SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Sullivan v DPP**
Citation:	**[2025] ACTCA 53**
Hearing Date:	8 August 2025
Decision Date:	18 December 2025
Before:	McCallum CJ, Mossop and Taylor JJ
Decision:	(1) The appeal is dismissed.
Catchwords:	**APPEAL** – CRIMINAL LAW – Inconsistent verdicts – where appellant charged with four counts of sexual intercourse without consent, one count of act of indecency without consent, and one count of assault occasioning actual bodily harm, all arising out of one incident – where appellant found guilty of three counts and not guilty of three counts – whether acquittals attributable only, or principally, to doubt about complainant's credibility or compromise by jury – where jury entitled to judge facts for itself, and not bound by parties' case theories – where verdicts reached were rationally open to jury acting reasonably and paying proper attention to the elements of each offence – appeal dismissed
Legislation Cited:	*Crimes Act 1900* (ACT), ss 24, 54, 60
Cases Cited:	*Hudson v DPP* [2024] ACTCA 28 *MFA v The Queen* [2002] HCA 53; 213 CLR 606 *R v Markuleski* [2001] NSWCCA 290; 52 NSWLR 82 *TK v The Queen* [2009] NSWCCA 151; 74 NSWLR 299 *Williams v DPP* [2024] ACTCA 24
Parties:	Jake Sullivan (Appellant) Director of Public Prosecutions (Respondent)
Representation:	**Counsel** S Howell (Appellant) T Hickey with K McCann (Respondent) **Solicitors** Hugo Law Group (Appellant) ACT Director of Public Prosecutions (Respondent)
File Number:	ACTCA 31 of 2024

Decision Under Appeal:	Court:	ACT Supreme Court
	Before:	Baker J
	Date of Decision:	24 September 2024
	Case Title:	DPP v Sullivan
	Court File Number:	SCC 322 of 2022

THE COURT:

Introduction

1. Jake Sullivan (the appellant) was charged on indictment with six offences, each arising from a single incident on 11 March 2022:

    (a) Count 1 (CAN 8509/2022): sexual intercourse without consent contrary to s 54 of the *Crimes Act 1900* (ACT);

    (b) Count 2 (CAN 8510/2022): sexual intercourse without consent contrary to s 54 of the *Crimes Act*;

    (c) Count 3 (CAN 8512/2022): sexual intercourse without consent contrary to s 54 of the *Crimes Act*;

    (d) Count 4 (CAN 8513/2022): sexual intercourse without consent contrary to s 54 of the *Crimes Act*;

    (e) Count 5 (CAN 8511/2022): act of indecency without consent contrary to s 60 of the *Crimes Act*; and

    (f) Count 6 (CAN 8508/2022): assault occasioning actual bodily harm contrary to s 24 of the *Crimes Act*.

2. The appellant pleaded not guilty to each charge. The appellant was tried before the primary judge and a jury in the Supreme Court between 9 September and 24 September 2024. On 24 September 2024, the jury found him guilty on count 1, count 2 and count 6, and not guilty on count 3, count 4 and count 5.

3. On 2 April 2025, a sentencing hearing was conducted before the primary judge and on 16 July 2025, the appellant was sentenced to a total effective sentence of three years and three months' imprisonment, suspended after 15 months.

4. The appellant seeks to challenge his convictions on counts 1, 2 and 6. Although two grounds of appeal were included in his notice of appeal, he only pressed a single ground of appeal:

> The verdicts of not guilty in relation to counts 3, 4 and 5 are inconsistent with the verdicts of guilty in relation to counts 1, 2 and 6, and the verdicts of guilty are unsustainable.

5. For the reasons that follow, there is a rational explanation for the different verdicts reached by the jury. As a result, the appellant has not established that there is an inconsistency in the verdicts which requires the verdicts of guilty on counts 1, 2 and 6 to be set aside. The appeal must therefore be dismissed.

Background

6. As of 11 March 2022, the appellant was a student at the Royal Military College, Duntroon, and had been a student at the Australian Defence Force Academy (ADFA) since 2019. The complainant was a fellow student at ADFA. The two knew each other and had been in a casual sexual relationship.

7. In her summing-up, the primary judge gave an overview of the common ground as to the lead-up to the events the subject of the charges, which may be summarised as follows:

   (a) First, the complainant and the appellant had slept together on-and-off a number of times in 2020.

   (b) Second, during that time, that is, in 2020, the complainant was interested in a more serious dating relationship with the appellant. The appellant was not interested in embarking upon a more serious dating relationship at that time.

   (c) Third, the appellant and the complainant were not close during the latter part of 2021.

   (d) Fourth, the complainant and the appellant started talking again after an Australian Defence Force event at the Royal Exchange in Brisbane on New Year's Eve in 2021 and, from that time, they were then exchanging text messages with some regularity.

   (e) Fifth, in the week before 11 March 2022, the complainant and the appellant arranged to meet up on 11 March and to have sexual intercourse that evening.

   (f) Sixth, the complainant went out with her friends on 11 March 2022. She had consumed alcohol, but she was not drunk.

   (g) Seventh, the appellant also went out with his friends on the evening of 11 March 2022. He had consumed alcohol, but he was not drunk.

   (h) Eighth, the complainant and the appellant saw each other at the Mooseheads nightclub in Civic as they had previously agreed. The complainant told the appellant that she was going back to her room. The appellant said that he would stay out a bit longer. The complainant said, "Okay, I'm heading off."

   (i) Ninth, the complainant then went to get an Uber with O, a female friend. While she was waiting, the appellant's male friend, N, came out. He asked where the appellant was. After the complainant said that the appellant was staying, N went back into Mooseheads. N said to the appellant, "[The complainant's] saying she's leaving. She's saying, 'Do you want to come?' I think I'm going to head off

as well. Come on, mate, let's go home." The appellant then decided to go back to ADFA as well.

(j) Tenth, the complainant, N, O and the appellant then travelled in an Uber back to the ADFA housing, and the complainant and the appellant went up to the complainant's room. Once in the complainant's room, the appellant and the complainant commenced engaging in sexual intercourse, which was consensual at first.

The incident

The complainant's evidence

8. The complainant's evidence was given, in part, by way of two evidence-in-chief interviews with police conducted on 1 April 2022 and 13 October 2022. She gave further evidence-in-chief and was cross-examined. The complainant's account of the incident may be summarised as follows.

9. The complainant said that, after arriving back at ADFA that evening, she and the appellant went to her room. She said the appellant "wasn't aggressive at all" and was "like, super relaxed and you know, just making jokes and whatnot". She got changed into her pyjamas. The appellant stripped down to his underpants. They got into bed together. They started kissing. She got on top of the appellant and took off her shirt. They each took off their pants, then started having consensual penile–vaginal sex.

10. The complainant said this continued for about 10 minutes, before the appellant "started getting really aggressive". The complainant said he grabbed her breast "really tightly" and pulled her hair "really aggressively". She said she reacted by saying to him, "ow, it hurts". The appellant, however, "continued to do it". The complainant later said the appellant grabbed her hair first, to which she said, "Ow, that really, really hurts", then grabbed her right arm "really roughly", to which she also said "ow", then grabbed her right breast and squeezed it forcefully. She said the appellant had done nothing like this before. This is what was alleged to be count 6.

11. In cross-examination, with respect to count 6, the complainant said:

> And for what period of time were you hooking up before you indicated that you were feeling discomfort?---Probably when he started grabbing my hair, my boob and my arms very tightly.
>
> No, no. I've asked you about a period of time, do you see? For what period of time did you hook up?---I don't remember the exact time.
>
> Can you give any estimate of how long it was that you engaged in intercourse?---I don't remember the time.

Not even an estimate?---I don't remember the time.

And what was the first discomfort that you say you felt that evening? Where was it?---It was either when he was pulling my hair or grabbing on my breast.

Right. Now, let me deal with pulling your hair. On other occasions in 2020 when the two of you had had sexual intercourse my client had taken you by the hair from time to time, hadn't he?---I don't remember.

Well, he had never pulled your hair in any aggressive fashion in the past, had he?---Not to the extent, no, I don't remember. I just remember him pulling really hard on that night.

Right. Now, when he pulled really hard on that night what did you say to him?---I said, 'Ow, that hurts.

Right. What did he say to you?---I don't remember.

Did he stop pulling your hair?---No, he continued.

Right. So there was a hurtful pull on the hair, your protest and then he continued to pull and I imagine continued to cause you pain. Is that right?---Yes.

Did you say something else to him?---Yes, because he kept doing it and I kept saying it hurt.

So how many times do you think you said that to him?---I don't know. I don't remember.

All right. In any event, by that stage it must have seemed to you that things were terribly different to the way in which they had been in the past?---Yes.

Did you ask him why he was behaving like that?---No, I just got off and turned the opposite way and said I wanted to go to sleep.

Well, just before we get to that, I thought I asked you about the first instances of pain or discomfort. One of the instances was pulling your hair, the other one - - -?---And grabbing at my bra, breast, yes.

Grabbing your breast. Now, was that something you say happened before, quote, you got off and said you wanted to go to sleep?---Yes.

Right, and in what position were you when he grabbed your breast in that way and caused you pain?---I was on top of him.

And when you say on top of him, you were straddling him with his penis inside you. Am I correct?---I don't remember if his penis was inside me at that stage or not.

And he grabbed which of your breasts?---I don't remember the exact one. It was either left or right.

Well, I think I'm correct in putting to you that when you spoke to the police and later two other people you described this man as grabbing and twisting one of your breasts very significantly?---Yes, I don't remember the exact one. Again, this is two and a half years ago. I don't remember the exact breast he grabbed.

And when he grabbed it and twisted it did he do so in a particularly aggressive fashion?---Yes, he just grabbed it and twisted.

> And from your perspective, there was no similarity between that and any caressing of your breast that he may have engaged in previously. Is that right?---Yes, it definitely wasn't a caress.
>
> And you took it to be a very aggressive and intentionally hurtful action on his part. Would that be right?---Yes, yes.

12. The complainant said she turned away from the appellant on the bed, faced the window and told the appellant she wanted to go to sleep. The appellant said something to her like, "You invited me here, you couldn't even make me cum" or "You're the one who invited me over here ... you've been talking about this for a week, you couldn't even make me [cum]". She said he then reached between her legs and "started fingering me". She froze and said nothing. This is what was alleged to be count 1.

13. The complainant said that, after the appellant digitally penetrated her vagina, he repositioned himself behind her and "tried to get his dick … inside me as well". He then grabbed her and pulled her on top of him and re-inserted his penis into her vagina. She said she froze and "blankly stared at him". She said she continued having penile–vaginal sex as she "just didn't know what to do". This intercourse is what was alleged to be count 2. The precise scope of the intercourse encompassed within count 2 is controversial and will be returned to below.

14. The complainant said, while she was on top of the appellant, he then inserted his thumb into her anus. She reacted to this and said, "No, no, no, I don't want to do that". The appellant responded by saying, "Oh, come on" or "No, no, it's – it's fine", in reply to which the complainant said, "No, no, I really don't want to do that" or "No, no, like I don't want to do that, I haven't done that before, I don't want to do it". She said the appellant did not stop and continued to penetrate her anus with his thumb. She said, "I didn't prepare", and the appellant said, "I don't care". This is what is alleged to be count 3.

15. In evidence-in-chief, with respect to count 3, the complainant said:

> In that same interview, when you were recounting what happened to you to police, you say something like this, "He put me on top of him and I just kind of hit - fight or flight to response – kind of just – I don't know – I don't think it hit me until afterwards. But anyway, he kept going and then he started to do things throughout the – he put his finger in my arse, and I was like, no, no, no, I don't want to do that". And you keep recounting the incident. When you're saying, put his finger in your arse, what do you mean by that?---Like he inserted his thumb into my arse without asking and just did it.
>
> I'm going to be a bit – go into a bit of detail, if I can? When you say, do you mean in between your bottom cheeks, or do you mean your anus? What do you mean?---Like fully – in anus, sorry.
>
> You could feel that?---Yes.

16. In cross-examination, she said:

> Okay. I'll come back to that. In any event, we were at that point in the narrative, I think, where you explained to the ladies and gentlemen of the jury that my client took you by - was it by an arm in order to get you to - - -?---Yes, my left arm.
>
> Right, and in some way did he [lift] you onto his body or did he take you by the arm resulting in you again straddling him?---He pulled me onto him, yes.
>
> Now, when you say he pulled you onto him, did he [lift] you up and onto his penis or was his penis already inserted in you?---I don't remember.
>
> When you were straddling him on that occasion were you facing him or facing away from him?---I think I was facing him.
>
> And at that point did you remain motionless?---I don't remember. Honestly, it just kind of seemed like a blur. I think I hit my fight or flight response.
>
> Well, you don't say that you were just frozen at that point, do you?---I don't remember.
>
> Did he lift you up and down on his penis?---I don't remember.
>
> Well, having put you in that position what happened next?---From memory, there was - we had moved at some stage down to the end of the bed and he had his head on my desk and then he - I was still straddling him at that stage and that's when he inserted a thumb into my anus.
>
> …
>
> And I imagine you immediately said something to him at that point, did you?---Yes, I said I know [possibly an erroneous transcription of "oh, no"] I don't want to do that.
>
> …
>
> And you had made that absolutely clear to him in the past?---Yes, and I had also made it clear to him in the moment. I said I do not want to do that and I tried to gross him out by saying I wasn't prepared.

17. The complainant said that following the appellant inserting his thumb into her anus, at some point she felt sick and got off him for a second time. She said she again told him she wanted to go to sleep and turned away from him. The appellant again said, "You didn't even make me come. You invited me over here. You told me all about it". She said he grabbed her left hand and put it on his penis "to continue like ... giving him a hand job" and he said, "Come on, keep going, like I'm really – I'm going to come, just keep going". She said initially the appellant masturbated his penis together with her, before she continued to masturbate him herself. This was what was alleged to be count 5.

18. In cross-examination, with respect to count 5, it was put to the complainant:

> [COUNSEL]: I want to suggest to you at no stage did this man take your hand and place it on his penis and then - - -?---He did.

> Just let me finish, please. And then force you, by application of his own hand on yours or otherwise to masturbate him?---He did.
>
> You agree, I think, that you told the police that he took your hand and placed it on his penis, and you continued to masturbate him?---No. He took my hand and continued to do it himself with my own hand and I continued because I was scared.
>
> All right. Did you tell him you didn't want to do that?---I told him I didn't want to give him head and he still forced me onto his penis.
>
> I'm not asking you about head for the moment.

19. The complainant said the appellant made her perform fellatio upon him. She said he grabbed her head and pushed it down to his penis. She said she performed fellatio upon him for "only a few like seconds, like 30 seconds probably" before he let go of her. She told the appellant, "I don't want to give head", as she did not like it. The appellant said, "Come on", to which she replied, "I don't want to do this, and like, I don't want to give you head. I hate giving head". This is what was alleged to be count 4.

20. In cross-examination, with respect to count 4, the complainant said:

> [COUNSEL]: ... Let me deal with the question of fellatio. Do you remember telling the police that at one stage – and you'll find this at the bottom of page 15 of that transcript, if you'd like to look. Question and answer 129?---Yes. I see it.
>
> > Because, like, obviously [something inaudible] I started, like, he grabbed my hand, started giving me a hand job and then he kind of like, pulled me on top of him and then, like, kind of, like, gestured towards me to suck his dick.
>
> Do you see that?---Yes.
>
> What gesture did he make?---He positioned my head towards his penis.
>
> Right. So how was that done? Just explain that?---He has grabbed my head with two hands and pushed it or like gestured it towards his penis.
>
> All right. So gestured it towards his penis. Is that right?---He's positioned.
>
> Right. Did he push your head right down onto his penis or did he simply take the back of your head and gently indicate it should go towards his penis?---He didn't gently do it, I think. He definitely pushed it towards there.
>
> Right. And you had a conversation with him at that stage, did you?---Yes. I said I didn't want to give head.
>
> And you can read the rest of the answer at 130, by all means?---Yes. He said he wanted – he said, 'Come on'. I expressed to him again that I didn't want to do it. I don't like giving head.

21. The complainant said that after this, they returned to having penile–vaginal sex. She said she knew the appellant was not wearing a condom at the start and was "fine with that", but said the appellant then ejaculated in her vagina, "which I didn't give him consent for".

In cross-examination, however, the complainant agreed that during their relationship in 2020, "when we were sleeping together regularly", there were occasions when the appellant ejaculated in her vagina.

22. The complainant said she got up and went to have a shower. The appellant got up and had a shower with her. She said she put soap on the appellant, then told him she was going to get back into bed. She got dressed, got into bed and faced away from the door. When the appellant emerged from the shower, he asked if she had any food, then said, "Oh, what's wrong, like why are you upset?" As described initially by the complainant, the conversation continued:

> [Complainant]: You – you hurt me, I just wanted to go to sleep, you hurt me …
>
> [Appellant]: Oh I'm just hungee …
>
> [Complainant]: Look, just fuck off, like, just leave …
>
> [Appellant]: Oh, I'm really sorry if I hurt you …
>
> [Complainant]: No, like, you really hurt me, like I'm swollen and like, I'm in pain …
>
> [Appellant]: Oh, I'm really, really sorry, I'll just message you tomorrow morning …

23. As described later in the complainant's evidence-in-chief interview:

> [Complainant]: You hurt me, like, I'm all swollen, like, my vagina is swollen right now …
>
> [Appellant]: Oh, I'm so sorry, I'm so sorry … Well I'm going to go back to Mooseheads because I want to go grab food from the kebab shop, and then ... I'll come back here …
>
> [Complainant]: No, don't come back here, like fuck off, don't come back here …
>
> [Appellant]: Oh, why not? …
>
> [Complainant]: Because you hurt me, like ... I'm in pain …
>
> [Appellant]: Oh, okay, well I'll message you in the morning, I'm sorry …

24. The complainant said the appellant then left her room. She estimated the incident took place over about 75 minutes.

The appellant's evidence

25. The appellant's account of the incident was in contrast to the complainant's account. Each of the acts alleged by the complainant and charged as counts 1 to 6 was denied.

26. The appellant said when they arrived back at ADFA, he and the complainant went to her room together. He said they both got undressed into their underwear and got into bed. He could not recall the complainant getting into pyjamas before getting into bed with him.

He said they began kissing, then performed oral sex “both ways”, before having consensual penile–vaginal sex. He said the complainant hopped on top of him to begin with, but he agreed that they changed positions. He said at one stage they were in a “missionary” position and said he also received oral sex.

27. The appellant said at no point did the complainant say she wanted to stop having sex with him. He denied pulling the complainant’s hair. He denied squeezing or twisting her breasts. He denied causing her any injury (“I never did anything forceful or anything to hurt her”). He said at no point did she roll over, face away from him, and say she wanted to go to sleep.

28. In cross-examination, it was put to the appellant:

> Okay. Do you recall pulling – tugging her hair?---No, because that didn’t happen either.
>
> Do you recall her – you agree, don’t you, that you’ve never pulled her hair aggressively before?---Yes, I’ve never done that. It doesn’t excite me at all, no.
>
> I’m not asking whether it excites you, but you agree you’ve never done that to her?---No, never done that. That’s important to note.
>
> Okay. So when she says that you’ve never done [that] before, you agree with her?---I agree with her, yes.
>
> Do you remember grabbing her tightly on her breast?---No, because that didn’t happen either. That’s another lie.
>
> Do you remember she saying [sic] to you, “Ow”, like it hurts or something like that?---Of course not, because I never did anything to cause that reaction, no.
>
> So, so - - -?---She never said that. I’ll make that clear, no.
>
> All right. Don’t you recall her saying something like, “I’m feeling uncomfortable”?---No, I don’t recall that ever being said, no.
>
> Do you remember her saying, “I’m going to sleep”, and she turned around and faced the opposite way?---That’s not how it happened, no. That did not happen, I should say. No.
>
> So you’re saying there is no occasion where she got off you and turned around and faced the window, we can see it in the photos?---She never mentioned being sleepy or having to go to sleep, or whatever that was, no. She never - never.
>
> Did you say to her, “You invited me here. You couldn’t even make me come,” or something to that effect?---Those are not my words. No.
>
> …
>
> Well, during the sexual intercourse, did you expect her to continue having sex with you?---I didn’t expect anything of her. That’s just simply how it happened.
>
> Well, do you remember her lying on her side and you trying to insert your finger into her vagina?---No. No, it’s not how I did that at all. No.

> Okay. Did you try and insert your penis into her vagina while she was on her side?---No, because she wasn't on her side then.
>
> Did you pull her on top of you to straddle you again?---No, she did that on her own. I never forced her into any position. No.

29. The appellant denied lifting the complainant on top of him after she had turned away and said she wanted to go to sleep ("I never did that").

30. He denied putting his finger or thumb into the complainant's anus ("that's simply another lie").

31. He denied taking her hand and forcing it onto his penis. He said he might have placed the complainant's hand on his penis but did not force her to put it there.

32. He said that, while he was in her room that night, the complainant did not say or do anything to indicate she did not want to continue doing what she was doing.

33. He accepted that it was possible he indicated that he wanted her to perform fellatio but said he did not "force" her head onto his penis. He said the complainant never said anything to the effect that she did not enjoy giving oral sex.

34. He said that, about mid-way through the incident, he recalled lubrication being used. He said it was his idea to use it as the complainant's vagina was dry, and intercourse had become uncomfortable (the complainant also said that, at some point, lubrication was used). He said the complainant got up out of bed and got the lubricant out of a drawer on the other side of the room. He said she passed the lubricant to him, and he applied it to his penis and her vagina before they continued to have sex. He said they were in the missionary position when he ejaculated. He could not remember talking about whether he should ejaculate inside her vagina, but said he had ejaculated inside her vagina without a condom during their previous sexual relationship in 2020.

35. The appellant said that, afterward, they talked about having a shower, and then they went to the shower together. He said they washed each other. The complainant got out of the shower first. When he returned to the room, he sat next to the complainant on the bed. She mentioned to him that her vagina was sore and he responded by saying, "Yeah, my penis is sore as well. I think it was from – when we were using – before we used the lube … I'm really sorry if I've caused you any pain like that. I didn't mean to at all". The appellant said he was hungry and asked the complainant if she had any food. She said that she did not. The appellant said he might go and grab some food. The appellant said that she reacted to him saying this by telling him to "just fuck off". He said, "I'll message you in the morning. We can grab breakfast if you want. I'll just head now. See you". He then left her room.

Other evidence in the case

36. There was a significant amount of complaint evidence, commencing with a complaint made shortly after the incident itself. The 15 different complaint witnesses included family members, fellow students at ADFA and staff from ADFA. The complaints varied in their level of detail and the specific allegations recorded in them. They provided significant support for the proposition that the events described by the complainant in her evidence had occurred and that she had, after some initial consensual sexual activity, not consented to its continuation. There was also some evidence from a doctor who had subsequently examined the complainant and from the informant.

37. It is not necessary to set out or summarise this evidence in order to understand the issues on this appeal.

Closing addresses

38. In his closing address, the prosecutor did not differentiate on the evidence between counts 1 to 5. The prosecutor said the "real issue" or "sole issue" in the case with respect to those counts was:

> ... for you to decide for each charge ... whether you are satisfied beyond a reasonable doubt that it turned non-consensual and that [the complainant] did not consent to what happened to her after then, and I suppose, whether the accused was reckless that she wasn't consenting. In relation to count 6, the issue is probably slightly different and it's whether the accused caused the bruising that we saw to [the complainant's] upper arms and breasts.

39. The prosecutor concluded his address by submitting:

> When you consider the evidence, can I suggest that the only reasonable conclusion is that the accused sexually assaulted [the complainant] in the way that she told us.

40. Counsel for the appellant commenced his address by suggesting:

> This case ... stands or falls on the evidence of the complainant …

41. Counsel's address focused on the reasons why, he submitted, the jury should not accept the complainant's evidence. With respect to the six counts, counsel said:

> Now, I want to talks [sic] about, under the sixth heading, what I'll call the flow-on effect. There are of course a number of counts on the indictment and each of those counts require proof beyond a reasonable doubt. There are in fact a number of trials being conducted all at the one time, each one of those trials relating to a separate count on the indictment. Her Honour will explain that to you. But the flow-on effect is this. If in considering any one of those counts you come to the view that you have a reasonable doubt, then the existence of that reasonable doubt logically may inform your assessment of the evidence on any other count because they all relate back to the evidence of [the complainant].

> Unless there is some very good reason why you could differentiate between counts, then a reasonable doubt on one has the flow-on effect or the trickle down or trickle up effect of allowing you to reason, well, I wasn't satisfied on that count and therefore it is more readily available to me to have a doubt about the other count and the one after that, etcetera.

42. Counsel emphasised the significance of the jury's assessment of the credibility of the complainant as a witness:

> Because it's the truth, the veracity and the reliability of the complainant ultimately which is the touchstone in this case. If you are left with a [sic] uneasy feeling about her evidence and your ability to rely upon it to that very high standard, then you will have ultimately a reasonable doubt.

43. Following the closing addresses, the primary judge confirmed with counsel for the appellant that her Honour could say to the jury that the real issue in relation to counts 1, 3 and 4 was whether the act occurred and in relation to count 2 was whether penile–vaginal penetration occurred as described by the complainant. She confirmed with counsel for the appellant that the real issue was whether the members of the jury were satisfied beyond reasonable doubt that the account given by the complainant was honest and reliable.

Summing-up

44. The primary judge directed the members of the jury that it was their task to evaluate the evidence and assess what evidence they accepted and what evidence they did not accept. She gave appropriate directions to the jury about the assessment of witnesses and, in particular, the assessment of the complainant's evidence:

> And the fact that you don't accept part of what a witness says doesn't mean that you have to reject all of what that witness says. For example, there may be issues upon which you think that a witness' account didn't ring true or that it sounded as though they might be mistaken, that they might have perceived or recalled something incorrectly. It doesn't follow that you have to reject all of their evidence. It's not an all or none proposition. And as I said at the outset, you have to determine whether you accept a witness to be honest and reliable. Honesty is different to reliability.
>
> An honest witness can make a mistake including about whether something happened or when it happened but it doesn't mean that they're not telling the truth. In making an assessment of the evidence of the witnesses, you are entitled to have regard to your understanding and experience of the nature of memory, particularly when you're considering the reliability of the witness' evidence, and so you might consider whether some kinds of events are likely to be imprinted on the memory in a more lasting way than others. A person might remember an important event some years ago but be unable to say what they had for breakfast last Wednesday.
>
> You might also consider whether it's easier to recall an event rather than a conversation about an event. You should bear those matters in mind when you're considering witnesses who couldn't recall matters. Ask yourself – you might want to ask yourselves is this the kind of matter that you would expect the witness to have recalled. You might also consider it

helpful to consider the actions and the conduct of witnesses at the time of the alleged events and afterwards to see whether or not you think that their behaviour afterwards is consistent with their account of what they say was happening at the time.

And in doing so, you should be very careful not to invoke stereotypes or make assumptions about how you think a person might react in a particular situation, especially not if it's one that you don't have experience of yourself. Members of the jury, there is no template for life experience. We're all individuals and we have individual responses to different kinds of events, so you should take into account the insight that you've gained about each critical witness, in particular the complainant and the accused, but you need to make - you need to be very careful not to apply stereotypes or assumptions under the guise of common sense.

This is particularly so in a trial of this nature. When considering the complainant's evidence, as both the prosecutor and [counsel for the accused] made reference to in their closing addresses, you do have to bear in mind that individuals react in a wide range of ways in response to a traumatic incident such as a sexual assault. Some of those responses might be automatic. For example, while some people may engage in a fight response such as physically fighting back, pushing or verbally resisting, other people might engage in a flight response, for example by running away or hiding.

Yet other people may freeze, becoming still, silent or tense or surrender by becoming loose or floppy. Yet others may attempt to placate or negotiate. There is no single way that an individual will respond. You must avoid making assessments based on pre-conceived ideas about how people respond to non-consensual sexual activity. There is also a wide range or wide variation in the way in which individuals respond to and disclose an experience of sexual assault.

Some people may be distressed whereas others appear to be flat and emotionless. Some people may complain immediately but others may take time to process and disclose. Some people feel comfortable disclosing information to some people that they would not feel [comfortable] disclosing to others.

So you should also bear all of that in mind when assessing the complainant's evidence.

45. The primary judge directed the jury to give each count separate consideration:

> You need to separately consider each of those counts. Of course, if you find that the prosecution has not proved one or more counts, because you had a reasonable doubt about whether or not you could accept what the complainant said about that count, then you would need to consider how that conclusion [affected] your consideration of the remaining allegations. However, you are entitled to bring in verdicts of not guilty on one or more counts and guilty on another count, or counts, if there is a logical reason for that outcome.

46. The primary judge warned against "compromise":

> It is also important that you understand that you must not regard the fact that the accused is facing more than one count on the indictment as an invitation to compromise your verdicts. So for example, if some of you decided that the accused was guilty of one count, and others thought he was not guilty of that count, it would [be] quite wrong to come to some compromise and to find him guilty on some counts and not guilty on other counts simply for the purpose of resolving any such disagreement.

47. The primary judge addressed the elements of the offences charged and the respective cases of the prosecution and defence. Her Honour first addressed counts 1 to 4:

So, firstly, counts 1 to 4, they each concern an allegation of sexual intercourse without consent. Count 1 concerns an allegation that the accused inserted a finger or fingers into the complainant's vagina. Now, some context for that count. The complainant gave evidence that prior to the act constituting that count, she had been having consensual sexual intercourse with the accused and that she said that the accused then started grabbing at her hair. She said, 'Ow, that really hurts,' but he kept pulling her hair.

She said that he then grabbed her right arm and that he then grabbed her breast, twisted and grabbed it with full force. The complainant said that she responded, 'Ow, that really hurts.' Now, I should say that that conduct, the grabbing of the arm and the grabbing and twisting of the breast, that actually constitutes count 6 on the indictment, the very last count on the indictment, so I will return to that when we come to that count.

But after that occurred, the complainant said that she then said, 'I just want to go to sleep,' and that she turned over to face the other way. She said that the accused then started saying things like, 'You're the one who invited me over. We've been talking about this for a week. You couldn't make me come.' The complainant gave evidence that the accused then continued to reach between her legs and that he put his fingers inside her vagina, so that was while she was on top of him.

That conduct, the digital penetration, that is, the digital penetration of the accused's(sic) vagina, is the act which is alleged to constitute the first count on the indictment. Now, you should bear in mind that in his evidence, the accused denied the allegations. You will need to consider the accused's evidence very carefully. By way of reminder, the accused denied that he ever pulled the complainant's hair.

He said that while he did touch the complainant's breasts, he never twisted the complainant's breast, that he never squeezed it, and that he never did anything forceful to the breast to cause the complainant pain. He also denied that the complainant ever rolled over saying that she was tired. He said that the complainant never said that she was tired.

Turning now to count 2. That concerns the allegation that the accused inserted his penis into the complainant's vagina. Count 2 is alleged to have occurred very shortly after count 1. The complainant said in her evidence-in-chief interview that she froze during the commission of count 1. She said that the accused then grabbed and pulled her on top of him. In her second evidence-in-chief interview, the complainant explained that she was blankly staring at the accused that time and she described that as a fight or flight response.

The accused agrees that he inserted his penis into [the] complainant's vagina but he says that this occurred in very different circumstances to that which was alleged by the complainant. As I have already mentioned, he denied pulling the complainant's hair or twisting her [breast], and also denied that the complainant had ever rolled over and said that she was tired. The accused said that the complainant did not say or do anything to indicate that she did not want to continue to engage in the consensual sexual intercourse that had begun.

Count 3 concerns the allegation that the accused inserted his finger or thumb into the complainant's anus. The complainant gave evidence that this occurred while she was sitting on top of the accused and that the accused, at that time, had his head partially off the desk, and you have a diagram - I think it is exhibit 1 - that shows you the layout of the room.

So the complainant's evidence in her evidence-in-chief interview was that after the accused inserted his finger or thumb into the complainant's anus she said, 'No, I don't want to do that.' And the accused responded, 'No, no. It's fine.' The complainant then said that she said, 'No.

No, like I don't want to do that. I haven't done that before. I don't want to do that.' But that the accused again responded, 'No. It's fine.' The complainant said that she then said that she hadn't prepared and that the accused again responded, 'No. It's fine. I don't really care.' The complainant said that she felt sick and said, 'This is not what I want.'

Now, the accused denied that that event occurred at all. He maintained that he did not insert his finger or thumb into the complainant's anus. He said that they had previously had a conversation about anal intercourse when the complainant said she wasn't comfortable doing that. The accused said that he responded in that conversation, 'It doesn't excite me so that's no worries.' The accused said that that topic did not need to be brought up again. So, again, for Count 3 the accused's case is that the act that is alleged simply did not happen.

Count 4 concerns an allegation of forced oral sex. The complainant gave evidence that the accused pulled her on top of him and that he gestured in a way as to indicate that he wanted oral sex. The complainant said that she indicated that she did not want to perform oral sex. The complainant gave evidence in her evidence-in-chief interview that the accused said words to the effect of 'Come on.' And that he then grabbed the complainant's head and forced it on to his penis.

The complainant gave evidence that they then engaged in oral sex, and this is again in the evidence-in-chief interview, for about 30 seconds. She said that the accused was holding her head in place at that time. She said that when he released his hand the complainant then moved her head away and said, 'I don't like giving head.'

The accused denied that incident. He agreed that they had had oral sex that evening and he acknowledged that it was possible that he may have indicated to the complainant that he would like her to fellate him but he denied that he ever forced the complainant to do so. He also said that the complainant did not say anything that suggested that she did not enjoy giving oral sex.

48. The primary judge directed the jury on recklessness and intoxication in relation to counts 1 to 4, then identified for the jury the "real issue" in the trial with respect to those counts:

Now, I just want to say some things about those elements in the context of this trial. As I have said you cannot convict the accused of any of those counts – one to four – unless you're satisfied that the prosecution has proved each one of those three elements beyond reasonable doubt.

However, and it is a matter for you but you might think that the real issue for each count is whether the prosecution has proved beyond reasonable doubt that the particular act alleged in each count occurred in the circumstances described by the complainant.

So, specifically, if you are satisfied beyond reasonable doubt that each act occurred in the circumstances alleged by the complainant, then you might be readily satisfied of all of the elements for each of the four counts. As I have already pointed out, the act alleged in Counts 1 to 4 satisfies the definition of sexual intercourse in respect of each charge. Digital penetration of the vagina or anus, penile penetration of the vagina and the introduction of the penis into the mouth of another person, each of those constitutes sexual intercourse at law.

It's a matter for you but if you accept the complainant's account beyond reasonable doubt, in particular that the previously consensual sexual encounter turned aggressive, that the accused pulled the complainant's hair, that he grabbed the complainant roughly by the arm and twisted her breast, that the complainant said, 'Ow, that hurts', that the complainant rolled

over, that she said she was tired, that the accused roughly grabbed her and put her on top of him, then you might readily conclude the second and third elements, that is consent and recklessness as to consent, are established beyond reasonable doubt for each count.

Further, in respect of count 3, the evidence that the complainant had previously told the accused that she did not consent to anal penetration and the nature of the act alleged in count 4, that is the forcing of the complainant's head onto his penis, might also, you might think, readily demonstrate both lack of consent and recklessness as to consent in respect of that count. Members of the jury, there's been no submission on behalf of the accused that on the account given by the complainant you would not be satisfied of any element of counts 1 to 4.

Rather, [counsel for the accused's] submission is that you would not be satisfied beyond reasonable doubt that the accused digitally penetrated the complainant's vagina or anus or that he forced the complainant to engage in oral intercourse or that the accused inserted his penis into the complainant's vagina in the circumstances described by the complainant. And so that's why I say to you that you might consider that the real issue for each of those four counts is whether you are satisfied beyond reasonable doubt that the complainant's evidence of those events, each of those acts and the circumstances immediately surrounding them, was honest and accurate.

In considering whether you're satisfied beyond reasonable doubt as to the honesty and reliability of the complainant, you must, of course, consider all of the evidence in the case, so not just her evidence but also the evidence of her complaints and the evidence of the bruising. You'll also, very importantly, need to consider very carefully the accused's evidence as to what occurred that evening. I'll have more to say about each of those matters, the complaint evidence, the evidence of bruising and the accused's evidence as well as the evidence of the complainant in the third part of my summing up.

For now, I just wish to emphasise that it's not a matter of choosing whether you believe the complainant's version or the accused's version. Rather, if you conclude that the evidence that the accused has given is true or that [it] might possibly be true, then you could not find any of counts 1 to 4, or for that matter any count on the indictment, established beyond reasonable doubt. Importantly, even if you reject the accused's account, you could not find the case proved beyond reasonable doubt unless you positively accept the complainant's account as both honest and reliable.

That's all I want to say about counts 1 to 4.

49. The primary judge then turned to count 5:

... I'll turn now to count 5 which is an offence of committing an act of indecency without consent. In relation to count 5, the complainant gave evidence that after the accused inserted his finger or thumb into her anus she said, 'That's not what I want', got off him and said, 'I just want to go to sleep'. She said that the accused then said, 'Come on. You invited me over here' and that she again said, 'I just want to go to sleep'.

The complainant gave evidence that at that time the accused then proceeded to grab her hand and to put it on his penis and to – so that she would give him a hand job. She said that the accused said to her, 'Come on. Keep going. Like, I'm really going to come. Just keep going'. The complainant said that at first the accused had his hand on top of hers and then she continued herself. The complainant said that she continued to masturbate the accused's penis because she was scared. The accused denied that that act occurred. He said that the complainant may have masturbated him but that he never forced her to do that.

He said that he did not tell the complainant to keep going or that he was going to ejaculate. He said that he ejaculated while they were in the missionary position. Again, the elements of this count, commission of an act of indecency without consent, are set out in the document that I've given you and in particular at page 3, and those elements are first, the accused committed an act. Second, the act was indecent according to the standards of morality and decency held by ordinary members of the community. Third, that the act was committed on or in the presence of the complainant.

Fourth, that the complainant did not consent to the act, and fifth, that the accused was reckless as to whether the complainant consented to the act. Again, there are some definitions there. They are legal definitions which you must apply. The first one is the definition of that word 'indecency'. At law, an act is indecent if it is indecent according to the standards of morality and decency held by ordinary members of the community. The act must have a sexual connotation. There are also [the] definitions for 'consent' and definitions for 'recklessness' and you'll see that those directions mirror and are identical to the directions that I've previously given you concerning sexual intercourse without consent.

But, again, I must emphasise that in order to convict the accused of that count, you must be satisfied of each of those elements beyond reasonable doubt. But, again, members of the jury, I don't understand there to be any dispute that if you are satisfied beyond reasonable doubt that that act occurred, firstly, and secondly, that it occurred in the circumstances described by the complainant, if you are satisfied of those matters beyond reasonable doubt, then you would be satisfied of each element of that count.

It's a matter for you but you might consider that if the accused forcefully took the complainant's hand, that he made her masturbate him without her consent, that such an act would be indecent according to the standards of morality and decency held by ordinary members of the community. Again, you might think that the real issue is whether you are satisfied beyond reasonable doubt that the complainant's evidence that the accused forcefully took her hand and masturbated him should be accepted as both honest and reliable. Again, I remind you it's not a question of deciding whose version you believe.

50. As to count 6, after directing the jury as to the elements, the primary judge reiterated:

So again, members of the jury, before you could find the accused guilty of that count, you would need to be satisfied beyond reasonable doubt of each of those four elements. If you have any doubt about any element, you must acquit. However again, I don't understand there to be any dispute that if you're satisfied beyond reasonable doubt that the act occurred in the circumstances described by the complainant then you would be satisfied of each element of this count.

So again, as with previous counts, you might think that the real issue is whether you're satisfied beyond reasonable doubt of the honesty and the reliability of the complainant's evidence that the accused aggressively grabbed her in the arm and grabbed and/or twisted and/or squeezed her on her breast.

51. The primary judge directed the jury that the complainant was a "critical" witness:

The complainant is a critical witness in the prosecution case and that's because she's the sole witness who gives evidence of each of the charges.

Because of the importance of the complainant's evidence toward proof of the prosecution case in respect of each count, then unless you are satisfied beyond reasonable doubt that she was both an honest witness and a witness whose evidence was accurate in its essential

> respects, then you could not find the accused guilty beyond reasonable doubt, and guilty beyond reasonable doubt of any count. So for that reason, before you convict the accused of any count, you need to carefully examine the evidence of the complainant to satisfy yourself that you can safely act upon that evidence to the high standard required in a criminal trial.
>
> I should tell you, I'm not telling you to be cautious because of any personal view that I have of the complainant. I told you at the outset of the trial and the summing up that I would not express my personal opinions on any aspect of the evidence. Rather, why I'm telling you this is because in any criminal trial where the prosecution case relies solely or substantially on the evidence of a single witness, the jury must scrutinise the evidence of that witness with great care because of the onus and standard of proof which is placed on the prosecution.

52. With respect to the appellant's evidence, the primary judge directed the jury:

> The accused gave evidence under an affirmation. He was not obliged to give this evidence and the fact that he voluntarily did so does not, in any way, alter the onus of proof. There is a very important direction that I must give you about the accused's evidence. I've already foreshadowed it earlier. It is that, as I've said now on a number of occasions, it's really important that you understand that the accused must be found not guilty if his guilt has not been proved beyond reasonable doubt and that he is entitled to the benefit of any reasonable doubt that you may have at the end of your deliberations.
>
> It follows from this that first, if you believe the accused's account as given in court, you would acquit him of all charges. Second, if you have difficulty accepting his account but you think that it might possibly be true, then you should also acquit him of all of the charges. What do you do if you do not believe the accused's account as given before you in court? If you do not believe the accused's account as given to you in court, then you just put that evidence to one side. The ultimate question for you still remains has the prosecution, on the basis of the evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?
>
> I emphasise to you, members of the jury, it's not a question of which version you believe. The question is whether you are satisfied of each count on the indictment beyond reasonable doubt.

53. After providing the jury with an overview of the common ground in the trial (see the points at [7] above), her Honour said:

> What is in dispute, fundamentally, is what happened in the complainant's room after that point. The complainant gave evidence that after some consensual sexual activity, the accused then became aggressive and that all sexual activity after that point was nonconsensual, and that account is, of course, denied by the accused.

Inconsistent verdicts

54. The principles concerning a ground of appeal alleging inconsistency in verdicts returned by a jury are well-settled. In *Williams v DPP* [2024] ACTCA 24 at [11], the Court of Appeal provided the following summary:

> Six propositions in relation to inconsistency between verdicts of a jury were outlined in *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368:

(a) First, there is a distinction between legal or technical inconsistency and suggested factual inconsistency, the former generally being easier to resolve.

(b) Second, factual inconsistency can arise as between different verdicts affecting the same accused and different verdicts affecting co-accused.

(c) Third, where the inconsistency arises in the jury verdicts upon different counts, the test is one of logic and reasonableness. The test is:

> [The appellant] must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.

(d) Fourth, courts have been reluctant to accept a submission that verdicts are inconsistent in the relevant sense. Therefore, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed its functions as required, that conclusion will generally be accepted. It is not the role of the appellate court to substitute its opinion of the facts for one which was open to the jury. That principle accommodates the necessity for the jury to consider the counts separately and apply the standard of proof beyond reasonable doubt. It also extends to the possibility that the jury reached a merciful verdict as a result of applying "their innate sense of fairness and justice in place of the strict principles of law".

(e) Fifth, there will remain some cases in which the different verdicts are "an affront to logic and commonsense" which suggest a compromise of the performance of the jury's duty. This might involve confusion in the minds of the jury, a misunderstanding of their function, uncertainty about the difference between the offences, or a lack of clarity in judicial instruction as to the law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the conviction will be set aside.

(f) Sixth, the obligation to establish inconsistency of verdicts rests upon the person making the submission. The relief that will be appropriate if the relevant inconsistency is established depends upon the facts of the particular case.

55. A number of further points relevant to the circumstances of this case were made in the judgment of Gleeson CJ, Hayne and Callinan JJ in *MFA v The Queen* [2002] HCA 53; 213 CLR 606 at [34], namely:

(a) Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case.

(b) Where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count.

(c) Every juror must be satisfied beyond reasonable doubt of every element of the offence, and the criminal trial procedure is designed to reinforce, in jurors, a

sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution.

56. In *TK v The Queen* [2009] NSWCCA 151; 74 NSWLR 299, Simpson J (McClellan CJ at CL and Latham J agreeing) said that, if an explanation can be found for acquittals in such a case, "without resort to doubts about the complainant's credibility, the verdicts of guilty may not be unreasonable, at least not on that basis" (at [128]). Her Honour observed (at [130]):

> Before *Jones* [*Jones v The Queen* (1997) 191 CLR 439] dictates that an appellate court, faced with diverse verdicts on multiple counts, must intervene to set aside the convictions, the court must inquire whether there exists any rational explanation for the *acquittals* (not the convictions), other than doubts about the complainant's credibility. If such an explanation can be found, then *Jones* has no application. Finding such an explanation is not always easy. Determining whether a proposed explanation is a rational one, other than by reason of the complainant's credibility, can be even more difficult. The central question is whether the acquittals are attributable only, or principally, to doubt about the complainant's credibility.

57. Relevant to the circumstances of the present case is what the Court of Appeal said in *Hudson v DPP* [2024] ACTCA 28 at [49]-[50]:

> In considering whether two or more verdicts are inconsistent, it is also important to bear in mind that, in order for the jury to convict an accused of any given count, it is necessary for the jury to be satisfied beyond reasonable doubt of each and every element of the offence charged. For this reason, an allegation of inconsistency in the verdicts requires careful consideration of each of the elements of the particular count.
>
> In a case such as the present, many of the alleged offences will require that the jury be satisfied beyond reasonable doubt of matters that are not within the knowledge of the complainant. For example, where the allegation is of sexual intercourse without consent, the jury must be satisfied beyond reasonable doubt not only that the complainant did not consent to the alleged intercourse, but also that the accused knew that the complainant did not consent, or that he was reckless as to this fact. A reasonable doubt as to this element does not suggest that the jury formed any adverse conclusions as to the complainant's credibility or reliability.
>
> (Emphasis in original.)

Appellant's submissions

58. The appellant accepted that, if there is "a proper way by which [this court] may reconcile the verdicts", then the appellant's single ground of appeal would fail. The appellant submitted, however, that, in the particular circumstances of this case, the verdicts of guilty on counts 1, 2 and 6, and not guilty on counts 3, 4 and 5, cannot stand together. He submitted that no reasonable jury applying their minds properly to the facts of the case could have arrived at that conclusion.

59. The appellant's submissions involved a detailed examination of the course of the physical and sexual interactions described by the complainant. They pointed to the non-consensual acts alleged as part of count 6, when the appellant became aggressive and violent. From that point, the acts described by the complainant were temporally and contextually connected. The sequence of events was summarised as follows.

    (a) There was approximately 10 minutes of consensual penile–vaginal sex.

    (b) The appellant became aggressive and violent, pulling the complainant's hair, grabbing her by her arms and squeezing her breasts, repeatedly, even after she said to him that what he was doing was hurting her (count 6 — guilty).

    (c) The complainant turned away from him and told him she wanted to go to sleep.

    (d) The appellant inserted his finger into her vagina (count 1 — guilty).

    (e) The appellant then repositioned the complainant above him and reinserted his penis into her vagina (count 2 — guilty).

    (f) From that position, the appellant inserted his thumb into her anus (count 3 — not guilty).

    (g) The complainant stopped having sex with him for a second time because of this, and again turned away from him.

    (h) The appellant took her hand forcing her to masturbate his penis (count 5 — not guilty) then pushed her head down onto his penis (count 4 — not guilty).

60. The appellant submitted that the recklessness found for the purposes of counts 1, 2 and 6 (of which he had been found guilty) should logically have continued in relation to counts 3, 4 and 5 (of which he was acquitted). He submitted that the evidence indicated that the complainant's lack of consent in fact became clearer in relation to counts 3, 4 and 5.

61. He submitted that it was not a case where (by reference to *R v Markuleski* [2001] NSWCCA 290; 52 NSWLR 82 at [235]) it could be said that:

    (a) the complainant's account of counts 3, 4 and 5 contained any concession that it may be less accurate than her evidence in relation to counts 1, 2 and 6;

    (b) the complainant's evidence in relation to counts 3, 4 and 5 was less particular than her evidence in relation to counts 1, 2 and 6 or differed in relation to matters of detail;

    (c) the appellant had called positive evidence in relation to the charge or charges on which he was acquitted but not in relation to the others;

(d) the acquittals were returned in relation to less serious offences; or

(e) the history of wrongdoing was lengthy or involved many incidents over a period of time or a large number of events within a very short time frame.

62. He submitted that, while the body of complaint evidence led by the prosecutor suffered from some omissions and inconsistencies, these features of the complaint evidence did not account for the differential verdicts returned.

63. He observed that the case, as it was left to the jury by the primary judge, made plain the contextual and temporal relationship of all of the counts, and that if the jury accepted the complainant's account of what happened in the room, then the elements of each offence would be proved.

64. He submitted that the appellant's acquittal on counts 3, 4 and 5 was explicable only by doubts the jury must have held about the complainant's credibility as to those acts having occurred, and that there was no other rational explanation for the acquittals. He said that the appellant's acquittal on those three counts was a rejection of the complainant's account of the incident in more than one significant respect.

65. Despite the specific direction given to the jury not to compromise, the appellant submitted that the different verdicts returned, given the stark choice with which the jury was confronted on the evidence of the two key witnesses to the incident, suggested a compromise of the performance of the jury's duty in this case.

Respondent's submissions

66. The respondent submitted that this was not a case in which the only explanation for the acquittals on counts 3, 4 and 5 was a reasonable doubt as to the complainant's credibility generally. Rather, the respondent submitted that the verdicts reflected a careful consideration by the jury of the evidence and the elements of each offence, in particular, the appellant's state of mind as to the complainant's lack of consent in relation to each act.

67. The state of the law as at 11 March 2022, the date when the offending was alleged to have occurred, was that the prosecution was required to prove that the appellant knew or was reckless as to the complainant's lack of consent. Evidence which suggested a reasonable possibility that the appellant had a genuine but mistaken belief that the complainant was consenting would require him to be acquitted. The jury was entitled to take into account evidence of the appellant's intoxication. The law was subsequently amended so that, from 12 May 2022, there was a requirement that any belief an accused had as to consent be reasonable.

68. The respondent submitted that there was a change in the way that the complainant responded to non-consensual acts as between counts 1, 2 and 6 and the later acts. In relation to the earlier acts, the complainant's lack of consent was clear, and the appellant's reckless state of mind was apparent. After this point, however, the complainant's response was one of submission. Her evidence was that she was worried that he would become aggressive again if she stopped engaging in sexual activity with him. Her response was relevant to the jury's consideration of the appellant's state of mind as to her lack of consent.

69. That submission was developed by reference to the evidence that, following count 2, sexual intercourse continued with "a few changing … positions", the discussion following digital penetration of her anus focused on her having not "prepared" for it, and intercourse continued for another 20 minutes, including her getting up to get a bottle of lubricant. Count 5 occurred in the context of the earlier continuation of sexual intercourse and her continuing to masturbate his penis after he had initially placed her hand on it. In relation to count 4, the performance of fellatio, the respondent pointed to slightly differing descriptions of what had occurred and noted that, after the approximately 30 seconds during which he had pushed her head towards his penis, she continued to have sexual intercourse with the appellant, conduct in relation to which there was no charge against the appellant.

70. The respondent submitted that, rather than reflecting a lack of confidence in the complainant's evidence or a compromise over the verdicts, the verdicts reflected a careful assessment of the evidence and the elements of the offences.

Consideration

The cases as put to the jury

71. During his closing address to the jury, the prosecutor emphasised numerous times that "it is a matter for you" to assess any of his factual submissions. He said:

> As I go through the evidence relating to the charges, I should make it clear that it is a matter for you to assess and decide using your own experiences which parts of a witness' evidence you accept and which parts you don't … It is entirely up to you guys.

72. So far as the evidence given by the appellant was concerned, the prosecutor suggested to the jury: "the impression that [the appellant] probably gave was he believed he was someone who was never wrong. You probably recall during his evidence that he spoke with confidence, perhaps a touch of arrogance, in denying what [the complainant] told us".

73. So far as the defence case was concerned, the appellant's counsel had suggested in opening that the complainant was "besotted" with the appellant and reminded the jury of the expression that "Hell has no fury like a woman scorned". He suggested that this was what motivated false complaints that she ultimately made to police. In closing submissions, he submitted that the case stood or fell on the evidence of the complainant. He suggested in his closing address that the complainant had given "deliberately dishonest answers". Further:

    (a) He emphasised the obligation of each member of the jury to assess the evidence, saying: "Each of you have to assess the evidence for yourselves … It is a personal and solemn obligation that each of you take on individually to assess the evidence."

    (b) He emphasised the burden that the prosecution bore and the significance of the appellant having given evidence. He emphasised that, "Unless there is some very good reason why you could differentiate between counts, then a reasonable doubt on one has the flow-on effect or the trickle down or trickle up effect of allowing you to reason, well, I wasn't satisfied on that count and therefore it is more readily available to me to have a doubt about the other count and the other one after that etcetera."

    (c) He continued to advance the proposition, as he had done in opening, that the complaints were false because the complainant, who was interested in an ongoing relationship with the appellant, felt slighted by his transactional and unemotional approach to the sexual encounter.

    (d) In dealing with the balance of the conduct after the incident, he suggested to the jury that the appellant might have been "a bit of a cad" who realised that his interest in the complainant was purely sexual and that her interest in him was more than that.

74. Consistent with that theme, counsel for the appellant's closing address to the jury concluded with the proposition: "Perhaps to my client's discredit, he was prepared to go along and have sex with this young woman who was so keen on him knowing, as he clearly did, that she was that keen, knowing that he didn't want to date her, knowing that that's what she wanted". He emphasised that this may not have been to his great credit in a moral sense, but it did not discredit him in a criminal sense.

75. In discussion with counsel for the appellant following the conclusion of closing addresses, the primary judge identified that "the real issue is, are they satisfied beyond

reasonable doubt of the account given by the complainant, that it is honest and that it is reliable?".

The instructions given to the jury

76. The primary judge's directions to the jury, when addressing the sexual intercourse without consent allegations in counts 1, 2, 3 and 4, specifically identified the three ways in which recklessness may be proven, and continued:

> So to reach any of those conclusions as to recklessness beyond reasonable doubt, the prosecution must exclude beyond reasonable doubt, the possibility that the accused's state of mind might have been that he genuinely, although wrongly believed that the complainant was consenting to the sexual act. A genuine belief on the part of the accused that the complainant was consenting to the act of sexual intercourse would be inconsistent with each of the above requisite states of mind.
>
> Again, just a word about intoxication, you can take into account the accused's intoxication in deciding whether the accused was reckless as to the complainant's consent. In some circumstances an intoxicated person may act without forming a particular intent. On the other hand, although considerably affected by alcohol, a person may still commit an act with the particular state of mind.

77. Her Honour then immediately turned to identify what she described as the "real issue" in relation to each count. It is notable that, in doing so, she appropriately emphasised that ultimately it was a matter for the jury what the real issue in the case was. What her Honour said is set out at [48] above.

78. The primary judge then turned to count 5. What she said is set out at [49] above.

79. The primary judge then made reference to count 6, as set out at [50] above.

The reversal of roles

80. For the purposes of this appeal, the usual forensic positions of the parties were reversed. So far as the appellant was concerned, his forensic interest was in demonstrating that, having regard to the jury's verdicts on counts 1, 2 and 6, he ought, if the complainant's evidence was accepted, to have been convicted on counts 3, 4 and 5. The failure to convict on those counts indicated, in his submission, either that the jury must have had a generalised doubt about the reliability of the complainant's evidence or that there had been an improper compromise in relation to the verdicts, despite the evidence.

81. On the other hand, the respondent, in seeking to establish a rational basis for the differential verdicts, was in the position of seeking to articulate a rational basis for the acquittal on counts 3, 4 and 5, notwithstanding the findings of guilt on the earlier counts.

The advantages of the jury

82. It is important, in seeking to determine whether there was a rational basis for the jury to acquit on counts 3, 4 and 5, to acknowledge that the jury had significant benefits, when compared to this court, in assessing and understanding the evidence given by the complainant and the appellant. In particular, in assessing issues relating to the appellant's state of mind, the jury had the benefit of seeing and hearing the appellant give evidence and forming an impression of him which would have been relevant to their assessment of his state of mind, even in circumstances where they rejected his version of events.

83. Both counsel, during their closing addresses, made reference to the impressions that the jury might have reached from having seen and heard the appellant give evidence. During the course of his closing address, the prosecutor invited the jury to form an adverse impression of the appellant: see [72] above. Even counsel for the appellant recognised that the jury may reach an adverse conclusion about the appellant, that he was "a cad" and only interested in the sexual interaction: see [73]-[74] above.

84. It was well open to the jury to take into account the impression of having seen and heard the appellant give evidence in making their own assessment of whether the element of recklessness was established, in relation to any of the counts, beyond reasonable doubt.

The jury was entitled to judge the facts

85. Both counsel and the primary judge made it clear to the members of the jury, on numerous occasions, that they were the judges of the facts and that whatever submissions or summing-up they were given, the assessment of the evidence was a matter for them. All of those references to it being "a matter for you", while they have, due to the repetition, a formulaic ring to them, have real meaning. It is for the jury to assess the facts and it is not for the judge or counsel appearing for either party to determine the jury's approach to particular factual questions.

86. So far as the appellant was concerned, the approach taken was that the sexual encounter occurred as he described and not as the complainant described. He specifically denied some of the sexual acts and, in relation to penile–vaginal intercourse and fellatio, described them as having occurred consensually in circumstances different to those described by the complainant. In those circumstances, it was completely understandable that no submission was made in the alternative that, if the acts occurred, the appellant did not have the requisite state of mind. That would have completely undermined the forensic stance that he adopted at the trial.

87. However, the forensic stance adopted by the appellant did not bind the jury. The members of the jury were instructed that they were required to consider the elements of each offence individually. They were repeatedly told that the assessment of the facts relevant to each such element was a matter for them. It was not submitted on this appeal that it was not open for them to do so and to reach different verdicts on the various counts. The question is whether the evidence that was available to them left it rationally open to them to have reached the conclusions that they did in relation to counts 3, 4 and 5.

88. Was the complainant's evidence such that it only left open, by the time counts 1, 2 and 6 were complete, a continuing recklessness as to the complainant's lack of consent or was it open to the jury to draw a distinction between the appellant's state of mind in relation to the first three counts (in time) on one hand and the remaining charges on the other?

89. Having regard to the manner in which the case was run, some of the uncertainties as to the timing of particular aspects of the sexual interactions between the appellant and the complainant did not need to be explored. However, that left it open to the jury, as finders of fact, to reach conclusions about how long and in precisely what context each of the alleged acts occurred.

What was the scope of count 2?

90. For present purposes, although not necessarily for the purposes of the trial, the scope of count 2 was significant. At the trial, any penetration of the complainant's vagina by the appellant when he was reckless as to her consent would be sufficient to satisfy this count. For the purpose of the appeal, the duration of any reckless penetration became significant because it would provide the context for the jury's determination of the subsequent counts. It would be significant if there was a period following the commission of count 2 during which sexual intercourse occurred where it was open to the jury to conclude that the appellant was no longer reckless about the complainant's consent.

91. The sequence of events was: the grabbing of the complainant's arms and breasts (count 6); the complainant being digitally penetrated after she had rolled over and indicated she wanted to go to sleep (count 1); the appellant then either penetrating or attempting to penetrate her vagina with his penis and then pulling her on top of him and engaging in penile–vaginal intercourse (count 2).

92. Count 2 would be established by penile–vaginal penetration to any extent. However, there was evidence available to the jury that indicated that, following penetration, the penile–vaginal intercourse continued for some time. It was open to the jury to find count

2 established yet find that, during at least the later part of that intercourse, the appellant was not reckless as to the complainant's consent.

93. In the complainant's first evidence-in-chief interview, she described turning away to face the window and the appellant saying, "You invited me here, you couldn't even make me cum". The next events are described as follows:

    (a) "[A]nd then he proceeded to, um, insert his fingers in my vagina, um, and then like, ah, insert his penis into me, in my vagina as well".

    (b) "And then he just pretty much grabbed me and pulled me on top of him".

    (c) "[B]ut, um, anyway, kept going, and then he started to do things throughout the um, in – he put his finger in my arse …".

94. This version suggested that some penile penetration (count 2) occurred prior to the complainant being pulled on top of the appellant.

95. A little later in that interview, the complainant described the sequence following her turning away and the appellant's remark as follows:

    (a) "And then continued to like, reach between my legs and put his – like, started fingering me…".

    (b) "that's when he like, came up beside me and then tried to get his – like, after fingering me, tried to get his dick, um, inside me as well."

    (c) "and then that's when he like, grabbed me and pulled me – and then put me on top of him."

    (d) "And then we continued having sex."

    (e) "And then, um, there was a few changing of positions and stuff, um, and then he like, that's when he proceeded to put his – I think it was his thumb, and I said – into my arse …".

96. Later, when asked to clarify the "multiple positions", she said:

> Um, I'm pretty sure I was on top for a bit and then he went on top and then I think it was, like, um, me on all fours, like, facing the other way.

97. By the time the anal penetration occurred, she was "on top of him, like, with my knees on the bed".

98. It was open on this evidence to have found that count 2 was established either by penile penetration immediately prior to or immediately after he moved her on top of him. It is fair to say that the emphasis was on the conduct that occurred after he moved her on

top of him as it was only in the very first description of the incident that she indicated that he inserted his penis into her vagina prior to moving her on top of him, as distinct from trying to do so.

99. The complainant's evidence was that, when she was pulled on top of the appellant, she "froze and … blankly stared at him". The evidence left open the potential that, as a result of the continuation of sexual intercourse and the various changes of position, the appellant was not reckless as to the complainant's lack of consent. The precise length of time that this intercourse continued is not identified but having regard to the description of the continuation of intercourse in various positions, it must have been for some time. Treating the continuation of intercourse as not involving recklessness on the appellant's part is also consistent with the 20 minutes of sexual intercourse following count 3, not the subject of any charge, and the sexual intercourse following counts 4 and 5, also not the subject of any charge.

The characterisation of count 3

100. In relation to this count, it was open to the jury to conclude that the penetration of the complainant's anus occurred in the context of the ongoing penile–vaginal sexual intercourse just described.

101. The complainant's description in her first evidence-in-chief interview was:

> he put his finger in my arse, and I was like, 'No, no, no, I don't want to do that.' And he said, 'Oh, come on,' and I was like, 'No, no, I really don't want to do that,' and he was like, 'No, it's fine, it's fine,' I was like, oh, try to steer away from it, like I haven't prepared for that, like, and he was like, 'Oh, it's fine, I don't care,' and then it, um, it happened you know, for another 20 minutes.

102. The reference to "it happened … for another 20 minutes" should be noted.

103. Later in this first interview, the complainant described the appellant having put his thumb "into my arse" and continued:

> and I said, 'No, like, I don't want to do that.' And he's like, 'No, no, it's – it's fine,' I was like 'No, no, like I don't want to do that, I haven't done that before, I don't want to do it.' And he's like, 'No, it's fine.' And I was like – I thought maybe if I said I hadn't prepared it might have grossed him out and he might stop, but he didn't, um, he's like, 'No, it's fine, I don't really care.' Um, that continued, and then I felt really sick after that, like I was just like, 'This is not what I want.' So I again got off him and was like, facing the exact same way and said 'I just want to go to sleep.'

104. The reference to "Um, that continued…" should also be noted.

105. During the course of cross-examination, the complainant was asked about the length of time between the anal penetration and her getting off the appellant. Her evidence that "it

happened … for another 20 minutes" was a reference to the continuation of penile–vaginal sexual intercourse in the period between the anal penetration and the complainant getting off the appellant for the second time:

> There is, according to you, an insertion of a digit in the anus and then intercourse for another 20 minutes, and I've got the sequence correct, have I, and you then tried to get off or did get off a second time?---Yes.

106. There was, therefore, evidence available to the jury that there was uncharged penile–vaginal sexual intercourse in a variety of positions prior to the actions giving rise to count 3, and then uncharged sexual intercourse for 20 minutes after that, prior to the complainant getting off him for the second time.

107. For the reasons given earlier, the evidence was not such that the jury was compelled to reach the conclusion that the appellant had remained reckless as to the complainant's lack of consent throughout that penile–vaginal sexual intercourse that commenced with count 2. It is significant that the complainant describes having just "blankly stared" at the appellant and engaged in penile–vaginal sexual intercourse over a period of time with him in a number of different positions, before the anal penetration occurred.

108. The evidence as to the interactions before and after count 3 left it open to the jury to characterise the complainant's response to the penetration of her anus as not indicating an unequivocal lack of consent, but rather her lack of "preparation" for the act to occur. There was then the evidence of continued penile–vaginal sexual intercourse for another 20 minutes before she got off him for the second time. The evidence left open the potential that the appellant, somewhat intoxicated, very much focused upon his own sexual gratification and lacking insight into the state of mind of the complainant, assumed, as a result of the continued penile–vaginal sexual intercourse prior to the anal penetration, that she consented to that additional act. The discussion that occurred after the initial penetration of her anus left open the possibility that the appellant thought she consented to anal penetration so long as he did not mind the fact that she had not physically "prepared" herself in advance of the interaction for an act of anal penetration.

109. A jury might legitimately have reasoned that, if the appellant recalled the complainant's previous lack of any interest in engaging in "anal intercourse" (communicated some substantial period earlier in their sexual relationship), and applied that to anal digital penetration, he would have realised that the continuation of penile–vaginal intercourse in different positions did not necessarily indicate consent to anal penetration as part of the sexual interaction. However, it could not be said that a jury was compelled to reach that conclusion if it accepted the complainant's evidence. The context surrounding count 3, both before and after, was apparently cooperative penile–vaginal sexual intercourse.

Accordingly, it was open to the jury to have reached a conclusion that a self-focused participant in sexual intercourse, possibly operating on assumptions about consent, thought, in the context of the complainant's equivocal response to the prospect of it, that there was also consent to an additional sexual act of a different type.

The characterisation of counts 4 and 5

110. So far as count 5 is concerned, the context in which that occurred is significant. After count 3 and the sexual intercourse that followed, the appellant was grabbing the complainant's arms quite tightly, the complainant felt sick, got off him and said that she wanted to go to sleep. He then once again complained that she had invited him over and said either:

    (a) "Come on, keep going, like I'm really – I'm going to come, just keep going"; or

    (b) "Oh well, can you at least touch it?".

111. Count 4 was closely associated with count 5. It was not included in the complainant's description of the incident at the very beginning of the first evidence-in-chief interview. However, it was described later in the first evidence-in-chief interview as follows:

> Because like, obviously (inaudible) I started like, he grabbed my hand and started giving him a hand job, then he kind of like, pulled me on top of him and then like, kind of like, gestured towards me to suck his dick.
>
> …
>
> And then I've looked at him and I was like, 'I don't want to give,' and he's like, 'Come on,' and I was like, whatever, and continued to do it. And then I was like, 'I don't want to do this, and like, I don't want to give you head. I hate giving head.' And then he was like 'Oh,' and then we just went back to having sex.

112. The complainant's evidence was that, having returned to penile–vaginal sexual intercourse, it was 15 minutes before he ejaculated. This evidence was consistent with the version that she gave in the second evidence-in-chief interview, which indicated that, after about 30 seconds, he let her head go and she then said, "I don't like giving head". It was after that that they moved back to penile–vaginal sexual intercourse.

113. Once again, the evidence that the complainant was masturbating the appellant prior to the fellatio and that sexual intercourse continued after the fellatio provided a foundation for a jury to find that, during the interaction, the appellant was very self-focused and had little insight into the state of mind of his sexual companion, and as a result, to have a doubt as to whether or not he was reckless about her lack of consent.

114. The potential for a jury to have a doubt about recklessness was also reinforced by the appellant's conduct after the sexual interaction concluded. He seemed to have a complete lack of insight into the complainant's experience of their sexual interaction. In her first evidence-in-chief interview, the complainant recorded him as saying:

> 'Oh, have you got any food?' and I was like, 'No, I don't have any food.' And he's like, 'Oh, what's wrong, like why are you upset?' And I was like, 'You – you hurt me, I just wanted to go to sleep, you hurt me.' He's like, 'Oh, I'm just hungee,' he kept saying 'hungee', like, not hungry, because he was – he was a little intoxicated, but wasn't like drunk, drunk. And then, um, continued to say he was hungry and then I was like, 'Look, just fuck off, like, just leave.'

115. Later in the same interview, she said:

> And then I – like, he came in and then continued to say he was hungry and whatnot. Um, then he realised that I was a bit upset, and I was like, 'You hurt me, like, I'm all swollen, like, my vagina is swollen right now.' Um, he was like, 'Oh, I'm so sorry, I'm so sorry,' um, and then kept saying, 'Well I'm going to go back to Mooseheads because I want to go grab food from the kebab shop, and then I'll come – I'll come back here.'

116. The interaction, as described by the complainant, is consistent with the appellant not having been reckless as to the complainant's lack of consent, at least during the parts of the interaction following count 2.

117. It was open to the jury to have a doubt about recklessness with respect to the counts 3, 4 and 5 on the basis that the appellant had a lack of insight into his own conduct and a lack of appreciation of the mental state of his sexual partner, together with the potential that he may have made assumptions as to her consent and was focused on his own sexual gratification. All of those matters would have reflected poorly on the appellant. It would also have been understandable, in light of the verdicts that they reached on counts 1, 2 and 6, if the jury had concluded that he remained reckless following count 2. That is particularly so in light of the case theory advanced by the appellant ("Hell has no fury like a woman scorned"). But, in light of the features of the evidence pointed out above, a jury acting reasonably and paying proper attention to the elements of each separate offence could have reached the verdicts that it did.

Conclusion

118. As was consistently emphasised to the jury, factual questions were matters for them and the jury was not obliged to see the case as an "all or nothing" case just because that was the manner in which it was presented to them by the parties.

119. As pointed out in *TK*, the central question is whether the acquittals are attributable only, or principally, to doubt about the complainant's credibility. For the reasons given above, there was a reason for the acquittals on counts 3, 4 and 5 not attributable to a doubt

about the credibility of the complainant. It is not a case where the acquittals on counts 3, 4 and 5 compelled the jury to acquit on counts 1, 2 and 6. It is not a case in which the acquittals on counts 3, 4 and 5 indicate that the jury improperly reached verdicts on the basis of a compromise as distinct from a faithful examination of the evidence in relation to each element of each offence. It is not a case in which the results indicate that a jury has not performed its function. Accordingly, the appeal must be dismissed.

Order

120. The order of the Court is:

(1) The appeal is dismissed.

I certify that the preceding one hundred and twenty [120] numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Date: