HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

JUSTIN PATRICK LIBKE APPELLANT

AND

THE QUEEN RESPONDENT

Libke v The Queen
[2007] HCA 30
20 June 2007
B1/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

B G Devereaux SC with P E Smith for the appellant (instructed by Legal Aid Queensland)

D L Meredith for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Libke v The Queen

Criminal law – Practice and procedure – Cross-examination – Appellant convicted at trial before jury of certain sexual offences against intellectually impaired person – Whether "miscarriage of justice" under s 668E(1) of *Criminal Code* (Q) by reason of manner in which prosecutor conducted cross-examination of appellant – Role of trial judge during the cross-examination – Application of the "proviso" in the circumstances – Requirements of *Weiss v The Queen* (2005) 224 CLR 300.

Criminal law – Practice and procedure – Directions to jury – Whether trial judge gave adequate directions on issue of consent as it related to cognitive capacity and intellectual impairment – Whether trial judge gave adequate directions on defence provided by s 216(4) of *Criminal Code* (Q) that accused had belief on reasonable grounds that person was not intellectually impaired.

Words and phrases – "cognitive capacity to give consent", "intellectually impaired person".

Criminal Code (Q), ss 24, 216, 229F, 348(1), 348(2), 349(2)(a), 668E(1).

1 GLEESON CJ. I have had the advantage of reading, in draft form, the reasons for judgment of Hayne J. I agree, for the reasons given by Hayne J, that the appeal should be dismissed. I would add two brief observations.

2 First, the argument that the conduct of the prosecutor during his cross-examination of the appellant resulted in an unfair trial, and a miscarriage of justice, involved a question of degree. As Mullins J pointed out in the Court of Appeal, the cross-examination of the appellant extended over 44 pages of transcript. In the course of that cross-examination, counsel made certain inappropriate comments. It is difficult for an appellate court, relying only on the written record, to assess the impact of undisciplined conduct by counsel. It is also difficult, away from the atmosphere of the trial, to measure the significance of the absence of intervention by the trial judge or by opposing counsel. Those difficulties are to be taken into account by way of caution in approaching any attempt to minimise the complaints made on behalf of the appellant. Even so, having read the whole of the evidence of the appellant, I would not interfere with the Court of Appeal's conclusions that the conduct of the prosecutor did not make the trial unfair.

3 Secondly, I agree that, in the circumstances of this case, in order to raise for the jury's consideration the defence provided by s 216(4) of the *Criminal Code* (Q), it was not necessary for the appellant to go beyond saying that the complainant "seemed fine". The appellant did not have to show that he thought there was a real question about the complainant's intellectual capacity, and arrived at an answer to that question. Most of the beliefs that form the basis of our dealings with other people are more in the nature of undisturbed assumptions than conclusions based on a process of reasoning. It was for the members of the jury to decide, in the light of all the material before them, including their assessment of the appellant, and their observation of the complainant, whether the appellant's evidence that the complainant "seemed fine" established a belief by the appellant that the complainant was not intellectually impaired, and whether that belief was on reasonable grounds. The case was left to the jury on the basis that it was open to decide those issues favourably to the appellant on the basis of that limited evidence. It was not necessary, and it would probably not have been to the appellant's advantage, for the trial judge to give more elaborate directions on the point. It is not surprising that trial counsel did not seek further directions.

4 KIRBY AND CALLINAN JJ. As we approach this appeal from the Court of Appeal of the Supreme Court of Queensland[1], it concerns primarily the standard of conduct required of a prosecutor, as such conduct affects the entitlement of a person accused of criminal offences to a fair trial.

The facts

5 Mr Justin Libke (the appellant) was found guilty by a jury, and convicted, after a trial in the District Court of Queensland (Griffin DCJ) on one count of rape, two counts of unlawful carnal knowledge of an intellectually impaired person, one count of unlawful exposure of an intellectually impaired person to an indecent act, and of unlawful and indecent dealing with an intellectually impaired person. The verdicts on counts 2, 3 and 4 were lesser and alternate verdicts. The indictment alleged three counts of rape, one count of indecent dealing with an intellectually impaired person, and one count of sodomy of an intellectually impaired person.

6 The complainant was 18 years old at the time of the events with which the Court is concerned. She is intellectually impaired. There was little or no contest about that at trial. Issue was joined, however, on the degree of impairment, and the extent to which impairment was apparent in her appearance, demeanour, speech and conduct generally.

7 The appellant was 39 years old. He met the complainant at a park where they exercised their dogs. After they introduced themselves, the appellant asked the complainant how old she was. She told him that she was 18. The appellant described her as being of Asian appearance, and speaking with an "Asian-type accent", with a lisp. She seemed "fine", he was later to say in evidence, "in regards to her mental health".

8 They met again at the park about two weeks later. The complainant told the appellant that her mother had been born in Malaysia and that her father was from England. The complainant neither said nor implied that she was in any way intellectually impaired. Nor did she mention that she had undertaken a special education course, or that she was unable to live unsupported.

9 It was common ground that, on their second meeting at the park, when they were seated on a bench, the appellant touched the complainant's legs, put his hand in her shorts and his finger in her vagina. She agreed that she did not say "no". That was the subject of count one. The complainant accepted in cross-examination that when the appellant asked her in the park, "Do you want to fool

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1 *R v Libke* [2006] QCA 242.

around a little?", she said "Yes", but that she did not know what that meant. In a videotaped record of interview, the complainant was asked "What if somebody came along?" She responded that that was what the appellant was checking for, adding:

> "… I asked him at first like what he was doing and I kind of . . . I refused to let him do it. He goes, 'Why?' and I didn't answer him at first because I don't know why [indistinct]. I just didn't answer him because I [indistinct] know him. I don't know why [indistinct], yeah."

10 The complainant was asked where her hands were when the appellant was touching her and she said they were by her side. She confirmed during cross-examination that she did not tell the appellant to stop or take his hands away. But when it was put to her that she responded or acted, as the appellant was touching her, as though she liked what the appellant was doing, she said "No".

11 As to the circumstances surrounding this, the first charge, of digital rape, there was a dispute as to the implied invitation said to have been offered by the complainant to the appellant. Williams JA in the Court of Appeal took the view that the appellant's evidence departed from the matters put in cross-examination of the complainant. His Honour said[2]:

> "Counsel for the appellant in addressing this Court placed great emphasis on a passage in the cross-examination of the complainant as to her conduct immediately after the appellant touched her on the vagina with his finger; the critical questions and answers are as follows:
>
> > 'And when he did that, put his fingers down your trousers to touch your vagina, you turned to face him, didn't you? – Yes.
> >
> > And you did that to allow him to touch your vagina more easily. Do you understand? You were doing that to enable him to touch you on the vagina. You tell me if you don't understand? – I understand.
> >
> > What I am suggesting is you turned your legs towards him and opened them slightly so it would make it easier for him to get his fingers to your vagina. That's what happened? – Yes.'
>
> That passage in the evidence was emphasised by defence counsel in his address, and was also referred to in the summing up. It clearly was of critical importance to the jury's deliberations. It is significant that at that

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2 [2006] QCA 242 at [12]-[15].

point in cross-examination counsel was apparently putting to the complainant the defence case; after the appellant touched her vagina she parted her legs to give him easier access. Though the complainant said that she understood what was being put to her, it was still a question for the jury as to the reliability of her responses to what was being put to her, and what weight, if any, should be attached to the adoption of what was put to her when considered in the light of all the evidence given at trial.

That passage in the evidence of the complainant was the focus of attention during addresses and summing up also because in his evidence the appellant told a different story. His evidence was not that after he initially touched the complainant's vagina she opened her legs to make access easier, a scenario which might suggest cognitive consent on her part. Rather his evidence was to the following effect. Whilst they were sitting on the park bench and he was rubbing her legs, she 'swung her legs towards' the appellant, and when she did so 'I seen her pussy'. According to the appellant's evidence-in-chief: 'I just seen it, and then I just put my finger [in] her vagina.' Nothing of the sort had been put to the complainant in cross-examination, and she had not been asked any questions about the nature of the underwear she had on at the time. Under cross-examination by the Crown prosecutor the appellant said that the complainant's underwear was 'loose'; she had loose shorts and loose underwear. On that account the complainant either deliberately or accidentally displayed her vagina to the appellant and he immediately inserted his finger.

Given the complainant's intellectual capacity and her obvious difficulty in understanding a number of things put to her in evidence, and given the propositions put to her in cross-examination which she apparently adopted, and given that those matters were not then confirmed by the appellant in his evidence but he gave a contrary version which was not put to the complainant, the jury may well have considered that the complainant's apparent adoption of the proposition that she opened her legs to give easier access to her vagina was deserving of little, or no, weight. As already noted it was for the jury in all the circumstances of the case to determine the significance to be attached to the adoption of the proposition put to her."

12 We observe at this stage that, although we would not ourselves attach to the departure between the matters put and not put on behalf of the appellant, and the evidence that he subsequently gave, the same significance as his Honour did, we do agree that it was for the jury to evaluate the complainant's evidence as a whole on the issue of her actually consenting, or appearing to do so.

13 All of the events the subject of the other charges occurred on the one occasion. We adopt the summary of it given by Mullins J in the Court of Appeal. Her Honour said[3]:

> "A couple of days later on 9 October 2002 the appellant telephoned the complainant at home and asked her if she wanted him to come over and she said that she did. The complainant let the appellant into the house. There was no one else at home. The appellant told the complainant that he could not stay for long. He asked her 'Do you want to have sex?' and the appellant gave evidence that the complainant responded affirmatively, but the complainant said that she did not say anything. The appellant asked her again whether she was 18 years old and she said she was. They went into the lounge room. The appellant undressed. The complainant then undressed. The complainant closed the blinds. The appellant gave evidence that at the park the complainant had told him when he came over to bring protection. In cross-examination the complainant said that she did not say anything like that. The complainant said that when the appellant was undressed she asked him if he had a condom and that he said 'Yes'. The appellant had brought a condom with him and he put it on.
>
> The complainant stated in her record of interview that they lay down on the lounge room floor and the appellant got on top of her and '… he kissed me and then he started, um, putting his penis in me' and described what happened:
>
> > 'And do you think it went in – into your – into your body very far? -- Yeah, it went pretty far because it started hurting.
> >
> > Did it? -- Yeah. And then he took – and I told him in the middle of it, and then when I told him, he took it out, and then, um, after that he, um – before I told him it hurt it, like, um – no, when – after I told him it hurt, he said that he needed a wank, and then – that's when he first went in with his fingers and then he had something on this – um, on the condom as well.'
>
> This sexual intercourse was the subject of count 2.
>
> The complainant described seeing the appellant have 'a wank'. This was the subject of count 3. The complainant said that the appellant tried to put his penis back in her vagina again, but '… he didn't put it too far in because I told him it hurt'. The complainant said that the appellant then

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3 [2006] QCA 242 at [57]-[62].

turned her around so that she was on her knees and '… then he, um, stuck his penis in my arse after that, yeah, but it didn't hurt because he didn't stick it far' and that she 'didn't feel it'. This was the subject of count 5. In cross-examination the complainant agreed with the suggestion that when she was on her knees, the appellant was moving his penis in the area of her vagina. The complainant also agreed in cross-examination that they both then lay beside each other on the floor, the appellant felt her vagina with his finger and that he tried again to have intercourse with her. This was the subject of count 4.

In cross-examination the complainant accepted that at the committal hearing she had agreed that she was attracted to the appellant in a sexual way and she agreed that she had said at the committal that the whole reason that she had wanted the appellant to come over to her house was because she knew that there would be sexual activity and that she had sexual feelings, urges and desires.

The appellant said in evidence-in-chief that when they lay down on the lounge room floor, he lay on top of the complainant, but could not keep an erection. He said that he tried to stimulate himself whilst sitting up a bit and that they changed positions in that the complainant got on her knees and he attempted to insert his penis into her vagina from behind her. He said he was unsuccessful in doing that and denied putting his penis into the complainant's anus. The appellant said that they lay on the carpet again and that his penis entered the complainant's vagina 'a little way'.

Both the complainant and the appellant got dressed and the complainant let the appellant out. The complainant stated that before the appellant left, he told her 'not to tell anybody at all'. The appellant stated that he did not make any such statement to the complainant."

14 Almost the entirety of the complainant's evidence-in-chief consisted of video tapes of interviews of her made and tendered pursuant to s 93A of the *Evidence Act* 1977 (Q) (the "Evidence Act"). That section relevantly provides as follows:

"**93A Statement made before proceeding by child or intellectually impaired person**

(1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if –

(a) the maker of the statement was a child or an intellectually impaired person at the time of making the statement and had

personal knowledge of the matters dealt with by the statement; and

(b) the maker of the statement is available to give evidence in the proceeding.

(2) If a statement mentioned in subsection (1) (the main statement) is admissible, a related statement is also admissible as evidence if the maker of the related statement is available to give evidence in the proceeding.

(2A) A related statement is a statement –

(a) made by someone to the maker of the main statement, in response to which the main statement was made; and

(b) contained in the document containing the main statement.

(2B) Subsection (2) is subject to this part.

(3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement."

15 No point was sought to be taken by the complainant with respect to the conduct of the interviews, and the repetitive nature of some of the questions asked, in consequence of which the complainant may have been given the opportunity of rehearsing her evidence, and causing it to be reinforced in the minds of the jury as they watched and listened to the video tape.

16 The complainant was cross-examined at some length about her conversations with the appellant:

"You never told Justin what school you attended? -- No, I didn't.

You never told him what your results were at school? -- No, we didn't talk much about anything.

Alright. Well, I have to ask you these questions? -- Yeah, I know.

You didn't tell him that you were doing a special educational course, did you? -- No, I didn't.

You didn't tell him what subjects you were doing? -- No.

You didn't tell him that you had any difficulties or disabilities, did you? -- No, I didn't.

You could fully understand – apart from those words you said you didn't know what playing around meant, you could fully understand everything else he was saying to you? -- Yes.

And you responded to what he was saying to you? You answered . . . ? -- Yes.

. . . his questions or had a conversation with him? -- Yes.

Was there anything else you remember him saying that you didn't understand? -- No, I don't.

You didn't tell him, for instance, that you'd only done unpaid work experience? -- No.

You didn't, or he didn't get you to count any money or anything like that? -- No.

He didn't go shopping with you at any stage, did he? -- No.

You didn't tell him you couldn't work a cash register or anything like that? -- No.

You never told him that you have trouble travelling on a bus or train by yourself? -- No.

And you had no difficulty in understanding – apart from that mucking around, the playing around – you didn't understand that – you had no difficulty in understanding what he was talking about? -- What do you mean?

Well, you were able to converse with him? -- Converse – what do you mean converse?

Talk, talk back and forwards? -- Yeah, we were just –

… you had no difficulty in understanding what he was saying apart from that playing around, whatever you said, alright? -- Yeah.

And did he appear to have any difficulty in understanding what you were saying? -- I don't think so."

17 The complainant agreed that she had opened her legs slightly to make it easier for the appellant to insert his fingers into her vagina when they met in the

park for the second time. She also agreed that she had given evidence at the committal hearing that the whole reason that she wanted the appellant to come over to her house was because she knew that there would be sexual activity, and that she did have sexual urges and desires.

The prosecutor's questions and comments

18 The appellant gave evidence at the trial. He was subjected to a scornful cross-examination punctuated by interruptions of answers and comments, but not, regrettably, objection by counsel or intervention by the trial judge.

19 To understand how the cross-examination may have affected the outcome of the trial, a deal of it needs to be set out:

> "Well, you have heard her say you parked your car down the road? -- Yeah.
>
> Did you tell her you parked your car down the road? -- No, she said when she was closing the blinds – she goes, 'Where's your car?'
>
> Did she? -- Yeah.
>
> When she was closing the blinds? -- Yeah.
>
> This was when you and she were in the heat of passion, was it? -- No.
>
> She asked where your car was? -- No, no, when she was closing the blinds, the . . .
>
> Yes? -- The blinds to, you know.
>
> Well, this is when you were undressing . . . ? -- Yes, yeah.
>
> . . . in the course of your passions. She asked where your car was? -- Yeah, no, when she was closing the blinds she looked out the window and she says, 'Where's the car?', and I said, 'It's down the road.'
>
> You said, 'It's down the road'? -- Yeah.
>
> Why didn't you say it was just next door? -- I just said, 'It's down the road.' I didn't – it wasn't – it wasn't an issue.
>
> Yes, it is. I put it to you your car was in fact parked down the road because you wanted to keep as discreet as you could your presence at her house? -- Well, I was parked next door."

20 The prosecutor questioned the appellant about his motives for telephoning the complainant from outside her house on the day of his visit to it:

> "But she answered the phone the second time, didn't she? -- Yeah.
>
> Right? -- Because . . .
>
> If you had been ringing to see whether she was the only occupant there that would have been a fair indication she was the only one home, wouldn't it? -- No, the music was up loud.
>
> Oh, yes. Look, I've heard all of that. I'm trying to convey to you I'm not buying it. I suggest you rang the second time just to check the coast and just see if, perhaps, you know, one of the other family might have been there and answered the phone? -- No, not at all. Not at all."

21 On the topic of the first encounter in the park, the cross-examination included the following:

> "How long were you with her on that occasion? -- On the first time down the park?
>
> Yeah? -- Oh, maybe – how long was I talking to her or how long was I in the park? I can't . . .
>
> I asked you how long you were with her? -- On the first occasion? I never – well, it could have been half an hour.
>
> Half an hour? -- Could have been.
>
> With her in the park? -- Yeah.
>
> On the first occasion? -- Oh, could have been.
>
> Well, you're the person who's the historian. How long was it? -- I don't know if …
>
> . . . you just celebrated your 39th birthday, the first day of it. As a grownup man, you're telling us it was half an hour? -- Half an hour. I don't know. I don't know exactly how long it is. So I can't say – it could have been around half an hour.
>
> I didn't ask you how . . . ? -- No, I can't say then it was half an hour. I can't establish exact time.
>
> Not the exact time if you're saying it was about half an hour, that means it may have been 25, it might have been 35 minutes? -- It could have been.

At least, anyway, in the vicinity of half an hour, right? -- It could have been.

We can only stand upon you for this, you see. I don't recollect she was asked how long you were together? -- Pardon?

Sorry, that may be a comment. I apologise for that. On your adult assessment, you were together for about half an hour? -- Yeah."

22 The prosecutor interrupted the appellant when he was trying to respond to further questions about the complainant's and the appellant's first meeting:

"Describe and tell to the jury what the circumstances were of your first encounter face-to-face with this young woman? -- We were in the park and I . . .

'We were in the park'? -- Yes.

That doesn't tell us much, does it? -- I'm not quite sure what you're trying to say.

I'm not trying to say a thing. I'm trying to get you to say something? -- I know."

23 The prosecutor resumed asking questions about that occasion:

"She talked to you first, did she? -- I can't remember. I can't remember if I introduced myself to her first or she introduced herself to me first.

'Introduced', that means giving names, does it? -- No, just saying 'Hello'. I can't remember if I introduced myself to her and she introduced herself to me.

Look, I'm giving you every opportunity? -- Honestly, I can't remember.

I'll shift to another topic whenever you're prepared to finish it. Is that what you're prepared to tell us, you don't know how the two of you first became acquainted? -- I thought – the way we became acquainted was in the park.

Yes? -- And we just started talking.

…

When you first became of her – aware of her existence as a human being within the Brisbane area? -- I just don't understand what – what – I honestly. Sorry, your Honour, I just – if you could explain. I'm not quite

sure if I'm explaining myself right, or anything like that. But I don't know if I started the conversation first or she started it or I approached her or she approached me. I just can't remember that, I'm sorry.

…

Now, that's the appearance. The accent. How long did it take you to appreciate she had an Asian accent? -- I worked with Asians at that stage, so it didn't bother me if she had an Asian accent or not.

It doesn't bother anybody in this courtroom either, but how long did it take you to appreciate that she had as well as an appearance but also an Asian accent? -- How long did it take me to realise it?

Yeah? -- Oh, I'm not quite sure.

Within the half hour? -- Yeah, I . . .

First couple of minutes? -- I can't recall. I really can't recall or . . .

During? -- I'll be saying something which I – I don't know that I thought of at the time.

We want honesty at all times, of course. So, during the course of that half hour, you don't know what stage, but well and truly within the half hour, you appreciated not only did she have an Asian appearance but she had an Asian accent; is that right? Is that right? -- Well, you're putting the question to me and . . .

I am? -- I'm not quite sure of – of what the – what you're . . .

HIS HONOUR: Don't, Mr Libke, worry at all about where [the prosecutor] is going, if he is going anywhere with the question. Just answer the questions to the best of your ability. -- Can you put the question to me again please?

[THE PROSECUTOR]: Yes. During the course of around about half an hour interlude with her on that first occasion, you say very very shortly after seeing her, meeting with her, you realise she was of Asian appearance? -- Yes.

During the course of that around about half an hour, how long did it take you to realise she had an Asian accent? -- I don't know if I – I don't know if it took – I don't know what time it took, sorry, I don't know.

…

No, don't talk about knowing. I asked you did it ever appear to you or occur to you she was retarded? -- No.

No? -- No, I didn't know she was retarded.

Never at all? -- No.

You have used the word 'no'. I'm trying to concentrate on the 'appear' to you to be? -- Appeared to me.

Did she ever appear to you to be retarded? -- No.

…

Anyway, as you say, she was very competent. You said the word two or three times she was very competent. What did you mean by that? -- She seemed confident.

I didn't get the right word. Was it competent or confident? What word did you use? C-O-N-F-I-D-E-N-T; was that the word? -- Confident.

Was that the word you used? -- Confident as in confident.

In control of yourself? -- Yeah.

Is that the word you used? -- Yeah.

She was very confident. Well, what gave you the impression she was so confident? -- Because she – she –well, I'm just trying to think. She's just a confident person.

I see? -- Because she approached me, she chats and . . .

Did she run off at the mouth? -- Run off at the mouth?

As you saw her on the video did she run off the mouth? -- How do you mean?

As per the video that you saw did she run off the mouth like that when she was chitchatting with you? -- No.

No? Her conversation was very chitchat and controlled, was it? -- Yes.

And confident? -- Yes.

Nothing unusual about it? -- Apart from her accent.

Apart from the accent? -- Which I asked her about later on and she said – and . . .

Apart from the accent was there anything unusual about her chitchat? -- I don't know what to say …

Could you just answer was there anything unusual about her conversation, manner of speaking? -- It was, she had a bit of an accent.

The accent was the only thing that . . . ? -- Well, I'd been working with Chinese and they had a thick accent.

Yes. Did she have a thick Chinese accent, did she? -- It was similar to the people who were running the Cisco's Cantina at that time. I'm not saying the same but it was similar.

Have any trouble understanding her? -- I have.

Did you have any trouble understanding this girl? -- Some things, yeah.

Such as? – K ------.

K ------ Street? -- Yeah.

So you weren't able to sort of zero in on what her address was? -- Yeah, I remember that.

…

I put it to you of course that none of this happened, but anyway I'm just trying to analyse your version of it? -- Well, none of what happened?

She turned – I put it to you your evidence is just a tissue of lies. That's what I'm putting to you, and I'm trying to work out just what it is that you're trying to tell us. She turned towards you? -- Mmm.

…

I put it to you in short that you took advantage of this girl, you importuned her, knowing full well she was disabled, that's what I put to you? -- No sir.

Now, you told her how you quit your job? -- I told her how I quit it.

Sorry, you told her you quit your job? -- Yes.

> Now we've heard with great *rhapsody* this morning about how and why you quit your job, but did you tell her that you quit it because you weren't being paid enough? -- Oh, that was one of the reasons. (emphasis added)
>
> …
>
> You heard her asked, 'What stuff were you talking about?' She answered, 'I don't know, just talking about movies, or something, and so was he' and then something indistinct, 'he wasn't interested anymore'? -- I can't remember talking about movies and DVDs.
>
> You're good changing the subject of the girl when you're talking with her in the park? -- Changing . . .
>
> Changing the subject. In other words, away from movies, that sort of thing, changing the subject to something else? -- No.
>
> Changing it on to more personal stuff? -- No."

24 The appellant put the complainant's telephone number into his mobile telephone under the first three letters of her name. He was cross-examined about his "dishonesty" in doing so:

> "Your counsel opened the case to the jury by saying you were trying to cut off any inquiry your wife – your de facto might have made about it? -- Yeah.
>
> Is that why you did that? -- Yeah, that's another reason too.
>
> So another piece of dishonesty? -- Dishonesty?
>
> Well, another piece of cunning, deception if your de facto happened to have a look at your phone? -- Oh, yeah, I guess so, I . . .
>
> How long had you and the de facto been together for? -- Oh, about three years.
>
> About three years. Did your de facto situation with her occur to you as you were ringing from the freeway, or on the morning that you went to – with a condom in your pocket? -- Did it occur to me?
>
> Mmm? -- Yeah, I knew I was in a relationship.
>
> …

Alternatively, I put it to you that, in any event, you knew and had every reason and, in fact, did know, that she was of much less than normal intellect? -- I didn't know she was intellectually impaired.

In other words, I put it to you that you knew that she was an intellectually impaired person? -- How do I know she is an intellectually impaired person?

HIS HONOUR: No. I don't think I said to you before, Mr Libke, you can't ask questions. It's [counsel's] role … You're simply there to answer them.

[THE PROSECUTOR]: I put it to you you had every reason to believe, to understand, to apprehend, to comprehend, to realise that she was an intellectually impaired person? -- No.

I put it to you, further, you had every reason to understand, to believe, in fact, you did believe and you knew that and had every reason to know she was an intellectually impaired person when you had those dealings with her in the house? -- No.

…

And the bottom line … is that you knew that girl was the victim of intellectual impairment? -- I didn't know that.

And there was not the slightest indication to you that she was intellectually impaired; is that what you're saying, by word, thought, gesture? -- Intellectually impaired, no.

I'll go through it again. By way of her words, there was nothing to indicate to you she was intellectually impaired? -- I got the impression she had a lisp, or something like that.

We've heard about that one? -- Well, that's the truth."

25 The appellant was cross-examined on the basis that his evidence of talking to the complainant about moisturiser was an invention:

"Why would you have to be telling her, asking her about the rash on her leg and talking about moisturiser to her? -- I just suggested that it might need some moisturiser.

See, I put to you that's just another one of these inventions of yours to try to cover every nook and cranny of the case against you. In other words, the rash on the legs, moisturiser, advice, therefore, that gives you a basis, you know, for explaining about how we came to be talking about legs? --

> No. No, I didn't even think of it like that. I was just telling her – I don't know, that she had dried legs."

26 The prosecutor was wrong to characterize the appellant's evidence about the moisturiser as an invention in light of the complainant's evidence to the same effect.

27 The prosecutor then put what he described as a "general proposition" to the appellant. This exchange occurred:

> "In other words – anyway, I'm putting to you wherever you see a situation there that's a problem you will thrash around to try to make up some explanation for it, whether it's a van, whether it's next door, whether it's rashes, whether it's moisturiser, whatever. Whatever. Do you want to comment? -- No, you're commenting to me.
>
> Hopeless asking a question."

28 After the appellant was found guilty by the jury, as described at the outset of these reasons, the trial judge convicted him and sentenced him to eight years' imprisonment.

The appeal to the Court of Appeal

29 The appellant unsuccessfully appealed against his convictions to the Court of Appeal of Queensland (Williams JA and Mullins J, Chesterman J dissenting on the conviction for rape). The sentence was unanimously reduced to five years' imprisonment.

30 Before the Court of Appeal, the appellant did not present a specific ground of appeal relating to the conduct of the prosecutor. However, as his grounds of appeal were prepared without access to the record, he reserved his right to amend the grounds. Whether on this basis, or as relevant to other grounds of appeal, there is no doubt that, on the hearing of the appeal, the appellant complained "that he was not fairly treated by the prosecutor when he was cross-examined"[4]. An extensive portion of the reasons of Mullins J addressed that complaint.

31 Her Honour records the prosecution submission that "in the context of the whole of the evidence given at the trial, the approach of the prosecutor did not cause the appellant to be unfairly treated"[5]. She also records the reliance of the

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4 [2006] QCA 242 at [82].

5 [2006] QCA 242 at [92].

prosecution, on the appeal, upon the "minimal intervention by the trial judge as indicative of how the cross-examination of the prosecutor was perceived at the trial". Her Honour observed that "the credit of the appellant was clearly in issue at the trial" and that "a vigorous cross-examination of the appellant was to be expected". Whilst deprecating "gratuitous comments" she stated that it was "a question of degree whether the number and content of such comments have prejudiced a fair trial". She concluded that the appellant had been "able to handle the cross-examination" and she was influenced by the lack of objection from the appellant's trial counsel[6].

32 The complaint about the prosecutor's conduct was described as involving few successful points and these were judged insufficient to warrant the intervention of an appellate court. Other members of the Court of Appeal, in their reasons, did not deal separately with this issue. By inference they concurred in Mullins J's analysis and conclusions on this point. In our view, and with respect to their Honours, this amounted to error.

The appeal to this Court

33 The appellant argued in this Court that a miscarriage of justice occurred by reason of the prosecutor's cross-examination of him, and commentary during it.

34 The principles governing the conduct of a prosecutor are well settled. They were restated by Deane J in *Whitehorn v The Queen*[7]:

> "Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general

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6 [2006] QCA 242 at [93].

7 (1983) 152 CLR 657 at 663-664.

> proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered."

In the same case, Dawson J said this[8]:

> "No doubt all of these observations are merely aspects of the general obligation which is imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he performs in a criminal trial. That function is ultimately to assist in the attainment of justice between the Crown and the accused. In this respect the Crown Prosecutor may have added responsibilities in comparison with other counsel but it does not mean that his is a detached or disinterested role in the trial process."

35 The role of prosecuting counsel is not to be passive. He or she may be robust, and be expected and required to conduct the prosecution conscientiously and firmly. Because a criminal trial is an adversarial proceeding, there is at least the same expectation of defence counsel. The obligation of counsel extends to the making of timely objections to impermissible or unacceptable questions and conduct. But it is also the duty of the trial judge to make appropriate interventions if questions of those kinds, capable of jeopardizing a fair trial, are asked. The duty of the trial judge is the highest duty of all. It is a transcendent duty to ensure a fair trial.

36 Section 21 of the Evidence Act, which provides as follows, does not suggest that a trial judge, even in an adversarial system, may not or should not intervene:

> "**21 Improper questions**
>
> (1) The court may disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the court considers the question is an improper question.
>
> (2) In deciding whether a question is an improper question, the court must take into account –
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> (a) any mental, intellectual or physical impairment the witness has or appears to have; and
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> (b) any other matter about the witness the court considers relevant, including, for example, age, education, level of

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8 (1983) 152 CLR 657 at 675.

understanding, cultural background or relationship to any party to the proceeding.

(3) Subsection (2) does not limit the matters the court may take into account in deciding whether a question is an improper question.

(4) In this section –

improper question means a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive."

37 In this case we are unable to conclude that the appellant did have a fair trial. Whether a cross-examination and commentary during it were excessive will usually be a question of degree. It would not be appropriate to require a standard of perfection or to impose undue weight on the occasional accidental slips and mistakes that can occur in the heat of a trial. Further, it is true that the appellant's credit was in issue and a rigorous cross-examination was therefore to be expected. However, it was seriously objectionable for a counsel to say, during an address to the jury, that he or she "did not buy" something said by a party in evidence, or that "we've heard about that one". It is not acceptable for counsel to make that comment, that is, to express a personal opinion about a party's, or indeed any witness', evidence during cross-examination as the prosecutor did here. It was equally inappropriate for counsel to comment after the appellant had made a responsive answer "whenever you're prepared to finish it". In the same category are these comments: "That doesn't tell us much, does it?"; "I'm just trying to analyse your version of it" and, "hopeless" in commentary upon an answer. These are but a few examples of the inappropriateness of the cross-examination. Here, the sarcastic and repeated commentary as a whole went too far. The appellant's counsel's failure generally to object, regrettable as that may have been, provided no antidote to the infection of the trial that the prosecutor's questions and comments caused. The circumstances called for the trial judge to intervene.

38 In his reasons Heydon J too has demonstrated the entirely unsatisfactory nature of the conduct of the trial of the appellant involved in the approach taken both by the prosecutor[9] and the trial judge[10] during cross-examination. In effect, they complement our own. Merely to offer judicial disapprobation to

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9 Reasons of Heydon J at [118]-[130].

10 Reasons of Heydon J at [133].

discourage[11] unsatisfactory prosecutorial conduct of this kind in the future can be of no solace to an accused the subject of it.

39 We are unable to accept that the "very egregiousness of the conduct generated safeguards against the dangers inherent in it" or that the conduct of the prosecutor "was such as to attract sympathy to the accused"[12]. It is at least as likely that the jury, considering the way the prosecutor as a public official, and the judge as the controller of the trial acted, took their cue from the improper questions and comments, and apparent judicial acquiescence in them respectively, and inferred that they reflected a justified hostility to the appellant which they were bound to share. Clearly their verdict is more consistent with that reaction than with any sympathy.

40 The appellant does not seek sympathy from this Court, simply orders that uphold for him and for future cases like his the proper standards of prosecutorial conduct enforced by vigilant judicial supervision. We are quite unconvinced that the course of the cross-examination did not result in a substantial miscarriage of justice. The orders we propose give effect to that conclusion.

Miscarriage of justice and the "proviso"

41 Every member of the Court accepts at least that the prosecutor's comments were inappropriate and should not have been made[13], and that in making them he aligned himself personally with the prosecution case. Nor does any judge question that, even though the proceedings were adversarial, the trial judge could have intervened to check the persistently inappropriate commentary of the prosecutor.

42 *Weiss v The Queen*[14] does not stand in the way of allowing the appeal; indeed to the contrary. The principal issue in *Weiss* was whether the intermediate appellate court was right to apply the proviso in an appeal against conviction on the grounds of the wrongful reception of irrelevant prejudicial evidence. The appeal by the accused to this Court was upheld, essentially because the Court of Appeal had allowed itself to be deflected by the formulation of a question whether the test to be applied was whether the jury in whose charge the appellant had been put would inevitably have convicted him, or whether any notional

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11 Reasons of Heydon J at [135].

12 Reasons of Heydon J at [134].

13 See reasons of Hayne J at [83].

14 (2005) 224 CLR 300.

reasonable jury would have done so, instead of applying the statutory language of the proviso. As always, the remarks of this Court in its reasons have to be read and understood in the context of the precise issue presented for its decision there.

43 In *Weiss*, after reviewing the history of the statutory demise of the Exchequer rule in criminal cases and pointing out that in consequence, an appellate court was not obliged in all cases in which irregularities had occurred to uphold an appeal, the Court said this[15]:

> "Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind."

44 The foregoing statement must be read with the several others[16] made in this Court which emphasise that, once it is shown, as it has been to all members of this Court, that irregularities disadvantageous to the appellant occurred at his trial, it is for the prosecution to satisfy the appellate court that such irregularities have caused no substantial miscarriage of justice. This is clear from the oft cited passage of Fullagar J in *Mraz v The Queen*[17]:

> "It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the

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15 (2005) 224 CLR 300 at 317 [45].

16 *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525; *Festa v The Queen* (2001) 208 CLR 593 at 627 [110]; and *TKWJ v The Queen* (2002) 212 CLR 124 at 144-145 [68].

17 (1955) 93 CLR 493 at 514.

appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

45 As it is put in *Stokes v The Queen*[18], an appellate court should only apply the proviso if the irregularity "could not reasonably be supposed to have *influenced* the result". If this cannot be ruled out, it may be impossible for a court to be satisfied that a substantial miscarriage of justice has not occurred. What occurred here could not justify the negative supposition required to deny the appellant a retrial. In our view this is so even if the irregularities were confined to the prosecutor's comments and did not extend, as we believe, to the questions that we have identified.

46 Not only will there be cases in which it is proper to allow the appeal and order a new trial, even though the appellate court may be persuaded on the admissible evidence to the requisite degree of the appellant's guilt, but also, as much more often will be the case, even after a careful examination of the record for itself, it will simply be *impossible* for that court to assess the impact of the irregularities on the fairness of the trial. Ultimately, an appellate court may only apply the proviso if it is affirmatively satisfied that *no substantial miscarriage of justice* to the accused has occurred[19]. A significant denial of procedural fairness will not, of course, be the only occasion for allowing an appeal. The reasoning of the Court in *Weiss* does not suggest otherwise.

47 What occurred in the present case plainly involved an interference with the fairness of the trial, whether it should be characterized as procedurally or otherwise irregular. Because of the repetition of the conduct, and the trial judge's abstention from reproof and checking of it, it can only be described as significant. At one end of the scale, the relevant conduct can be seen to have posed a real risk of a wrongful conviction. At the other end, it is difficult to see how it could have done otherwise than to prejudice the jury against the appellant.

48 Justice is to be administered according to law. Justice, in strict terms, miscarries whenever there is a departure from proper process. Not every such departure will necessarily produce a substantial miscarriage of justice When however there is a departure from what the law requires, an appellate court, although it does not act upon a presumption that the departure has necessarily produced a substantial miscarriage of justice, proceeds upon the basis that, the

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18 (1960) 105 CLR 279 at 284-285 per Dixon CJ, Fullagar and Kitto JJ.

19 cf *Weiss* (2005) 224 CLR 300 at 316 [42]. See also at 314 [35].

accused having been denied a trial according to law, he or she may well have been the subject of such a miscarriage.

49 Although it is the duty of an appellate court to decide, that is to say, satisfy itself that a substantial miscarriage of justice has occurred before allowing an appeal, it must do that against the background of the much broader discretion that it enjoys than a jury does, for they may only acquit or convict. An appellate court is not bound to decide the case finally. In weighing the possible impact of an irregularity, an appellate court will often be unable to determine whether there has been no substantial miscarriage of justice. In such a case the prosecution can be seen to have failed to establish that the proviso should be applied. This is why an appellate court may order a retrial, as we would do here.

50 We have undertaken for ourselves the exercise which *Weiss*[20] reiterates should be undertaken. We have independently assessed the evidence, making due allowance for such natural limitations as apply to appellate processes. But in doing so, necessarily, we have had regard to the complexion that the evidence, counsel's addresses and the trial judge's summing up may well have assumed, by reason of the highly inappropriate remarks of the prosecutor, and more, the trial judge's apparent silent approval of them.

51 In undertaking this exercise, we are not attempting to predict what a jury may or may not do[21], but simply to make it clear that we are not convinced that a substantial miscarriage of justice has not occurred.

52 *Weiss* is only part of the relevant law on the topic. What the law is presents a question for legal analysis of the relevant statute and of the several authorities which together bear upon it. *Weiss* was written against the background of, and should be read subject to, almost a century of elucidation of the language of the "proviso" in criminal appeal statutes. It certainly did not cast doubt on the existence of the forensic burden imposed on the prosecution to demonstrate innocuous harmless error once a mistake of law, or observance of the requirements of justice, or an irregularity has been proved to have occurred in a criminal trial. That is the position here. *Weiss* holds that in undertaking its assessment, the appellate court must keep in mind that the jury has returned a

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20 (2005) 224 CLR 300 at 316 [41]; see also *Driscoll v The Queen* (1977)137 CLR 517 at 524-525 per Barwick CJ; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; *Morris v The Queen* (1987) 163 CLR 454; *M v The Queen* (1994) 181 CLR 487; *Festa v The Queen* (2001) 208 CLR 593 at 631-633 [121]-[123] per McHugh J.

21 cf *Weiss* (2005) 224 CLR 300 at 314 [35].

verdict of guilty. The relevance and force of that consideration are capable of immense variation according to the degree of irregularity in the conduct of the trial.

53 If an example for the last statement be required, *Nudd v The Queen*[22] provides it. There, irregularities of a potentially serious kind on the part of counsel for the accused occurred. However, they were able to be, and unlike here were, satisfactorily repaired by the trial judge. In that case, for that reason, the jury's verdict of guilty could safely be taken to be both highly relevant and powerful. We agree with Hayne J that in this case, intervention by the trial judge would have prevented any suggestion of unfairness. That intervention however was not, as it should have been, forthcoming. Its absence was disregarded by the Court of Appeal. We cannot, and are not prepared to, disregard it in this Court.

54 We would allow the appeal on this ground.

Requirement of a retrial

55 As we are of the opinion that the entry of a verdict of acquittal by this Court is not justified, and that there should be an order for a retrial, it is necessary to consider the other grounds of appeal which raise questions as to the directions appropriate to the offences of which the appellant was convicted and which will be required to be given at a retrial.

56 Two of the other grounds of appeal involve consideration of the complainant's intellectual capacity. The case for the prosecution at trial was put on the basis that the complainant lacked the cognitive capacity to give consent to sexual intercourse or other sexual activity, and that the appellant must have known that the complainant was intellectually impaired. It was also argued by the prosecution that it had discharged the onus of negativing the defence of honest and reasonable mistake (as to the complainant's capacity to consent) under s 24 of the *Criminal Code* (Q). That section provides:

> "**24 Mistake of fact**
>
> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

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22 (2006) 80 ALJR 614 at 645 [162] per Callinan and Heydon JJ; 225 ALR 161 at 200-201.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

57 In a trial such as the present, the prosecution has to prove beyond reasonable doubt the happening of the events giving rise to the alleged criminal conduct. In that respect, the onus rests on the prosecution throughout. It obliges the prosecution to prove all relevant acts and omissions beyond reasonable doubt. At the trial, properly, the prosecutor did not contest that this was so. The onus, in relation to belief of intellectual impairment or not, however, lies squarely upon an accused. This is no doubt because of the need for special protection of intellectually impaired persons. The *Criminal Code* nonetheless does not treat consensual sexual activity with such a person as an offence of absolute liability: an accused will be entitled to an acquittal if he can prove a negative, a matter notoriously more difficult to prove than a positive; that he believed on reasonable grounds that the complainant was not intellectually impaired.

58 Section 229F of the *Criminal Code* defines an intellectually impaired person in this way:

"**Meaning of intellectually impaired person**

A person is an intellectually impaired person if the person has a disability –

(a) that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

(b) that results in –

(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(ii) the person needing support."

59 Section 208(4) of the *Criminal Code* refers to the belief of an accused person. It provides as follows:

"(4) It is a defence to a charge of an offence defined in subsection (1)(c) or (d) to prove –

(a) that the accused person believed on reasonable grounds that the person was not an intellectually impaired person; or

(b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the intellectually impaired person."

60 The trial judge here defined intellectual impairment for the jury. It would have been better, however, if he had sought to relate each of the necessary components of the definition directly to the evidence in the case so as to emphasize to the jury that the appellant's defence, the onus lying upon him, could succeed if they were satisfied on the balance of probabilities that the appellant believed that the complainant was not intellectually impaired. In this regard the jury's attention would need to be drawn to the apparently normal conversations that the appellant had had with the complainant, that is to say her not substantially reduced capacity for communication, her mature appearance, her ability to interact with him, and the absence, so far as he was aware, of her need for support, and in particular his evidence in cross-examination about these matters that we have set out.

61 There are varying degrees of belief just as there are varying degrees of consciousness, cognition, awareness, sophistication, experience, maturity, gullibility and naivety. A person may understand some matters very well and others barely at all. In general, people are entitled to believe what they have no reason to suppose to be otherwise or what it would not occur to them to question. The presence or absence of a belief may be a matter of inference. In *Jiminez v The Queen*[23] the majority judgment of this Court pointed out that the absence of a warning that a person was too fatigued to drive and might fall asleep, laid a foundation for an honest and reasonable belief that it was safe for an accused driver to continue driving[24]. Here the appellant's evidence was that he thought the complainant to be fine. He denied that he had reason "to believe, to understand, to apprehend, to comprehend, to realize that [the complainant] was an intellectually impaired person". She conversed with him about her interests and invited him to her house. She was physically mature. She spoke normally except for a slight accent and lisp. On the appellant's version she invited sexual overtures. This evidence did lay a foundation for a submission and directions of the explicit kind to which we have referred, as to a belief of the appellant that the complainant was not intellectually impaired. Having regard to the failure of the appellant's counsel to seek any redirections at trial, we do not consider that it is necessary for us to decide whether an appeal would be allowed on a challenge to the trial judge's directions on this issue. However, on any retrial, depending upon how the evidence falls out, directions should be given which give effect to what we have said.

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23 (1992) 173 CLR 572 at 575 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron, 585 per McHugh JJ.

24 (1992) 173 CLR 572 at 583-584.

62 The ground concerning the trial judge's directions with respect to the defence of honest and reasonable mistake of fact that the complainant did have the cognitive capacity to consent is not sustainable. The directions with regard to that defence were adequate.

63 As we have foreshadowed, the appellant's submission that acquittals should be entered has not been made out. There was evidence upon which a properly directed jury could reach the verdicts that they did. However, they could only do this in a fair trial that met the high standards required by the law both of a prosecutor and of a trial judge presiding over it.

Orders

64 We would therefore allow the appeal; set aside order 1 of the orders of the Court of Appeal; order that the convictions of the appellant entered by the District Court of Queensland be quashed; and order a retrial of the offences of which the appellant was convicted.

65 HAYNE J. The appellant was indicted in the District Court of Queensland on three counts of rape, one count of indecent dealing with an intellectually impaired person, and one count of sodomy of an intellectually impaired person. The same person was alleged to be the victim of all the offences charged. The first count of rape was alleged to arise out of an incident that had occurred in a park where the complainant and the appellant had each been walking a dog; the other counts concerned events occurring some days later at the complainant's home.

66 The appellant pleaded not guilty. There was no substantial dispute at trial that the complainant was an intellectually impaired person. There was no substantial dispute that, on the occasion which was the subject of the first charge, the appellant had digitally penetrated the vagina of the complainant. There was no substantial dispute that some days later the complainant had invited the appellant to her home and that they had had sexual intercourse there. The appellant denied any anal penetration. The principal live issues at trial were issues about consent, and whether the appellant reasonably believed the complainant was not intellectually impaired.

67 At trial, the appellant was convicted of the first count of rape (the digital penetration that took place in the park). He was acquitted of the other two counts of rape, the count of sodomy and the count alleging indecent dealing, but the jury returned verdicts of guilty to three alternative, lesser, offences: two offences of unlawful carnal knowledge with an intellectually impaired person, and an offence of exposing such a person to an indecent act.

68 The appellant appealed to the Court of Appeal of the Supreme Court of Queensland against his convictions, and against the sentences imposed by the trial judge. His appeal against conviction was dismissed; his appeal against sentence was allowed[25]. By special leave, he has appealed to this Court against the dismissal of his appeal against conviction.

69 The appellant's complaints in this Court focused chiefly upon two matters. Although not expressed this way in the notice of appeal, it is convenient to describe his principal contentions in the terms of the relevant appeal provision of the *Criminal Code* (Q) (s 668E). First, he alleged that there was "on any ground whatsoever ... a miscarriage of justice"[26] because the prosecutor's cross-examination of the appellant at trial was such as to make his trial unfair. Secondly, he alleged that there was a "wrong decision of [a] question of law"[27]

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25 *R v Libke* [2006] QCA 242.

26 *Criminal Code* (Q), s 668E(1).

27 *Criminal Code*, s 668E(1).

because insufficient and incorrect directions were given to the jury. In addition to these two submissions, to which most attention was directed in oral argument, the appellant submitted that there was "on any ground whatsoever ... a miscarriage of justice" because the conviction was unsafe and unsatisfactory. None of the matters raised by the appellant provides a sufficient basis for disturbing the order of the Court of Appeal dismissing the appeal against conviction. The appeal to this Court should be dismissed.

70 It is convenient to deal first with the questions argued about the fairness of the trial and then deal separately with the issues about directions to the jury. The first questions require consideration of well-established and undisputed general principles; the second set of issues requires close attention to the applicable provisions of the *Criminal Code*.

An unfair trial?

71 A criminal trial in Australia is an accusatorial[28] and adversarial[29] process. In that process, prosecuting counsel has a role that is bounded by long-established duties and responsibilities[30]. Those duties and responsibilities are summarised when it is said that "[t]he duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice"[31]. In the Supreme Court of Canada, Rand J described[32] the role of the prosecutor as being:

> "not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It

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28 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

29 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ.

30 *R v Woodhead* (1847) 2 Car & Kir 520 [175 ER 216]; *R v Cassidy* (1858) 1 F & F 79 [175 ER 634]; *Adel Muhammed el Dabbah v Attorney-General for Palestine* [1944] AC 156 at 167-169; *Richardson v The Queen* (1974) 131 CLR 116; *R v Apostilides* (1984) 154 CLR 563.

31 *Randall v The Queen* [2002] 1 WLR 2237 at 2241 citing *R v Puddick* (1865) 4 F & F 497 at 499 [176 ER 662 at 663] and *R v Banks* [1916] 2 KB 621 at 623.

32 *Boucher v The Queen* [1955] SCR 16 at 23-24.

> is to be efficiently performed *with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*." (emphasis added)

A central, even the central, element in that role is "ensuring that the Crown case is presented *with fairness to the accused*"[33].

72 The prosecution case is to be presented in the context of an adversarial process in which each side "is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked"[34]. But again, there are boundaries to that process. The choices that have been described are to be made "subject to the rules of evidence, fairness and admissibility"[35]. As Dawson J said in *Whitehorn v The Queen*[36]:

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and *the judge's role in that system is to hold the balance between the contending parties* without himself taking part in their disputations." (emphasis added)

It is not for the judge to attempt to remedy the deficiencies of a party's case. As was pointed out in *Whitehorn*[37], and earlier in *Richardson v The Queen*[38], the judge will frequently lack the knowledge and the information that would be necessary to making a decision about whether and how any deficiency would be remedied. But it is for the judge to "hold the balance between the contending parties". It is for the judge to ensure that the trial is conducted fairly.

73 Unfairness may take many forms. Often what is unfair will constitute a departure from the ordinary rules that ensure the orderly conduct of a trial. Those rules encompass not only the rules of evidence but also such diverse matters as when and how counsel may address the judge and the jury. This is not to say that every departure from those rules is to be branded as causing unfairness. But, because the rules of orderly procedure are designed to safeguard

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33 *Richardson* (1974) 131 CLR 116 at 119 (emphasis added).

34 *Ratten* (1974) 131 CLR 510 at 517 per Barwick CJ.

35 (1974) 131 CLR 510 at 517 per Barwick CJ.

36 (1983) 152 CLR 657 at 682.

37 (1983) 152 CLR 657 at 682.

38 (1974) 131 CLR 116 at 122.

the fairness of the proceedings, what is unfair will often be a departure from those rules.

74 In the present case, the appellant's complaint of unfairness focused upon what happened when the trial prosecutor was cross-examining him. He submitted that the cross-examination "was designed *unfairly* to undermine the appellant's credibility and included improper questions, in the sense that many questions were confusing, harassing, oppressive and repetitive" (emphasis added). He further submitted that the trial prosecutor "expressed or implied personal opinions and made impermissible comment". The text of the relevant passages from the trial transcript appears in the reasons of Kirby and Callinan JJ and it is unnecessary to repeat it here.

75 The sting in the first of the propositions advanced by the appellant lies in the word "unfairly". There is no doubt that the trial prosecutor set out to undermine the appellant's credibility, but it was an essential part of the prosecutor's function to test the credibility of the account which the appellant gave. Was that done unfairly?

76 It is important to notice that no objection was made at trial to the questions that the trial prosecutor put to the appellant. In particular, it was not said that any question, or series of questions, was confusing or oppressive. None was said to be harassing or repetitive. Failure to object to the questions at trial does not bar the appellant from complaining, on appeal, that the trial was unfair. Not least is that so because it must be recognised that counsel for an accused person may well hesitate before objecting to a line of questioning put in cross-examination of the accused, lest it appear to the jury that counsel feels a need to protect the witness. But responsibility for deciding whether objection should be taken to the way in which a question is put to a witness, or to the conduct of opposing counsel, is a responsibility that rests primarily with counsel, not with the judge. And where, as here, the cross-examination was interrupted by an adjournment, it is open to counsel for an accused to make any necessary protest in the absence of the jury and without further interruption of the cross-examination. But no such objection or protest was made in this case.

77 Where, as here, no objection was taken at trial, but it is said on appeal that the examination of the appellant was unfair, it is important to examine carefully what has happened at trial to see in what respect there is said to have been an unfairness.

78 In the present case, if comments made by the trial prosecutor are put to one side, the complaints of unfairness that now are made directed attention to the way in which the prosecutor set out to undermine the appellant's credibility. It was said that this was done "unfairly". The appellant identified a number of questions as evidencing this "unfairness". Some, the appellant said, were founded on a false or unproved assertion. Others, he submitted, made

unwarranted criticism of evidence he had given. But leaving aside the prosecutor's intrusion of his comments on the evidence, the cross-examination, when read as a whole, betrays no unfairness to the appellant. Some questions might have been framed better than they were. Some carried imputations critical of the appellant's evidence. Some questions were founded on assertions that were not established or admitted. But the appellant was able to and did give the account he wished to give of the events about which he was asked. And whether the cross-examination was such as to distract the jury from a proper and dispassionate examination of the issues in the case requires consideration of not only those questions that were said to be designed unfairly to undermine the appellant's credibility, but also the various comments made by the trial prosecutor in the course of his examination of the appellant.

79 More than once in the course of his cross-examination of the appellant, the trial prosecutor made a comment about the appellant's evidence. Sometimes the comment took the form of putting a proposition to the appellant ("I put it to you your evidence is just a tissue of lies") but then proceeding at once to pose some other question. At other points, the prosecutor directly intruded his own views about the worth of the appellant's evidence. Thus the prosecutor said, at one point, "Look, I've heard all of that. I'm trying to convey to you I'm not buying it." And at the end of his cross-examination, having asked the appellant whether he wanted to comment on the proposition that "wherever you see a situation there that's a problem you will thrash around to try to make up some explanation for it", the trial prosecutor expostulated, on being told that the appellant did not want to comment on the proposition, "Hopeless asking a question".

80 The trial prosecutor should not have made any of the comments he did during the appellant's cross-examination. That was not the time for submission or argument about the effect of the answers that the appellant gave. The trial prosecutor's opinion about the veracity of the appellant's answers was wholly irrelevant to any issue in the case. Sometimes that opinion was conveyed directly: "I'm trying to convey to you I'm not buying it." At other times the opinion was conveyed indirectly by putting a proposition ("your evidence is just a tissue of lies") but not permitting the appellant to respond.

81 The comments the trial prosecutor made, in the course of cross-examining the appellant, departed from the rules that ensure the orderly conduct of a trial. But that observation does not answer the critical question presented by the appeal provision of the *Criminal Code*, which is said to be engaged. That question is whether there was a "miscarriage of justice". More particularly, did the making of these comments, either standing alone, or in conjunction with other aspects of the prosecutor's cross-examination of the appellant, make the trial unfair?

82 The trial prosecutor should not have aligned himself with the prosecution case, which is what he did whenever he conveyed to the jury his own opinion of the appellant's evidence. Would these repeated expressions of alignment with the

prosecution case have distracted the jury from their task of assessing whether the evidence that was led at trial established the appellant's guilt beyond reasonable doubt? Would other aspects of the cross-examination have caused or contributed to that consequence?

83 Both those questions should be answered "no". To discharge their function properly, the jury had to focus upon whether they were persuaded, beyond reasonable doubt, that the evidence established the appellant's guilt of any of the several offences they had to consider. The jury's verdicts, acquitting the appellant of some offences but not others, are consistent with their having paid close attention to their proper task. The comments which the trial prosecutor made were comments about matters in issue in the case. They were not comments that suggested (whether directly, or indirectly, by appealing to prejudice or passion) that the jury should follow some impermissible path of reasoning[39]. The trial prosecutor's alignment with the contention that the jury should be persuaded to that conclusion did not make the underlying prosecution case unfair. The trial prosecutor should not have made the comments he did but their making caused no miscarriage of justice. The appellant's complaint of miscarriage on account of the prosecutor's conduct fails.

84 Although it is for these reasons that the complaint of miscarriage on account of the prosecutor's conduct should be rejected, it is as well to say something further about the role of the trial judge. It would have been both possible and desirable for the trial judge, at an early stage of the prosecutor's cross-examination, to have said something requiring him to desist from making comments on the evidence that was being given. There should have been no need to make the point at any length or to draw undue attention to it. If, for some reason, it had become necessary to engage in some sustained reproof or extended criticism of counsel, that should have been done in the absence of the jury[40]. But an early intervention from the judge would have prevented any suggestion of unfairness of the kind now said to have arisen from the conduct of the prosecutor.

85 Trial judges are rightly reluctant to intervene in the course of counsel's cross-examination of a witness. That reluctance stems in large part from the fact that the trial judge will usually not know how counsel intends to set about the forensic task that is presented. Counsel's choices about the order, content and tone of cross-examination will usually be moulded by information that the trial judge does not know. Nothing that is said here should be read as denying the desirability of a trial judge avoiding such interventions as far as possible. But the obligation to ensure a fair trial will sometimes best be met by a timely reminder

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39 cf *R v DDR* [1998] 3 VR 580.

40 *RPS* (2000) 199 CLR 620 at 625-626 [13].

to counsel of the need to observe the rules that regulate the orderly conduct of a trial.

Misdirection?

86 The appellant made three complaints about the directions that the trial judge gave the jury. First, he submitted that there was a failure to give adequate directions "on the question of consent as it related to cognitive capacity and intellectual impairment". Secondly, he submitted that the jury should have been told that "if the appellant honestly and reasonably believed that the complainant's capacity for communication, social interaction or learning was not substantially reduced, or, if he reasonably and honestly believed that the complainant was not a person needing support, he was entitled to be acquitted". The third complaint was related to the second, and was that flow charts given to the jury as part of the trial judge's directions "were inadequate in that they did not include a reference to an honest and reasonable but mistaken belief or to any defences available". Each of these arguments requires consideration of the central provisions of the *Criminal Code* that were engaged in this matter. Each of them also requires the proper identification of "the real issue or issues in the case"[41].

87 At first sight, identifying those issues in this case seems difficult. The indictment charged five counts. There were several statutory alternative offences that had to be considered. Several provisions of the *Criminal Code* were directly or indirectly engaged in the matter. But by the time the trial judge came to direct the jury, the real issues to be considered by the jury were more confined than might have been the case.

88 As was said at the start of these reasons, there was no substantial dispute about whether the complainant was an intellectually impaired person. There were some significant factual disputes, including whether, as the charge of sodomy alleged, there had been an incident of anal penetration. There were some differences about what exactly had happened at the time of the digital penetration in the park. There was a dispute about whether the complainant had suggested to the appellant that he "bring protection" when he came to her home. But apart from these particular factual disputes, the issues that had to be considered by the jury related chiefly to whether the complainant consented to the particular acts in question, what the appellant knew or believed about her consent, and what the appellant knew or believed about her intellectual impairment.

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41 *Alford v Magee* (1952) 85 CLR 437 at 466; cf *Tully v The Queen* (2006) 81 ALJR 391; 231 ALR 712.

89 Three statutory concepts were engaged: the Code's definition[42] of "consent", in connection with the offence of rape, as "consent freely and voluntarily given by a person with the cognitive capacity to give the consent", the Code's general provision[43] about mistake of fact, and the provision[44] that it is a defence to a charge of certain offences of sexual misconduct towards an intellectually impaired person that the accused "believed on reasonable grounds that the person was not an intellectually impaired person".

90 Questions about the complainant's cognitive capacity to give her consent had particular application to the charges of rape. Did the prosecution prove beyond reasonable doubt that the complainant had not freely and voluntarily consented to what had occurred, or did the prosecution prove that she did not have the capacity to give her consent? Questions of mistake of fact also had particular application to the charges of rape. Did the prosecution prove beyond reasonable doubt that the appellant had sexually penetrated the complainant when he was not acting under a reasonable, but mistaken, belief that she was able to and was consenting? The appellant's belief about whether the complainant was intellectually impaired bore upon only those offences in which proof of her intellectual impairment was an element.

91 The first of the appellant's arguments about the sufficiency of the directions given to the jury directed attention to questions about the complainant's "cognitive capacity" and her "intellectual impairment". As already noted, those questions are separate. They were to be treated distinctly. Before considering the evidence that was given about those subjects, it is important to examine the relevant sections of the *Criminal Code.*

92 Section 349(2)(a) of the *Criminal Code* provided that a person rapes another person if "the person has carnal knowledge with or of the other person without the other person's consent". Other forms of conduct also constituted rape but it is not necessary to notice those other aspects of the provision. Section 348(1) provided that in Ch 32 of the Code (the chapter within which the provisions concerning the offence of rape appeared) "'**consent**' means consent freely and voluntarily given by a person *with the cognitive capacity to give the consent*" (emphasis added). The meaning of "consent" was then amplified by the provisions of s 348(2), which identified circumstances in which consent to an act is not freely and voluntarily given, but again it is not necessary to notice the

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42 s 348(1).

43 s 24.

44 s 216(4)(a).

detail of these provisions. For present purposes it is the reference in s 348(1) to the requirement for "cognitive capacity to give the consent" that is important.

93 The expression "cognitive capacity" was not defined in the Code. It is an expression the construction and application of which is assisted by reference to what may be said to be the related, but different, expression used in the Code – "intellectually impaired person".

94 Section 229F of the *Criminal Code* defined an "intellectually impaired person" as a person that has a disability that is attributable to one or more of certain kinds of impairment ("intellectual, psychiatric, cognitive or neurological") and that "results in" two consequences: "(i) a substantial reduction of the person's capacity for communication, social interaction or learning" and "(ii) the person needing support". This definition of "intellectually impaired person" applied in those provisions of the Code that used the expression. Those provisions will require separate consideration in the present matter.

95 The fact that a person meets the definition of an "intellectually impaired person" does not require the conclusion that the person lacks "cognitive capacity to consent" to sexual conduct. There are several reasons why that is so. First, and most obviously, the two expressions are different. It is to be assumed that they were intended to have different meanings. That is not to say, of course, that there can be no overlap in their application. No doubt there can and will be cases in which a person who is an "intellectually impaired person" will lack that capacity. But the question of cognitive capacity to consent to sexual conduct focuses attention upon the understanding of the person, in particular, that person's understanding of what it was that he or she was consenting to. The definition of "intellectually impaired person" directs attention to various causes of impairment ("intellectual, psychiatric, cognitive or neurological") and to the consequences of impairment that are described much more broadly than by reference to the concept of consent.

96 Secondly, the Code, read as a whole, requires the conclusion that a person may have "cognitive capacity to give the consent" although that person meets the definition of "intellectually impaired person". The different and separate provisions made about sexual offences against an intellectually impaired person, and in particular the provisions of s 216(1), dealing with carnal knowledge of an intellectually impaired person, would have no work to do if such a person could never give consent to sexual intercourse. Unless "cognitive capacity to give the consent" is read as requiring a different inquiry from the definition of "intellectually impaired person", carnal knowledge of such a person would always constitute rape.

97 The complainant was aged about 18 years at the time of the alleged offences. The appellant's trial was held about two years after the offences were said to have occurred. Expert evidence led at the appellant's trial proved that the

complainant was an "intellectually impaired person". The evidence was that the complainant was assessed as having an intellectual capacity described as a "full scale IQ" of 61 and that "a person [who] has an IQ of below 70 [has] ... an intellectual disability". The complainant's "level of social reasoning" was said to be "within the eight to 10 year level" and "consistent with her level of intellectual maturity". It followed that, in the terms used in s 229F of the *Criminal Code*, her intellectual impairment results in a substantial reduction of her capacity for learning, and in her needing support.

98 The trial judge told the jury that if they were to find that the complainant suffered from "some intellectual deficit, that does not necessarily mean that that deficit will deprive the complainant of the cognitive capacity to give or withhold consent". It follows from what has been said earlier in these reasons that this direction was correct. The trial judge then directed the jury to consider whether the prosecution had established to the requisite degree that the complainant had "given or withheld" her consent. In the course of that direction the trial judge told the jury to consider whether "the complainant was capable of giving consent" but gave no further direction about how the jury should decide that question beyond emphasising the need to identify the consent as "freely and voluntarily given".

99 In the particular circumstances of this case, it was neither necessary nor appropriate for the trial judge to give the jury any further instruction about the meaning of "cognitive capacity to give the consent". It was not suggested that the complainant was not competent to give her account of events, or that her account of those events should not be received in evidence. She was cross-examined by trial counsel for the appellant. In the course of that cross-examination she was asked about the sex education she had received at school. She said that she understood what was meant by sexual intercourse and that she was aware of contraception and sexually transmitted diseases. In these circumstances, it may greatly be doubted that there remained any real issue about her cognitive capacity to consent to the sexual activity that was alleged to have occurred. To the extent that any issue about the complainant's cognitive capacity to give consent remained alive in the trial, it was sufficient to direct the jury, as the trial judge did, to ask whether she had freely and voluntarily consented to the appellant doing what he was alleged to have done.

100 The appellant's written submissions on this branch of the argument emphasised that the prosecution bore the burden of proving lack of consent beyond reasonable doubt. Reference was made in that respect to *Shepherd v The Queen*[45], a decision concerning the assessment of circumstantial evidence. Important as that decision is, it provides no relevant guidance to the resolution of

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45 (1990) 170 CLR 573.

this matter. The case against the appellant depended upon the evidence of the complainant. It may be accepted that her evidence about consent was capable of being portrayed as indistinct or equivocal. Whether it was, was a matter for the jury. Of course there were circumstantial aspects of the evidence that were to be taken into account by the jury. It will be a rare case when there are no circumstantial matters to consider when the evidence is being evaluated. But a direction of the kind described in *Shepherd* was not sought at trial, and it was neither necessary nor desirable to give such a direction in this case.

101 There was no want of adequate directions to the jury on the real issues in the trial concerning cognitive capacity and intellectual impairment. The directions that were given have not been shown to have been erroneous.

102 All of the relevant offences in which an element was that the victim was an intellectually impaired person were offences created by s 216 of the *Criminal Code*. That section created several different offences. For present purposes, only two need be considered. The section provided that it was an offence to have, or attempt to have, unlawful carnal knowledge of an intellectually impaired person[46]. It also made it an offence to expose such a person "wilfully and unlawfully" to an indecent act by the offender or any other person[47]. The appellant was convicted of two counts of the former offence and one of the latter.

103 Section 216(4) of the *Criminal Code* provided that:

> "It is a defence to a charge of an offence defined in this section to prove –
>
> (a) that the accused person believed on reasonable grounds that the person was not an intellectually impaired person; or
>
> (b) that the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances constitute sexual exploitation of the intellectually impaired person."

It was not disputed that the burden of proving a defence under this section was on the defendant, and it was not disputed that the standard of proof of the defence was the balance of probabilities.

104 At his trial, the appellant submitted, among other things, that he established a defence to all of the offences under s 216 that the jury was called on to consider. He submitted that he had established a defence by showing that he

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46 s 216(1).

47 s 216(2)(d).

had believed at the time, on reasonable grounds, that the complainant was not an intellectually impaired person.

105 The appellant did not give evidence that he had actively turned his mind to any question about the intellectual capacity of the complainant at any time before or during the events that gave rise to the charges. It would have been forensically difficult for the appellant if he had given evidence that he had thought about the question. Evidence of that kind could only provoke the further questions: Why? What was it about the complainant that made you think about this subject? Be this as it may, the highest point to which the appellant's evidence rose on this topic was when, in answer to a question from the trial judge, ("Now, tell me more about her. How did she appear to you? How was she talking to you?") the appellant said "Fine. She was friendly, confident. She – she seemed fine. She was attractive. I just – we just were talking." Although the trial judge sought to have the appellant expand upon what he meant by the word "fine", the most that the appellant said was "She seems fine, she seems okay."

106 The appellant contended that the trial judge should have instructed the jury to consider the appellant's belief by reference to the two separate elements of the definition of "intellectually impaired person". That is, the appellant submitted that the trial judge should have directed the jury to consider whether the appellant had either a belief that the complainant's capacity for communication, social interaction or learning was not substantially reduced, or a belief that the complainant was not a person needing support. There may be cases where such a direction would be appropriate. This was not one of them. The evidence which the appellant had given on this topic did not provide a basis for the jury to consider questions refined to the degree suggested. All that he had said was that she seemed "fine". The issue thus presented was sufficiently identified by asking whether the defendant had established to the requisite standard that he believed her not to be an intellectually impaired person.

107 Nor was it necessary to direct the jury, as the appellant submitted, that the question was one of "subjective" as opposed to "objective" belief. Even if it is possible to draw such a distinction, attempting to do so in this case would have introduced needless confusion. The statutory inquiry was about the *appellant's* belief. The trial judge made plain to the jury that this was the question to consider.

108 In the course of the oral argument of the appeal in this Court, attention was given to whether the defence could be established without there being evidence that the accused had turned his or her mind to the intellectual capacity of the complainant. Although the appellant's grounds of appeal may not encompass this question it is as well to say that direct evidence that an accused person positively considered the extent of the intellectual capacity of the complainant is not essential to establishing the defence. There are circumstances in which a person may be said to hold a belief, and to hold that belief on

reasonable grounds, even though the person does not consciously advert to the question. Often the absence of some indication of departure from what is generally assumed to be the norm will be an important consideration in deciding not only whether a person believes that the norm applies but also whether there were reasonable grounds for holding that belief.

109 The evidence in the present case taking the form it did, it was neither necessary nor desirable for the trial judge to do more than pose the statutory question to the jury for their consideration.

110 The last of the complaints made about the trial judge's directions to the jury concerned some written flow charts given to the jury in the course of the summing up. The trial judge gave these documents to the jury to assist their consideration of the sequence of steps that had to be taken in deciding first, whether the appellant was guilty of the offences charged in the indictment, and then, whether he was guilty of any of the statutory alternatives to those charges. The appellant pointed out that the flow charts did not refer to the defences that the jury may have to consider, and submitted that the trial judge did not make sufficiently plain to the jury that the documents were supplementary to, not in substitution for, the oral directions.

111 It is enough to say that when the purpose of the documents was, as the trial judge told the jury, to "help [the jury] understand what I am about to say" and to describe when it would become necessary to consider an alternative charge, the provision of the flow charts constituted neither some wrong decision of a question of law nor, on any other ground, a miscarriage of justice. While it is clear that the flow charts did not contain *all* the directions that the jury needed, that was not their intention and the jury would not have understood that to be their purpose. The absence of reference to the defences did not constitute a misdirection.

112 The final issue to consider is whether, as the appellant submitted, the convictions were unsafe or unsatisfactory. In the Court of Appeal, Chesterman J held[48] that the appellant's conviction for rape should be quashed. In his Honour's view[49], the complainant's evidence was "insufficient to prove the charge". He concluded[50] that the jury could not have been satisfied beyond reasonable doubt "that the complainant did not consent, or that the appellant could not have honestly and reasonably believed that she had consented".

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48 [2006] QCA 242 at [33]-[36].

49 [2006] QCA 242 at [34].

50 [2006] QCA 242 at [34].

113 It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt[51]. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. In the present case, the critical question for the jury was what assessment they made of the whole of the evidence that the complainant and the appellant gave that was relevant to the issue of consent to the digital penetration that had occurred in the park. That evidence did not require the conclusion that the jury should necessarily have entertained a doubt about the appellant's guilt.

114 As for the other offences of which the appellant was found guilty, there was ample evidence demonstrating his commission of the acts constituting those offences. Did he believe, on reasonable grounds, that the complainant was not an intellectually impaired person? The answer to that question depended on what the jury made of the appellant's evidence. It was open to the jury to reach the conclusions they did.

115 None of the appellant's grounds of appeal being made out, it is, of course, not necessary to go on to consider the application of the proviso. It is as well to emphasise, however, that the unanimous decision of this Court in *Weiss v The Queen*[52] warned against attempting to describe the operation of the statutory language in other words, lest such expressions mask the nature of the appellate court's task in considering the application of the proviso. The Court expressly discountenanced[53] any attempt to predict what a jury (whether the jury at trial, or some hypothetical future jury) would or might do. Rather, the Court said[54] that "in applying the proviso, the task is to decide whether a 'substantial miscarriage of justice has actually occurred'". Unless, and until, a majority of this Court qualifies what is said in *Weiss*, the intermediate courts of Australia must continue to apply that decision.

116 The appeal should be dismissed.

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51 *M v The Queen* (1994) 181 CLR 487 at 492-493.

52 (2005) 224 CLR 300 at 313 [33].

53 (2005) 224 CLR 300 at 314 [35].

54 (2005) 224 CLR 300 at 314 [35].

117 HEYDON J. I agree with Hayne J, and would add only the following remarks about the cross-examination. The criticisms made must be read keeping in mind that the cross-examiner was not represented in this appeal.

The powers of a cross-examiner

118 There were many respects in which the cross-examination of the appellant was in breach of ethical duties flowing from the position of the cross-examiner as counsel for the prosecution, and in breach of other ethical duties. For present purposes, what is important is that those breaches were also breaches of rules established by the law of evidence. While breaches of these evidentiary rules do not often result in appeals being allowed, while there are relatively few reported cases about them, and while writers have given less attention to them than to more fashionable or interesting subjects, there is no doubt that they exist and no doubt that they are well settled.

119 They are rules which necessarily developed over time once it came to be established that oral evidence should be elicited, not by means of witnesses delivering statements, and not through questioning by the court, but by means of answers given to a succession of particular questions put, usually by an advocate, and often in leading form. A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways.

120 "Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness."[55]

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55 *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 359 per Viscount Sankey LC, quoting Lord Hanworth MR with approval (Lords Blanesburgh, Atkin, Macmillan and Wright concurring); approved in *Wakeley v The Queen* (1990) 64 ALJR 321 at 325; 93 ALR 79 at 86 per Mason CJ, Brennan, Deane, Toohey and McHugh JJ.

Hence the powers given to cross-examiners are given on conditions, and among the relevant conditions are those which underlie the rules of evidence contravened in this case.

Offensive questioning

121 The most striking characteristic of the cross-examination in this case was its wild, uncontrolled and offensive character.

122 A prosecutor must "conduct himself with restraint and with due regard to the rights and dignity of accused persons. A cross-examination must naturally be as full and effective as possible, but it is unbecoming in a legal representative – especially in a prosecutor – to subject a witness, and particularly an accused person who is a witness, to a harassing and badgering cross-examination."[56] One reason why there is a rule prohibiting this type of questioning was put thus by Wigmore[57]:

> "An intimidating *manner* in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which in form or subject *cause embarrassment, shame or anger* in the witness may unfairly lead him to such demeanor and utterance that the impression produced by his statements does not do justice to his real testimonial value." (emphasis in original)

Another was advanced by Lord Langdale MR when he deprecated "the confusion occasioned by cross-examination, as it is too often conducted", for it tended to "give rise to important errors and omissions"[58]. Yet another was suggested by an American judge: "a mind rudely assailed, naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses."[59]

123 In this case the questioning was conducted "without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of

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56 *S v Booi* 1964 (1) SA 224 at 227-228 per O'Hagan J. See also *S v Makaula* 1964 (2) SA 575 at 577-578 per van der Riet J.

57 Wigmore, *Evidence in Trials at Common Law*, Chadbourn ed (1970), vol 3, at 173 [781].

58 *Johnston v Todd* (1843) 5 Beav 597 at 601-602 [49 ER 710 at 712].

59 *Elliott v Boyles* 31 Pa 65 at 66 (1857) per Lowrie J.

law", and, as a result, it was "indefensible"[60]. The cross-examination was improper because it was "calculated to humiliate, belittle and break the witness"[61]. Its tone "was often sarcastic, personally abusive and derisive"[62]. It resorted to remarks "in the nature of a taunt"[63]. It amounted to "bullying, intimidation, personal vilification or insult", none of which is permissible[64].

124 The cross-examination not only offended these common law rules. Many of the questions were annoying, harassing, intimidating, offensive or oppressive, contrary to s 21 of the *Evidence Act* 1977 (Q)[65].

Comments

125 The cross-examination also contravened the rules of evidence in that many things said by the cross-examiner were not questions at all. To adopt the language of the Ontario Court of Appeal, counsel for the prosecution infringed the rules of evidence when he "regularly injected his personal views and editorial comments into the questions he was asking"[66]. One vice of comments made in

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60 *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 360 per Viscount Sankey LC (Lords Blanesburgh, Atkin, Macmillan and Wright concurring).

61 *R v Thompson* [2006] 2 NZLR 577 at 588 [68] per Hammond, Baragwanath and Potter JJ. See also *R v R(AJ)* (1994) 94 CCC (3d) 168 at 177 per Osborne, Doherty and Laskin JJA.

62 *R v Bouhsass* (2002) 169 CCC (3d) 444 at 447 [11] per Finlayson, Moldaver and Feldman JJA. See also *R v Robinson* (2001) 153 CCC (3d) 398 at 417 [40] per Rosenberg, Moldaver and Goudge JJA.

63 *Rubin v State* 211 NW 926 at 929 (Wisc, SC, 1927) per Owen J.

64 *Randall v The Queen* [2002] 1 WLR 2237 at 2242 [10] per Lords Bingham of Cornhill, Nicholls of Birkenhead, Hutton, Hobhouse of Woodborough and Rodger of Earlsferry.

65 It is set out by Kirby and Callinan JJ at [36]. There are similar provisions in jurisdictions other than Queensland: *Family Law Act* 1975 (Cth), s 101; *Evidence Act* 1995 (Cth), s 41; *Evidence Act* 1995 (NSW), s 41; *Evidence Act* 2001 (Tas), s 41; *Criminal Procedure Act* 1986 (NSW), s 275A; *Evidence Act* 1958 (Vic), s 40; *Evidence Act* 1929 (SA), ss 22 and 25; *Evidence Act* 1906 (WA), s 26; *Evidence Act* (NT), ss 13 and 16.

66 *R v Bouhsass* (2002) 169 CCC (3d) 444 at 447 [12] per Finlayson, Moldaver and Feldman JJA.

the course of questioning is that although they may be potentially damaging in the jury's eyes, they are not questions, and thus the witness has no opportunity of dealing with the sting in the comments. Another vice is that the jury may regard counsel as a person of special knowledge and status and therefore pay particular regard to the comments – particularly where it is counsel for the prosecution who chooses "to throw the weight of his office" into the case[67]. The time for comments, at least legitimate ones – for disparaging comments based on evidence or the lack of it can be legitimate – is the time of final address[68]. "Statements of counsel's personal opinion have no place in a cross-examination."[69] The role of prosecution counsel in the administration of justice should not be "personalized"[70]. Their own beliefs should not be "injected" into the case[71]. Thus in *R v Hardy*[72] junior counsel (the future Gibbs J) for one of the accused asked a witness who had attended certain allegedly seditious meetings: "Then you were never at any of those meetings but in the character of a spy?" The future Lord Ellenborough CJ, appearing for the prosecution, objected to this line of questioning. Eyre LCJ said to defence counsel:

> "[Y]our questions ought not to be accompanied with those sort of comments: they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of acts, to probe a witness as closely as you can; but it is not the object of a cross-examination, to introduce that kind of periphrasis as you have just done."

After junior counsel for the accused sent for leading counsel (the future Lord Erskine LC), and the point was debated further, Eyre LCJ upheld the objection[73]:

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67 *R v Robinson* (2001) 153 CCC (3d) 398 at 418 [45] per Rosenberg, Moldaver and Goudge JJA.

68 *Randall v The Queen* [2002] 1 WLR 2237 at 2242 [10] per Lords Bingham of Cornhill, Nicholls of Birkenhead, Hutton, Hobhouse of Woodborough and Rodger of Earlsferry.

69 *R v R(AJ)* (1994) 94 CCC (3d) 168 at 178 per Osborne, Doherty and Laskin JJA.

70 *R v S(F)* (2000) 144 CCC (3d) 466 at 472 [13] per Labrosse, Weiler and Charron JJA.

71 *R v S(F)* (2000) 144 CCC (3d) 466 at 474 [18] per Labrosse, Weiler and Charron JJA.

72 (1794) 24 *Howell State Trials* 199 at 753-754.

73 (1794) 24 *Howell State Trials* 199 at 756. See also *R v Ings* (1820) 33 *Howell State Trials* 957 at 999 per Dallas LCJ.

> "I think it is so clear that the questions that are put are not to be loaded with all of the observations that arise upon all the previous parts of the case, they tend so to distract the attention of every body, they load us in point of time so much, and that that is not the time for observation upon the character and situation of a witness is so apparent, that as a rule of evidence it ought never to be departed from ...".

126 Comments are particularly objectionable when they are sarcastic or insulting. They are even more objectionable when they are statements indicating the personal belief of prosecution counsel in the credibility or guilt of the accused: that is not something to be said in address, and a fortiori is not something to be said during questioning.

Compound questions

127 Partly by reason of the interspersing of both comments and questions between the accused's answers, and partly by reason of other defects in the form of the questions, some "questions" asked during this cross-examination were not single questions, but were compound questions. "A compound question simultaneously poses more than one inquiry and calls for more than one answer. Such a question presents two problems. First, the question may be ambiguous because of its multiple facets and complexity. Second, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address."[74] But compound questions have additional vices. It is unfair to force a witness into the position of having to choose which questions in a compound question to answer and in which order. Cross-examiners are entitled, if they can, to frame questions so as to seek a particular answer – either "Yes" or "No". Even though the answers desired by the cross-examiner to a compound question may be all affirmative or all negative, the witness may wish to answer to some affirmatively and some negatively. To place witnesses in the position of having to reformulate a compound question and answer its component parts bit by bit is unfair to them in the sense that it prevents them from doing justice to themselves. Some "questions" asked in this case contained at least four questions within them.

Cutting off answers before they were completed

128 On occasion during his cross-examination the accused's answers were cut off either by a comment or by some further question even though it was clear that there was more which the accused wished to say. "Evidence should ordinarily be

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74 Wright and Gold, *Federal Practice and Procedure: Evidence*, (1993), § 6164 at 354, approved in *State of Hawaii v Sanchez* 923 P 2d 934 at 948 [25] (Hawai'i App, 1996) per Burns CJ, Watanabe and Acoba JJ.

given without interruption by counsel."[75] The cutting off of an answer by a further question, though always to be avoided as far as possible, can happen innocently when a questioner is pursuing a witness vigorously and the witness pauses in such a fashion as to suggest that the answer is complete; it can happen legitimately if a witness's answer is non-responsive. But very few of the interruptions here can be explained away on these bases. They were usually interruptions of responsive answers, often by offensive observations. The rule against the cutting off of a witness's answer follows from the encouragement which the law gives to short, precise and single questions. It is not fair to ask a question which is disparaging of or otherwise damaging to a witness and to cut off an answer which the cross-examiner does not like. The right of a cross-examiner to control a witness does not entail a power to prevent the witness from giving any evidence other than that which favours the cross-examiner's client.

Questions resting on controversial assumptions

129 The cross-examiner on occasion alleged that the accused was inventing evidence when in fact the proposition supposedly invented corresponded with evidence given by the complainant in the prosecution case. The cross-examiner also put implicitly unfounded assertions that the accused was being evasive. And the cross-examiner, in putting a question about the accused's dishonesty, wrapped up in it an assumption that there had been an earlier and different piece of dishonesty.

130 A question put in chief which assumes a fact in controversy is leading and objectionable, "because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect."[76] While leading questions in the cross-examination of non-favourable witnesses are not intrinsically objectionable, "[w]itnesses should not be cross-examined on the assumption that they have testified to facts regarding which they have given no testimony. Such questions have a tendency to irritate, confuse and mislead the witness, the parties and their counsel, the jury and the presiding judge, and they embarrass the

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75 *Randall v The Queen* [2002] 1 WLR 2237 at 2242 [10] per Lords Bingham of Cornhill, Nicholls of Birkenhead, Hutton, Hobhouse of Woodborough and Rodger of Earlsferry.

76 Wigmore, *Evidence in Trials at Common Law*, Chadbourn ed (1970), vol 3, at 171 [780]. According to Starkie, *A Practical Treatise on the Law of Evidence*, 4th ed, (1853) at 197, n (*s*), as early as 1818 Abbott J ruled in *Hill v Coombe* and *Handley v Ward* against questions which assumed facts to have been proved which had not been proved, or particular answers to have been given which had not been given.

administration of justice."[77] This is because a leading question put in cross-examination which assumes a fact in controversy, or assumes that the witness has in chief or earlier in cross-examination given particular evidence which has not been given, "may by implication put into the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his."[78] A further vice in this type of questioning is: "An affirmative and a negative answer may be almost equally damaging, and a perfectly honest witness may give a bad impression because he cannot answer directly, but has to enter on an explanation."[79] Questions of this character are misleading and confusing, within the meaning of both the statutory and common law rules.

Argumentative questions

131 Another vice in the questioning in this case stemmed from the fact that some of the questions and observations of counsel for the prosecution did not seek to elicit factual information, but rather provided merely an invitation to argument[80]. Examples include: "That doesn't tell us much, does it?", "Look, I'm giving you every opportunity?", "I'll shift to another topic whenever you're prepared to finish it", and "We want honesty at all times, of course". In form these remarks seemed apt to trigger a debate about how much the accused's hearers had been told, whether he was being given every opportunity, whether he had finished a topic, and whether he was being honest. The vice in a particular

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77 *State v Labuzan* 37 La Ann 489 at 491; 1885 WL 6095 (SC La, 1885) per Bermudez CJ.

78 Wigmore, *Evidence in Trials at Common Law*, Chadbourn ed (1970), vol 3, at 171 [780]. The rule does not forbid questions being put to experts on assumed facts, controversial though the assumption may be: there is here no question of trapping or misleading the witness, because the witness is not invited to accept the truth of the assumption. Nor does the rule forbid counsel putting suggestions to witnesses that propositions are true which counsel is not in a position to support by calling evidence, so long as counsel believes in good faith and on a reasonable basis that the proposition is correct: *Fox v General Medical Council* [1960] 1 WLR 1017 at 1023; [1960] 3 All ER 225 at 230 per Lords Radcliffe, Tucker and Cohen; *R v Lyttle* (2004) 180 CCC (3d) 476 at 489-493 [47]-[66]; *Ebanks v The Queen* [2006] 1 WLR 1827 at 1839-1844 [26]-[31].

79 Walker and Walker, *The Law of Evidence in Scotland*, (1964) at 361.

80 *R v R(AJ)* (1994) 94 CCC (3d) 168 at 178 per Osborne, Doherty and Laskin JJA.

type of argumentative cross-examination was described thus by the English Court of Appeal:[81]

> "One so often hears questions put to witnesses by counsel which are really of the nature of an invitation to an argument. You have, for instance, such questions as this: 'I suggest to you that ...' or 'Is your evidence to be taken as suggesting that ...?' If the witness were a prudent person he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others.' An answer of that kind, no doubt, requires a good deal of sense and self-restraint and experience, and the mischief of it is, if made, it might very well prejudice the witness with the jury, because the jury, not being aware of the consequences to which such questions might lead, might easily come to the conclusion (and it might be true) that the witness had something to conceal. It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact."

Like several other of the rules discussed above, the rule against argumentative questioning rests on the need not to mislead or confuse witnesses.

The effect of the rules on the value of testimony

132 It is not unique in the law of evidence to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. It is certainly the case in this field. The rules permit a steady, methodical destruction of the case advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing. It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most scrupulous courtesy and calmness. From the point of view of cross-examiners, it is much more efficient to comply with the rules than not to do so.

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81 *R v Baldwin* (1925) 18 Cr App R 175 at 178-179 per Lord Hewart LCJ, Rowlatt and Swift JJ. See also *R v Ruptash* (1982) 68 CCC (2d) 182 at 188-189.

Role of the judge

133 It was open to counsel for the accused to object to the questions criticised above, but there was no objection. He could well have judged that it was prudent not to do so. However, the permissibility of questioning of the type criticised in this case does not depend solely on whether there are objections from counsel representing the party calling the witness. "The failure of counsel to object does not ... give Crown counsel *carte blanche* ..."[82]. Trial judges have a responsibility independently of objections to prevent this type of questioning being employed[83]. "If counsel begin to misbehave [the trial judge] must at once exert his authority to require the observance of accepted standards of conduct."[84] Here the trial judge occasionally intervened to control the witness's answers, but never to control counsel's questions.

Miscarriage of justice

134 While the breaches of exclusionary rules discussed above were capable of placing the accused in an unfair position, taken as a whole the breaches generated neither unfairness nor a miscarriage of justice. That is so partly because, despite interruptions, the accused was able to get his version of events across. It is so partly because at least the questions (as distinct from the comments) were not irrelevant and hence did not influence the jury towards an illogical approach to the issues. It is so partly because the uncontrolled ineptness of the questioning was such as to attract sympathy to the accused. Evidently designed to disparage and humiliate the accused, the questioning is likely to have rehabilitated him in the jury's eyes as he struggled with success towards advancing an account of the events to which the questioning related. The very egregiousness of the conduct generated safeguards against the dangers inherent in it. "[T]he adoption of an unfair conduct in cross-examination has often an effect repugnant to the interests which it professes to promote."[85] Here the overly aggressive and unfair approach of the cross-examiner was one which was likely to have generated sympathy in

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82 *R v R(AJ)* (1994) 94 CCC (3d) 168 at 180 per Osborne, Doherty and Laskin JJA. See also *R v F(A)* (1996) 1 CR (5th) 382.

83 See, for example, *Elliott v Boyles* 31 Pa 65 at 66 (1857) per Lowrie J ("Witnesses ... are entitled to the watchful protection of the court"); *Rubin v State* 211 NW 926 at 929-930 (SC Wisc, 1927) per Owen J.

84 *Randall v The Queen* [2002] 1 WLR 2237 at 2242 [10] per Lords Bingham of Cornhill, Nicholls of Birkenhead, Hutton, Hobhouse of Woodborough and Rodger of Earlsferry.

85 Evans, Appendix to Pothier, *A Treatise on the Law of Obligations or Contracts* (1826) vol 2 at 234.

the jury for the accused. Even if it did not, the accused showed himself capable of pointing out the defects of the cross-examination in a dignified way, and overcoming them.

135 The disapproval of the conduct of this trial to be found in all the judgments of this Court may discourage and prevent its repetition. But it is not the function of the Court to seek to discourage and prevent repetition by allowing an appeal unless there has been a miscarriage of justice. Despite that fact, dismissal of the appeal is not to be taken as complaisance in the conduct examined.