HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, BELL, GAGELER AND KEANE JJ

GRAEME STEPHEN REEVES APPLICANT

AND

THE QUEEN RESPONDENT

Reeves v The Queen
[2013] HCA 57
18 December 2013
S44/2013

ORDER

1. *Special leave to appeal on Grounds 2.1, 2.2 and 2.3 of the Application for Special Leave to Appeal filed on 21 March 2013 granted.*

2. *Application for special leave to appeal otherwise dismissed.*

3. *Appeal treated as instituted and heard instanter.*

4. *Appeal allowed in part.*

5. *Set aside paragraphs 6, 7, 8 and 9 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 21 February 2013.*

6. *Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for further consideration in accordance with the reasons of the Court.*

7. *Appeal otherwise dismissed.*

On appeal from the Supreme Court of New South Wales

Representation

P J D Hamill SC with S F Beckett for the applicant (instructed by Legal Aid (NSW))

L A Babb SC for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Reeves v The Queen

Criminal law – Malicious infliction of grievous bodily harm with intent – Consent to battery resulting from surgery – Whether "informed consent" was correct test – Whether patient informed in broad terms of nature of procedure – Application of *Rogers v Whitaker* (1992) 175 CLR 479.

Criminal law – Appeal – Appeal against conviction – Application of proviso – Whether misdirection to jury actually resulted in substantial miscarriage of justice.

Criminal law – Appeal – Prosecution appeal against sentence – Where appellate court failed to consider residual discretion.

Words and phrases – "consent to medical procedure", "proviso", "substantial miscarriage of justice", "residual discretion".

Crimes Act 1900 (NSW), s 33.
Criminal Appeal Act 1912 (NSW), ss 5D, 6(1).

1 FRENCH CJ, CRENNAN, BELL AND KEANE JJ. The applicant was convicted following a trial in the District Court of New South Wales (Woods DCJ) of the malicious infliction of grievous bodily harm on CDW, the complainant, with intent to inflict such harm[1]. He was sentenced to a term of two and a half years' imprisonment with a non-parole period of one year for this offence.

2 The applicant is a gynaecologist. The injury inflicted upon CDW was the removal of her external genitals ("vulva") in a surgical procedure described as a "simple vulvectomy" which was carried out at the Pambula Hospital on 8 August 2002. CDW had been referred to the applicant by her general practitioner for treatment for a lesion identified as vulval intraepithelial neoplasia grade 3 ("VIN 3") on her left labia minora. This is a pre-cancerous condition which if left untreated can progress to cancer. Expert evidence established that the appropriate treatment for CDW's condition was the surgical excision of the lesion together with a margin of surrounding tissue.

3 It was the prosecution case that the applicant carried out the simple vulvectomy knowing that it was not surgery for CDW's benefit. There was no evidence that the applicant entertained hostile feelings towards CDW. She was unknown to him before his one consultation with her. The conclusion that he removed her vulva knowing that the surgery was not for her benefit was an inference from the expert evidence that the surgery was excessive. By 2002 the simple vulvectomy was a largely outmoded procedure, although there was some evidence that it might still be appropriate in a case of multifocal disease.

4 The central issue at the trial was proof that the applicant did not have lawful cause or excuse for the surgery[2]. Proof that the applicant performed the surgery, knowing that it was not proper surgery for CDW's benefit, would negative that he acted with lawful cause or excuse ("the unwarranted surgery case"). Proof that the applicant did not honestly believe that he had CDW's consent to the surgery would also negative that he acted with lawful cause or excuse ("the consent case"). The prosecution case was put in both of these ways.

---

1 *Crimes Act* 1900 (NSW), s 33.

2 Section 33 of the *Crimes Act* 1900 (NSW), at the time, relevantly provided: "Whosoever ... maliciously ... inflicts grievous bodily harm upon any person ... with intent in any such case to do grievous bodily harm to any person" is guilty of an offence. At the time, section 5 defined "maliciously" in terms which excluded acts done with "lawful cause or excuse".

5 CDW was an adult of sound mind capable of giving consent to surgery. It was the prosecution case that CDW had agreed to the surgical excision of the VIN 3 lesion which, she had been informed, involved the removal of a small flap of skin and not the removal of her vulva, including her labia and clitoris.

6 It was the applicant's case that at a consultation with CDW he observed widespread sinister changes to her vulva and that he considered a simple vulvectomy was appropriate in light of the extent of those changes. The applicant said that he had explained his observations to CDW, making clear that the surgery involved the removal of the vulva, including the labia and clitoris. He maintained that he had an honest belief that the surgery was for CDW's benefit and that she had consented to it.

7 For the purposes of sentencing, the trial judge was not satisfied that the applicant's guilt had been proved on the unwarranted surgery case. His Honour sentenced upon a finding that the applicant may have wrongly but honestly believed that the surgery was for CDW's benefit. His Honour considered that the applicant's criminality lay in performing the surgery knowing that he did not have CDW's consent to it and "arrogantly disregard[ing]" any possible opinion CDW may have had.

8 The applicant appealed against his conviction to the New South Wales Court of Criminal Appeal (Bathurst CJ, Hall and R A Hulme JJ). The Director of Public Prosecutions ("the Director") appealed against the inadequacy of the sentence for the offence against CDW and an unrelated offence of dishonesty to which the applicant had pleaded guilty.

9 The Court of Criminal Appeal found that the trial judge had wrongly introduced the concept of "informed consent" in directing the jury how the prosecution might negative that the applicant had a lawful cause or excuse for the infliction of the harm[3]. The Court accepted that the applicant's guilt had not been proved on the unwarranted surgery case but was satisfied that the applicant's guilt had been proved beyond reasonable doubt on the consent case[4]. Notwithstanding the misdirection respecting proof of liability on that case, the Court determined

---

3 *Reeves v The Queen* [2013] NSWCCA 34 at [86]-[88] per Bathurst CJ, [109] per Hall J, [284] per R A Hulme J.

4 *Reeves v The Queen* [2013] NSWCCA 34 at [92] per Bathurst CJ, [169]-[170] per Hall J, [285] per R A Hulme J.

that it was appropriate to dismiss the applicant's appeal under the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW)[5].

10 The Court of Criminal Appeal upheld the Director's appeal and resentenced the applicant for this offence and the dishonesty offence. The Court did not refer to its residual discretion to dismiss a prosecution appeal against sentence despite the fact that evidence had been adduced, and submissions made, in support of its exercise[6].

11 The applicant applies for special leave to appeal against the orders of the Court of Criminal Appeal dismissing his appeal and allowing the Director's appeal. His first ground contends that the Court of Criminal Appeal formulated and applied an incorrect test of liability under the criminal law for acts done by a surgeon in the course of surgery (Ground 2.1). His second ground contends that the Court of Criminal Appeal erred in its application of the proviso (Ground 2.2). His remaining grounds relate to the sentence appeal. He contends the Court erred: by allowing the appeal without considering the residual discretion (Ground 2.3); in its treatment of the evidence of the applicant's psychiatric condition (Ground 2.4); and by failing to acknowledge the discretionary nature of sentencing and to give reasons for the conclusion that Woods DCJ's discretion miscarried (Ground 2.5).

12 On 7 June 2013 French CJ and Kiefel J referred the application to an enlarged Full Bench. For the reasons to be given, special leave to appeal against the conviction, Grounds 2.1 and 2.2, should be granted but the appeal should be dismissed. Special leave to appeal against the determination of the Director's appeal should be granted on Ground 2.3 and the appeal should be remitted to the Court of Criminal Appeal for consideration of the residual discretion. Special leave should be refused on Grounds 2.4 and 2.5.

The appeal against conviction (Grounds 2.1 and 2.2)

13 This was the applicant's second trial on a charge arising out of the surgery on CDW. The jury were discharged without verdict at the first trial. A recording

---

5 "[T]he court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." *Reeves v The Queen* [2013] NSWCCA 34 at [106] per Bathurst CJ, [109] per Hall J, [284] per R A Hulme J.

6 *Criminal Appeal Act* 1912 (NSW), s 5D.

of the applicant's evidence given at that trial was admitted without objection in the prosecution case. The applicant did not give evidence in the defence case. What follows is a summary of the evidence on the consent case, including the applicant's evidence at the first trial.

The evidence

14 In June 2002 CDW consulted her general practitioner, Dr Salisbury, in relation to an area of thickening on her vulva. A biopsy was conducted. The results of the biopsy revealed the existence of VIN 3 on her left labia minora. On 5 July 2002 Dr Salisbury made an appointment for CDW to see the applicant that day. The entry in the applicant's appointment register recorded "Vuvlal [sic] Cancer URGENT".

15 The consent case largely turned on what occurred at the consultation on 5 July 2002 ("the consultation"). The applicant's account follows. He took a history and examined CDW's vulva. The examination was assisted by the use of a binocular magnifying instrument called a colposcope. Prior to the colposcopic examination the applicant placed a swab soaked in a solution of acetic acid on the vulva. The solution soaks into the skin and highlights any abnormalities. The examination revealed dystrophic changes "all over the vulva". Dystrophy is a clinical term used to describe abnormal growth or appearance. The dystrophic changes involved both labia minora and part of the labia majora on the left side. The changes were running to the area where the labia minora fused to become the clitoris hood and were within millimetres of it. One explanation for these changes was a condition known as lichen sclerosus. The applicant made this association in light of CDW's history of rashes. Lichen sclerosus on the vulva is sinister.

16 The applicant told CDW that he thought she had a "dystrophic vulva" and that treatment would require "staged biopsies". He suggested that she could travel to a clinic in Sydney or Melbourne for the treatment. CDW was unwilling to travel because she was caring for her mother, who was unwell. She told the applicant that she wanted it "done in one go".

17 Given the combination of dystrophy and VIN 3 and CDW's medical history and life circumstances the applicant concluded that the only option was a simple vulvectomy. He explained the procedure to her by reference to a diagram which he drew on a sheet of A4 paper. On the top half of the page he drew the vulva with a dotted line indicating the area of the excision. He told CDW that everything within the dotted line would be removed. The labia and clitoris were within the dotted line. On the bottom half of the page the applicant drew a second diagram to depict the appearance of the genital area after the surgery.

The applicant did not use the word "clitoris" in describing the surgery. He believed that the removal of the clitoris was implicit given that his explanation involved reference to the diagram.

18 The diagram triggered a discussion about sexual intercourse. CDW asked whether she would be able to have intercourse after the surgery. The applicant responded by asking if she had a partner and she said that she did not. He asked if she anticipated having sexual intercourse in the short term and she said that she did not. He told her that once the wounds had healed she would be able to have sexual intercourse but that her vulva would look and feel different. CDW said that she was pleased because she did not want to rule out sexual activity in the future. The applicant gave the diagram to CDW to take home with her. He did not keep a copy of it.

19 At the end of the consultation CDW signed a consent form. The form recorded CDW's pre-admission diagnosis as "VIN III" and the surgery proposed as "simple vulvectomy". Underneath the words "simple vulvectomy" there was a diagram of the vulva. The only feature recorded on the diagram was a hatched oval area on the anatomical left. Next to this was the notation "VIN III".

20 CDW's account of the consultation now follows. CDW agreed that the applicant had used the words "simple vulvectomy". She had not understood the nature of the procedure and would not have consented to the removal of her clitoris. The only diagram that she had been shown was the diagram on the consent form. CDW had no knowledge that any tissue was to be removed apart from a small flap of skin as depicted in the diagram on the consent form that she signed.

21 CDW was familiar with the appearance of a colposcope. She had been previously examined with the use of one. She denied that the applicant had used a colposcope or applied a swab soaked in acetic acid to her vulva in the course of the examination. She agreed that the applicant had offered her the opportunity of obtaining a second opinion and that she had told him that she wanted the "quickest most complete treatment". She also agreed that the applicant "would have asked" her if she was involved in a sexual relationship and that she would have told him that she did not rule out a sexual relationship in the long term. She accepted that the applicant had probably told her that intercourse would "look and feel different" but it would be possible once the scars of the operation had healed.

22 Other evidence was adduced at trial. The applicant wrote a report to Dr Salisbury following his consultation with CDW. In the report he described CDW as suffering from "troublesome VIN 3". He commented on CDW's

"interesting" history, which included cervical dysplasia and an abdominal hysterectomy and observed that "now she has developed extensive in situ cancer in the vulva". He noted that CDW had been through a very stressful time over the past 18 months with the death of her husband, complicated business matters, litigation and her mother's illness. He remarked that he had not elicited a history of exposure to any noxious agent associated with "multi-genital cancers". His examination "show[ed] quite localised VIN on the left labia minora extending to the majora." The report continued:

> "Clearly, it will be simple to adequately excise this lesion without the need for grafting and I have recommended to [CDW] that she should, within the next few weeks, be admitted to Pambula Hospital for a relatively simple vulvectomy. I have very carefully been through the procedure with [CDW] and I feel that this will be a simple procedure which will not debilitate her greatly and which she will be able to continue working as she is."

23 CDW was admitted to the Pambula Hospital for the surgery on 8 August 2002. A nurse confirmed CDW's consent to a simple vulvectomy, although the nurse did not know what was involved in the procedure.

24 CDW said that when she was in the operating theatre just before losing consciousness the applicant had moved close to her face and said "I'm going to take your clitoris too". The applicant denied saying this. No other person present in the operating theatre heard the remark. The scrub nurse was insistent that "I definitely did not hear him say that". There was conflicting evidence about whether the sedative drugs administered to CDW might produce false recollection.

25 A nurse recalled commenting that the surgery was "fairly radical" and the applicant's response was "if I didn't take that much the cancer would spread". The nurse had volunteered "[y]ou wouldn't be taking my clitoris, no matter what", to which the applicant replied that the patient's husband was dead "so it didn't matter anyway." The applicant accepted that he may have mentioned that CDW's husband was dead but he denied saying anything to the effect that "it didn't matter".

26 The applicant's operation report made no reference to the dystrophy that he claimed to have observed on examination.

27 The applicant signed a pathology form, which requested that the excised vulval tissue taken from CDW be tested for "VIN III". The form contained a

diagram of the vulva, which indicated the site of the lesion on the anatomical left. There was no reference on the form to any other condition.

28 Dr Edwards, a pathologist who specialises in the study of surgically removed skin tissue, conducted a macroscopic examination of CDW's vulval tissue. She identified a lesion which was 20 mm across. She detected no other abnormality in the tissue. She took 13 sections from the specimen. These were examined microscopically by Dr Jain, a pathologist. The majority of sections were from the left side of the vulva. Five exhibited VIN 2 to 3. The remainder showed no abnormality. Dr Jain considered that the vulva was normal except for the area of VIN 2 to 3.

29 The contemporaneous records to which reference has been made and the results of the pathology tests did not provide support for the applicant's account that he had observed dystrophic changes to CDW's vulva (apart from the VIN 3 lesion). However, the applicant's clinical notes contained a diagram of CDW's vulva depicting the VIN 3 lesion and an area at the top of the vulva and another area on the right labia each bearing the notation "DYS", an abbreviation of dystrophic. The notes also recorded that CDW had noticed the lesion on her vulva in the past two years. A copy of the notes was in evidence.

30 The prosecution contended that the entries recording areas of "DYS" and the history that the lesion had been present for two years were fabrications made by the applicant after he became aware that CDW was complaining about the surgery. The applicant denied that this was so. He pointed to evidence that CDW had given a history to another doctor of having suffered from vulval irritation for a long time and having done nothing about it because her husband was ill. CDW's husband died in August 2001.

31 CDW remained in hospital for six days following the procedure. She was visited daily in the hospital by the applicant. She was referred by a nurse to a social worker for her "complex business [and] personal affairs" and "serious health worries". During this time CDW did not complain about the extent of the surgery. On 19 August 2002 CDW returned to the applicant to have the sutures removed. She expressed a preference for removal under anaesthetic. The applicant removed the sutures at the Pambula Hospital on 22 August 2002. Again there was no complaint about the surgery. CDW did not complain to Dr Salisbury, her female general practitioner, about the surgery. Dr Salisbury examined CDW gynaecologically on a number of occasions and noted a "well-healed scar".

32 CDW explained her absence of complaint saying that she had been living "on autopilot" and that in August 2004 she "snapped out of that" and started to

look into what had happened to her. CDW commenced civil proceedings claiming damages against the applicant in July 2005. CDW's first complaint to the police was made in 2008.

The directions on informed consent

33 The jury were supplied with written directions of law, which included directions on "informed consent". The oral directions on this topic were in the same terms as the written directions. Relevantly, the written directions stated.

> "There will *not* be 'lawful cause or excuse' for the surgery performed by the [applicant] *if* the Crown proves beyond reasonable doubt that the [applicant] *did not honestly believe at the time of the operation that the patient had given her informed consent to the full extent of the operation, including removal of the labia and clitoris*". (emphasis in original)

34 Under the heading "*What Does 'Informed Consent' mean?*" the written directions included the following:

> "*To be valid, consent must be 'informed'. This means that the medical practitioner must at least explain to the patient the purpose of the operation, the part or parts of the body to be cut or removed, the possible major consequences of the operation, and any options or alternative treatments which may be reasonably available.*" (emphasis in the original)

Consent to medical procedures

35 The Court of Criminal Appeal found, correctly, that it was an error to direct the jury in terms of "informed consent". Specifically, it was an error to direct that a medical practitioner must explain the "possible major consequences of the operation" together with "options" and "alternative treatments" before the patient's consent to the procedure will afford the medical practitioner lawful cause or excuse for performing it. The nature of the consent to a medical procedure that is required in order to negative the offence of battery is described in the joint reasons in *Rogers v Whitaker*[7]. It is sufficient that the patient consents to the procedure having been advised in broad terms of its nature[8].

---

7 (1992) 175 CLR 479; [1992] HCA 58.

8 *Rogers v Whitaker* (1992) 175 CLR 479 at 490 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.

Provided CDW was informed that the surgery involved the removal of her labia and clitoris, the applicant had a lawful cause or excuse for performing it. This was so regardless of any failure to inform CDW of its possible major consequences and any alternative treatments. A failure in either of these respects might be a breach of the applicant's common law duty of care exposing him to liability in negligence but it would not vitiate the consent to the surgery.

The first ground – the Court of Criminal Appeal's formulation of the test

36 The applicant contends that the Court of Criminal Appeal formulated an incorrect, overly stringent test of consent to surgery and applied that test in its determination that his guilt had been proved. The complaint misconstrues the Court of Criminal Appeal's reasons, which, on this subject, were given by Bathurst CJ.

37 Bathurst CJ stated the test for consent to a surgical procedure in terms drawn directly from the joint reasons in *Rogers v Whitaker*[9]. This is supported by his Honour's review of the authorities in England and Canada, which adopt a like test[10]. Despite Bathurst CJ's clear recognition of the authority of the statement in *Rogers v Whitaker*, the applicant submits that when his Honour formulated the direction that should have been given, he added a gloss to it[11]:

> "In these circumstances, any direction to the jury on this issue should be to the effect that the accused will not be guilty of assault unless the Crown proves beyond reasonable doubt that the complainant has not consented to *the nature and extent* of the procedure and that the doctor does not honestly believe that she has so consented. The only exception is where consent is vitiated by fraud or misrepresentation. Expressions such as 'informed consent' or 'real consent' should be avoided as, in my opinion, they tend to obscure the difference between criminal and civil liability in this area." (emphasis added)

---

9 *Reeves v The Queen* [2013] NSWCCA 34 at [74], [82], citing *Rogers v Whitaker* (1992) 175 CLR 479 at 490 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.

10 *Reeves v The Queen* [2013] NSWCCA 34 at [75]-[83], citing *Chatterton v Gerson* [1981] QB 432 at 443 per Bristow J, and *Reibl v Hughes* [1980] 2 SCR 880.

11 *Reeves v The Queen* [2013] NSWCCA 34 at [86].

38 Consent to the "nature and extent of the procedure" is suggested by the applicant to be a different and more demanding test than one which asks whether the patient was informed "in broad terms of the nature of the procedure". In the context of this trial it is a complaint without substance. No meaningful distinction could be drawn between asking if the prosecution had proved that CDW was informed in broad terms of the nature of the procedure being the removal of her vulva, including the labia and clitoris, and asking if CDW was informed of the nature and extent of the procedure. If, as CDW maintained, she was not told that the procedure would involve the removal of her vulva, including the labia and clitoris, her signed consent to the simple vulvectomy was not consent to the surgery. If, as the applicant maintained, CDW had been shown a diagram depicting her labia and clitoris within the area of tissue to be removed, it was not disputed that her signed consent gave the applicant lawful cause or excuse for the surgery.

39 The error in the trial judge's directions on informed consent lay, as Bathurst CJ recognised, in the risk that the jury might reason to guilt even if the jury considered that it was reasonably possible that CDW understood in broad terms the nature of the operation: the jury might find that CDW had not given informed consent because the applicant had not explained the possible major consequences of the surgery or any alternative treatments to her ("the informed consent case").

The second ground – the proviso

40 Bathurst CJ's conclusion, that the misdirection had not actually occasioned a substantial miscarriage of justice, took into account that the expert evidence was not directed to alternative treatments and that cross-examination on the possible consequences of the surgery had been limited. His Honour noted that the prosecutor had referred in her closing address to the fact that CDW was not told of the difficulty that she may have with urination in consequence of the surgery. His Honour continued[12]:

> "but it does not seem to me that that cross-examination or that reference would lead to a real likelihood that the jury convicted on the grounds that although [CDW] was informed of the nature and extent of the operation, she was not informed that subsequent to it she would have difficulties in urination."

---

12 *Reeves v The Queen* [2013] NSWCCA 34 at [102].

41 The applicant submits that determining that there was no "real likelihood" that the verdict was based on the informed consent case was an answer to the wrong question. The correct question, he contends, was to ask whether it is possible that the jury reasoned to guilt on the informed consent case[13]. He argues that this possibility cannot be dismissed in circumstances in which the one question asked by the jury in the course of their retirement concerned the misdirection. The jury asked:

> "On page 6 of the Directions of Law a definition of informed consent is given. Are we to assume that this is the literal definition of informed consent by which the accused is to be judged for his actions relating to the operation he carried out in August 2002?"

42 The applicant's principal submission is that a misdirection on a critical element of liability necessarily occasions a substantial miscarriage of justice. This misdirection resulted in the imposition of a lower threshold for negativing that the surgery was done with lawful cause or excuse. To hold that this did not occasion a substantial miscarriage of justice, he contends, is to have the appellate court usurp the function of the jury.

43 Finally the applicant challenges the Court of Criminal Appeal's conclusion that his guilt was proved beyond reasonable doubt, submitting that Bathurst CJ's analysis of the record of the trial was incomplete and inconsistent.

The Court of Criminal Appeal's analysis of the evidence

44 Some of the applicant's criticisms of Bathurst CJ's conclusion, that his guilt had been proved, proceed upon a view that it was inconsistent, having rejected the unwarranted surgery case, to take into account evidence adduced in support of that case in considering the consent case. Critical to Bathurst CJ's analysis of the evidence was his Honour's conclusion that the applicant had not observed the dystrophic changes to CDW's vulva that he claimed to have seen. There was no inconsistency in his Honour's reasoning in this respect[14]. Acceptance that the applicant may have honestly believed that the surgery was for CDW's benefit did not dictate, as a logical corollary, acceptance of his evidence that he had observed dystrophic changes "all over the vulva". It was open to consider, as the trial judge found, that the applicant honestly may have

---

13 *Gassy v The Queen* (2008) 236 CLR 293 at 307 [34] per Gummow and Hayne JJ; [2008] HCA 18.

14 *Reeves v The Queen* [2013] NSWCCA 34 at [95]-[96].

believed that the simple vulvectomy would eradicate any possibility of the development of cancer.

45 Bathurst CJ considered that had the applicant observed dystrophic changes, which may have been lichen sclerosus, it was inconceivable that the observation would not have been recorded – in the consent form that he caused CDW to sign; in his report to Dr Salisbury; in his operation notes; or in his request for pathology testing of the excised vulval tissue[15]. This was a conclusion that was open. Satisfaction that the applicant did not make the claimed clinical observations inevitably led to rejection of aspects of his account of the things conveyed to CDW in the consultation.

46 The objective evidence that told against acceptance of the applicant's account was critical to the Court of Criminal Appeal's conclusion on its review of the evidence. The evidence to which the applicant complains Bathurst CJ failed to refer in that review does not detract from the force of the conclusion. There should, however, be some reference to that evidence.

47 The applicant notes CDW's acceptance that he had used the word "atrophy" in the consultation. In his evidence the applicant said that he told CDW that she had "mixed vulval dystrophy". He denied using the word "atrophy". He accepted that vulval atrophy describes the thinning of tissue and can be part of the normal process of ageing.

48 Next the applicant submits that Bathurst CJ failed to consider that the inference to be drawn from the report that he wrote to Dr Salisbury was not all one way. He points to the statement that CDW "has developed extensive in situ cancer in the vulva". However, this was not a report of dystrophy or lichen sclerosus. At trial, Dr Dalrymple, a gynaecological oncologist, said that "in situ cancer" is an old term for preinvasive disease albeit he would not have described a 2 cm lesion as excessive. It remains that the applicant described CDW presenting with "troublesome VIN 3" and advised that "it will be simple to adequately excise this lesion without the need for grafting".

49 Next the applicant points to Bathurst CJ's failure to consider CDW's acknowledgement that there had been some discussion at the consultation about her ability to have sexual intercourse after the wound had healed. He submits that the excision of a small flap of skin on the labia would hardly give rise to a concern about sexual functioning. The inference, he submits, is that CDW

---

15 *Reeves v The Queen* [2013] NSWCCA 34 at [95].

understood the nature of the surgery at the time. CDW and the applicant were agreed about the content and extent of the discussion of sexual matters. That evidence has been detailed earlier in these reasons. An alternative inference is that had CDW understood that her vulva, including her labia and clitoris, were to be removed it might be expected to have prompted rather more discussion on that subject. The existence of these competing inferences does not diminish the force of Bathurst CJ's conclusion based upon the evidence of the contemporaneous documents[16].

50 The conclusion that the applicant's guilt was proved by evidence properly admitted at the trial was a necessary, but not a sufficient, condition for the dismissal of the applicant's appeal[17]. The record of the trial, upon which the appellate court bases its conclusion of guilt, includes the fact of the verdict. Where, as here, the legal error at the trial was a wrong direction relating to an element of liability, the significance of the verdict was to be assessed in light of the capacity of the misdirection to have led the jury to wrongly reason to guilt. Bathurst CJ addressed this consideration by asking whether the misdirection deprived the applicant of a "real chance" of acquittal[18]. The question echoes the formulation in *Mraz v The Queen*: did the error deprive the accused of "a chance fairly open" of acquittal[19]? His Honour's conclusion, that in the way in which the trial was conducted there was not a "real likelihood" that the jury reasoned to guilt on the basis of the misdirection, was an answer to the question that had been framed in terms of the existence of a "real chance".

51 In decisions since *Mraz* this Court has cautioned against reference to judicial expressions that differ from the statutory expression when applying the proviso[20]. The Court of Criminal Appeal was required to dismiss the applicant's appeal if it considered that no substantial miscarriage of justice has *actually* occurred. The applicant's contention that a misdirection concerning an element

---

16 *Reeves v The Queen* [2013] NSWCCA 34 at [98].

17 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]; [2005] HCA 81; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

18 *Reeves v The Queen* [2013] NSWCCA 34 at [100].

19 (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59.

20 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 105 [31] per French CJ, Gummow, Hayne and Crennan JJ.

of liability is necessarily productive of a substantial miscarriage of justice should be rejected. The modifier "actually" makes clear that the appellate court is to determine whether the error in this trial *in fact* occasioned a substantial miscarriage of justice. This requires consideration of the issues at the trial.

52 Bathurst CJ's conclusion, that there was no real likelihood that the jury reasoned to guilt upon a finding that the applicant had not explained possible major consequences of the surgery or alternative treatments to CDW, was based on the assessment that the issue of consent at the trial was a stark one: had CDW been informed that the surgery involved the removal of her vulva, including her labia and clitoris[21]? The applicant submits that this conclusion overlooks that evidence was adduced from CDW about the consequences of the surgery, including with respect to sexual response and difficulties in urinating. The opinion evidence included the explanation that ought to be given to the patient before removing the clitoris. The applicant had been cross-examined about his failure to inform CDW that her sexual response would be reduced to almost nil by the surgery. Moreover, the prosecutor had opened referring to "informed consent" and saying that CDW was not told of "any of the consequences sexually, or in every day life", of the surgery.

53 The evidence of CDW and the applicant was lengthy. In each case the evidence touching on the discussion of the consequences of the surgery was brief. The opinion evidence was focussed on the unwarranted surgery case. The applicant's submission, that the concept of informed consent permeated the trial, needs to be understood in the context of the way in which the prosecution case was opened and left to the jury. The prosecutor's use of the phrase "informed consent" in her opening was with respect to the case that the applicant did not have CDW's consent to perform such a "radical operation"; that CDW at no time was told of the amount of tissue that was to be taken; that CDW was given to believe that a small lesion would be cut out; and that she was not told to expect the complete excision of her vulva. Towards the conclusion of her opening the prosecutor explained the two ways in which the case was put in these terms:

> "the Crown of course contends that it was never necessary for the [applicant] to perform this radical and disfiguring surgery in circumstances where there was only a small lesion and it was never conveyed to [CDW] that so much was going to – that this entire area of her body would be removed."

---

21 *Reeves v The Queen* [2013] NSWCCA 34 at [102].

54 In her closing address the prosecutor invited the jury to consider that "it's inconceivable that he really told this lady that he was going to take everything". The prosecutor reminded the jury of passages of CDW's evidence in support of the submission on the consent case:

> "Did you ever consent to an operation to remove your entire vulva including your clitoris? She said 'Never never never never'. She only had to say it for you to believe it ladies and gentlemen. Of course she didn't. Not for what she had. Not without further biopsies. Not without other – more consultations than that and time to think about it."

55 Notably, the prosecution did not dispute that, had the applicant explained the surgery to CDW in the way that he said he had done, CDW's signed consent gave him lawful cause or excuse for its performance. Nor did the prosecutor submit that, in the event the jury were not satisfied that CDW did not understand that her vulva, including her labia and clitoris, were to be removed, it was still open to convict if satisfied that the applicant had not explained the possible consequences of the surgery or alternative treatments to CDW.

56 The applicant was represented at the trial by senior counsel. There was no objection to the directions on informed consent. It is evident that it did not occur to the parties or the trial judge that the jury might reason to guilt upon a view that CDW understood that her vulva, including labia and clitoris, was to be removed but her consent to the removal did not afford the applicant lawful cause or excuse because he had not explained the possible major consequences of the surgery or any alternative treatments to her. That conclusion is reinforced when it is appreciated that the jury's question did not prompt consideration that the jury might reason in that way. Trial counsel did not apply for any further direction in response to it. Any assessment of the significance of the question must take into account the answer that was given to it:

> "Now the answer to that question is yes. But when you read the material on page 6 relating to informed consent you should also bear in mind what is on page 5 under Lawful Cause or Excuse. That is to say the Crown must prove both the absence of informed consent from the perspective of the patient and as well it must rule out beyond reasonable doubt an honest belief by the [applicant] that there was informed consent at the time of the operation. …
>
> It is for the Crown to prove that the [applicant] had no lawful cause or excuse and towards the bottom of the page the second last paragraph is what we are dealing with here. There will not be lawful cause or excuse for the surgery performed by the [applicant] if the Crown proves beyond

reasonable doubt that the [applicant] did not honestly believe at the time of the operation that the patient had given her informed consent to the full extent of the operation including removal of the labia and clitoris."

57 The reference to "informed consent" was to informed consent to the full extent of the operation including the removal of the labia and clitoris. The further directions given in response to the jury's question conveyed that lawful cause or excuse could only be negatived by proof beyond reasonable doubt that the applicant did not honestly believe that CDW had consented to an operation involving the removal of her labia and clitoris.

58 There was no error in concluding, in the context of this trial, that the phrase "informed consent" and the reference to possible major consequences and alternative treatments did not distract the jury from determining the one issue presented with respect to CDW's consent. This was whether the prosecution had excluded beyond reasonable doubt that CDW had been informed that the surgery involved the removal of her vulva, including her labia and clitoris. The Court of Criminal Appeal did not err in holding that the misdirection did not actually occasion a substantial miscarriage of justice. The application for special leave to appeal should be allowed but the appeal against conviction must be dismissed.

The appeal against sentence (Grounds 2.3, 2.4 and 2.5)

59 Reference has been made to the grounds upon which the applicant seeks to challenge the determination of the prosecution appeal against sentence. Neither ground which challenges the Court of Criminal Appeal's conclusions that the sentencing judge's discretion miscarried and that the sentence imposed for the offence against CDW (or that imposed for the dishonesty offence to which the applicant pleaded guilty) was manifestly inadequate justifies the grant of special leave.

60 The applicant adduced evidence in the Court of Criminal Appeal of the deterioration in his health during his time in custody. He submitted that his health and the imminence of the expiration of his non-parole period were considerations which justified the dismissal of the Director's appeal in the exercise of the residual discretion[22]. In allowing the Director's appeal and resentencing the applicant the Court did not refer to this material or to the residual discretion.

---

22 *Green v The Queen* (2011) 244 CLR 462 at 471-472 [26] per French CJ, Crennan and Kiefel JJ, 506 [131] per Bell J; [2011] HCA 49.

61 The Director accepts that the Court of Criminal Appeal erred by its failure to consider the exercise of the discretion and submits that the proceeding should be remitted to enable it to do so. In light of that concession, it is appropriate in relation to the sentence appeal to grant the applicant special leave to appeal on Ground 2.3, and to allow the appeal and remit the proceeding to the Court of Criminal Appeal for it to consider the exercise of the discretion to dismiss the appeal under s 5D of the *Criminal Appeal Act* 1912 (NSW).

Orders

62 There should be orders as follows.

1. Special leave to appeal on Grounds 2.1, 2.2 and 2.3 of the Application for Special Leave to Appeal filed on 21 March 2013 granted.

2. Application for special leave to appeal otherwise dismissed.

3. Appeal treated as instituted and heard instanter.

4. Appeal allowed in part.

5. Set aside pars 6, 7, 8 and 9 of the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 21 February 2013.

6. Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for further consideration in accordance with the reasons of the Court.

7. Appeal otherwise dismissed.

63 GAGELER J. I agree with the orders proposed in the joint reasons for judgment. With one reservation, I agree with the reasoning.

64 To apply the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW), Bathurst CJ in the Court of Criminal Appeal of the Supreme Court of New South Wales considered that he needed to determine both (in terms derived from *Weiss v The Queen*[23]) that the evidence properly admitted at trial proved the applicant's guilt beyond reasonable doubt[24] and (in terms derived from *Mraz v The Queen*[25]) that the misdirection did not deprive the applicant of a real likelihood of acquittal by the jury[26].

65 The joint reasons for judgment accept that the Court of Criminal Appeal, having concluded that the evidence properly admitted at trial proved the applicant's guilt beyond reasonable doubt, needed to engage in a further stage of analysis. The joint reasons for judgment do not couch that further stage of analysis in the terminology of *Mraz*. They couch it instead in terms of the Court of Criminal Appeal needing ultimately to be satisfied that no substantial miscarriage of justice had "in fact" occurred. The substance of the analysis is nevertheless that which Bathurst CJ undertook: excluding any real likelihood that the jury was misled by the misdirection in reasoning to guilt.

66 The joint reasons for judgment respond to the arguments in this Court. Whether one or the other stage of the analysis undertaken ought to have been sufficient in order for the Court of Criminal Appeal to apply the proviso in a case of a misdirection of law was not argued. I would reserve that question for consideration in a future case.

---

23 (2005) 224 CLR 300 at 316 [41]; [2005] HCA 81.

24 *Reeves v The Queen* [2013] NSWCCA 34 at [90]-[99].

25 (1955) 93 CLR 493 at 514; [1955] HCA 59.

26 *Reeves v The Queen* [2013] NSWCCA 34 at [100]-[104].