

BETWEEN: CHRISTOPHER EDMONSTON FERNEAUX LUMLEY
Applicant

AND: THE QUEEN
Respondent

APPLICANT'S SUMMARY OF ARGUMENT

Part I: A concise statement of the leave or special leave questions said to arise

1. To what extent may a Court of Appeal proceed to reach factual conclusions about the hypothetical impact of evidence which was not led at the trial, but which was before the Court of Appeal; without thereby usurping the role of the jury, and defeating the purpose of the appellate jurisdiction to set aside a conviction in the light of the evidence?
2. Can a Court of Appeal dismiss a complaint about the unreasonableness of a verdict, based on fundamental weaknesses in a Crown case, on the basis that these weaknesses were in issue at the trial and were matters for the jury?

Part II: A brief statement of the factual background to the application

3. The 36 year old complainant first met the applicant at about 6 pm on 24 September 2001 at a tavern in Surfers Paradise.¹ She and her friend "S"² had been at the tavern since around 2.30 pm [P5 L54; T124 L34-49]. By the time she met the applicant she had eaten a late lunch [P5 L55] and consumed 2 "VB" pots of beer [P6 L10] and about "3 or 4 glasses" of wine [P7 L49]. After they met, she ate some hot chips [P7 L28-32] and had "a couple more" glasses of wine which he purchased for her [P7 L54]. She said she was an "accustomed" drinker [P6 L56-7] and that this quantity would not normally have affected her [P7 L58]. She noticed the applicant's jewellery [P47 L15]. Her next memory was being naked on the floor in the lounge room of the applicant's unit.[P8 L13-30]. She could not recall leaving the tavern [P8 L4].
4. However, S said that she saw the complainant talking to two men at the bar around "5.30, six" [P125 L50-58]. She saw the complainant a little later and noticed some blood on the shoulder of her blouse and had the following exchange [P126 L35-40]:
"I said "What's that?", and she – and it was blood. She said, "I bit him." And he's [referring to the applicant] gone: "She bit me.", and I said: "I don't want to know.", and I went back to the bar."

S thought that this conversation was a matter of humour between the applicant and the complainant [P127 L35] who "seemed to be laughing" and having "a good time" [P128 L54-55]. She thought there was "clearly something going on" between the two [P127 L49]. She did not see the complainant leave [P128 L17-18].

¹ This complainant's evidence was recorded on video and played to the jury pursuant to section 21A of the *Evidence Act 1977* (Qld). P7 L25 of the transcript of complainant's video evidence (referred to as P).

² This is the pseudonym used by the Court of Appeal.

5. The complainant denied any sexual attraction to the applicant at the tavern [P18 L1]. She said that she had a date with someone else that night [P6 L55]. She could not recall kissing the applicant or biting his lip [P22 L7, 20]. The Crown made a formal admission that the bar manager (Hollingsworth) saw the complainant and the applicant “having a bit of a ‘snog’”. [P187 L49-50]. Blood was found on the complainant’s shirt which matched the DNA profile of the applicant. [P173 L14-20]
6. The complainant then described the course of events in the unit.
 - 6.1. The starting point was that she saw the applicant sitting on a couch with a cane in his hand tapping his knee [P8 L34, 46-50]. He told her that if she wanted to be his “girlfriend” he was going to whip her and that she had to “learn to take it harder”. She conceded that she did not know whether she had told the applicant earlier that she would like to try some “bondage and discipline” and like activities [p59 L3-12]. She turned away and he grabbed her hair to get her to face him [P8 L54-59]. He told her to lean over the arm of the couch, which she did [P9 L30, 40]. He positioned her and said that if she moved, she was going to get it worse (although he had not done anything at that stage) [P9 L46-55]. He stood behind her and whipped her buttocks and the back of her legs [P10 L13-24]. She could not remember how many times he hit her with the cane [P10 L25]. At one point he put his left hand on her back and pushed her over and kept hitting. She then “passed out” [P11 L1-5]. **(Count 3)**
 - 6.2. She then said that the applicant inserted the cane into her anus [P11 L10]. One hand was on her back [P44 L58]. She said that he “just kept putting it in and out and then in” [P11 L16]. She said that this was done “roughly” and that it was “shoved in” in one motion, She described it as a “forceful” and “rapid motion” [P45 L25-58, P50 L34]. The cane was not positioned so that it was on or just inside the anal opening before it was shoved in. It was shoved in,” “then out, and then in again.” [P45, L25-35]. She described an intense pain and said that she started to “lose consciousness” [P11 L20]. **(Count 1)**
 - 6.3. After regaining consciousness she asked for a glass of water. He pointed to a drink and when she reached over to get it he said it was the wrong one and then bit her on the right breast [P11 L53 – P12 L2].³ She pushed him away and fell backwards on to the floor [P12 L22-25]. He told her to spread her legs, grabbed one and hit her with the cane again. This time it was on her pubic mound, in a downward motion. She described “burning excruciating pain” [P12 L35-60]. She curled up but he grabbed her leg and inserted the cane into her vagina. He kept “putting it in and out” [P13 L10-24]. **(Count 2)**
 - 6.4. She described “coming to”, seeing the applicant leave the room and then breaking the cane over her knee. She recalled “coming to” again and seeing the applicant put a needle into her left arm twice [P14 L25, 35]. She asked what he was doing and he said “I’m putting a needle in your arm” [P14 L48-54]. She did not see any syringe or plunger and did not know what sort of needle it was [P14 L33, P47 L47]. Her next recollection was of walking along the highway, being picked up by a car driven by a curly haired man, who gave her his jumper to put on [P15 L11-40].⁴
 - 6.5. The complainant could “not recall”:
 - 6.5.1. How she got to the unit [P25 L33 – P26 L50; P32 L52 – P33 L58].
 - 6.5.2. How she got undressed [P15 L3].
 - 6.5.3. Consuming alcohol or smoking any cigarettes at the unit [P35 L12-17].
 - 6.5.4. Leaving the unit at approximately 8.30pm and returning to it [P58 L10-25].
 - 6.5.5. Whether she had performed oral sex upon the applicant [P43 L19-25, P58 L35-40].
 - 6.5.6. Whether she had caned the applicant [P58 L40-50].

³ Dr Culliford located a bruise on the applicant’s right breast, but she could not say that it was a bite mark.

⁴ There could be no doubt that this did not occur.

- 6.6. She accepted that it was possible that some of these things occurred but she just "couldn't remember" [P58 L45-50].
- 6.7. Notwithstanding these gaps in her memory, the complainant asserted certainty as to the fact that she did not consent to being caned, nor to having the cane inserted into her vagina or anus [P19 L29].

Other forensic evidence

7. Forensic examination of items located at the applicant's unit revealed:
 - 7.1. Out of 45 cigarette butts located in an ashtray on the dining room table, the DNA profile of the complainant was on 3 butts, a mixed DNA profile from both the complainant and the applicant was on 17 and the DNA profile of the applicant on 11. Another 43 butts were located in a bin in the kitchen, but not tested [P38 L40; P43 L33, P48 L20-23; P185 L55].
 - 7.2. Mixed DNA profile consistent with having come from both the complainant and the applicant was found on the rim of a glass located on the kitchen sink [P173 L59 - P174 L2]. DNA matching the profile of the complainant was found on a 'Mount Franklin' water bottle located in a bin in the kitchen [P43 L15; P174 L34]. A button on the floor of the bathroom was similar to those on the complainant's blouse [P44 L33; T173 L35].
 - 7.3. A piece of stick was in the toilet bowl and one next to the toilet bowl in the bathroom [P45 L10, 33]. DNA profile of the complainant was found on the stick located next to the bowl. There was no blood on it [P175 L30]. Another piece of stick was found on the lounge room floor [P40 L28-29].
 - 7.4. A cane (67 cm long and 1cm diameter) and another piece of stick (in two pieces) were located in a cupboard in the hallway [P46 L20-25, T47 L5]. DNA profile of the complainant and some additional DNA profile of the applicant were found on one end of the cane [P176 L18-20]. The complainant's DNA was consistent with an epithelial cell but it could not be said if it was vaginal or buccal (from the mouth). It was not from blood [P176 L37-40]. There was no blood on the cane [P181 L28]. The cane was not tested for faeces. There was no obvious faecal staining. [P176 L45-52].

Independent observations of the complainant

8. The operator of a delicatessen (Henderson) within the applicant's unit complex observed a woman matching the complainant's description near the elevators at about 8pm on 24 September, getting aggravated with the "buzzing machinery". He saw her being assisted into the lifts which go up to the 12th floor where the applicant's unit was located [P167-169].
9. A security officer (Pompey) at the applicant's unit complex saw a woman near the lifts at approximately 4.15am the next day. He said she looked "horrified" and was "clutching at her chest" [P133 L35-38]. Her white blouse appeared to be unbuttoned and top buttons on her trousers were undone [P133 L45, 52]. He asked her what had happened and she replied that she could "not remember" [P134 L5].⁵ A female cleaner (Fisher) then spoke to the complainant. She described her as being "hysterical" [P119 L54-57]. She thought that the complainant was obviously affected by alcohol or drugs [P122 L10]. She recalled her saying: "This shouldn't have happened to me. I'm big and fat. He shouldn't have raped me" [P120 L25].
10. The complainant refused an offer to call police and was helped to a taxi [P20 L24-30]. The complainant had no money and indicated that her purse was still up in the unit [P121 L38-39]. The complainant said she did not have her underwear on [P120 L35]. Once the complainant

⁵ The transcript is equivocal as to whether the witness could not remember or whether he was saying that the complainant could not remember.

got into the taxi, Fisher (who accompanied her) observed that she was “virtually hysterical” and “jiggling around” [P120 L46-47]. She heard the complainant say either “oh, he shouldn’t have given it to me up the arse” or “he gave it to me up the arse” [P120 L49-50; P123 L1-4]. They went in the taxi, at the complainant’s direction to Stanhill Drive where the complainant got out [P31, 33, 121]. The taxi driver (Young) recalled the complainant saying “you wouldn’t know what it was like to be raped” [P32 L58] and that she was somewhat “aggressive” to him [P34 L10-20]. Young and Fisher reported the matter to police [P33, 121].

The police investigation

11. The complainant conceded at trial that the events of that night remain “very confused” in her mind [P21 L30] and that allegations as to penetration by a cane were not included in the original statement she gave to police. They emerged in a statement that she made nearly 6 months later on 19 March 2002 [P49 L9-20]. She also conceded that she had been informed of her entitlement to claim criminal compensation before she made these specific allegations to police. [54 L2-8]. The manner in which her account evolved bears some examination.
12. After leaving the taxi, the complainant was spoken to by police officers Martin and Walker, and then McGrath and Percival.⁶ The complainant showed her buttocks which appeared “severely bruised.”⁷ She stated that her “backside” was sore [P136 L33] and that she “couldn’t sit down because of pain to her “lower area” [P139 L3, 35-39].⁸ She said to Martin that she didn’t know what had happened to her [P137 L15] and, referring to her underwear, she said that they “aren’t sexy” and that she “didn’t plan on having sex last night” [P136 L24-25]. No complaint was made to Martin or Walker [P169 L20-30; P137 L20]. Percival said that the complainant told him she’d been “raped” and that she indicated pain in her anal area [P56 L33-41]. She was taken to the Surfers Paradise police station. She was told that if she had a shower, evidence could be lost. However, she left saying that she wanted to have a shower and go home. She said that she did not want to wait for a medical examination and withdrew her complaint. The police drove her home [P52 L1-20]. She later explained that this was because of what she had been told might be the expected delay before she could be examined [P68 L28-35]. About 30 to 45 minutes later police returned to the complainant’s house, collected her underwear and brought her back to the station. She was then taken to the Southport hospital where she was examined by a government medical officer (Culliford) [P59 L8-20].
13. The medical examination of the complainant revealed:
 - 13.1. No evidence of any injury to the external areas of the anus and vagina [P96 L14; P97 L9, P98 L11]. No evidence of any injury to the internal anus area or on a digital examination of the internal vaginal area [P99 L58].⁹
 - 13.2. Extreme anal spasm, the anal sphincter was closed. Dr Culliford gave evidence that this was likely to be due to interference or external stimulus “whether it’s an injury due to a medical cause or an injury due to a traumatic cause” [P98 L5-7, 15-30].
 - 13.3. “Tram-track” bruising across buttocks and upper thighs, a bruise across her back and confluent bruising across her buttocks (where all the bruises have coalesced into one) [P91 L25-30; P92 L15-18]. Dr Culliford estimated in excess of 10 impacts, consistent with the use of a cane [P92 L37, 55]. She stated that it is difficult to assess the force used as some people bruise more than others with “larger people” tending to bruise more. With that caveat, she estimated the force used as significant [P93 L1-8, 15].

⁶ Martin is female.

⁷ P136 L31-37 (Martin), P139 L7-10 (Walker), P51, L10-60 (Percival).

⁸ Walker added after lower area “anus and vagina”; under cross-examination couldn’t recall the exact words.

⁹ The anal examination was undertaken the next day, 26 September 2001. T101 L50-6.

- 13.4. A 2cm lump on the back of her head [P94 L35].
- 13.5. Three small marks on the inside of her left elbow, two of which were consistent with either needle marks or mosquito bites and three 1cm bruises on her right elbow, a bruise on her right breast with no particular characteristics so she could not say if it was from a bite [P94 L36-43; P95 L1-5; P106 L30; P94 L 40, P8 L50-60].
- 13.6. The complainant complained of anal pain but stated that she had no vaginal pain [P102 L15-17, 48]. A note taken records this history given to Dr Culliford [P103 L40-45]:
- “I can remember very little. Had a couple of drinks last night. Remembers nothing until waking up this morning with? needle in her arm... confused, vomiting, no memory of the events”.
- 13.7. As at midday on 25 September 2001, the complainant’s blood alcohol level was 0.133 [P163 L38, 50; P161 L50]. Using a standard analysis, if she had stopped drinking at 3am, her blood alcohol content would have been 0.29 at approximately 4am [P166 L30-34]. Urinalysis showed amphetamine/methylamphetamine at levels of 60 micrograms per litre and the medical explanation of this was that the amphetamines were used quite a number of days ago [P163 L14]. The complainant denied any drug use [P25 L14-18].

Memory taint

14. The complainant then spent several days in a hospital bed. The medical staff made a number of notes which are relevant to assessing the cogency of her memory and account at trial. It is not entirely clear why the notes were not tendered. However, Dr Culliford adopted a number of the entries made by various hospital staff about their discussions with the complainant [P111-114]. They recorded a number of events concerning the complainant’s recollection and memory at that time:

“25/9/1 - 18.30 Nursing

Jacqueline received phone call @ 18.20 from? CIB? Following this call she became distressed. ‘Not the person I once was. Don’t want to get hysterical. Found out what happened to me’

“Follow up from previous SW intervention. Supportive contact with patient post patient receiving a phone call from Craig CIB this p.m.”

“Patient reports was told by police that the man who has been taken into custody has admitted assaulting the patient. Patient reports that she has been told that perpetrator has been charged with rape and torture. Reports perpetrator has admitted using cane stick to beat her and insert stick into her anal passage.”

“And also distressed at not being able to remember what has happened to her. Reports that she remembers drinking wine at the Irish Bar in the Renaissance building with a girlfriend who she went to the bar with. Reports that someone had bought her a drink (can’t remember details of such) and reports can’t remember a thing from approximately 8 pm onwards. Reports she has a memory of a needle in her arm. Reports that she also remembers the perpetrator having a European accent. This memory error was triggered by a woman helping her in hospital today who had an accent. The patient visibly distressed about not being able to remember anything else.”

“Unable to remember what happened”

“I do not know who Jackie is”

“26/9/01 - Nursing; Contacted twice by CIB this shift. Current condition/status of patient: patient unwilling to talk to CIB at this time.”

“27/9 - Social Work

She states she does not know what he looks like. CIB been to see her this a.m. and reassured her that the offender is in gaol and won’t be out on bail.”

15. The arresting officer Craig McGrath denied having any phone call with the complainant whilst she was at hospital [P154 L16]. He did not know of any other detective at the Southport CIB called “Craig” [P154 L30]. He accepted that he rang and spoke to hospital staff, although he could not estimate how many times [P154 L58 – T155 L10]. The notes are not traversed in detail in the cross-examination of the complainant. Her evidence was that she had little memory of her time in hospital [P42 L8]. She could not remember any call with a police officer at 1620

hours on 25 September in which she was told the man confessed to inserting something in her anus [P51 L19-25] nor could she recall being unwilling to talk to the CIB when they rung at the hospital [P63 L50-54].

The applicant's account

16. The applicant neither gave nor called evidence. Taped statements he made to the police were played to the jury. His account included the propositions that:

16.1. He met the complainant for the first time at a tavern in the afternoon. They had some food and drinks together. She "picked (him) up" and "asked (him) to take her home. She told him that she'd never tried "B & D" and she'd like to try it [P3 L6, P4 L58; P3 L15-18]. She kissed him at the pub and bit his lip, causing it to bleed [P5 L22-36, P6 L20-33]. They left the bar together. On the way home, he bought a bottle of rum [P7 L15, P8 L36] and a bottle of water for the complainant [P9 L14-24].

16.2. Upon arriving at his unit, the complainant ran a bath, undressed the applicant and performed oral sex on him [P10 L10-20, P11 L10-25]. No other sexual intercourse occurred [P11 L30-36] however they engaged in "B and D" [P3 L 17]. They consumed a lot of alcohol together including the rum bottle. [P13 L 42].

16.3. The bruises on the complainant's buttocks and back were caused by him hitting the complainant with a cane. He had hit her about 10 times, lightly at first but then harder. He did not use full strength [P13 L 11-28]. She said she liked it and asked him to continue [P11 L54 – P12 L10; P13 L60 – P14 L4; P14 L33]. He described her as lying across the sofa [P12 L20]. She was not restrained at all and had not at any stage asked him to stop, even though she was capable of doing so. He went to some detail about his actions and conversations with her and about whether she was getting physically aroused from the conduct and her reassurances that she was, and that she wanted him to continue, despite her not being "wet". [P13 L34, P14 L29; P14 L35].

16.4. The applicant firstly denied penetrating either her anus or vagina, but then conceded he may have penetrated her vagina with the cane "just tickling her around the front." He denied penetrating her in the anus with the cane or at all [P14 L5-25]. He stated that she had at one stage hit her own head accidentally [P12 L23-45]. He did not take any drugs nor possess any syringes. He did not see her take any drugs [P12 L49-55]. She left at about 4 o'clock in the morning when she said "I'm happy to go home now" [P3 L18-20]. She asked him to go with her. He suggested she not go home in that state, by referring to their state of intoxication and her state of undress [P13 L35-45].

17. The applicant was medically examined. He was found to have an injury on the left side of his upper lip and some bruising across his buttocks [P72 L56-57; P73 L10].

The complainant's recollection of events at trial

18. The complainant was cross-examined and many of matters were put to her including the matters set out in the applicant's recorded interview with the police. At the outset she conceded that the events of 24 September and the following day were "very confused" in her mind. More specifically she stated that she could not remember many of the events that were put to her. It was necessary for her to invoke a "lack of recall" on about 189 occasions in the course of her evidence. This was even the case in relation to events of some importance, such as:

- 18.1. The kissing/biting incident at the tavern;
- 18.2. The purchasing of a bottle of water on the way home at her request;
- 18.3. The consumption of alcohol and cigarettes at the unit;
- 18.4. The sharing of numerous cigarettes with the applicant; or
- 18.5. Leaving and re-entering of the unit at about 8 pm or so in the evening.

Course of Proceedings

19. The applicant was tried before Newton DCJ sitting with a jury at Southport District Court in respect of two counts of rape¹⁰ and one count of torture.¹¹ On 5 March 2003, he was acquitted of Count 2 (rape)¹² and convicted of Count 1 (rape)¹³ and Count 3 (torture). He was sentenced to concurrent terms of 8 and 5 years imprisonment respectively.¹⁴
20. On 23 April 2004 the applicant's appeal against these convictions to the Court of Appeal (Queensland) was dismissed.

Part III: Applicant's Argument

Ground 1

21. The issue of "anal spasm" assumed fundamental significance in the trial. The complainant's evidence was problematic. The acquittal on Count 2 demonstrates that there were difficulties involved in accepting her evidence. In these circumstances, the influence of corroboration was always going to be powerful. The sole piece of corroboration referable to Count 1 was the existence of anal spasm.
22. As the Crown case was presented to the jury:
 - 22.1. On 25 September 2001 the complainant was suffering from anal spasm.
 - 22.2. Anal spasm is due to some external stimulus, "usually injury" [P98 L38].
 - 22.3. The only given examples of external stimulus were "medical cause or an injury due to a traumatic cause".
23. But the jury was concerned. They asked the question: "can anal spasm be caused by anything other than penetration, e.g. nerve affected?" [P223]. The trial judge did not respond directly, but said the question was something with which counsel could deal "as they see fit during their addresses" [P223 L28].
24. The Crown Prosecutor then told the jury that the anal spasms were "quite significant". He emphasised that they were independent of the complainant "because they're an involuntary thing", and read from Dr Culliford's evidence [P98], before declaring that this evidence "tends to support a material particular that anal penetration occurred" [P287].
25. Defence Counsel could only submit: "My submission to you is, and it's my client's position, that there was no anal penetration by the stick, so I can't address the issue of penetration of the anus, because in my submission, it didn't occur. There's certainly no evidence from her that it occurred. There is evidence from Dr Culliford that – well, you've heard her evidence, my friend read it out to you. So, if you have any reasonable doubt about that, unless you're sure beyond reasonable doubt – even if you think there might've been penetration – you acquit". [[P273 L35-45].
26. Then, in the summing up, his Honour:
 - 26.1. Used the concept of anal spasm to illustrate the process by which inferences might be drawn [P292 L10].

¹⁰ Section 349(2)(b) *Criminal Code (Qld)*.

¹¹ Section 320A *Criminal Code (Qld)*.

¹² This had been particularised as the insertion of a cane into her vaginal cavity.

¹³ This was particularised as the insertion of the cane into the complainant's anus.

¹⁴ He had been in custody since being taken into custody on 25 September 2001.

- 26.2. Noted that Dr. Culliford was an expert witness, and as such that in the absence of any good reason it would be silly to disregard her learning and experience [P296 L30 - 55].
- 26.3. Told the jury that the evidence of anal spasm was capable of corroborating the complainant's allegations in respect of Count 1 [P313 L20]. That is, told them it was independent evidence which confirmed "in some material particular, not only that the offence in question (had) been committed, but that the accused was the person who committed it" [P311 L20].
27. However, the monocausal view of anal spasm expressed by the general practitioner was challenged, in the Court of Appeal, by the view of a relevantly qualified specialist [Para 74]. There is, as the jury apprehended there might be, more than one reason why anal spasm could occur.
28. This issue was considered by the Court of Appeal under a heading which included reference to the Applicant's legal representatives [Para 72-73]. However, whether it was "fresh" or "new", it was necessary for the Court of Appeal to consider whether, upon its own view of Dr. Lumley's material, there was a significant possibility that, in the context of the trial, it would have removed the certainty of guilt from the mind of the jury.¹⁵
29. McMurdo P seems to have accepted that this was the Court's task. In disposing of this issue, her Honour said that she was not persuaded that Dr. Lumley's evidence gave rise to a significant possibility or likelihood that the jury would have acquitted the Applicant.¹⁶ But this issue must have been at the epicentre of the jury's deliberations. They had other doubts about the complainant. There was no other relevant corroboration. A direct question was asked by the jury and it is now known that the response they received was inadequate and misleading.
30. Not only was the Court of Appeal plainly in error when it failed to acknowledge the effect of this evidence, but the method by which its relevance was dismissed reveals an error in approach. The reasoning is contained in three sentences written by McMurdo P:¹⁷
- "Dr. Culliford's evidence strongly suggests that the spasm she saw was involuntary spasm. There was no anal fissure or tear or external trauma to the anus and nor was there any injury to the anus internally in the lower five or six centimetres. The absence of such injuries did not, however, exclude penetration of the anus with a cane."
31. The juxtaposition of the first and second sentences warrants examination. Dr. Lumley's opinion was that involuntary spasm is often associated with trauma. He thought that when spasm occurred from injury "you would expect to find evidence of an injury". McMurdo P follows the conclusion that the evidence "strongly suggests" involuntary spasm with the observation that there was no trauma. Plainly it would be wrong to cite the second sentence as authority for the proposition contained in the first. If the second and third sentences are merely recitations of the evidence, then they are of neutral effect. They do not support the proposition contained in the first sentence, which is in any case unsupportable.
32. It follows that the Court of Appeal has, in acting upon the basis that the evidence "strongly suggests" involuntary spasm, supplanted its own opinion for anything that could be concluded from the evidence. Whilst a Court of Appeal can and must form its own view of the facts, it is not entitled to form expert opinions for which no basis has been established.

¹⁵ *Burton* (1986) 24 A Crim R 169 per Street CJ at 174 - 175

¹⁶ In paragraph 77

¹⁷ In paragraph 76

33. There is a real danger that the Crown has obtained a conviction from a jury which was profoundly misled on an issue about which it was concerned. The Court of Appeal failed properly to address this issue. The means by which it avoided doing so bespeaks a misapprehension as to the ambit and extent of its responsibilities and powers on appeal.

Ground 2

34. There was a disturbing weakness at the cornerstone of the Crown case. At a time when the complainant had either no or significantly impaired recollection of the incidents which were the subject of convictions, her memory was fundamentally and irretrievably tainted by the information that the applicant had admitted to the insertion of the cane in her anus [P112], and that he had been charged with rape and torture.

35. All narrative provided from that point in time must necessarily have been influenced by that information. There is danger that the allegation as to the insertion of the cane into the anus was no more than an adoption of that which she believed had been admitted. There is an accompanying danger that the fact of the applicant's being charged with rape and torture led, upon reconstruction, to a complaint about what had been a consensual – albeit unusual – episode.

36. The complainant's subsequent physical discomfort was no doubt real and her desire, once sober, to attribute blame was understandable. However, her denunciation of the applicant's behaviour as unilateral and excessive does not conform with the objective evidence (see 17.1et seq above). It does, of course, dovetail nicely with that which she had been told, by others, at a time when she had nothing to report herself.

37. Concern about the effect of "memory taint" upon the soundness of the verdicts is compounded when it is accepted that:

37.1. Important aspects of that which she had been told were false.

37.2. The complainant was, on any view, grossly intoxicated at the time of the incident.

37.3. The complainant's recollection of events was demonstrably susceptible to suggestion. The mere fact of being helped (in hospital) by a woman with an accent "triggered" an erroneous "memory" of the perpetrator having a European accent [P113 L10].

38. Faced with a complaint that, as a result of these deficiencies, the verdict on Counts 1 and 3 was unreasonable, the Court of Appeal was obliged to make:

"... its own independent assessment of the evidence and determine whether, notwithstanding that there is evidence upon which the jury might convict, nonetheless it would be dangerous in all the circumstances to allow the verdict of guilty to stand."¹⁸

39. Of the five paragraphs which follow the heading "Was the verdict unreasonable?", McMurdo P devotes three paragraphs to the question of inconsistent verdicts. In the fourth [Para 33] it is noted that the complainant was in discomfort and distressed shortly after the incident, but no reference is made to her behaviour beforehand, nor to her intoxication. In the fifth the conclusion on this topic was reached after observing that:

"The weaknesses in the complainant's evidence were in issue at the trial and were matters for the jury to consider in determining whether the prosecution had proved its case beyond reasonable doubt. They did not compel the jury to reject her evidence as to anal rape and torture..."¹⁹

¹⁸ *M v. The Queen* (1994) 181 CLR 487 at 492

¹⁹ At paragraph 34.

40. However, the case was one where proven circumstances were suggestive of unreliability. The jury enjoyed no special advantage over the Court of Appeal when it came to an assessment of these circumstances.
41. This was not an issue to be resolved by reference to the complainant's honesty. A witness giving evidence from a tainted memory may well honestly believe that which is being recounted. The recovery of this "memory" was a matter of such significance that the Court of Appeal ought to have addressed it. There is no indication that they did so.²⁰ Indeed, had the exercise been undertaken, it is difficult to see how it would not have compelled the view that a reasonable doubt ought to have been entertained, as regards both anal rape and torture.
42. By avoiding engagement on this issue, and dismissing the relevant concerns as "matters for the jury", the Court of Appeal has misconceived its function and abrogated its duty. The interests of the administration of justice require that this approach be corrected.

Part V: Reasons Why Special Leave Should be Granted

43. There is a real concern that the Applicant has been convicted on the basis of evidence which is either untenable or which was, in the context of the trial, misleading. A miscarriage has occurred. The interests of justice in this particular case warrant the grant of special leave.
44. Moreover, the proposed grounds of appeal raise substantial questions as to the manner in which a Court of Appeal discharges its function. If that Court has erred in the manner suggested then the intervention of the High Court is warranted.

Part V: Costs

45. Costs are not ordinarily ordered in criminal proceedings.

Part VI: Table of Authorities, legislation and other materials

46. Legislation:
 46.1. *Criminal Code 1889* (Qld) sections 320A, 349(2)(b)
 46.2. *Judiciary Act 1903* (Cth) section 35A
47. Authorities:
 47.1. *Burton* (1986) 24 A Crim R 169
 47.2. *M v. The Queen* (1994) 181 CLR 487

Part VII: Oral Argument

48. The applicant wishes to supplement this summary with oral argument.

Bret Walker SC (Syd)
 PJ Callaghan (Bris)
 B O E L A W Y E R S
 September 2004

²⁰ This was considered only in the context of a complaint that the jury had heard the inadmissible evidence paras [35]-[38].