SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2021 0130

JOHN CHARLES (a pseudonym) Applicant

v

THE QUEEN Respondent

JUDGES:	EMERTON P, KYROU and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	18 July 2022
DATE OF JUDGMENT:	18 August 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 166
JUDGMENT APPEALED FROM:	[2021] VCC 1282 (Sentence) (Judge Gucciardo)

CRIMINAL LAW – Appeal – Conviction – Indecent act with child under 16 – Whether substantial miscarriage of justice occurred by admission of irrelevant evidence – Whether unfairly prejudicial – Whether cross-examination of applicant and prosecutor's closing address reversed onus of proof – Whether verdicts inconsistent or unreasonable – Whether victim impact statement contained fresh evidence resulting in substantial miscarriage of justice – Whether prosecutor's submissions on complainant's distress at time of complaint resulted in substantial miscarriage of justice – Application for leave to appeal granted – Appeal allowed – Convictions set aside and new trial ordered.

Palmer v The Queen (1998) 193 CLR 1 applied; *Paull v The Queen* [2021] VSCA 339 discussed.

Counsel

Applicant:	Mr T Kassimatis QC with Ms A Roodenburg
Respondent:	Ms D Piekusis QC

Solicitors

Applicant:	Tony Hargreaves & Partners
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

EMERTON P
KYROU JA
T FORREST JA:

1 The applicant was a senior member and instructor at a karate club in central Victoria. Between 2002 and 2004, the complainant was a junior member. On 14 April 2021, the applicant was convicted by a jury of two charges of indecent act with a child under 16[1] and two charges of sexual penetration of a child under 16.[2] The jury acquitted him of charges 6 and 7 (sexual penetration of a child under 16 years) and, by direction of the judge, found him not guilty on charges 3 and 8 (indecent act with a child under 16). On 2 September 2021, he was sentenced by a judge of the County Court as follows:

Charge on Indictment	Offence	Max Penalty	Sentence	Cumulation
1	Indecent act with a child under 16	10 years	5 years	1 year and 5 months
2	Indecent act with a child under 16	10 years	3 years	8 months
4	Sexual penetration of a child under 16	10 years	5 years	Base
5	Sexual penetration of a child under 16	10 years	5 years	1 year and 5 months
Total Effective Sentence:		8 years 6 months' imprisonment		
Non-Parole Period:		5 years 6 months		
Pre-sentence Detention Declared:		141 days		
Other Relevant Orders: 1. Lifetime reporting period pursuant to s 34 of the *Sex Offenders Registration Act 2004*. 2. Sentenced as a serious sexual offender on charges 4 and 5.				

2 The applicant seeks leave to appeal his conviction on charges 1, 2, 4 and 5, on the following grounds of appeal:[3]

> Ground 1: The trial judge erred, and a substantial miscarriage of justice occurred, because of the judge's refusal to discharge the jury after the complainant gave evidence of 'Kylie's Corner'.
>
> Ground 2: The cross-examination of the Applicant and the submissions made by the prosecutor in closing address reversed the onus of proof, occasioning a substantial miscarriage of justice.
>
> Ground 4: The verdicts on charges 1, 2, 4 and 5 are inconsistent with the acquittals on charges 6 and 7.

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1 *Crimes Act 1958,* s 47(1) (as amended by the *Crimes (Sexual Offences) Act 1991*).
2 *Crimes Act,* s 45(1) (as amended by the *Crimes Amendment Act 2000*).
3 Proposed ground 3 was abandoned by counsel at the hearing of the application.

Ground 5: The verdicts on charges 1, 2, 4 and 5 are unreasonable and cannot be supported having regard to the evidence.

Ground 6: A substantial miscarriage of justice has occurred because the Victim Impact Statement of the complainant, filed by the prosecution after the Applicant was convicted, contained fresh evidence and there is a significant possibility that the jury might have acquitted the Applicant if that evidence had been available at trial.

Ground 7: A substantial miscarriage of justice occurred because:

a) the prosecutor invited the jury to use the complainant's distress at the time of her complaint to her boyfriend as support for her account regarding the offences alleged; and

b) the trial judge directed the jury that they could use the complainant's distress at the time of her complaint as indirect or circumstantial evidence which supported her account that she had been sexually abused.[4]

Ground 8: The trial miscarried by reason of an aggregate of errors.

The prosecution case

3 The Crown's case at trial was that the offending occurred between 1 January 2002 and 31 December 2004, when the complainant was aged between 11 and 14 years. The applicant was aged between 27 and 30 years.

4 The complainant commenced karate at the leisure centre of her regional Victorian town when she was nine or 10 years old. Training took place at a *dojo,* an internal room at the leisure centre, initially on Tuesday evenings. The applicant was one of a number of karate instructors for the junior members. It was alleged that the complainant spoke to the applicant for the first time when she was being graded to determine whether she could move to the next level in karate.

5 Work commitments meant the complainant's mother was often late to pick her up from junior training. The complainant stated that the applicant would wait with her outside the leisure centre until her mother collected her. On one such occasion, it was alleged that the applicant asked the complainant whether she had a boyfriend, what she did with boys and if she had ever been 'fingered'. The complainant said no, to which the applicant is said to have replied, 'you haven't lived until you've been fingered'.

6 The prosecution alleged that on another evening, the applicant offered to drop the complainant home. Her mother accepted. It then became routine for the applicant to drive the complainant the short trip home after training on Tuesday nights. The complainant developed a crush on the applicant and recorded this in her 2002 school diary. As the complainant progressed grades and commenced training with the seniors, it was largely the applicant who drove her home on Mondays, Wednesdays and Fridays.

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4 Leave was granted at the hearing of the application to add this ground.

7 The prosecution contended that the offending largely occurred on the trips to the complainant's house. The applicant is alleged to have asked questions about what the complainant had done with boys. This turned into 'dares' or 'challenges'. On the first occasion this happened, the applicant is alleged to have said, 'You won't touch me on the cock … you won't do that you're chicken'. The complainant then touched the applicant's penis on the outside of his clothing and the applicant said, 'I'm so hard'. The complainant stated she touched the applicant's penis 'countless' times when the applicant was driving her home (charge 1 — indecent act with child under 16, course of conduct.)

8 The complainant stated that over time 'the challenges would increase'. She masturbated the applicant until he ejaculated on almost all of the occasions he drove her home (also charge 1). She said the applicant touched her breasts underneath her karate uniform (charge 2 — indecent act with child under 16, course of conduct) and 'from time to time' the applicant digitally penetrated her vagina, which also became routine (charge 4 — sexual penetration of child under 16, course of conduct). On one such instance, the complainant stated that the applicant parked the car near her house and while she masturbated him he inserted his fingers in her vagina. She said she 'faked an orgasm … so that he would stop touching [her]… it was painful'. The applicant was said to have penetrated the complainant's vagina with his tongue (charge 6 — sexual penetration of child under 16, course of conduct). This type of event was not as regular as the digital penetration and the applicant would do it only when 'the car was able to be pulled over, and there was enough privacy'. The applicant was found not guilty of charge 6.

9 The applicant also was alleged to have placed his penis into the complainant's mouth. On the first occasion this happened, the applicant pulled the car into a car park on a service road and the complainant put her mouth on his penis until he ejaculated. She stated that she swallowed the ejaculate and then the applicant dropped her home. She further stated that the oral sex became 'so routine that [the complainant] wouldn't be able to put a number' on how many times it happened (charge 5 — sexual penetration of child under 16, course of conduct).

10 The applicant and the complainant were alleged to have travelled together to a training camp in central Victoria. The complainant stated that on the drive home she masturbated the applicant and the applicant digitally penetrated her. The applicant drove to the side of the road. The complainant stated she produced a condom from her bag, climbed on top of the applicant and inserted his penis into her vagina (charge 7 — sexual penetration of child under 16). The applicant was found not guilty of this charge.

11 On Good Friday 2004, it was alleged that the applicant and the complainant were training together at the dojo. There may have been someone else training with them. After they finished training, the applicant locked up the dojo, grabbed the complainant's breasts (charge 3 — indecent act with child under 16) and touched her vagina (charge 8 — indecent act with child under 16) in the hallway of the leisure centre. The jury was directed to acquit the applicant on both these charges.

12 During the years the offending occurred, the complainant kept school diaries. She showed her 2002 diary and 2004 diary to police during the investigation and these were exhibited in the trial. The complainant could not locate her 2003 diary. The 2004 diary

contained symbols and pictures which the complainant explained were cryptic records of when and what types of sexual activity with the applicant had occurred. The complainant gave evidence that the missing 2003 diary would have similarly contained symbols and pictures. In 2017 she drew up a legend and provided it to police, matching the symbols and pictures in the diaries with their explanations as she remembered them. (For example a love heart with a vertical line through it meant 'kissing').

13 This is a pithy summary of the evidence supporting the prosecution case and how it was put at trial. We will descend into more detail as we examine the grounds of appeal.

Ground 1

14 Ground 1 contends that the judge erred, and a substantial miscarriage of justice occurred, because of the judge's refusal to discharge the jury after the complainant gave evidence of 'Kylie's corner'.

15 In oral argument counsel for the applicant accepted that the ground was expressed clumsily and the irregularity the ground identified was the admission into evidence of the 'Kylie's corner' evidence. This is a conceptually different approach to the ground. Rather than identifying that the exercise of a judicial discretion has miscarried, the applicant now seeks to argue that the admission of inadmissible and unfairly prejudicial evidence has caused the trial to miscarry. There is no real prejudice to the respondent in this reformulation of this ground of appeal.

16 It is necessary to set out the impugned evidence. It must be observed that the evidence set out below occurred in the broader context of the complainant giving evidence about the applicant's sexual advances upon her, after karate class, in his vehicle, at a particular location. We also observe that the applicant denied at all times that there was ever any sexual component to their relationship, which was essentially one of teacher/pupil at the karate club.

> [PROSECUTOR]: Okay. One of the other things that you said that he did with you in the car was he required you to perform oral sex on him, fellatio?---Yes.
>
> How did that — you have indicated that things progressed — but do you recall the first time that that took place?---Yes.
>
> Okay. Focusing on that first time, what do you say happened?---I remember driving home from the [leisure centre] to my house … I remember there was a car lot on a service road, down near [the complainant's address], and he pulled in there, and I remember leaning over the console, the centre console, and, uh, giving him fellatio and him finishing and — sorry, him ejaculating, and, I swallowed the ejaculate, and then he dropped me back home.
>
> You have given evidence that you were only a five minute drive or so away from the leisure centre. Was there a typical, or usual, route home that you would travel?---Yes.

> And would that sometimes change, or did it remain the same?---No it would sometimes change.
>
> And how often would it change?---I'm not sure that I can answer how often it would've changed, I think — it depended on what was happening at the time.
>
> Okay. Well what do you---?---I remember going — I mean there would have been like a direct route that we could have taken, but I remember going a less direct route, and *we would often go past this place that we both called 'Kylie's Corner'*, which was a place that had a big, old-style, heritage red letter box that stuck out in my mind because *another member of the Karate Club, Kylie — he'd had an interaction with [her][5] there one day.*

17 We have added emphasis to the impugned evidence.

18 At this stage the complainant was still giving evidence-in-chief. Senior counsel for the applicant, perhaps mindful of highlighting the impugned evidence, deferred raising any issue until the next morning. At that time he took the judge to the relevant transcript. He then submitted as follows:

- The 'Kylie's corner' evidence was clearly unresponsive to the question.
- The only implication open from the impugned passage is that 'on an occasion prior to this occasion that she speaks of that [the applicant] had an interaction, namely a sexual interaction with a member of the club Kylie who may or may not have been a junior member of the club.'
- It is capable of amounting to tendency evidence. No tendency notice was served and it is impermissible for it to be used in this way.
- The implication from the evidence is that the area the applicant was taking her to, away from her normal route home, and for the purpose of sex acts, was an area at which he had had a previous sexual interaction with Kylie, another member of the club.
- No judicial direction could cure the damage caused by the statement and there was a high degree of need to discharge the jury.

19 The judge did not call upon the prosecutor to reply. The revised ruling reads:

> I'm against you, [defence counsel]. I do not agree with that submission that the implication in the answer, or the only implication from the answer is that on occasion prior to the — the generality of the answer which the complainant gave, the accused had an interaction of a sexual nature. The word interaction seems to me to be very broad indeed.
>
> It was — I'm not even sure that I disagree with what you say was an unresponsive answer. The question, I note, was about whether there were, in that drive back to her place, a typical or usual route home, or would that sometimes change, or did it remain the same. It invited the witness to explore the ways, geographically, if you like, which [the applicant] would take in order to take her home. And in order to explain that answer she gave a geographical location identified by a heritage, red letter box, where there had been an

[5] The transcript reads 'here' — this is clearly a typographical error and should read 'her'.

interaction with a member of the karate club called Kylie. I do not agree that it must have been, as you say in your submission, a sexual interaction. There is nothing that indicates that in that answer. I understand that this may be a matter, and the learned prosecutor will, of course, disagree with you if it's not the case.

But I, of course, accept what you say that it's never been raised before. But in terms of what it contains, how it was said, when it was said, the speed at which it was said and in the context of her evidence, it does not, in my view, carry the implication that you give it. It does not require a direction. It would be most dangerous for me to go to this piece, speculating about what else it means. And even though it's a statement from a critical witness, in my view it does not give rise to the high necessity which would be required to discharge this jury. But I will give full reasons in writing in due course to this matter. So, your application is refused.

20 Some days later the judge delivered 'full reasons' which we shall also set out:

The application was made to discharge the jury by defence counsel. This application was [said] to arise out of evidence given on 24 March by the complainant … I will recite the evidence briefly. The complainant had been giving evidence about being driven home from karate school by the accused man and was being asked about whether there were different routes that were taken by the accused and this in the context of the first time that the accused had 'required her to perform oral sex on him' …

She was asked to focus on that first time and on what had happened. She gave her answer at line 13 and following. At that point she was then asked, 'was there a typical or usual route home that you would travel?' She answered, yes. The next question was 'And would that sometimes change, or did it remain the same?' She answered, 'no, it would sometimes change'. 'How often would it change?' was the next question.

She answered, 'I'm not sure that I can answer how often it would have changed. I think it depended on what was happening at the time'. She continued 'I remember going — I mean, there would have been like a direct route that we could take, or could have taken, ah, but I remember going a less direct route, and we would often go past this place that we'd called, Kylie's corner, which was a place that had a big old style heritage red letter box, that stuck out in my mind because another member of the karate club, Kylie, he'd had an interaction with her [the transcript reads here rather than her] there one day. If we wanted to take a bit longer, for these to be — for there to be more sex acts, then he would drive around the block. I remember going up [an address] which was near my home.'

It was submitted that alternatively, 'Some of the detail', was clearly unresponsive to the question, and later that that answer was unresponsive. I disagreed with the submission. The witness was being asked about whether the drive to her home took a typical or usual route, whether it changed sometimes, or if it remained the same and how often the route changed. She was, in my view, entitled to answer as to this change and it's frequency by recourse to what was no more than a reference to a landmark as an aid to her to answer the question asked.

> In that sense it was not unresponsive. The next submission argued that either, 'The only implication was that the interaction mentioned by the witness, was that the accused had a sexual interaction with Kylie. It was later put in the submission that that interaction, 'Must be sexual interaction in the context.' This was said to be, 'A clear inference.' I disagreed with this submission, the answer in no way suggested that this interaction alluded to, was of a sexual or inappropriate manner. I am not at all persuaded that the jury would or could have perceived that answer as referring to a sexual interaction or could infer that from the answer.
>
> Embedded as it was in the description of the location of the first incident of fellatio, between accused and complainant, this locational detail could not reasonably have been heard as an [a]llusion to sexual interaction. The submission noted the witness had not mentioned this place in her statement previously, preliminary hearing evidence or at first trial, that appears to be so and that clearly the complainant is the critical witness in the prosecution case. However, given the I [sic] have found a (indistinct words) this is of no consequence, disadvantage or unfairness to the defence in my view.
>
> This part of the submission argued the evidence was impermissibly capable of amounting to tendency evidence. That argument of course is based on an acceptance of the implication or inference or implication argument raised before.
>
> Given that I reject that submission, there is no basis for arguing this evidence amounts to tendency evidence. A submission was made that because the defence had opened the accused's good character, that this evidence now affected that issue and required the defence 'To deal with the evidence by exploring other avenues of evidence.' I do not accept that the accused's good character assertion is affected in any way by this evidence.
>
> I note in this context that a significant part of the cross-examination of the complainant on the day before, was related to a large number of young pupils at the dojo and the frequency and presence of many instructors and their interactions within the leisure centre and its precinct. Lastly, it was said, no direction that I could give the jury could or would undo the damage caused by the evidence and therefore a discharge without verdict was the only remedy. I need only say that the evidence requires no direction from me to the jury, I perceive no damage done to the integrity of the process of the trial and to the fairness of it to be accorded to the accused and therefore there is not present here the high necessity required to discharge the jury without verdict.

21 On this application, the applicant contended that the evidence was 'inadmissible, unfairly prejudicial, and, could not have any probative value whatsoever'. He further submitted that this was inadmissible evidence 'of the applicant's tendency to drive other (potentially junior) females from the [karate club] home and commit sexual acts'. It also tended to undermine the foreshadowed good character submission opened by the defence at the commencement of the trial.

22 The respondent argued that this evidence was neither prejudicial nor inadmissible; it arose in the context of questions directed to the complainant about a typical route the applicant would travel when taking her home. The reference to 'Kylie's corner' was

made in the context of the complainant describing a less direct route and the reference was not prejudicial. It could not be inferred that the interaction with Kylie was sexual, or that it was with a child, or that it amounted to tendency evidence. The karate club had both adult and junior membership, and '[a] single interaction with a person could have many innocuous meanings'.

Consideration

23 We consider there is substance to this ground. In our view the incidental allusion to 'Kylie's corner' had the effect of conveying a good deal more than as a 'recourse to what was no more than a reference to a landmark'. Further we disagree with the judge that the impugned answer 'in no way suggested that this interaction alluded to, was of a sexual or inappropriate manner'.

24 In the context of being asked about the first time she was required to perform fellatio on the applicant as he drove her home, the witness said sometimes the route changed to a less direct route 'for there to be more sex acts'. It was in this context that the complainant stated that they would go past a place 'we both called "Kylie's Corner"'. So far, without further elucidation, this part of her answer is unremarkable. However the applicant went on to state that the place (including the heritage letter box) stuck in her mind 'because another member of the Karate Club, Kylie — he'd had an interaction with [her] there one day'.

25 We do not accept that this was a mere reference to a landmark. We consider it clearly was capable of conveying that the applicant had engaged in some sexual interaction with Kylie, a karate club member, at that corner and probably in a vehicle. In a case where the married applicant was claiming good character and denying that there was ever any sexual contact between himself and the complainant, this 'Kylie interaction' evidence had no probative value at all and, in our view, was capable of generating considerable unfair prejudice. We consider that a jury *could* have used it, impermissibly, as evidence that the applicant had a tendency to drive other female members of the karate club to that corner for sexual purposes.

26 It is difficult to reconcile the trial judge's remarks that he was 'not at all persuaded that the jury would or could have perceived that answer as referring to a sexual interaction or could infer that from the answer', with his recognition that to give a direction would be 'most dangerous' and invite speculation. Either the evidence was innocuous or it wasn't. This recognition did not find its way into the 'full reasons'.

27 So there the impugned evidence lay, unaddressed, by other evidence in the case, and incapable of challenge by the defence without highlighting it.

28 We note that, shortly after the 'Kylie's corner' evidence, the witness referred to previous sexual encounters with the applicant as 'previous interactions'.

29 We also observe that a transcript of all evidence in the trial was provided to the jury before they retired to consider their verdicts. The impugned passage remained in the transcript for the jury's consideration, together with the failure by the defence to challenge it.

30 We consider that the reception of this inadmissible and potentially potent 'tendency' evidence constituted an 'error or irregularity in the trial'. The question as to whether it has given rise to a substantial miscarriage of justice is more difficult. The impugned passage is confined to a simple short sentence, very early in the trial, and then studiously avoided by all parties, in a case where there was a large body of evidence called by both parties subsequent to the reception of this disputed evidence. The respondent must demonstrate that the reception of the evidence made no difference to the outcome of the trial in order to resist this ground. In a case where there are two diametrically opposed accounts, and no substantive independent evidence, this is a difficult burden to discharge and we doubt that the respondent has done so. In view of our findings on ground 2 and ground 8, it is unnecessary finally to determine whether this error or irregularity constitutes a substantial miscarriage of justice on a standalone basis.

Ground 2

31 Ground 2 contends that the prosecutor throughout his cross-examination of the applicant, and in his closing address framed questions and made submissions that tended to reverse the onus of proof or were otherwise unfair.

32 The applicant took us to various portions of the transcript that, it was said, in combination established this ground. In oral submissions the applicant further developed this ground and submitted that a significant tranche of the cross-examination of the applicant proceeded on a false evidentiary foundation.

33 The respondent submitted that most, if not all of the impugned questions, did not have the tendency to reverse the onus of proof, nor were they objected to. The respondent appeared to accept that the prosecutor on an isolated occasion asked a rhetorical question, 'Why say these things if they're not true?' that may have had the tendency alleged, but submitted that considered in the entire context of the prosecutor's final address the overall effect was unexceptional. Further the respondent contended that the trial judge gave a firm direction about the onus of proof immediately after the prosecutor's address, despite not accepting that the overall effect of the prosecutor's final address was to reverse the onus of proof. The respondent made no submissions about the asserted false evidentiary foundation, except to contend that if the impact of it were as substantial as now claimed, senior counsel would surely have objected to the prosecutor's questions.

Legal principles

34 We shall set out some relevant legal principles.

35 It is impermissible to ask an accused person why a complainant would lie, or to ask that question rhetorically of a jury. It invites the jury to speculate, is unfair to the accused, who cannot be expected to read the complainant's mind, and has a tendency to

undermine the onus of proof. If put in a question to an accused the answer is also irrelevant to any issue in the case. This is settled law.[6]

36 It is also impermissible for a witness to be asked whether he or she thinks another witness in the case is lying.[7] In *Cupid,* the accused 'should not have been asked whether he thought his daughter was lying'.[8] In *Foley,* the accused should not have been asked, amongst other questions, 'All these other witnesses are telling lies?'.[9] This practice was deprecated by the Queensland Full Court, who said:

> The literal object of such a question is to obtain an opinion whether someone else is a liar, and that of course is not an issue in the case or a matter for any other witness to express an opinion, it is a matter for the judge or jury. It is also unfair, because it forces the honest witness into a recrimination and seeks to rely upon the natural reluctance of a person to defame another. It is also a form of bullying, using unfair means to persuade a person to retract his or her evidence. Such questions are inadmissible … Regrettably the practice of asking such questions is by no means uncommon. It should cease.[10]

37 It should be noted that in *Foley,* the Court also observed:

> [T]here must of course be a certain degree of tolerance of loose practices in cross-examination, and such errors commonly occur without impairing overall the receipt of a fair trial by an accused person.[11]

38 In *Buckley,* Nettle JA (Winneke P and Charles JA agreeing), said this:[12]

> The principal ground of appeal is that the judge erred in allowing the prosecutor to cross-examine the applicant, despite objection, as to whether he considered that KD, JG and Michelle Buckley had lied or perjured themselves in their evidence. In my opinion that contention is well founded.
>
> Whatever may have been the position in the past, the law in this State is now that any witness and particularly an accused who gives evidence ought not to be asked in cross-examination whether another witness is telling lies or has invented something. Cross-examination of that kind is impermissible because it

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6 *Palmer v The Queen* (1998) 193 CLR 1, 5–12 [6]–[13]] (Brennan CJ, Gaudron and Gummow JJ), 36–7 [95]–[96], 39 [98], 42 [102]–[103] (Kirby J) (*'Palmer'*). See also, eg, *R v Cupid* [2004] VSCA 183, [28] (Ormiston JA) (*'Cupid'*); *R v Davis* [2007] VSCA 276, [20] (Buchanan JA); *Salvaggio v The Queen* [2022] VSCA 88, [47] (Maxwell P, Kyrou and Niall JJA); *Spence v The Queen* [2016] VSCA 113, [28]–[30] (Redlich, Priest and Ferguson JJA).

7 [2004] VSCA 183, [36] (Callaway JA). See also *R v Foley* [2000] 1 Qd R 290, 296–7 (de Jersey CJ, Thomas JA and Derrington J) (*'Foley'*), *R v Perussich* [2001] QCA 557; *R v Leak* [1969] SASR 173, 173–4 (Bray CJ, Hogarth and Walters JJA); *R v SAB* (2008) 20 VR 55, 60–3 [19]–[28] (Nettle JA, Dodds-Streeton JA agreeing at 67 [52], Mandie AJA agreeing at 87 [53]); [2008] VSCA 150; *Meyer (a pseudonym) v The Queen* [2018] VSCA 140, [215]–[217] (Priest and Kaye JJA), citing *R v Buckley* (2004) 10 VR 215, 218 [9] (Nettle JA, Winneke P agreeing at 216 [1], Charles JA agreeing 216 [2]); [2004] VSCA 185 (*'Buckley'*); *R v Bajic* (2005) 12 VR 155, 169 [73]–[74] (Eames JA); [2005] VSCA 158.

8 [2004] VSCA 183, [36] (Callaway JA).

9 [2000] 1 Qd R 290, 296 (de Jersey CJ, Thomas JA and Derrington J).

10 Ibid 297.

11 Ibid.

12 (2004) 10 VR 215, 217–8 [8]–[9] (citations omitted).

> may deflect the jury from a proper assessment of the credibility of the Crown witnesses and of the accused in accordance with the burden and standard of proof borne by the Crown. The problems which it creates are not easily overcome by the judge telling the jury that the accused is not required to provide an explanation for the propensity of other witnesses to lie. And the very fact of the cross-examination gives to the cross-examiner clear benefits which he or she is not entitled to have. The problems became particularly acute in a case like this where the central issue involves oath against oath.

39 This is settled law. All counsel should be aware of it.

Factual background

40 In her evidence, the complainant stated, unequivocally in our view, that the applicant possessed keys to the internal 'dojo' room but that she did not know whether he possessed keys to the larger leisure centre building. We refer to the following pieces of evidence:

> [PROSECUTOR:] Yes?---But because he had keys to the dojo and say if there was a grading come up, ah, and we wanted to train for that, it would occasionally happen that we would go to the dojo outside of the regular training hours.
>
> …
>
> And this training outside club hours, would that happen within those periods of time?---Yes.
>
> You also said that you could train outside because he had keys?---Yes.
>
> Why did he have keys?---Because he was a senior member of the karate club, um, who was, the head of the juniors at one point and in charge of opening the dojo and locking it up.
>
> …
>
> Okay. And when you say that he had keys, what did he have keys to, in so far as the building is concerned?---He had keys to the Karate Club, I know that much. I can't remember if he had keys to the outside or not.
>
> …
>
> [DEFENCE COUNSEL]: Do you agree that in April 2004, [the applicant] did not have keys to the [leisure centre]?---No, I don't agree with that.
>
> Right. When do you remember him having keys to the [leisure centre], as opposed to the dojo which was within the [leisure centre]?---Can you please ask that question again.
>
> All right. The dojo is an area within the [leisure centre], is that so?---Yes.
>
> He had keys to the dojo, did he not?---Yes.
>
> The [leisure centre] was also capable of being locked, was it not?---Yes, I would

assume so.

Did he have keys to that to your knowledge?---I don't know.

41 The applicant complains that the following passages of cross-examination of him were either unfair or tended to reverse the onus of proof:

> [PROSECUTOR]: And when you were interviewed by the police, you'd say that you were telling the truth?---Yes.
>
> And you understand and you accept don't you, that the two narratives insofar as they exist the jury's heard, they — well they can't sit together. There's no middle ground there, you'd agree?---Can you explain that — what you mean by narratives please?
>
> Well, on her narrative, you've done terrible things to her over a number of years, yes?---Does narrative mean like, her opinion - - -
>
> Yes, on her evidence as we saw (indistinct)?---Yes.
>
> And on your narrative, no such thing ever took place?---No, that's correct.
>
> And there's no mistaking that there are two distinct narratives here and they can't both be right, can they?---No they can't.
>
> Okay. And it's your evidence that the evidence that [the complainant] has given is just wrong?---Yes.

42 We consider this cross-examination to be unexceptional. The prosecutor was defining the area of dispute between the two accounts, and whilst he invited the applicant to state that the complainant's account was wrong, at this stage at least, he did not invite the applicant to say that she was lying.

43 The applicant then took us to a lengthy exchange in the applicant's cross-examination which occurred as the cross-examination reached its conclusion:

> Did you [sic] dad have keys to the [leisure centre]?---Ah, yes, he would have at some point.
>
> Okay, and did you have access to those keys?---No.
>
> Why would you have — if your dad had them, why would you not have access to them, did he lock them in a vault?---I just didn't have access to them. They were his keys.
>
> Well, where did he keep them?---I have no idea. In his pocket probably.
>
> You don't know where your dad kept the keys to the dojo that you've spent so much time at?
>
> [DEFENCE COUNSEL]: No — no. We object, Your Honour.
>
> [PROSECUTOR]: I'll withdraw the question and I'll put it differently. Did you ever open or close the [leisure centre]?---Ah, yes.

> Okay. What did you use to open or close them as the case may be?---My own key.
>
> You had your own key. So, you don't know where your dad's key is, but you had your own. When did you get your key?---I think it was very late in the piece, towards, maybe, 2006, because I know I only had it for a slight amount of time before I had to return it, when we moved to [an address in regional Victoria].[13]

44 We interpose to observe that 2006 was well after the alleged offending period. The questioning continued:

> Okay, so, *when [the complainant] said in her evidence that you had the key to access the place, she's not wrong, you did?*---In a later year, yeah.
>
> Yes?---In 2006, I had a key, yes.
>
> [The complainant] was challenged on that. So, let's just to be sure we all understand [the complainant's] evidence correctly, *where [the complainant] said that you had a key to the leisure centre, and locked up on the way out, she's not wrong.* You had a key, and you could lock up on the way out, yes?---In 2006, I — yes, I could have.
>
> *Whatever the year, she says, and she's right to say it, isn't she?*---She wasn't around then though. But yes, I did have a key to the leisure centre in 2006.
>
> She wasn't around — how would she know it if she wasn't around?---I don't remember her returning after her knee operation.
>
> *Isn't it the case the only way she could know that you had a key that could lock up [leisure centre] is because she was there when you did it?*---No, that — she might have been referring to a key to the karate club.
>
> *That's not what she said. She said you had a key to the leisure centre. You agree that you did. How did she know that if she didn't see you do it?*---I don't know. Because I didn't have a key till late in the piece. I had a key for the karate club when I had my black belt, but I never had a key to the [leisure centre] till late.
>
> *You're not just saying that she guessed that right, are you?*---I think she's talking about the key to the actual dojo.
>
> *Well, that's not what her evidence was. Her evidence was that you had key to the leisure centre* - - -?---She may - - -
>
> - - - *which is correct, we agree?*---I — I had a key to that, but she may be referring to the dojo as the [leisure centre].
>
> No, with respect, that wasn't what she said, and I'm going to put it to you squarely. *She said you had a key to the [leisure centre], and you did. Didn't you?*---In 2006, yes, I did.
>
> *Okay, and the only way she could know that, I suggest to you, is because she was there and saw you lock up on one occasion.* Isn't that right?---I don't

[13] 2006 was two years after the alleged courses of sexual conduct had ceased.

believe that.

You what?---I don't believe that at all.

So, how do you say [the complainant] knew that you had a key to that centre, whatever the year?---I'm thinking she's got her memory — her words mixed up and she's talking about the key to the dojo, not the centre.

But you had a key to the centre, and she said you had a key to the centre, do we agree that that's what happened? You did have a key, and she said you had a key?---I'm not disagreeing that she said that. I'm disagreeing with what she's interpreting the key as.

Or — so, *you say that when she said you had a key to the leisure centre and you did, she's confused, and she's really referring to a key to the dojo?*---Yes.

That's your evidence?---That's what I would think. Because I can never remember seeing her there after her knee operation, like her mother said yesterday.

Can you give me a reason as to why you think she made that mistake, given that she's factually correct?---She's saying she's factually correct, but she may be calling the dojo the [leisure centre].

Well, *she was challenged on that, and that very point was put to her vigorously in cross-examination and she held firm and said, 'No, that's not what I meant.'* So I'm asking you now, in light of those denials and any - - -

[DEFENCE COUNSEL]: (Indistinct words) — you can't be asking repeatedly the same question.

HIS HONOUR: What's the question?

[PROSECUTOR]: She says she didn't get it wrong, and she's factually correct and she was challenged on the point. Do you remember seeing that?---I can't recall, but no, I'll take your word on it.

It just happened the other day?---Yeah, I'll take your word on it.

Okay. So notwithstanding that she was challenged on the point, it was drawn to her attention and she said no, it was a key to the [leisure centre] and you say, 'Nah, she's still wrong,' do you?---I'm saying I had a key there — if she says that was the key - - -

HIS HONOUR: His evidence is that she must have mixed up the words.

[PROSECUTOR]: Yes. (To witness) *Can you explain to the jury why it is that you say she got the mixed up words* - - -

[DEFENCE COUNSEL]: How can he say that, Your Honour - - -

HIS HONOUR: That's a bit difficult.

[PROSECUTOR]: All right, I'll leave the point.[14]

45 We have highlighted passages that either incorrectly represent the effect of the complainant's evidence or which invite the applicant to speculate how the complainant could know this.

46 We are troubled by both the content of this cross-examination and the failure of defence counsel and the judge to intervene. It is clear to us that this cross-examination was conducted on an incorrect factual basis. The complainant did not say that the applicant had a key to the main leisure centre building; she didn't know whether he had one or not. On ten occasions over the course of three pages of transcript evidence, the prosecutor made this incorrect factual assertion to the applicant. This question was not insignificant to the prosecution case as the applicant's access to the external keys to the building were said to provide him with the opportunity to meet the complainant 'out of hours' for sexual purposes.[15]

47 We consider that it is likely that prosecution and defence counsel simply misunderstood the effect of the 'key' evidence. Had the prosecutor appreciated the limitations of this evidence, we consider that he certainly would have approached this aspect of his cross-examination differently and had the defence appreciated that the factual foundation of the questioning was incorrect, there certainly would have been an objection. We cannot conceive of a forensic purpose in deciding not to do so.

48 In our view, the vice in the 'key' cross-examination is two-fold. Firstly, the applicant was cross-examined forcefully and repetitively on a false evidentiary foundation about an important issue in the case. Secondly, within that cross-examination, the applicant was repeatedly asked to explain how the complainant could know certain things — this type of questioning is unfair, impermissible and tends to invert the onus of proof.

49 The above unfortunate cross-examination was a prelude to the prosecutor's dramatic cross-examination finale. He returned to the incorrect 'key' theme whilst referring to the Good Friday 2004 offence (charge 3):

> I want to suggest to you, Mr [Charles], that on Good Friday, you had ample opportunity over the afternoon to meet up with [the complainant], having returned from your honeymoon. Do you agree or not?---I do not that.
>
> You say your day was so full of activity there wasn't the opportunity to meet her at the dojo?---That's exactly what I'm saying.
>
> If you had said to your then-wife, 'Look, I need to go down to the dojo and check that everything's okay,' you had the keys to do it?---There's no way my wife would've let me - - -
>
> The question is, if you [had] done it, you had the keys to do it?---No.
>
> You didn't?---No. I had the dojo key, but I didn't have a key for the [leisure

[14] Emphasis added.

[15] For instance, in relation to offending said to have occurred on Good Friday 2004, the prosecutor addressed the jury: 'there was plenty of time in the day for things to happen. He had the car, he had the keys, he had the willingness, he had the time.'

centre].

I suggest to you, Mr [Charles], that this is just a brazen denial of sexual offending against that child?---I deny that.

And your evidence is that as she sat there in the witness box, she was giving untrue evidence to the jury - - -?---That's exactly - - -

- - - on the days that she was giving it?---That's exactly what I'm saying.

And if I suggested to you that, no, it's actually you that's sitting over there right now dishonestly denying those sexual offences, you would say, 'Nope, didn't do it.'?---Exactly.

Nothing further, Your Honour.

50 Having once more incorrectly put the evidence about the keys to the leisure centre building (as opposed to the dojo), the prosecutor, using extravagant language, described the applicant's evidence as 'a brazen denial of sexual offending against that child', and then invited the applicant to characterise the complainant's evidence as untrue 'as she sat there in the witness box', when in fact it was the applicant who was dishonest. As we have observed it is well established that any witness, and particularly an accused, ought not be asked in cross-examination whether another witness has lied.[16] It ought not be hinted at either.

51 The applicant submits that passages in the prosecutor's final address also were unfair and tended to reverse the onus of proof. He pointed to a number of submissions made by the prosecutor, to the effect that the complainant should be believed because her account was neither contrived, nor overblown, and not the sort of account invented by a liar. An example of this is:

> Her manner in telling you is another reason why you might accept what she said. Her manner here, she wasn't overblown, she wasn't contrived. She never once painted herself as the victim. Now if you're going to lie about this, and remember effectively what's being said is that everything you heard from [the complainant] over there was either flat out dishonest, take your pick, but it's not truth. That's what's being said.
>
> If you're going to tell a lie about this sort of thing you paint yourself in the best light you can, 'He forced me. He made me. I didn't want to'. You don't tell the narrative that [the complainant] gave you because it paints you as a co-conspirator in a sense. It puts you there as guilty for the actions as well. She never once shirked from the fact that she was happy with what was going on. She didn't play a victim card. And in circumstances where if you're going to fib about it at this level you might think that you would paint yourself in a better light than the way she painted herself. And it's the fact that she painted herself with those concessions to her own behaviour in that way that you might find her evidence has the clarity of a truthful narrative.

52 Whilst this and similar arguments attributed to the defence the assertion that the complainant was a liar (as opposed to holding a genuine but mistaken belief — that is,

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16 *Palmer* (1998) 193 CLR 1.

a confabulation), this argument in our view is primarily directed to the plausibility of the complainant's account and is in that regard unexceptional. A prosecutor is entitled to scrutinise a complainant's evidence and assert, if appropriate, that it is plausible or has the 'ring of truth'. A prosecutor is also entitled to anticipate arguments to be put by defence counsel, and endeavour to meet them. There is no reversal of the burden of proof in this sort of approach. In amongst these sorts of submissions, however, the prosecutor said, in relation to the complainant's evidence, that the applicant, in an understated or off-hand way, had threatened to kill her:

> She described it as a threat that was being made in an offhand way; make of that what you will. But we're not, and she's not more importantly, asserting that this was an eye-bulging threat, finger-pointing threat. It's nothing of the kind. It was an offhand statement to her that she didn't have much regard for because she had no intention of telling anyone. Again not playing herself the victim, 'I was terrified by the threat, so I was sworn to silence. I worried that if it would happen that certain things might happen to me or my family', that sort of thing, none of that.
>
> She wasn't bothered by the threat because she had no intention of saying anything about this at any stage to anyone. Why? You might remember what she said: because if she said something about this she'd be in trouble, he'd be in trouble, that the shared sexual contact they were having would stop, that she didn't want it to stop. *Why say these things if they're not true?* They have the clarity of truth because they are as you would expect given her conduct in the lead-up to these matters: that she is in love with him, that she wants to be in the car with him, that she actively engaged, that she flirts with him.[17]

53 These highlighted words were a clear breach of a well-settled principle established over 20 years ago[18] and repeated almost ad nauseum over the intervening years. It is simply unfair to expect an accused to suggest or establish a motive held by a witness to make false allegations, and a prosecutor — even one inflamed by the moment — really should understand this. Later in his final address the prosecutor returned to this theme and again, if a little more subtly, asked effectively the same question 'why would you not believe her?' At the conclusion of the prosecutor's final address, counsel for the applicant complained that the 'why would you not believe her' theme, present throughout the final address, was 'deliberately said and deliberately meant to reverse the onus of proof'. The judge remarked that the address sailed 'closer to the wind than it should have' although he did not consider it amounted 'to a reversal of the onus in the way in which you're putting'. The judge thought that the breach of *Palmer,* despite its repeat, may have been 'inadvertently or incautiously said'. Senior counsel requested a strong direction on where the onus of proof lies. This occurred, and no complaint is made about this direction, although the applicant argues that it also should have been repeated on similarly strong terms during the judge's charge.

Consideration

54 We are concerned about several aspects of this ground. It is plain that on occasions during cross-examination of the applicant, he was impermissibly asked by the

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17 Emphasis added.

18 *Palmer* (1998) 193 CLR 1; [1998] HCA 2.

prosecutor to express his opinion about why the complainant would be saying various things. This is unfair, irrelevant and an invitation for the jury (and the witness) to speculate. It is also clear enough that on at least two occasions the prosecutor in his final address asked the forbidden '*Palmer* question', to the effect of 'why would the complainant be saying these things if they weren't true'. All of this might possibly be excused by the failure of senior counsel of vast experience to object to the impugned cross-examination, and by the trial judge's firm direction on the onus of proof to which we have recently referred. The problem that we have been unable to resolve in the respondent's favour, however, is the false evidentiary basis of all of the impugned cross-examination. This, we consider, intensifies the unfairness in the prosecutor's approach. Not only was there a distinct flavour of reversal of the onus of proof, it was introduced on an evidentiary basis — that the complainant had given evidence that the applicant had a key to the leisure centre — that did not exist. The applicant was asked to explain evidence that was never given.

55 We consider the applicant has established that a substantial miscarriage of justice has occurred. There has been an irregularity in the trial and we are unable to conclude that, in the face of the diametrically opposed accounts of the protagonists, the irregularity made no difference to the result.[19] The irregularity identified was central to the prosecution case, both in cross-examination of the applicant, and in the prosecutor's final address.

Grounds 4 and 5

56 Grounds 4 and 5 are concerned with the complaint that the jury verdicts on charges 1, 2, 4 and 5 are inconsistent with the acquittals on charges 6 and 7. In the oral hearing, counsel for the applicant accepted that these grounds, in effect, made the one argument, and he was content to rely on the written case in relation to both grounds.

Legal principles

57 Verdicts will be factually inconsistent with each other if 'no reasonable jury, [applying] its mind properly to the facts of the case, could have arrived at the conclusion' so reached.[20] In *MacKenzie,* Gaudron, Gummow and Kirby JJ set out a number of general propositions concerning inconsistent verdicts. Relevantly to ground 4, they said:[21]

> 3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone*[22] is often cited as expressing the test:[23]
>
> > He must satisfy the court that the two verdicts cannot stand together, meaning

19 *Baini* (2012) 246 CLR 469, 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 469.

20 *Woods v The Queen* [2019] VSCA 259, [74]–[80]. See also *MacKenzie v The Queen* (1996) 190 CLR 348, 366 (Gaudron, Gummow and Kirby JJ); [1996] HCA 35 (*'MacKenzie*').

21 (1996) 190 CLR 348, 366–8; [1996] HCA 35.

22 Unreported, 13 December 1954 (Devlin J).

23 See, eg, *R v Hunt* [1968] 2 QB 433, 438; *R v Durante* [1972] 1 WLR 1612, 1617; [1972] 3 All ER 962, 966; cf Archbold, *Criminal Pleading, Evidence & Practice,* 43rd ed (1995), vol 1, [4]–[457].

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

4. Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense.[24] Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted.[25] If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury.[26] In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt.[27] Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries.[28] The early history of New South Wales was affected by English juries which, in the face of clear evidence, declined to find the value of goods stolen sufficient to attract the punishment of death, thereby affording to the offender the alternative punishment of transportation.[29] Australian decisions have acknowledged that the role of the jury continues to be ameliorative in this respect. In *R v Kirkman*,[30] in the Supreme Court of South Australia, King CJ (with the concurrence of Olsson and O'Loughlin JJ) observed:

> (J)uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. 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 a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty.

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24 See *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580, 595; *Ward v Roy W Sandford Ltd* (1919) 19 SR (NSW) 172.

25 *R v Wilkinson* [1970] Crim LR 176.

26 *Hayes v The Queen* (1973) 47 ALJR 603, 604–5.

27 *R v Andrews Weatherfoil Ltd* (1971) 56 Cr App R 31, 40.

28 *R v Hunt* [1968] 2 QB 433, 436.

29 Castles, *An Australian Legal History* (1982), 56.

30 (1987) 44 SASR 591, 593.

We agree with these practical and sensible remarks.

> 5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and common sense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty.[31] More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law.[32] It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside.[33] It is impossible to state hard and fast rules. 'It all depends upon the facts of the case'.

Consideration

58 Charge 6, as we have observed, was a charge of sexual penetration of a child under 16 by the introduction of the applicant's tongue into the complainant's vagina. It was a course of conduct charge, however the complainant stated that this was not a regular occurrence, and would only occur 'at opportune times', when there was enough time and privacy 'to perform that act'. The complainant said the first time this occurred was on a Friday night when the applicant was driving her to her mother's place of work. It follows from the evidence that, if this event occurred, it must have been on a Friday night in 2003 or 2004 as these were the only years in which she trained with the Friday night group. It will be recalled that the complainant's 2003 and 2004 diaries contained hand drawn symbols said to be a diary record of the particular type of sexual conduct alleged by the complainant. The complainant's 2004 diary did not contain a codified entry for the Friday night oral penetration alleged by the prosecution as the first of its type (and thus the start of the charge 6 course of conduct), and her 2003 diary had not been recovered. Therefore there was no contemporaneous record available for the offending the subject of charge 6.

59 We agree with the respondent that the jury verdict in relation to charge 6 does not necessarily indicate that the complainant was positively disbelieved on this charge. It may be that the evidence on this charge was of a different quality than the evidence on other charges which were well-represented in the 2004 diary. Alternatively, it may be that the jury may not have been satisfied that the 'course of conduct' aspect had been proven, in that they could not be satisfied that the conduct had been repeated. Further the verdict may find its explanation in the jury taking a merciful view of the facts on this charge, given its irregularity and lack of objective support. Or a combination of all these factors as between the twelve jury minds. We do not consider that the verdict on

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31 *R v Irvine* [1976] 1 NZLR 96, 99; *R v Morgan* [1981] 2 NZLR 164, 168–9; *R v Cooper* (1993) 149 AR 207; Ewaschuk, *Criminal Pleadings and Practice in Canada,* (1983), s 15.212, requiring that the verdicts be 'so mutually contradictory or violently at odds in relation to the evidence that they cannot stand together in the sense that no reasonable jury, who had applied their mind to the facts of the case, could have arrived at the same conclusion': *R v Peterson* (1966) 106 CCC (3d) 64, 79; cf *Hall v Poyser* (1845) 13 M & W 600 [153 ER 251]; *Bedford v Crapper* [1949] 3 DLR 153.

32 *R v Zundel* (1987) 35 DLR (4d) 338, 401–2, applying *R v McShannock* (1980) 55 CCC (2d) 53, 55–6; cf *Mack v Elvy* (1916) 16 SR (NSW) 313.

33 *R v Drury* (1971) 56 Cr App R 104, 105.

charge 6 was one that no reasonable jury could reach, in the face of the other verdicts in the case.

60 The verdict of not guilty on charge 7 is also not inconsistent, in the sense described above, with the verdicts on charges 1, 2, 4 and 5. Charge 7 related to one act of penile-vaginal sexual penetration of a child under 16. The complainant stated that this offence occurred after six to 12 months of consensual sexual activity. She stated that she obtained, covertly, a condom from her mother's bedroom and took it to the training camp. Whilst driving home from the camp and whilst engaging in sexual play in the course of the drive, the applicant pulled his two-seater Holden utility over. The complainant said:

> I leaned down to my bag, and got a condom out. I produced the condom, and — I can't quite remember whether I put it on him, or whether he put it on — and then I straddled him, I was in passenger side, the car was stopped, I climbed over the centre console, and I was facing him, and got on top of him, and inserted his penis into my vagina.

After penetrative sex for a very short period, the applicant is alleged to have said that they should stop and the complainant returned to her seat. The applicant is alleged to have said they should not be doing this, he could get into a lot of trouble and they should wait until the complainant was older.

61 The applicant retained the Holden Utility up until trial, and pictures of its interior were exhibited, which we have viewed. One of those pictures depicts the applicant positioned in the driver's seat. The door is open to facilitate a view of the interior. The passenger compartment of the utility is a two bucket seat configuration with a centre console and a short manual gear lever emerging from the console area, immediately ahead of the handbrake. The steering wheel appears of large standard size, is angled slightly forward of the vertical, and with the applicant appearing to sit in a usual seating position, the bottom rim of the wheel sits just above his thighs about 12 to 15 centimetres back from his knees.

62 The applicant denies that this incident occurred, or that he ever in fact drove the complainant to or from the central Victorian dojo. The complainant was unable to date this episode with any precision, stating that it could have occurred in 2002, 2003 or 2004. She stated that throughout those years, when she was 12, 13 or 14, she was of average size for a young girl of those ages. The complainant's mother stated that the complainant had attended the camp, and she believed the complainant may have been 14 at that time. If this is correct, the camp was in 2004. She stated in evidence-in-chief that the applicant had driven her daughter to and from the camp however, in cross-examination she conceded this may be incorrect.

63 This was the first and only act of penile-vaginal sex alleged by the complainant. There is no discernible record of it in the applicant's 2002 or 2004 diaries, and as we have said the 2003 diary cannot be found.

64 In the circumstances we consider, as with charge 6, it was open to the jury to have entertained a reasonable doubt about charge 7, without positively finding that the

complainant's evidence overall lacked credibility. In particular, the following circumstances may have influenced the jury on this charge:

- There is no contemporaneous diary record of what may well have been a momentous event in the complainant's life.
- The evidence that the applicant actually drove the applicant to the camp received some, but not a lot of support from the complainant's mother, who accepted the possibility that she was incorrect on the issue. There was no other independent support of the complainant's account on this issue. The applicant denied ever driving the complainant to the camp.
- The jury may have considered that the reasonably confined interior of the Holden utility would make the activities described by the complainant inherently unlikely. Further the jury may have reasoned that if there were to be consensual sexual activity of this nature it would occur in the much less restrictive passenger bucket seat — but that was not the complainant's account.

65 In our view, as with charge 6, the verdict of acquittal on charge 7 is not one that no reasonable jury could reach, in the face of the other verdicts in the case. In more positive language, the jury may well have considered the evidence on this charge less compelling than on charges 1, 2, 4 and 5. Alternatively the jury may have taken a merciful view of the facts on this charge, given its one-off nature, and on the complainant's own account the fact that she took a more active role, and the applicant withdrew from the act very shortly after it commenced.

66 The inconsistent verdicts argument that underpins ground 4 must be rejected.

67 In oral argument under ground 5, the applicant accepted that the substance of ground 5, 'the unreasonable ground', was effectively identical to ground 4. It follows that if the applicant did not make out the inconsistency argument that underpinned ground 4, ground 5 could not be established.

68 Further we have had the advantage of reading the entire transcript of the applicant's second trial. In our view there was evidence capable of supporting the verdicts on charges 1, 2, 4 and 5. It is unnecessary to say more about ground 5.

69 Leave to appeal on grounds 4 and 5 will be refused.

Ground 6

70 Under this ground the applicant complains that certain statements made by the complainant in her victim impact statement contained fresh evidence, which if available at trial, raised a significant possibility that the applicant may have been acquitted by the jury of all charges.

71 The statements said to constitute 'fresh evidence' are, in summary:

(a) She 'often dissociates' when she has to give evidence of the allegations.

(b) She felt constrained in telling anyone of what occurred because of the applicant's threat to kill her.

(c) She is still concerned about that threat.

(d) She was threatened like this, as a child, on a regular basis.

(e) She developed post-traumatic stress disorder from the threat.

(f) She attributes spending time in a psychiatric hospital to the offending.

(g) She went to school covered in bruises, alleged to be caused by the applicant at the karate club where he 'was able to be physically violent and intimidate me without ever raising suspicions from anyone'.

72 'Fresh evidence' is evidence that either did not exist at the time of trial or which could not, with reasonable diligence, have been discovered. In order to demonstrate a substantial miscarriage of justice, an applicant must demonstrate not just that the evidence is fresh, but also that if the evidence had been led at trial, and believed, there is a significant possibility that the evidence would have led the jury to acquit the applicant.[34]

73 None of the evidence of the threat to kill, or its psychological sequelae is 'fresh', although we observe that the complainant's evidence (and the prosecution case) at trial was that the complainant had a crush on the applicant, willingly engaged in sexual relations with him and the threat to kill was an 'offhanded comment' made once when the touching first started. The implication was that at the time, the complainant was not unduly affected by the threat. Unsurprisingly, senior counsel for the applicant asked very few questions about the threat, notwithstanding that he had a committal and two trials in which to do so had he wished. We consider that these victim impact statements are merely epexegetical of evidence given at trial, and are in no way 'fresh'.

74 It is correct that the complainant had not said before that she often dissociates when required to relive the offending in graphic detail. To this extent this evidence is 'fresh', however, we are of the view that had the defence been aware of it, it would have been of little if any utility to the defence. The statement is not an expert opinion and is an expression, in our view, of the trauma occasioned by the trial process upon the complainant's psyche and her method of dealing with it — by dissociating. We interpret that statement to mean that she disconnected when having to revisit the trauma of these events. This is precisely what one would expect in a victim impact statement. Had the complainant been cross-examined about what she perceived to be the effect of this offending on her psyche and her efforts to cope with the stresses involved, the applicant's prospects of success at trial were unlikely to be improved.

75 It is also correct to observe that the complainant did not give evidence at trial about going to school covered in bruises caused by the violent and intimidating applicant. Whilst this may also be 'fresh' evidence, it is difficult to see how at trial this evidence could have been used to the applicant's advantage. Bruises are hardly surprising in a child engaged in a contact sport such as karate, and the complainant's opinion as to why the bruises were inflicted is patently inadmissible, whether adduced in examination-in-chief or in cross-examination.

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34 *Bowden v The Queen* (2017) 54 VR 135, 144 [36] (Priest JA); [2017] VSCA 46.

76 The complainant's statement in her victim impact statement that she spent days in a psychiatric hospital on account of the offending, that she was psychologically affected by the offending, that her lifestyle was affected by it, and that she had been hospitalised for her mental health are not 'fresh evidence'. It was in evidence before the jury that on 11 September 2014, the complainant had been admitted to the St Vincent's Hospital psychiatric ward, and that in 2016 she commenced consulting a psychologist. Senior counsel cross-examined the complainant regarding the 2014 admission and used the fact that a Crisis Assessment Treatment Team attended to her while she was in a psychotic state, to attempt to discredit her evidence. What little additional evidence there is in the victim impact statement is, in our opinion, evidence that could have been discovered with the exercise of reasonable diligence either during the pre-trial process, the committal or the first trial. In the unlikely event that such cross-examination were permitted, it is hard to see how cross-examination of the complainant of her belief that her psychotic state in 2014 was due to the offending, would have improved the applicant's chances before a jury.

77 The applicant has failed to establish this ground.

78 It would be remiss of us to pass from this ground without expressing our concern at the prospect that statements made by a victim of crime in a victim impact statement may be introduced into a subsequent trial (after, say, a successful appeal) as a means of discrediting the maker of those statements. Victim impact statements are the vehicle by which the court hears from victims on the impact of crimes committed against them. They are made at a time when the victim may be very emotional and may express intimate feelings with less restraint than evidence in a formal trial setting. They are a victim's only chance of communicating this impact to the court and victims perform an admirable service to our legal system by providing such statements. Courts are required to take the impact into account when imposing sentence,[35] and any activities that may inhibit the free flow of information from victim to court are to be deprecated. Perhaps an amendment to div 5, pt 2.1 of the *Evidence Act 2008* could be considered prohibiting cross-examination derived from the contents of a victim impact statement without the leave of the court.

Ground 7

79 On the hearing of the application, the applicant sought leave to add a new ground submitting that:

> A substantial miscarriage of justice occurred because:
>
> a) the prosecutor invited the jury to use the complainant's distress at the time of her complaint to her boyfriend as support for her account regarding the offences alleged; and
>
> b) the trial judge directed the jury that they could use the complainant's distress at the time of her complaint as indirect or circumstantial evidence which supported her account that she had been sexually

[35] *Sentencing Act 1991,* s 5(2)(daa).

abused.

80 The evidence at trial was to the following effect:

- The complainant and Marcos Brooks[36] were at a training camp at Apollo Bay in 2007.
- The complainant, while at this camp, entered Brooks' room crying and in a distressed state. Brooks asked her what was wrong and she said, 'I can't tell you. He'll kill me.'
- That same month Brooks questioned the complainant about this statement. The complainant again became distressed, cried uncontrollably and stated that the applicant had had sex with her some time earlier.

81 It follows that these two statements, made in a state of distress, took place two to three years after the alleged sexual relations between the applicant and the complainant.

82 In the prosecutor's final address, he made the following submission about the applicant's state of distress:

> You can use that complaint evidence as evidence in this trial. You can also use her distress in the way that she went about it to assess the consistency of her conduct. What do we mean by that? If someone told you that they'd been raped or they'd been the victim of a serious crime, at the time that they told [you] they were tap dancing and juggling some balls you'd think, 'That behaviour is not consistent with the distress that I'm seeing'. Silly example but illustrates the point.
>
> Her distress is what you would expect to see from someone recalling a traumatic event or series of events. The traumatic events that she was recalling when she was telling [Marcos Brooks] about it was the very subject matter of this trial and that her distress fits with what you would understand people to — or the way in which you might expect her to react when she was recalling those events.

83 Immediately prior to the commencement of the judge's charge, senior counsel for the applicant directed the bench to this aspect of the prosecutor's address and submitted that the trial judge ought give the jury a direction to the effect that while a contemporaneous complaint accompanied by distress may be powerful evidence, evidence of a distressed condition at a much later stage is of little weight as supporting evidence.

84 The judge directed the jury in the following terms:

> There was also evidence that when she made that complaint, [the complainant], when she told [Marcos Brooks] was described as being distressed during that complaint.
>
> The prosecution invites you to use this as indirect evidence — another word for that might be circumstantial evidence and I will give you some directions about circumstantial evidence in a moment and what conclusions can be drawn from indirect evidence. *The prosecution argued that that indirect evidence supports*

[36] A pseudonym.

> *the complainant's account that sexual acts had taken place, supports that conclusion because they say that distress comes from the fact that she was remembering and recounting a traumatic even[t].*
>
> *Given the circumstances the prosecution say the traumatic event was the offences committed by the accused upon her.* When you come to hear my directions about circumstantial evidence you will recall this particular aspect. There is another aspect to this which you should also consider and that is that the very fact of recounting such an event may have been the true cause of her distress rather than that she was remembering some memory or other of what had taken place.
>
> So what you make of that distress is a matter for you once you assign what it was that she was distressed about. If you find that she was distressed because she was recounting or remembering a true traumatic event then you can use that as a piece of evidence which is supportive of her account.[37]

85 The direction was in line with the model directions in the Criminal Charge Book as at 8 April 2021.[38] It did not, however, deal with the applicant's contention that the delay between the alleged offending and the distress ought be taken into account when considering the weight to be given to the evidence of distress.

86 On 7 December 2021, this Court gave judgment in *Paull v The Queen.*[39] In short, the Court concluded that two sentences from the model directions were misleading and should be deleted.[40] Those sentences are highlighted in the passage of the charge set out above.

87 In *Paull*, the impugned evidence of distress occurred during a VARE[41] conducted some 38 years after the alleged offending. The Court said this:[42]

> Distress displayed by a complainant shortly after an alleged sexual offence can in certain circumstances be a form of circumstantial evidence that independently supports a complainant's account. To be admissible, however, it must be reasonably open to infer from the evidence that there was a causal connection between the distressed condition of the complainant and the alleged sexual offence.[43] Even when admitted, evidence of distress generally will carry little weight. Thus, in *Munro*, Nettle JA said:[44]
>
> > In *R v Flannery*[45] it was held that in determining whether evidence of the distressed condition of a complainant is capable of amounting to corroboration, regard must be had to such facts as the age of the complainant, the time interval between the alleged assault and when she was observed in

37 Emphasis added.
38 *Victorian Criminal Charge Book*, Judicial College of Victoria, [4.9.1].
39 [2021] VSCA 339 (*'Paull*').
40 Ibid [48]–[49] (Priest, Kaye and Niall JJA).
41 Video and Audio Recording of Evidence.
42 [2021] VSCA 339, [40] (Priest, Kaye and Niall JJA).
43 *R v Flannery* [1969] VR 586, 591 (Winneke CJ, Pape and Starke JJ); *R v Rogers* [2008] VSCA 125, [18]–[20] (Nettle JA); *Flora v The Queen* (2013) 233 A Crim R 320, 333 [69] (Redlich, Weinberg and Coghlan JJA).
44 *R v Munro* [2005] VSCA 260, [49] (citation as in original).
45 [1969] VR 586, 591.

> the distressed condition. If, having regard to such factors, the reasonable inference from the evidence is that there was a causal connexion between the alleged assault and the distressed condition, evidence of the latter is capable of constituting corroboration. Except in special circumstances, however, evidence of distressed condition will carry little weight and the court said that juries should be so warned by the trial judge in the course of the judge's charge.

88 The applicant contended that the judge's jury directions on this aspect were deficient such as to amount to a substantial miscarriage of justice. They contained two sentences from the model directions that were held by the Court in *Paull* to be misleading and, given that the conduct evidencing of distress occurred at least two years and perhaps three years after the conclusion of the alleged offending conduct, it was not reasonably open to the jury to infer from the evidence that there was a causal connection between the complainant's distress and the alleged offending.

89 In this case, in a perfect world, the judge would have avoided using the sentences subsequently deprecated in *Paull,* and would have also directed the jury as to the weight evidence of distress generally carries, particularly in circumstances of substantial delay between alleged offending and exhibited distress. However, in our view, no realistic unfairness was occasioned to the applicant by the treatment of distress in this case. We consider that the distress exhibited in 2007 was reasonably capable of being viewed by the jury as causally connected to the underlying offending that allegedly took place two to three years earlier. The prosecutor accurately described the use the jury could make of the distress evidence should it wish — to assess the consistency of the complainant's conduct — and the judge correctly directed the jury that if it was satisfied that the complainant's distress was causally connected to the underlying traumatic event, then it was available as a piece of circumstantial evidence capable of supporting the complainant's account of the offending. The jury were subsequently directed in correct and orthodox terms about the use it may make of circumstantial evidence.

90 Leave to appeal under this ground will be refused.

Ground 8

91 This ground alleges that an aggregate of errors caused the trial to miscarry. In view of our conclusion on ground 2, it is unnecessary to consider this ground further. In the event that we have overvalued the impact of ground 2, we consider that the aggregate of errors in ground 1 (the 'Kylie's corner' ground) and ground 2 (the *Palmer* onus of proof reversal predicated on a false evidentiary basis) is sufficient to establish this ground. Very few trials are perfect, but this trial was sufficiently imperfect as to require a retrial.

Conclusion on conviction

92 The applicant will be granted leave to appeal on grounds 1 and 2, the appeal will be allowed, the verdicts on charges 1, 2, 4 and 5 will be set aside and a new trial will be ordered.

Application for leave to appeal against sentence

93 It is unnecessary to consider the application for leave to appeal against sentence, given our conclusions on the conviction appeal.