HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

ALAN ARTHUR FARRELL APPELLANT

AND

THE QUEEN RESPONDENT

Farrell v The Queen (H4-1997) [1998] HCA 50
Date of Order: 27 May 1998
Date of Publication of Reasons: 13 August 1998

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of Tasmania and in lieu thereof allow the appeal to that court, quash the convictions and order a new trial on counts 1, 2, 3, 4, 5 and 6.*

On appeal from the Supreme Court of Tasmania

Representation:

M A M MacGregor QC with G D Wendler for the appellant (instructed by Butler McIntyre & Butler)

D J Bugg QC with M A Stoddart for the respondent (instructed by Director of Public Prosecutions, Tasmania)

CATCHWORDS

Farrell v The Queen

Criminal law – Expert evidence – Whether expert evidence admissible which discloses existence of mental disability likely to bear on reliability of complainant's evidence – Whether possibility of impairment of memory by alcohol and substance abuse within experience of ordinary persons – Whether knowledge of effect of anti-social personality disorder within experience of ordinary persons.

Criminal law – Jury direction on weight to be given to expert evidence about credibility and reliability of complainant witness – Whether misdirection deprived appellant of fairly open chance of acquittal.

Criminal Code Act 1924 (Tas), s 402(2).

1 GAUDRON J. On 27 May 1998, the Court pronounced orders in this matter. By those orders, the appeal to this Court was allowed, the orders of the Court of Criminal Appeal of Tasmania were set aside, the appeal to that Court was allowed, the convictions were quashed and a new trial was ordered on counts 1, 2, 3, 4, 5 and 6 in the indictment presented against the appellant. The following are my reasons for participating in those orders. They are given in a context in which the facts and the evidence of Dr Sale, with which the appeal to this Court was primarily concerned, appear in other judgments. Those facts are repeated only to the extent necessary to make clear my reasons for participating in the orders made.

2 Although the Notice of Appeal contains five grounds of appeal, the oral argument for the appellant was concentrated on ground 5. It dealt also, albeit only briefly, with some matters relevant to the question whether the verdicts entered against the appellant are unsafe and unsatisfactory. Save for the matter raised by ground 5, I agree with Hayne J, for the reasons that his Honour gives, that this appeal cannot succeed.

3 Ground 5 of the Notice of Appeal is as follows:

> "That a majority of the Court of Criminal Appeal erred in law by holding that the Learned Trial Judge did not err when he instructed the jury that '*Dr Sale's opinion really did not count for anything because he did not get to the stage of diagnosing an actual medical condition which would be beyond your experience and mine*'."

To understand the precise import of ground 5, it is necessary to summarise the effect of Dr Sale's evidence. Dr Sale testified that, in his opinion, the complainant suffered from three distinct mental or psychiatric disorders. The first was alcohol dependence and polysubstance abuse, the substances including benzodiazepines. The second was anti-social personality disorder and the third was borderline personality disorder.

4 So far as concerns the first of the mental or psychiatric disorders of which Dr Sale gave evidence, he said that long-term alcohol dependence may result in a Korsakoff state, an extreme form of which may cause greatly impaired memory. However, he was unable to say that the complainant's memory had been affected by reason of his alcohol abuse. Dr Sale also said that the ingestion of large quantities of benzodiazepines can affect memory and result in amnesia. He did not express an opinion as to whether, in relation to the complainant, that had occurred. He also gave evidence that persons who are dependent on benzodiazepines frequently lie to obtain drug supplies.

5 So far as concerns anti-social personality disorder, Dr Sale relevantly gave evidence that persons with that disorder "tend to exploit or to con others, they are often regarded as deceitful". He also said that "information provided [by them] ... should be regarded with caution" and that "they are inherently less truthful than

the average person." He did not give any evidence as to the reliability of information provided by a person with a borderline personality disorder.

6 The argument for the appellant was that the direction incorporated in ground 5 of the grounds of appeal effectively deprived him of the benefit of Dr Sale's evidence. In putting that argument, Counsel relied heavily on the statement of Brennan J in *Bromley v The Queen* that "if the nature, severity and significance of [a] witness's mental disorder is deposed to by persons qualified to do so, that may bring home to the jury more vividly and more authoritatively than a judicial warning ... the danger of acting upon the witness's evidence without corroboration"[1].

7 It appears from exchanges in the course of Dr Sale's evidence that the trial judge's direction that "Dr Sale's opinion really did not count for anything" was based on his Honour's view that expert evidence was only relevant and admissible if it went to the impairment of the complainant's capacity to give accurate evidence, all other matters going to the reliability of his evidence being matters upon which the jury could form an opinion based upon ordinary experience. That view is consistent with the statement of Brennan J in *Bromley* that expert evidence is admissible to show that a witness's "capacity to observe, to recollect, or to express is impaired by mental disorder ... for it is relevant to the weight to be given to his evidence"[2].

8 The circumstances in which expert evidence is admissible with respect to a witness's mental disorder were stated somewhat differently by the House of Lords in *R v Toohey*[3]. In that case, Lord Pearce, with whom Lords Reid, Morris of Borth-y-Gest, Hodson and Donovan agreed, put the matter this way:

> " Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them."[4]

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1 (1986) 161 CLR 315 at 325.

2 (1986) 161 CLR 315 at 322. See also *R v Toohey* [1965] AC 595 at 608; *R v Dunning* [1965] *Criminal Law Review* 372 and *Wigmore on Evidence*, vol II, par 497(c).

3 [1965] AC 595.

4 [1965] AC 595 at 608.

Later, his Lordship emphasised that the admissibility of expert evidence is not limited to the subject of a witness's ability to give accurate evidence, by stating unambiguously that "[m]edical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence."[5]

9 In the present case, the evidence of Dr Sale fell somewhat short of evidence of the complainant's impaired capacity to give accurate evidence. It simply raised the possibility of his being impaired in that way on account of alcohol and substance abuse. It also raised the probability of greater unreliability of the complainant's evidence on account of his anti-social personality disorder than in the case of persons who do not suffer from that disorder. In principle, however, there is no reason why expert evidence should be excluded, although it does not disclose a witness's impaired capacity, if, nevertheless, it discloses the existence of a disability the likely consequences of which bear on the reliability of that witness's evidence and extend beyond the experience of ordinary persons.

10 It is well settled that expert evidence is admissible "to furnish ... scientific information which is likely to be outside the experience and knowledge of a judge or jury."[6] In *Clark v Ryan*[7], Dixon CJ approved the somewhat more expansive statement that expert evidence "is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."[8]

11 In my view, Dr Sale's evidence that the complainant suffered from alcohol dependence and polysubstance abuse is in a different category from his evidence of the complainant's anti-social personality disorder. Regrettably, alcohol dependence and substance abuse do not extend beyond the experience of ordinary persons. However, the experience of ordinary persons is not such that most will know the mental state of a person who suffers some mental impairment in consequence of alcoholism or substance abuse. But in the present case, the evidence did not assert any such distinct consequence, merely leaving open the possibility of impaired memory. That possibility is a matter well within the

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5 *R v Toohey* [1965] AC 595 at 609.

6 *R v Turner* [1975] QB 834 at 841, approved in *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J, 130 per Dawson J.

7 (1960) 103 CLR 486 at 491.

8 Referring to the case note to *Carter v Boehm*, 1 Smith LC, 7th ed (1876) at 577. See also *Cross on Evidence*, 5th Aust ed (1996) par 29050; Freckelton & Selby, *Expert Evidence*, (1993) pars 8.250-8.350, 8.510-8.570.

experience of ordinary persons. Thus, in my view, there was no error in the direction incorporated in ground 5 of the Notice of Appeal, so far as it was concerned with the possible effects of alcohol dependence and substance abuse.

12 The evidence of Dr Sale concerning the complainant's anti-social personality disorder went beyond a mere description of anti-social behaviour which may well be within the experience of ordinary persons. His evidence was that the complainant suffered a distinct disability, one feature of which was that persons with that disability "are inherently less truthful than the average person." That is not, in my view, a matter within the experience of ordinary persons and, thus, Dr Sale's evidence was, to that extent, relevant and admissible.

13 To the extent it suggested that Dr Sale's opinion concerning the reliability of evidence given by persons with anti-social personality disorder was irrelevant and should be ignored, the direction incorporated in ground 5 of the grounds of appeal was erroneous. The correct approach was to inform the jury that it was for them to decide whether or not to accept that part of Dr Sale's evidence and, if they did, that they should then proceed on the basis that the complainant's evidence was inherently less reliable than that of an average person.

14 However, the question whether the appeal should be allowed does not depend solely on there having been an error in the trial process. It depends, also, on whether, in terms of s 402(2) of the *Criminal Code Act* 1924 (Tas)[9] there was a "substantial miscarriage of justice". The trial judge directed the jury to scrutinise the complainant's evidence with extra care because of his background and instructed them that there was "a real risk that his evidence might be unreliable and [they] must be careful to take into account that risk, extra in his case, over and above ordinary witnesses, when ... considering his evidence". Although that was a strong direction, a direction that, if they accepted Dr Sale's evidence, they should proceed on the basis that the complainant's evidence was inherently less reliable than that of the ordinary person would have been of even greater force.

15 The case against the appellant may fairly be described as a strong one. Even so, it is a case that depends on acceptance of the complainant's evidence concerning the events alleged to constitute the six offences of which the appellant was convicted. Had the jury been properly directed, they may not have given the complainant's evidence sufficient weight to have been satisfied beyond reasonable doubt of the appellant's guilt of some or all of those offences. It follows that the

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9 Section 402(2) provides that:

> " The Court may, notwithstanding that it is of the opinion that the point 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."

appellant was deprived of a chance of acquittal that was fairly open to him[10] and entitled to the orders made on 27 May 1998.

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10 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

16 McHUGH J. I agree with the judgment of Hayne J.

17 KIRBY J. My conclusion is the same as that of Callinan J. For my reasons, I gratefully accept his Honour's statement of the facts and will not repeat his quotations from the transcript of the trial and from the directions of the trial judge (Underwood J).

The issues

18 After all the skirmishing in the courts below, the appellant confined himself, in this Court, to three grounds of challenge to his conviction on those counts of the indictment upon which he was found guilty by the jury:

1. That the trial judge had erred in admitting into evidence a photograph, taken in the appellant's home some four months before the subject offences, depicting a necktie. It was argued that the trial judge ought to have exercised his discretion to exclude that evidence on the basis that its prejudicial effect on the jury, having regard to the circumstances in which it was procured, outweighed its probative effect, as tending to support the evidence of the complainant and thus the Crown's case. (The admission of evidence point).

2. That the verdicts of the jury upon those counts on which they convicted the appellant were unreasonable[11], having regard to a careful examination of the evidence. As is common practice, this argument was expressed in terms that the verdicts were "unsafe or unsatisfactory". That expression, not being used in Australian legislation, should not, in my opinion, be further used[12]. Instead, the applicable statutory language should be applied. But the difference matters not in this case. The point is the same. One feature of the argument (not itself a separate ground of appeal) was that the differential verdicts of the jury cast doubt on the acceptability of the complainant's evidence. Specifically, the jury's rejection of those counts which related to the presence during the complainant's alleged ordeal of a second assailant ("Frank" or "the animal"), not being otherwise explained, put in doubt the whole of the complainant's evidence, acceptance of which was crucial to establishing the guilt of the appellant. (The unreasonable verdicts point).

3. That the trial judge's rulings on the evidence which the defence might procure from an expert psychiatrist, Dr Ian Sale, and the directions later given to the jury on the use they could make of that evidence, amounted to a misdirection occasioning a mis-trial. (The misdirection point).

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11 *Criminal Code Act* 1924 (Tas), s 402(1).

12 See discussion in *Gipp v The Queen* (1998) 72 ALJR 1012 at 1035-1037; 155 ALR 15 at 47-50.

A photograph was correctly received into evidence

19 There is no substance in the admission of evidence point. Very properly, the appellant conceded that the photograph of the tie taken at his home, during an investigation by police into a previous assault on the appellant, was both relevant and admissible. It was concrete evidence, from a reliable source, which tended to link the appellant to the offences alleged. As the remnants of the tie which had bound the complainant's hands were retrieved when he presented to his brother with his complaints, the photograph might be viewed by the jury as contradicting the appellant's evidence that his conduct in taking the complainant into his home was nothing but an act of kindness. The photograph suggested that some form of binding of the complainant's hands had taken place, almost certainly in the appellant's home, using a tie belonging to the appellant. The only innocent explanation would have been that the binding was consensual, perhaps related to consensual sexual activity. This, in turn, could have been consistent with the otherwise curious absence of bruise marks which the evidence suggested would have been expected from involuntary binding over several hours as the complainant asserted.

20 The appellant denied any sexual activity, consensual or otherwise[13]. His attempts to explain how a tie belonging to him might have come to be used to bind the complainant were unconvincing. The trial judge's directions to the jury on the use which they might make of the photograph were careful and accurate. They conformed to authority[14]. The evidence was highly damaging to the appellant's case. However, its probative value was also high. The complainant could not have bound his hands behind his back with the tie in the way in which his brother found him. The tie's pattern and orange colouring were virtually unique. In the absence of an innocent explanation, the tie tended to corroborate the complainant's version of events. No error therefore occurred in admitting the evidence of the photograph. As to the prejudicial effect of thereby disclosing the circumstances in which the photograph had been taken, that assumed less significance when the appellant's case opened up the circumstances of the previous event which had occasioned the photograph. It allowed those circumstances to be fully explained. All that was then left was the probative force of the photograph linking the appellant to the tie remnant. It was powerful, objective evidence. The Court of Criminal Appeal was correct to reject the complaint about its admission. It was for the judge to rule on its admissibility as he did. It was for the jury to give the photograph the weight they considered it deserved.

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13 At the time of the alleged offences and before the passage of the *Criminal Code Amendment Act* 1997 (Tas), homosexual activity was unlawful even when performed in private by consenting adults.

14 *Shepherd v The Queen* (1990) 170 CLR 573.

The verdicts were not unreasonable

21 Nor, subject to the misdirection point, do I see any error in the treatment by the Court of Criminal Appeal of the complaint that the verdicts, on those counts of the indictment upon which the appellant was convicted, were unreasonable[15].

22 As is usually the case in a lengthy trial which comes under scrutiny in this Court, some elements in the evidence supported the appellant's assertion that he was not guilty of the offences charged. Despite an alleged encounter of six hours, the complainant failed to identify the appellant as his assailant in two separate out of court occasions when given the opportunity to do so. Although evidence of sperm was found in the complainant's anal canal, DNA tests could not establish that it came from the appellant. The complainant's testimony was that his assailants used the names "Tom" and "Frank". Neither of those names coincided with the name of the appellant; nor was it suggested that he was known by either name. Although the complainant alleged that he was tied up for about six hours, there was no evidence of bruising of the hands or wrists, as might have been expected from such a long period of confinement. The complainant was sure that lubricant had been used but there was no scientific evidence that it was found on his person; nor was any found by police on the appellant's bed. The complainant had a long history of psychiatric disturbance. His extensive medical record included various complaints of sexual abuse. There were some similarities between the allegations made against the appellant and his alleged companion and at least one earlier incident of unconsensual sexual assault. The complainant was reported as suffering from hallucinations, blackouts and chronic alcohol and drug abuse. He admitted that in the past he had attempted suicide. There were repeated complaints by the complainant to hospitals against his family and others. He acknowledged that he had lied to medical practitioners in the past, principally in attempting to procure medicinal drugs. All of these elements of his evidence (most of which the complainant admitted) made it important that his testimony be scrutinised with care. Repeatedly and with great clarity, the trial judge warned the jury that they should do so.

23 As against this evidence, there was much other testimony which strongly supported the conclusions to which the jury came. In fact, the evidence against the appellant combined to a very strong circumstantial case. The appellant left a glass of beer, which he had hardly touched, to follow the complainant out of a hotel, and to obtain a car and take him to his home. On his own story, he took the complainant upstairs to his own bed, although the latter had urinated in his shorts and was bleeding from a fall. If his objectives were as compassionate as he claimed, it was open to the jury to find it extremely suspicious that a little more than an hour later the appellant removed the complainant from his home and returned him, still

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15 *M v The Queen* (1994) 181 CLR 487 at 492, 523-525; *Jones v The Queen* (1997) 72 ALJR 78 at 84-85, 94-95; 149 ALR 598 at 606-607, 619-621.

affected by alcohol or some other drug, to a public street near where he had originally picked him up. Although the appellant described the complainant as being "paralytic" and in a state consistent with his being "dead drunk", and although he claimed he was in his home in this state for only a relatively short time, the complainant was able to give the police a most detailed sketch of the appellant's home showing the layout of the upstairs bedroom and the position of a toilet. The sketch also described furniture, wall colouring and other features of the interior with a clarity seemingly difficult to reconcile with a short visit in a profoundly inebriated state. The discovery of a distinctive copper bed warmer upon which the complainant had commented, apparently removed from the appellant's home to a locked room on Church premises, was consistent with attempts by the appellant to take from the scene of the alleged offences an item which might otherwise add credence to the complainant's story. The presentation of the complainant some seven hours after he was picked up by the appellant was objectively established and consistent with the complainant's story. The appellant's evidence left five hours or more of time unexplained. The spermatozoa found in the complainant's person was described as having been deposited between 4 and 24 hours prior to the test, conducted soon after the police were called by the complainant's brother. This was consistent with the complainant's allegation. An innocent hypothesis, compatible with the appellant's version of events, would have been that the complainant had a sexual encounter (consensual or otherwise) at the time between his return to the street and his arrival at his brother's home. But then there was the tie, the remnant of which apparently matched the photograph taken at the appellant's home some four months previously.

24 The circumstantial evidence, supporting the complainant's accusations and undermining the appellant's explanations, was therefore substantial. Clearly, on that evidence, it was open to the jury to conclude that the appellant had bound the complainant with the tie and, over a period of many hours, that (contrary to the protestations of the appellant) sexual activity had occurred. If the appellant had relied on a defence that sexual activity with the complainant had been consensual, there would doubtless have been problems for him of a professional, religious and legal kind. But he never raised such a defence. He denied absolutely any sexual contact with the complainant. On the basis of the Crown case, which I have outlined, it was therefore open to the jury to reject the appellant's explanations. Subject to what follows, it was open to the jury, notwithstanding the repeated warnings of the care with which they had to approach the complainant's evidence, to accept that, on this occasion and as against the appellant, the complainant was telling the truth.

25 The only remaining ground which the appellant advanced to support the suggestion that the guilty verdicts were unreasonable was that they rested upon verdicts which were difficult to reconcile. The Court of Criminal Appeal correctly analysed the differentiation in the verdicts. There was a directed verdict on count 8 of the indictment. The jury acquitted the appellant on counts 7, 9, 10, 11 and 12. However, as Cox CJ pointed out in the Court of Criminal Appeal, the

differentiation was consistent with a careful scrutiny by the jury of the nature and quality of the evidence relating to each count. The approach of the Court of Criminal Appeal on this issue conformed to the authority of this Court[16]. One consequence of this Court's insistence upon specificity in the expression of criminal charges and on their separate explanation to a jury is that cases will occur where a jury rationally differentiates between the establishment of an accused's guilt upon one (or more) counts but concludes that guilt has not been proved on others. This could easily have been the case here. Leaving aside the third ground of complaint to which I now turn, neither the evidence independently reviewed nor the suggested inconsistencies between the verdicts sustains the appellant's contention that the verdicts on the counts of which he was convicted were unreasonable or such as could not be supported having regard to the evidence[17].

Rejection of and directions on expert evidence

26 The third complaint, on which the appellant's argument concentrated, has two parts. First, it was suggested that the trial judge erred in excluding evidence of Dr Sale which the appellant wished to tender. Secondly, it was submitted that having permitted some evidence, the judge misdirected the jury on the use which they might make of it. The relevant testimony of Dr Sale and the rulings and directions of the trial judge are set out in the reasons of Callinan J.

27 The trial judge was right to approach with caution any attempt to call evidence which could have the effect of usurping the jury's function in reaching their ultimate conclusion as to whether a witness was telling the truth or not. The problem confronted by the Court in a case of this kind is that of reconciling two rules of evidence liable to come into conflict. The first is that the assessment of credibility is a matter for the tribunal of fact (here the jury). In the present state of science it may not be usurped by technology (such as polygraphs)[18]. Nor may it be assumed by witnesses, including expert witnesses, offering their opinion on the accuracy, consistency and believability of the testimony in question, however derived. On the other hand, the study of human behaviour, including psychology, is an accepted scientific discipline. It is one upon which the frontiers of expert knowledge are constantly expanding[19]. If it were necessary in every trial to confine the tender of psychological and psychiatric evidence to cases where a physiological injury could be objectively demonstrated, decision-makers

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16 *MacKenzie v The Queen* (1996) 71 ALJR 91 at 100-102; 141 ALR 70 at 82-85.

17 *Criminal Code Act* 1924 (Tas), s 402(1).

18 *R v Beland* (1987) 36 CCC (3d) 481 at 489.

19 cf *Suresh v The Queen* (1998) 72 ALJR 769 at 778; 153 ALR 145 at 157.

(including juries) might be deprived of relevant evidence[20]. In particular, where established patterns of human behaviour have been studied, analysed and scientifically described, it is appropriate that evidence about them should be available to the decision-maker[21]. It is not then admitted to usurp the decision-maker's ultimate assessment of the credibility of the witness. Principle, and a recognition of the imperfections of the science, deny that consequence. For every pattern of human behaviour, there will be exceptions.

28 In the present case, it would have been quite wrong to cast a person such as the complainant into a limbo of unbelievable witnesses simply because, in the past, he had manifested psychological conditions which are often, or sometimes, associated with mendacity. The law could not condone removing its protection from the complainant simply because his past history suggested a tendency sometimes to distort, to confuse and to lie. But if the study by an expert psychiatrist of the extensive medical and hospital records of the complainant convinced him that the complainant was manifesting symptoms of an established psychological condition, it would be erroneous to deprive the decision-maker (in this case the jury) of evidence about what such a condition entailed. Such testimony goes beyond the ordinary experience of the trier of fact[22]. It is not a mere analysis of statistical probability[23]. It is not tendered to suggest that a witness, capable of telling the truth, would *choose* not to do so[24]. It does not involve an invitation to the decision-maker to abandon its duty itself to determine the credibility of the witness[25]. It is rather the provision by an expert witness of an opinion resting upon established research within that expert's scientific discipline. The foundation may not be physiological. At least it may not be entirely so or presently known to be so. However, the causes of some psychiatric disorders being unknown, it is scarcely sensible to exclude evidence of opinion about a syndrome which has been identified simply because science, to this time,

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20 cf *R v Hedstrom* (1991) 63 CCC (3d) 261 at 272.

21 An example of the willingness of the courts to accept psychiatric and psychological evidence of newly studied patterns (syndromes) of human behaviour is battered women's syndrome; cf *R v Lavallee* [1990] 1 SCR 852; *Malott v The Queen* [1998] 1 SCR 123.

22 *R v Turner* [1975] QB 834 at 841; *R v Lavallee* [1990] 1 SCR 852 at 889-890; *R v Marquard* (1993) 85 CCC (3d) 193 at 207-208.

23 *R v Taylor* (1986) 31 CCC (3d) 1.

24 *MacKenney* (1981) 76 Cr App R 271 at 276.

25 *R v Marquard* (1993) 85 CCC (3d) 193 at 228.

has been unable to prove with certainty that there is an objective physiological foundation for the opinion.

29 Therefore, in principle, while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility, is admissible, provided that (1) it is given by an expert within an established field of knowledge relevant to the witness's expertise; (2) the testimony goes beyond the ordinary experience of the trier of fact; and (3) the trier of fact, if a jury, is provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine[26].

30 In the present case, although some such evidence was ultimately admitted, its impact was then undermined by the express direction of the trial judge that:

> "Dr Sale's opinion really does not count for anything because he did not get to the stage of diagnosing an actual medical condition which would be … [beyond] your experience and mine".

With respect, the evidence was evidence of a "medical condition". It did relate to an established pattern which had been scientifically observed and documented. It was evidence given by an expert in the science in question. The jury were entitled to receive it and to use it, although with an appropriate warning that such evidence could not usurp the jury's determination of the credibility of the complainant, which was a question ultimately for them to decide.

31 The significance of the direction which the trial judge gave was two-fold. First, in the words of Brennan J in *Bromley v The Queen,* it effectively deprived the appellant of the evidence of a medical expert likely to be more vivid and authoritative, as such, than a judicial warning of what might be regarded as a statement of the obvious[27]. Secondly, the importance of the complainant's testimony was crucial to the Crown case. Anything that tended to undermine that evidence was therefore vital for the appellant. Anything that tended to bolster it was supportive of the Crown and especially so because of its many obvious problems to which the trial judge properly drew the jury's attention.

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26 *R v Marquard* (1993) 85 CCC (3d) 193 at 210 per L'Heureux-Dubé J, 223 per McLachlin J; Mewett, "Editorial - Credibility and Consistency" (1991) 33 *Criminal Law Quarterly* 385 at 386; cf *Bromley v The Queen* (1986) 161 CLR 315 at 322 per Brennan J; *MacKenney* (1981) 76 Cr App R 271.

27 See *Bromley v The Queen* (1986) 161 CLR 315 at 325.

Conclusion and orders

32 Although this was a strong circumstantial case for the Crown, for reasons which I have demonstrated, the prosecution case depended substantially, from first to last, on the complainant. The exclusion of expert evidence and misdirections about the use of the evidence which was received, relevant to the jury's approach to the complainant's testimony, was therefore very important. The jury may have reached their conclusion without feeling any need to rely on psychiatric testimony. But for all that this Court knows, they may, obedient to the instructions of the trial judge, have had doubts about the complainant's veracity but put those doubts to one side where they would not have done so had the expert evidence of established psychiatric conditions been allowed in full and its use properly explained to them[28]. It cannot be said that the appellant's conviction was inevitable had the evidence been properly admitted and explained.

33 Like Slicer J in the Court of Criminal Appeal, I consider that this is the only ground upon which the appellant was entitled to succeed. Although Cox CJ saw no error, Wright J was also of opinion that the trial judge had "incompletely and inaccurately expressed himself" but not in such a way as to deprive the appellant of the opportunity of acquittal otherwise reasonably open to him[29]. According to the high standards which our law insists upon in the conduct of criminal trials, a mistake occurred which cannot, in this case, be treated as immaterial or insubstantial. It is not one for the application of the "proviso"[30].

34 The foregoing are the reasons why I agreed in the orders proposed by Gaudron J and announced by the Court on 27 May 1998.

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28 On the importance of judicial clarification about the use of such evidence see *BRS v The Queen* (1997) 71 ALJR 1512 at 1521-1522, 1526, 1543; 148 ALR 101 at 113-114, 119-120, 142-143.

29 *Farrell v The Queen* unreported, Court of Criminal Appeal (Tas), 7 June 1996 at 4 per Wright J.

30 *Criminal Code Act* 1924 (Tas), s 402(2); cf *Domican v The Queen* (1992) 173 CLR 555 at 565-566, 570-571; *Crofts v The Queen* (1996) 186 CLR 427 at 452; *MacKenzie v The Queen* (1996) 71 ALJR 91 at 106; 141 ALR 70 at 91.

35 HAYNE J. The appellant, then an Anglican priest, went to a hotel in Hobart. According to him the hotel was "one of the very few really rough dives" in Hobart. He was later to tell police that he stayed drinking at the hotel from lunch time to about 4.00 pm but came back later in the day "for a final drink". While the appellant was at the hotel on this second occasion, another man ("the complainant"), who had been drinking at the hotel and was much affected by alcohol, left but fell over on the footpath outside the hotel. According to the appellant, he went to the aid of the complainant. He put the complainant into his (the appellant's) car and took him to the appellant's home. There, the appellant, by his account, managed to help the complainant into the house and put him on the sofa in the sitting room. The appellant went to make a cup of coffee; on his return he found that the complainant had fallen asleep.

36 The appellant told police that he thought that if someone called, it would be hard to say this was someone that he had "just picked up in the street"; he therefore thought it wise to move him somewhere else. Accordingly, he took him upstairs to the bedroom which he, the appellant, used. He chose to put him there rather than in the spare bedroom because the bed in the spare bedroom was not made up and was covered in washing. The complainant was, according to the appellant, unconscious at this time.

37 The appellant said that after about an hour he became "really anxious" to get the complainant out of the house and he therefore went back upstairs, woke him and asked him where he lived. The complainant gave the appellant an address despite being difficult to understand and incoherent. The appellant said that he drove the complainant to a point near the address which he had given and left him there, still very drunk.

38 The complainant gave a very different version of events. According to him he was taken to a house where he was bound, sexually assaulted and beaten by two men - one who spoke with a distinctive cultured accent and was called Tom and another who was known as Frank or "the animal". (The prosecution alleged that the appellant was the man called Tom. I shall refer to the other man as "Frank".) Eventually the complainant was led from the house, with a pillowcase over his head and his hands tied behind his back, and driven to Elizabeth Street in North Hobart. From there he walked first to the home of his brother and then to the home of another of his brothers. At the first house, he was unable to rouse the occupants (it being in the early hours of the morning) but at the second house he attracted the attention of his brother who cut the necktie that had bound the complainant's hands. The complainant had earlier managed to remove the pillowcase and he left it at the first house at which he sought help.

39 The complainant alleged that he had been raped and beaten. Police were called and he was medically examined. On examination he was found to have semen in the anal cavity. Genetic testing of that material was inconclusive. It neither implicated nor exonerated the appellant.

40 Some weeks before this incident, the appellant had complained to police that he had been assaulted in his home by two men whom he had met at the same hotel. These men, according to the appellant, had not only assaulted him, they had set about damaging his home. Police took photographs of the appellant's home. In one of the photographs there is depicted a necktie of quite striking and unusual pattern. It is shown lying on the floor of the appellant's house. The tie that was used to bind the complainant was very similar to the tie shown in the police photograph.

41 The complainant, a man aged 34 at the time of the events, has a long psychiatric history. At the trial of the appellant it was suggested that the complainant had attempted suicide more than once. He acknowledged that he had been admitted to hospital more than once for treatment for alcohol and benzodiazepine abuse. According to medical records, he had been diagnosed as having borderline personality disorder or an anti-social personality disorder or both.

42 The appellant was charged with eight counts of rape, two counts of aggravated sexual assault and two counts of assault. He was found guilty of one count of assault, one count of aggravated sexual assault and four counts of rape. Four of those verdicts of guilt (three counts of rape and the count of aggravated sexual assault) were verdicts returned by majority.

43 Having failed in his appeal to the Court of Criminal Appeal of Tasmania, the appellant now appeals to this Court by special leave. The principal focus of the arguments advanced to this Court was upon evidence which had been called on the appellant's behalf from a consultant psychiatrist, Dr Sale, and the trial judge's charge to the jury on that subject.

Dr Sale's evidence

44 Dr Sale gave evidence of his opinion that the complainant was suffering certain psychiatric conditions. Dr Sale had not examined the complainant but based his opinion on hospital and medical records relating to the complainant which were, after some debate, tendered in evidence with the consent of the prosecution. The material (which became Exhibit 49) was treated at trial as being evidence of the truth of the contents of the records including the opinions that were expressed in them by doctors and nurses who had examined, and in some cases treated, the complainant over the years. Exhibit 49 also contained reports by welfare officers and other similar material. The records covered a period of more than 13 years.

45 Dr Sale swore that in his opinion the complainant had a mental disorder which he described as "alcohol dependence and polysubstance abuse" and "a personality disorder". He described a personality disorder as "perhaps more like a disability than an illness ... where an individual has a characteristic way of

behaving, of responding to situations, of doing things that is mal-adaptive and causes distress or dysfunction either to themselves and/or others". He said that these were the only disorders that he could clearly identify.

46 The trial judge intervened in the course of Dr Sale's evidence-in-chief on several occasions. There was a deal of debate between trial counsel for the appellant and the trial judge about the form of questions that were being put to Dr Sale. Some questions were rejected by the judge but no complaint is now made about that.

47 Much of the debate about Dr Sale's evidence took place in the presence of the jury and at one point the trial judge sought to explain to the jury what the debate was about. Referring to what had been said by Brennan J in *Bromley v The Queen*[31] he said that

> "[E]vidence showing that [a witness'] capacity to observe, to recollect or to express [what he observed] or recollected if there is evidence that that was impaired by mental disorder then it may be called before the jury because it affects of course the weight you give that evidence. But short of that that is what juries are for, it is for them to assess the witnesses and see what they make of them."

The trial judge went on to say:

> "But if it goes beyond the matter of ordinary assessment, and that would include ordinary alcoholic people, that's juries' general experience of hearing or seeing or speaking to alcoholic people from time to time, if it is merely a matter of that then it is for you to decide what you believe or what you don't believe of his story. But if for example he had some specific psychiatric disorder, which I will call X and X was such that, feature I should say or a sign of the illness X was that witnesses couldn't accurately register what they saw or they completely fantasized about things and then looked you in the eye and told you it is a truth. If that was a feature of disorder X then it would only be right that a psychiatrist comes and tells you that isn't it? But unless it gets to that stage then it seems to me that possible illnesses and thoughts and ideas is not [the] sort of material to go before you. Now I explain all that to you so you can follow what is going on."

This, the appellant contended, amounted to a direction of law to the jury that they should disregard the psychiatric evidence unless it amounted to evidence of the kind described by the judge. I do not accept that the jury would have understood the judge to be giving any direction to them about the evidence that had already been led from Dr Sale or was later to be led from him. All that the judge was doing

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31 (1986) 161 CLR 315 at 322.

was explaining to the jury what the debate that was being conducted in their presence was about. In aid of that explanation he gave an example which was, and would have been understood by the jury to be, no more than a hypothetical case. No error is demonstrated in this respect.

48 Trial counsel for the appellant then continued his examination of Dr Sale. Dr Sale said that in forming his opinion that the complainant suffered from alcohol dependence and polysubstance abuse he had relied on the fact that the complainant had attended regularly upon various health services in Tasmania and in Victoria seeking assistance for his alcohol problems and for his substance abuse problems and that on several occasions he had been admitted for detoxification. In the doctor's opinion the major substances abused by the complainant were benzodiazepines and that at times the complainant had presented to hospitals reporting what the doctor described as "prodigious use of substances". He went on to say that the ingestion of large quantities of benzodiazepines "can certainly affect memory" and that "a very common side effect of benzodiazepine use and especially abuse would be periods of amnesia during the time when the levels are at the peak levels in the person's body". Such persons, in Dr Sale's opinion, become dependent upon the benzodiazepines and need to find ways of maintaining their supply of the drugs and for that purpose may lie to doctors in order to obtain supplies on prescription.

49 Dr Sale said that as a heavy user of alcohol, the complainant was at risk that his alcohol abuse would have some effect on his memory and ability to recall but that he was unable to say whether the complainant had suffered such effects.

50 Dr Sale then amplified his opinion that the complainant suffered a personality disorder. Personality disorder was, so Dr Sale said, often subdivided into various types and in the complainant's case "there were two particular types that repeated over and over again in the files - they were the diagnosis of anti-social personality disorder and the diagnosis of borderline personality disorder." It may well be that the records do not reveal as frequent repetition of these diagnoses as the doctor suggested in this answer but I leave this to one side. He explained to the jury that the terms "anti-social personality disorder" and "borderline personality disorder" are defined in a diagnostic and statistical manual of mental disorders as a classificatory system. A person with a borderline personality disorder "characteristically has stormy relationships and stormy moods - and they are usually impulsive and they are frequently attempting suicide or threatening suicide". A person with an anti-social personality disorder "is a person who habitually deviates from cultural norms regarding social behaviour such that they frequently have an extensive criminal record, they frequently have a poor occupational record, they tend to exploit or to con others, they are often regarded as deceitful."

51 Dr Sale said that it was his opinion that the complainant suffered from anti-social personality disorder and that it was probable that he suffered from

borderline personality disorder but that in the latter case he could not "reach all the criteria" required by the diagnostic and statistical manual. In his opinion, a borderline personality disorder would have no impact upon memory or reporting. He said that the anti-social personality disorder "will not actually affect the structure of a person's memory but it may have an impact on what they report". He told the jury that "they [persons suffering from anti-social personality disorder] are inherently less truthful than the average person."

The trial judge's direction

52 The trial judge directed the jury that they must exercise "some special care" when considering the complainant's evidence. The complainant had admitted that he had prior convictions for offences of dishonesty and that he had lied to get drugs. This, the trial judge said to the jury, might be used in considering what weight to give to his evidence. He went on:

> "Now I'm not suggesting to you that you should think that his evidence is unreliable and I'm not suggesting to you that you should think it is reliable, that's your decision, but the law requires me to warn you about the need to look for [sic with] extra care at the complainant's evidence. Doctor Sale told you that he's got these personality disorders but he was quite clear that he had no opinion that he had a psychiatric condition that affected his capacity to recall events and recount them to you. And although [trial counsel for the appellant] referred to this evidence at some length and said about it, in effect, you must be careful when you assess his reliability, I direct you in this way that you must take that care but not because of what Doctor Sale said, juries only need evidence from psychiatrists when they have got information and opinions about people's mental health that ordinary folk like you and I would not be able to form, that's when we need psychiatric help, and Doctor Sale didn't have any of those opinions about this man. He knew what we all know, that he's alcoholic, he said that himself, that he's addicted to these prescription drugs, he said that himself, he's got a turbulent history, he's been admitted to hospitals here and Victoria, he's attempted to commit suicide. You remember he gave you a bit of detail about all of that. In Victoria, when he tried to electrocute himself, and he's lied to doctors, as I say, he's had hallucinations and we all know that if somebody with that sort of background tells you something happened you need to scrutinise it with extra care. That's what I'm telling you about [the complainant's] evidence, because of that background history you need to scrutinise it with care before you accept it. It's an ordinary proposition, of course. It was plainly put to you on behalf of the defence that by reason of his history you couldn't put any faith in what [the complainant] said, in fact he made up the whole account in order to draw attention to himself or get a drink. Well, you will have to assess that. It would be wrong to write off somebody of no account just because they're alcoholic and addicted to drugs and with this kind of background, it would be quite wrong to say 'Well anything you say to us ever again we'll never

> believe you.' On the other hand, it would be quite wrong and certainly unfair to the accused with respect to such a person to say 'Oh well, I believe everything you tell me, no question. It's just as if the Commissioner of Police had told me himself', as it were, to pick him at random. So it would be wrong either way, and all you do is apply your common sense and look at the other evidence, the outside evidence."

At a later point in his charge, discussing expert evidence tendered about the genetic analysis of the semen taken from the complainant's anus, the trial judge said:

> "Well now I just mention briefly the medical evidence and remind you, as I think [trial counsel for the appellant] correctly told you, and I mention to you that it is up to you whether you accept expert opinion evidence or not. The rule of evidence is that generally witnesses can only tell juries what they perceive with one of their senses, it is something they see or hear or touch or smell and so on, and it is up to the jury to draw what inferences they think are appropriate from that. But sometimes ordinary human experience is not sufficient to understand the evidence so where we move into the realm of expert testimony such as medical testimony the witnesses are allowed to give their opinion of matters within their expertise and that is why you got opinions from these Doctors you see but you could not get opinions from others and that is why Dr Sale's opinion really does not count for anything because he did not get to the stage of diagnosing an actual medical condition which would be on [sic beyond] your experience and mine."

No exception taken

53 Trial counsel for the appellant took no exception to the trial judge's directions about Dr Sale's evidence. There is no rule of court or other statutory provision in Tasmania that deals expressly with the consequences of the failure of trial counsel to take exception to what, on appeal, is said to be misdirection or non-direction of the jury[32]. But as Barwick CJ pointed out in *General Motors-Holden's Pty Ltd v Moularas*[33]:

> "... the common law on this matter is quite clear. Without attempting an exhaustive statement, it is established that, generally speaking, a criticism of the summing up which is capable of being cured at the trial must be taken at the trial and the judge asked to correct it. If this is not done in a case where it ought to be done, a new trial on the basis of that criticism of the summing up will, in general, not be ordered. Again, the matter is not the subject of any

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32 cf Criminal Appeal Rules 1952 (NSW), r 4.

33 (1964) 111 CLR 234 at 242-243.

> hard and fast rule, because the court retains a general discretion and is able in a proper case in the interests of justice to relax the requirement."[34]

The underlying purposes of the rule include, first, the obvious desirability of avoiding unnecessary retrial of proceedings but also the need to give full weight to the way in which the jury may be expected to understand directions given to them when proper regard is had to the atmosphere of the trial. It is not always easy to discern from the written record of a trial the relative importance attached by parties to points that arise in the course of the hearing. Further, counsel for an accused may well make a forensic choice not to draw attention to some aspect of the trial judge's charge lest, by doing so, the point assume an importance which counsel would rather it did not. In appropriate cases, trial counsel's failure to take exception will be a matter of great importance.

54 In this case, however, no point of this kind having been made by the prosecution in either the Court of Criminal Appeal or this Court, I leave it to one side.

55 The appellant's central contention was that the trial judge's direction took the consideration of Dr Sale's evidence away from the jury and that in doing so the trial judge denied the appellant the benefit of the weight which Dr Sale's diagnosis and opinion gave to the appellant's contention that the complainant should not be believed.

56 It is as well to begin consideration of this argument by recalling some fundamental propositions. First, whether a witness should be believed is ordinarily a matter for the tribunal of fact. Cross-examination is the chief method of testing the credibility of a witness. Secondly, the common law has always imposed strict limits upon admitting evidence which affects only the credit of a witness and is not relevant to matters in issue. As Latham CJ pointed out in *Piddington v Bennett and Wood Pty Ltd*[35]:

> "Exceptions to the rule at common law are that after cross-examination of his opponent's witnesses a party may give evidence to show that they are notorious liars, or have given their testimony from a corrupt or other wrong motive, or that they have previously made statements inconsistent with their

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34 cf *Quartermaine v The Queen* (1980) 143 CLR 595 at 612 per Mason and Wilson JJ; see also *Bahri Kural v The Queen* (1987) 162 CLR 502 at 512 per Toohey and Gaudron JJ; *Duke v The Queen* (1989) 180 CLR 508 at 529 per Toohey J; *R v Clarke & Johnstone* [1986] VR 643 at 661-662.

35 (1940) 63 CLR 533 at 545.

evidence. A statutory exemption allows proof of convictions where such convictions have been denied by a witness."

57 *Bromley* was a case about the sufficiency of directions given to a jury, not about admissibility of evidence. Nevertheless, all of the members of the Court in *Bromley* accepted that evidence showing that a witness' mental disability "which may affect his or her capacity to give reliable evidence"[36] was admissible. But whether the witness should be believed remains a question for the jury. *Bromley* examined whether the directions given to the jury in that case were sufficient.

58 Counsel for the appellant contended that the course of debate between trial counsel and the trial judge during Dr Sale's evidence, and the directions which the trial judge gave to the jury, indicated that the trial judge considered that evidence led from Dr Sale would be relevant if, and only if, the doctor was of the opinion that the complainant's mental disorders had actually affected his capacity to observe, recollect and express the matters which his evidence was tendered to prove. For my part I doubt that the matters to which counsel for the appellant pointed lead to the conclusion asserted but the complaint now made is not about any ruling on evidence, it is a complaint about the judge's charge.

59 Dr Sale was of the opinion that the complainant was suffering from alcohol dependence, polysubstance abuse and a personality disorder which took the form of an anti-social personality disorder (and probably took the form of a borderline personality disorder). His opinion then ascribed certain characteristics to persons suffering from those conditions. For present purposes the most significant opinion was that persons suffering from anti-social personality disorder "are inherently less truthful than the average person".

60 If matters had been left there it would have been for the jury to determine whether to accept Dr Sale's evidence. That is, it would have been for the jury to decide whether Dr Sale should be accepted as telling the truth (and I say at once that there was no suggestion that he was not) and whether his opinions should be accepted (and no contrary evidence was called). But at its highest his evidence amounted to telling the jury that the complainant was "inherently less truthful than the average person".

61 The psychiatric condition of the complainant was a matter for expert evidence. To this extent the trial judge was wrong to tell the jury that Dr Sale did not have opinions about the complainant's "mental health that ordinary folk like you and I would not be able to form". To that extent the judge was wrong to take away from the jury their task of assessing Dr Sale's evidence. But in doing so the

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36 (1986) 161 CLR 315 at 319 per Gibbs CJ; cf "a mental disorder which affects his capacity to observe, recollect and express the matters which his evidence is tendered to prove" at 322 per Brennan J.

judge directed the jury to proceed as if they had resolved this question in favour of the appellant when he told the jury that they needed "to look [with] extra care" at the complainant's evidence. And in doing that the judge referred to the complainant being "alcoholic", being addicted to prescription drugs, having a turbulent history, having been admitted to hospitals, having attempted to commit suicide, having lied to doctors and having had hallucinations. The jury therefore had the benefit of a direction which, to borrow from language used in connection with identification evidence[37], had "the authority of the judge's office behind it", was "cogent and effective" and isolated and identified for the benefit of the jury matters of significance which might reasonably be regarded as undermining the reliability of the evidence which the complainant gave. Contrary to the contention of the appellant the warning to the jury by the judge brought the dangers of acting upon the complainant's evidence home to the jury authoritatively and vividly.

62 This, then, was no misdirection to the jury which disadvantaged the appellant. He was not deprived of a fair chance of acquittal[38].

Verdicts unsafe or unsatisfactory?

63 The appellant also submitted that the verdicts were unsafe and unsatisfactory. It was submitted that the jury's acquittal of the appellant on some counts demonstrated the insufficiency of the evidence against him. The counts of which the appellant was acquitted were those in which the principal offender was alleged to be Frank, rather than the appellant. The prosecution's case was that the appellant aided and abetted Frank in the conduct attributed to him.

64 There was little evidence before the jury of any active conduct on the part of the appellant in encouraging Frank in his assaults on the complainant. At several points in his charge to the jury concerning the counts in which Frank was alleged to be the principal offender, the trial judge emphasised the need for the jury to consider whether the appellant had actively encouraged Frank's conduct. In the end, other than the alleged presence of the appellant during part or all of Frank's assaults upon the complainant, the only evidence of encouragement that was adduced was that at some point the appellant told the complainant that Frank was going to have intercourse with him too but that while Frank was doing so, according to the complainant, "Tom was in the room watching but Tom did nothing and said nothing".

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37 *Domican v The Queen* (1992) 173 CLR 555 at 562.

38 *Criminal Code Act* 1924 (Tas), s 402; *Wilde v The Queen* (1988) 164 CLR 365 at 372 per Brennan, Dawson and Toohey JJ; *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

65 In those circumstances I attach no weight to the different verdicts given by the jury to the various counts charged. The verdicts are entirely consistent with the jury not reaching the requisite degree of satisfaction that the appellant had aided and abetted Frank in his assaults on the complainant.

66 Overall the case against the appellant on the counts of which he was found guilty was strong if not overwhelming. There could be no doubt that the complainant had been assaulted. His hands were tied behind his back in a way which must have been done by someone else. His story of being hooded with a pillowcase was borne out by scientific evidence that showed that he had bled onto the inside of it. The scientific evidence also showed that he had recently had anal intercourse and the other facts and circumstances indicated that the intercourse was not consensual. There was independent evidence, and indeed the appellant acknowledged, that the appellant had picked the complainant up outside the hotel where they had both been drinking and that at that time the complainant was very drunk. On the appellant's own story he had taken the complainant to the house in which the complainant said he was assaulted. The complainant was able to describe parts of the house into which the appellant said he had not taken him and the bedroom from which the appellant said he had taken the complainant while the complainant was still unconscious. Standing alone, these matters might have made a strong circumstantial case against the appellant.

67 But of greatest difficulty to the appellant was the tie which had been used to bind the complainant. It was submitted that the tie should not have been admitted in evidence. It was said that the prejudicial effect outweighed its probative value unless evidence were led (which it was not) of the number of such ties sold in Tasmania. There is no substance in this contention. No doubt the evidence of the tie was very damaging to the appellant. It was for the jury, drawing on their collective experience and common sense, to say whether ties like the one tendered in evidence were common and whether the tie tendered was the one shown in the photograph. Even if the jury had thought that ties of the particular pattern were not uncommon (a conclusion which for my part I would find surprising) that by no means concluded the question. The back seam of the tie shown in the photograph was visible. The juxtaposition of the pattern on the fabric thus created was distinctive and the jury could readily conclude that it was the same as that on the tie tendered in evidence.

68 It was therefore well open to the jury to conclude that the tie was one which some weeks earlier had been in the possession of the appellant. The appellant's evidence of giving the tie away before he first met the complainant was a story which the jury could well have rejected. Similarly, the jury could well have concluded that the appellant deliberately hid an antique warming pan which the complainant had described to police as being present in the house where he was assaulted and that the appellant had hidden this item following publicity given to the alleged assault before police first spoke to the appellant.

69 The case against the appellant was very strong. The jury's verdicts were not unsafe or unsatisfactory.

70 The appeal should be dismissed.

CALLINAN J.

Facts

71 The appellant, a clergyman, was convicted in the Tasmanian Supreme Court of the crimes of rape, aggravated sexual assault and assault perpetrated in Hobart on the evening of 23 February 1994. He was acquitted of other crimes alleged to have been committed during the course of that evening. He appealed to the Tasmanian Court of Criminal Appeal against sentence, and conviction, on grounds of wrongful reception of evidence, inadequate direction to the jury, failure to discharge the jury and that the verdicts were unsafe and unsatisfactory. He also sought a retrial on the basis of fresh evidence obtained since his trial.

72 On the evening of 23 February 1994, the appellant was present in a suburban hotel at the same time as the male complainant. The complainant, who was drunk, left the hotel, was seen by two women with nursing experience to be in difficulty and was assisted by them from a position of danger he had assumed on the roadway. The appellant left the hotel and volunteered assistance to the complainant. He departed from the scene and returned with his motor vehicle. Assisted by the women, the appellant put the complainant, who had been incontinent and was wet, in the front seat of his motor vehicle. The car was then driven away.

73 In the early hours of 24 February, the complainant appeared at the home of his brother who resided in the same neighbourhood as the hotel and the home of the appellant. Police were notified and the complainant was taken to hospital and medically examined.

74 So much is either conceded by the appellant or clearly established by evidence which cannot be doubted.

75 The complainant alleged that during the course of the previous evening, he had been repeatedly assaulted and raped by two men (referred to by him as Tom, or "the gentleman" and Frank, "the animal") at an unknown residence, the interior of which he could describe. He claimed that with his hands tied, and head hooded in a pillow case, he had been taken by car and left in a street in North Hobart. From there he had made his way to the home of his brother.

76 The appellant was interviewed by police officers. Whilst he admitted that he had taken the complainant to his home, he denied any misconduct. His gesture, he maintained, was one of kindness to a person in distress. He was unable to ascertain the complainant's address and had taken him, he said, to his house because he was drunk and insensible. The appellant assisted or carried the complainant to his bedroom upstairs where he placed him on his own bed. He claimed that he had chosen his own bed because the one in the spare room was not made up and was covered in the appellant's clothing. After the complainant woke, between one and

two hours later, the appellant took him, and left him, he said, in the area in which he had encountered him.

77 The appellant's claim that the complainant could not provide him with his address does not sit comfortably with the complainant's ability to give a reasonably accurate description of the bedroom to which he was taken, and the improvement in his condition alleged by the appellant which induced the latter to remove him from his residence.

78 The complainant was unable to identify the appellant as one of his assailants. The complainant claimed that he had remained at the residence where the assaults occurred, for about six hours. He said that after he was returned to the street, he removed the hood, and, with his hands still tied, walked to his half-brother's house which was nearby. There, he dropped the hood in the yard of the house, and, as his half-brother was absent, walked some distance to his brother's residence, also close by.

79 The brother said in evidence that he was awakened at about 4am. He found the complainant with his hands bound with a necktie. The complainant was visibly upset and stated that he had been "abducted, bashed and raped". Police officers arrived at the residence at approximately 4.30am. The duration of the detention and the complainant's return was claimed to have been approximately 8.5 hours, that is from about 7.40 pm until 4 am. This was generally consistent with the complainant's estimate of the time he had spent at the place of his detention.

80 Medical evidence established that there was no trauma to the anal region, but demonstrated the presence of spermatozoa in the anus. DNA testing of this material neither implicated nor exonerated the appellant.

81 The complainant was 34 years old at the time of the offences. He had been a heavy drinker and was a long term consumer of drugs, especially benzodiazepine (a tranquillizer).

82 Coincidentally, the appellant had made a complaint of a violent assault by two men whom he had invited to his home as an act of charity some three months of so before the events the subject of these proceedings. In the course of investigating that assault upon the appellant, a police officer took photographs in which a good representation of a distinctly patterned, predominantly orange coloured necktie appeared, and which was apparently of the same colour and pattern as the one that was used to bind the complainant's hands. The appellant was unable, in cross-examination, to do more than speculate that the tie in the photograph may have been a gift to him. He had no effective recollection of it.

The appeal to the Court of Criminal Appeal

83 On appeal, the appellant unsuccessfully sought to persuade the Court of Criminal Appeal that the verdicts were against the weight of the evidence and were unsafe or unsatisfactory.

84 Complaint was made of the reception in evidence of the photographs of the necktie. The Court of Criminal Appeal was of the view that the evidence was relevant and admissible: that it was logically probative of the complainant's version of events and tended to negative that of the appellant.

85 The other complaint with respect to evidence related to the rejection, with brief reasons by the trial judge in the presence of the jury, of evidence from a psychiatrist (Dr Sale), called in the appellant's case. That witness had already given evidence on a voir dire. His evidence on the voir dire gives a good insight into the detail of the evidence he would, if permitted, have given before the jury:

> "A There were concerns about the effects of such substance use, particularly chronic alcohol use, it also seemed likely to me that [the complainant] suffered from a personality disorder. This was certainly a diagnosis that appeared repeatedly through the case files – that this was such a diagnosis. And, finally, there was a pattern in his hospital admissions and the way he tended to present to hospitals or other similar services that raised in my mind the possibility that he may also be manifesting factitious – a factitious disorder, that is, presenting to hospitals or agencies raising various complaints, the truth of which may be open to doubt.
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> …
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> Q Now, in the material you had before you, was there some evidence of what might be described as factitious disorder?
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> A Yes, the …
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> Q Well, firstly, if you could just explain what that means?
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> A It is the presentation with complaints that are not based in truth but it is different from malingering in that in malingering the presentation of a false illness or an exaggerated illness is for some external gain – such as financial reward. In factitious disorder the individual presents with false or exaggerated complaints but what they seek – they seem to be seeking is not any external gains such as money or drugs but some need to be recognised, some need to be looked after. Some need for attention. They may present with physical symptoms or they may present with psychological symptoms. The most extreme variant of this pattern of

behaviour is known as Munchausen syndrome which is fairly well known I think.

Q Now if you just stay with that syndrome, can you just tell us a bit about this syndrome known as Munchausen syndrome?

A Yes, it applies – it is applied to individuals who present repeatedly to hospitals usually gaining admission, their complaints are often of a dramatic nature, they often present as apparent emergencies. They usually present at hours when the less experienced medical and nursing staff are around so that they do gain admission. They often tell unnecessarily elaborate stories about why they are there, more than is needed for them to gain admission. And it is for that reason it is called Munchausen syndrome in that Baron Munchausen was a German raconteur famous for his tall tales. They often use aliases to gain admission to hospital because after a while they become recognised at various hospitals, they present at different hospitals and not tell hospital number two that they have recently been at hospital number one. Once in hospital their behaviour is not typical of what you would expect of a patient, in that they don't seem to be seeking to alleviate their complaints and their behaviour is often seen as disruptive or demanding.

Q Are those persons sometimes known as 'hospital hoboes'?

A Yes, that's an old term that was used, yes.

Q Do you see the evidence as to whether or not [the complainant] displayed the traits of what might be described as a 'hospital hobo'?

A Well certainly when I look through those medical files that came to my mind that this might be a case of a man with a factitious disorder, maybe not a full Munchausen in that there is no use of aliases as far as I am aware, but getting close to it with repeated hospitalisations. The hospitalisations tended to be precipitated by dramatic complaints, almost theatrical at times, and there were repetitive themes when he would turn up at various places the themes were of self-injury, by electrical means or complaints of sexual victimisation either to himself or to others.

Q And to make sure I understand you Doctor, is one of the themes that you identified in the hospital notes was one of those themes this repeated lament by him of being sexually victimised?

A Yes, or concerns that others had been."

Notwithstanding the trial judge's ruling, Dr Sale was permitted to give quite detailed evidence to the jury of the effects on reliability and memory of prolonged alcohol and drug ingestion, and of the manifestations of an anti-social personality disorder. For example, evidence was led of another doctor's opinion (given out of court, but recorded) of a trait of evasiveness on the part of the complainant.

86 During the course of Dr Sale's evidence before the jury, the trial judge (Underwood J) directly addressed them in these terms:

> "the High Court has said that … 'Evidence showing that a witness' capacity to observe, to recollect or to express what he observed or recollected if there is evidence that that was impaired by mental disorder then it may be called before the jury' because it affects the course the weight you give that evidence. But short of that that is what juries are for, it is for them to assess the witnesses and see what they make of them. But if it goes beyond the matter of ordinary assessment, and that would include ordinary alcoholic people, that's juries' general experience of hearing or seeing or speaking to alcoholic people from time to time, if it is merely a matter of that then it is for you to decide what you believe or what you don't believe of his story. But if for example he had some specific psychiatric disorder, which I will call X and X was such that, feature I should say or a sign of the illness X was that witnesses couldn't accurately register what they saw or they completely fantasized about things and then looked you in the eye and told you it is a truth. If that was a feature of disorder X then it would only be right that a psychiatrist comes and tells you that isn't it? But unless it gets to that stage then it seems to me that possible illnesses and thoughts and ideas is not [the] sort of material to go before you. Now I explain all that to you so you can follow what is going on."

His Honour's rejection of much of Dr Sale's evidence seems initially to have been based on two quite different propositions: that the evidence related to matters of ordinary observation rather than matters within the expertise of a psychiatrist; and, as it did not establish an actual illness or disability, it could not be led to prove the possible existence of such an illness or disability. However, the latter portion of his Honour's observations seems to show, that his major concern was that evidence of the possible existence of a relevant disability or illness, as opposed to evidence of its actual existence, should not be received. This also appears from the way in which his Honour dealt with questions subsequently asked of Dr Sale and objections to them by the respondent, and from his directions to the jury. In those directions, further reference is made to matters falling within the experience of an ordinary member of the community:

> "Doctor Sale told you that [the complainant's] got these personality disorders but he was quite clear that he had no opinion that he had a psychiatric condition that affected his capacity to recall events and recount them to you. And although [counsel for the appellant] referred to this evidence at some

length and said about it, in effect, you must be careful when you assess his reliability, I direct you in this way that you must take care but not because of what Dr Sale said, juries only need evidence from psychiatrists when they have got information and opinions about people's mental health that ordinary folk like you and I would not be able to form, that's when we need psychiatric help, and Doctor Sale didn't have any of those opinions about this man. He knew what we all know, that he's alcoholic, he said that himself, that he's addicted to these prescription drugs, he said that himself, he's got a turbulent history, he's been admitted to hospitals here and [in] Victoria, he's attempted to commit suicide. You remember he gave you a bit of detail about all of that. In Victoria, when he tried to electrocute himself, and he's lied to doctors, as I say, he's had hallucinations and we all know that if somebody with that sort of background tells you something happened you need to scrutinise it with extra care. That's what I'm telling you about [the complainant's] evidence, because of that background history you need to scrutinise it with care before you accept it. It's an ordinary proposition, of course. It was plainly put to you on behalf of the defence that by reason of his history you couldn't put any faith in what [the complainant] said, in fact he made up the whole account in order to draw attention to himself or get a drink. Well, you will have to assess that. It would be wrong to write off somebody of no account just because they're alcoholic and addicted to drugs and with this kind of background, it would be quite wrong to say 'Well anything you say to us ever again we'll never believe you.' On the other hand, it would be quite wrong and certainly unfair to the accused with respect to such a person to say 'Oh well, I believe everything you tell me, no question. It's just as if the Commissioner of Police had told me himself', as it were, to pick him at random. So it would be wrong either way, and all you do is apply your common sense and look at the other evidence, the outside evidence."

And later:

"Well now I just mention briefly the medical evidence and remind you, as I think [counsel] correctly told you, and I mention to you that it is up to you whether you accept expert opinion evidence or not. The rule of evidence is that generally witnesses can only tell juries what they perceive with one of their senses, it is something they see or hear or touch or smell and so on, and it is up to the jury to draw what inferences they think are appropriate from that. But sometimes ordinary human experience is not sufficient to understand the evidence so where we move into the realm of expert testimony such as medical testimony the witnesses are allowed to give their opinion of matters within their expertise and that is why you got opinions from these Doctors you see but you could not get opinions from others and that is why Dr Sale's opinion really does not count for anything because he did not get to the stage of diagnosing an actual medical condition which would be beyond your experience and mine."

It is to the last sentence of this passage that the appellant particularly points in criticising the trial judge's directions.

87 The complaint that the rejection of some of Dr Sale's evidence and the summing up on it were erroneous was rejected on appeal by Cox CJ. He said that the evidence "went nowhere near establishing a mental disease or abnormality which deprived the complainant of the capacity to give to the jury a true or reliable account of his dealings with the appellant"[39]. Wright J also rejected the evidence on grounds the same as, or similar to those of the Chief Justice. However, Slicer J was of a different view. His Honour thought that the directions given with respect to Dr Sale's evidence were inadequate in that they did not sufficiently explain that, according to the expert testimony of Dr Sale, the complainant's condition could cause mendacity.

88 During the trial, some members of the jury of their own initiative had made an unprompted inspection of the area in which the complainant was first found by the appellant. The inspection was made with a view to determining a peripheral issue, whether the appellant's car had to be retrieved from his residence or a parking place near the hotel. Another juror sought and obtained some information from the Weather Bureau about the time of the setting of the sun on the afternoon before the commission of the offence. At the trial, the primary judge rejected a call by the appellant's counsel for the discharge of the jury. The Court of Criminal Appeal unanimously held that the trial judge's directions to the jury were adequate to cure any misplaced, or perception of misplaced reliance by the jury upon these matters. No argument was addressed to this Court on these matters.

89 A further ground argued, whether the convictions should have been quashed because fresh evidence of the requisite kind was now available was unanimously rejected. That ground too, was not pursued before this Court.

The appeal to this Court

90 The grounds of appeal which were argued before this Court (albeit in an amended form) were as follows:

> "1. That the Court of Criminal Appeal erred in law by holding that the learned Trial Judge did not err in law by ruling as admissible evidence of the existence of a neck tie allegedly photographed within the Applicant's home approximately four months before the alleged crimes.

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39 *Alan Arthur Farrell v The Queen* unreported, Court of Criminal Appeal of Tasmania, 7 June 1996 at 14.

> 2. That the Court of Criminal Appeal erred in law by holding that the verdicts of the jury should not be set aside on the grounds that they were unreasonable or unsafe.
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> 3. That the Court of Criminal Appeal erred in law by holding that the learned Trial Judge did not err by ruling that it was impermissible for the defence to lead evidence from the defence witness, Dr Sale, concerning other possible mental states suffered by the complainant.
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> …
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> 5. That a majority of the Court of Criminal Appeal erred in law by holding that the Learned Trial Judge did not err when he instructed the jury that '*Dr Sale's opinion really did not count for anything because he did not get to the stage of diagnosing an actual mental condition which would be beyond your experience and mine'."*

The arguments with respect to grounds 3 and 5 which may be dealt with together, were developed in a submission in these terms:

> "The Appellant was entitled to have the relevance and force of Dr Sale's diagnoses and opinion associated with the reliability of the complainant's testimony as the credibility of the complainant was central to the defence case. He was entitled to have the evidence which Dr Sale identified as the basis for the diagnosis and the consequences of these conditions in the Complainant's history identified as supportive of the diagnoses. It is submitted that these conditions and their consequences were not, as was clearly recognized by Brennan J (as he then was) in [*Bromley v The Queen*[40]], a matter of general knowledge. To suggest that general knowledge of drunkenness is a substitute for Dr Sale's expert psychiatric opinion is to trivialize the science of psychiatry and to undermine the worth of his evidence."

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40 (1986) 161 CLR 315.

The statement by Brennan J in *Bromley*[41] upon which the appellant relied was as follows:

> "It cannot be said that a conviction on the uncorroborated evidence of a person suffering from a mental disorder, whatever the kind or degree of the disorder may be, is generally, in the absence of a warning pointing out the danger, a miscarriage of justice. If the mental disorder is quite trivial and transient, it may be quite irrelevant to the credit which might properly be given to the witness's evidence. And if the nature, severity and significance of the witness's mental disorder is deposed to by persons qualified to do so, that may bring home to the jury more vividly and more authoritatively than a judicial warning on the danger of acting upon the witness's evidence without corroboration."

Two observations should be made about what Brennan J said in *Bromley*. First, it was said in disposing of an application for special leave which was refused. Necessarily, the remarks were more abbreviated than might have been the case in reasons given in determining an appeal in which consideration will ordinarily be more detailed. Secondly, the other members of the Court placed greater emphasis than did Brennan J upon the nature and quality of the direction or warning that might be called for in the circumstances of the case. Gibbs CJ there said this[42]:

> "If it appears that a witness whose evidence is important has some mental disability which may affect his or her capacity to give reliable evidence, common sense clearly dictates that the jury should be given a warning, appropriate to the circumstances of the case, of the possible danger of basing a conviction on the testimony of that witness unless it is confirmed by other evidence. The warning should be clear and, in a case in which a lay juror might not understand why the evidence of the witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case.
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> In the present case the danger that Carter might be an unreliable witness must have been apparent to the jury after particulars of the effect of his schizophrenia had been elicited in cross-examination …".

His Honour then set out a passage from the summing up in that case and held that it was sufficient to warn the jury of the possible danger of acting upon the

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41 (1986) 161 CLR 315 at 325.

42 (1986) 161 CLR 315 at 319.

schizophrenic's evidence. Mason, Wilson and Dawson JJ each agreed with the reasons of the Chief Justice.

91 The trial judge in this case repeated his instruction to the jury about the importance of assessing the complainant's evidence:

> "but all the time you've got to keep to the forefront of your mind you couldn't convict the accused on any count unless you were satisfied that what [the complainant] told you was in substance accurate and reliable. So that's very important and I'm sure you'd be well aware of it".

So the position was, that although the learned trial judge did tell the jury that Dr Sale's evidence should be disregarded because that witness could not express an affirmative opinion that the complainant suffered from a mental disorder, he did warn them of the need to assess very carefully the evidence of the complainant. What they were left with, his Honour said, were matters with which ordinary members of the community were familiar. It was true that all, or most of the matters to which Dr Sale referred, or would have referred, were actually canvassed in the evidence: the effects upon memory and reliability of alcohol and drug abuse, and the propensity of the complainant (demonstrated by accounts of other somewhat bizarre incidents of alleged rape and violence) to make up such stories. Except for the latter, these are also matters within the ordinary knowledge and experience of the general community.

92 Courts are understandably cautious about the tendering of expert evidence to prove a witness' disposition towards dishonesty or honesty. Character or reputation evidence (which obviously goes, among other matters, to such a disposition) in a criminal trial, or indeed in a defamation trial, may generally only be given as a matter of statutory or common law exception to rules forbidding the reception of evidence of this kind[43]. Whether a witness is dishonest or not is very much a matter for the jury to determine, and to determine primarily upon the evidence given in court and tested in cross-examination[44].

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43 See *Attwood v The Queen* (1960) 102 CLR 353; *Simic v The Queen* (1980) 144 CLR 319 at 333 per Gibbs, Stephen, Mason, Murphy and Wilson JJ. See also the discussion in *Wigmore on Evidence*, (Tillers rev 1983), vol 1A at §64 and *Cross on Evidence*, 5th Aust ed (1996) at [19165] regarding the reception of evidence in civil trials and with respect to character evidence in criminal trials at [19100] . See also *Evidence Act* 1995 (Cth), s 110.

44 See *Smith v The Queen* (1990) 64 ALJR 588 where Deane J said at 588:

> "It is basic to the operation of the jury system that general questions as to the credit and reliability of the evidence of witnesses, including the reliability of identification evidence, are, subject to special exceptions, matters which are

(Footnote continues on next page)

93 The admissibility of expert evidence for this purpose was considered by the Supreme Court of Canada in *R v Marquard*[45]. There McLachlin J (with whom Iacobucci and Major JJ concurred) drew a distinction between issues of credibility which were for the jury alone and issues upon which the jury might be aided by the evidence of an expert:

> "It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion. This court affirmed that proposition in *R v Beland*[46], in rejecting the use of polygraph examinations as a tool to determine the credibility of witnesses:
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> > 'From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority.'
>
> A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself [to] determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter[47]. Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict. Finally, credibility is a notoriously difficult problem, and the expert's opinion may be all too readily accepted by a frustrated jury as a convenient basis upon which to resolve its difficulties. All these considerations have contributed to the wise policy of the law in rejecting expert evidence on the truthfulness of witnesses.
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> …
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> For this reason, there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on

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> within the range of human experience which must be determined by the assessment of the jury."

45 (1993) 85 CCC (3d) 193 at 228-229.

46 (1987) 43 DLR (4th) 641 at 649 per McIntyre J.

47 See *R v B (G)* (1988) 65 Sask R 134 at 149 per Wakeling JA; affirmed [1990] 2 SCR 3.

> human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact."

If those of her Ladyship's observations that I have quoted were to be read as being confined to the existence, or possible existence of a disorder or disability affecting the capacity of a witness to give reliable evidence I would respectfully agree with them. Doing so would, I believe, amount to adopting a position similar to that of Brennan J in *Bromley*.

94 An expert witness in a defence case is not confined to giving evidence of the relevant effects of a disorder or disability if the expert is of the opinion that such a disorder or disability actually exists. If there is evidence entitling the expert to say that its existence is a real possibility then it is for the jury to assess that possibility. Here of course, neither Dr Sale nor the appellant's advisers had the means of compelling the complainant to submit to a psychiatric examination which would probably have enabled the doctor to express a more confident or certain opinion. Of necessity, the witness's evidence had to be based on the medical records of the complainant made available to him, although they were very extensive.

95 With respect to the trial judge, whose conduct at the hearing was otherwise impeccably fair throughout, he should have permitted the psychiatrist to give the evidence which the appellant's counsel sought to put before the jury of the possible existence of a disability or disorder as it bore upon the complainant's capacity to give reliable evidence. It would follow that his Honour would then have been obliged to inform the jury of the way in which they might use such evidence, commenting on it as might be appropriate. If a medical expert is unable to depose to the actual existence of a mental disorder, then the probative value of his or her evidence may be limited. It might attract comment by the prosecutor and the trial judge to that effect.

96 It is true that the trial judge repeatedly warned the jury, in very explicit terms, of the danger of reliance upon the complainant's testimony. Further, there was evidence before the jury of the complainant's unreliability such as to give them some picture of the complainant's propensities and failings. A detailed summary of his medical and psychological history was placed before the jury. Nevertheless, the circumstantial and direct case against the appellant was a strong one. Amongst the evidentiary features which implicated the appellant and tended to contradict his evidence were:

1. the binding of the distinctive tie around the complainant's wrists;

2. the way in which the appellant quite abruptly left the hotel, retrieved his car and drove the complainant to his house;

3. the removal of the complainant from the couch downstairs in the appellant's house to the appellant's own bed upstairs;

4. the complainant's accurate and detailed account and sketch of the appellant's house and bedroom although the appellant alleged that the complainant was at all material times insensible; and

5. the appellant's own statement that he left the complainant in the same area as he found him, a mere hour or so later.

This evidence, and other evidence which I need not mention, constituted a powerful combination of circumstances entitling a jury, having seen and heard the appellant, to convict him of the offences they did.

97 Save for the ground of appeal based on the rejection of the evidence of Dr Sale, there is no substance in the appellant's appeal. He does not now argue that the evidence regarding the tie was inadmissible. However, he contended that the trial judge should have excluded the evidence concerning the photograph of the tie on the ground that its probative value is outweighed by its prejudicial effect[48]. I do not agree. The evidence was striking evidence. It was no doubt very damaging to the appellant. However, its damaging effect was a result of its striking character and the extraordinary coincidence between the photographed tie and the tie with marks on it which was found around the complainant's wrists when he arrived at his brother's home complaining of his ordeal. In other words, the tie and the earlier photograph had very considerable probative value. The jury were entitled to have the evidence before them to help to contradict the appellant's evidence that the complainant was taken to his home as an act of kindness and for that purpose alone.

98 The jury convicted the appellant on some counts and found him not guilty on others. The position is accurately described in the appellant's submissions:

> "The jury returned verdicts of not guilty on Counts 7 and 9 to 12 inclusive. These counts alleged offences of assault, rape and aggravated sexual assault. There were six counts of sexual assault by means of anal penetration by the Appellant (Counts 3,4,5,6,7 and 8). There was a verdict by direction in respect of Count 8 on the Crown's concession that evidence would not support a conviction on the 6th count of intercourse. The particulars in each count in the indictment were the same. Count 9 alleged an act of fellatio (oral intercourse). Count 10 alleged an assault with a knife. Counts 11 and 12

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48 As to the discretion to exclude otherwise admissible evidence where the prejudicial effect of its admission would outweigh its probative value see *R v Christie* [1914] AC 545; *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J.

> alleged a crime of aiding and abetting another person, ie the person identified by the complainant as 'Frank' to carry out anal assaults (digital and penile)."

No ground of appeal was filed complaining that the verdicts of the jury were so inconsistent that the convictions could not stand. However, an argument was advanced to that effect. It was submitted that there was no difference in any material respect between the evidence of the complainant on counts 9 and 10 and evidence tendered in respect of the other counts, and yet the jury rejected this evidence. It was submitted that the failure of the jury to convict on either count to which the second man was allegedly a party necessarily involved the rejection by the jury of the existence of such a person. Yet his presence had always been an essential part of the complainant's allegations and thus the Crown's case. It is certainly true that, apart from the allegations made by the complainant, there was no evidence led by the Crown linking the appellant with such a second person.

99 In the Court of Criminal Appeal, Cox CJ explained this differentiation in the verdicts. The evidence concerning the distinctive tie was logically corroborative of much of the complainant's evidence and capable clearly of linking the appellant with the commission of the offences of which he was charged. There was no similar corroboration of the offences involving the second man. The position may simply have been that the jury were left in a state of doubt about those offences. It cannot be said that there is no rational basis for the respective verdicts of guilty and not guilty. This Court in *MacKenzie v The Queen*[49] after discussing different types of repugnancy or inconsistency in jury verdicts said:

> "Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense[50]. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as

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49 (1996) 71 ALJR 91 at 101; 141 ALR 70 at 83-84 per Gaudron, Gummow and Kirby JJ; see also *R v Hunt* [1968] 2 QB 433 at 438 per Lord Parker CJ quoting Devlin J in *R v Stone*, unreported, 13 December 1954, CCA:

> "When an appellant seeks to persuade this court as his ground of appeal that the jury had returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand."

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

> required, that conclusion will generally be accepted[51]. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury[52]. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt[53]. Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries[54]."

Because of the view which I have taken of grounds 3 and 5 it is unnecessary for me to consider separately the ground that the verdicts were unsafe, unsatisfactory and unreasonable.

100 I return to the main argument of the appellant. It will be clear that I have formed the opinion that the learned trial judge's directions and manner of dealing with Dr Sale's evidence during the trial were erroneous. The question is whether they have caused a substantial miscarriage of justice in terms of s 402 of the *Criminal Code Act* 1924 (Tas)[55].

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51 *R v Wilkinson* [1970] *Criminal Law Review* 176.

52 *Hayes v The Queen* (1973) 47 ALJR 603 at 604-5.

53 *Andrews Weatherfoil Ltd* (1971) 56 Cr App R 31 at 40.

54 *R v Hunt* [1968] 2 QB 433 at 436.

55 "(1) On an appeal the Court shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment or order of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(2) The Court may, notwithstanding that it is of the opinion that the point 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."

101 In *Mraz v The Queen*[56] Fullagar J said:

> "It is very well established that the proviso to s 6(1) [of the *Criminal Appeal Act* 1912 (NSW)] does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law."

More recently, three members of this Court in *Glennon v The Queen*[57] said:

> "In order to apply the proviso where there has been a misdirection by the trial judge that is not fundamental in the sense discussed above, the Court of Criminal Appeal must be satisfied that, in the absence of the misdirection, the jury would inevitably have reached the same verdict[58]. This is so even if the case against the accused is otherwise a strong one[59]."

The conditions for the application of the proviso are, by the authority of this Court, stringent. Although the evidence against the appellant was strong I am unable to conclude that the jury would inevitably have convicted him had Dr Sale's evidence been properly dealt with. The appellant may have lost a chance of acquittal that was fairly open to him. As in *Domican v The Queen*[60] where the identification evidence may have been decisive, so too the evidence of the psychiatrist here, and an appropriate direction on it, may well have swayed the jury in favour of the appellant. In a trial in which the jury's assessment of the credibility of the

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56 (1955) 93 CLR 493 at 514.

57 (1994) 179 CLR 1 at 8-9 per Mason CJ, Brennan and Toohey JJ.

58 *Domican v The Queen* (1992) 173 CLR 555 at 565-566 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372 per Brennan, Dawson and Toohey JJ; *Quartermaine v The Queen* (1980) 143 CLR 595 at 600 per Gibbs J; *Driscoll v The Queen* (1977) 137 CLR 517 at 542-543 per Gibbs J (with whom Mason and Jacobs JJ agreed).

59 *Domican v The Queen* (1992) 173 CLR 555 at 566 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

60 (1992) 173 CLR 555.

complainant was crucial to the Crown case, any error or misdirection affecting the way in which the jury would treat that evidence was bound to be critical.

102 Of particular importance was the direction by the trial judge that, "Dr Sale's opinion really does not count for anything because he did not get to the stage of diagnosing an actual medical condition which would be beyond your experience and mine". This direction was not only based upon what I consider to be an erroneous rejection of evidence. It was also factually wrong because Dr Sale was allowed to, and did, give some evidence of the consequences of actual disorders or disabilities arising from drug and alcohol abuse and personality disorders. Furthermore, some medical evidence to that effect which was at least impliedly adopted by Dr Sale appeared in the exhibit which summarised much of the complainant's medical history.

Orders

103 The appeal should be allowed. The orders of the Court of Criminal Appeal of Tasmania should be set aside. In lieu thereof it should be ordered that the appeal to that Court be allowed, the convictions quashed and a new trial ordered on counts 1 to 6.