HIGH COURT OF AUSTRALIA

GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

ALAN JOHN STUBLEY APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Stubley v Western Australia [2011] HCA 7
Date of Order: 20 October 2010
Date of Publication of Reasons: 30 March 2011
P29/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 3 March 2010 dismissing the appellant's appeal against conviction and, in place thereof, order that:*

   (a) the appeal to the Court of Appeal be allowed;

   (b) the convictions of the appellant be set aside; and

   (c) there be a new trial.

On appeal from the Supreme Court of Western Australia

Representation

D Grace QC with S Vandongen for the appellant (instructed by Michael Tudori & Associates)

J McGrath with D A Lima for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Stubley v Western Australia

Criminal law – Evidence – Admissibility and relevance – Propensity evidence – Evidence of uncharged acts – Appellant former psychiatrist charged with offences relating to sexual misconduct with two former patients – Evidence of sexual misconduct with three former patients adduced at trial – Whether trial judge erred in ruling evidence of uncharged acts had significant probative value.

Criminal law – Evidence – Admissions – Appellant conceded having consensual sexual activity with both complainants – Whether concession constituted admission for the purposes of s 32 of *Evidence Act* 1906 (WA) – Whether concession rendered consent the only live issue at trial.

Words and phrases – "significant probative value".

Evidence Act 1906 (WA), ss 31A, 32.

1 GUMMOW, CRENNAN, KIEFEL AND BELL JJ. After a trial in the Supreme Court of Western Australia, before Johnson J and a jury, the appellant was convicted of six offences of rape, an offence of attempting to commit rape and three offences of unlawful and indecent assault. The appellant was sentenced to 10 years' imprisonment and made eligible for parole. The appellant appealed against his conviction and sentence to the Court of Appeal of the Supreme Court of Western Australia.

2 A majority of the Court of Appeal (Owen and Buss JJA, Pullin JA dissenting) upheld an appeal against sentence, reducing the term to six years' imprisonment. The majority dismissed the appeal against the convictions[1]. On 30 July 2010, Hayne and Bell JJ granted the appellant special leave to appeal from that order. On 20 October 2010, at the conclusion of the hearing of the appeal in the Full Court, orders were made allowing the appeal, setting aside the order of the Court of Appeal and the appellant's convictions and directing a new trial. Our reasons for making those orders are as follows.

3 At issue in the appeal was the admissibility of the evidence of three witnesses, LB, MM and AW, of uncharged acts of sexual misconduct against them by the appellant.

Background facts

4 The appellant was a medical practitioner with a specialist qualification in psychiatry. Between 1965 and 2000, he had engaged in private practice as a psychiatrist and from about 1966 until about 1976 he also consulted as a psychiatrist at Royal Perth Hospital.

5 Between 1975 and 1978, the appellant was alleged to have engaged in sexual activity with two women, JG and CL, without their consent. Each was his patient at the time and the offences were alleged to have occurred in his consulting rooms during appointments scheduled for psychotherapy.

6 JG was the appellant's patient from 1974 to 1996. The sexual encounters commenced between December 1975 and January 1976 and ended some time before December 1980. In 1983, JG was questioned by a person from the Medical Board regarding an unspecified complaint. She did not speak about sexual intercourse on that occasion as she said she feared the appellant and that

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1 *Stubley v The State of Western Australia* [2010] WASCA 36.

she would "end up in an institution". She made complaints, through her lawyers, to the Medical Board of Western Australia in 1996, and to the police in 2006.

7 CL was a patient of the appellant between 1976 and 1981 and the sexual encounters extended over four years, commencing in 1977. CL made complaints to the Medical Board of Western Australia in 1981.

8 The appellant was charged under the *Criminal Code* (WA) ("the Code") with 14 offences relating to sexual activity with JG and CL: seven counts of rape; one count of attempting to commit rape; and six counts of unlawful and indecent assault. The offences against JG were alleged to have been committed on unknown dates between 8 December 1975 and 31 August 1978. The offences against CL were alleged to have been committed on unknown dates between 1 January 1977 and 30 June 1978[2].

9 Prior to the trial the prosecution notified the appellant that it intended to call LB, MM and AW to give evidence of indecent touching by him or sexual intercourse with him in his consulting rooms when they were his patients. No offences involving these three women were charged in the indictment. The admissibility of the evidence was determined under s 31A of the *Evidence Act* 1906 (WA).

Section 31A

10 Section 31A provides:

"(1) In this section —

propensity evidence means —

(a) similar fact evidence or other evidence of the conduct of the accused person; or

(b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

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2 Unless otherwise stated, references to the *Criminal Code* in these reasons are to the *Criminal Code* (WA), reprint as at 13 December 1983.

(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —

(a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and

(b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial."

11 Section 31A was introduced into the *Evidence Act* in 2004[3]. The provision abrogates the common law rule that similar fact evidence is inadmissible unless, when considered with the other evidence in the prosecution's case, there is no reasonable view of the similar fact evidence that is consistent with the innocence of the accused[4]. The admissibility of "propensity evidence" and "relationship evidence" is governed by the requirements of sub-ss (2)(a) and (2)(b). Sub-section (2)(a) requires an assessment that the evidence, by itself or with other evidence to be adduced in the trial, has "significant probative value". The meaning of that expression was discussed by Steytler P in *Dair v Western Australia*[5]:

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3 *Criminal Law Amendment (Sexual Assault and Other Matters) Act* 2004 (WA), s 13.

4 *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7; *Phillips v The Queen* (2006) 225 CLR 303 at 308 [9] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; [2006] HCA 4; *HML v The Queen* (2008) 235 CLR 334 at 431 fn 309 per Heydon J; [2008] HCA 16.

5 (2008) 36 WAR 413 at 429 [61]. Section 31A of the *Evidence Act* has also been considered by the Court of Appeal of the Supreme Court of Western Australia on a number of other occasions. See eg *Donaldson v Western Australia* (2005) 31 WAR 122 at 142-149 [98]-[131]; *Di Lena v Western Australia* (2006) 165 A Crim R 482 at 492-497 [48]-[73]; *Noto v Western Australia* (2006) 168 A Crim R 457; *Horsman v Western Australia* (2008) 187 A Crim R 565; *Buiks v Western Australia* (2008) 188 A Crim R 362; *Western Australia v Atherton* (2009) 197 A Crim R 119.

> "Before evidence can have significant probative value it must be such as 'could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent: ie more is required than mere … relevance': *Zaknic Pty Ltd v Svelte Corporation Pty Ltd*[6]. Heydon[7] suggests that significant probative value is something more than mere relevance but something less than a 'substantial' degree of relevance and that it is a probative value which is 'important' or 'of consequence'. He makes the point that the significance of the probative value of tendency evidence must depend on the nature of the facts in issue to which it is relevant and the significance or importance which that evidence may have in establishing the fact". (citations omitted)

12 The correctness of Steytler P's analysis was not in question on the appeal. The appeal did not raise for consideration the exercise mandated by sub-s (2)(b)[8]. In issue on the appeal was the conclusion of the majority in the Court of Appeal that the evidence of LB, MM and AW (whether characterised as "propensity evidence" or "relationship evidence") possessed significant probative value as explained in *Dair*.

The pre-trial application

13 Before his trial commenced, the appellant applied for an order for separate trials and to exclude the evidence of LB, MM and AW[9]. On the hearing of the application, the appellant's counsel conceded that the counts charging offences against JG and CL were properly joined in the indictment and the application for separate trials was withdrawn[10]. No issue with respect to joinder, or the evidence

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6 (1995) 61 FCR 171 at 175-176.

7 *Cross on Evidence*, 7th Aust ed (2004) at [21245].

8 Sub-section (2)(b) reflects the language of McHugh J's reasons in *Pfennig v The Queen* (1995) 182 CLR 461 at 529.

9 Section 98(2)(a) of the *Criminal Procedure Act* 2004 (WA) provides that, at any time before an accused's trial begins, the court may determine any question of law or procedure that is necessary or convenient in order to facilitate the conduct of the trial. Section 98(6) provides that a proceeding under s 98(2) is taken to be part of the accused's trial.

10 See s 133 of the *Criminal Procedure Act* 2004 (WA) with respect to orders for separate trials.

of JG and CL of sexual acts committed against them by the appellant that were not the subject of charges, or of the evidence of JG in the trial of the counts involving CL and vice versa, was raised on the appeal.

14 The application to exclude the evidence of LB, MM and AW was maintained. Senior counsel for the appellant informed the trial judge that the appellant would admit at the trial that during the period identified in the indictment "some or all of the acts of a sexual nature occurred" but would assert that the acts were consensual[11]. Counsel conceded that the evidence of LB, MM and AW was "propensity evidence". The evidence of LB, MM and AW appears to have been tendered to prove the appellant's tendency to act in a particular way. The prosecutor submitted that the relevance of the evidence was its capacity to prove the applicant's conduct in "bringing about a situation where sexual activity occurs, without consent in its legal sense, but without opposition or resistance from the particular complainant"[12].

15 Johnson J was conscious of this Court's decision in *Phillips v The Queen*. In that case it was said that the question of whether one complainant consents to sexual activity with an accused does not relevantly bear on the assessment of the evidence of another complainant that she did not consent to sexual activity with that accused[13]. On the authority of *State of Western Australia v Osborne* her Honour held that "where there is an evidentiary purpose other than establishing lack of consent, the fact that the propensity evidence also addresses lack of consent does not make it inadmissible"[14]. In this respect she identified two issues to which the evidence was directed[15]. The first issue was "the conduct of the accused both before and after engaging in sexual activity with the witnesses". The second issue was "matters personal to the witnesses which go to explaining or understanding why no complaint of this activity was made despite it being alleged that the sexual activity was not consensual". Her Honour concluded that the evidence of the three witnesses had significant probative value and that fair-minded people would think that the public interest in adducing it

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11 *Stubley v The State of Western Australia* [2009] WASC 57 at [3].

12 [2009] WASC 57 at [51].

13 *Phillips v The Queen* (2006) 225 CLR 303 at 318 [47].

14 [2009] WASC 57 at [39], citing *State of Western Australia v Osborne* [2007] WASCA 183 at [27].

15 [2009] WASC 57 at [62].

must have priority over the risk of an unfair trial[16]. She did not explain how, in light of the indication that JG's and CL's evidence that the appellant engaged in sexual intercourse with them in the course of consultations was not disputed, evidence of his conduct before or after intercourse was probative of any issue in the trial. There was no identification of the asserted tendency or feature of the conduct of the appellant which the evidence of LB, MM and AW was admitted to prove. There was no further explanation of what her Honour described as the "second issue". No matters personal to LB, MM and AW having the capacity to explain the absence of complaint were identified.

The trial

16 The trial proceeded more than 30 years after the last offence was alleged to have been committed. The complainants and LB, MM and AW were called as witnesses and gave evidence. The complainants both gave evidence that they did not consent to any of the sexual activity that took place in the appellant's rooms. The appellant gave evidence that he had sexual relations with JG and CL in the course of consultations and that they had consented on each occasion. He denied that their consent had been obtained by threats or intimidation.

The appeal in the Court of Appeal

17 The appellant appealed against his convictions to the Court of Appeal upon grounds which included that the trial judge erred in law in failing to exclude the evidence of LB, MM and AW. Section 30(3) of the *Criminal Appeals Act* 2004 (WA) provides (subject to the proviso in s 30(4)) that the Court of Appeal must allow the appeal if, in its opinion, the conviction should be set aside because of a wrong decision on a question of law by the judge, or there was a miscarriage of justice.

18 Buss JA observed that, in the case of an appeal against conviction on the ground of the wrongful admission of evidence to which objection was taken, the appeal is against the conviction and not the ruling[17]. The trial judge determined the application to exclude the evidence on the basis of the witness statements made by LB, MM and AW and the statements of the two complainants. The

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16 [2009] WASC 57 at [62], [64].

17 *Maric v The Queen* (1978) 52 ALJR 631 at 634 per Gibbs ACJ, Mason and Jacobs JJ concurring; (1978) 20 ALR 513 at 520; *Webb v The Queen* (1994) 181 CLR 41 at 90 per Toohey J; [1994] HCA 30.

Court of Appeal had regard to the whole of the evidence given at the trial in determining whether the evidence was wrongly admitted and whether it had occasioned a miscarriage of justice. In the event, there appears to have been little difference between the evidence at the trial and the contents of the statements[18]. The trial was conducted, as counsel foreshadowed, on the basis that JG's and CL's evidence that the appellant had engaged in sexual relations with them during consultations was not disputed. Before turning to the reasons of the majority for concluding that the decision to admit the evidence did not involve legal error, it will be necessary to refer to the evidence of the complainants and the three witnesses in greater detail. What follows is a summary of the evidence given at the trial.

JG's evidence

19 The first 11 counts in the indictment charged the appellant with offences against JG. At the trial JG did not give evidence of the incidents that were charged in counts 3, 7 and 9. The appellant was acquitted by direction on each of these counts. The jury acquitted the appellant of the offence charged in count six, which was an allegation of indecent assault involving the penetration of JG's anus by the appellant with his finger.

20 JG was born in September 1946. Her first child was born in 1974. JG suffered depression following the birth of the child and she was admitted to a private hospital for treatment for this condition. She remained in hospital for about three months. The appellant attended some group psychotherapy sessions which JG and other patients attended. Before her discharge in December 1975, the appellant told JG that she could leave the hospital provided she consulted him as a patient at his West Perth rooms. She made an appointment to see the appellant a week or two weeks after her discharge.

21 JG's evidence of the offences was as follows.

Count 1

22 One or two weeks after her discharge from hospital JG attended a consultation with the appellant at his rooms in West Perth. She walked into the room and the appellant gave her a big hug, telling her how well she looked. After some discussion about how JG had been coping the appellant asked her to come and sit on his knee. She was very shocked. After a period of silence, the

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18 [2010] WASCA 36 at [22].

appellant repeated the request in a "very authoritarian, quite demanding" tone. Ultimately JG complied and sat on the appellant's knee. He put his hand on her leg, rubbing it up and down the inside of her leg and touching her crotch. JG "just froze". She was afraid of the appellant and of what he might do to her. She told him that she "did not want to do this". He did not respond. The incident lasted for "probably five minutes". After this JG got up and walked towards the door. The appellant told her that he would need to see her again in a week or two. JG made a further appointment with the appellant's receptionist.

Count 2

23 About one or two weeks after this incident, JG attended for a further appointment with the appellant. In the course of the consultation the appellant threw a cushion on the floor and he lay down, saying "come lie with me". JG remained seated. The appellant repeated his request in "a very authoritarian way". After a time she complied. The appellant undid his trousers, removed JG's stockings and underwear, and had sexual intercourse with her. Before removing his trousers, JG said "I don't want you to do this". The appellant ignored her. JG was crying during the intercourse, which lasted for 10 or 15 minutes. Afterwards the appellant stood up and dressed. JG remained on the floor, crying. After a time she pulled up her clothing and sat on a chair. She was sobbing. There were two doors leading from the consulting room. One gave out to the waiting area and the other to the fire exit. The appellant opened the door to the fire exit and JG ran out of the room and down the fire stairs. Later, the appellant's receptionist telephoned JG and fixed a further appointment for her.

24 JG attended the third appointment. She was angry and she told the appellant that she wanted to know "what this was all about". He replied that "it's part of your therapy and you need to continue to come". He also said "if you don't come, you'll have to go to an institution and you would be separated from your daughter and your husband". There was no sexual contact during this consultation.

25 JG continued to see the appellant following the third consultation. On occasions the appellant had sexual intercourse with her during the consultations. JG had no recollection of particular instances. She attended consultations at the West Perth rooms for perhaps a year. Counts one and two were the only offences alleged to have occurred at the West Perth rooms. The pattern of the uncharged sexual conduct described by JG was similar to her account of the incident charged in count two. On each occasion the appellant had thrown a cushion on the floor and invited JG to lie down with him and he had proceeded to have intercourse with her. On one occasion JG said to the appellant "I don't understand why I have to be doing this". He replied "it's part of your therapy and

if you don't do it then, you know, you get your depression back, you'll have to go back to hospital and you'll be apart from your child and your husband".

Count 4

26 The appellant opened consulting rooms in West Leederville approximately a year after JG commenced seeing him. The first time JG attended the West Leederville rooms the appellant locked the door to the consulting room. After a time, he threw a cushion on the floor and said "come lie with me". Eventually JG complied. He removed his trousers and JG's pantyhose and underwear and had intercourse with her. JG was crying. The appellant thrust quite harshly causing abrasions to her back. Afterwards the appellant washed his penis in the basin in the room. JG adjusted her clothes and sat on a chair in the consulting room. She could not stop crying. Eventually the appellant opened the door and she ran out of the room.

27 Three or four weeks after the incident charged in count 4, JG attended a further consultation with the appellant. She was fearful of experiencing another bout of depression. She wanted to be well enough to look after her husband and child. She did not want to be re-admitted to hospital. There was no sexual contact on this occasion.

Count 5

28 On another occasion at the West Leederville rooms JG was upset and crying during the course of the consultation. The appellant threw a cushion on the floor, saying "let me comfort you". He had sexual intercourse with her.

29 JG decided to have a second child. Around this time she stopped seeing the appellant. Quite late in her pregnancy JG became anxious about the rise of post-natal depression. She discussed her fears with her general practitioner and following this discussion she resumed seeing the appellant.

Count 6

30 There was an occasion at the West Leederville rooms when the appellant pushed his finger into JG's anus. It hurt her. She asked him not to do it. He said that he was trying to make her have an orgasm.

Count 8

31 On one occasion during a consultation JG objected to sexual intercourse, saying to the appellant "I've got my period. I don't want to have sex with you."

The appellant straddled JG with his legs over her head and pushed his penis into her mouth. JG was crying.

Count 10

32 JG attended a consultation with the appellant when she was about eight months pregnant. The appellant threw a cushion on the floor and lay down saying, "come and relax with me here". JG lay on the floor feeling quite relaxed. She did not expect the appellant to have intercourse with her at this stage in the pregnancy. The appellant took his trousers off. JG said "what are you doing? What are you doing? I don't want this. My baby's due in four weeks' time. I'm not having intercourse with my husband. I don't want to have intercourse". The appellant responded "it will be okay. It will be quite okay". He proceeded to have sexual intercourse with JG. It did not last for very long and he was not as rough as usual. JG was terrified that the intercourse might bring on the birth of her baby prematurely. The next day she started to haemorrhage. She telephoned the appellant's rooms and spoke with him. She was extremely angry and she told him about the haemorrhage. He said that "that can happen" and JG responded that "it shouldn't have happened".

Count 11

33 JG continued to fear post-natal depression and after the birth of her second child she returned to see the appellant. On the first occasion the appellant threw down a cushion on the floor and invited JG to come and lie with him. He repeated the request and JG complied, saying "I've got my baby in this room and my baby is asleep and I don't want to lie with you". The appellant did not reply. He removed his trousers and pulled JG's garments down and had intercourse with her. During the intercourse JG said "look, I can't do this. I can't do this". She was crying. He took no notice of her. Afterwards he washed himself in the basin. JG remained on the floor sobbing.

34 JG continued to see the appellant. She had tried not to go to appointments but she was very afraid of getting depressed. Her third child was born in December 1980. Sexual intercourse continued on occasions after the birth of the second child but it stopped prior to the birth of the third.

35 In the years following the birth of JG's third child she continued to see the appellant. She finally stopped seeing him in 1996.

<u>CL's evidence</u>

36 Counts 12, 13 and 14 charged offences against CL.

37 CL was born in February 1946. In 1976 she had returned to live in Perth. It was a stressful time in her life. Her marriage had broken down and she had moved back into the family home with her two infant children at a time when her mother was dying. CL consulted her general practitioner because she was suffering from tension headaches. She was referred to a psychologist who referred her to the appellant. CL commenced seeing the appellant in the later part of 1976 at his West Perth rooms.

38 At her first consultation with the appellant CL told the appellant that she "knew of some sorts of therapy but that [she] was quite specifically not interested in bed therapy which [she] had read about". There was no physical contact between CL and the appellant at this initial consultation.

Count 12

39 CL sustained a neck injury in 1977. In the latter half of 1977 she mentioned to the appellant that she had a pain in her neck in the course of a consultation. He stood behind her and rubbed her neck and then he rubbed his hands over her breasts. CL did not recall whether anything was said. She remained in her chair and the appellant moved away without referring to what had occurred.

Count 13

40 Either on the occasion charged in count 12 or during a later consultation the appellant invited CL to hug him. He put his hands around her and stroked her in an erotically stimulating way. He slid his hands down and lifted CL's skirt and attempted to remove her underwear. He attempted to force his penis between her legs. CL "sort of eased away" from him. The appellant's penis was flaccid. He laughed and said "oh, that doesn't work". He escorted CL into his receptionist's room to ensure that she made further appointments.

41 Two weeks, or perhaps a month, after this incident CL returned to see the appellant. She was in a state of turmoil. She had been stunned by his behaviour on the last occasion and she had thought that he must have forgotten himself. The appellant sat in his chair quite passively during the consultation and after a pause he said "I feel rejected". This was said in a "very, very menacing tone". CL felt very afraid of the appellant.

Count 14

42 At a subsequent consultation the appellant opened his arms in what CL took to be an invitation "to some sort of cuddling or something; and it led to him undressing me, undressing himself and lying on the floor and engaging in sexual intercourse". CL was "a bit stunned". Before the intercourse, the appellant engaged in stimulating foreplay. CL was not sure but she did not think that she had said anything to the appellant. At the time the intercourse commenced CL was very much aroused and she responded to it. The appellant told her that "this is the most important relationship you will ever have".

43 Over the next three or four years CL attended consultations with the appellant and had intercourse with him. She could not recall particular incidents. The appellant washed his genitals in the basin after intercourse. CL went to consultations anticipating that sexual intercourse would occur "but hoping to God it would not". She did not communicate this hope to the appellant. The appellant was a "very scary man" and CL was afraid of him. The appellant had led CL to understand that he had power under mental health legislation to commit her to a mental hospital without the need for a second opinion from another medical practitioner. CL recalled the appellant mentioning, in the course of a consultation, that she had a "sickness".

44 In cross-examination, CL gave an account of an occasion when she told the appellant that she did not want to lend money to support a project in which he had an interest. The appellant had paused and then said "you seem to be very angry. Sometimes when people are very angry, they need to be put in hospital for a couple of weeks".

45 CL said that in the period 1976 until she ceased treatment with the appellant in 1981 she had been afraid of him. In cross-examination she acknowledged that she had been infatuated with the appellant and that she had been "sucked into thinking this [her relationship with the appellant] was love".

<u>The evidence of the "propensity witnesses"</u>

LB

46 LB was a patient of the appellant between early 1973 and about 1975. She had been in what she described as a "serious mental state" and she felt that her sessions with the appellant had lessened her disturbance. As the consultations progressed there had been some hand-holding and hugging but LB had not perceived the appellant's behaviour at that time to have sexual connotations.

47 In early 1975, LB was planning to move interstate. Prior to her departure the appellant told her that she was sexually repressed and "too nice". He said that LB needed to be in touch with her true self and to express her true senses. He touched her breasts on several occasions. He told her that he wanted her to express her sexuality. LB thought that the appellant was in love with her. She was flattered but she was not interested in the appellant sexually. However, she felt protective towards him and did not want him to feel embarrassed or rejected.

48 At a consultation in January 1975, the appellant suggested that they should remove their clothes and hug each other in order to help LB overcome her fears of expressing her sexuality. He suggested that it would be easier if LB lay down. She did so and the appellant lay on top of her. After this, "everything went blank" for LB. She did not have a recollection of any other sexual acts occurring. After this incident LB saw the appellant again before leaving Perth but there was no further physical or sexual contact.

49 LB rejected the suggestion that the sexual activity that she had engaged in with the appellant was consensual. She said that she had conflicting emotions about it. She had felt both humiliated and excited, feelings which she considered were associated with sexual abuse.

MM

50 MM was employed by the appellant as a receptionist at his West Perth rooms. She became his patient during the period that she was working for him. Initially the relationship between MM and the appellant was very formal. However, on MM's 21st birthday, the appellant told her that now she could do whatever she wanted. He kissed her on the lips.

51 In a consultation which took place after her 21st birthday, the appellant hugged MM and undressed her, saying that he knew that she would be beautiful. He had sexual intercourse with her on the floor of the consulting room. MM had not wanted to have sexual intercourse with the appellant. During intercourse she had a "frozen grin" on her face. After intercourse the appellant washed himself in the basin. MM did not resist because she did not want to jeopardise her employment. She also believed that the appellant's conduct was part of his treatment of her as a patient. About a week after this episode MM confronted the appellant and told him that there was not to be any further sexual contact between them. The appellant agreed. No further sexual contact took place between the two.

AW

52 AW was referred to the appellant in 1975 for psychiatric treatment. She was "very stressed and confused". Initially, the appellant did not seem to be a caring person and AW was scared of him. She thought he had an "angry personality". However, as the sessions progressed, AW came to think that the appellant was "fantastic". She wanted to be close to him. This feeling intensified, culminating with AW without invitation sitting on the appellant's lap during a consultation and kissing him. The appellant then removed AW's dress and his own clothes. He lay on the floor indicating that AW should do likewise. She did so. They had sexual intercourse. After this, the appellant washed himself in the basin. There were further instances when the appellant had sexual intercourse with AW during consultations.

53 In cross-examination AW said that, at the time she kissed the appellant, she had felt the need to be emotionally, not sexually, connected to him. She had wanted the appellant to put his arms around her but she had not wanted to have sexual intercourse with the appellant. She had not said anything as he undressed her or after the episode of intercourse. At the time AW believed that the only way to get the appellant's attention was through sex. On occasions AW performed fellatio on the appellant while he was seated in his chair in the consultation room. AW did not detect any change in the appellant's manner of relating to her during the period in which sexual relations between them took place. The appellant remained "still distant" and "shut off".

The conduct of the trial

54 The Prosecutor opened his case by stating that the issue in respect of most, if not all, counts would not be proof that the sexual acts occurred but proof that they had occurred without consent.

55 The appellant's counsel exercised his right to open his case immediately after the prosecution opening[19]. In his address counsel said that the appellant would admit that he was sexually intimate with JG, CL, MM and AW (the admission did not extend to LB, of whom it was said the appellant had no recall). Counsel acknowledged that the appellant's conduct might be characterised as dishonourable, immoral and unprofessional. He confirmed that the issue in the trial would be proof of absence of consent, stating that the appellant would say that on each occasion the acts were consensual and did not involve force,

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19 *Criminal Procedure Act* 2004 (WA), s 143.

coercion, intimidation or manipulation. The generality of the admission was explained by inviting the jury to consider that after an interval of 30 to 35 years the appellant was unable to "tick a box" as to each act charged. Counsel concluded his address, saying:

> "I think what [the general admission of sexual intimacy] does – and it really mirrors what the prosecution have said because we have spoken before the trial and clearly told Mr Troy what the issues will be, and the issue will be one of consent, so that's a matter for you. I hope by making those admissions, I haven't done it in a formal way but certainly that's going to be the issue at this trial, so that's what you need to focus on … "

56 Consistently with the tenor of the opening, the appellant gave evidence at the trial in which he admitted to having had sexual relations with JG and CL in the period limited by the indictment. He said that he had been an adherent of a school of thought that sexual relations between doctor and patient was a helpful methodology. He had since come to regard his conduct as ethically unsound and he regretted that it had occurred. He denied threatening JG that she would be sent to a psychiatric institution if she did not comply with his demands and he had no memory of saying "I feel rejected" to CL.

The reasons of the Court of Appeal

57 The majority in the Court of Appeal held that the trial judge's ruling was correct and that the evidence of AW, LB and MM satisfied both limbs of s 31A(2) of the *Evidence Act* and had been rightly admitted. In the principal judgment, Buss JA correctly identified the issues at the trial as[20]:

> "(a) [W]hether the appellant had committed the particular acts alleged in each count in the indictment;
>
> (b) whether JG or CL, as the case may be, had consented to the sexual activity or attempted sexual activity alleged in each count; and
>
> (c) if JG or CL had not consented in relation to any count, whether the appellant nevertheless had an honest and reasonable (but mistaken) belief that there was consent."

58 His Honour said that, while there were some material differences in the evidence of LB, MM, AW, JG and CL with respect to the characteristics of their

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20 [2010] WASCA 36 at [354].

relationship generally and their sexual interaction with the appellant, there were "common features of importance"[21]. These were the position of power and the psychological ascendency that the appellant had over each of the women, which arose from the following circumstances[22]:

> "(a) [T]he appellant was an experienced consulting psychiatrist and JG, CL, AW, LB and MM were his patients;
>
> (b) the women suffered from depression or some other mental illness or, at least, a psychological difficulty requiring psychiatric treatment or psychotherapy;
>
> (c) the women were, in varying degrees, frightened of the appellant;
>
> (d) the women were, at least psychologically and emotionally, vulnerable and isolated;
>
> (e) the women were significantly younger than the appellant; and
>
> (f) the women perceived the appellant, in varying degrees, as a powerful but remote or distant authority figure."

59 Buss JA's reasons for concluding that the evidence of LB, MM and AW had been correctly admitted did not depend upon the capacity of the evidence to prove (by itself or with other evidence) that the appellant engaged in sexual relations with JG and/or CL during consultations. The probative value of the evidence that his Honour identified was its capacity to rationally affect, directly or indirectly, to a significant degree, four matters[23]. First, "the probability that the sexual activity occurred in the manner and circumstances (including the dynamics of the relationship) described by the complainant (JG or CL as the case may be) and not in any different manner or circumstances asserted by the appellant". Second, "the probability of whether the complainant actually consented to the activity". Third, "the probability of whether the appellant had an honest and reasonable (but mistaken) belief that there was consent". Fourth, "the jury's view as to why, and as to the significance (if any) to be attached to the fact that JG and CL continued to consult with the appellant as their psychiatrist

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21 [2010] WASCA 36 at [357].

22 [2010] WASCA 36 at [357].

23 [2010] WASCA 36 at [360]-[364].

notwithstanding his offending behaviour and, further, the fact that JG and CL did not make a contemporaneous complaint about his offending behaviour".

60 Buss JA considered that *Phillips* did not preclude the admission of the evidence of the propensity witnesses for purposes unrelated to consent, even though the evidence may have borne indirectly on this issue[24]. Owen JA added some further observations on the point observing that nothing said in *Phillips* rendered the propensity evidence inadmissible[25].

61 Pullin JA would have allowed the appeal against the convictions. His Honour considered that the evidence of AW, LB and MM could only have demonstrated the propensity of the appellant to have sexual encounters with women patients in his consulting rooms for the purpose of proving that the sexual encounters with JG and CL took place[26]. As this was not in issue at the trial, due to the admissions made by the appellant, his Honour found that evidence of his propensity was irrelevant to any live issue at trial.

62 Pullin JA perceived that the only live issue was "whether the [respondent] proved that JG and CL did not consent or were induced to consent by force, threat, intimidation or fear of bodily harm to touching, carnal knowledge or attempted carnal knowledge, or whether the appellant had an honest and reasonable mistaken belief that they did consent"[27]. His Honour noted that JG gave evidence of a threat made by the appellant (which was denied by the appellant) and that CL gave evidence of conduct which may have amounted to intimidation (which was also denied by the appellant)[28]. However, his Honour found that "none of [AW, LB or MM] gave evidence of conduct which went to show a propensity to engage in a particular kind of conduct in order to gain his patient's consent" and which provided evidence probative of the account of JG as to a threat or CL as to intimidation[29]. Pullin JA noted that there was some evidence as to whether or not AW, LB and MM consented. However,

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24 [2010] WASCA 36 at [375].

25 [2010] WASCA 36 at [2]-[3].

26 [2010] WASCA 36 at [14].

27 [2010] WASCA 36 at [112].

28 [2010] WASCA 36 at [129]-[131].

29 [2010] WASCA 36 at [138].

his Honour held that, in accordance with *Phillips*, given that whether one person consents or not is not relevant to whether another person consents or not[30], the evidence of AW, LB and MM was of no probative value for any purpose and therefore inadmissible under s 31A[31].

The appellant's admission

63 Section 32 of the *Evidence Act* provides that "[a]n accused person, either personally or by his counsel or solicitor, in his presence, may admit on his trial any fact alleged or sought to be proved against him, and that such admission shall be sufficient proof of the fact without other evidence". The provision does not require that any particular formality attend the making of an admission. Nonetheless, counsel's statement made in the course of opening the appellant's case, that the appellant had been sexually intimate with JG and CL, was not an admission for the purposes of the provision. The appellant did not admit any fact sought to be proved against him. It remained incumbent upon the prosecution to prove each act of sexual conduct that it alleged in the 14 counts in the indictment. It follows that Pullin JA's discussion of the capacity of the prosecution to adduce evidence in proof of an admitted fact does not arise for consideration in this appeal[32].

64 The evidence of LB, MM and AW was capable of proving that the appellant had a tendency to engage in sexual relations with his patients during consultations. Proof of such a tendency was rationally capable of affecting the assessment of JG's and CL's evidence that the appellant had engaged in sexual relations with them during consultations. Owen JA considered the evidence of LB, MM and AW was relevant to proof that the acts alleged in the indictment occurred[33]. This was not the basis upon which the trial judge admitted the evidence. Her assessment of the probative value of the evidence of LB, MM and AW assumed the fact that sexual activity between the appellant and the two complainants was not in issue. The evidence was admitted as tending to establish the circumstances in which the sexual conduct occurred, this being relevant to the assessment of JG's and CL's evidence that they had not consented to the various acts charged in the indictment. Buss JA's analysis of the probative

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30 *Phillips v The Queen* (2006) 225 CLR 303 at 318 [47].

31 [2010] WASCA 36 at [121], [140].

32 [2010] WASCA 36 at [92]-[119].

33 [2010] WASCA 36 at [3].

value of the evidence of the three witnesses also assumed that the fact of sexual relations between the appellant and JG and CL was not disputed[34].

65 The respondent acknowledged that the question of whether the appellant had engaged in the sexual activity alleged by JG and CL was not a live issue at the trial. The circumstance that the trial was conducted from the outset on the basis that JG's and CL's account that the appellant had sexual relations with them in the course of consultations was not disputed was material to the consideration of admissibility of the evidence of LB, MM and AW under sub-ss (2)(a) and (2)(b). The probative value of the evidence to prove that the sexual acts charged in the indictment occurred (by demonstrating the appellant's tendency to have sexual relations with his patients) ceased to be significant once it was known that JG's and CL's evidence that the appellant had sexual relations with them during consultations was not challenged. Furthermore, evidence of sexual misconduct not charged in the indictment committed against other women led in order to prove an issue that was not live in the trial, would not meet the test in sub-s (2)(b).

66 As noted earlier in these reasons, before the trial judge the evidence of LB, MM and AW was conceded to be "propensity evidence", with the result that no attention was directed to the identification of the particular tendency (or other feature of the conduct of the appellant) which it was tendered to prove. In the Court of Appeal and in this Court, the parties were agreed that the evidence had been admitted either as "propensity evidence," being the appellant's tendency to act in a particular way, or as "relationship evidence". Only one aspect of the six features of the "propensity evidence" identified by Buss JA was an attribute of the appellant. The remaining features might be thought to describe a class of persons: younger, vulnerable female patients. Perhaps for this reason his Honour considered the evidence of LB, MM and AW was "relationship evidence"[35]. That characterisation was not in issue on the appeal. Whether the evidence was admitted as propensity evidence or as relationship evidence its significant probative value is said by the respondent to have been its capacity to demonstrate the appellant's position of power and psychological ascendency over JG and CL.

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34 [2010] WASCA 36 at [360]-[364].

35 [2010] WASCA 36 at [353].

67 Buss JA summarised the prosecution's submission as to the probative value of the evidence in this way[36]:

> "[T]he appellant was able to and did exploit his power and ascendency by manipulating JG, CL, AW, LB and MM to *acquiesce in sexual activity with him without consent*. His manipulation of them, in the context of his position of dominance, enabled him to exploit them sexually without violence or express threats. In any event, a complainant who, at or before the time of sexual penetration, does not by word or action manifest her dissent is not in law thereby taken to have consented to the penetration." (emphasis added)

68 At the date of these offences, the criminal law of Western Australia recognised the vulnerability of some classes of persons to sexual exploitation and criminalised sexual relations with persons within the class regardless of consent[37]. The vulnerability of girls to sexual exploitation by men in positions of authority was recognised in the offence of having sexual intercourse with a girl under the age of 17 years while being her guardian, employer, teacher or schoolmaster[38]. The protection of the criminal law in this respect did not extend to the adult patients of psychiatrists or psychotherapists.

69 The concept of exploiting a position of power or ascendency in order to manipulate another into acquiescing in sexual activity without consent is to be analysed by reference to the law as it stood at the material time with respect to the crimes of rape and unlawful and indecent assault. Rape was defined in s 325 of the Code as follows:

> "Any person who has carnal knowledge of a woman or girl, not his wife, or of his wife whilst he is separated from her and they are not residing in the same residence, without her consent, or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married

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36 [2010] WASCA 36 at [358].

37 See eg, *Criminal Code*, s 183 ("indecent treatment of children under fourteen"); s 185 ("defilement of girls under thirteen"); s 188 ("defilement of idiots"); s 189 ("indecent dealing of girls under sixteen"; and s 190 ("defilement by guardian").

38 *Criminal Code*, s 190.

woman, by personating her husband, is guilty of a crime which is called rape."

70 The provision drew a distinction between the absence of consent and "consent" that is vitiated by the presence of one or more of the stated circumstances. One vitiating circumstance was the making of false and fraudulent representations as to the nature of the act. There was no suggestion of that kind in the case of JG or CL. The Code did not define consent and the word bore its ordinary meaning[39]. Proof of absence of consent was directed to the subjective state of mind of the complainant at the time of penetration. It was not necessary that the complainant manifest dissent but it was necessary to prove either that she did not in fact consent or that her consent was vitiated in one of the ways contemplated by the section[40]. The law recognised that consent to intercourse may be hesitant, reluctant, grudging or tearful but that if the complainant consciously permitted it, and her permission was not obtained by any of the means stated in s 325, the act was not rape[41].

71 The prosecution was also required to prove the complainant's absence of consent to the acts of unlawful and indecent assault. The Code distinguished absence of consent from consent that is obtained by fraud[42]. Nothing was said to turn on the difference between proof of absence of consent for the offence of rape and for the offence of unlawful and indecent assault. It was the prosecution's case that JG and CL did not consent to any of the sexual conduct charged in the indictment or that their consent was obtained by threats or intimidation. JG and CL each gave evidence that she had not consented. Each also gave evidence of the appellant's conduct that was capable of being viewed as threats or intimidation designed to induce consent.

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39 Section 319(2) of the *Criminal Code* as it now stands contains a definition of consent for the purposes of the sexual offences contained in Ch XXXI. The provision was inserted by s 6 of the *Acts Amendment (Sexual Offences) Act* 1992 (WA).

40 See *R v IA Shaw* [1996] 1 Qd R 641 at 645-646 per Davies and McPherson JJA with respect to s 347 of the *Criminal Code* (Q), as it then stood, on which s 325 of the *Criminal Code* (WA) was based.

41 *Holman v The Queen* [1970] WAR 2 at 6.

42 *Criminal Code,* s 222.

72 Neither LB, MM nor AW gave evidence that the appellant had engaged in threatening or intimidating conduct inducing her consent to sexual activity. The respondent conceded that the evidence of these witnesses could not rationally affect the assessment of the likelihood that JG's or CL's consent had been obtained by threats or intimidation.

73 The probative value of the evidence of LB, MM and AW was confined to the case that JG and CL did not consent to the acts charged. In this Court the respondent submitted:

> "[T]he highest it can be put is this – that the appellant engaged in conduct, which conduct was … the manipulation in the context of his position, [of] dominance, that he was able to have the sexual contact or conduct in circumstances where there was no consent."

74 The submission conflates proof of psychological dominance with proof of absence of consent. JG and CL were adult women at the time of these events. The evidence of their psychiatric condition, if any, did not establish that either was incapacitated such as to be incapable of consenting to intercourse. Their case was that they did not consent. Proof of the appellant's tendency to engage in grave professional misconduct by manipulating his younger, vulnerable, female patients into having sexual contact with him could not rationally affect the likelihood that JG or CL did not consent to sexual contact on any occasion charged in the indictment.

The assessment of JG's and CL's reasons for continuing treatment

75 The majority in the Court of Appeal considered that the evidence of LB, MM and AW was capable of rationally bearing on the assessment of the plausibility of the reasons given by JG and CL for not complaining and for continuing to attend on the appellant for treatment. This was the fourth way in which the evidence of the three witnesses was said to have significant probative value[43]. It was the second respect in which the trial judge assessed the evidence to have significant probative value.

76 The absence of timely complaint was relevant to the credibility of JG's and CL's evidence that neither had consented to the sexual conduct[44]. It may be

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43 [2010] WASCA 36 at [364].

44 *Crofts v The Queen* (1996) 186 CLR 427 at 446-448 per Toohey, Gaudron, Gummow and Kirby JJ; [1996] HCA 22.

doubted that evidence was admissible in order to support acceptance of the plausibility of JG's or CL's account in either of these respects[45]. The evidence of LB, MM or AW in any event did not have the capacity to bear rationally on the determination of any collateral issue involving the reasons for JG's late complaint and the continuation of her treatment by the appellant, nor for CL's continuation of treatment.

77 In examination in chief JG was asked why she had continued to see the appellant for so many years given his conduct towards her. The question, which went only to JG's credibility, was not the subject of objection. JG said that she had wanted to see another psychiatrist but that she had been dissuaded from this course because she was part-way through her therapy. She also said that she was suffering from depression, that she had undergone a traumatic divorce and that she had developed a degree of dependency on the appellant. JG was cross-examined to suggest that it was unlikely that she would continue to seek treatment from the appellant had he been sexually abusing her. JG responded that she had "dissociated" and that she feared being committed to an institution.

78 CL stopped seeing the appellant in 1981 and she complained to the Medical Board about his conduct in that year. The prosecution did not seek to lead evidence of CL's reasons for not making a prompt complaint. The challenge to CL's evidence of non-consent was not directed to any claimed delay in making a complaint or in continuing to attend the appellant for treatment.

79 LB moved interstate, as she had planned to do, shortly after the incidents of sexual abuse occurred. MM confronted the appellant a week after sexual intercourse telling him that there was to be no further sexual contact. He agreed. MM's reasons for not complaining included that she did not want to lose her job. AW was infatuated with the appellant and engaged in sexual relations with him to get his attention. After a period of hospitalisation during which AW came to appreciate the wrongfulness of the appellant's conduct, she confronted him in the presence of a group of his patients.

80 The differing accounts of the sexual abuse experienced by LB, MM and AW were not capable of bearing rationally on the assessment of the reasons given by JG for continuing to undergo treatment and for not complaining about the appellant's conduct. It was equally incapable of bearing rationally on the

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45 *HML v The Queen* (2008) 235 CLR 334 at 396-397 [164] per Hayne J; 432-433 [293] per Heydon J.

assessment of CL's reasons for continuing to attend consultations with the appellant over the four year period that the sexual conduct took place.

The defence of honest and reasonable but mistaken belief in consent

81 In the event that the jury were satisfied beyond reasonable doubt that JG or CL did not consent to any act charged in the indictment, it was necessary to consider whether the prosecution had established beyond reasonable doubt that the appellant did not have an honest and reasonable but mistaken belief that either JG or CL had consented[46]. It was open to the prosecution to lead evidence to negative the "defence" of honest and reasonable belief in its case. It was incumbent on it to establish the absence of such a belief regardless of whether the appellant gave evidence that he held that belief. However, nothing in the evidence of the LB, MM or AW, when taken with that of JG and CL, was capable of relevantly bearing on the exclusion of the defence. The evidence of JG, CL, LB, MM and AW was capable of proving a pattern of sexual misconduct between the appellant, a psychiatrist, and younger, vulnerable, female patients. It was open to reject the appellant's account that his motives were altruistic and to conclude that he knowingly took advantage of the dynamics of the therapeutic relationship to manipulate his patients into having sexual relations with him.

82 LB removed her clothes to make the appellant feel better because she felt embarrassed on his behalf. MM said she did not want to have sexual intercourse with the appellant but she had not known how to convey her revulsion. AW initiated sexual contact with the appellant in an endeavour to get his attention on occasions. She fellated him while he sat in his chair somewhat impassively. It may have been open to conclude that the appellant well understood the dynamics which led AW to act in this way and that he appreciated his gross professional misconduct in fostering the situation. However, manipulating a person into sexual intercourse by exploiting that person's known psychological vulnerability would not, without more, vitiate their consent. The cynical exploitation of the appellant's position of power was not inconsistent with him holding an honest belief that the victims of his attentions were consenting to the conduct.

83 The jury were not directed that it was open to have regard to the evidence of LB, MM or AW in assessing whether the prosecution had negatived the appellant's honest and reasonable but mistaken belief in consent. The respondent acknowledged that there were "difficulties" with the directions given as to the use the jury might make of the evidence of the propensity witnesses. In this Court

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46 *Criminal Code*, s 24.

the respondent did not advance any basis upon which the evidence of LB, MM or AW might have tended towards negativing the defence of honest and reasonable mistake save by recourse to the contention that the evidence of these witnesses demonstrated the appellant's psychological ascendency over his patients. Absent any feature of the evidence tending to demonstrate the appellant's awareness that his manipulation of his patients had not succeeded in procuring their assent to his predatory advances, proof of the imbalance of power did not rationally bear on the issues raised by the "defence".

84 The evidence of LB, MM and AW did not have significant probative value under s 31A(2)(a) of the *Evidence Act*. It should not have been admitted into evidence at the appellant's trial.

The disposition of the appeal

85 The appellant submitted that taking into account his age and poor health, the proper order was to allow his appeal, set aside his convictions and enter a verdict and judgment of acquittal on each count. In the Court of Appeal the appellant was less ambitious. In the event that his appeal to that Court was upheld, he had sought an order for a new trial.

86 The respondent did not submit that, in the event that the appellant's challenge to the admission of the evidence succeeded, it was a proper case for the application of the proviso. However, the respondent submitted that the appropriate order was to direct a new trial. This was the order made. The charges in the indictment allege the commission of serious offences. The evidence of JG and CL was in each case capable of establishing the prosecution case. The matters on which the appellant relied in support of the order he proposed were properly matters for the Director of Public Prosecutions to take into account in the exercise of his discretion.

87 HEYDON J. This appeal should have been dismissed. That is because the similar fact evidence showing the commission by the accused of acts of sexual intimacy was admissible, though on different grounds from those assigned by the trial judge and the majority in the Court of Appeal. Below the expression "similar fact evidence" is used to mean the evidence of LB, MM and AW about alleged conduct not the subject of any charges. The expression "the complainants" is used to mean JG and CL, whose evidence went to the alleged conduct which was the subject of charges. The expression "acts of sexual intimacy" is used to mean the intentional commission of the various rapes, attempted rapes and acts of gross indecency alleged against the accused in the testimony of the complainants and in the similar fact evidence. The expression "the consent issues" is used to mean the issue of whether JG and CL did not consent to acts of sexual intimacy, the issue of whether they were induced to consent to acts of sexual intimacy by force, threat, intimidation or fear of bodily harm, and the issue of whether the accused had an honest and reasonable mistaken belief that JG and CL consented to acts of sexual intimacy.

Making "admissions" in criminal cases

88 *The common law.* At common law, at least in felony prosecutions[47], once the accused pleaded not guilty, it was not possible for the accused to make any admission otherwise than by admissions in testimony[48]. This rule seems to have rested on the theory that the rules of evidence in criminal cases cannot be waived by the accused[49]. Thus the accused cannot waive compliance with the rule that

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47 *Smart v Pepper* (1987) 26 A Crim R 140 at 142.

48 *R v Bateman* (1845) 1 Cox CC 186; *Munday v Gill* (1930) 44 CLR 38 at 68 and 80; [1930] HCA 20; *R v O'Sullivan* (1975) 13 SASR 68 at 73; *R v Maes* [1975] VR 541 at 550. Cf *R v Thornhill* (1838) 8 Car & P 575 at 576 [173 ER 624], where Lord Abinger CB refused to accept an agreement between the attorneys and said that no admission could be made unless it was made at the trial by the defendant or the defendant's counsel; but in *Rattray v Roach* (1890) 16 VLR 165 the Full Court of the Supreme Court of Victoria denied the proposition that admissions could be made by counsel. In *Smart v Pepper* (1987) 26 A Crim R 140 at 142 it was said that the trend of recent English authority "gravitates towards requiring a defendant to be bound by admissions made by his advocate in his presence as an application of the general principles of agency", citing *R v Turner* (1975) 61 Cr App R 67 at 82. But *R v Turner* concerned admissions made by an advocate, not in the trial of the accused in which they were tendered, but in an earlier trial.

49 See the authorities collected by Isaacs CJ in *Munday v Gill* (1930) 44 CLR 38 at 66-68. A possible exception exists where there is a failure to object to evidence – a topic neither fully nor decisively explored in the authorities.

evidence given in English must be translated for the benefit of an accused person who cannot understand that language. Speaking in that context, the English Court of Criminal Appeal (Lord Reading CJ, Scrutton and Low JJ) said[50]:

> "the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law."

With respect, there is sense in this approach. The accused may be unrepresented, or not well represented. Taking shortcuts may be adverse to the interests of both the accused and justice generally. It is difficult to classify facts into those that do and do not relate to particular issues in criminal cases, since typically some relate to several issues. Where trial is by jury it is often the simplest and fairest course to let the jury hear the whole unbowdlerised story. Further, the common law rule against waiver is simply an illustration of the burden resting on the government in criminal investigation and prosecution. Suspects cannot be arrested or charged or put on trial without some factual basis. Once a trial has started, accused persons are not to be put to their defences unless a case to answer is established by evidence. No conviction can be obtained unless the prosecution discharges the burden of proving its case beyond reasonable doubt. So, it has been thought, it is not for the accused to relieve the prosecution of that burden by admitting parts of the prosecution case.

89 *The statutory position.* In all Australian jurisdictions the common law rule has been altered by statute. In each jurisdiction there is a facility by which an accused person can make what are commonly called "formal admissions". "Formal admissions" cannot be contradicted by evidence. They are binding on their maker unless leave is given to withdraw them. These "formal admissions" are distinct from informal admissions made by the accused before trial and received by way of exception to the rule against hearsay. Informal admissions can be contradicted. They are not binding. They cannot be "withdrawn" whether by leave or otherwise. "Formal admissions" are also distinct from the adverse answers which an accused may give to particular questions while testifying. These too can be contradicted. They are not binding. They cannot be withdrawn in an effective fashion. In Western Australia the relevant provision is s 32 of the *Evidence Act* 1906 (WA) ("the Act")[51]. It provides:

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50 *R v Lee Kun* [1916] 1 KB 337 at 341.

51 See also *Evidence Act* 1995 (Cth), ss 184 and 191; *Evidence Act* 1995 (NSW), ss 184 and 191; *Evidence Act* 2008 (Vic), ss 184 and 191; *Evidence Act* 1929 (SA), s 34; *Criminal Code* (Q), s 644; *Evidence Act* 2001 (Tas), ss 184 and 191; *Criminal*

(Footnote continues on next page)

> "An accused person, either personally or by his counsel or solicitor, in his presence, may admit on his trial any fact alleged or sought to be proved against him, and such admission shall be sufficient proof of the fact without other evidence."

90 A legislative provision of this kind, relieving the prosecution of the need to offer proof of a particular fact, is a dramatic inroad on the common law. For that reason, while s 32 does not in terms stipulate any formal requirements, on its true construction the admissions must be specific and clear. Speaking of the procedure under s 404 of the *Crimes Act* 1900 (NSW), a precursor to the present New South Wales provision similar to s 32, in *Smart v Pepper* Grove J adopted the following description of the "customary practice" in the then standard text[52]:

> "The customary practice is for the admissions to be reduced [to] writing and handed to the Judge who asks the accused 'Do you on the advice of your counsel admit ...?' reading aloud to the accused the contents of the document."

Unlike s 32, the New South Wales legislation there under discussion required the admission to be made on the advice of counsel. But Grove J's description of that practice as "no doubt prudent"[53] would apply also to an adaptation of it for s 32 – having the admissions reduced to writing and handed to the judge, who would read the contents of the document to the accused and ask if they were admitted. Other techniques given by Grove J[54] in a non-exhaustive list could also be modified: an oral statement by the accused of the admissions; a written statement of the admissions signed by counsel; an oral statement by counsel in the presence and hearing of the accused. So far as these techniques employ writing, the admissions will have clarity, and there is no reason why techniques not involving writing should not attain the same standard.

Code (NT), s 379. For New Zealand see *Evidence Act* 2006, s 9 (the now repealed predecessors of which were *Criminal Code Act* 1893, s 403; *Crimes Act* 1908, s 426; *Crimes Act* 1961, s 369). In England the change was made by the *Criminal Justice Act* 1967, s 10. In South Africa the change dates from at least the *Criminal Procedure and Evidence Act* 1917, s 318: *R v Bushula* 1950 (4) SA 108 (E). See now *Criminal Procedure Act* 1977, s 220. For Canada see *Criminal Code* 1985, s 655.

52 (1987) 26 A Crim R 140 at 142, quoting Watson and Purnell, *Criminal Law in New South Wales*, 2nd ed (1981) at 425 [1148].

53 *Smart v Pepper* (1987) 26 A Crim R 140 at 142.

54 *Smart v Pepper* (1987) 26 A Crim R 140 at 143.

91 In *R v Lewis*[55] the technique adopted by counsel for the defence was to admit every fact alleged in the opening address of counsel for the prosecution. The English Court of Appeal (Phillimore LJ, Stephenson LJ and Cantley J) said that that procedure was only to "be adopted rarely and with extreme caution", because of the "difficulty in distinguishing between what was said in that speech as fact and what was said as law and what was mixed law and fact and what was comment"[56].

92 There was a similar concern for precision in *R v Lennard*, where the English Court of Appeal (Lawton LJ, Scarman LJ and Phillips J) said[57]: "whenever admissions are made, the manner of doing so should be such that what has been admitted should appear clearly on the shorthand note." To the shorthand note may be added whatever other method of recording the evidence is employed – a tape recording or transcript from shorthand or tape recording. Formal admissions should be "fully and accurately recorded."[58] If it is necessary that the record of the admissions be clear, a fortiori the admissions themselves should be clear. There must be "a formal setting out of the admissions made"[59]. A formal admission cannot be made unless there is an intent to do so[60]. A formal admission must be "formally and deliberately made"[61]. It has the "purpose of shortening [proceedings], or to save trouble or expense by making it unnecessary for the Crown to call witnesses to prove the fact or facts so admitted."[62]

93 In South Africa authorities on formal admissions have sprung up more profusely than elsewhere. There another consideration has been stressed by Hoffmann[63]:

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55 (1971) 55 Cr App R 386.

56 (1971) 55 Cr App R 386 at 389.

57 [1973] 1 WLR 483 at 486; [1973] 2 All ER 831 at 834.

58 *S v W* 1963 (3) SA 516 at 522 per Ogilvie Thompson JA.

59 *S v Langa* 1969 (3) SA 40 at 42 (N) per Harcourt J.

60 *R v Bushula* 1950 (4) SA 108 at 115-116 (E).

61 *R v Bushula* 1950 (4) SA 108 at 120 (E) per Jennett J.

62 *R v Mazibuko* 1947 (4) SA 821 at 831 (N) per Milne AJ. See also *R v Bushula* 1950 (4) SA 108 at 120 (E).

63 Hoffmann, *The South African Law of Evidence*, 2nd ed (1970) at 302 (one footnote omitted).

> "Formal admissions are a useful way of shortening a criminal trial by dispensing with proof of uncontroverted and uncomplicated facts. But judges are understandably reluctant to allow [the provision] a wider scope. It is one thing for the accused to plead guilty. It is quite another for the representatives of prosecution and defence to confront the judge with an agreed set of facts and to ask him to pronounce whether on those facts the accused is guilty or not guilty. This takes the adversary system to the point of absurdity. A judge will frequently wish to resolve ambiguities and test the evidence on points which may not have occurred to either prosecution or defence. This is part of his duty as 'an administrator of justice' who 'has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'[64] If the judge is unable to go behind the facts admitted … he may be left with an uneasy feeling that although the rules have been observed, justice has not been done."

94 A common forensic tactic seeks to prevent damning evidence being called, or to water down the evidence which is called, by narrowing the issues in the case. The making of an admission under s 32 is an example of this tactic[65]. It is a particularly advantageous tactic because there is substantial authority for the view that once an admission of a matter of fact has been made by the defence, not only is it not necessary for the prosecution to call further evidence on that

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64 The quotation is from *R v Hepworth* 1928 AD 265 at 277, where Curlewis JA said:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

65 In *Suresh v The Queen* (1998) 72 ALJR 769 at 772-773 [18]; 153 ALR 145 at 150; [1998] HCA 23, McHugh J gave another: "it is not uncommon for counsel to attempt to blunt the predicted effect of a cross-examination of a witness by leading, and seeking to explain, in evidence-in-chief a discreditable incident concerning the witness." He said (footnote 11): "A well known example is Sir John Simon's question to his witness in 'The "Mr A" Case' in the *Old Bailey Trial Series* published by Jarrolds (at 261): 'I am sorry to have to ask you, Mr Newton, but I had better ask it here. Have you been convicted of forgery?'"

matter of fact, but it is not open to it to do so, unless that evidence is relevant to another issue[66].

Were the consent issues the only live issues?

95 Once a Senior State Prosecutor signed the indictment on 24 October 2008, the prosecution bore the legal burden of establishing beyond reasonable doubt the facts material to the 11 charges in relation to JG and the three charges in relation to CL which it contained. In each case the prosecution had to establish commission of the acts of sexual intimacy which had been alleged and it had to exclude consent.

96 The accused in this Court supported the view stated in Pullin JA's dissenting judgment in the Court of Appeal that the similar fact evidence was inadmissible because it could only go to the question whether acts of sexual intimacy had taken place, and that that question was not a matter in issue. It was said that that was because the accused had excised from the case the issue of whether acts of sexual intimacy had taken place. Thus Pullin JA said that "the only live" issues for the jury to consider were the consent issues[67]. He said that the happening of acts of sexual intimacy "was not in issue at the trial because of admissions made by the" accused[68]. I respectfully disagree.

97 If the issues other than consent were excised, some questions arise. How did this excision take place? Did it take place as a result of what happened before the trial judge on 5 November 2008, in the hearing preparatory to her ruling on 14 November 2008 that the evidence of AW, LB and MM was admissible? Did it take place as a result of the opening address by counsel for the accused? Did it take place as a result of a supposed failure of counsel for the accused to cross-examine JG and CL to suggest that their evidence that the

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66 *R v Longford* (1970) 17 FLR 37 at 38 per Gibbs J ("at least if the calling of such evidence would be likely to have any prejudicial effect on the accused"); *R v O'Sullivan* (1975) 13 SASR 68 at 74; *R v Raabe* [1985] 1 Qd R 115 at 116, 123-124; *Ali v The Queen* (2005) 79 ALJR 662 at 674 [73]; 214 ALR 1 at 17; [2005] HCA 8. In his dissenting judgment in the Court of Appeal in this case, Pullin JA approved the approach taken in these cases: *Stubley v The State of Western Australia* [2010] WASCA 36 at [92]-[107]. Cf *R v Smith* [1981] 1 NSWLR 193 at 194-195 (denying that *R v Longford* reflected the law and practice in New South Wales).

67 *Stubley v The State of Western Australia* [2010] WASCA 36 at [112].

68 *Stubley v The State of Western Australia* [2010] WASCA 36 at [14].

accused had committed certain acts was incorrect? Did it take place as a result of a supposed failure by the accused to deny their evidence in his evidence in chief?

Did the accused's testimony render the consent issues the only live ones?

98 The last possibility can be excluded at once. What the accused said and did not say in the witness box did not excise any issue from the case in such a way as to render inadmissible the similar fact evidence. The rules of evidence obliged the prosecution to call all its evidence before its case in chief closed; it would have been very risky for the prosecution to wait and see what testimonial line the accused would take if he entered the witness box; and the prosecution very probably could not have tendered the similar fact evidence in reply. So far as there was a failure of the accused to deny prosecution evidence after the prosecution case closed, that failure cannot support the conclusion that the initial decision to receive the evidence tendered by the prosecution before its case closed was incorrect. This failure of the accused to deny prosecution evidence might arguably have caused evidence which was admitted before the prosecution case closed to become inadmissible so as to justify an order striking it out or a special jury direction. But in this appeal the accused made no complaint that that order was not made or that that direction was not given. His case was that the similar fact evidence was inadmissible at all stages, should never have been the subject of the trial judge's ruling favourable to admissibility, and should never have been tendered at the trial before the jury. In any event the assumption on which the possibility under discussion rests – that the accused did not deny the complainants' evidence of acts of sexual intimacy with the complainants – is not correct. The reasons for this view are given below[69].

Did the accused's failure to cross-examine the complainants render the consent issues the only live ones?

99 Let it be assumed that, in principle, the failure of a person in the accused's position to cross-examine the complainants, JG and CL, about the acts of sexual intimacy could justify an application for the rejection of the similar fact evidence, which had been held admissible on 14 November 2008, before LB, MM and AW gave it. Even if that assumption is correct, it cannot be said that in this case the accused had failed to cross-examine the complainants about the acts of sexual intimacy. The reasons for that view are given below[70].

100 It is necessary to turn to the other two ways in which excision may have occurred.

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69 See [124]-[128].

70 See [124]-[125].

Did the preliminary hearing on admissibility render the consent issues the only live ones?

101 On 5 November 2008 the trial judge was told, at the preliminary hearing on the admissibility of the similar fact evidence, "that at trial the accused would admit that during the period identified, some or all of the acts of a sexual nature occurred, both with the complainants and with three witnesses giving propensity evidence". That statement cannot support the accused's contention that this left the consent issues as the only live issues. That is so for the following reasons. First, counsel for the accused does not appear to have submitted that what he said was in itself an admission within the meaning of s 32 and that the prosecution was precluded from calling any further evidence to that effect. The trial judge in giving reasons for her ruling did not mention s 32. Secondly, even if counsel had made that submission, it must have failed: what was said fell far short of the requirements necessary to satisfy s 32[71]. Thirdly, the statement made by the accused's counsel foreshadowed that at the trial the accused would admit that "some or all" of the acts occurred. From the prosecution's point of view this was not good enough. The prosecution was entitled to seek to prove not only that "some" occurred, but that "all" occurred.

Did the opening address of counsel for the accused render the consent issues the only live ones?

102 *What counsel for the accused said.* When counsel for the accused on the first day of the trial made an opening address to the jury, he said that he was "going to make some admissions" on behalf of the accused. He said:

> "I make those admissions on his behalf not because there is any obligation on him or any accused to make admissions … I do so to simply refine the issues, that is to get to the nitty-gritty of what this case is about and by telling you his perspective, his position, it will make it easier for you, I am sure."

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71 There is also a question, which need not be resolved now, whether the proceedings on 5 November 2008 were part of the trial. Section 32 admissions can only be made by an accused "on his trial". If no s 32 admission could be made at the preliminary hearing to determine the admissibility of similar fact evidence, the hearing would only have utility if accused persons undertook to make the relevant s 32 admission at the trial.

Near the end of his address he said:

> "I told you I would be making some admissions. Can I say this: I do so not because of any obligation to do so but because simply to focus these issues. Dr Stubley will admit that he was sexually intimate with four of these women. That includes [JG], [CL], [MM] and [AW], but he says that his sexual intimacy on each occasion was consensual; that is, with the consent of each one of those females, that there was no force or coercion or intimidation or manipulation of any one of those females, and maybe he accepts that he may be morally and ethically wrong for what he did; he's not guilty of the criminal allegations that have been brought against him and will explain the circumstances in which the sexual intimacy took place.
>
> Can I say this: after 30 to 35 years he's not able to tick a box like a questionnaire to relate to each particular act. I mean, who could? Who could after 30 to 35 years? Who could accurately describe in detail things that happened so long ago? Apparently, the complainants can. Let's see about that."

He said he had spoken to the prosecutor before the trial and told him what the issues would be – the consent issues. He then said: "I hope by making those admissions, I haven't done it in a formal way but certainly that's going to be the issue at this trial". He did not mention s 32, and his language points against any intention on his part to make s 32 admissions.

103 *Pullin JA's conclusion.* Pullin JA said of the opening[72]:

> "As Steytler P (Pullin and Miller JJA agreeing) said in *The State of Western Australia v Wood*[73], s 32 … does not prescribe 'procedure for making statutory admissions but the cases reveal that [it] is desirable that the admissions be made in specific terms' and cited authority that such admissions should not be made 'casually'. It is necessary to say that senior counsel adopted an off-hand and casual approach to making the admissions in this case. There seems to be an unfortunate tendency for some counsel appearing in criminal trials to adopt this cavalier approach

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72 *Stubley v The State of Western Australia* [2010] WASCA 36 at [110]. Two matters must be made plain. Counsel who appeared for the accused at the trial did not appear in the Court of Appeal or in this Court, and what is said below is subject to the inability of trial counsel to respond to the criticisms made by Pullin JA. The other is that the impression given at the time may be different from the impression given by the words used as recorded on the page.

73 [2008] WASCA 81 at [25].

> … In my opinion, trial judges should demand greater formality, deliberation and precision when admissions are made."

This passage suggests that Pullin JA was treating what counsel said as an endeavour to make admissions under s 32. If this was what counsel was doing, the adjectives used by Pullin JA were just. In addition, it may be said that counsel's attempt to account for the vagueness of the "admissions" was unfortunately phrased. It might have led the jury to the reflection – a regrettable one from the accused's point of view – that perhaps the reason the "females" could accurately describe what happened long ago, while the accused could not, was that the events complained of were unique in their experience, but merely quotidian and banal in his.

104 *Pullin JA's bargain theory.* But a later passage suggests that Pullin JA treated counsel's statement as not amounting to an admission under s 32. Instead he treated it as an offer open for acceptance by the prosecution by the eliciting of particular testimony from JG and CL. He said that, in relation to JG and CL, counsel's statement amounted to this[74]:

> "if the two complainants, JG and CL, gave evidence that the appellant engaged in 'sexual intimacy' … then the appellant would not dispute that evidence, and there would then be an admission that the acts constituting each alleged offence occurred. As will be seen below, the whole of the appellant's case was conducted in accordance with the admission."

105 Reasons will be given later for doubting the last sentence[75], and also for doubting the whole "bargain theory"[76]. For the present, it must be noted that the use by Pullin JA of the word "admission" raises two possibilities. One is that counsel made an "admission" complying with s 32. The other is that counsel had made some other kind of "admission".

106 *Was a s 32 "admission" made?* No s 32 admission was made. That is so substantially for the reasons given by Pullin JA in reliance on *The State of Western Australia v Wood*. Counsel's statement was too vague. It was not clear enough. It was not formal enough. It did not relate to what Hoffmann called "uncontroverted and uncomplicated"[77] facts but to facts integrally tied up with controverted and complicated questions of consent. An admission under s 32

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74 *Stubley v The State of Western Australia* [2010] WASCA 36 at [111].

75 See [120]-[131].

76 See [115].

77 See above at [93].

would debar the prosecution from calling any evidence about what actually happened on each occasion apart from evidence going to the consent issues: if counsel's opening address was to have this radical effect, more was required from it. It was totally lacking in the concreteness and verisimilitude which testimony could convey. The difficulty is illustrated by what Connolly J said in *R v Raabe*, a case in which the applicant was convicted of assault occasioning actual bodily harm[78]:

> "After the jury was empanelled his counsel immediately informed the court that the applicant proposed to admit that the injuries sustained by the complainant amounted to bodily harm. When pressed he said that he would admit that whatever injuries were sustained were such as to interfere with the health or comfort of the complainant; and when further pressed said that he was prepared to make such an admission that the jury would only have to consider whether or not the applicant assaulted the complainant. The learned trial judge was disposed not to permit the admission to be made, correctly divining that the applicant's counsel wished to avoid evidence of the severity of the attack going before the jury. Eventually however the admission was made in the terms which I have indicated supplemented by these facts: that the injuries sustained were a fractured mandible and a laceration to the scalp five centimetres in length over the left parietal region."

107 Further, Wigmore spoke of "the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate)" as not being "a thing which the party [calling the witness] can be said to be always entitled to." On the other hand, he thought there were limits to the capacity of one party to use an admission to neuter testimony, for he said: "a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof."[79] These issues do not arise here for the reasons just given.

108 It may be very difficult to make admissions under s 32 except in relation to particular discrete factual matters. Thus it may be difficult to make an admission about a major issue in proceedings. In particular it may be very difficult to make an admission under s 32 – usefully or at all – where the accused

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78 [1985] 1 Qd R 115 at 116.

79 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at 824-825 [2591] (emphasis in original).

does not deny sexual intercourse but does contend that it took place by consent. That is because it is very difficult to fillet out the details of the relevant events which go only to sexual intercourse from those which are relevant to consent as well.

109 It may be thought harsh in the case of offences which allegedly took place as long ago as the offences charged in this case that the desire of an accused to make an admission should be thwarted because he is unable to be specific in consequence of the lapse of time. In some ways it is harsh; in other ways not. The lapse of time brought advantages and disadvantages to the accused. One of the advantages was that it would be easier for the jury to have a reasonable doubt about the evidence of the complainants. One of the disadvantages was that it made it harder for him to make an admission conforming to s 32.

110 *Was an "admission" made otherwise than under s 32?* Pullin JA, however, does not seem to have treated the statement as a s 32 admission. He appears to have acted in accordance with the following proposition he stated in *The State of Western Australia v Wood*[80]: "It is plain that in criminal trials parties can limit issues sometimes by formal admission and sometimes by the way the case is conducted." By "formal admission" Pullin JA meant an admission pursuant to s 32.

111 Now it is true that issues on which the prosecution bears the legal and evidential burdens of proof can be limited by the way the prosecution conducts a case, and it may be assumed that those issues can be limited by the way the accused conducts a case.

112 But it is not possible to treat the opening address of counsel for the accused as containing admissions, if they were not "admissions" made pursuant to s 32. The common law forbad the making of admissions except in the witness box. When the accused entered the witness box, in his evidence in chief he was noticeably chary about making distinct admissions concerning acts of sexual intimacy on the specific occasions charged as distinct from generalised admissions. While the precise periods stated in the charges may not have been material, he declined to pin his concessions about acts of sexual intimacy to the periods or occasions identified by the complainants, and he denied the acts of sexual intimacy relevant to count 10 completely. If the only relevant exception to the common law ban on non-testimonial admissions is to be found in s 32, the non-satisfaction of s 32 meant that what was said by counsel for the accused could not count as an admission. In particular, it could not prevent the prosecution calling the similar fact evidence if it was intrinsically admissible. Despite what counsel for the accused said, it was not correct for him to call his

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80 [2008] WASCA 81 at [33].

statements "admissions", and he was not making admissions. Rather he was adopting a well-intentioned course of indicating what the accused would not be contesting and what he would be positively contending. But for the accused, through his counsel, to "admit" that he was "sexually intimate with four of these women" – and thus to say that he was not contesting that proposition – was not necessarily to admit the acts of sexual intimacy relevant to the charges, for he said in chief that there were acts of sexual intimacy with at least JG and CL on occasions other than those relevant to the charges. And in cross-examination he went much further in denying or seeking to cast doubt on the testimony of JG and CL about the acts of sexual intimacy relevant to the charges[81].

113 Pullin JA stated that the similar fact evidence was inadmissible because "once JG and CL had given evidence about the acts constituting the charges on which convictions were recorded", only the consent issues remained[82]. As noted above, in effect he saw the giving of that evidence as the fulfilment of a bargain offered in the opening of counsel for the accused and accepted by the testimony of JG and CL. But the acceptance of the offer did not relieve the prosecution of its burden of proving beyond reasonable doubt the commission by the accused of the acts of sexual intimacy on the occasions relevant to the charges. Indeed, even if it could be inferred that the accused did not dispute them – from the terms of counsel's opening, from counsel's supposed failure to cross-examine about them, from the accused's supposed failure to deny them in testimony – the prosecution still had to seek to establish them. It was open to the jury, depending on the impression which the complainants made in the witness box, to reject their evidence on the issue of acts of sexual intimacy as much as on the more hotly contested consent issues.

114 The acquittal of the accused on count 6 is instructive. That acquittal may have been based on doubts about JG's evidence of the relevant act of sexual intimacy. It may have been based on doubts about her evidence on the consent issues. It may have been based on both. There is no way of choosing between or stating a likelihood for these possibilities, but each is a possibility. The possibility that the accused was acquitted on count 6 because of doubts about JG's evidence of the relevant act of sexual intimacy points to the risk that the jury could have experienced similar doubts on any of the other counts involving JG – or any of the counts involving CL. It was a risk which the prosecution was entitled to seek to reduce as much as possible.

115 In any event, Pullin JA's bargain theory is, with respect, unsound. Counsel for the accused was not making any offer capable of acceptance by the

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81 See below at [129]-[131].

82 *Stubley v The State of Western Australia* [2008] WASCA 81 at [120].

prosecution calling particular evidence in chief. What counsel for the accused said was unconditional. He "admitted" acts of sexual intimacy; he did not say that he admitted whatever acts of sexual intimacy JG, CL, MM and AW testified to. Apart from anything else, that would have been a very dangerous course, for their testimony could have gone beyond what counsel might have been expecting.

116 Apart from relying on Pullin JA's reasoning, in this Court counsel for the accused pointed to two concessions by counsel for the prosecution. One concession was made by counsel for the prosecution in the Court of Appeal (who also appeared at the trial, but not in this Court). Pullin JA asked counsel for the prosecution whether he accepted that the trial judge proceeded on the basis of what she was told on 5 November 2008, namely, "that there was to be an admission that some or all of the acts of a sexual nature occurred both with the complainants and the three witnesses, but the acts were consensual". Counsel answered in the affirmative[83]. The other concession was made by counsel for the prosecution in this Court (who did not appear at the trial). The written submissions on behalf of the prosecution filed for use in this appeal stated: "Given the admissions and the conduct of the trial it is accepted that it was not a live issue as to whether the appellant did engage in the sexual activity alleged by JG and CL." With respect, each concession was irrationally generous. Each was plainly erroneous. Neither can alter the actual position at the trial.

The trial considered as a whole

117 What were the live issues at trial? That depends on a consideration of what happened in the trial as a whole. The determination must turn on examining the conduct of the parties, their advocates and the trial judge at the trial, not what the parties or their advocates said later. The conduct of the parties, their advocates and the trial judge includes not only what they said at the time, but also what they did and did not do at the time.

118 There are numerous indications that the trial judge, counsel for the parties and the accused himself thought that the question of whether acts of sexual intimacy had occurred remained an issue in the case at all stages.

The opening of counsel for the prosecution

119 Near the start of his opening, counsel for the prosecution said:

> "*As I understand it*, and as will become clear … during the course of the morning the issue in respect of *most if not all* of these charges on the

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83 *Stubley v The State of Western Australia* [2010] WASCA 36 at [64].

> indictment is not how the prosecution prove that the sexual acts actually occurred. That *as I understand it* will be *in the main at least accepted*. Rather the issue will be whether the prosecution have proved that the sexual acts that did occur occurred without the person's consent as defined by law." (emphasis added)

The italicised words are tentative, cautious and provisional. They indicated that counsel saw the position on some charges at least – perhaps all – as being doubtful for the time being. That perception coloured the later statement of counsel for the prosecution that the similar fact evidence was relied on as evidence of the accused's conduct in bringing about a situation where sexual activity occurred without consent.

The opening of counsel for the accused

120 The concluding remarks of counsel for the accused in opening are relied on by the accused in this Court to suggest that the commission of acts of sexual intimacy was not a live issue. In fact these remarks suggest it was a live issue. For to question, as counsel for the accused did, how the memory of the prosecution witnesses could be so good after 30 to 35 years, was to put a cloud over their testimony before it was given. It was to question whether the evidence of the prosecution witnesses on that issue could be accepted in its totality. It had the effect of undermining it in advance. The proposition which counsel purported to admit in one sentence was being denigrated in another. It was being denigrated because it was in issue.

The trial judge and cross-admissibility

121 The trial judge appears to have ruled on 14 November 2008 that the evidence of the two complainants concerning the acts charged was cross-admissible. She concluded that the evidence of CL, when considered in relation to the charges concerning JG, met the criteria identified in s 31A(2) of the Act. And she appears to have assumed that the evidence of JG, when considered in relation to the charges concerning CL, met the criteria identified in s 31A(2). This is an understandable assumption in view of the need, when considering the admissibility of similar fact evidence, to consider both the primary evidence and the similar fact evidence. It would be difficult to find that CL's evidence was admissible in relation to the JG charges without finding that JG's evidence was admissible in relation to the CL charges.

122 Now this view that there was cross-admissibility would be pointless and wrong if it were truly the case that the question whether acts of sexual intimacy had occurred was not a live issue. If that question were not a live issue, it would not have been necessary to form a view that there was cross-admissibility. That the trial judge held that view suggests that she thought that that question was a live issue.

123 The trial judge also appears to have assumed another type of cross-admissibility – that the evidence on one count against JG was admissible on the others, and similarly that the evidence on one count against CL was admissible on the others. She so directed the jury. That too would be an error if the commission of acts of sexual intimacy were not a live issue, and that too suggests that the trial judge thought it was a live issue. Yet counsel for the accused made no complaint about either of those regimes of cross-admissibility before the trial judge, before the Court of Appeal, or before this Court.

Cross-examination of JG and CL by counsel for the accused, and the examination in chief of the accused

124 *Cross-examination of JG.* In this Court, counsel for the accused (who did not appear at the trial) submitted that the cross-examination of JG and CL "revealed absolutely that there was no dispute that the sexual acts occurred." I disagree, with respect. Counsel for the accused at the trial conducted an occasionally aggressive cross-examination of JG, which, while it may have been directed to the consent issues to some degree, often moved beyond them. It would have had the effect of casting doubt on the accuracy of her memory and the reliability of her testimony about the acts of sexual intimacy. In part this cross-examination took the form of pointing to differences between, on the one hand, her evidence in chief, and, on the other hand, a statement made to her solicitor and delivered to the police and statements she made to a prosecutor before the trial. In part it took the form of asking her about discussions she had had with MM and CL before the trial about the accused's behaviour with her, about whether she exchanged notes with them, and about whether they had put their heads together "to bolster up your case".

125 *Cross-examination of CL.* Counsel for the accused cross-examined CL by reference to an earlier statement to suggest that in her testimony she had got the sequence of the three incidents to which counts 12-14 related wrong. She was asked about the quality of her memory. She was accused of making up evidence on the spot. She was also asked about her conversations with JG and MM about the accused's behaviour. This cross-examination did not seem to relate to consent, but was likely, like the cross-examination of JG, to have the effect of casting doubt on the accuracy of her memory and the reliability of her testimony about acts of sexual intimacy.

126 *Examination in chief of accused.* During his examination in chief of the accused, counsel for the accused elicited denials of, or evidence tending to contradict, aspects of the testimony of JG and CL about acts of sexual intimacy, as distinct from testimony about consent. Thus the accused said he found it "rather hard to believe" that he had had sexual intercourse while JG was pregnant because it was "not the sort of thing that I tend to do." He then added that he probably would not have had intercourse with her during pregnancy at all, "but

certainly not at that point in pregnancy where there was such a risk to her and the baby." That evidence could have been regarded by the jury as raising a reasonable doubt entitling the accused to an acquittal on count 10. Contrary to what counsel for the accused had indicated in opening, the accused denied sexual intercourse with AW, and he appeared to deny the details of sexual intercourse with MM.

127 *Conclusion.* The cross-examination of JG and CL and the examination in chief of the accused by counsel for the accused contradict the suggestion that the question whether acts of sexual intimacy had occurred was not a live issue. Counsel for the accused was evidently of the view that the issue was sufficiently live to make it worthwhile to seek to enhance his client's position and damage the position of JG and CL in the manner he did. And counsel for the prosecution also evidently thought the issue to be live: he did not object to questions from his opponent along the lines just summarised. Nor did the judge think it right to intervene.

128 Counsel for the accused in this Court – who presented his client's case with considerable capacity – was asked why, if the occurrence of acts of sexual intimacy was not a live issue, evidence in chief about them was permitted. He gave two answers. The first was: "there ought to have been admissions formally made that obviated the need for that evidence to be given." That is true – but none were made. The second answer was: "There was simply no objection to that evidence being given." That, too, is true – and it indicates that the prosecution did not think the evidence was open to objection because it went to a live issue.

<u>The cross-examination of the accused by counsel for the prosecution</u>

129 In the cross-examination of the accused, counsel for the prosecution explored the consent issues. But he also appeared to be concerned to obtain admissions from the accused about the detail of what the complainants and the similar fact evidence witnesses had said in their testimony in relation to acts of sexual intimacy. One example is whether the accused had removed his clothes, invited LB to remove her clothes, and then lain on top of her. Another is whether the accused had sexual intercourse with AW, which he denied, and whether she had fellated him, which he also denied. Another is whether, on the first occasion JG visited the accused's rooms at Kings Park Road, the occasion which relates to count 1, he hugged her, which he said could have happened. Another example relating to count 1 is whether the accused placed his hand up JG's skirt, which he said he did not remember. Another concerns an incident relevant to count 2 in which, allegedly, he invited JG to lie on the floor with him, she did so, he removed his trousers and got on top of her – an incident of which he said he had no "specific memory". He was asked about the details of JG's evidence in relation to count 4. He was asked about the details of JG's evidence in relation to count 6, which he said he did not remember and which "doesn't sound like the

sort of thing that I would do." In relation to count 10, many details of JG's testimony about his having had sexual intercourse with her when she was eight months' pregnant were put to him. In relation to count 11, he was asked about many details of JG's account of having sexual intercourse with him a month after she had had a baby. He was asked about denials he made to the Medical Board of acts of sexual intimacy with JG, CL and MM, and his failure to admit them or to advance the excuses he put forward in his testimony to the jury. He admitted lying about them. He was asked about the details given in the testimony of MM and CL.

130 Pullin JA criticised counsel for the prosecution for cross-examining the accused about acts of sexual intimacy in relation to counts 10 and 11, on the ground that it "was cross-examination regarding a fact not in issue."[84] The accused repeatedly answered counsel's suggestions in cross-examination, in relation to count 11, by saying it was not the sort of thing that in his belief he would have done. Pullin JA said that this was not a denial of committing the acts, and thus that the accused did not resile from the "admission which had been made on his behalf, namely that he would not dispute the evidence JG and CL gave as to the acts constituting the charges."[85] With respect, that is not so, because the accused's answer invited the court not to accept JG's evidence – and there were quite a few answers of the same kind in relation to other counts. So the accused, too, seemed to regard the occurrence of acts of sexual intimacy as a live issue.

131 These aspects of the cross-examination reveal that counsel for the prosecution was endeavouring, with some limited success, to elicit evidence of sexual intimacy going beyond what the accused had been prepared to give in chief. That endeavour, the failure of counsel for the accused to object to it, and the failure of the trial judge to stop it, indicated that counsel on both sides and the judge thought that the occurrence of acts of sexual intimacy remained a live issue.

The trial judge's summing up

132 At most the statements of counsel for the accused in opening indicated what would and what would not be the main fields in controversy. But this leaves open what the position was if the complainants gave evidence of sexual intimacy, but not in a convincing manner. Were the jury *bound* to convict? Or did they retain liberty to refuse to convict? If an affirmative answer were given

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84 *Stubley v The State of Western Australia* [2010] WASCA 36 at [119].

85 *Stubley v The State of Western Australia* [2010] WASCA 36 at [119].

to the latter question, the issue of whether acts of sexual intimacy took place was a live issue.

133 The trial judge directed the jury in a manner indicating an affirmative answer to the latter question. She said:

> "If at the end of your deliberations you are left with a reasonable doubt as to any necessary component or element of the charges brought against the accused, it is your duty to find him not guilty of those charges."

If that were so, the question of whether particular acts of sexual intimacy had taken place remained a live issue. Counsel did not complain about that direction.

134 The trial judge pointed out that the "accused has admitted having a sexual relationship with a number of the witnesses", but she did not say that that obliged the jury to find that he had in fact had those relationships.

135 The trial judge then gave various examples of how the jury could use the similar fact evidence, and said:

> "for example, you may listen to the evidence of the complainant and think, 'Who behaves like that? That can't be true,' but you can, if you accept it, use the evidence of the other witnesses to see if that assists you in reaching a conclusion about those sorts of circumstances; so in other words, you do not have just the witness saying, 'This is how it happened, in this way, no communication. He undressed me. He did this and I just lay there doing nothing,' or, 'I just stood there,' or whatever. There is other evidence to support those accounts of the surrounding circumstances of how the events occurred."

That direction does not suggest that the occurrence of acts of sexual intimacy was not a live issue.

136 The trial judge also gave the following direction:

> "When you are considering the evidence given by one of the complainants and you are considering what facts you find, what you are prepared to accept, you may think, 'I'm not satisfied that the accused would behave in that particular way, it's too unlikely or it's too implausible.' The same evidence given by one of the other witnesses may support the complainant's evidence, if you accept it, and lead you to review that sort of conclusion and conclude, 'Actually I do accept that that occurred.'"

137 The trial judge also gave directions about the difficulty which the lapse of time caused the accused. She gave four examples.

> "If a complaint had been made at the time, the accused may have been able to call evidence to say that [1] in relation to some charges perhaps he was not in his rooms on a particular date or [2] he was on leave during a particular period of time or [3] call a witness, such as the receptionist, to say that on a particular day in relation to a particular matter she saw the complainant leave the room and she was happy and laughing. That sort of evidence the accused is precluded from calling because of the time lapse.
>
> Another example: [4] he may have been able to call the receptionist to say that on a particular occasion, the first visit, [JG] did not bring her baby to the room. So the accused man may have been able to call evidence that would cast considerable doubt on the evidence of the complainant."

The third example goes partly to consent, but it and the other three all go to whether particular acts of sexual intimacy happened as the complainants said at all.

138 In directing the jury as to the ingredients of the crime of rape, the trial judge told the jury that they had to be satisfied beyond reasonable doubt that penetration occurred. She then said:

> "the accused admits that sexual intercourse took place which includes penetration. However, he was unable to identify specific events, so you still need to be satisfied in relation to each charge of rape that penetration took place in that incident or in relation to that incident."

That is a clear indication that the question of whether acts of sexual intimacy had occurred *on the particular occasions charged* was a live issue. She also gave directions, based on a similar assumption, about attempted rape and indecent assault. In relation to indecent assault, for example, she said that one element was "that the assault was committed by the accused and that is most certainly something that I will entirely leave to you."

139 Then she said:

> "clearly the principal issue between the parties is this issue of consent, because the actual sexual contact between the accused and the complainants is admitted, but it is also whether there is indeed evidence of each specific offence."

She concluded by summing up the evidence of the two complainants on counts 1, 2, 4-6, 8 and 10-14. She made no suggestion that there was no need to reach a view on the correctness of parts of it going to the occurrence of acts of sexual intimacy on the ground that its correctness was not a live issue. She also took the

jury through the testimony of the accused in which he denied, or said he could not recall, particular details of the complainants' testimony.

140 In *Dhanhoa v The Queen* Gleeson CJ and Hayne J said[86]:

> "It is the duty of the prosecution, in its case, to lead the whole of the evidence to which the accused is required to make answer[87]. It will often appear, in the course of a defence case, that some, perhaps much, of that evidence is not in dispute. In that event, it will be appropriate for a judge to point that out to the jury."

Neither Pullin JA, nor the accused in this Court, denied that it was the duty – and the entitlement – of the prosecution to lead the evidence of JG and CL at the trial. If it had appeared from the defence case that some or much of that evidence was not in dispute, it would have been appropriate for the trial judge to point that out to the jury. She did not do so because, as events turned out, it seemed to be largely in dispute despite what counsel for the accused said in opening.

141 There was no complaint by counsel for the accused about this summing up. He did not submit that matters had been left to the jury which were not live issues. His stance fits in with his opening, in which he spoke of the obligation on the prosecution to prove its case, in which he said he was telling the jury of the accused's "perspective" and "position", and in which he requested the jury to "listen until her Honour puts it all in perspective". When the trial judge did that, making it plain that the jury had to be convinced beyond reasonable doubt of the acts of sexual intimacy, counsel for the accused made no protest about misdirection. That is a further indication that counsel for the accused at the trial considered that the occurrence of the acts of sexual intimacy remained a live issue.

<u>If the occurrence of acts of sexual intimacy remained an issue, was the similar fact evidence admissible?</u>

142 Pullin JA rightly accepted that the evidence of LB, MM and AW showed that the accused had an unusual propensity to engage in sexual relations with his patients during consultations, and that proof of this tendency was rationally capable of affecting the assessment by the jury of the probability that the accused had engaged in acts of sexual intimacy with JG and CL during consultations[88].

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86 (2003) 217 CLR 1 at 9 [20]; [2003] HCA 40.

87 *R v Chin* (1985) 157 CLR 671 at 676-677 per Gibbs CJ and Wilson J; [1985] HCA 35.

88 *Stubley v The State of Western Australia* [2010] WASCA 36 at [90].

For those reasons it had "significant probative value" within the meaning of s 31A(2)(a) of the Act. And its probative value compared to the risk of an unfair trial was such that "fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial" within the meaning of s 31A(2)(b).

143 That is because to many people – perhaps not all, and perhaps not all jurors, but at least many people who have not been afflicted with the cynicism characteristic of hard-bitten and experienced criminal lawyers – an allegation that a psychiatrist was engaging in sexual intercourse with a female patient suffering from a mental disturbance which it was his duty to treat would seem so serious and inherently unlikely as to be startling, outlandish and far-fetched to the point of being bizarre. It would seem so bizarre, in the absence of corroboration, that it would be extremely difficult for the prosecution, in a case of oath against oath about conduct taking place in secret, to exclude a reasonable doubt. Thus a prosecution which rested on a single allegation by JG might very easily founder, however truthful she was. A prosecution including all JG's allegations might also easily founder: it would be easy for the defence to rely on her mental illness, her delay in complaint, the long lapse of time and so forth. A prosecution in which CL's evidence was admissible on each count concerning JG and vice versa – a state of affairs the validity of which the accused at no stage, in no court, challenged – would be a prosecution supported by evidence of much greater probative value. And a prosecution supported by the evidence of three other women giving similar testimony about the tendency of the accused to engage in acts of sexual intimacy with patients during consultations would be a prosecution backed up by evidence of so high a degree of probative value that the public interest had priority over the risk of an unfair trial. Accordingly, the reception of the similar fact evidence was not erroneous.

Precluding the reception of similar fact evidence

144 Earlier an assumption was made that it is open to accused persons to limit the issues in a case even if no s 32 admissions are made[89]. Is that assumption correct? If so, how can the issues be limited? The underlying problem has been acute in similar fact evidence cases. At one extreme Lord Sumner saw the limitation of issues as being legitimate and possible. In *Thompson v The King* he said[90]:

> "Before an issue can be said to be raised, which would permit the introduction of [similar fact] evidence so obviously prejudicial to the

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89 See above at [111].

90 [1918] AC 221 at 232-233.

> accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its character, may be better off in regard to admissibility of evidence than a man whose acts are at any rate capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one. Still, so it is."

At the other extreme, two cases may be noted. In *R v Armstrong*[91] a solicitor was accused of murdering his wife by administering arsenic. The similar fact evidence tendered was that after the wife died the accused offered a buttered scone containing arsenic to a rival solicitor with the emollient words, "Excuse my fingers."[92] Counsel for the accused at the trial "intimated that the defence would be that the deceased committed suicide by taking arsenic, and that no defence of accidental poisoning would be raised."[93] The English Court of Criminal Appeal (Lord Hewart CJ, Avory and Shearman JJ) said[94]:

> "an intimation given by counsel at an early stage of the case as to the defence upon which he proposes to rely cannot preclude the prosecution from offering any necessary evidence to show that the accused committed the crime. It was an essential part of the case for the prosecution here to prove that arsenic was designedly administered by the appellant to his wife, and any evidence that tended to prove design must of necessity tend to negative accident and suicide … The fact that he was subsequently found not merely in possession of but actually using for a similar deadly purpose the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose".

145 The other extreme case is *R v Sims*, where the English Court of Criminal Appeal (Lord Goddard CJ, Oliver, Croom-Johnson, Denning and Lynskey JJ)

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91 [1922] 2 KB 555.

92 [1922] 2 KB 555 at 557.

93 [1922] 2 KB 555 at 565.

94 [1922] 2 KB 555 at 565-566.

stated, in a judgment which Lord Goddard CJ said had been largely prepared by Denning J[95]:

> "whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able, by confining himself at the trial to one issue, to exclude evidence that would be admissible and fatal if he ran two defences; for that would make the astuteness of the accused or his advisers prevail over the interests of justice."

146 In turn, the Privy Council in *Noor Mohamed v The King* preferred Lord Sumner's opinion, with one qualification, which Lord du Parcq expressed thus[96]:

> "An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying 'Let the prosecution prove its case, if it can,' and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said … to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence."

147 Shortly afterwards the English Court of Criminal Appeal (Lord Goddard CJ, Hilbery and Barry JJ) retreated in *R v Hall* when it said[97]:

> "a plea of not guilty is a plea of the general issue, and when the general issue is pleaded all defences are open to a prisoner, but it would not, on that account, be right at once in all cases to assume that a prisoner is going to set up a defence which is theoretically open to him. He may, however, have shown perfectly clearly the defence which he is going to raise by what he has said at the time of arrest or by the way in which the matter was conducted at the magistrate's court; or it may be that some particular defence does not emerge until some cross-examination takes place in the court of trial, from which it can be seen that a prisoner is going to set up a mistake or accident, or, as in this case, innocent treatment.

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95 [1946] KB 531 at 539.

96 [1949] AC 182 at 191-192.

97 [1952] 1 KB 302 at 307.

> As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion evidence may be given which otherwise might be inadmissible".

148 The problem in the present case is the vagueness of the accused's stated position, which was simply not probative or corroborative of the specific evidence given by the complainants. It may be compared with the following example given by Denniston J in *R v Rogan*[98]:

> "if in a charge of burglary it is relevant to prove that the accused was at a certain place on the day of the burglary, and it was proposed to prove that fact by evidence that he on that day committed another offence in that town, an admission of the fact that he was there on the day would make the proof unnecessary, and it would be excluded."

In New Zealand in 1915 there was an equivalent to s 32, namely the *Crimes Act* 1908 (NZ), s 426, and an admission of the kind postulated by Denniston J would now be receivable in Western Australia under s 32. The same is true of another New Zealand case, in which an admission of identity was held to make similar fact evidence inadmissible[99]. Until 1967 there was no provision having the broad effect of s 32 in England.

149 In *Harriman v The Queen* Toohey J said[100]:

> "If the accused is concerned that evidence sought to be adduced is relevant only to a defence upon which he does not intend to rely and that it is prejudicial to him, his counsel may so inform the court. Presumably the evidence will not then be pressed or, if pressed, it is likely to be rejected because it is not probative of any disputed fact."

It is not clear whether Toohey J only "had in mind the making of a formal admission"[101]. It is plain that the widespread existence of statutory provisions similar to s 32 affords a facility for removing issues from the case. The question is whether there are other means of doing so.

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98 [1916] NZLR 265 at 304.

99 *R v Horry* [1949] NZLR 791 at 798-799.

100 (1989) 167 CLR 590 at 608; [1989] HCA 50.

101 *Di Lena v Western Australia* (2006) 165 A Crim R 482 at 498 [81] per Roberts-Smith JA.

150 There is no point in analysing further the difficult question of what techniques are open to an accused person who is concerned to forestall the admission of similar fact evidence, particularly since this is a dissenting judgment. That is because whatever techniques are available to remove particular issues from the case, none of them was successfully employed here.