Authorised report: (2021) 17 ACTLR 72

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Vunilagi v The Queen**
Citation:	**[2021] ACTCA 12**
Hearing Dates:	17 – 18 May 2021
Decision Date:	9 November 2021
Before:	Mossop, Loukas-Karlsson and Abraham JJ
Decision:	See [279]
Catchwords:	**CRIMINAL LAW** – APPEAL – Whether verdicts were unreasonable – whether trial judge could be satisfied of the appellant's guilt beyond reasonable doubt – where challenge focussed on the reliability of the complainant's evidence – held: ground dismissed – whether trial judge impermissibly and unfairly introduced evidence into reasoning – evidence to be considered in context – held: ground dismissed. **CONSTITUTIONAL LAW** – APPEAL – Order for trial by judge alone without an accused's consent – challenge to the validity of s 68BA of the *Supreme Court Act 1933* (ACT) – whether provision invalidated by *Kable* doctrine because it compromised the institutional integrity of the Supreme Court – whether the provision was beyond the power of the Legislative Assembly because the reference to "Supreme Court" in s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) required trials on indictment to be by jury – whether s 68BA is invalid by reason of incompatibility with s 80 of the Constitution – held: provision not invalid
Legislation Cited:	*ACT Supreme Court (Transfer) Act 1992* (Cth) *Australian Capital Territory (Self-Government) Act 1988* (Cth), ss 22, 48A, Part VA *Australian Capital Territory Supreme Court Act 1933* (Cth), s 11 *Constitution* (Cth), ss 71, 73, 80, 122 *Court Procedures Rules 2004* (ACT), r 5531 *COVID-19 Emergency Response Act 2020* (ACT) *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT) *Crimes Act 1900* (ACT), ss 54, 60, 281 *Crimes Act 1900* (NSW), s 395 *Criminal Law Amendment Act 1883* (NSW) *Criminal Law and Evidence Amendment Act 1891* (NSW) *Criminal Procedure Act 1986* (NSW), s 132(7) *Evidence Act 2011* (ACT), s 144 *Evidence (Miscellaneous Provisions) Act 1991* (ACT), Part 4.3 *Juries Ordinance 1932* (ACT) *Juries Ordinance 1967* (ACT) *Jury Act 1901* (NSW)

Magna Carta (1297) 25 Edw 1 c 29, s 29
Public Health Act 1997 (ACT)
Seat of Government Supreme Court Act 1933 (Cth)
Supreme Court Act 1933 (ACT), ss 68B, 68BA, 68C(2), 115, 116, 117

Cases Cited:

Alqudsi v The Queen [2016] HCA 24; 258 CLR 203
Attorney-General (NT) v Emmerson [2014] HCA 13; 253 CLR 393
Bropho v Western Australia (1990) 171 CLR 1
Cameron v The Queen [2002] HCA 6; 209 CLR 339
Capital Duplicators Pty Ltd v Australian Capital Territory (1992) 177 CLR 248
Cheatle v The Queen (1993) 177 CLR 541
Doney v The Queen [1990] HCA 51; 171 CLR 207
Farrell v The Queen [1998] HCA 50; 194 CLR 286
Faull v Commissioner for Social Housing for the ACT [2013] ACTSC 121; 277 FLR 61
Fennell v The Queen [2019] HCA 37; 93 ALJR 1219
Fittock v The Queen [2003] HCA 19; 217 CLR 508
Filippou v The Queen [2015] HCA 29; 256 CLR 47
Ford v R [2020] NSWCCA 99
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45
GAX v The Queen [2017] HCA 25; 91 ALJR 698
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Khamis v R; Hussain v R [2018] NSWCCA 131
Kingswell v The Queen (1985) 159 CLR 264
Kirk v Industrial Court (NSW) [2010] HCA 1; 239 CLR 531
Leeth v Commonwealth (1992) 172 CLR 455
Libke v The Queen [2007] HCA 30; 230 CLR 559
M v The Queen [1994] HCA 63; 181 CLR 487
Mitchell v Barker (1918) 24 CLR 365
North Australian Aboriginal Justice Agency Ltd v Northern Territory [2015] HCA 41; 256 CLR 569
North Australian Aboriginal Legal Aid Service Inc v Bradley [2004] HCA 31; 218 CLR 146
Pell v The Queen [2020] HCA 12; 268 CLR 123
Re Governor, Goulburn Correctional Centre; Ex parte Eastman [1999] HCA 44; 200 CLR 322
R v Bernasconi (1915) 19 CLR 629
R v E (1997) 96 A Crim R 489
R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai [2020] ACTSC 225; 354 FLR 452
R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai (No 2) [2020] ACTSC 274
RC v R; R v RC [2020] NSWCCA 76
Smith (a pseudonym) v The Queen [2021] ACTCA 16
Spratt v Hermes (1965) 114 CLR 226
The Queen v Baden-Clay [2016] HCA 35; 258 CLR 308
Vella v Commissioner of Police (NSW) [2019] HCA 38; 93 ALJR 1236
Wong v The Queen [2001] HCA 64; 207 CLR 584

Texts Cited:	J Stephen, *A History of the Criminal Law of England* (Macmillan and Co, 1883) vol 1 W Windeyer, *Lectures on Legal History* (Law Book Company, 2nd ed (revised), 1957)
Parties:	**ACTCA 40, 47 of 2020**
	Saimoni Vunilagi (Appellant)
	The Queen (Respondent)
	The Attorney-General of the Australian Capital Territory (Intervenor)
	ACTCA 39 of 2020
	Ismeli Vatanitawake (Appellant)
	The Queen (Respondent)
	ACTCA 38 of 2020
	Josefa Masivesi (Appellant)
	The Queen (Respondent)
Representation:	**Counsel**
	J Stellios and K Musgrove (Appellant Vunilagi)
	B Morrisroe (Appellant Vatanitawake)
	S Whybrow (Appellant Masivesi)
	S Drumgold SC and K McCann (Respondent)
	P Garrison SC, H Younan SC and A Hammond (Intervenor)
	Solicitors
	Hugo Law Group (Appellant Vunilagi)
	Tim Sharman Solicitors (Appellant Vatanitawake)
	Boxall Legal (Appellant Masivesi)
	ACT Director of Public Prosecutions (Respondent)
	ACT Government Solicitor (Intervenor)
File Numbers:	AC 38 of 2020
	AC 39 of 2020
	AC 40 of 2020
	AC 47 of 2020

Decisions under appeal:	Court/Tribunal:	Supreme Court of the ACT
	Before:	Chief Justice Murrell
	Date of Decision:	13 August 2020; 9 October 2020
	Case Title:	R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai;
		R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai (No 2)
	Citation:	[2020] ACTSC 225; [2020] ACTSC 274
	Court File Numbers:	SCC 24 of 2020; SCC 25 of 2020; SCC 28 of 2020; SCC 54 of 2020

THE COURT

Introduction

1. In the early hours of 3 November 2019, the complainant, a 22-year-old woman, while intoxicated, met and began socialising with the appellants at a bar. The appellants were unknown to her. Ultimately, she went with them to Mr Josefa Masivesi's one-bedroom unit. The Crown alleged that there, the three appellants engaged in various acts of sexual intercourse and acts of indecency with the complainant without her consent.

2. On 9 October 2020, following a trial by judge alone before Murrell CJ (*R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai (No 2)* [2020] ACTSC 274), the following verdicts were delivered:

   (a) Mr Saimoni Vunilagi was found guilty and convicted of seven counts of sexual intercourse without consent (counts 3, 6, 9, 14-17) contrary to s 54 of the *Crimes Act 1900* (ACT) and one count of act of indecency without consent (count 4) contrary to s 60 of the *Crimes Act*.

   (b) Mr Ismeli Vatanitawake was found guilty and convicted of one count of sexual intercourse without consent (count 5) contrary to s 54 of the *Crimes Act*; and

   (c) Mr Masivesi was found guilty and convicted of an act of indecency (count 11) contrary to s 60 of the *Crimes Act* and two counts of sexual intercourse without consent (counts 12-13) contrary to s 54 of the *Crimes Act*.

3. Each of the appellants appeal their respective convictions on the basis that the verdicts entered against them are unreasonable having regard to the evidence (first ground). They also each allege as a ground of appeal (second ground), that:

> The trial judge impermissibly and unfairly introduced evidence into her deliberations that was not before her Honour, were not matters of common knowledge and upon which no submissions had been made or opportunity to make submissions was provided to the defence giving rise to a miscarriage of justice.

4. In addition, Mr Vunilagi asserts that the trial miscarried because the trial judge's order for a trial by judge alone was made pursuant to an invalid provision (third ground). This ground of appeal raises questions of both Federal and Territory constitutional law on which the Attorney-General of the Australian Capital Territory (Attorney-General) intervened. Finally, Mr Vunilagi contended that he suffered a miscarriage of justice as a result of the proceedings being tried by judge alone instead of before a jury (fourth ground).

5. It is convenient to address the first two grounds of appeal before turning to the challenges to the validity of the trial by judge alone. The first two grounds of appeal are somewhat intertwined, and as such ground two will be addressed in the course of dealing with the first ground that the verdicts were unreasonable.

6. For the reasons below, the appeals are dismissed.

Unreasonable verdicts having regard to the evidence

7. The test for determining this ground of appeal is well established. The question is whether, upon an independent examination of the evidence, it was open to the trier of fact to be satisfied of the appellant's guilt beyond reasonable doubt: *M v The Queen* [1994] HCA 63; 181 CLR 487 at 492-495; *The Queen v Baden-Clay* [2016] HCA 35; 258 CLR 308 at [65]-[66]. Finding that a verdict is unreasonable requires the appellate court to be satisfied that the trier of fact *must*, as opposed to might, have entertained a reasonable doubt as to the appellant's guilt: *Libke v The Queen* [2007] HCA 30; 230 CLR 559 at [113]; *Pell v The Queen* [2020] HCA 12; 268 CLR 123 (*Pell*) at [37]-[39]. In conducting that examination, the appellate court must have regard to the advantage the trier of fact had in seeing and hearing the witnesses.

8. In this context, reference to the judge's "finding" is understood to refer to the ultimate finding of guilt or otherwise, as opposed to the findings of fact leading to the ultimate finding: *Filippou v The Queen* [2015] HCA 29; 256 CLR 47 (*Filippou*) at [6], [80]. The finding of guilt is not to be disturbed "unless there is no or insufficient evidence to support the finding, or the evidence was all one way, or the finding is otherwise unreasonable, or unless there has been a misdirection leading to a miscarriage of justice": *Filippou* at [12]. Irrespective of whether the conviction followed from a trial by jury or judge alone, the question is always whether the ultimate finding of guilt was one which was open to the trier of fact on the whole of the evidence. This court should read the reasons of the trial judge fairly and as a whole.

9. As this was a trial by judge alone, this court has her Honour's reasons for reaching the conclusions her Honour did. The availability of reasons for a judge's decision will inform the consideration of whether it is unreasonable because, unlike in a jury trial, the process of reasoning is exposed: *Ford v R* [2020] NSWCCA 99 at [56]. Trial by judge alone judgments must include the principles of law applied by the judge and the findings of fact on which the judge relied: s 68C(2) of the *Supreme Court Act 1933* (ACT) . The plurality in *Filippou* proceeded on the basis that, assuming the trial judge has complied with that requirement, the appellate court should have regard to the judge's reasons: at [48]. In this context, Gageler J observed at [83]:

> Irrespective of whether it is applied in an appeal against conviction following a jury trial or in an appeal against conviction following a trial by judge alone, the question under the first limb is always whether the ultimate finding of guilt was one which was open to the tribunal of fact on the whole of the evidence. In some cases of an appeal against a conviction following a trial by judge alone, consideration of the first limb will require the Court of Criminal Appeal to review for itself the totality of the evidence so as to form its own assessment of whether or not it was open to the trial judge to be satisfied beyond reasonable doubt that the accused was guilty without any regard to the reasons for judgment of the trial judge given in compliance with s 133(2). In a case where the argument in the appeal against conviction is that there are particular reasons why it was not open to the trial judge to be satisfied beyond reasonable doubt that the accused was guilty, it may be open to the Court of Criminal Appeal to discharge its appellate function under the first limb by reviewing the evidence and forming its own independent assessment of that evidence to the extent necessary to

> engage with that argument while adopting, without need for independent assessment, other intermediate findings of fact of the trial judge about which no complaint is made in the appeal. But having adopted the intermediate findings of fact of the trial judge about which no complaint is made, and having arrived at its own conclusion on the evidence to the extent necessary to engage with the particular argument, the question for the Court of Criminal Appeal in such a case will remain whether or not the Court of Criminal Appeal has a reasonable doubt about the ultimate finding of guilt which cannot be resolved by taking into account the trial judge's advantage in seeing and hearing the evidence.

10. This case at trial involved issues of credibility and reliability of witnesses, in particular, the appellants raised issues in relation to the complainant's credibility and reliability. In contrast, on the Crown case, the complainant's evidence was credible, reliable and supported by circumstantial evidence and could properly be accepted. To have convicted the appellants on the counts her Honour did, having considered the whole of the evidence, her Honour must have accepted the complainant's evidence as credible and reliable in respect to those counts.

11. In that context, the High Court in *Pell* observed at [39]:

> The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.

12. On appeal, the focus of the challenge was on the reliability of the complainant's evidence. The submissions were not directed to individual counts, but rather, as to the complaint's evidence generally as to what occurred in the unit. In summary, each of the appellants identified factors which they said were reasons that cast doubt on her Honour's ability to be satisfied of the reliability of the complainant's evidence. Each appellant contended that the complainant had admitted to having "false memories" of events which had occurred at Mooseheads (a bar and nightclub) where she and the appellants were immediately before travelling to the unit, where the offences are said to have occurred. It was contended that in light of inconsistencies in the complainant's evidence, and in particular, the false memories as to what occurred at Mooseheads, her Honour could not accept the reliability of her evidence as to the offences. The appellants also criticised her Honour's reasons for her verdict, in particular, complaining that her Honour erroneously approached her conclusion through a prism of stereotypical conduct. There was considerable overlap in the submissions of each appellant insofar as they relate to the complainant, although each necessarily focussed on the allegations in relation to their client. We return to the details of the submissions below.

13. Suffice to say at this stage, bearing in mind the submissions made as to the significance of the inconsistent statements, and in particular in relation to the events at Mooseheads, an independent examination of the evidence reflects that it was nonetheless open to the trial judge to be satisfied of the appellants' guilt on each count.

14. Before addressing the appellants' submissions, it is appropriate at the outset to make the following observations.

15. *First*, the trial proceeded over 13 days, with the complainant giving evidence for five days (having been cross-examined by four counsel). This provided the trial judge with an

extended opportunity to observe and assess the complainant and the other witnesses. This provided a significant advantage to the trial judge compared with that held by this court.

16. In that context, we note also the observations in *Fennell v The Queen* [2019] HCA 37; 93 ALJR 1219 at [81]:

> Where a court of criminal appeal is called upon to decide whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the offence charged, the court must not disregard or discount either that the jury is the body entrusted with primary responsibility of determining whether the prosecution has established the accused's guilt or that the jury has had the benefit of having seen and heard the witnesses. At the same time, however, the court may take into account the realities of human experience, including the fallibility and plasticity of memory especially as time passes, the possibility of contamination of recollection, and the influence of internal biases on memory. The court can also take into account the well-known scientific research that has revealed the difficulties and inaccuracies involved in assessing credibility and reliability. [citations omitted]

17. *Second*, during the appeal, counsel (in particular, counsel for Mr Masivesi) complained that aspects of her Honour's reasons were deficient in their reasoning, despite there being no ground of appeal alleging inadequacy of the reasons. Nor, insofar as counsel submitted that aspects of the reasons "came close to" reversing the onus of proof, is there any ground of appeal alleging such an error. Neither of these matters are identified as particulars of this ground of appeal. Indeed, no complaint was made about any of the legal directions contained in the reasons.

18. *Third*, as will become obvious from the discussion of the evidence, there were five men present at Mr Masivesi's unit that night, with four men alleged to have committed sexual offences against the complainant. The fourth accused, Mr Macanawai, was found not guilty of the offences with which he was charged. In respect to Mr Macanawai, the real issue in his trial was identity. That is, whether the prosecution had proved beyond reasonable doubt that he was the third man (sequentially), who engaged in the events in the bedroom. There was another person in the unit that night, TW, who was unable to be located, and it was submitted that the trial judge could not exclude that the third man was TW. Her Honour concluded that although it was extremely likely that Mr Macanawai was the third assailant, in all the circumstances she was unable to exclude the possibility the third man was TW. Given the evidence as to identification and her Honour's reasoning, that conclusion does not affect the reliability of the complainant's evidence about the events in the unit. None of the appellants suggested it did.

19. *Fourth,* two of the appellants, Mr Masivesi and Mr Vunilagi, were interviewed by the police and answered questions about the events. Those interviews are only relevant in the cases of each of those appellants. However, Mr Masivesi also gave evidence in the trial. Although his evidence was rejected by the trial judge, his evidence was available to be used in the cases against each of the appellants. Her Honour concluded that given she rejected Mr Masivesi's evidence, it could only be relied on insofar as it supported the complainant.

20. *Fifth,* the issues at trial between the appellants were different. In respect to Mr Vunilagi and Mr Vatanitawake the real issue was consent. Mr Vunilagi gave an account to the police. Mr Vatanitawake did not, but the case put in cross-examination (and closing) was based on consent. That is, it was not disputed that sexual activity occurred, but because of the unreliability of the complainant, it could not be established that it was

non-consensual or that the appellant was reckless as to the complainant's consent. In respect to Mr Masivesi, the real issue was whether any sexual activity occurred with him, as alleged by the complainant. Mr Masivesi gave evidence. The submission advanced by him was again that given the complainant's unreliability, sexual activity could not be established. Although the appellants emphasised that their cases were different, on many topics they adopted or relied on submissions of other appellants or advanced arguments to the same effect.

Factual overview

21. The trial judge summarised the evidence in her reasons for verdict, the accuracy of which was not challenged in this appeal. Rather, the appellants' submissions were directed to her Honour's findings and reasoning. In that context, having read the evidence, we are satisfied of its accuracy and therefore, for the purposes of this judgment we refer to aspects of that summary. This summary is not exhaustive.

22. The Crown case was that the complainant was heavily intoxicated when she met the appellants (and Mr Macanawai) at Mooseheads in Civic at about 4:30am on 3 November 2019. The appellants were not known to the complainant. She began to socialise with them.

23. Much of the submissions on the appeal were directed to the activities at Mooseheads as they were captured on CCTV and some inconsistencies in the complainant's evidence in respect to those events can be objectively established. It will be necessary to return to this below.

24. Described below is the evidence of the chronology of events which unfolded the morning of 3 November 2019.

Mooseheads

25. The trial judge summarised the CCTV vision of the events at Mooseheads as follows at [123]-[125] and [129]-[138]:

> [123] At 4:50 AM, Vunilagi stumbled, taking the complainant with him. They stood back up.
>
> [124] At 4:51 AM, an unknown male spoke to Vunilagi, who forcefully pushed the man away in a seemingly agitated manner. At 4:52 AM, Vunilagi continued to engage with the unidentified male, releasing the complainant. Macanawai attempted to calm Vunilagi, but Vunilagi struck out at Macanawai. Vunilagi pulled the complainant in and held her with his left arm around the front of her neck. She placed both her hands on his arm.
>
> [125] At 4:52 AM, Ekeroma approached the table and spoke to Vunilagi, who indicated that a man in a T-shirt had caused the problem. Several men crowded around where Vunilagi held the complainant. The complainant placed her hand over her mouth and began to wipe her eyes while she was being held. She appeared to be crying. Vunilagi had his back against a pole and his left arm wrapped around the complainant's neck and chest in a "seatbelt" grip. She was on his left. Ekeroma gave a "thumbs up" signal to the complainant twice. She responded with a "thumbs up" (indicating that she was okay) and moved away to Vunilagi's right side.
>
> …
>
> [129] Ekeroma gave evidence that Vunilagi and the complainant were "really intoxicated". Their actions showed that they were "onto the sloppy side of drunk". The complainant's eyes were hazy, and he could tell her condition from her body language and face. She did not look as though she was aware of her surroundings. Ekeroma contrasted the condition of Vunilagi and the complainant with that of Macanawai, who was "lively drunk"; he was dancing around.

[130] The CCTV footage showed that, after Ekeroma approached, the complainant moved away, and briefly stood behind another man, wiping her eyes. She was beckoned by Vatanitawake and she followed him downstairs to the toilets area, dabbing her eyes.

[131] Vunilagi resumed an agitated exchange with the man in the T-shirt. At 4:55 AM, a security guard escorted Vunilagi towards the door.

[132] Warcaba, a security officer, gave evidence that he had seen Ekeroma attempting to escort a tall man (inferentially, Vunilagi), who was intoxicated and resisting the effort to remove him. Warcaba assisted with the removal.

[133] Masivesi, Macanawai, TW and the man whom Vunilagi had pushed away remained at the table.

[134] Meanwhile, at 4:54 AM, the complainant and Vatanitawake descended stairs to the male and female toilets and another bar area. The complainant's arms were linked through Vatanitawake's right arm and she was touching or wiping her face or eyes. They remained downstairs, just outside the entries to the male and female toilets, for about 10 minutes. In the footage, the complainant seemed to be upset, and Vatanitawake appeared to console her. The complainant and Vatanitawake talked, kissed and cuddled, and it appeared that the complainant did so willingly. At times when she spoke, she used animated arm gestures, and seemed to be trying to explain something to Vatanitawake. She wiped her eyes a couple of times. At 5:02 AM, after the complainant used her perfume to spray a woman who was exiting the female toilets, she sprayed Vatanitawake with the perfume.

[135] At 5:04:36 AM, the complainant led Vatanitawake through the door into the female toilets. The movement of their feet, which remained visible through a screen grate near the foot of the door to the female toilets, suggested a continuation of the amorous exchange outside the toilets.

[136] At 5:05:29 AM, Warcaba knocked on the bathroom door and announced himself. The complainant emerged, followed by Vatanitawake. Warcaba observed that they looked embarrassed but were laughing and seemed to be fine.

[137] The complainant and Vatanitawake ascended the stairs to the ground floor of Mooseheads. Halfway up the stairs, the complainant stopped and waited for Vatanitawake. He took her hand at the top of the stairs. They then ceased holding hands and walked separately towards the Bravo Door exit. She exited Mooseheads, followed closely by Vatanitawake.

[138] At 5:09 AM, Macanawai and Masivesi remained inside Mooseheads. Masivesi left at 5:11 AM.

26. It is timely to refer to the evidence of Mr Ekeroma, a security officer at Mooseheads. He gave evidence that having finished his security shift at 3am, he observed Mr Vunilagi's arm diagonally across the complainant's chest (like a seatbelt) holding her back against his body. She looked scared. Mr Ekeroma said he thought that after a few more drinks Mr Vunilagi may be "trouble". He approached them to enquire whether the complainant was comfortable. He questioned her with a "thumbs up" and she responded with a "weird" thumbs up, prompting him to ask, "Are you sure?". Although she responded in the affirmative, she did not smile. He said that a man in a red shirt had argued with Mr Vunilagi and seemed to be "trying to stick up for" the complainant. Mr Ekeroma said that he observed Mr Vunilagi engaging in an altercation with another man while the other men stood around the table. He approached Mr Vunilagi and told him to "calm down before we kick you out". The complainant was crying and looked scared. Mr Ekeroma told her to "leave" or "go home", and he took Mr Vunilagi's arm and led the complainant from the table, telling her to "go".

27. Mr Ekeroma gave evidence that Mr Vunilagi and the complainant were "really intoxicated". Their actions showed that they were "onto the sloppy side of drunk". The complainant's

eyes were hazy, and he could tell her condition from her body language and face. She did not look as though she was aware of her surroundings. Mr Ekeroma contrasted the condition of Mr Vunilagi and the complainant with that of Mr Macanawai, who was "lively drunk" and dancing around.

28. The CCTV footage showed that, after Mr Ekeroma approached, the complainant moved away, and briefly stood behind another man, wiping her eyes.

29. The events that occurred outside Mooseheads were also captured on CCTV, and were summarised by the trial judge at [152]-[160]:

> [152] The CCTV footage shows that, at 5:06 AM, the complainant exited Mooseheads by herself, and began to turn left down London Circuit towards East Row. Vunilagi was standing outside the Bravo Door, speaking to the man in the red shirt. As the complainant exited, he reached out and touched her arm. The man in the red shirt removed Vunilagi's hand. She looked towards them, stepped forward and spoke to Vunilagi. He took her hand, then let go.
>
> [153] The complainant walked east, past Verity Lane to the corner of East Row and London Circuit. At 5:16 AM, she was standing on the corner of London Circuit and East Row.
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> [154] Vunilagi chatted to the man in the red shirt near the Bravo Door exit. At 5:12 AM, both men walked from the Bravo Door east towards the southern (or top) end of Verity Lane (where Verity Lane meets London Circuit).
>
> [155] Vunilagi was joined by Vatanitawake, who then returned to the colonnade area near the Charlie Door entrance to Mooseheads, where others, including Macanawai, were milling. Macanawai sat down, then fell over.
>
> [156] At 5:16 AM, Vatanitawake went to the area outside the Charlie Door to Mooseheads, followed shortly thereafter by the complainant. En route, she passed Vunilagi and the man in the red shirt, who were still standing at the top of Verity Lane. When the complainant neared the Charlie Door, Vatanitawake beckoned to her. She approached him and spoke to him, another man and Masivesi for several minutes, before sitting down next to where Vatanitawake was standing.
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> [157] Vunilagi remained speaking to the man in the red shirt at the top end of Verity Lane until, at 5:17 AM, he walked part way down Verity Lane and spoke to Masivesi, who thereafter remained in Verity Lane.
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> [158] At 5:19 AM, Vunilagi went to the area outside the Charlie Door, where the complainant was seated in a group, near Vatanitawake and Macanawai. Vunilagi pulled the complainant up by her arm, put his left arm around her waist and walked with her back to Verity Lane and north up Verity Lane, holding her left arm and shoulder, then her left hand. She looked at and rubbed her left arm. They stopped and he examined her left arm. They stopped for a second time further down the Lane and were talking. At about 5:22 AM, they embraced.
>
> [159] By 5:22 AM, Vatanitawake, Macanawai and Masivesi were standing in Verity Lane. They followed Vunilagi and the complainant down the Lane. Vatanitawake, Masivesi and Macanawai stood back some distance from Vunilagi and the complainant.
>
> [160] As they exited the northern end of Verity Lane, towards the taxi rank on Alinga Street, the complainant and Vunilagi passed a police vehicle.

Taxi to unit

30. The trial judge summarised the evidence of the taxi van driver at [161]-[170] as follows:

[161] The taxi van driver collected the complainant, Vunilagi, Vatanitawake and Macanawai from the Alinga Street taxi rank and drove them to Masivesi's unit at 514 Northbourne Avenue, Downer.

[162] The woman got in first and sat behind him. The muscly guy (Vunilagi) stood beside the taxi and told the driver that two more guys were coming. CCTV footage showed that, at 5:29 AM, the complainant was the first to enter the taxi.

[163] A man got in the rear. He was short and had a stomach. CCTV footage shows that this man was Macanawai.

[164] Vunilagi entered the taxi and sat beside the complainant. They were smiling, and they seemed happy with each other.

[165] Finally, a very dark man (Vatanitawake) sat in the front. He smelled of alcohol and had been smoking a cigarette. By 5:34 AM, Vatanitawake was seated in the front seat. When he started driving, the complainant told him that she was "not comfortable" with Vatanitawake. He thought that she was "making fun".

[166] Once they were all in the car, the complainant seemed to be troubled and the driver asked, "Are you good?" and she said that she was. She spoke normally.

[167] The complainant did not move next to Vunilagi, but he moved towards her as the taxi travelled down Northbourne Avenue. He pulled her towards himself. She was also friendly, smiling at Vunilagi and acting politely. Everyone was friendly to each other.

[168] However, when the taxi neared the Downer/Dickson lights, the woman "started refusing" Vunilagi. They had an argument. The man in the front said something about coming to his house. He was behaving rudely, and the men had a very rude conversation, about themselves. They spoke partly in English and partly in another language. The conversation sounded aggressive. After the conversation, the woman was not happy or friendly towards the men. She was "refusing stuff" and her behaviour changed.

[169] When the taxi arrived at its destination, Vatanitawake got out first. Vunilagi suggested that they need not pay. The complainant insisted that the driver be paid and offered to pay with a credit card. Macanawai then paid him in cash.

[170] The woman did not seem to be overly drunk (she may have had four to five drinks) but the men were intoxicated.

The complainant's evidence at the unit

31. The complainant's evidence in respect to the events at the unit is summarised by the trial judge as follows (emphasis in original):

[171] When they arrived at Masivesi's unit, Vunilagi took the complainant inside. There was a lounge room with a kitchen and a door to the bathroom on the right. The bedroom was on the left.

[172] She removed her shoes inside the front door, and Vunilagi took or dragged her into the bedroom. Later, she told Linden that she had taken her shoes off when she entered as it was a habit.

[173] She removed her hoop earrings and put them in her bag as she thought that they would get pulled.

[174] She was not sure whether the stocky man walked into the house after her. It was possible that she was in the bedroom with the door shut before Masivesi arrived home. She was already in the bedroom when the fifth man arrived.

[175] The complainant did not recall whether she had wanted to go into the bedroom.

[176] "From the beginning", she told Vunilagi that she "didn't want to do anything". She was told to take her clothes off and she began to do so. Vunilagi pulled her dress

over her head and she sat down on the bed. He removed her underwear. She could not recall whether she had wanted to remove her clothes or whether she had sat willingly on the bed.

[177] Count 1. The tall man (Vunilagi) was on top of her, kissing her. She was on her back. He directed her to "go down" on him and perform "oral". He lay down. He was on his back and she was on her knees. He was not wearing a condom. He became erect. The fellatio lasted for a long time, about five minutes. She did not want to perform oral sex, but he grabbed her hair and she felt physically obliged to do so.

[178] **Count 2.** The complainant could not recall the circumstances in which she got on top of Vunilagi, whether he pulled her or told her to get on top. He penetrated her with his penis. She felt that she had to do what she was told because he seemed very aggressive.

[179] He lost his erection "when [she] started crying …it's like it turned him off…".

[180] **Count 3.** He laid her on her back and started "fingering" her violently. It was painful. She cried and told him to stop but he did not stop.

[181] **Count 4.** He used his mouth to "go down" on her. He was violently humping her and asking her whether she liked it. She continued crying.

[182] He grabbed her head and told her to suck him again. She tried to curl into a ball, and she thought that it was when she was trying to curl into a ball that he had grabbed her hair and told her to suck him. However, in re-examination, she was unsure whether she had sucked his penis a second time during this first episode.

[183] The complainant said that, when she continued to cry and he remained unable to revive his erection, Vunilagi opened the door and called "Simi" (Vatanitawake) into the room. She was not sure whether the door was then closed or remained open.

[184] **Count 5.** Vunilagi spoke to Vatanitawake in another language and gestured that Vatanitawake should undress and get on top of the complainant. She stayed on the bed, crying, as she felt too intoxicated to do anything. Vatanitawake undressed quickly, "made out" with the complainant until he became erect and had penile/vaginal intercourse with her while Vunilagi was watching. He ejaculated inside the complainant.

[185] **Count 6**. While Vatanitawake was having intercourse, Vunilagi grabbed the complainant by her hair and required her to "suck" him again. She was on her back. This continued until Vatanitawake ejaculated.

[186] In cross-examination, it was put to the complainant that she had demanded another person. The stocky man had entered, but the complainant had rejected him. Vunilagi had then obtained Vatanitawake, whom she had accepted. It was put to the complainant that Vatanitawake had engaged in intercourse doggy style while she had willingly sucked Vunilagi's penis. She had said that she wanted them both at once and Vunilagi had stood by the side of the bed while she had sucked him. She rejected this scenario.

[187] The complainant said that Vatanitawake left the room. The tall man remained in the room with her. She stood to dress.

[188] **Count 7.** The stocky man walked into the room. When the complainant said that she was leaving, Vunilagi told her that she was not leaving and must get back on the bed. The stocky man undressed and lay on the bed. Vunilagi pushed the complainant onto the bed and told her to have sex with the man. When she refused, he grabbed her hair and pushed her onto the man's crotch, telling her to "suck him". She performed oral sex on the man. Vunilagi commented "Where'd you learn to suck?".

[189] **Count 8.** Vunilagi pulled the complainant by her hair and required her to sit on the stocky man's penis. She sat facing him. The stocky man used his hands to hold

her hands against her hips so that she could not move freely, and he had penile/vaginal intercourse with her until he ejaculated inside her.

[190] She felt intimidated by Vunilagi as he was very rough. She did what she was told.

[191] **Count 9**. During the penile/vaginal intercourse, Vunilagi repeatedly pushed his fingers into the complainant's vagina, and the associated severe pain caused her to cry and scream loudly. However, it was difficult to hear her screams as loud Islander music was playing and drowning out her screams.

[192] After the stocky man ejaculated, she lay on the bed holding a dirty pillow to cover herself, with her back against the wall in a foetal position. The stocky man left.

[193] **Count 10**. Vunilagi got back on the bed and was "trying to finger" her. She was lying on her back, crying and telling him to stop because it hurt. He was beside her. He was trying to kiss her. He was "still basically fingering [her], trying to". He said "it's okay. You're fine. We're looking after you."

[194] While Vunilagi was "still basically fingering" her and she was begging him to stop, the older man (Masivesi) entered and told Vunilagi to stop and to leave the room. This was the first time that the complainant had seen Masivesi at the unit. Vunilagi left the bedroom (for the first time).

[195] Masivesi said, "it's okay. I'm going to take you home soon. Just get some rest". He tried to comfort her.

[196] Masivesi left the room for about 20 or 30 seconds. She was on the bed and she moved a curtain (she thought) and looked outside. She had no idea where she was. She did not use her phone because she was so distraught that she "didn't remember [her] phone".

[197] **Count 11.** Masivesi returned. He caressed her face, then her arms and breasts, moving down to her genital area. She cried and asked him to stop. He said "it's okay. I'm looking after you. You're safe with me" and "Those guys aren't going to come back in here. This is my house. I'll take care of you". He grabbed her shoulders and started kissing her on her lips and body.

[198] **Count 12**. Masivesi put his mouth on the complainant's vagina and "gave her oral". He licked her vagina for a short time and then she started crying.

[199] **Count 13**. Masivesi "fingered" her with his right hand until she began to cry uncontrollably in pain, hyperventilating as though she was having a panic attack. His fingers "went in all pretty far".

[200] He "penetrated her as well". In cross-examination, she said that he had tried to have sex; he had put his penis into her vagina, but they had not had sex. She said that it was as he was penetrating her that she had had a panic attack.

[201] Masivesi got off her and tried to calm her down and comfort her. He left, saying, "I'm sorry. I'll leave you alone now. Just go to sleep and I'll take you back home when you wake up". He left the room. She fell asleep.

[202] **Count 14**. The complainant was awoken by Vunilagi "fingering" her again. His fingers were inside her vagina. It was very painful. She was crying and told him to stop but he did not stop. He was wearing a different shirt, like a basketball jersey. It was a bright colour, yellow or orange.

[203] The complainant said that Vunilagi had "dry humped" her and slapped her butt cheek at least three times, extremely hard, telling her to stop crying. She had asked how he would feel if one of his ancestors or daughters was in her place. He responded that she was "okay" and that they were "just looking after" her. He then left the room.

[204] The complainant also gave evidence that she thought that it was when she was on top of the third man that she had been slapped.

[205] The complainant said that she needed to urinate. She dressed herself and went to the lounge room, where the five men were located. She told them that she needed to go to the toilet. She was told that she could go later, but she begged to go.

[206] She was permitted to go to the toilet under escort. The door was left open. Vatanitawake stood at the doorway.

[207] She tried to send a message saying “please help me” on the first occasion that she went to the toilet, at about 7 AM (or 7:30 AM). However, as she did not have credit on her telephone, the message did not transmit.

[208] The attempted transmission was at 7:16 AM.

[209] The complainant also said that the message had been generated on a second occasion when she went to the toilet. In cross-examination, she said that she had mixed up the occasion on which she had attempted to send a message to her friend. She also said that she had tried to message by data, but as her data had run out, her phone had defaulted to sending a text message. Her phone credit had run out and the text message was not delivered. She agreed that it would have been rational to call 000 but said she had been thinking only about getting home, not about the police.

[210] It was after attempting to send the message that she realised that she needed a charger.

[211] The complainant said that there had been a second (later) occasion when she went to the toilet, but she could not recall when that was. On that occasion, she was escorted to the toilet, but the toilet door was closed. The first time that she went to the toilet she was wearing her choker but, on the second toilet visit, she was no longer wearing her choker and she observed scratches on her neck and right side, under her right arm. However, in cross-examination, she agreed that, as no necklace was visible in the taxi van CCTV footage, she must have removed her choker earlier in the evening and placed it in her bag.

[212] When the complainant exited the toilet, she saw her shoes. She sat on the couch trying to put them on. Vunilagi came and sat next to her, on the chair to her left. Vunilagi said, “what are you doing?”. She replied that she was going home. He said, “no you’re not. You’re going to stay here. We are looking after you. You’re okay here”. He removed her shoes and socks and put her socks in her bag.

[213] She said that when she went outside to go to the toilet and was trying to put her shoes on, she passed her telephone to the old guy and asked whether they would charge it for her. He just held onto it and had no apparent interest in charging it. She snatched the phone back from him and sent (or tried to send) the message.

[214] She agreed that when she went to the toilet, she walked past the front door but made no attempt to flee. She did not remember why she had not attempted to leave at that time.

[215] **Count 15**. When the complainant was seated on the couch, trying to put her shoes on, Vunilagi was seated to her left, on a seat that was immediately adjacent to where she was seated on the couch. He pulled her leg up to facilitate him pushing his fingers into her vagina while she was seated. The other four men who were present were drinking, laughing, and looking. She lay on the couch, crying and begging him to stop but he did not.

[216] Vunilagi pulled the complainant up, grabbed her right arm and took her back to the bedroom, where he made her remove her clothes. He took her back into the bedroom where he “continued to finger” her and “make [her] give him oral again”.

[217] **Count 16**. In the bedroom, Vunilagi required the complainant to “give him oral again” and she fellated him. He was on his knees.

[218] **Count 17.** He told her to lie on the bed and he “gave her oral”, i.e. he licked her vaginal area.

[219] It is likely that the complainant was intending to convey that Count 17 preceded Count 16.

[220] He dry-humped her and asked her if she liked it. He told her to moan. She was crying and screaming "the whole time". He then left the bedroom.

[221] The complainant said that all acts of intercourse and other sexual acts at the unit occurred without her consent.

[222] She said that she was choked by Vunilagi. She was not sure when that occurred, although she thought that it had occurred while Vunilagi was dry humping her and had his arm around her neck.

[223] The light was off all the time that she was in the bedroom.

[224] After Vunilagi left the bedroom, the complainant put her long hair up, preparing for the fight that may be required in order to leave.

[225[Masivesi came into the room as the complainant was dressing and gathering her belongings. He "touched" and "felt" the complainant, trying to "feel [her] up" again. At first, she said "just get it over and done with" but then she decided that she "couldn't take it" so she got up, pushed him away and walked out. By that stage, she was feeling more sober.

[226] The living room was empty although the music was still playing loudly. The front door was wide open. She walked towards the door, but Vunilagi came back in and was "in her face". He confined her against the wall in front of the front door and asked, "Where are you going?". He told her to wait until Vatanitawake returned as he had just left to purchase a box of beer and would take her home when he returned. She pushed past Vunilagi, through the front door. He grabbed her and pulled her back in. She thinks that it was at that time that she was accidentally burned by a cigarette that he had been smoking.

[227] She walked briskly down the driveway to the main road.

[228] The complainant's evidence concerning necklaces was confusing. Ultimately, she agreed that she had not been wearing a necklace in the taxi van and had taken it off during the evening. She seemed to be saying that her second necklace, a choker necklace, "went missing" when she was at Masivesi's unit, and that Vunilagi may have pulled it from her when he was choking her. She left her bra at the house; she could not find it when she was leaving the house.

32. We note there is objective evidence that the complainant tried to send such a text message at 7:16am on the Sunday morning. The trial judge observed at [396]:

> A critical piece of objective evidence is the text message "please help me" created at 7:16 AM, after the complainant had been at the residence for about an hour and almost three hours before she finally left the residence and immediately sought help from a passer-by. At 7:16 AM, the complainant must have perceived herself to be endangered and incapable of extracting herself without the assistance of others.

Leaving the scene

33. In the passage recited above, her Honour refers to the complainant immediately seeking help from a passer-by, Mr Prentice, upon leaving the unit. Mr Prentice did not know the complainant. He was walking along the street at the front of Mr Masivesi's unit when the complainant approached him and asked for a pen. She asked him if he knew the number of the house. He told her he did not have a pen, but gave her the number of the house. She appeared "upset", "disorientated" and had "red eyes, like swollen eyes, and looked like she'd been crying and she started crying". Mr Prentice asked if the complainant was "okay" to which the complainant replied, "I don't know if it is rape or what you'd call it" and started crying. Mr Prentice gave evidence that:

> …I said 'Well do you want me to call the police or would you like me to call somebody for you' and she…the reason she was asking me for a pen, she told me, is because her phone had run out of batteries…so I asked if she'd like me to call and she said no, she was worried because she'd been intoxicated or something and so I said 'Look, do you want me to call a friend or your parents or someone or something' and she said she didn't know the numbers because they were in her phone so I asked if she'd like to call a taxi so we ended up calling a taxi…

34. Mr Prentice gave evidence that almost the first thing the complainant said was "I don't know if you'd call it rape, or what you'd call it". Mr Prentice observed a man exiting the unit and said, "There's someone coming out". The complainant ran and hid behind a bush and was "really frightened". At some stage she said they want to take her home but "I don't want to get in a car with them", and that she did not want to be seen by them.

35. He gave evidence that the complainant told him she had been out, that she had been drinking and "met some guy". The complainant told him that "they'd turned the music up" and "had taken turns with her throughout the night and turned the music up to drown out her shouting, or screaming". Further, that "she was afraid they were going to kill her". Throughout the time he was talking with the complainant she would burst into tears. Her voice was wavering and she was "frightened and crying". "[S]he would start crying and she'd be shaking and nervous and anxious, really anxious looking, and then she's start speaking and she would start crying again." Mr Prentice saw that the complainant had bruises on her throat or neck that looked like hand marks and fingerprints, as well as scratches on her chin and waist. Mr Prentice gave evidence that he was with the complainant for approximately 20 minutes at most.

36. The taxi driver who collected the complainant from the unit gave evidence that the complainant was crying. He asked her what had happened and the complainant told him she had gone home with one friend and "after some time he called more friends" who abused her. She said the music was loud and she was shouting. He gave the complainant his business card and wrote the number of the house where he picked her up on the back.

37. When she arrived home she spoke to a friend, Ms Lu. The complainant and Ms Lu reported the matter to police. That evening the complainant was forensically examined at Canberra Hospital.

Medical examination

38. Dr Thomas, a Registrar at the Clinical Forensic Medical Services and Forensic and Medical Sexual Assault Care Unit at Canberra Hospital, performed a medical examination on the complaint at approximately 9:30pm that evening on 3 November 2019. He gave evidence of the procedure he used to take the history. While examining the complainant, he took notes (Exhibit 15B). Dr Thomas explained inter alia:

> Q: And you go on, 'This may differ from subsequent statements made by the patient relating to the same incident'?
>
> A: That's correct. So we know that – we know that patients who have undergone a traumatic incident might provide different accounts to different people and that might be a way of their brain coping with missing pieces of information or they may just not remember at the time and things might come later or they might provide us with information that they don't provide to an investigator, for various reasons.

39. The trial judge summarised the evidence at [273]-[293]:

> [273] The complainant thought that she had not used the toilet before going to the hospital.

[274] At the hospital, the complainant's injuries were photographed: a scratch to the right side of the neck, a red mark on the left rear neck, and a long scratch/graze to the right side of the chest: Exhibit 6. The complainant said that she did not remember how she had sustained them, but she had not had them before she entered the bedroom. She told the doctor that she had a sore, dry throat and was dehydrated.

[275] Dr Thomas, a Registrar at the Clinical Forensic Medical Services and Forensic and Medical Sexual Assault Care Unit, Canberra Hospital, commenced examining the complainant at 9:30 PM. While examining her, he took notes: Exhibit 15B.

[276] The complainant told Dr Thomas that she had been assaulted by four men, whom she described as follows:

(a) About 6'5'' tall, athletic build, missing front teeth (assailant 1, Vunilagi).

(b) About 5'6" tall, slim build, oldest man, 40-50 years old, dreadlocks (assailant 2, Masivesi).

(c) About 6'1'' tall, slim build, a similar age to the complainant, possibly called "Simi" (assailant 3, Vatanitawake).

(d) Short, stocky build, with a beard (assailant 4).

[277] Her narrative account was as follows:

> We were in the club, I remember someone holding me. He kept kissing me, I think I was crying. The guy the same age as me took me outside to wait for a taxi. The tall guy grabbed me and dragged me through the alley, around to a taxi van. The guy the same age got in the taxi as well. Then four of them got in. They threatened the taxi driver. I got out when they got to their house. The tall guy took me to the bedroom, he grabbed my dress and ripped it off me. He started touching me. He went down on me. He fingered me. There was a lot of pain. He made me give him oral. He called in the younger guy, I think his name was Simi. He made the younger guy fuck me. He came inside me. I was saying no. The stocky guy came in, the tall guy made me give him oral. The stocky guy then sat me on top of him, he came inside me as well. Then the older guy came in, the taller guy came in and threatened the older guy. I was screaming and saying no. The older guy told the others to leave. He left but came back, then rubbed my body down, he fingered me. He put his dick inside me but I don't think he finished. The taller guy came back in and kept fingering me. I was screaming and crying. I fell asleep, but woke up to the taller guy fingering me. I was in so much pain. The older guy got back up on top of me. I went to the toilet. I was trying to put my shoes on. The taller guy put his fingers inside me again. I pushed the older guy off me. I was screaming and crying. I got out the door but he pulled me back in. I managed to get out to the road, there were people around. I saw a guy on the road and he called me a cab. I think the tall guy tried to choke me.

[278] The complainant did not refer to having had a panic attack while being assaulted.

[279] In relation to Vunilagi, the complainant reported penile/vaginal penetration, digital penetration, oral penetration by the penis and fingers (that he put his fingers in her mouth), oral contact by Vunilagi with her vagina, "bottom" (it could have been the bottom cheek), mouth and breasts, and the use of saliva as a lubricant (he "spat").

[280] In relation to Vatanitawake, the complainant reported penile/vaginal penetration, digital penetration, oral penetration by the penis, and oral contact by Vatanitawake with her vagina, "bottom", mouth and breasts. She said that he had ejaculated.

[281] In relation to Masivesi, the complainant reported penile and digital penetration of the vagina, penetration of the mouth by the penis, and oral contact with her vagina, "bottom", mouth and breasts.

[282[In relation to the fourth assailant, the complainant reported penile and digital penetration of her vagina, penetration of her mouth by his penis, and oral contact with her vagina, “bottom”, mouth and breasts.

[283] She said that no condom was used. She said that Vunilagi had not ejaculated. She was unsure whether Masivesi had ejaculated. Both Vatanitawake and the fourth assailant had ejaculated.

[284] The complainant’s presentation was “flat” and dull, her voice was monotonal and her eye contact was poor. She was not tearful. She said that, since the assault, she had experienced painful urination, vaginal pain and vaginal spotting.

[285] The complainant said that assailant 1 (Vunilagi) had used his right hand to strangle her but did not say when that had occurred in the sequence of events. She was unsure about an associated loss of consciousness or memory. She said that she experienced neck pain, a sore throat, voice changes, a cough, and tunnel vision. She reported a previous strangulation, but no details were taken. Dr Thomas said that a strangulation could aggravate an earlier injury.

[286] The complainant told Dr Thomas about injuries possibly caused by Vunilagi – a scratch to her right side (flank), an open hand strike on her buttocks and a bite on her right buttock and bottom lip. She said that he had pulled her hair, choked her and may have burned her left arm. She had scratched Vunilagi with her right hand. He had not “threatened” her.

[287] At 11:05 PM, Dr Thomas conducted a general medical examination. He did not test the complainant’s blood alcohol level. He took photographs of injuries: Exhibit 6. He observed a 12 mm scratch/abrasion to the right side of the neck (images 3 and 4), which could have been caused by sharp fingernails or a blunt force, irregular shaped areas of redness on the back right side of the neck (images 6 and 7), a 200mm x 8 mm abrasion to the right side of the body/chest (images 8 and 9), which were probably caused by blunt force, a possible bite mark to the right side of the right buttock (five small bruises less than 3 mm diameter in a curvilinear shape), but did not note that they were yellow as was his normal practice with yellow (older) bruises. The possible bite mark was not photographed.

[288] The doctor conducted a genital examination. The external genitals were tender to touch. There were two linear abrasions, each about 1 cm long, extending from the outer labia to the perineal area. The internal examination yielded little of interest. He said that the insertion of a sharp fingernail may or may not have caused damage to the vaginal or cervical walls; it was unlikely to have reached to the cervical wall and the vaginal walls are very elastic and can accommodate objects without injury.

[289] Dr Thomas could not say that any of the injuries necessarily showed that there had been a sexual assault. The neck marks were likely the result of the application of blunt force.

[290] Forensic samples were collected. In that context, the complainant reported that she had had vaginal intercourse with her fiancé on 1 November 2019.

[291] The complainant told Dr Thomas that she had felt very drunk and dizzy and that she had been forced to consume alcohol by (Vunilagi) and (Masivesi). She said that the she [sic] had drunk two glasses of white wine (at 9 PM), two passionfruit cocktails (between 11 PM and midnight), a vodka raspberry (at midnight), half a can of Smirnoff double black (at midnight), one Canadian Club mixed drink and two Jack Daniels (between 1 AM and to 3 AM), and two vodka Red Bulls (at 3 AM). Then the “other guy” had poured her drinks from 3 AM until 5 AM. She felt that her drinks may have been “spiked”.

[292] Dr Thomas said that symptoms of intoxication include discoordination, loss of balance, euphoria and dysphoria (elevation or alteration in mood), and disinhibition.

[293] Based on the complainant's drinking history, Dr Thomas opined that she would have been intoxicated at 5 am. After looking at the CCTV footage recorded at 4:33 AM (when the complainant was standing outside and entering Mooseheads), he said that she may have had a balance issue, but he agreed that she had walked into Mooseheads without apparent difficulty. He said that the CCTV footage recorded at 5:05 AM (as the complainant was walking upstairs from the toilets) and at 5:16 AM (outside Mooseheads), did not demonstrate a difficulty with coordination. She did not appear to be intoxicated when he saw her.

40. A forensic sample was taken from the complainant. A DNA analysis of the endocervical swab found extremely strong support for contribution by Mr Vatanitawake.

Police Interviews

41. On 7 November 2019, the complainant participated in a police evidence-in-chief interview.

42. Mr Vunilagi, Mr Macanawai and Mr Masivesi were interviewed by police. Those respective interviews were admitted into evidence in the case against each appellant but not in relation to the other appellants.

Appellants' submissions in relation to the complainant's evidence

43. As noted above, although each of the appellants' cases are separate, there is considerable overlap in the submissions made on the verdict being unreasonable. At the heart of the appeal ground was an attack on the reliability of the complainant's evidence.

44. Put most simply, the appellants' submission is significantly based on an assertion that the complainant had "false memories" about the events which occurred in Mooseheads, and that there were other inconsistencies in the complainant's evidence about the events, such that there must have necessarily been a reasonable doubt about her evidence as to the counts on which the appellants were convicted. In particular, the appellants point to the complainant's evidence about what occurred at the unit. It was submitted that the trial judge did not address these "false memories".

The inconsistencies

45. At the outset it is appropriate to identify the inconsistencies relied on by the appellants in advancing this submission.

46. The "false memories" at Mooseheads primarily relied on by the appellants were as follows:

(a) The complainant told police she was grabbed by one of the tall guys inside Mooseheads and that when she got up to the table of men, she could not remember if she "got grabbed or whatever". The CCTV footage showed the complainant walked directly to the table and was not grabbed.

(b) The complainant told police the group of men kept buying her drinks all night and that she estimated she had probably five drinks from the group. She told Dr Thomas "she was forced to consume alcohol by the tall guy [Mr Vunilagi], the older guy [Mr Masivesi]". CCTV footage showed the complainant had one drink whilst in the company of the men and she was not forced to consume alcohol. We note that while that is so, it does appear she was offered (but not forced to consume) a number of drinks by them, however she declined.

(c) The complainant's evidence was that Mr Vunilagi grabbed and touched her and that she did not want to be touched by him. She said she started crying because

Mr Vunilagi kept kissing her and that she tried to pull him off her. The CCTV footage showed that from approximately 4:37:17 until approximately 4:51:13, the complainant was embracing, kissing, and talking to Mr Vunilagi. She accepted she did so willingly. After she started crying the complainant made no attempt to get away from Mr Vunilagi.

(d) The complainant recalled being pulled away from Mr Vunilagi by Mr Vatanitawake and taken downstairs so they could get away. The CCTV footage showed that Mr Vunilagi released his grip on the complainant. Mr Vatanitawake then beckoned the complainant, she moved over to him and together they went downstairs.

(e) The complainant said she did not spray her perfume on Mr Vatanitawake when they were downstairs, but the CCTV footage showed that she did.

(f) The complainant said that when she left Mooseheads she walked outside with Mr Vatanitawake, but the CCTV footage showed she was not with him. The complainant recalled being dragged by Mr Vunilagi to the taxi, when the CCTV footage showed the complainant and Mr Vunilagi walking while holding hands, and that they had previously been standing closely, talking and/or kissing.

47. The complainant accepted her memory on those topics was inaccurate, or that she had no memory of certain events. The complainant's evidence was that she had limited recall of the events between when she left her friends that night and when she entered the taxi at about 5:30am.

48. The inconsistencies that are identified and relied on by the appellants as to the events which occurred after leaving Mooseheads were primarily:

(a) That the complainant reported being scared and intimidated by Mr Vunilagi in the taxi. The complainant sat in the taxi alone for approximately five minutes before the taxi left and made no attempt to shut the door on Mr Vunilagi or to get the taxi driver to drive away. She conceded she willingly got into and remained in the taxi;

(b) The complainant thought Mr Vunilagi pulled her out of the taxi, however, she had ample opportunity to refuse to get out of the taxi;

(c) Mr Vunilagi ripped her dress off, although the complainant accepted she started to undress herself and what she meant was that Mr Vunilagi pulled her dress over her head;

(d) Mr Vunilagi dragged her by the arm to the bedroom when actually she walked along the driveway and had ample opportunity to flee;

(e) There was an issue as to when she removed her jewellery;

(f) There was an issue as to when she attempted to send the text message seeking help;

(g) That the complainant said she could not find her bra at the unit, and that the police did not locate it at the unit; and

(h) It was said that the complainant misdescribed the mattress on the bed.

49. Some of the appellants on occasion also referred to some of these alleged inconsistencies as "false memories". We note that the appellants were not consistent in the use of that label.

50. That said, leaving aside for a moment the evidence which supported the complainant's reliability, a number of observations may be made about those topics referred to in [48].

51. Some of the matters identified are not inconsistencies in the evidence, but rather a submission that the complainant could have refused to get out of the taxi or have fled the scene. That is, her behaviour was inconsistent with her evidence about her state of mind at the time. The submission presupposes what is said to be an appropriate reaction or behaviour. The failure to flee is not necessarily reflective of the complainant not being scared. It cannot be extrapolated from the failure to flee that the complainant consented to the sexual activity with the appellants. It is a factual matter to be assessed with all other evidence.

52. As to the jewellery, text message, bra and mattress, her Honour concluded at [388]-[392]:

> [388] The complainant was confused concerning when she had been wearing her two necklaces and when and how they had been removed from her neck. I do not consider that this evidence undermines the complainant's credit; it is consistent with the events of the evening that the complainant was confused about a relatively peripheral matter.
>
> [389] The complainant's memory of going to the toilet on the two occasions, when she requested a charger and when she attempted to send a message (and why the message did not transmit) is confused and blurry. However, there can be no dispute that she attempted to send a message at 7:16 AM.
>
> [390] Although the complainant suggested to police that they would find a pink bra and lot of hair in the bedroom (because Vunilagi had tugged at her hair), when executing the search warrant, the police did not find these items.
>
> [391] This does not affect my assessment of the complainant's credibility. Her hair may well have been tugged without clumps of hair being removed. Some hair may have been present but not located because the forensics team was not called in. The location of the bra remains a mystery. It would seem that the search was less than thorough.
>
> [392] The complainant denied that there were two mattresses and a sheet on the bed. Masivesi said that a mattress and sheet that had been on the bed were placed outside because they were filthy after being used by so many people. When the search warrant was executed, the police saw a mattress and sheet over the fence of the premises. The complainant may have been wrong about a second mattress and sheet. If so, that is a relatively minor detail that does not cause me to doubt her evidence of critical matters.

53. Considering the evidence as a whole, such findings were plainly open on the evidence. Moreover, the failure of the police to locate items must be considered in that context. For example, there is no suggestion put to the complainant that she still had the bra or that it was other than where she said it was. This is in the context where it was not disputed by any appellant that sexual activity took place at the unit.

54. The first appellant, Mr Masivesi, did submit that there were some differences in the complainant's account given to Dr Thomas and her recorded examination-in-chief, and criticised the manner in which the trial judge dealt with that. The third appellant, Mr Vunilagi, submitted that the complaint's account given to the two police officers and the account given to Dr Thomas are inconsistent, with particular reference to lack of reference to oral sex. These submissions are referred to below.

55. It is noted that these identified topics of inconsistency do not include that the complainant has been inconsistent as to the events she said occurred in the bedroom and the unit more broadly (either as to what occurred, when or with whom) in her recorded examination-in-chief and her evidence, or generally within her evidence.

The "false memories" submission

56. Against that background, we turn to the trial judge's consideration of the "false memories" the complainant had about the events at Mooseheads.

57. In relation to the events where the complainant accepted that the CCTV footage differed from her memory, the trial judge concluded that the complainant had not deliberately lied but had an incorrect memory. Of note, the trial judge found that:

    (a) the complainant had no recollection of some significant events and wrongly recalled that she had been plied with drinks by Mr Masivesi and Mr Vunilagi; and

    (b) the complainant wrongly recalled that her interaction with Mr Vunilagi at Mooseheads had commenced when he had "grabbed" her and that he had "dragged" her to the taxi rank.

58. However, as her Honour stated, in some respects, the complainant's evidence was consistent with the CCTV footage and the evidence of Mooseheads' security officers. For example, she accurately described the way in which Mr Vunilagi held her in a "seatbelt" grip and the interaction with Mr Ekeroma.

59. Her Honour stated at [374]:

> … the complainant's lack of memory and "false memory" about some important events at Mooseheads and in the Civic area —things that would have been of some importance at the time, not just in retrospect—means that her evidence about later events must be examined very closely (both internally and in the context of other evidence) if, as to critical matters, it is to be accepted beyond reasonable doubt.

60. There is no basis to contend, as the appellants did, that her Honour did not do as she stated she would.

61. Insofar as the appellants characterise the inconsistencies as "false memories", they appear to do so to attempt to place an elevated significance on them. The term "false memories" was one introduced into the trial by the appellants in cross-examination. We note that although her Honour refers to that concept, she does so in inverted commas, as opposed to an acceptance of the correctness of that description.

62. In support of their submission in respect to the "false memories" the appellants referred, in particular, to two cases; *R v E* (1997) 96 A Crim R 489 (*E*) and *GAX v The Queen* [2017] HCA 25; 91 ALJR 698 (*GAX*).

63. The appellants rely on *E* and contend that case is "directly applicable" to the case at hand. That submission is incorrect. *E* concerned the issue of recovered memories. That is, the complainant in that case gave evidence that although for many years she had no memory of being sexually abused, she now remembers that occurring. The factual sequence of events giving rise to the recovered memory was important to the reasoning of the majority (Smart and Sperling JJ) in that case, although is unnecessary to recite here. Suffice to say that this is plainly not such a case. We note also that although Simpson J (in dissent) would have agreed with the concerns of the majority, her Honour did not do so as there was other evidence available (in that case, medical evidence supporting the allegations that sexual abuse occurred although not implicating the offender). Importantly, as Simpson J correctly observed at 493, the circumstances of that case called for "the most careful scrutiny of the evidence", which is the approach adopted by the trial judge in this case.

64. The facts in *GAX* are also to be distinguished from this case. Although the first appellant submitted the case referred to "what might be termed 'false memories'", that term is not referred by the Court. In *GAX*, the High Court allowed an appeal against conviction, concluding that on the evidence there was a real possibility that the complainant's evidence was a reconstruction and not an actual memory which could not be excluded beyond reasonable doubt: *GAX* at [31]. The complainant was a child at the time of the alleged offences. The plurality discussed the evidence, and what it was that gave rise to such a conclusion. The complainant gave evidence of an alleged sexual assault which occurred about a decade earlier when she was 13 years old. The plurality recited a critical passage of evidence which included that when asked what her father was doing while on the bed, the complainant said: "I was asleep before and ended up finding out what happened". That is the basis on which the issue of reconstruction arose. Again, that is not suggested in this case.

65. Properly considered *E* and *GAX* are examples of the application of well-established principles in respect to whether a verdict is unreasonable (as referred to above), to the evidence in the particular case. The test remains the same. Putting a label on what is a witness inaccurately recalling an event or where the witness has no memory of aspects of an event, does not assist in resolving the issues at hand. Each case must be assessed on its own facts.

66. That there are plainly factual distinctions between the circumstances of this case, *E* and *GAX* is not to suggest that the inconsistencies in the complainant's evidence are not important. To the contrary, as her Honour acknowledged in the passage recited above at [58], it is necessary to closely examine the complainant's evidence in that context. Her Honour must have been satisfied, considering the evidence as whole, that the complainant's memory of the events the subject of the convictions was reliable. This necessarily involved a consideration that her memory had been inaccurate as to aspects of the events at Mooseheads. That conclusion was open. Importantly, in conducting the independent examination of the evidence required for a consideration of this ground of appeal, this court must take into account, inter alia, any inconsistencies (however they are characterised) in the complainant's evidence which must necessarily encompass the nature of them.

The context of the inconsistencies must be assessed

67. The appellants' submission as to "false memories" in this case also approaches the complainant's evidence in a vacuum.

68. At this stage, in that context, there are four observations which can be made.

69. *First,* there was evidence which supports the complainant's version of events in the unit, some of which was uncontested. It is important to recall that, as previously explained, the contested issue in the case against each appellant is different and not all matters were in issue in the case against each appellant.

70. There were a number of instances where other evidence, including evidence from the appellants, was consistent with the complainant's evidence. For example, the oral evidence of Mr Masivesi contained significant support of the complainant's version of events at the house and was admitted in each case. In Mr Vunilagi's case, his recorded interview with the police contained admissions of two occasions of oral sex involving the complainant, one of which occurred while Mr Vatanitawake was having penile vaginal sexual intercourse with the complainant. That was consistent with the complainant's

version and caused consent and recklessness to be the substantial issues to be decided in relation to counts 1 and 2. Mr Vunilagi's girlfriend also gave evidence that he had told her he had oral sex with the complainant on two occasions and that there was dry humping. Again, this is consistent with the evidence of the complainant. In relation to Mr Vatanitawake, the DNA evidence which indicated the presence of his semen had the result that the contest was over consent and recklessness rather than whether the sexual intercourse occurred.

71. In relation to Mr Masivesi, in addition to his oral evidence, his interview with police was evidence in his case. His statements to the police were consistent with the complainant's version of events to a greater extent than his oral evidence, providing considerable support for the proposition that the complainant's evidence was reliable.

72. In addition, as explained in more detail below at [84]-[102], there is other supportive evidence admissible in each case. Thus, in each case it was a matter of assessing the reliability of the complainant's evidence in a context where the issues were confined by other admissions or uncontested evidence that supported the reliability of the complainant's evidence.

73. *Second*, insofar as the alleged inconsistencies are said to relate to various complaints made by the complainant, in assessing whether there is an inconsistency and if so, what if any impact it may have on the complainant's evidence, regard has to be had to the circumstances in which each of those complaints were made to police and the statements were made to Dr Thomas.

74. The complainant went to the police at about 2pm on the day of the incident. Senior Constable Burns spoke to the complainant for about 20 minutes, with his evidence summarised at [252]-[262] of the trial judge's reasons. The purpose of speaking to the complainant, he said, was to obtain an overview of the events to enable him to brief detectives. It was not his role to investigate or ask any probing questions. During the conversation he observed that the complainant was upset, she seemed exhausted and that her voice was very crackly and raspy. When Senior Constable Burns asked the complainant why her voice was affected, she said that it was because the men had turned up the music to drown out her cries and screams.

75. Pausing there, the purpose of this interaction was not to take a statement from the complainant. Senior Constable Burns was taking notes of what the complainant said, for the purpose of gaining an overview and, given its purpose, it was not intended to be a complete account.

76. At around 4.30pm that same day the complainant was introduced to Senior Constable Linden. Senior Constable Linden took the complainant through the events, with his evidence summarised in the trial judge's reasons at [263]-[271]. He observed that the complainant's voice was hoarse, "noting it was from screaming in the house", and that she was exhausted and in shock.

77. So far as reliance was placed upon matters that the complainant did or did not say to Dr Thomas, it is relevant to take into account that Dr Thomas saw the complainant at the hospital at approximately 9:30pm on 3 November 2019. Dr Thomas took, inter alia, a history from the complainant. He explained:

> Q: So you've written, 'The history given by the patient is taken in the context of a clinical therapeutic relationship'. Can you just explain to the court what that means?

A: So first and foremost, your Honour, we're medical doctors and nurses, so our main priority is the health and wellbeing and identification of injuries that might be a threat to someone's health. So first and foremost, I act as that patient's doctor and being that I am an emergency department doctor, I have a number of links within the emergency department and if I identify injuries and things, I can help to organise for the patients to have those treated. The point of that line is - is to show that I'm actually there as - as a healthcare provider, not as someone who's just taking an interview or just collecting evidence for police.

Q: And you go on, 'This may differ from subsequent statements made by the patient relating to the same incident'?

A: That's correct. So we know that – we know that patients who have undergone a traumatic incident might provide different accounts to different people and that might be a way of their brain coping with missing pieces of information or they may just not remember at the time and things might come later or they might provide us with information that they don't provide to an investigator, for various reasons.

78. Dr Thomas also asked questions to complete his required forms. These questions were not in chronological order, but rather were questions asked per assailant, with Dr Thomas referring to them as assailants one though to four.

79. The conversation that occurred at the hospital was some 12 to 16 hours after the incidents. The complainant had not slept in that time, had eaten once at 12:30pm and it might be accepted, was hungover. Given the time that the offences occurred, and that she had been getting ready to go out since about 10pm the night before, it can be accepted the complainant had been awake, or had had little sleep for a long time.

80. The nature and purpose of these statements is to be contrasted to the recorded statement from the complainant which was not taken until 7 November 2019. The recording spans from 2:21pm to 7:16pm.

81. Any assessment of alleged omissions from her accounts, and what significance, if any, arises therefrom must be considered in that context.

82. *Third*, as to specific submissions about what is said to be deficiencies in the complaint's evidence, it is necessary to consider not only what the complainant said to police or to Dr Thomas but also to other evidence in the case. The following two examples illustrate this point. It was submitted by Mr Vunilagi that the complainant did not refer to oral sex in the accounts provided to Senior Constable Burns or Senior Constable Linden. So much may be accepted. However, the complainant did refer to oral sex when speaking to Dr Thomas. Mr Vunilagi's girlfriend also gave evidence that he had told her he had oral sex with the complainant on two occasions and there was also dry humping. Although not referred to in the initial complaints, the complainant gave evidence that in relation to Mr Vunilagi, both oral sex and dry humping occurred. Another example is the submission by Mr Vunilagi that the complainant made no reference to choking in her conversation with the Senior Constable Burns. Again, that is correct. However the complainant did mention choking to Dr Thomas and Dr Thomas described injuries to her neck. Also, and more importantly, when the complainant left the house that morning she was observed to have injuries to her neck which looked like fingerprints. All this simply illustrates is that it is necessary to assess the evidence as a whole, rather than in any piecemeal fashion.

83. *Fourth*, as noted above, the complainant was in the witness box for five days. In respect to the events at the unit, her evidence was generally consistent, and with the account she gave in her recorded statement and the various statements the day she went to the police.

The trial judge made a finding at [360] that the complainant's evidence with respect to the events was generally consistent and the appellants did not challenge that finding.

Other evidence relevant to the assessment of the reliability of the complainant

84. As observed above, the appellants' submission (including their reliance on *E* and *GAX*) considers the evidence in a vacuum. The assessment of any inconsistencies and what effect, if any, they have on the complainant's evidence must necessarily be considered in the context of all the evidence in the trial (admissible against the relevant appellant).

85. There is evidence which, considered as a whole, is capable of providing support for the complainant's evidence as to the events at the unit.

86. As the trial judge also noted, the CCTV footage at Mooseheads is also consistent with some aspects of the complainant's evidence. For example, the complainant describes Mr Vunilagi holding her with his hand across her chest in what has been described as a seatbelt grip. The complainant was crying. Mr Ekeroma's evidence was that she appeared scared. Mr Vunilagi was a large man who was drunk and who was behaving aggressively towards other men. We note that the complainant's evidence was that she felt intimidated by him.

87. In that context she extracts herself from his grip and removed herself from him.

88. When she returns from being downstairs with Mr Vatanitawake, the complainant removed or separated herself from both Mr Vunilagi and Mr Vatanitawake outside Mooseheads. It was apparent it was Mr Vunilagi who went looking for her and sought her out. She is sitting on the kerb outside of Mooseheads when Mr Vunilagi approached her.

89. As noted above, whatever happened at Mooseheads, there was evidence from the taxi driver that in the trip to the unit the complainant was uncomfortable.

90. As described above, the complainant was moving away from Mr Vunilagi in the taxi as they approached the unit. She was unhappy, and rejecting Mr Vunilagi's advances. She had expressed she was uncomfortable with Mr Vatanitawake being there. The taxi driver was concerned for her.

91. Bearing in mind that the complainant was the first person in the taxi vehicle, it appears it was Mr Vunilagi who asked the taxi driver to wait for others, who then got in. The other males were walking some distance behind the complainant and Mr Vunilagi. It may be readily accepted that going to the unit with the expectation of one person is different to there being a number of men. That other men were in the taxi says nothing as to the complainant's willingness to have sexual activity with those other persons. Noting also that it later became apparent that there were additional men travelling to the unit in a second taxi.

92. The appellants contend that the complainant's evidence was not supported by that of the taxi driver who took them to the unit. The complainant said that she was sitting directly behind the taxi driver and leant forward towards his left ear and told him she was scared. The taxi driver said that the complainant never told him she was scared. Although that may be so, what is apparent from the taxi driver's evidence is that he was concerned for the complainant, and she appeared "troubled" such that he asked if she was fine before beginning the journey. Mr Vatanitawake was the front seat passenger. There was evidence the complainant had expressed she was not comfortable with Mr Vatanitawake's

presence, that she started refusing Mr Vunilagi, and her behaviour changed as they approached Mr Masivesi's unit.

93. The appellants' submission as to inconsistency in the complainant's conduct, referred to above at [48], is to be considered in that context.

94. The events in the unit also occurred in that context.

95. As described above at [32], there is evidence that while at the unit the complainant attempted to send a text message, "please help me" at 7:16am. In the chronology of events, according to the complainant's account, this occurs after Mr Masivesi had committed the sexual acts.

96. We note that Mr Masivesi contended that the meaning of the text message was ambiguous and it may have simply been a "request for lift home". He was the only appellant to address this evidence. That submission is inconsistent with the plain meaning of the words of the text. Importantly, this piece of evidence, as with others is not to be looked at in isolation. We will return to the submission when addressing Mr Masivesi's appeal.

97. Mr Masivesi gave evidence, which as explained below, was rejected by the trial judge. Her Honour only accepted the evidence insofar as it supported the complainant. We note his evidence in the trial is admissible in the case of each appellant. As to the events in the unit, the evidence of Mr Masivesi supports the complainant's evidence that she was in the bedroom with Mr Vunilagi first. Mr Masivesi's evidence was consistent with that of the complainant as to who was in the bedroom at the outset, and that Mr Vunilagi came out of the bedroom to get Mr Vatanitawake, and that both men then went into the bedroom. Mr Masivesi said that he turned up the music in the lounge room to cover the noise of what was happening in the bedroom, as the complainant described. Mr Masivesi also said he went into the room to get his charger. On the complainant's evidence, counts 16 and 17 occurred towards the end of the events, being after she had been to the bathroom and Mr Vunilagi had taken her from the living room couch back into the bedroom. Mr Masivesi gave evidence that late in the events, when the complainant was in the living room on the couch, Mr Vunilagi took her back into the bedroom (which Mr Vunilagi denied in his interview with the police).

98. In the case against Mr Masivesi, his interview was also admissible and supported elements of the complainant's evidence. For example, this included saying that Mr Vunilagi "dragged" Mr Vatanitawake and Mr Macanawai into the bedroom and they were "probably" having sex. At one stage, Mr Vunilagi and Mr Macanawai were in the bedroom together; he and the other men were scared of Mr Vunilagi because he was big and drunk; when the complainant went to the toilet either Mr Vunilagi or Mr Vatanitawake followed her; at one stage, when he walked into the bedroom, Mr Vunilagi was in the bedroom with his fingers in the complainant "touching her up", he told him to stop and reassured the complainant; that when the complainant was on the couch she was unhappy and wanted to leave; and Mr Vunilagi tried to touch her vagina and then pulled her (or made her go) back into the bedroom.

99. As described above at [33]-[36], when the complainant fled the unit at about 10:00am she was upset, disorientated, crying and appeared really frightened. Mr Prentice, the passer-by, observed various injuries including marks around the complainant's neck which he said looked like hand marks, and scratches on her chin.

100. The complainant made a complaint to Mr Prentice, to the taxi driver, and by around 2pm had made a complaint to the police. Reliable complaint evidence, if accepted, can be relevant to the complainant's credit and, as each of the complaints were made when the events in question would have been "fresh in the memory" of the complainant, as some evidence of the facts asserted.

101. As described above at [38]-[39], Dr Thomas observed injuries on the complainant, consistent with her evidence.

102. Forensic samples revealed strong support for the hypothesis that the contributor to the DNA sample obtained by the endocervical swab was that of Mr Vatanitawake, and excluded other appellants. Noting that the complainant, inter alia, had showered before she was examined and had removed her clothes which she left in the shower.

103. This evidence is consistent with the complainant's evidence and generally supports her account as to what occurred in the unit. It supports the reliability of her evidence as to those events. Reliability on facets of the complainant's evidence has clear implications for her reliability on other facets of her evidence: see, for example, *E* at 493.

Intoxication, common knowledge and unfairness

104. It is appropriate at this stage to consider the issue of intoxication, as it is not only relevant to the appellants' submission as to the complainant's reliability, but also as her Honour's reasoning on this topic is the subject of the specific ground of appeal, which is set out at [2] above.

105. It was the complainant's evidence that she was intoxicated. In her evidence-in-chief interview she estimated the amount of alcohol she had consumed over the night. However, to reach a conclusion that the complainant was intoxicated does not need to involve an acceptance as to the accuracy of her evidence as to how much she had to drink.

106. The position advanced on behalf of the appellants at trial was that the complainant was not as drunk as she said she was and that the allegations were made as a result of her concern regarding her fiancé's knowledge that she had consensually engaged in sexual activities with other men. Despite the evidence being unclear as to how much alcohol the complainant had consumed that evening, it is well open for the trial judge to be satisfied that she was intoxicated.

107. Mr Ekeroma, the security officer at Mooseheads, gave evidence that he had been a "bouncer" for 10 years and had significant experience in dealing with intoxicated persons. By reference to the CCTV footage of the complainant entering Mooseheads at 4:33am, he said that at that point, she did not appear so intoxicated such as to deny her entry. He said however, that inside Mooseheads, he observed the complainant was "really drunk" and described her eyes looking "hazy". When asked to describe any other reason which led to him forming that view he said:

> Q: Any other reason?
>
> A: But I could tell she was really drunk. And, like -because I don't know what I - yes, I don't know, like, just body language and, like, you know, they were both pretty drunk. It was closer to the - it was closer to the end of the night, so that's when we, you know, start to see those -the people would - we start closing the bar, slowing down the alcohol intake ...(inaudible)...
>
> Q: What was it about her body language?

A: I just remember her face that night. She just looked really drunk, like - I can't really, like - it's a long ago, so I can't really remember, like, specific details like that, but I just remember his face and her face, like, clearly.

Q: This is Simon's face, are you talking about?

A: Yes. Simon's face, clearly. And hers - and the way he was acting, and the way she was acting, they were both very intoxicated.

108. He recalled seeing the complainant stumble on the stairs heading to the bottom floor of Mooseheads at some point, and that he was surprised the complainant was still at the venue. He gave evidence that he had contemplated whether or not he should remove her from the premises.

109. Dr Thomas gave evidence in cross-examination that one of the symptoms of intoxication which may be present is ataxia or uncoordinated movement, as well as "euphoria…dysphoria and disinhibition". Dr Thomas was shown clips of the complainant, and noted that whilst she appeared to stumble on occasions, she did not "appear to have severe ataxia". He said at some points of the CCTV she may have had a balance issue, but he agreed at other points that she had walked into Mooseheads without apparent difficulty. The evidence of Dr Thomas on this topic was limited.

110. The evidence of the taxi driver who drove the complainant from Mooseheads to the unit, was that the complainant appeared "drunk, but not that much". He thought the complainant might have had one, two or three drinks. He told the police it was four or five, although he said the police asked him whether it was four or five, and he agreed.

111. Based on the CCTV footage, it appears the complainant had her last drink shortly after arriving at Mooseheads, and she drank only once from the glass which appeared to only be a sip. The complainant arrived at Mooseheads at 4:33am. The last camera vision from the taxi is time stamped at 5:42am. It is 10:32am when the complainant entered the taxi after the events. It follows that the complainant was in the unit for about four and a half hours. By the time the complainant left the unit, it was nearly six hours since her last drink of alcohol.

112. As noted above, the evidence Mr Masivesi gave during the trial is admissible against all appellants. Although Mr Masivesi gave evidence that the complainant looked fine and did not appear drunk, he also said to her at the end of the night (about five hours after her last drink) "you sober up". That evidence is capable of supporting the proposition that, contrary to his denial, the complainant had been intoxicated, or at least that he believed the complainant was intoxicated.

113. The trial judge concluded that the complainant's memory difficulties, including her inaccurate memories as to the events which occurred inside and around Mooseheads were primarily a result of intoxication.

114. The appellants criticise her Honour's findings at [373] which are in the following terms:

> I have concluded that the complainant was telling the truth as she recalled it, that her poor memory of events at Mooseheads was primarily the product of intoxication, and that the impact of intoxication was much reduced by the time that the complainant arrived at Masivesi's residence. Her memory of events at the unit was reliable. However, because of the influence of alcohol and exhaustion (she had been out all night), her emotions and judgment were impaired.

115. To put that in context, immediately thereafter at [374] her Honour states:

> However, the complainant's lack of memory and "false memory" about some important events at Mooseheads and in the Civic area —things that would have been of some importance at the time, not just in retrospect—means that her evidence about later events must be examined very closely (both internally and in the context of other evidence) if, as to critical matters, it is to be accepted beyond reasonable doubt.

116. Mr Masivesi, who primarily presented this submission, contended that the findings in [373] "could not be made as matters of common knowledge or common sense". He submitted that "[i]t is simply not known to [him], who was given no opportunity to comment on this matter, the basis upon which the learned trial judge was able to conclude that whilst on the one hand alcohol and exhaustion had impaired the complainant's emotions and judgement, it did not have a similar effect on her memory and it was reliable at the unit, notwithstanding it was totally unreliable only minutes earlier".

117. In Mr Masivesi's written outline of submission it was put in these terms:

> Ordinary common sense and experience of life about the effects of intoxication and sobering up on memory may allow general inferences to drawn about why a person may have no recollection or a patchy or inconsistent recollection of events. In the absence of other independent corroborative evidence going to the reliability of a particular recollection, ordinary common sense and experience does not extend to determining whether a particular memory is reliable when a person has been shown to been experiencing false memories shortly before the relevant events.

118. That passage recognises that as a matter of ordinary common sense and experience, general inferences can be drawn as to the effects of intoxication on memory, and may explain why a person may have no recollection or a patchy or inconsistent recollection of events. It also recognises that supportive evidence can go to reliability of a witness' evidence and whether the evidence can be accepted.

119. Put simply, as properly recognised in the above passage, that alcohol may impact on memory and recall, and that the effects of alcohol dissipate over time, are matters of ordinary understanding. They are not beyond the experience of ordinary persons: see for example, *Farrell v The Queen* [1998] HCA 50; 194 CLR 286 at [11]. Contrary to the appellants' contention, expert evidence was not necessary to enable that matter to be considered. Certainly, the appellants never suggested that to the trial judge.

120. It is in this context that the appellants' submission that the trial judge was required to give them notice if she was going to rely on the dissipating effect of alcohol on the complainant's memory falls to be considered. In our view, it is a matter of common sense, and in the circumstances of this case, was not a topic on which notice was required. In any event, the appellants were on notice that the potential effect of intoxication on the complainant's memory was an issue.

121. The Crown's case was advanced in closing submissions, inter alia, as follows:

> So, in [the prosecution] submission, the human mind is fragile at the best of times. Factors such as alcohol, trauma, fatigue, passage of time, not positively committing neutral actions to memory at the time in which it occurs can affect a person's ability to later recall. Her lack of memory at Mooseheads also indicates her strong level of intoxication. And whether she had 21 or 15 drinks over a seven hour period is still a significant amount of alcohol… So I submit that your Honour can accept that [the complainant] was grossly intoxicated and her lack of recall of what occurred in the club is simply an honest mistake and nothing more than that.

122. Indeed, in closing submissions counsel for Mr Macanawai acknowledged as much. The appellants made no complaint about the submissions made during the trial and nor was a

submission put that the trial judge could not take the effects of alcohol into account in relation to assessing the complainant's evidence.

123. Moreover, the complainant gave evidence that:

> Q: Well, can you explain to her Honour why you can be sure about that, but you were completely wrong about everything that happened in Mooseheads, where it was different to your memory?
>
> A: I was more intoxicated when I was still out than by the time it was in the morning, when everything happened.
>
> Q: Well, everything started to happen within minutes of getting back to the house, didn't it?
>
> A: I can't remember.
>
> Q: Well, I thought you could remember better at the house because you were less intoxicated?
>
> A: I can't remember how quickly everything happened when we got to the house.
>
> Q: Your memory because of less intoxication comes on fairly suddenly, I suggest?
>
> A: ---Yes.
>
> Q: Because it is 4.39 in the morning and you can't remember any of those interactions with the tall guy?
>
> A: Yes.
>
> Q: In fact, your memories are completely wrong about that, aren't they?
>
> A: Not completely wrong, but most of it was inaccurate.

124. The complainant also gave evidence that she sometimes suffered blackouts from alcohol use. By comparison, the complainant said she was more intoxicated on the night of the incident than she was in September 2019 when she was restrained by the police for being drunk and disorderly.

125. Although there is no clear evidence as to how much alcohol the complainant consumed that evening, there is evidence that she had been drinking and evidence she was intoxicated (at least to some degree).

126. Moreover, the relevance of alcohol consumption is not confined to its effect on memory, but can also lead inter alia, to disinhibition and poor decision making. That alcohol can affect one's judgment should be uncontroversial.

127. Although [373] forms the basis of an individual ground of appeal, it nonetheless is also part of the submissions in relation to the ground of appeal concerning unreasonable verdicts.

128. In that regard, the appellants submit that the trial judge's conclusion in [373] that the effects of alcohol had dissipated by the time she was at the unit, is implausible. It was submitted that there simply was not enough time for that to occur, with there being an emphasis on it being a three-minute taxi ride from Mooseheads to the unit. That submission is artificial. For example, it was some time since the complainant's last drink. Moreover, there is evidence supportive of the complainant's recollection in relation to what occurred leading up to their arrival at the unit (for example, what occurred while in the taxi), and as to the events in the unit. In that context, the circumstances of the unit were removed from that in

Mooseheads. When [373] is read in context, it is apparent from the trial judge's reasons, that the dissipation of the effects of alcohol was not considered in isolation.

129. That said, the language of [373] may be rather infelicitous, insofar it is read as suggesting an immediate sobering up upon arrival. Moreover, it is unnecessary to make a finding as to intoxication in isolation of other evidence at the time the complainant entered the unit, but rather, the issue is whether it was open to accept the complainant's evidence as to the counts on which the appellants were convicted. That must necessarily involve a consideration of such matters as to any inconsistencies and the potential significance thereof, which, given the trial judge's findings, included the impact of alcohol on the reliability of her evidence. It also includes other supportive evidence in light of the issue that was relevant to each particular appellant. This is also in a context where, as the appellants accepted, the effects of alcohol dissipate over time. These events occurred over some hours.

130. We note as an aside, that her Honour properly directed herself when taking intoxication into account in relation to the appellants when considering if a lack of consent had been established, or whether the appellants were reckless as to that fact. That necessarily involved considering the effects of alcohol on a person. It was not suggested her Honour was not in a position to do so.

131. The ground of appeal identified at [2] above is therefore not made out.

The "stereotyping" submission

132. Before addressing the submissions about each of the verdicts being unreasonable, it is appropriate to address an allegation by the appellants that the trial judge reasoned through gender stereotyping.

133. It is important to recall that in respect to the unreasonable verdicts grounds of appeal, it is not necessary for this court to agree with the reasoning of the trial judge, or that we would necessarily articulate the reasoning in the same manner as the trial judge. Rather, the issue is whether we are satisfied, upon applying the relevant principles that the verdicts (each being addressed separately) were open to the trial judge.

134. The appellants made submissions that various paragraphs in her Honour's reasons reflect that the trial judge approached the reasoning as to how the complainant and various appellants would have acted at times based on a stereotype, and approached her reasoning through that prism. The submission was principally advanced by Mr Masivesi, who identified the impugned paragraphs as [352], [412], [415], [419], [429], [438], and [466]. It is trite to say that it is important that those paragraphs be considered in the context of the evidence, and in which they appear in the reasons and not in isolation.

135. As a general observation, as Murrell CJ recently stated in *Smith (a pseudonym) v The Queen* [2021] ACTCA 16 at [133]:

> …it is indisputable that a factfinder must apply their common sense and the wisdom that they have gained through life experience. In some circumstances (including those in the present case), the application of common sense will include a consideration of "the apparent logic of events", a decision-making tool that was mentioned with approval in *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31].

136. In *Doney v The Queen* [1990] HCA 51; 171 CLR 207 at 214, the court observed:

> [T]he genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental

> to that purpose that the jury be allowed to determine, by inference from collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.

137. The observations relating to applying common sense and using one's experiences of life when assessing the evidence must necessarily apply similarly where a trial judge is the trier of fact. That includes when assessing the plausibility of particular events occurring as reflected by the evidence and the manner in which they occurred.

138. It follows that for a trial judge to suggest that a complainant was likely or unlikely to have done a certain act, in the context of the evidence, is not reasoning based on gender stereotyping. We return to this topic at [195]-[196] when addressing a submission raised in relation to Mr Masivesi's case.

139. That said, and with respect to the trial judge, there are instances in the reasons where the language used by the trial judge may be infelicitous, and we would not, for our part describe the reasoning in the same way.

140. Before leaving this topic, it is appropriate to note the respondent's submission that much of the cross-examination and submissions to this effect were redolent of stereotypical and antiquated assumptions of how a complainant of sexual assault should behave or react; see for example, *RC v R; R v RC* [2020] NSWCCA 76 at [153]; *Khamis v R; Hussain v R* [2018] NSWCCA 131 at [533]. There is substance to that submission. As the respondent submitted, "it ought to go without saying, engaging in "amorous" and consensual behaviour with men earlier in the evening does not provide carte blanche consent to sexual activity (with all men) later".

Unreasonable verdict ground: Mr Vunilagi

141. Chronologically, the offences commenced with those committed by Mr Vunilagi, and as such it is appropriate to address his case first.

142. The appellant identified what he contended were inconsistencies, being those referred to above. It was submitted that the sheer volume of inconsistencies, the fact they continued in parts of the complainant's evidence inside the unit, and that she believed them until shown otherwise, must raise a reasonable doubt about the accuracy of the complainant's evidence regarding the sexual interactions said to have occurred. The submission did not discriminate between convictions.

143. He submitted that the inconsistencies cannot be explained away as merely being caused by intoxication, referring to the evidence of what was contended to be a lack of intoxication. If the inconsistencies at Mooseheads were as a consequence of intoxication, there was no basis to find (as the trial judge did) that the complainant had sobered up on the trip to the unit. It was submitted that was implausible.

144. Mr Vunilagi called character witnesses. The evidence of Mr Nayavulevu (which is summarised at [405] of the reasons) was that he has seen Mr Vunilagi intoxicated a couple of times, and on those occasions Mr Vunilagi was happy and easy-going. He said he had not seen Mr Vunilagi behave aggressively. When sober, he is respectful towards women and when intoxicated he behaves in the same way. He said Mr Vunilagi would not cheat on his girlfriend. Mr Tawake gave evidence to a similar effect (summarised at [403] of the reasons).

145. However, in relation to whether Mr Vunilagi was inclined to become aggressive when intoxicated, as the trial judge concluded at [408], the CCTV footage confirms that on the

occasion in question he did behave aggressively towards other men. Further, there was evidence from Mr Ekeroma that he has seen Mr Vunilagi "arc up at people", although he has not seen him punch anyone. In relation to whether Mr Vunilagi would "cheat" on his girlfriend, on Mr Vunilagi's own admission he did so on the night. The trial judge's findings on this were not challenged.

146. The complainant had previously cried when she was at Mooseheads with Mr Vunilagi, and Mr Ekeroma approached them out of concern for her. On her evidence, she felt intimidated by Mr Vunilagi when he was aggressive towards others at Mooseheads.

147. The trial judge rejected Mr Vunilagi's version of events given in his interview. Again, her Honour's finding was not challenged, and it was implausible given the events, in particular, with the complainant rebuffing him immediately before in the taxi. We note also that his version of the events included that he did not go back into the bedroom after the complainant went to the toilet, which was towards the end of the evening. This is inconsistent with the complainant's evidence and that of Mr Masivesi.

148. Turning to the counts.

149. Mr Vunilagi was convicted on counts 3, 4, 6, 9, 14, 15, 16 and 17. In relation to the first two counts, although the trial judge accepted the events the subject of those counts did occur, and that the complainant was not consenting, her Honour was not satisfied it had been established that Mr Vunilagi was reckless as to the complainant's lack of consent. Mr Vunilagi was also found not guilty on count 10, which was a count alleging digital penetration by Mr Vunilagi after the digital penetration involved in count 9. The trial judge concluded that the complainant's evidence of the event was brief, her account was consistent with attempted penetration rather than actual intercourse and there was no clear definition between the earlier discrete act of digital penetration and the continuation of that act. It was not submitted that the verdicts were inconsistent and unreasonable on that account. That is unsurprising given the basis on which those verdicts were entered.

150. As previously explained, immediately prior to the events in the unit, the evidence from the taxi driver is that the complainant was unhappy and was rejecting Mr Vunilagi's advances during the taxi ride.

151. In that context, it was plainly open to find as the trial judge did, that Mr Vunilagi's statement in his interview that when he went into the room he did not know what was going to happen until he realised she was giving him a "blow job" is not credible.

152. The complainant gave evidence that when she began crying in the bedroom, she rebuffed Mr Vunilagi and he lost his erection. Mr Vunilagi then called Mr Vatanitawake into the room. That Mr Vunilagi may lose his erection in circumstances where the complainant is crying, is plausible. The complainant gave evidence that Mr Vunilagi then began aggressively digitally penetrating her, which is also plausible.

153. Mr Vunilagi's assertion in his interview that it was the complainant's idea to call Mr Vatanitawake into the room is, in all the circumstances, implausible. Shortly prior to this the complainant was uncomfortable with Mr Vatanitawake's presence in the taxi. In his interview Mr Vunilagi gives varying inconsistent versions of this aspect of the events. Mr Vunilagi's version that includes the complainant pointing out Mr Vatanitawake from the bedroom, although she apparently could not do so given the position of the room, is not credible.

154. Rejecting Mr Vunilagi's evidence is insufficient. The issue is whether a consideration of the evidence reflects it was open to the trial judge to convict Mr Vunilagi on the counts her Honour did. This necessarily involves a consideration of the reliability of the complainant's evidence, and in particular, in respect to those counts. That said, as previously explained, the appellant's submission was general and not directed to particular counts. It was that the trial judge could not have accepted the reliability of her evidence beyond reasonable doubt. If that is not established, no further submission was directed to satisfaction of particular counts.

155. In that context, there is no issue as to the occurrence of the first sexual act, although the circumstances in which it occurred differ.

156. Moreover, the complainant's evidence was that there were multiple instances of oral sex during the proceedings, including when Mr Vunilagi was dry humping her and that Mr Vunilagi was having oral sex when Mr Vatanitawake was also having sex with her. In his interview, he said he had oral sex when Mr Vatanitawake was having sex. This is consistent with the complainant's evidence. There is evidence that Mr Vunilagi told his girlfriend that he had oral sex twice and there was dry humping.

157. The complainant also gave evidence that when Mr Vatanitawake entered the room, he and Mr Vunilagi spoke in another language before Mr Vatanitawake sexually assaulted her. That is also how they communicated in the taxi. Her evidence on that is entirely plausible. Particularly as there would be no need to converse in a mode of communication the complainant could not understand if she had initiated the presence of Mr Vatanitawake and was a willing and engaged participant in the events, as Mr Vunilagi described. On the complainant's evidence there was no conversation between her and Mr Vatanitawake in the bedroom, only between the two appellants. The complainant gave evidence she was still crying when Mr Vatanitawake was having vaginal sexual intercourse and ejaculated inside of her. It will be recalled that there was strong support for the hypothesis that Mr Vatanitawake's DNA was on the endocervical swab.

158. The complainant's evidence as to events with Mr Vunilagi is summarised above at [31].

159. Although Mr Vunilagi said he did not go into the bedroom with the complainant at the end of the evening, there is evidence from Mr Masivesi during the trial which supports the complainant's evidence that once she had left the bedroom and was sitting on the couch, Mr Vunilagi took her back to the bedroom. We note also that sequence of events is referred to by the complainant in her complaints to Senior Constables Burns and Linden. This supports that her evidence is reliable. Noting also that this is now many hours after her last alcoholic drink. By then, the complainant had attempted to send the text message for help. Her evidence was that by this time she had scratch marks on her neck and under her right arm. She had observed those injuries when she went to the toilet. Dr Thomas' evidence supports the existence of such injuries. The first group of counts in relation to Mr Vunilagi had occurred before this time.

160. When the complainant left the house, Mr Prentice said she had appeared to have been crying as she had red swollen eyes, she was upset, disorientated and frightened. She had obvious injuries. She had bruises on her throat, and scratches on her chin and neck. The crux of her complaint was that she had gone home with one person, and then others took turns during which she was crying and screaming.

161. Her account of the events in the unit is consistent. As explained above at [84], facets of the complainant's evidence are supported by independent evidence which lends support that other aspects of her evidence are also reliable.

162. An independent examination of the evidence reflects it was open to the trial judge to be satisfied that in relation to the sexual acts the subject of the counts on which Mr Vunilagi was convicted; that the acts occurred, the complainant was not consenting and the appellant was at least reckless as to that.

163. Having considered the evidence, the alleged inconsistencies relied on by the appellant, including the so called "false memories" at Mooseheads do not lead to the conclusion that the trial judge must have acquitted the appellant of these counts. Having considered the evidence, that there is a reasonable possibility her memory is unreliable as to these counts can be excluded.

164. The unreasonable verdict ground of appeal is not established in relation to Mr Vunilagi.

Unreasonable verdict ground: Mr Vatanitawake

165. Mr Vatanitawake was convicted of one count of sexual intercourse without consent (count 5). That is the act referred to at [184] of the trial judge's reasons, see [31] above, which occurred while Mr Vunilagi was in the room.

166. The count in relation to Mr Vatanitawake occurred in a context where it was open on the evidence to find that the complainant had not consented to the sexual activity with Mr Vunilagi up to that point of time.

167. Mr Vatanitawake did not challenge that he had sexual intercourse with the complainant or that Mr Vunilagi was present and was also having sex with her. The reliability of the complainant's evidence on that topic was not actively contested. The issue was whether it had been established the complainant did not consent to it, and that Mr Vatanitawake was at least reckless to the lack of consent.

168. Mr Vatanitawake primarily relied on the "false memories" as to what occurred at Mooseheads, noting that the appellant submitted that the trial judge failed to address that evidence. It was also submitted that the complainant's evidence was contradicted by the evidence of the taxi driver who drove them to the unit. He submitted his case was different to that of the other appellants. Mr Vatanitawake's sexual encounter occurred at a time very proximate to arriving back at the unit. That is, at a time very proximate to the difficulties experienced by the complainant with her memory, "be it false memories or whatever it would be that it would be labelled". At some stage thereafter he left the unit and did not return. He was not present for the entire period of the events. It was a discrete incident to be contrasted with the time spent in the bedroom by the other appellants. This was also in circumstances where there was amorous behaviour consensually engaged in between the complainant and Mr Vatanitawake at Mooseheads shortly before the incident. He submitted that although there was some evidence supporting the complainant, it did not implicate him in any offending.

169. As to the purported contradiction of the evidence by the taxi driver, that submission is addressed above at [88]-[92]. Notably, Mr Vatanitawake did not address the events in the taxi including that the complainant was uncomfortable with him and that she was moving away from Mr Vunilagi.

170. Some of the evidence supporting the complainant, as Mr Vatanitawake observed, does not implicate him. That said, some does. The taxi driver's evidence is one example. Moreover, in a context where the issue is the reliability of the complainant's evidence, that there is DNA evidence supporting her account of sexual intercourse with the appellant and that there were recent complaints (including the involvement by the appellant in non-consensual sexual intercourse to Senior Constable Linden and Dr Thomas) does provide support for the complainant's reliability in respect to Mr Vatanitawake. Moreover, that the complainant's evidence is reliable as to some aspects of the events in the unit supports that it is reliable on other aspects.

171. The appellant relies on the consensual conduct between himself and the complainant at Mooseheads. However, as the trial judge relevantly observed, that conduct is removed from what is said to have occurred at the unit. As her Honour correctly observed at [480]:

> It should go without saying that the fact that a drunken 22 year old woman is prepared to kiss and embrace a man within the relatively safe environment of a bar provides very limited support for the proposition that she is also prepared to engage in penile/vaginal intercourse with him at a private residence to which she has gone in the company of another man and in the presence of that other man.

172. There was no conduct at Mooseheads, or any time thereafter, that in any way could suggest that the complainant was willing to engage in sexual activity of the nature that occurred in the unit. To the contrary, there had been intervening events where she removed herself from him, and where in the taxi she was uncomfortable with his presence. That fact would have been readily apparent to Mr Vatanitawake. The activity at Mooseheads is removed by time, location and circumstances from this act.

173. Mr Vunilagi had Mr Vatanitawake join him in the bedroom. Mr Vunilagi and Mr Vatanitawake spoke in a different language. The complainant was crying. Mr Vatanitawake had sex with the complainant, with no suggestion of any conversation with her, no question of her as to consent, but only a conversation with Mr Vunilagi who also had sex with her at the same time.

174. In that context, an independent examination of the evidence reveals that it was open to the trial judge to conclude that the act occurred, and the complainant was not consenting, and at the very least, Mr Vatanitawake was reckless as to that fact.

175. The "false memories" or inconsistencies relied on do not lead to the conclusion that the appellant must have been acquitted. Again, that there is a reasonable possibility her memory is unreliable as to this count can be excluded.

176. The unreasonable verdict ground of appeal is not established in relation to Mr Vatanitawake.

Unreasonable verdict ground: Mr Masivesi

177. Mr Masivesi submitted that his appeal could be broken down into three areas. *First*, that false memories were a real issue raised in the trial which were not addressed by the trial judge, and that it could not be excluded beyond reasonable doubt on the evidence. *Second*, the trial judge's analysis of the evidence was through the prism of gender stereotyping, relying in particular on [352], such that any issues or problems with the complainant's evidence are distilled through that prism "which is almost like a rebuttable presumption". *Third*, the trial judge resorted to general experience, human behaviour and knowledge about how a person's state of sobriety can affect memory which was not the

subject of expert evidence and were not matters which were properly within s 144 of the *Evidence Act 2011* (ACT).

178. Each of those matters have been addressed above.

179. The appellant made two complaints in particular relating to the trial judge's reasoning.

180. Mr Masivesi complained that the trial judge provided no reasoning as to the basis on which his evidence was rejected, and that there was no basis to do so. The submission cannot be accepted. It is appropriate therefore to recite aspects of her Honour's reasoning.

181. As observed above, the trial judge rejected Mr Masivesi's evidence. At [350]-[359] her Honour explains:

> [350] In assessing Masivesi's evidence, I have taken into account that English is his second language and the character evidence.
>
> [351] Masivesi was a very unimpressive witness who, at times, presented as cavalier.
>
> [352] His evidence that, after willingly engaging in sexual intercourse with two other men, the complainant willingly offered herself to him (a drunken stranger who was twice her age) but he stoically declined, is contrary to ordinary human experience and common sense.
>
> [353] His evidence that he could not see into the bedroom and he was having fun and not concentrating on who went into the bedroom was unbelievable, given that the unit was cramped, events occurred within metres and the complainant must have remained in the bedroom for almost 4 hours.
>
> [354] His explanation as to why he said, "It's time to go" (he was worried that the complainant's family would be concerned about her at 9 or 10 AM—presumably, as opposed to 5 or 6 AM) was unbelievable.
>
> [355] I disbelieve his explanation as to why, on his account, he spoke to Vunilagi in Fijian, saying "Just remember your family or your sister" or "What if this is your sister?". Such statements imply disapproval of improper behaviour.
>
> [356] Regardless of the propriety of the police conducting an interview after Masivesi had declined to be interviewed or any moralistic tone to the police questioning (arguments advanced by Masivesi's counsel), Masivesi participated in the interview and volunteered answers. Neither those answers nor Masivesi's demeanour during the interview support his assertion that "confusion" influenced his answers. Of course, except to the extent that it was introduced through the evidence given in court, the interview was not admitted against the co-accused.
>
> [357] When cross-examined by the prosecutor, Masivesi prevaricated and professed a lack of memory regarding almost any matter that may have implicated himself or the other accused, including whether he made certain statements to the police in the course of a record of interview and whether he did or did not see Vunilagi attempting to touch the complainant's genital area in the presence of other men in the living room.
>
> [358] On the other hand, he eagerly agreed with almost every proposition put to him by counsel for the co-accused. This was, perhaps unsurprising, given that he, Vatanitawake and Macanawai are "like a family", having spent 10 months together in custody awaiting trial.
>
> [359] Except insofar as it serves to corroborate the complainant's evidence (and, in Masivesi's trial, may have broader significance), I place no reliance whatsoever on Masivesi's evidence

182. The earlier observations are not to be read in isolation. Her Honour explained the basis for doing so at [512]-[518] of the reasons, as follows:

[512] For the reasons discussed above, I found Masivesi to be a very unimpressive witness upon whom no reliance could be placed, except insofar as he corroborated the complainant's evidence or made limited admissions against interest.

[513] The statements that he made when interviewed during the search warrant and on 9 December 2019 confirm the unreliability of the various versions that he has advanced. When interviewed during the search warrant, he stated that he had met three Fijian friends for the first time that night and referred to them as "Mini" (inferentially, Vunilagi), "Rody" (to whom he referred in evidence as "JP") and "Leli" (to whom he referred in evidence as "Simi"). He described Mini as being about 150 centimetres tall and having an "average" body shape, although Vunilagi is strikingly tall and athletic in appearance. Clearly, Masivesi was prepared to lie to protect the co-accused.

[514] I have approached the complainant's evidence against the other accused with considerable caution, inter alia, because her memory of events at Mooseheads was demonstrably flawed.

[515] In relation to the case against Masivesi, the position is somewhat different. The version of events provided by Masivesi on 9 December 2019, while unreliable, contains some admissions against interest and features that support the complainant's account of the sequence of events, the sexual assaults by the co-accused, and some of her interactions with Masivesi. It bolsters her reliability. In particular, he said that:

(a) Vunilagi and the complainant were in the bedroom when he arrived home and were apparently having sex.

(b) Vunilagi "dragged" Vatanitawake and Macanawai into the bedroom and they were "probably" having sex. At one stage, Vunilagi and Macanawai were in the bedroom together.

(c) The men were drunk. The other men were scared of Vunilagi because he was big and drunk. (If so, that is strong support for the complainant's assertion that she was intimidated.)

(d) At one stage, the complainant went to the toilet and either Vunilagi or Vatanitawake followed her.

(e) Masivesi went into the bedroom either once or twice (his evidence was unclear on this point). He reassured the complainant and advised her to rest. There was a discussion about a charger.

(f) At one stage, when he walked into the bedroom, Vunilagi was in the bedroom with his fingers in the complainant, "touching her up". He told Vunilagi to stop and reassured the complainant.

(g) At that stage or when he re-entered the bedroom a few seconds later, the complainant said words to the effect of "I know what you want, you just want to have sex". When she said that, his wife's face flashed before him and "told him off".

(h) When the complainant was on the lounge, Vunilagi tried to "touch her up" and was trying to touch her genital area. The complainant's expression indicated that she did not consent. Macanawai and Vatanitawake were present at the time. Masivesi told Vunilagi to stop because it was "not right".

(i) After that incident, Vunilagi grabbed the complainant and took her to the bedroom, where they probably had sex again.

(j) When the girl wanted to leave, Vunilagi wanted her to stay and became angry with Masivesi for letting the girl go.

(k) He disapproved of what was occurring and told Vunilagi that the girl was "no animal".

[516] On 4 November, 9 December and in evidence, Masivesi also made many assertions that exonerated or tended to exonerate himself or the co-accused. Insofar as he made such statements, I consider that no reliance can be placed upon them.

[517] By his own admission, Masivesi felt tempted to engage in sexual intercourse; in effect, he asserted that the complainant offered herself to him, but he refrained because his wife's face flashed before him. Further, he seemed to agree with the complainant that he had entered the bedroom after the other men had been in the bedroom. If so, it must have been not long before the complainant attempted to send the message "please help me" at 7:16 AM. It is hardly likely that the complainant offered herself to him at about the same time.

[518] It was submitted that Masivesi had forcefully and convincingly denied the distasteful suggestion that he performed cunnilingus on the complainant after his three friends had assaulted her. No doubt, on sober reflection, Masivesi finds such conduct to be very distasteful, but that does not mean that he did not engage in the conduct when highly intoxicated and disinhibited.

183. Her Honour concluded at [519]-[525]:

[519] The complainant gave a detailed and consistent account of Masivesi's conduct. Her evidence is consistent with Masivesi equivocating about whether he should give way to temptation (appreciating that the conduct was wrong); he comforted her, left the room, and then returned shortly thereafter and assaulted her.

[520] I find that there is no reasonable possibility that—as Masivesi stated in the record of interview—the complainant was right about the sexual activity of his drunken friends but was wrong about Masivesi himself abusing her.

[521] I am satisfied beyond reasonable doubt that Masivesi performed the acts the subject of Count 11 (touched the complainant's breasts, genital area and kissed her lips and breasts), Count 12 (cunnilingus) and Count 13 (digital/vaginal penetration).

[522] I am satisfied beyond reasonable doubt that each act occurred without the complainant's consent.

[523] I am satisfied beyond reasonable doubt that the acts the subject of Count 11 were indecent by ordinary community standards because they occurred without the complainant's consent.

[524] I am satisfied beyond reasonable doubt that Masivesi was reckless about the complainant's lack of consent; indeed, as he counselled the co-accused against similar conduct, he must have known that she probably did not consent.

[525] In reaching these conclusions, I have taken the impressive evidence of Masivesi's good character into account. I also bear in mind that, on his own admission, Masivesi provided an opportunity for his friend, Vunilagi, to cheat on his girlfriend and, over a lengthy period, failed to control the actions of the younger men. Consistent with the character evidence, Masivesi did not become aggressive, recognised that what was occurring was disrespectful to the complainant, and was somewhat sympathetic to the complainant's plight. Regrettably, in his intoxicated condition, he also succumbed to the temptation to abuse her.

184. As a consideration of the evidence reveals, it is readily apparent that there are strong reasons to reject Mr Masivesi's evidence. The submission that there was no reasoning supporting the conclusion, and no basis to reject it, cannot be accepted.

185. Mr Masivesi's account given to the police, whilst denying involvement in any sexual conduct with the complainant, did include a description of events on other matters consistent with that of the complainant, implicating other appellants and their conduct. However, what the appellant said to the police is admissible only in the case against him.

186. When giving evidence during the trial, although he maintained his denial of any involvement in any sexual conduct, his version of events changed. In some respects those changes were significant, including as to his own conduct. His evidence included omitting certain incriminating events and conduct of other appellants as he had previously described in his police interview.

187. For example, *first*, in his interview Mr Masivesi said to the police that the complainant was "really drunk", which is to be contrasted to his evidence that "she was fine. She doesn't look drunk".

188. *Second*, in his interview he stated that when the complainant went to the bathroom in his unit he "chased [Vatanitawake] out from the toilet. He wanted to go have sex with her". He stated in the interview that Mr Vunilagi and Mr Vatanitawake just wanted to follow the girl around. In evidence he did not relate that event, and in cross-examination said he did not remember telling the police that. The complainant's evidence was that when she went to the toilet the first time, the bathroom door was open and Mr Vatanitawake stood at the doorway.

189. *Third*, in his interview he described that there was a time (which appears to be after they had been in the unit for some time) when the complainant was sitting on the couch and Mr Vunilagi was "touching her up" and just "wanted to have sex with her". Mr Vunilagi tried to touch her vagina and then pulled her (or made her go) back into the bedroom. His evidence-in-chief did not include any of those details. In cross-examination he denied that Mr Vunilagi tried to touch her vagina, and said he could not remember telling that to the police. Rather he said all he could remember was that Mr Vunilagi took the complainant by the hand and led her to the bedroom. The complainant's evidence was that when she sat on the couch, Mr Vunilagi began pushing his fingers in her vagina and she was crying. He then grabbed her arm and took her back into the bedroom.

190. *Fourth*, in his interview he said, at the time when the complainant was on the lounge (which is described in the preceding paragraph), she was unhappy and wanted to leave. She also was not happy when she came out of the bedroom for the last time. The appellant said he had an argument with Mr Vunilagi about allowing her to leave, and described in some detail those conversations and why he did so. This included that Mr Vunilagi grabbed the complainant's wrist and pulled her. He told Mr Vunilagi he had to stop. Mr Masivesi's evidence was silent on those matters. Rather, he said that any discussion about her leaving was that her family would be worried about her, and not about "what was happening there or the sex". His evidence was that during the entire time the complainant was in the unit "she was happy to be there".

191. *Fifth*, in his interview the appellant said he went into the bedroom twice (which appears to be after the incident on the couch), to get Mr Vunilagi out of the room and to get his phone charger. He said that when he walked into the room, Mr Vunilagi was playing with the complainant's private parts and she was lying on the bed. He came in to stop him. He left the room and returned a few seconds later to get his phone charger as she was sleeping. He closed the door after himself, and told her to rest. This was when she said to him "I know what you want you just want to come out and have sex", but that he rebuffed her. In evidence he said he only went into the room once to retrieve his phone charger. There was no reference to Mr Vunilagi in the room, or him getting Mr Vunilagi to leave the room.

192. *Sixth*, in his interview the appellant said that when he was in the room "that's where she tried to take off - you remember just like [indistinct] touching her shoulder then he's [sic] tried to take her pants off". He touched her face. He kissed her, he thought just on the

cheek, he "just wanted to make sure she's all right". When asked if he kissed her on the mouth he said "No, Not really no". In evidence, he denied touching the complainant in any way. In evidence he denied kissing the complainant on the cheek, or anywhere.

193. From these few examples it is apparent that, apart from Mr Masivesi's denials of his involvement, what he told the police as to certain events including that other people went with her to the toilet, the conduct on the couch involving Mr Vunilagi, the number of times the appellant went into the bedroom, that the complainant was unhappy and wanting to leave supports or accords with the complainant's account.

194. In addition, his recount was consistent with the complainant's account as to the sequence of events and the order of persons who went into the bedroom. For example, in his interview Mr Masivesi said that Mr Vunilagi was in the bedroom when he arrived at the unit and that he came out of the room and dragged Mr Vatanitawake into the bedroom. In relation to that, the appellant also said that it was not right what was occurring. Mr Masivesi's account was also consistent with what the complainant said in relation to asking him to charge her phone.

195. Given the nature of the differences in Mr Masivesi's accounts between his interview and giving evidence, the obvious inference is that he was protecting himself and the other appellants.

196. Apart from the appellant's complaint that there was no basis for rejecting his evidence, as explained above, the only other aspect of the reasoning specifically complained of was [352] which is said to involve reasoning by gender stereotyping, and which has been generally addressed earlier in these reasons. That paragraph must be considered in the context of the later and further findings. Insofar as the appellant submitted in his written submission that the matters in [352] were not capable of judicial notice, as explained earlier in these reasons, the submission misunderstands the nature of reasoning by a trier of fact. The submission advanced also considers the comment in isolation, without regard to the evidence, in particular, of the events that had occurred leading up to the counts relating to Mr Masivesi.

197. What was said at [352] was simply one comment made in assessing the appellant's evidence. There was an ample basis to conclude that the appellant's version of events was implausible in the circumstances. It was open to her Honour to make that observation. The findings of satisfaction of the offence are based on what is in [519]-[525] of the reasons, recited at [182] above.

198. Contrary to the appellant's contention, there is ample basis for her Honour's findings rejecting his evidence.

199. Addressing the issue of the reasonableness of the verdicts in relation to Mr Masivesi more generally, a number of further points can be made. Mr Masivesi was convicted of counts 11-13, which are referred to at [194]-[201], recited at [31] above.

200. *First*, Mr Masivesi's interview provides further and considerable support for the reliability of the complainant's evidence as to the events which occurred in the unit.

201. *Second*, even if the contents of the text message did not, as Mr Masivesi submitted, directly implicate him, the contemporaneous plea for help by the complainant supports the reliability of her complaint that she had been earlier assaulted by others and hence bolsters the reliability of her complaint in relation to Mr Masivesi. Moreover, the appellant's submission that the text message is consistent with having been assaulted by others, puts

his version in a context where the complainant had already been sexually assaulted. We note also, that during the appeal the appellant commended the time frame and the order of the events in respect to counts 11-13, which was as described by the trial judge. It follows that the text message was sent after those events were alleged to have occurred.

202. *Third*, as will be apparent from the summary of the complainant's evidence given above at [31] she said that when Mr Masivesi entered the bedroom the first time she was being digitally penetrated by Mr Vunilagi. That was consistent with what Mr Masivesi told the police (Mr Vunilagi was "like playing with her-her private parts") and supports the reliability of the complainant's evidence. The complainant said that it was shortly after that Mr Masivesi re-entered the bedroom and the offending took place.

203. *Fourth*, Mr Masivesi said in his interview that when he returned to the room the complainant was on the bed and he closed the door after himself. Recalling that he said he only went into the bedroom to get his phone charger, that task would not require the door being closed. This left him alone in the room with the complainant. Mr Masivesi in his interview admits to some physical contact with the complainant; he touched her face and thought he kissed her on the cheek. That he admits to having some contact with the complainant is inconsistent with his prior claim of having no contact. This is in a context where the complainant's evidence was that the sexual activity began with the appellant caressing her face, arms and breasts.

204. *Fifth*, insofar as the appellant relies on the absence of DNA evidence implicating him, that is relevant to the assessment. However, that must be considered, inter alia, in light of the nature of the activity alleged, and that the complainant had showered before the medical examination.

205. *Sixth*, insofar as the appellant also relies on what he says is his attitude to the mattress, such that he would not have done as the complainant says, as noted above, the trial judge rejected his evidence.

206. An independent examination of the evidence reflects that it was open to the trial judge to convict the appellant of the offences.

207. Having considered all the evidence, the alleged inconsistencies and false memories, and the submissions on other matters including the mattress, do not lead to the conclusion that the trial judge must have acquitted the appellant.

208. The unreasonable verdict ground of appeal is not established in relation to Mr Masivesi.

Vunilagi's challenge to s 68BA

209. As a result of an order made by the trial judge, the joint trial of the appellants proceeded by judge alone: see *R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai* [2020] ACTSC 225; 354 FLR 452. The order was made notwithstanding that Mr Vunilagi did not consent to a trial by judge alone. The order of the court compelling trial by judge alone was made pursuant to s 68BA of the *Supreme Court Act* in combination with s 116 of that Act.

210. Mr Vunilagi challenged the validity of s 68BA of the *Supreme Court Act* on three grounds. Those grounds may be summarised as follows:

    (a) Section 68BA compromised the institutional integrity of the Supreme Court and, in accordance with the decision in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (*Kable*), was invalid because:

(i) The provision was incapable of equal application to accused persons in the same position; and/or

(ii) The conditions controlling the s 68BA(3) discretion were not capable of judicial application.

(b) The enactment of s 68BA was beyond the power of the Legislative Assembly because:

(i) The reference in s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (Self-Government Act) to the "Supreme Court" is to the constitutional conception of a "Supreme Court" and trial of indictable offences by jury was a defining characteristic of a "Supreme Court" at federation in the same way that the supervisory jurisdiction in *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531 (*Kirk*) was found to be a defining characteristic of such a court and thereby beyond the power of the Legislative Assembly to qualify; and/or

(ii) Because, as a matter of history, trials of indictable offences in the Territory were trials with a jury, s 48A of the Self-Government Act should be interpreted in a manner that precluded trial for such offences by judge alone.

(c) Trial by judge alone was precluded by s 80 of the Constitution because the decision in *R v Bernasconi* (1915) 19 CLR 629 (*Bernasconi*) can be distinguished on the basis that the guarantee in s 80 should be applied in territories surrendered by States, as distinct from the territory the subject of the decision in *Bernasconi*.

211. These were not matters raised at the trial or at the time when the trial judge made the order under s 68BA of the *Supreme Court Act*. As a result, the appellant required leave under r 5531 of the *Court Procedures Rules 2006* (ACT) to raise those matters. There was no opposition to the grant of leave and the court granted leave.

212. The appellant claims that, as a result of the invalidity of s 68BA, his trial miscarried. The necessary consequence of such a conclusion would be the ordering of a retrial.

213. Each of the grounds for challenging the validity of s 68BA must be rejected. Section 68BA is not invalid and, as a result, the trial did not miscarry by reason of the fact that the order for trial by judge alone was made pursuant to an invalid provision.

214. On 16 March 2020 the ACT Minister for Health declared a public health emergency under the *Public Health Act 1997* (ACT) in response to the public health risk posed by the novel coronavirus SARS-CoV-2 (COVID-19). On 2 April 2020 the Legislative Assembly enacted the *COVID-19 Emergency Response Act 2020* (ACT) (COVID Act). That Act came into effect on 8 April 2020. It made amendments to a large number of Acts in response to the public health emergency. The Acts amended included many Acts relating to the criminal justice system.

215. So far as the *Supreme Court Act* was concerned, the COVID Act expanded the range of criminal matters which might be the subject of an election for a trial by judge alone. That expansion allowed an election to be made in relation to charges under ss 54 and 60 of the *Crimes Act*, charges faced by the appellant. The Act also amended the *Supreme Court Act* so as to insert s 68BA. That section provided:

68BA Trial by judge alone in criminal proceedings—COVID-19 emergency period

(1) This section applies to a criminal proceeding against an accused person for an offence against a territory law if the trial is to be conducted, in whole or in part, during the COVID-19 emergency period.

(2) To remove any doubt, this section applies—

(a) to a criminal proceeding—

(i) that begins before, on or after the commencement day; and

(ii) for an excluded offence within the meaning of section 68B (4); and

(b) whether or not an election has been made by the accused person under section 68B, including before the commencement day.

(3) The court may order that the proceeding will be tried by judge alone if satisfied the order—

(a) will ensure the orderly and expeditious discharge of the business of the court; and

(b) is otherwise in the interests of justice.

(4) Before making an order under subsection (3), the court must—

(a) give the parties to the proceeding written notice of the proposed order; and

(b) in the notice, invite the parties to make submissions about the proposed order within 7 days after receiving the notice.

(5) In this section:

commencement day means the day the *COVID-19 Emergency Response Act 2020*, section 4 commences.

COVID-19 emergency period means the period beginning on 16 March 2020 and ending on—

(a) 31 December 2020; or

(b) if another day is prescribed by regulation—the prescribed day.

(6) This section expires 12 months after the commencement day.

216. The explanatory statement relevant to this provision included:

> The reason this amendment is urgent is to ensure that serious criminal matters are not unnecessarily delayed due to COVID-19 distancing measures. This amendment supports a defendant's rights in criminal proceedings by allowing matters to be heard without unnecessary, and unspecified, delay.

217. On 18 May 2020 the Supreme Court indicated that the court would resume some jury trials from 15 June 2020, but that "[f]or a significant number of matters (including matters involving multiple accused)" it would not be feasible to conduct jury trials in the near future.

218. On 18 June 2020 the appellant, his co-accused and the respondent were provided with written notice under s 68BA(4) of the trial judge's proposal to order that the proceedings be tried by judge alone.

219. On 8 July 2020 the Legislative Assembly enacted the *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT) (COVID Amendment Act). That Act took effect from 9 July 2020. The COVID Amendment Act repealed s 68BA. It also inserted transitional provisions into the *Supreme Court Act* (ss 115-117) which had the effect that if, before 9 July 2020, the court had given notice under s 68BA(4) but had not made a decision under s 68BA(3), the court could still make an order under s 68BA even though the provision had been repealed.

220. The explanatory memorandum for the bill which became the COVID Amendment Act said, in relation to the repeal of s 68BA:

> The repeal of section 68BA of the SCA is appropriate given the decision of the Supreme Court to recommence the conduct of jury trials with special measures to ensure that social distancing requirements can be complied with.

221. On 13 August 2020 the trial judge conducted a hearing in relation to whether or not the trial should be by judge alone. The appellant and the Crown had filed written submissions opposing an order permitting trial by judge alone. Between the date of the notice and the date of the hearing, the position of the appellant's three co-accused had changed from neutrality or opposition to a trial by judge alone to supporting the making of an order for such a trial. The position adopted by the various accused corresponded to whether or not he was in custody. The appellant was on bail. The other co-accused had been in custody since their arrest in November 2019 as a result of the charges the subject of the proceedings. As a consequence, a further delay in the trial would have different consequences for the different accused.

222. The trial judge considered the matters referred to in s 68BA(3) and ordered that the trial proceed by judge alone.

First argument – Kable

223. The *Kable* principle was articulated in *Attorney-General (NT) v Emmerson* [2014] HCA 13; 253 CLR 393 at [40] as follows:

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.
>
> (Footnotes omitted.)

224. The principle applies to the ACT Supreme Court because it is amongst the third category of courts referred to in s 71 of the Constitution and hence forms part of the integrated court system established by the Constitution: *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; 218 CLR 146 at [28] (*Bradley*).

225. The two separate arguments put by the appellant are outlined at [209](a) above. They may be referred to as the "equal application argument" and the "criteria of operation argument".

Equal application argument

226. The equal application argument was that s 68BA was incapable of equal application to accused persons who are in the same position.

227. The appellant referred to the statement of Gaudron J in *Kable* at 107 that "[p]ublic confidence cannot be maintained in a judicial system which is not predicated on equal justice: see *Leeth v The Commonwealth* (1992) 174 CLR 455 at 502." He also referred to the statement of Gaudron, Gummow and Hayne JJ in *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [65] (*Wong*), made in the context of sentencing, that:

> To focus on the *result* of the sentencing task to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.

(Emphasis in original.)

228. Finally, the appellant referred to passages in *Cameron v The Queen* [2002] HCA 6; 209 CLR 339, a sentence appeal. Gaudron, Gummow and Callinan JJ made reference to the concept of discrimination as involving the unequal treatment of equals. In that case, in seeking to determine whether a sentence discount for a plea of guilty could be justified, their Honours asked whether the differential treatment of persons who had pleaded guilty or not guilty was "appropriate and adapted to the attainment of a proper objective": at [15]. In that case they concluded that it was. Similarly, McHugh J made reference to the passage from *Wong* concerning equal justice.

229. From this collection of obiter dicta the appellant sought to argue that the *Kable* doctrine would be infringed if s 68BA permitted a different outcome, in the sense of a different mode of trial, in relevantly identical cases. As will become apparent, fundamental to the appellant's argument was the proposition that all accused persons committed for trial in the Supreme Court were in a relevantly similar position because they all faced the risk of delay to the trial by reason of COVID-19.

230. The appellant submitted that because there was a possibility that in one case a notice under s 68BA(4) was given, yet in another relevantly identical case such a notice was not given, there was the potential that in relevantly identical cases there might in one be a trial before a jury and in another a trial before a judge alone. It was this potential for two relevantly identical accused to have different modes of trial that led to the submission that the *Kable* doctrine was infringed. The submissions of the appellant did not identify any previous case in which inequality of treatment formed a basis for *Kable* invalidity.

231. In considering the appellant's argument it must be noted that the submissions made had no established factual basis. The trial judge did not find, and it has not been established on appeal, that there was any occasion in which relevantly identical cases were treated unequally by virtue of a decision to issue a notice under s 68BA(4) in one case but not another. It has certainly not been established that there was any other case which contained the unusual combination of factors favouring the making of an order under s 68BA as were present in this case. Rather, the argument was conducted at the level of abstraction based only upon what might have occurred.

232. In the absence of any established factual basis for a complaint of lack of equal treatment, the proposition at the heart of the appellant's argument was that because all cases were subject to the risk of delay due to the consequences of the COVID-19 pandemic, they were all relevantly identical and were required to be treated equally. The submission is flawed. It selects as the subject matter for the consideration of equal treatment only one of a myriad of factors that might be relevant. It is a factor no more useful in deciding whether there has been equal treatment than that the case is a matter committed for trial in the Supreme Court. Those other factors in a case such as this involving allegations of rape would include: when the matter was committed for trial, the estimated length of the trial, whether there were co-accused and, if so, how many, the date upon which the matter was listed to commence its trial, whether the accused was in custody (and hence would be incarcerated during any period of delay), whether the complainant had given pre-trial evidence and the court's best assessment of how long a jury trial would be delayed if an order was not made that the trial be by judge alone. The existence of features such as these indicate that the premise upon which the appellant's argument was dependent – that all cases facing delay due to COVID-19 were relevantly identical – cannot be established.

233. Section 68BA is a provision designed to facilitate the orderly and expeditious discharge of the business of the court during a period of a health emergency. It does so by giving to judges of the court the capacity to compel a trial by judge alone rather than by jury. It can be accepted that because of the significance of trial by jury in the determination of serious criminal charges, the power in s 68BA is more significant than many other case management powers. As a discretionary case management power, it leaves open the possibility that two relevantly identical cases will, as a result of discretionary judicial decisions, have different outcomes. That possibility does not detract from the desirability of adopting a consistent approach to the case management issues presented by the health emergency and the desirability of similar outcomes in similar cases.

234. The operation of the section may be distinguished, if it was necessary to do so, from a provision such as that which was attacked in *Leeth v Commonwealth* (1992) 172 CLR 455 (*Leeth*). In that case Gaudron J, dissenting, characterised the law as *requiring* discriminatory treatment and hence inconsistent with the judicial process: *Leeth* at 502-503. In the present case, there is nothing about s 68BA which requires discrimination in the sense of not treating like cases in a like manner or which requires a failure to give proper account to genuine differences. The mere possibility of different outcomes does not compel the conclusion that the power given by the section substantially impairs the court's institutional integrity so as to render the power incompatible with that court's role as a repository of federal jurisdiction.

235. The criteria of operation argument was that the conditions controlling the discretion in s 68BA(3) were not capable of judicial application. On this point the appellant relied upon the decision in *Vella v Commissioner of Police (NSW)* [2019] HCA 38; 93 ALJR 1236 where the dissenting judges and, to a lesser extent the Chief Justice, recognised the possibility that the specification of criteria which were incapable of judicial application may lead to a statutory provision being characterised as substantially impairing a court's institutional integrity.

236. So far as s 68BA(3)(a) ("will ensure the orderly and expeditious discharge of the business of the court") was concerned, the appellant submitted that it was "necessarily satisfied in all cases" because the purpose of the provision was to ensure that cases could continue notwithstanding the public health emergency and the alternative to the making of an order was that the case in question would be delayed.

237. So far as s 68BA(3)(b) ("is otherwise in the interests of justice") was concerned, the appellant submitted that "it was entirely unclear from the statutory text and context whether any matters would ever *militate against* the making of an order" (emphasis in original). The appellant therefore submitted that s 68BA(3) left the trial judge with no independent function because the discretion could not be exercised according to objective criteria. On that hypothesis the Supreme Court was merely enlisted to achieve a legislatively determined outcome, undermining its institutional integrity. Further, the appellant submitted that once s 68BA was repealed but its operation continued pursuant to ss 115-117, the discretion became "entirely devoid of meaningful content".

238. These submissions cannot be accepted.

239. It is wrong to say that s 68BA(3)(a) would inevitably be satisfied. Whether or not it would be satisfied will depend upon the overall state of the lists of the court. In that regard, three points must be noted.

240. *First*, given the expanded capacity for accused persons to elect for trial by judge alone, it is quite possible that there would be an increase in judge alone trials and hence, from time to time, the court may be in a position to continue to discharge its workload without compelling any accused person to have a trial by judge alone against that person's will.

241. *Second*, within the COVID-19 emergency period some jury trials of limited duration or complexity may have been possible so as to correspondingly reduce the need for judge alone trials other than by an accused person's election.

242. *Third*, there may well be a change in circumstances between the time at which the s 68BA(4) notice is given and the time when any decision is made. In this case there was almost two months between the date of the notice and the date of the decision. The factual circumstances of the pandemic are, by their nature, uncertain and may have become more or less conducive to conducting trials by jury, altering the assessment of the likelihood that a jury trial might be conducted on the date fixed for trial or altering the likely period of delay of any future jury trial if the listed trial did not proceed. Given the potential for a change in circumstances, it cannot be said that satisfaction of s 68BA(3)(a) was inevitable.

243. These possible scenarios illustrate that whether or not s 68BA(3)(a) was satisfied would depend upon a judgment made based upon the facts that exist at the point of decision and that it cannot be said that, in the variety of circumstances that might exist throughout a pandemic, the requirements of the paragraph would always be satisfied.

244. So far as s 68BA(3)(b) is concerned, it is plainly incorrect to say that there were not matters that would militate against the making of an order. In her Honour's decision the trial judge recognised that trial by jury was "the desirable way of trying serious criminal matters": at [40](a). Her Honour recognised that it was preferable in a case in which the complainant's credibility was to be a critical issue in the trial that the matter been tried before 12 jurors who could bring their collective experience and common sense to bear on the issue: at [40](d). These are matters which are clearly relevant and tended against the making of an order.

245. The trial judge identified that two factors which tended to favour a conclusion that it was in the interests of justice to make an order were the interests of the complainant and other witnesses in having the matter resolved expeditiously: at [40](f); and that three of the accused were remanded in custody who supported the making of an order for trial by judge alone: at 40(b)-(c). However, they illustrate the potential for there to be matters which favoured a conclusion that it was not in the interests of justice to make an order. For example, if instead of being remanded in custody, the appellant's three co-accused had been on bail then that would have been a significant factor telling against the ordering of a trial by judge alone because the prejudice to the accused of a delay in the proceedings would have been substantially less. Similarly, had the complainant given her evidence and been cross-examined pre-trial pursuant to Part 4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) then that would have reduced the prejudice to the complainant arising from a delay in the conduct of the trial and hence be a factor telling against the conclusion that it was in the interests of justice to make an order for trial by judge alone.

246. A consideration of where the interests of justice lie involves an evaluative judgment based on a broad range of factors that might be relevant in any particular case. The examples given in these reasons of factors which may tend against a conclusion that it was in the interests of justice to order a trial by judge alone are sufficient to illustrate that, contrary to the appellant's argument, the criterion in s 68BA(3)(b) is not devoid of meaningful content and does not deny to a trial judge an independent function.

247. Insofar as the appellant contended that, following the repeal of s 68BA, the discretion given to the court was "entirely devoid of meaningful content" because the continued operation of s 68BA(3) turned on "the arbitrary condition of notice", that submission must also be rejected. As the reasons given by the trial judge make clear, the decision of the court that it was possible to conduct jury trials did not mean that all such trials could proceed. In the present case, the finding of the trial judge was that, having regard to the number of co-accused and the estimated length of the trial, it could not be run as a jury trial until the then current distancing and spacing requirements had been lifted or at least substantially eased. The trial judge concluded that there was "no prospect of that occurring in the short to medium term": at [36]. In those circumstances, the same considerations which applied prior to the repeal of s 68BA remained relevant and the reconciliation of the competing public interests was a matter for the court to determine on the basis of the submissions made to it in light of the facts that existed at the time of the decision.

Second argument – interpretation of s 48A of the Self-Government Act

248. The two separate components of the appellant's argument are summarised at [209](b). The first component of the argument may be described as the "constitutional character argument" and the second component may be described as the "statutory character argument".

Constitutional character argument

249. The appellant's argument contained a number of steps:

(a) When the Commonwealth Parliament established the ACT Supreme Court by s 6 of the *Seat of Government Supreme Court Act 1933* (Cth) (subsequently renamed the *Australian Capital Territory Supreme Court Act 1933* (Cth)) it established a court of the same status and character as State Supreme Courts referred to in s 73(ii) of the Constitution.

(b) None of the amendments to the *Australian Capital Territory Supreme Court Act*, the Self-Government Act or the *ACT Supreme Court (Transfer) Act 1992* (Cth) (Transfer Act) altered the status or character of the court.

(c) Because it is beyond the power of a State "so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description": *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63], it is beyond the power of the Legislative Assembly to make an enactment incompatible with the status and character required by the description of the court as the "Supreme Court" in s 48A of the Self-Government Act.

(d) The High Court recognised in *Kirk* that the supervisory role of State Supreme Courts exercised through the prerogative writs is a defining characteristic of those courts and hence not susceptible to deprivation by a State legislature.

(e) The conduct of criminal trials for indictable offences by a judge and jury was an essential feature and defining characteristic of Supreme Courts as understood at federation and there was no capacity to force an accused to be tried by judge alone before a Supreme Court.

(f) The mode of trial was of no less constitutional significance than the jurisdiction considered in *Kirk* to be entrenched by Chapter III of the Constitution. State

parliaments have no power to compel an accused person to be tried on indictment by a State Supreme Court constituted by a judge sitting alone.

(g) The notion of a "Supreme Court" adopted in s 48A includes that same qualification and s 68BA is therefore inconsistent with s 48A and invalid.

250. There is no authority which directly supports steps (e)-(g) of this argument.

251. The critical step in the argument is that which converts the historical fact about the mode of trial as at federation into a defining characteristic of a "Supreme Court". In *Kirk* the institutional function of the Supreme Courts as at federation included the granting of a writ of certiorari for defect in jurisdiction, notwithstanding the existence of a statutory privative clause: *Kirk* at [97]. Further, the fundamental structural need for the existence of a supervisory jurisdiction in order to avoid "islands of power immune from supervision and restraint" appears to have been significant in the court reaching the conclusion that the supervisory role of the Supreme Courts exercised through the prerogative writs "was, and is, a defining characteristic of those courts": *Kirk* at [98]-[99].

252. It may be accepted, as part of the background against which this issue must be decided, that community participation in the criminal justice process through the institution of the jury trial is a matter of great structural value and not a mere matter of procedure. The dissenting judgment of Deane J in *Kingswell v The Queen* (1985) 159 CLR 264 at 299-303 and the judgment of Gageler J in *Alqudsi v The Queen* [2016] HCA 24; 258 CLR 203 at [129]-[138] in the context of s 80 of the Constitution make this clear.

253. Notwithstanding the significance of trial by jury as part of the criminal justice process, the references to "Supreme Court" of a State in the Constitution do not incorporate, as a defining characteristic of such a court that indictable offences must be tried by a jury.

(a) At federation there was a well understood distinction between indictable and summary offences. Trials on indictment were required by legislation to be conducted before juries. There was, however, legislation which permitted the summary trial of certain indicatable offences with the consent of the accused. For example, the *Criminal Law Amendment Act 1883* (NSW) provided a mechanism permitting a summary trial of certain larceny offences. The *Criminal Law and Evidence Amendment Act 1891* (NSW) allowed attempted suicide and a range of theft offences to be disposed of summarily. The lack of a uniform and mandatory requirement for a jury trial for indictable offences tends to undermine the proposition that it was an inherent characteristic of a Supreme Court referred to in the Constitution.

(b) The proposed constitutionalisation of the requirement for a jury trial by holding that it is an inherent characteristic of a Supreme Court would be conceptually incoherent because it would not address the position in relation to other courts which existed at federation, and exist today, which have the capacity to try charges on an indictment. If it were to be said that trial of indictable offences by jury was an inherent characteristic of a Supreme Court, that would say nothing about those other courts in the States which try charges on an indictment. Current examples are the District Court of New South Wales and the County Court of Victoria. Given the absence of direct reference to such courts in the Constitution other than as courts which may be invested with federal jurisdiction, it could not be argued that they have constitutionally entrenched characteristics which, outside the scope of s 80 of the Constitution, require them to try charges on

indictment by jury. Acceptance of the appellant's argument would constitutionalise jury trials in Supreme Courts but leave unaffected the power of State legislatures to modify or not require jury trials in those other courts. In contrast to the outcome in *Kirk*, this would be conceptually incoherent.

(c) Given that the only language upon which the appellant seeks to anchor his argument is the name "Supreme Court", and the contention is based upon the allegedly uniform statutory position in the federating colonies, it is not clear what technique other than judicial whim the appellant contends would permit the entrenched characteristics of what are now perceived to be undesirable characteristics of the jury system as at federation to be discarded. Most obvious among such characteristics is the fact that "criminal juries in 1900 were constituted exclusively by males who satisfied some minimum property qualification": *Cheatle v The Queen* (1993) 177 CLR 541 at 560. In relation to s 80 of the Constitution, the constitutional language "trial … by jury" allows a judicial enquiry as to the essential features of that institution. That is a relatively focused exercise. In contrast, the appellant's argument would involve an exercise at a higher level of abstraction because the only language being interpreted is the reference to a "Supreme Court". That would make it correspondingly more difficult to discover by orthodox judicial technique what characteristics of the jury system as at federation are picked up and constitutionally entrenched by the concept of a "Supreme Court".

(d) The formulation of the proposed constitutionally entrenched characteristic of a Supreme Court put forward by the appellant was one which precluded trial by judge alone without the consent of the accused. The qualification that permits a trial by judge alone with the consent of the accused was no doubt included because of the recognition that legislatures around Australia have now permitted accused persons in many cases to make an election for trial by judge alone. However, if the basis for the constitutionalised requirement for jury trials is the state of the law as at federation, there is no basis for such a qualification and laws which permitted such a course would be invalid. The reality is that State and territory legislatures have proceeded in ignorance of the appellant's proposed constitutional limitation, have modified the nature of jury trials and permitted them to be dispensed with the consent of the accused as well as, in limited circumstances, without the consent of the accused. (Examples of the latter include s 68BA of the *Supreme Court Act* and s 132(7) of the *Criminal Procedure Act 1986* (NSW)). Much or all of this would be invalidated if the appellant's contention was accepted, at least insofar as the trials took place in a Supreme Court.

254. Given that the appellant has not established this essential step in his argument, his contention that the reference to the "Supreme Court" in s 48A of the Self-Government Act incorporates within it the essential characteristic that, in the absence of the consent of an accused, trials of indictable offences must be by jury cannot be accepted. In those circumstances, it is neither necessary nor desirable to express any conclusions on the other steps in the argument. It is sufficient, in order to dispose of this aspect of the appellant's argument, to say that the use of the words "Supreme Court" in s 48A does not impliedly pick up as an essential characteristic of that court a requirement that, in the absence of the consent of the accused, trials on indictment be before a judge and jury rather than a judge alone.

Statutory character argument

255. The statutory character argument was that because of the legislative history of jury trials within the Supreme Court of the ACT, the reference to "Supreme Court" in s 48A of the Self-Government Act must be taken as denying the Legislative Assembly the power to authorise a trial by judge alone in the Supreme Court without the consent of the accused.

256. This is an argument based directly upon statutory interpretation and does not depend upon the argument as to the defining characteristics of a "Supreme Court" referred to in the Constitution. The steps in the appellant's argument are as follows:

    (a) There was an unbroken commitment to trial by jury that can be traced back to before federation.

    (b) It is unlikely that the Commonwealth Parliament in making the Transfer Act (which inserted s 48A) intended to depart from this feature of the Supreme Court.

    (c) Section 48A of the Self-Government Act should be interpreted as preserving as a defining characteristic of the Supreme Court that accused persons must not be tried on indictment by a judge alone unless they consent.

257. The appellant invoked in support of the contention as to the interpretation of s 48A:

    (a) The statements of the principle of statutory interpretation that a parliament should not be taken to overthrow fundamental principles or systemic values unless it does so clearly: *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41; 256 CLR 569 at [11] and the authorities referred to therein.

    (b) The statement made in relation to Part VA by the Shadow Attorney-General during the second reading debate on the bill that became the Transfer Act:

> The new part was designed to ensure that any laws that were made in relation to the judicial power of the Territory had to be made in accordance with high standards–standards as regards continuity of proceedings, continuity of jurisdiction, protection for the independence of judges, and so on.

258. The appellant also made reference to s 29 of the *Magna Carta* (1297) 25 Edw 1 c 29 which provides that a person may not be imprisoned except "by lawful judgment of his peers or by the law of the land". However, the appellant did not develop any submission based upon this provision, which continues in operation in the ACT, as to the meaning of the provision when it was enacted or what the significance of the words "or by the law of the land" were. Sir Victor Windeyer said of s 29 that its meaning was "extremely obscure" but that it "certainly was not intended to be a guarantee of trial by jury": W Windeyer, *Lectures on Legal History* (Law Book Company, 2nd ed (revised), 1957) at 81. It may be put to one side.

259. The appellant is correct to say that, prior to 1993, trials on indictment were required to be by jury. This was a result of s 395 of the *Crimes Act 1900* (NSW) as applied in the Territory which required that if, upon being arraigned, the person pleaded not guilty "he shall, without further form, be deemed to have put himself upon the country for trial, and the Court shall, in the usual manner, order a jury for his trial accordingly". After the *Crimes Act* was converted to an ACT enactment, this provision was subsequently renumbered and became s 281. The reference to "put himself upon the country" is explained, as best as it can be, in J Stephen, *A History of the Criminal Law of England* (Macmillan and Co, 1883) vol 1, 297-298. The statutory requirement that the trial be by jury was given effect by the

provisions of the *Jury Act 1901* (NSW) that was applied in the Territory, the *Juries Ordinance 1932* (ACT) and the *Juries Ordinance 1967* (ACT). The appellant characterises the trial by jury of charges on indictment as being "a foundational tenet" of the criminal justice system and the "underlying premise" of the *Australian Capital Territory Supreme Court Act 1933* (Cth). This, however, is to overstate the position. The requirement for a jury trial had a statutory basis which identified the requirement for a jury trial and its incidents. That it is an important component of the criminal justice system cannot obscure its basis in statute.

260. At the time of self-government, and subsequently at the time of the transfer of responsibility for the Supreme Court to the Territory, there was no express attempt to entrench or constitutionalise the requirement for a jury trial. Rather, at self-government both the *Crimes Act* and the *Juries Ordinance 1967* became enactments, subject to the general legislative power of the Legislative Assembly to modify them. This included the power to modify the statutory provisions relating to jury trials.

261. Given the statutory basis for jury trials and the potential for modification of those provisions following self-government, the general principles of statutory interpretation relating to infringement of fundamental rights are of no assistance to the appellant. Such principles might have been able to have been deployed if there was some issue as to how to interpret s 68BA itself. That is the specific provision which modifies the entitlement to a jury trial. However, the appellant does not seek to deploy the principles in relation to the interpretation of s 68BA but seeks instead to use them in order to create a requirement for jury trials within s 48A, the most general statement of the jurisdiction and powers of the Supreme Court. The entitlement to a jury trial has never been present within the general statement of the jurisdiction of the Supreme Court. It was not present in s 11 of the *Australian Capital Territory Supreme Court Act*. The statutory provisions defining the jurisdiction of the court have always been separate from the statutory provisions relating to jury trials and, as a result, to attempt to deploy the principles relating to modification of fundamental rights in relation to such provisions is to seek to deploy them at the wrong target.

262. Orthodox principles of statutory interpretation do not permit s 48A to be interpreted so as to entrench, unless the accused consents, trial by jury. Section 48A is a statement of jurisdiction. Its precise content is obscure, as is the reason for departing from the relatively straightforward statement of jurisdiction that existed prior to transfer in s 11 of the *Australian Capital Territory Supreme Court Act*. It has been held to guarantee the existence of the Supreme Court: *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* [1999] HCA 44; 200 CLR 322 at [78] and to entrench its supervisory jurisdiction: *Faull v Commissioner for Social Housing for the ACT* [2013] ACTSC 121; 277 FLR 61 at [109].

263. There is nothing in the text of the provision which supports the appellant's contention that the reference to "Supreme Court" has embedded within it the carefully crafted qualification that there may be no trial on indictment of a criminal offence by a judge sitting alone unless the accused consents.

264. There is no implication that necessarily arises from the text of the section, its context within the Self-Government Act or the purpose of the section or the Act which would make the appellant's submission a valid one.

265. The historical fact that trial on indictment was conducted before a judge and a jury does not provide a basis for the conclusion that it is an essential characteristic of a

"Supreme Court" that trial continue in that way. That is all the more obvious in circumstances where at the time of the enactment of the provision the long-established position was, as a result of the decision in *Bernasconi* that this was not a constitutional requirement. Had there been any intention to alter the position that existed under the Constitution and to constrain the Territory legislature so as to preclude it from changing the mode of trial of criminal proceedings in the Supreme Court, then the Transfer Act would have done so. While Part VA does contain a series of restrictions on the power of the Legislative Assembly to affect the Supreme Court and its judicial officers, those restrictions have nothing to do with the mode of trial for criminal offences. The carefully articulated restrictions upon Territory legislative power set out in Part VA tend strongly against reading into s 48A a restriction which has no basis in the language used.

Third argument – *Bernasconi*

266. The contention that s 68BA was inconsistent with s 80 of the Constitution was outlined in the appellant's written submissions. While those written submissions were adopted at the hearing of the appeal, they were not elaborated upon in oral submissions.

267. The appellant contended that the decision of the High Court in *Bernasconi* is not an insuperable obstacle. He submitted that a distinction could be drawn based upon the nature of the territory in question. In particular, the appellant placed reliance upon the fact that the ACT was created by the surrender of territory by New South Wales and its acceptance by the Commonwealth. He submitted that because of this, the decision in *Bernasconi* could be distinguished. He submitted that territories that have been surrendered by a State raise different constitutional considerations to other classes of territories subject to s 122 of the Constitution. He noted that upon federation the people of the States agreed to unite in one indissoluble federal Commonwealth under the Constitution and people in the surrendered territories did not lose their membership of the body politic which the Constitution brought into existence. He relied upon the majority judgment in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (*Capital Duplicators*) as an example of a case in which the constitutional consequences of a surrender of territory were qualified by what was perceived to be a broader purpose of the Constitution. He submitted that in working out the relationship between ss 80 and 122 of the Constitution the approach advocated by Gaudron J in *Capital Duplicators* at 288 should be adopted. That involved interpreting the Constitution in a way that "secures to Territorians the same basic rights that the Constitution confers on other Australians, unless the contrary is clearly indicated."

268. The broad ratio in *Bernasconi* (at 635) that "the power conferred by sec. 122 is not restricted by the provisions of Chapter III. of the Constitution, whether the power is exercised directly or through a subordinate legislature" is no longer correct. It was rejected in *Spratt v Hermes* (1965) 114 CLR 226 at 244-245, 248, 253, 266, 269-270, 275, 277 and is inconsistent with the line of cases culminating in *Bradley* where it was accepted that territory courts are within the scope of s 71 of the Constitution. The narrow ratio of *Bernasconi* that the power in s 122 is not qualified by s 80 remains binding upon this court. The suggestion that a distinction can be drawn between territories derived by the surrender of territory by States and other territories is not a distinction drawn in the Constitution itself. Nor is it a distinction which is reflected in the authorities of the High Court, notwithstanding the tentative statement in *Mitchell v Barker* (1918) 24 CLR 365 at 367 that: "It may be that a distinction may someday be drawn between Territories which have and those which have not formed part of the Commonwealth". The exception

to this is the decision of the majority in *Capital Duplicators* which must be rationalised on the basis of the particular significance given in the plurality judgment to the creation by the Constitution of a free trade area within the original States. The submission, based upon the judgment of Gaudron J in *Capital Duplicators*, that the relationship between ss 80 and 122 should be worked out in a way that secures to Territorians the same basic rights that the Constitution confers on other Australians, unless the contrary is clearly indicated, is an invitation to top-down reasoning which this court should not accept.

269. *Bernasconi* remains binding upon this court and compels the rejection of this aspect of the appellant's argument. That is because s 122 of the Constitution is not qualified by s 80. Nor is the general grant of legislative power in s 22 of the Self-Government Act to make laws, including s 68BA.

270. In those circumstances, it is not necessary to consider the issue that was left undecided by *Fittock v The Queen* [2003] HCA 19; 217 CLR 508, namely whether an offence against an enactment of a self-governing territory was outside the scope of s 80 because it did not match the description of "any offence against any law of the Commonwealth".

Miscarriage of justice

271. Mr Vunilagi contended that a miscarriage of justice has occurred as a result of the proceedings being tried by judge alone and not a jury.

272. The submission, as developed orally appears to be this. A factor the trial judge took into account in considering the interest of justice aspect of s 68BA was that three of the accused were in custody, a matter which did not apply to the appellant. It was said that this was an irrelevant consideration. It was then submitted that having a trial by judge alone, as opposed to a jury by itself gave rise to a miscarriage of justice because he lost a chance was fairly open to him of being acquitted by a jury.

273. The appellant's submission cannot be accepted.

274. The context in which the order was made for a trial by judge alone was this. The appellant and his co-accused were charged on the one indictment. There was no application by Mr Vunilagi for a separate trial from his co-accused. That is unsurprising given that, as the appellant accepted during submissions, any application was unlikely to succeed. That is because there was a compelling argument that in the circumstances of this case, the interests of justice required a joint trial.

275. As a result of the appellant's approach, there was no issue that the interests of justice required a joint trial of the accused. It followed that consideration of the criteria in s 68BA occurred in the context of it being a joint trial. We note that the submissions before the trial judge on this application did not suggest otherwise. We note also that it was not suggested to the trial judge by Mr Vunilagi (or any accused) that the considerations were different as between the accused. Nor did Mr Vunilagi suggest the consequences of a failure to make an order were not relevant. Mr Vunilagi did not attempt to appeal the order made. Nor, as a result of the order, did he seek a separate trial.

276. The order made was a valid one. That being so, there is no basis to suggest that the appellant did not get a fair trial, or that a miscarriage of justice occurred as a result.

277. The appellant has not established this ground.

Orders

278. Each of the appeals must be dismissed. Mr Vunilagi also had an application for leave to appeal against the interlocutory decision of the primary judge ordering that his trial proceed by judge alone (ACTCA 47 of 2020). The necessity for that application was overtaken by an amendment of the grounds of appeal in his appeal against conviction (ACTCA 40 of 2020) so as to raise the asserted invalidity of s 68BA of the *Supreme Court Act*. Therefore the application for leave to appeal may also be dismissed.

279. The orders of the Court are as follows:

Vunilagi v The Queen (ACTCA 47 of 2020)

The application dated 9 December 2020 is dismissed.

Vunilagi v The Queen (ACTCA 40 of 2020)

The appeal is dismissed.

Vatanitawake v The Queen (ACTCA 39 of 2020)

The appeal is dismissed.

Masivesi v The Queen (ACTCA 38 of 2020)

The appeal is dismissed.

I certify that the preceding two hundred and seventy-nine [279] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Justice Mossop, Justice Loukas-Karlsson and Justice Abraham.

Associate:

Date: 9 November 2021