relationship but, rather, was highly prejudicial evidence of a particular criminal offence said to have been committed by the applicant against Ms A quite some time earlier in a quite different environment. It had limited or no probative value in relation

[5] (2011) 242 CLR 610 at 625 [47] per French CJ, Hayne, Crennan and Kiefel JJ.

to the nature of the relationship. It did not provide evidence directly relevant to a fact in issue in the proceedings.[6]

[27] In our opinion, the admission of this evidence and the failure of the trial judge to provide directions to the jury as to the use that could appropriately be made of such evidence constituted an error such that the verdicts cannot stand. This is not a suitable case for the application of the proviso.[7] The extension of time and leave to appeal should be granted and the appeal allowed. The convictions should be set aside and a new trial in relation to those counts should be ordered.

[28] In light of the ruling in relation to ground 1, the following grounds do not require detailed consideration. However, we will consider them briefly.

Ground 10: The admissibility of the relationship evidence

[29] It is convenient to deal with ground 10 in conjunction with ground 1. In addition to evidence regarding the Brisbane incident, evidence of a series of events described as 'relationship evidence' was admitted at the trial. The submissions on behalf of the applicant focused upon three or four different incidents but the evidence as to the relationship was more widespread. The incidents upon which focus was placed included (in summary form):

1. In April 2007, Ms A ran from the applicant's house after an extended episode of verbal abuse, interrogation and accusations of sexual

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6 *Frawley v The Queen* (1993) 69 A Crim R 208 at 222–3 per Gleeson CJ; *KRM v The Queen* (2001) 206 CLR 221 at 228–33 [20]–[31].
7 *Criminal Code* (NT) s 411(2).

infidelity. She was picked up by a stranger, a nurse, who noted her distress. The applicant pursued the nurse's vehicle in his brother's utility in a highly dangerous manner. The applicant caused the nurse's vehicle to stop 4 to 6 times by pulling in front of the vehicle. The nurse was forced to reverse and drive around the utility. On one occasion, the applicant left his vehicle and banged his fist on the window of the nurse's vehicle and screamed abuse. He drove the utility at the nurse's vehicle at high speeds.

2. In 2007, whilst working at Royal Darwin Hospital, Ms A was informed by the pharmacist that he had received a call from 'someone' advising him to stay away from Ms A or he would be stabbed. The applicant confirmed he made that call.

3. In the middle of 2007 Ms A was at a hotel when she was confronted by the applicant. She did not want to see him and ran away. She and some female friends went to the Deck Bar. The applicant followed her and pushed the chair on which she was seated. A security officer told him to leave. Police attended and Ms A thereafter took out a domestic violence order against the applicant.

[30] Whilst these incidents were part of the evidence about the nature of the relationship, the evidence went much further. It included evidence of harassing telephone calls described by one witness as a 'bombardment'; evidence of abusive and demeaning language addressed to Ms A both in a

private setting and in public; rough conduct towards Ms A; and constant and outlandish accusations against Ms A of infidelity with a wide variety of men.

[31] As to this evidence the applicant submitted that it was overwhelmingly prejudicial and of little or no probative value. It was suggested that it amounted to evidence of bad character based on sporadic incidents of violence in a relationship that was 'up and down'. The evidence did not explain the sexual assaults and the fact of significant jealousy had no probative value regarding alleged sexual assaults occurring during the relationship.

[32] Evidence which may show propensity but which is also relevant to other issues will not necessarily be excluded and, where admitted, should be the subject of a warning against its use as propensity evidence.[8] In *Roach v The Queen*[9] it was said:

> The purpose of the evidence in *Pfennig* may be contrasted with that which the evidence in question was tendered in the present case. Here the complainant gave direct evidence both of the alleged offence and the 'relationship' evidence. The latter evidence, which included evidence of other assaults, was tendered to explain the circumstance of the offence charged. It was tendered so that she could give a full account and so that her statement of the appellant's conduct on the day of the offence would not appear 'out of the blue' to the jury and inexplicable on that account, which may readily occur where there is only one charge. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury.

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8 *Roach v The Queen* (2011) 242 CLR 610.
9 Ibid at 624 [42] per French CJ, Hayne, Crennan and Kiefel JJ (citation omitted).

[33] Relationship evidence is admissible for the purpose of 'providing answers to questions which might naturally arise in the minds of the jury, such as questions about the complainant's reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events. These examples are not exhaustive.'[10]

[34] In this case, there were differences between Ms A and the applicant regarding the nature of the relationship. Accepting the description provided by Ms A, this was a bizarre, extreme and unusual relationship, in which the applicant exhibited controlling and dominating behaviour towards Ms A over the period of the relationship. In the absence of evidence as to the applicant's behaviour within the relationship, the complaints of Ms A may have been regarded by the jury as difficult to believe. There was also evidence that Ms A continued in the relationship with the applicant for some time after the behaviour of which she complained. It was pointed out to the jury that they may use the relationship evidence in considering the likelihood that Ms A would continue in the relationship notwithstanding that behaviour.

[35] The evidence of Ms A was relevant for the purpose of providing context, the absence of which would have left the evidence of Ms A without the necessary support that arises from the nature of the relationship. It did not, as submitted by the applicant, serve only to show bad character on the part

[10] *HML v The Queen* (2008) 235 CLR 334 at 502 [513] per Kiefel J.

of the accused. To exclude that evidence would be unfair to the witness. Its probative value outweighed any prejudice.

[36] The trial judge's directions as to the evidence not being used for propensity purposes were appropriate.

[37] In our opinion no error has been demonstrated.

Ground 2: A *Longman*[11] direction

[38] The Brisbane incident occurred in January or February 2008. The evidence of Ms A was that she complained to her friend CM a couple of days later, but the friend did not give evidence of the complaint. Ms A also said that she told her parents in January 2009 of 'everything that happened between Johann and myself'. The applicant was not charged until December 2009. It was submitted that the delay in complaint placed the applicant 'at a very significant disadvantage' and that a *Longman* warning should have been provided.

[39] In our opinion his Honour did provide an appropriate warning. The warning was in the following terms:

> ... there is also the question of delay. The first the accused was told of the allegations of misconduct was in mid-December 2009. The events go back to 2008 and you would appreciate that this delay puts the accused at a disadvantage. For example, where it is said that [Ms A] suffered bruising from an event, if the accused had been told about it immediately, he would have been in a position himself to check her arm or leg immediately. He would have been in a position to work out who might have seen her and to have spoken to them.

[11] *Longman v The Queen* (1989) 168 CLR 79.

> Medical evidence, perhaps, could have been obtained. So the delay works to the disadvantage of the accused.

His Honour went on to say:

> In all these circumstances, I direct you that it would be dangerous to convict on the evidence of [Ms A] alone unless, having approached her evidence with caution and having given it particularly careful scrutiny, you are satisfied that her evidence is both truthful and reliable. In approaching [Ms A's] evidence, you must bear in mind this warning and approach it with extra caution and give it particularly careful scrutiny.

[40] There was no request for a redirection by the very experienced senior counsel who appeared on behalf of the applicant at the trial.

[41] In our opinion this proposed ground of appeal is without merit.

Ground 3: Unreasonable verdicts

[42] It was submitted on behalf of the applicant that the verdicts of guilty delivered by the jury were inconsistent and/or illogical and should be set aside. The basis of the submission was that the case for the prosecution in relation to each count rested upon the acceptance by the jury of the evidence of Ms A and that, therefore, her evidence must not have been accepted in relation to the counts where the applicant was found not guilty. It would have been illogical for the jury to have found the applicant guilty beyond reasonable doubt in relation to some counts, but not on others. It was submitted that this was not a case where any suggested inconsistency could be explained by the members of the jury taking a cautious approach to the heavy responsibility resting upon them.

[43] The approach to this type of ground of appeal was addressed by the High Court in *M v The Queen*[12] and is well known. The court must ask itself whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The court must not disregard the fact that the jury is the body entrusted with primary responsibility in this area and has had the benefit of seeing and hearing the witnesses. Nevertheless, in most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.

[44] In *Mackenzie v The Queen*[13] the majority adopted the following observations of King CJ,[14] referring to them as 'practical and sensible remarks':

> Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of the judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of a system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because the verdict of guilty cannot be reconciled as a matter of strict logic with the verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at a verdict of guilty.

[45] In *MFA v The Queen*[15] the observations of King CJ were again referred to with approval. The majority went on to say:

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[12] (1994) 181 CLR 487 at 493–4 per Mason CJ, Deane, Dawson and Toohey JJ.
[13] *Mackenzie v The Queen* (1996) 190 CLR 348 at 367–8 per Gaudron, Gummow and Kirby JJ.
[14] *R v Kirkman* (1987) 44 SASR 591 at 593.
[15] (2002) 213 CLR 606 at 617 [34] per Gleeson CJ, Hayne and Callinan JJ.

> 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.

[46] In our opinion the submission of the applicant is without merit. It is not the case that the jury must necessarily have found the evidence of Ms A to be unreliable in respect of the counts upon which they acquitted. As is pointed out by the respondent a finding of not guilty can arise as a result of any number of reasons. The obligation upon the Crown is to prove the individual charge against the applicant beyond reasonable doubt. Reasonable doubt may exist without impugning the veracity of the complainant. It is apparent from the verdicts that the jury considered each count separately. Where the evidence of Ms A was corroborated, the jury found the applicant guilty. It does not follow that where there was no corroboration the jury was obliged to acquit. There is nothing to suggest that the verdicts cannot stand together. The jury may have taken a cautious or 'merciful' view of those matters in relation to which the applicant was found not guilty.

[47] In the circumstances of the present proceedings we do not regard the verdicts as inconsistent and/or illogical. There was a basis for different

verdicts in relation to different charges. The findings of not guilty were explicable by reference to the evidence supporting the individual charges. The verdicts do not provide an affront to logic and common sense. We do not regard the differing verdicts as being obviously inconsistent and we do not regard them, by themselves, as suggesting a possible injustice.

Ground 4: The conduct of counsel

[48] It was submitted on behalf of the applicant that the acts and omissions of counsel for the applicant at the trial resulted in a miscarriage of justice by depriving him of a fair trial.

[49] The applicant was represented by a very experienced senior counsel and junior counsel. The same counsel also appeared on behalf of the applicant on the unsuccessful hearing of the appeal against sentence and, further, on an unsuccessful application for special leave to appeal to the High Court. Both counsel gave evidence before this Court on the hearing of the application. They were each cross-examined by senior counsel for the applicant.

[50] In *Chenhall v Mosel*[16] this Court reviewed the applicable principles in such an appeal and observed that, generally speaking, appeal courts will not scrutinise decisions made by trial counsel. In *TKWJ v The Queen*, an appeal based on a decision by counsel for the accused not to call character evidence at the trial, Gleeson CJ said:

[16] [2013] NTCA 10.

> Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts. It is only in exceptional cases that the adversarial system of justice will either require or permit counsel to explain decisions of that kind. A full explanation will normally involve revelation of matters that are confidential. A partial explanation will often be misleading. The appellate court will rarely be in as good a position as counsel to assess the relevant considerations. And, most importantly, the adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives.[17]
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> ...
>
> It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks.[18]

[51] The focus is not so much on the conduct of counsel, but on whether there has been a miscarriage of justice.[19] The question whether there has been a miscarriage of justice is usually answered by asking whether the act or

[17] (2002) 212 CLR 124 at 128 [7].
[18] Ibid at 130–1 [16].
[19] Ibid at 133 [25] per Gaudron J; 149–50 [79] per McHugh J.

omission in question 'deprived the accused of a chance of acquittal that was fairly open'.[20]

[52] The applicant identified seven instances said to constitute the failures. One of those related to the decision of the applicant not to give evidence at his trial. The other six related to evidence regarding telephone calls between the applicant and Ms A which went to the issue of whether Ms A was correct in her assertion that the relationship between the applicant and herself was 'over' from 2 November 2008 until May 2009, or possibly a little earlier.

(a) Continuing relationship

[53] It was argued that the receipt of evidence regarding communications between Ms A and the applicant and evidence that Ms A had accompanied the applicant at various times in that period demonstrated that the relationship was not 'over', as claimed by her, and this would reflect on her credibility.

[54] This issue was raised in a different context in the sentencing appeal.[21] There the applicant sought leave to adduce fresh evidence to demonstrate that his relationship with Ms A did not cease for any significant period after the offending which was alleged to have occurred on 2 November 2008. The evidence related to the level of telephone contact, the suggestion that Ms A invoiced some customers of the applicant on his behalf, and that she was in the delivery vehicle of the applicant at a time when she said the relationship

[20] Ibid at 133 [26] per Gaudron J, quoting *Mraz v The Queen* (1955) 73 CLR 493 at 514 per Fullagar J.
[21] *Lo Castro v The Queen* [2011] NTCCA 1 at [22]–[31].

was ‘over’. The Court in the sentencing appeal observed that Ms A did not say that she had no contact with the applicant in that period or that she did not accompany him in the course of deliveries.

[55] The issue was also raised with senior counsel in his evidence. He observed that his memory was ‘that her case was that there was no sexual contact after a certain date, but there was still a loose association’.

[56] Before this Court it was submitted that the failures of counsel contributed to a miscarriage of justice by depriving the applicant of a fair trial. It was submitted that counsel failed to ensure that all telephone records had been obtained and it was observed that the records initially produced by the prosecution were used to support the credit of Ms A and to undermine the credit of the applicant. It was argued that the issue of the continuation of the relationship was central to her credit and that unfairness arose from the failure of counsel to object to the tender of the telephone records or to seek an adjournment so that the material could be properly understood.

[57] Counsel gave evidence that, although the telephone records were produced at a relatively late time, there was sufficient time to consider them. No adjournment was thought by counsel to be necessary and none was sought. Senior counsel noted that the records simply recorded the fact of telephone calls but not the content. The issue was not whether there was ongoing contact between the two but whether the relationship had terminated. It is difficult to see how further examination of the telephone records would have

impacted in any significant way upon the assessment of the credibility of the complainant at the trial.

[58] Similar observations can be made regarding the suggestion that Ms A had signed some documentation in this period which reflected her involvement in the delivery of goods related to the applicant's business. It is difficult to see how that evidence, if admitted, would have impacted upon the assessment of the credibility of the complainant.

(b) Evidence from the applicant

[59] The applicant gave evidence in this Court that he informed his counsel that he wished to give evidence in the trial. He said he was advised not to do so. He now complains that he was not properly advised of the benefits of giving evidence in the circumstances of this particular case and that his failure to give evidence denied him the opportunity to explain his case. The evidence of the applicant in this regard cannot be accepted. Both counsel were clearly and firmly of the view that the applicant did not want to give evidence. They each said that the applicant strongly resisted giving evidence and therefore it was necessary to seek to have his record of interview admitted into evidence. Senior counsel said:

> Mr Lo Castro never once, either at the committal or in any of the conferences in between the trial or during the trial, suggested that he wanted to give evidence.

[60] The evidence of counsel is supported by the transcript of the proceedings which reveals that the defence had to overcome the opposition of the

prosecution to the admission of the record of interview and also an indication from the trial judge that it would not be received into evidence. Ultimately the record of interview was admitted. Further, there was produced at the hearing before this Court a document written by junior counsel, and signed by the applicant on 12 May 2010, stating:

> I, Johann Lo Castro, have discussed with my lawyers the option of giving evidence in my trial. I have been advised that this issue is also being discussed with my family. I have decided that I do not wish to give evidence in my trial.

[61] We do not accept the evidence of the applicant, contradicted as it is by the evidence of both counsel and by the written instructions provided at the time by the applicant.

(c) The other matters

[62] In the course of argument counsel for the applicant referred to other matters which he submitted were not satisfactorily handled by counsel at the trial. These were decisions made in the course of the trial by experienced counsel. They were decisions which were understandable. In their evidence, counsel from the trial denied that decisions were made in circumstances where time pressure was a factor. Senior counsel made it clear that both counsel had allocated adequate time and had no other competing commitments. In addition, the fact that one trial was to follow immediately upon the other was not a concern to counsel. There was no issue in relation to funding. The decisions in relation to which complaint is made were of a tactical kind which counsel are called on to make in the course of a trial.

[63] In our opinion none of the complaints made by the applicant regarding the conduct of counsel have merit. Further, it has not been demonstrated that a miscarriage of justice has resulted from any of the tactical decisions taken by counsel at the trial.

Ground 5: The trial judge's charge to the jury

[64] It was submitted on behalf of the applicant that, when considered as a whole, the summing up of the trial judge to the jury was not a balanced and fair presentation of the defence and prosecution cases.

[65] Attention was drawn to various parts of the summing up to support the submission. In our opinion none of the matters referred to achieved that result. By way of example, counsel referred to a difficulty in reconciling the evidence of two Crown witnesses and noted that the prosecutor had simply left the issue to the jury. The trial judge proffered to the jury for consideration a possible explanation for the differences. It was submitted that 'by so doing he stepped into the shoes of the prosecutor'. In our opinion it was part of the role of the judge to assist the jury where neither counsel had done so. We are unable to accept that the judge went beyond what was appropriate in the circumstances.

[66] In the course of his evidence, senior counsel for the applicant was asked whether, in the trial concerning the allegations of Ms A, the trial judge had 'displayed an affinity for the prosecution's case.' Senior counsel responded:

> Well I had not appeared before his Honour before, and in certain jurisdictions some judges are more robust than others, I don't think in relation to the way he conducted the trial that he was more robust than I have experienced in the past.

[67] In our opinion, read as a whole, the submission that the charge of the trial judge was not balanced was not made out.

Ground 6: The evidence of Ms B

[68] Ms B was to be the complainant in the trial to follow that relating to the complaints of Ms A. The trial did not proceed because the applicant pleaded guilty to the relevant counts.

[69] Ms B gave evidence in the first trial as to the nature of her relationship with the applicant, but not as to any criminal activity on the part of the applicant directed towards her. His Honour permitted the Crown to call Ms B for the limited purpose of providing specific examples of her relationship with the applicant, which his Honour regarded as being 'strikingly similar' to features of the relationship between the applicant and Ms A. Those features included evidence that in each of the relationships the applicant 'set out to dominate and used a particular methodology' to achieve that end. The methodology included specific actions reflecting extreme jealousy, paranoia, constant telephoning, using particular terms of abuse, physically checking the person of Ms A or of Ms B for the smell of men and a range of other unusual actions. In ruling Ms B's evidence admissible, his Honour observed that:

> [A]t the heart of this case with respect to [Ms A] is a particular form of relationship. That is, that the accused set out to dominate and used a particular methodology. And that domination is part of the explanation for why on the Crown case, Ms A behaved the way she did, why she kept coming back, why she did not go off to the police earlier, why she didn't make complaints, et cetera, notwithstanding this conduct.
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> It is a situation not unknown to the criminal courts to say the least. Therefore, evidence independent of [Ms A] which tends to prove that the accused did dominate her, did behave in this way that she has described, is admissible. Further, it seems to me that evidence that the accused in another relationship, not too remote from this relationship, used a very similar methodology to gain control and domination over the second woman is admissible in connection with charges relating to Ms A.
>
> It has significant probative value, and it does not carry with it the prejudicial value if it is restricted to the evidence about the methodology…

[70] On the appeal it was argued that counsel for the applicant was unfairly constrained in his ability to cross-examine Ms B 'in the true context of the situation as a complainant'. No such complaint was made by counsel at the trial and no example of the constraint was demonstrated in this Court. Senior counsel who conducted the cross-examination of Ms B gave evidence before this Court and was not asked whether, in fact, he was so constrained. This submission must be rejected.

[71] However, in our opinion, the evidence was not admissible for the purpose identified by the trial judge. The evidence was directed to the relationship between Ms B and the applicant and 'the mutual dealings between them and

the consequential attitudes each has for the other'[22] and had nothing to say about the relationship between Ms A and the applicant. The relationship with which the jury was concerned was between Ms A and the applicant and the evidence of Ms B was not direct evidence of any fact relevant to a fact in issue regarding that relationship.[23] The evidence could only be relevant to that relationship through some form of impermissible propensity reasoning.

[72] The admissibility of the evidence depends upon considerations of its probative value and prejudicial effect. Ms B's evidence was prejudicial because it revealed discreditable conduct on the part of the applicant. Its probative value, if any, was clearly outweighed by this prejudicial effect.

[73] We would also grant leave to appeal and allow the appeal on this ground.

Ground 8: Aggregate of errors

[74] It was submitted on behalf of the applicant that as a result of an aggregate of errors which have been addressed a miscarriage of justice arose and the applicant was deprived of a fair and proper trial. In light of the rulings in relation to grounds 1, 6 and 9 it is unnecessary to address this ground.

Ground 9: Failure to direct in accordance with *R v Markuleski*[24]

[75] The applicant complained that in the charge to the jury there was no reference by the trial judge to the interconnection of credibility issues regarding the complainant, Ms A. It was submitted that the judge had

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[22] *Clark v The Queen* (2001) 123 A Crim R 506 at 581 [160] per Heydon JA.
[23] *Frawley v The Queen* (1993) 69 A Crim R 208 at 222–3.
[24] *R v Markuleski* (2001) 52 NSWLR 82.

informed the jury that this was a 'word against word' case but the jury was not told that any finding or conclusion of unreliability on the part of Ms A regarding one count may impact upon conclusions reached on other counts.

[76] The usual direction in relation to a series of counts is that each count should be considered separately from the other counts on the indictment and on the basis of the evidence admissible in relation to that count. In a case such as the present, which was a 'word against word' case, the direction may need to be modified in order to assist the jury. It may be necessary to inform the jury that a negative conclusion reached regarding the credibility of the complainant in relation to one count may be relevant to the deliberations concerning other counts.

[77] In *Markuleski* Spigelman CJ observed that it will 'often be appropriate to direct the jury that where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.'[25] Whether such a direction is required or is appropriate is a matter to be determined in accordance with the circumstances of the individual case.[26]

[78] In the present case the trial judge did not give such a direction to the jury. In the circumstances of this matter, the absence of a *Markuleski* direction created a risk that the applicant was denied the chance of acquittal. Whilst

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[25] Ibid at 122 [188].
[26] *AM v The Queen* (2006) 18 NTLR 110 at 112.

the jury did not necessarily find the evidence of Ms A unreliable in relation to any particular count, and reasonable doubt in relation to the counts of which the applicant was acquitted may have arisen without the veracity of the complainant being impugned, it cannot be known whether that was the case.

[79] The Crown case in relation to each charge was largely or entirely dependent upon acceptance of the evidence of Ms A. If the jury did not accept her evidence in relation to one charge that would, necessarily, impact upon the consideration of each of the remaining charges. In this case a *Markuleski* direction was required and was not given, resulting in an unfair trial. We would grant leave to appeal and allow the appeal on this ground as well.

Ground 11: The indictment

[80] The applicant complained that the indictment was calculated to embarrass or prejudice. It was submitted that trivial matters were pleaded along with quite serious matters allowing for the introduction of prejudicial material in the proceedings. It was unjust for individual acts to be separated out of an ongoing event taking place over a relatively short period of time. It was argued that, in the circumstances, the indictment was unfair to the extent that it permitted irrelevant and prejudicial evidence to be introduced into the trial so as to bring about a miscarriage of justice.

[81] In their evidence to this Court counsel who appeared at the trial made no complaint about the indictment. They did not see it as an issue of concern. No application was made at the trial in relation to the indictment.

[82] It was submitted on behalf of the respondent that it was necessary to plead the separate counts to avoid accusations of duplicity. The conduct relating to each count was said to be separate conduct and requiring a separate count.

[83] In our opinion the complaint of the applicant in this regard should be dismissed. Counsel at the trial had no issue with the indictment. Each of the counts in the indictment referred to separate conduct. Nothing has been identified which would suggest that any complexity in the indictment led to any difficulty on the part of the applicant in presenting his case or any confusion on the part of the jury in the trial.

Ground 12: The photographs

[84] The applicant contended that the trial judge erred in failing to direct the jury that photographs of injuries said by the complainant to be taken by her could not be used as supporting the evidence of the complainant.

[85] Ms A gave evidence that, following the events of 2 November 2008, she took some photographs of her injuries which she said had been received at the hand of the applicant. It was submitted that, in the absence of an appropriate direction, the photographs could easily have been incorrectly used by the jury as corroborative evidence of the fact that the complainant received the injuries.

[86] There was a dispute about the time at which the photographs were taken and as to what the photographs depicted. The trial judge reminded the jury of these disputes and went on to say:

> Of course, ladies and gentlemen, the marks themselves cannot prove that the offences occurred, not in themselves, but they are part of the circumstances and it is evidence to which the Crown points as supporting the evidence of Ms A.

[87] The applicant says that the photographs were so poor that they did not independently confirm the nature of the injuries. The value of the photographs therefore depended entirely upon the reliability of the evidence of Ms A. The applicant submitted that the jury should have been told that the photographs, because of their poor quality, could not support the evidence of the complainant and that they did not independently show the injuries she described. They could not be corroborative of the fact that she was injured in the course of the sexual assault of which she complained.

[88] It is to be noted that his Honour did not refer to the photographs as being corroborative of the evidence of Ms A. The highest it was put was that the Crown said that it was supportive of her evidence. However, in our view, in light of the submission of the prosecution, it would have been appropriate for his Honour to draw attention to the quality of the photographs and to inform the jury that they could not amount to corroboration of the evidence of the complainant because they were not independent of her. As the appeal is to be allowed, whether that omission by itself would have led to a miscarriage of justice need not be determined.

Ground 7 – The pleas of guilty in the trial concerning Ms B

[89] In addition to the principles which apply when this Court is determining whether to grant an extension of time to appeal against conviction,[27] a court of appeal can only entertain an appeal against conviction, where a plea of guilty has been recorded, if it appears that: (1) the plea of guilty was not unequivocal and was made in circumstances suggesting that it is not a true admission of guilt;[28] (2) the appellant did not appreciate the nature of the charge;[29] (3) upon the admitted facts the appellant could not in law have been convicted of the offence charged;[30] or (4) there has otherwise been a miscarriage of justice.[31]

[90] The sole proposed ground of appeal in relation to the pleas of guilty entered by the applicant was expressed as follows:

> The pleas of guilty in the trial involving complaints of sexual misconduct made by [Ms B] should be set aside as they were entered in circumstances where they were not a free and voluntary confession and they are not attributable to a genuine consciousness of guilt; and further, the circumstances in which they were made affected the integrity of the plea as an admission of guilt.

[91] The background to this ground of appeal is as follows.

[92] On 18 May 2010, while the jury in the first trial was deliberating upon its verdicts, the applicant was arraigned in front of another jury panel on the five counts on the indictment in the second trial, being the trial in which Ms

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27 See [8] above.
28 *Maxwell v The Queen* (1996) 184 CLR 501 at 511 per Dawson and McHugh JJ.
29 *R v Forde* [1923] 2 KB 400 at 403.
30 Ibid.
31 *DPP (Cth) v Hussein* (2003) 8 VR 92 at 95 [9] per Buchanan JA.

B was the complainant. The indictment was dated 7 May 2010. He pleaded not guilty to all counts. A jury was empanelled and the second trial went ahead before the first trial had concluded. The trial judge made general remarks to the jury, the Crown opened its case and attempted to call Ms B but she could not be called because there was a problem with the recording equipment in the court. After 1.26 pm on the first day of the second trial, the jury in the first trial started returning its verdicts and the applicant was found guilty of a number of counts. The last verdict came in at 8.59 pm and the jury was discharged at 9.18 pm. When the jury was discharged it had not completed its deliberations on two counts.

[93] The applicant was upset by the verdicts and says that he did not sleep that night. He was in a state of anxiety. On 19 May 2010, at the start of the second day of the second trial, the applicant told defence counsel that he had decided to change his pleas to guilty and he signed a piece of paper, prepared by junior counsel, stating that he wanted to plead guilty to all of the five counts he faced in the second trial. Senior counsel then told the trial judge that the applicant wished to change his pleas, the applicant was re-arraigned and he pleaded guilty to all counts. Upon the applicant entering pleas of guilty, the trial judge directed the jury to find the applicant guilty of each of the five counts on the indictment. The jury did so. The applicant was then remanded in custody and both proceedings were adjourned to 22 July 2010 to enable defence counsel to prepare submissions for the plea on sentence and for expert reports to be obtained.

[94] The effect of the jury finding the applicant guilty of the counts involving Ms B and the judge accepting the verdicts of the jury and discharging them was that the applicant could not withdraw his pleas of guilty if he changed his mind before he was sentenced.[32] His only remedy would have been to seek leave to appeal against his convictions for the counts involving Ms B.

[95] On 20 May 2010 the Crown prosecutor prepared a draft statement of facts for the five counts involving Ms B, and between 20 May and 22 July 2010 junior counsel for the defence took instructions from the applicant about what facts he was prepared to admit and he conveyed the applicant's instructions to the Crown. On 22 July 2010 the agreed facts were read in open court in the presence of the applicant. Senior counsel for the defence told the court that the applicant admitted those facts. Senior counsel also made detailed submissions on sentence on the basis of the admitted facts. The trial judge then passed sentence on the applicant.

[96] In his sentencing remarks the trial judge made the following statements (among others):

> [O]ne of the features that is lacking in all of the material before me and particularly from the psychiatric reports is a demonstration of true insight into your conduct and the causes of it. While you spoke to the psychiatrists about the effects of your medication and drugs, there does not appear to me to be any proper insight into your conduct. For example, in respect of Ms B against whom you admit you committed offences, as I mentioned earlier you told one of the psychiatrists that the arguments were because of 'all the games and bullshit'. The whole tenor of your statements to the psychiatrists is to

[32] *Griffiths v The Queen* (1977) 137 CLR 293 at 301–2 per Barwick CJ; *R v Chiron* [1980] 1 NSWLR 218 at 226–7 per Lee J.

> blame the victims, particularly Ms A, and to regard yourself as the victim of their misconduct.
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> …
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> It might be thought that one positive sign is your acceptance of your responsibility for your conduct with respect to Ms B. However, your pleas came at a very late stage after the trial had commenced *and, when you entered your [guilty] pleas, it was readily apparent from your conduct that you entered each plea very reluctantly*. I do not accept that you are truly sorry for your conduct towards Ms B generally or for the particular offences you committed against her (emphasis added).

[97] At no stage between 19 May and 22 July 2010 did the applicant tell anybody that he did not want to plead guilty to the five counts on the indictment filed in the second trial or that the only reason he did so was because he was induced to do so by the circumstances which existed on 19 May 2010. Nor did he ask anybody for advice about what he could do in the circumstances.

[98] On 13 August 2010 the applicant filed an application for leave to appeal against sentence only. On 18 February 2011 the Court of Criminal Appeal dismissed the applicant's appeal against sentence. Thereafter, the applicant was unsuccessful in making an application for special leave to appeal against sentence to the High Court of Australia. It was only after the application for special leave to appeal to the High Court was unsuccessful that the applicant gave consideration to an appeal against his convictions for the five counts in which Ms B was the complainant; and it was not until 8 October 2012 that the applicant filed an application for extension of time and an application for leave to appeal against those convictions.

[99] Before dealing with the particular aspects of this case, we observe that in *Liberti v The Queen*[33] Kirby P stated:

> For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests upon high public interest in the finality of legal proceedings *and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary ingredients of the offence* (emphasis added, citations omitted).

[100] The applicant submitted that his pleas of guilty are tainted because they were induced by the oppressive manner in which the second trial started before the first trial concluded, resulting in a miscarriage of justice.

[101] The applicant's submission was based on the following propositions:

1. Until the jury's guilty verdicts were returned in the first trial, the applicant was adamant that he would plead not guilty to the counts about Ms B. Accordingly, he pleaded not guilty when he was first arraigned on the five counts on the indictment in the second trial. He only changed his pleas after the jury returned the guilty verdicts in the first trial which occurred after the second trial had started.

2. Both the applicant and junior counsel for the defence gave evidence that the applicant was 'truly gutted' upon the return of the guilty verdicts in the first trial.

[33] (1991) 55 A Crim R 120 at 122.

3. The applicant caved in and pleaded guilty as a result of the outcome of the first trial. Senior and junior counsel for the defence gave evidence that it was an utter shock to them that the applicant was changing his pleas of not guilty to guilty.

4. Neither senior nor junior counsel for the defence sat down with the applicant upon receiving his change in instructions and analysed why he had changed his instructions and what his options were. In particular, the applicant was not given advice that the first trial had miscarried before he pleaded guilty to the counts in the second trial. He was only advised that if he pleaded guilty to the counts in the second trial he was likely to get one year on top of the sentence of imprisonment for the first trial only. Whereas, if he maintained his pleas of not guilty, he would get 18 months to two years on the top of the other sentence of imprisonment.

5. The first trial miscarried partly as a result of the wrongful admission of Ms B's evidence in the first trial. The trial judge had made observations during his summing up at the end of the first trial that Ms B was a reliable witness and he was to be the trial judge in the second trial.

6. In the circumstances the applicant's pleas of guilty were not a genuine admission of guilt. The applicant was induced to change his plea as a result of the pressure created by the second trial commencing before the first trial concluded, the outcome of the first trial, which had

miscarried, and the lack of opportunity to be adequately advised about the outcome of the first trial and his options in the circumstances.

7. When passing sentence, the trial judge stated that it was readily apparent that the applicant entered each plea of guilty very reluctantly.

8. The applicant was unable to change his plea prior to being sentenced on 22 July 2010 because he pleaded guilty in front of the jury and the jury's verdicts of guilty constituted a finding that the applicant was guilty of the 5 counts on the indictment. His only remedy was to appeal.

9. Until Mr Tippett QC was retained as his counsel, he did not know that he could appeal against a conviction in circumstances where he had pleaded guilty.

[102] The applicant's submissions must be assessed in the context of his evidence about the incidents which are the subject of the five counts on the indictment involving Ms B, what transpired during the course of the second trial and all relevant subsequent conduct and events.

[103] Neither in his affidavits, nor in his oral evidence before this court, did the applicant clearly deny that he had committed the offences with which he was charged. He has not clearly asserted in these proceedings that he has a defence on the merits. Nor has the applicant tendered any detailed evidence

about what he says occurred, if anything, on the five occasions involving Ms B. However, the Court had the following evidence before it.

[104] Dr Kevin Smith interviewed the applicant on 18 June 2010. In his report dated 24 June 2010 Dr Smith stated:

> Mr Lo Castro said that in the first month of his relationship with [Ms B] 'the same pattern appeared' and 'she started lying.' He described her as a heavy drug user, who 'always broke her promises' such that 'he lost trust in her.' *He referred to the charges to which he had [pleaded] guilty and said that he had done so 'because of the position he was in' after his first trial.* I assumed he meant that having been found guilty of the same charges in his earlier trial he could expect greater leniency in sentencing if he [pleaded] guilty to the charges involving [Ms B]. Once again, he denied ever having inflicted serious violence on her, or ever raping her. He said, 'I can't believe what she has done to me', referring to [Ms B's] charges against him, 'she set me up.' He admitted he has pushed [Ms B] and verbally abused her, but stated that she used to punch him in the head and has run at him with a knife. She has damaged property as part of her aggressive behaviour, and she would come around 'without any invitation' when he was 'still in love with [Ms A]'. He now thinks that he should have called the police when [Ms B] came to his house while he was with [Ms A] who he still loved 'despite all the problems'. … With regard to his alleged offending behaviour he admitted only 'pushing and shoving' [Ms B] and throwing her bag and pillows at her 'when they both raged out.' (emphasis added)

[105] Dr Olav Nielsen interviewed the applicant on 19 June 2010. In his report dated 25 June 2010 he stated:

> *He said that the offence to which he had entered a plea of guilty took place in August 2009.* When taken to his state of mind around the time of the offence, Mr Lo Castro said that he was under a great deal of stress because of the demands of his multiple jobs and business interests, and said that his behaviour was made worse by the psychological effects of the amphetamine-like weight reducing medication Duromine that he took to give him the energy to work such long hours. (emphasis added)

[106] In the pre-sentence report that was ordered by the trial judge, the probation and parole officer stated that:

> In addition, Lo Castro claimed he and [Ms B] had planned a trip to Queensland together but an argument about her substance misuse erupted just prior to the trip and the offender changed his mind about accompanying her on the trip. The argument continued with [Ms B] demanding the return of her money as she had paid the airfares, claiming she would take him to Court to retrieve the money if necessary. Their arguments continued to the point where they were pushing and shoving each other.
>
> He claimed [Ms B] was much more physically built than he, so it was not a one-sided physical encounter, in his opinion. *He pushed her onto the bed and at that time unzipped his trousers and pulled out his flaccid penis and slapped her groin area with it, making the comment 'you do not turn me on anymore'.* Lo Castro maintained he left her property to get her the money and when he returned he apologised for his behaviour and wished her good luck on her holiday.
>
> When asked why he thought [Ms B] was accusing him of sexual assault considering they had been in a six-month sexual relationship, he commented she was angry with him for 'giving her herpes' which he believed he contracted from his first girlfriend. Lo Castro stated [Ms B] told him she was pressing charges because she was being pressured by her cousin who 'forced' her to attend the police station and an attending police person who 'pressured her' to impose a Domestic Violence Order. Lo Castro also believed [Ms B] was after the compensation she may receive from the court case. (emphasis added)

[107] The material in the three reports referred to above contains some denials regarding the circumstances surrounding the actual offences, and partial admissions made by the applicant.

[108] It was accepted by all of the witnesses that the period when the jury returned its guilty verdicts was a very stressful time for the applicant. The applicant's stress levels significantly increased after the verdicts in the first trial. The

applicant's eyes were watery and the tone of his voice clearly indicated that he was upset. He was distraught. Counsel for the defence did not attempt to obtain any instructions from the applicant on the night of 18 May 2010. Senior counsel was concerned about the applicant being in a position to give instructions while he was so stressed. Senior counsel was concerned that the applicant may need some reassurance and he told him to try and stay calm. He told the applicant that they would discuss the situation in detail on 19 May 2010.

[109] The applicant's junior counsel at trial also gave evidence that on the morning of 19 May 2010 the applicant was angry and concerned about what would happen to him following the jury's guilty verdicts. The applicant was still emotional but less so than the night before. Counsel could see signs that indicated the applicant was emotional about the pleas and the guilty verdicts of the previous day.

[110] There is a conflict between the evidence of the applicant and the evidence of his two defence counsel about how he came to change his pleas and plead guilty on 19 May 2010. The applicant maintains that he only considered changing his pleas after he was told by his counsel that he may wish to consider changing his pleas in the light of the fact that he would be sentenced to a long term of imprisonment for the offences of which the jury found him guilty in the first trial and there would be a reduced total sentence if he pleaded guilty to the counts involving Ms B.

[111] In the affidavit he made on 10 April 2013 and during his oral evidence the applicant stated the following:

> He was shattered and gutted by the verdicts of guilty. He had been found guilty for things he had not done.
>
> On the night of 18 May 2010 he could not sleep properly. He had just been robbed of years of his life for things he had not done. It was not a good time for him.
>
> The following morning he was brought back to court from the prison. He recalls arriving at the court cells sometime between 8.30am and 9 am on 19 May 2010 feeling tired, sick and uneasy. He was taken upstairs to the holding cell then to the interview room near the court where he waited for his defence team to arrive. He was dry-retching in the morning in the holding cell.
>
> He saw his counsel briefly. They advised him about the trial involving Ms B. They told him he was looking at a lengthy sentence as some of the charges in his first trial carried life imprisonment. If he wanted to change his plea he would get a discount in his sentence. His counsel raised the question of him changing his plea. They did not seem to be confident about the second trial and were telling him, 'mate, it's a matter of years; you're the one doing the time, not us.' His defence team seemed to be in a rush and not prepared for the second trial. They spent a lot less time with him preparing for Ms B's trial.
>
> When the matter of the applicant changing his pleas to guilty was raised, *he asked himself why he should plead guilty for something he did not do*. However, he was thinking about the first trial and the fact that he had been robbed of years of his life for things he did not do and the years that he could be spending with his family. He would have the same judge for the second trial. He thought he was biased. The judge was continually backing up the prosecution and interrupting his defence. He strongly believed that the judge would act the same way in the second trial.
>
> He wanted to speak to his parents about the decision to plead guilty. He asked if he could but he recalls senior counsel told him that it was

important he made the decision on his own. *He was overwhelmed and he caved in.*

At the end of his meeting with his counsel, he was asked to sign a piece of paper stating that he was changing his plea. He read it. He did not want to change his pleas but he signed it and gave it back to his counsel. It all happened at once.

He was still in shock from the evening before. He had an interrupted sleep during the night. He recalls not wanting to sign the document but he eventually signed it. *He wanted to fight Ms B's charges but he was put in a corner. He felt pressured and that he had no alternative but to plead guilty.*

When he was arraigned the second time he had his jaw clenched and he was saying 'not'. He had to force himself to plead guilty. However, he understood that it was his choice to plead 'guilty' or 'not guilty'. It was his choice but he caved in.

After he pleaded guilty, he was asked to see a number of professional people for the purpose of obtaining reports prior to being sentenced. He did not suggest to any of those people that he had committed any of the offences involving Ms B.

He has no memory of any meeting between himself and his trial counsel at the Darwin Correctional Centre between 19 May 2010 and 22 July 2010. On 22 July 2010 he did not go through the Crown Facts with his counsel prior to those facts being read out in court.

On 22 July 2010 the Crown prosecutor read out the facts of the counts he pleaded guilty to. He heard the facts being read out in court. He did not say anything when the facts were read out because he thought it was all over.

He believed he had no choice but to agree the facts which were read out in court. He did not see those facts.

Later on, he was advised to appeal against his sentence. He wanted to fight against his conviction, but he was advised that if he went for a retrial there was a chance that extra charges would be brought against him. He was advised to appeal against sentence only.

[112] Both defence counsel maintain that it was the applicant who informed them that he wished to change his pleas. It came as a complete shock to them because up until then the applicant was adamant that he was pleading not guilty.

[113] In his affidavit made on 15 May 2013 senior counsel stated the following. On the morning of 19 May 2010 the applicant instructed counsel that he wanted to plead guilty to the charges he faced in the second trial. Senior counsel then sent a note to the trial judge asking for the trial to be stood down to enable them to take appropriate instructions. He had a conversation with the applicant in words to the following effect.

> He said: *I'm thinking of pleading guilty*. Do you think I will get more time?
>
> I said: Johann if you were found guilty by the jury, *you will probably receive several years longer in custody than if you pleaded guilty*.
>
> He said: How much time will I get if I plead guilty?
>
> I said: Johann we cannot know what the judge will give you but the sentence will be cumulative.
>
> He said: I would like to speak to my parents about what I am planning to do.
>
> I said: Johann you know we have tried in the past to have your parents see you in this room and Corrective Services have not allowed it. It is really out of our hands. *Johann only you know if you are guilty or not and ultimately you must make that decision.*

He said: I know.

I said: We will represent you no matter what decision you make. If you maintain your plea of not guilty, John and I will bat on with the trial. You must know that only you can make this decision.

He said: What will happen now if I plead guilty?

I said: We will let his Honour know and you will be re-arraigned and have to enter pleas of guilty. All matters will then be adjourned to another date for sentence.

I said: We will go and speak to the Crown and we will come back and talk to you further. (emphasis added)

[114] Later that morning, counsel had another conference with the applicant. Almost one hour had elapsed since the applicant first instructed them that he wished to plead guilty. He and the applicant had a conversation in words to the following effect.

I said: Have you reached your final decision?

He said: How much time will I get if I am found guilty?

I said: Johann this is a difficult decision to make but it has to be your decision. *Only you know if you are guilty or not.* Not your parents or your friends.

He said: I know.

I said: *Your decision has to be based on your knowledge. Only you know.* If you admit you are guilty you will serve time in custody. *But if you are found guilty by the jury your sentence will be more severe.* As I said earlier, we will represent you *no matter what decision you make*.

He said: *I am going to plead guilty.*

I said: I will need you to sign written instructions to confirm your change of plea.

He said: Okay. (emphasis added)

[115] As a result of those conferences, the applicant signed instructions that junior counsel had written out. The general tenor of the document outlined that the applicant wished to plead guilty, he appreciated he would receive a significant gaol term, there would be some accumulation of the sentence that would be imposed for the counts about Ms B and that his rights and options had been fully explained to him.

[116] From senior counsel's observations, it was the applicant who wanted the issue of pleas of guilty to be aired. It was the applicant who raised the subject for the first time and it was the applicant who signed instructions to that effect. It was only after the applicant approached them to plead guilty that they discussed the penalties potentially applicable in the Ms B trial. The applicant asked if counsel could explain to him the practical machinations of such a plea. Based on the information they provided and the lengthy discussions they had with the applicant, senior counsel was of the opinion that the applicant could make his own decision. He made it clear to the applicant that he was very much against him ever pleading guilty to something he did not do. At no stage did the applicant indicate that he was hesitant or did not want to plead guilty. Neither counsel indicated that they were not confident of success in the second trial.

[117] Before the appeal against sentence in the Court of Criminal Appeal was heard, senior counsel went to Darwin to see the applicant. At no stage did the applicant give instructions to agitate an appeal against conviction in the Ms B matter. At no stage was there any suggestion by the applicant that the plea was wrongly entered. Until recent times, there has never been a suggestion made to senior counsel that the applicant had issues with his pleas of guilty.

[118] Junior counsel gave similar evidence to senior counsel. He stated that on 19 May 2010 he told the applicant that, if he pleaded guilty to the counts involving Ms B, the sentence of imprisonment he would receive for those counts would only add an extra year to his total sentence. Whereas if the applicant pleaded not guilty, but he was found guilty by the jury in the second trial, it was likely to add 18 months to two years to his total sentence of imprisonment.

[119] Both defence counsel agreed that they did not ask the applicant why he was changing his plea. Nor did they advise him about his options following the outcome of the first trial.

[120] On 20 May 2010 the Crown prosecutor sent a draft of the proposed Crown Facts about the counts involving Ms B to junior counsel.

[121] On 15 June 2010 junior counsel met with the applicant at the Darwin Correctional Centre and obtained instructions from him about the proposed Crown Facts. Neither counsel nor the applicant has any recollection of this

meeting. However, a document was tendered in evidence which contains notations made by counsel on a copy of the draft Crown Facts during the meeting on 15 June 2010.

[122] A fair reading of counsel's handwritten notes on the draft Crown Facts suggests that he received the following instructions from the applicant. The applicant denied that he was as controlling, domineering and menacing as the Crown Facts stated. There was aggression both ways in the relationship. Ms B had attacked him on a number of occasions with her fists and she had tried to stab him with a knife on one occasion. As to count one, the applicant denied that he threatened Ms B with his fists and head butted her. He said that she is about eight inches taller than him. As to count 4, he denied biting Ms B on the lip. As to count 5, he said that there was pushing and shoving both ways. They were both angry. Ms B thought he was not going to give her the money for the airfare. However, at no stage did the applicant wholly deny the substantive aspects of each of the counts about Ms B.

[123] There is also a conflict between the evidence of the applicant and senior counsel about whether there was a further discussion between them about the Crown Facts on the morning of 22 July 2010. This topic was not dealt with in any of the affidavits made by the applicant or either counsel. However, at the instigation of the Court this issue was dealt with in the oral evidence of the three men.

[124] During his oral evidence before this Court, senior counsel stated that he could not remember any discussions with the applicant about the Crown Facts. However, he did not believe that there was any issue as to the Crown Facts. He recalled that on the morning of 22 July 2010 he had a meeting with the applicant during which the final form of the Crown Facts was shown to the applicant. He had no specific memory of any discussion between the applicant and him on 22 July 2010. During the plea on sentence the Crown Facts were read onto the record of the court. Senior counsel did not object as he had received no instructions to object to any of the Crown Facts.

[125] In the context of trying to establish that the applicant had consistently adhered to his guilty pleas until very recently, the respondent led evidence from both counsel that the applicant had never asked for advice about appealing against his convictions for the counts involving Ms B. In our opinion, a fair assessment of this issue is that, until Mr Tippett was briefed, the applicant would not have known that he had a right to appeal against his convictions for the counts to which he pleaded guilty. Further, trial counsel advised the applicant against appealing against his convictions for the counts involving Ms A. During cross-examination, senior counsel conceded that the advice about an appeal against conviction was negative.

[126] In our opinion, the evidence of senior counsel about the circumstances in which the applicant came to plead guilty to the counts involving Ms B is to be preferred to the evidence of the applicant. It is normal human behaviour

for the applicant to have been concerned about his predicament following the return of the guilty verdicts by the jury and to have been considering whether he should plead guilty to counts in the second trial given the outcome of the first trial. We find that he did say to senior counsel that he was thinking of pleading guilty. He did so in circumstances where he had seen Ms B give evidence in the trial involving Ms A and heard the Crown opening in the trial involving Ms B. Further, once the issue was raised, the applicant was given appropriate advice about the effect and the consequences of pleading guilty. He must have understood the nature of the charges and the extent of the Crown case against him. He is an intelligent person with tertiary qualifications.

[127] There was also the following exchange between Riley CJ and the applicant while he was giving evidence before this court.

Riley CJ:	One matter I wanted to ask you. You told us on a number of occasions that either – well I think it was [senior counsel] said to you, 'you were the one doing the time, it is a matter for you.' What was the context of that – what was the surrounding conversation?
Applicant:	Sir, I can't recall the exact context. It was around while we were discussing about changing my plea, but I remember – I recall the words, 'Mate you are the one doing the time, not us, it is a matter of years'. That is just imprinted in my head.
	…
Riley CJ:	When he said, 'You are the one doing the time' what did you understand him to mean by that?

Applicant:	As if I am the one who is going to be incarcerated. I am the one doing the time.
Riley CJ:	And therefore?
Applicant:	It is my choice.

[128] It is clear that the applicant understood it was his choice and he voluntarily and deliberately made the decision to plead guilty.

[129] Mr Tippett submitted this case is on all fours with *R v Chiron*.[34] He argued that in *R v Chiron* the guilty plea was a product of a proceeding which miscarried and the same principle applies in this case. But for the premature commencement of the second trial, which was oppressive and miscarried, the applicant would not have pleaded guilty.

[130] In *R v Chiron* the Court of Criminal Appeal of New South Wales considered an appeal against conviction in the following circumstances. At the appellant's trial for rape, the complainant gave evidence that in May 1977 after a slight collision between her motor vehicle and the appellant's they exchanged their particulars and the appellant then assaulted her, handcuffed her, said he was a policeman and was arresting her for drunken driving and drove her to his place of residence, where he raped her. During the trial, the prosecution sought to introduce evidence that in January 1975 in Melbourne the appellant was involved in a collision in which the other driver concerned was a woman and that arising out of this incident, the defendant was charged

[34] [1980] 1 NSWLR 218.

with assault with intent to commit rape to which charge he pleaded guilty. The trial judge ruled, over the objection of defence counsel, that the evidence was admissible on the basis that it was similar fact evidence. The appellant then in the light of certain advice given to him by his counsel and a comment by the trial judge (so the appellant understood) that the admission of the evidence would be sudden death to his chances of acquittal, changed his plea to guilty and was convicted. The Court of Appeal ruled that the trial judge's decision to admit the evidence of the Melbourne collision was wrong. Further, the majority of the Court of Criminal Appeal ruled that the guilty plea was tainted because it had been induced by the incorrect ruling of the trial judge and the statement that the appellant thought the trial judge made. The appellant's will had thereby been overborne. Consequently, the plea of guilty was not properly available to the jury as a basis for returning a verdict of guilty.

[131] In our opinion, the facts in *R v Chiron* are entirely different to those of the present case. In *R v Chiron* the defendant was led to believe that by reason of an error of law on the part of the trial judge he would be found guilty when, but for that error, he had a good chance of being acquitted. In the present case there is no factor that caused the appellant to believe that there was a prospect of him being wrongly convicted of the five counts on the indictment. On the contrary, the appellant had a genuine understanding of what the process was and what a guilty plea involved and he made a deliberate choice to plead guilty. He has only sought to appeal against

conviction having failed in his appeal against sentence. As to the pressure on the applicant which was created by the second trial starting before the first trial concluded, it is apparent that the applicant was less emotional the next morning and that he was focusing on the options available to him. Unlike the previous night, both counsel were confident about taking instructions from the applicant. While the applicant may have been in a state of anxiety which was heightened by the fact that the second trial had started before the first trial concluded, his will was not overborne. His mind was not so unbalanced as to render it unsafe to act.

[132] While the applicant has made some denials since he pleaded guilty, these denials do not detract from his pleas of guilty. As the trial judge found when sentencing the applicant, they are a result of his failure to fully accept responsibility for his actions and his tendency to blame others for his predicament.

[133] This ground of appeal is not sustained.

Conclusion

[134] In our opinion, in relation to the proceedings concerning Ms A, grounds 1, 6 and 9 of the proposed grounds of appeal have merit. An extension of time should be granted, leave to appeal in relation to those grounds should be granted, the appeal should be allowed and a new trial ordered. We would grant leave to appeal but dismiss the appeal in relation to the remaining grounds.

[135] The application for an extension of time and leave to appeal against the convictions for the counts involving Ms B should be refused.

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