CITATION:	*BD v The Queen* [2017] NTCCA 2
PARTIES:	BD v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 4 of 2016 (21405513)
DELIVERED:	13 April 2017
HEARING DATES:	21 July 2016
JUDGMENT OF:	GRANT CJ, KELLY and BARR JJ
APPEALED FROM:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – OFFENCES AGAINST THE PERSON – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Whether Crown's evidence at its highest disclosed indecency in the relevant sense – whether disclosed an offence against s 132(2)(a) of the *Criminal Code* – necessary to prove either that the dealing was indecent in itself, or that it was committed in circumstances of indecency – offence was committed in circumstances of indecency if touching the complainants was sexually motivated – appellant's intention or motive was relevant – appeal dismissed.

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – OFFENCES AGAINST THE PERSON – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Whether failure to explain the significance of the appellant's assertion that the motive or purpose of his conduct was his duty as a teacher – whether failure properly to direct the jury of need for satisfaction beyond reasonable doubt that the appellant's purpose or motive was to obtain sexual gratification – directions given to jury inadequate – failed to explain significance of the motive or purpose of the appellant's conduct – directions in error in drawing attention to the defence of justification under s 27(p) of the *Criminal Code* – appeal allowed.

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – OFFENCES AGAINST THE PERSON – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Whether tendency evidence erroneously admitted into evidence – significant probative value within the meaning of s 97(1)(b) of the ENULA – evidence identified in Crown notice described conduct not overtly indecent or sexualised – conduct not of a particular kind of act or of a particular kind of act committed in particular circumstances – appeal allowed.

CRIMINAL LAW – APPEAL AND NEW TRIAL

Whether integrity of the jury's deliberations compromised by unlawful or improper conduct and irregularities – whether enquiry required to determine if miscarriage of justice – general rule of the administration of criminal justice that once trial has been determined by an acquittal or conviction and the jury discharged evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict – exclusion does not operate in relation to evidence extrinsic to the jury's deliberations or to unlawful coercion – unnecessary to decide.

CRIMINAL LAW – APPEAL AND NEW TRIAL

Conviction quashed – whether interests of justice require new trial – whether admissible evidence sufficiently cogent to justify new trial – whether any circumstances which might render it unjust to the accused to

make him stand trial again – public interest in the proper administration of justice – time already spent in custody – no longer employed as a teacher – adverse and irremediable consequences in the event of a retrial – prejudice by delay.

Criminal Code (NT) s 1, s 27, s 31, s 95, s 132(2)(a), s 187, s 188, s 411, s 413
Evidence (National Uniform Legislation) Act (NT) s 95, s 97, s 101
Supreme Court Rules r 86.08

Drago v The Queen (1992) 8 WAR 488, applied.

AK v Western Australia (2008) 232 CLR 438, *Alford v Magee* (1952) 85 CLR 437, *BBH v The Queen* (2012) 245 CLR 499, *Beal v Kelley* [1951] 2 All ER 763, *Brennan v The King* (1936) 55 CLR 253, *Cant v R* [2003] NTCCA 5, *Conway v R* (2000) 172 ALR 185, *CEG v The Queen* [2012] VSCA 55, *Crowe v Graham* (1968) 121 CLR 375, *Dao v R* (2011) 278 ALR 765, *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627, *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349, *FDP v R* [2008] NSWCCA 317, *GBF v The Queen* [2010] VSCA 135, *Harkin v R* (1989) 38 A Crim R 296, *Hoch v The Queen* (1988) 165 CLR 292, *HML v The Queen* (2008) 235 CLR 334, *IMM v The Queen* (2016) 90 ALJR 529, *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569, *King v The Queen* (1986) 161 CLR 423, *Peacock v The King* (1911) 13 CLR 619, *Perara-Cathcart v The Queen* [2017] HCA 9, *Pfennig v The Queen* (1995) 182 CLR 461, *Purves v Inglis* (1915) 34 NZLR 1051, *R v Abusafiah* (1991) 24 NSWLR 531, *R v AH* (1997) 42 NSWLR 702, *R v Bryant* [1984] 2 Qd R 545, *R v Coombes* [1961] Crim LR 54, *R v Cornwell* (2003) 57 NSWLR 82, *R v Court* [1989] AC 28, *R v Culgan* (1898) 19 LR(NSW) 166, *R v DH* [2000] NSWCCA 360, *R v Falconer* (1990) 171 CLR 30, *R v Ford* (2009) 201 A Crim R 451, *R v George* [1956] Crim LR 52, *R v Getachew* (2012) 248 CLR 22, *R v Grant* [2016] NTSC 54, *R v Johnson* [1968] SASR 132, *R v Kilbourne* [1972] 1 WLR 1365, *R v Lock* (1997) 91 A Crim R 356, *R v Lockyer* (1996) 89 A Crim R 457, *R v McBride* [2008] QCA 412, *R v McIver* (1928) 22 QJPR 173, *R v Nazif* [1987] 2 NZLR 122, *R v PWD* (2010) 205 A Crim R 75, *R v Quach* [2002] NSWCCA 519, *R v RL* [2009] VSCA 95, *R v Sams* (1990) 46 A Crim R 468, *R v Thomas* (1985) 81 Cr App R 331, *R v Vallance* (1961) 108 CLR 56, *R v Zhang* (2005) 158 A Crim R 504 , *Semaan v R* (2013) 230 A Crim R 568, *Sokolowskyj v The Queen* (2014) 239 A Crim R 528, *Smith v Western Australia* (2014) 250 CLR 473, *Vallance v R* [1960] Tas SR 51, *Wilkinson v R* (1985) 20 A Crim R 230, referred to.

S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120].

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC and T Lee
Respondent	P Usher

Solicitors:

Appellant:	Halfpennys Lawyers
Respondent	Director of Public Prosecutions

Judgment category classification:	A
Number of pages:	70

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

BD v The Queen [2017] NTCCA 2
No. CA 4 of 2016 (21405513)

BETWEEN:

BD
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, KELLY and BARR JJ

REASONS FOR JUDGMENT

(Delivered 13 April 2017)

THE COURT:

[1] By indictment dated 12 May 2015 the appellant was charged with six counts of indecently dealing with a child under the age of 16 years contrary to s 132(2)(a) of the *Criminal Code* (NT). The charges involved four different complainants. The appellant was a teacher, the complainants were his pupils, and the offences were alleged to have taken place in the school environment.

[2] On 4 March 2016, a jury found the appellant guilty on counts 1 and 2 of the indictment, and not guilty on the remaining four counts. He was convicted and sentenced to imprisonment for three months on each

count. One month of the sentence imposed in respect of count 2 was ordered to be served cumulatively with the sentence imposed in respect of count 1, and an order was made partially suspending the total effective period of imprisonment after the appellant had served two months in prison. The appellant was taken into custody on 15 March 2016 following sentence, and subsequently granted bail on 29 March 2016 in anticipation of this appeal.

[3] The appeal is brought against those findings of guilt. The Second Amended Notice of Appeal dated 19 May 2016 identified eight grounds of appeal.[1] Three of those grounds were ultimately abandoned.[2] The remaining grounds of appeal may be summarised as follows, in the order in which they were argued.

(a) The Crown's evidence at its highest did not disclose indecency in the relevant sense, and so did not disclose an offence against s 132(2)(a) of the *Criminal Code*.[3]

(b) The trial judge wrongly failed to explain the significance of the appellant's assertion that the motive or purpose of his conduct was his duty as a teacher to the complainants; and so failed properly to direct the jury that the asserted purpose or motive necessarily

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1 Ground (i) does not operate as a separate ground of appeal. It contends that by reason of the error described in one or other of the preceding grounds "as a result there was a miscarriage of justice".

2 Grounds (d), (f) and (g), concerning variously the admission of certain evidence, the assertion that the Crown failed properly to particularise its case, and an assertion that the trial judge wrongly failed to explain to the jury the duty owed by a teacher in the circumstances.

3 Second Amended Notice of Appeal, ground (e).

excluded indecency unless they could be satisfied beyond reasonable doubt that the appellant's purpose or motive was in fact to obtain sexual gratification.[4]

(c) Certain of the tendency evidence was erroneously admitted into evidence by the trial judge because it did not and could not as a matter of law have any or any significant probative value within the meaning of s 97(1)(b) of the *Evidence (National Uniform Legislation) Act* (NT) ("ENULA").[5]

(d) In the alternative to (c) above, the probative value of the tendency evidence did not substantially outweigh its prejudicial effect within the meaning of s 101(2) of the ENULA, and so could not be used against the defendant.[6]

(e) The unanimous verdicts of guilty did not represent the true verdicts of the jury and/or the integrity of the jury's deliberations was compromised by unlawful or improper conduct and irregularities; or, in the alternative, the matters disclosed in relation to the jury's deliberations require an enquiry to determine whether there has been a miscarriage of justice. [7]

[4] On 30 March 2016, leave to appeal was granted in respect of the grounds identified in (c), (d) and (e) of the immediately preceding

4 Second Amended Notice of Appeal, ground (h).

5 Second Amended Notice of Appeal, ground (a).

6 Second Amended Notice of Appeal, ground (b).

7 Second Amended Notice of Appeal, ground (c).

paragraph. On 19 May 2016, the application for leave to appeal in respect of the grounds identified in (a) and (b) of the preceding paragraph was adjourned for consideration during the hearing of the appeal proper.

Indecency in the relevant sense

[5] As already described, the first ground of appeal is that the Crown's evidence at its highest did not disclose indecency in the relevant sense, and so did not disclose an offence against s 132(2)(a) of the *Criminal Code*.

[6] Counts 1 and 2 on the indictment were in the following terms:

> **Count 1**
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> Between 23 July and 28 September 2012 at Darwin in the Northern Territory of Australia, [the accused] indecently dealt with [name redacted] a child under the age of 16 years.
>
> Section 132(2)(a) of the Criminal Code
>
> **Count 2**
>
> Between 23 July 2012 and September 2012 at Darwin in the Northern Territory of Australia, [the accused] indecently dealt with [name redacted] a child under the age of 16 years.
>
> Section 132(2)(a) of the Criminal Code

[7] Section 132 of the *Criminal Code* provides relevantly:

> **132 Indecent dealing with child under 16 years**
>
> (1) In this section, deals with includes the doing of any act which, if done without consent, would constitute an assault within the meaning of sections 187 and 188.

(2) Any person who:

(a) indecently deals with a child under the age of 16 years;

….

is guilty of an offence and is liable to imprisonment for 10 years.

[8] The meaning of the term "deals with" is defined inclusively rather than exhaustively by reference to an act which would constitute an assault within the meaning of ss 187 and 188 of the *Criminal Code*. The term "assault" is defined for the purposes of those provisions by reference to the actual, attempted or threatened "application of force". That phrase is defined in turn in the following terms:[8]

> ***application of force*** and like terms include striking, touching, moving and the application of heat, light, noise, electrical or other energy, gas, odour or any other substance or thing if applied to such a degree as to cause injury or personal discomfort.

[9] The Northern Territory legislature, in common with a number of other Australian jurisdictions, has created specific offences concerning indecent acts or dealings with minors.[9] One of those is the offence established by s 132(2)(a) of the *Criminal Code*.[10] That the offence is

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8 *Criminal Code*, s 1.

9 The Australian Capital Territory, Queensland, Victoria and Western Australia have created a similar range of offences concerning indecent acts or dealings with young persons. See *Crimes Act 1900* (ACT), s 58-61A; *Criminal Code* (Qld), s 210; *Crimes Act 1958* (Vic), ss 47-49; *Criminal Code* (WA), ss 319-322.

10 In its original iteration, s 132 of the *Criminal Code* created the single offence of indecently dealing with a child under the age of 14 years. It roughly replicated the offence of indecently dealing with a girl under the age of 17 years originally found in s 216 of the *Criminal Code* (Qld). It effectively replaced the previously existing Northern Territory provision found in s 66 of the *Criminal Law Consolidation Act* (NT), which created the offence of indecent assault on a woman or girl. That offence was complemented by s 3 of the *Children's Protection Act* (NT), which provided that no child under the age of 17 could consent to an indecent assault.

defined by reference to acts which would constitute assault reflects its origin in and relationship to the statutory crime of indecent assault.[11] The same general considerations which govern the operation and interpretation of the term "indecent" in the statutory crime of indecent assault also have application to the offence established by s 132(2)(a) of the *Criminal Code*.

[10] In order to prove the appellant guilty of an offence against s 132(2)(a) of the *Criminal Code*, it was incumbent on the Crown to prove beyond reasonable doubt:

(a) that the accused "dealt with" the complainant in the relevant sense;

(b) that the accused was intentional or reckless in performing the act which constituted the dealing;

(c) that the dealing was "indecent"; and

(d) that the complainant was under the age of 16 years at the time.

[11] It is common ground in respect of each count under consideration that the appellant touched the complainant's legs in a manner that constituted a dealing in the relevant sense, that the appellant intended

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11 There is no separate crime of indecent assault in the Northern Territory. Rather, it is a circumstance of aggravation to the crime of common assault under s 188 of the *Criminal Code* if the victim is indecently assaulted: *Criminal Code*, s 188(2)(k). It may be noticed that under the crime of common assault if the person assaulted is both indecently assaulted and under the age of 16 years it is not a defence to a charge that the person assaulted consented to the act constituting the offence: *Criminal Code*, s 188(3). As may be seen from the definitional provisions set out in the body of these Reasons, the crime of indecent dealing with a child also removes the requirement of consent, but that crime comprehends a broader range of conduct than does common assault.

to do so, and that the complainant was under the age of 16 years at the time. The only matter at issue was whether the dealing was "indecent" in the relevant sense.

[12] In its ordinary meaning "indecent" connotes something that is unseemly, unbecoming or offensive to common propriety, or something that would offend the modesty of the average person. In the context of this style of offence it carries in addition a sexual connotation. This is because the ambit of the term "indecent" will take its flavour from the context in which it appears. As Windeyer J observed in *Crowe v Graham*:[12]

> Let us turn to the words "obscene", "indecent". Each is a well-known word. Each has been long used in law. Apart from any definitions given them by statutes, they are both to be understood with the meanings they have for common law; and for present purposes each must be understood with any colour it takes by their collocation. I say this because the adjective "indecent" has long been used in law to describe multifarious forms of offensive or objectionable conduct. In this general sense it sometimes denotes lewd forms of misbehaviour, but not always. Indecent exposure, indecent assaults involve lewdness, Indecent language does not: see e.g. *Norley v. Malthouse* (1924) SASR 268. Brawling in church, maltreating corpses, grave-snatching have all been punished as indecent. Sometimes indecent conduct was punished at common law because it created a public nuisance. Sometimes simply as, in Lord Mansfield's words, "against public decency and good manners". The House of Lords has said that for the common law the list is not closed.

[13] In considering the indecent act provisions in s 227 of the *Criminal Code* (Qld), the Queensland Court of Criminal Appeal has observed that it is not the function of the Criminal Code in its relevant operation

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12 (1968) 121 CLR 375 at 390. The case concerned a statute dealing with the publication of any indecent or obscene picture or printed or written matter.

to punish lapses of good taste or good manners, or to concern itself with behaviour which was simply "unbecoming" or "offensive to common propriety".[13] In making those observations the court approved the reasoning in the earlier case of *Bryant* to the effect that "indecency" carries with it the notion of lewd, prurient or immoral conduct.[14] The earlier case had also noted that the relevant provision fell within a chapter of the Code dealing with "Offences against Morality", suggesting an element of sexual impropriety or conduct containing the element of lewdness.[15]

[14] In *Drago v The Queen*[16], the Full Court of Western Australia considered a conviction for indecent dealing with a child under the age of 13 years contrary to s 189(3) of the *Criminal Code* (WA).[17] The two principal assertions on appeal were that the trial judge erred in directing the jury only that the word "indecent" included "conduct that is unbecoming and offensive to common propriety"; and that the trial judge should have directed the jury that it was necessary for the Crown to prove not only that the dealing was intentional but also that the

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13 *R v McBride* [2008] QCA 412 at [20].

14 *R v Bryant* [1984] 2 Qd R 545 at 549, 550 and 552.

15 It may be observed in this respect that s 132(2)(a) of the *Criminal Code* falls within Part V, Division 2, which is also concerned with "Offences against morality".

16 (1992) 8 WAR 488.

17 The Western Australian provision defines "deals with" in terms not materially different to s 132(2)(a) of the *Criminal Code.* The conduct in question involved the accused taking down a child's pyjama pants and running a biro over the top of and around the child's penis.

accused intended to commit an act which right-minded persons would regard as indecent.

[15] In pressing the first assertion the appellant sought to rely on *Bryant*[18] for the proposition that the trial judge should have directed the jury in terms suggesting that "indecency" involved moral turpitude or acting in a base or shameful matter, rather than by reference only to conduct offensive to common propriety. The Full Court of Western Australia considered that having regard to the terms of the offence and the Chapter of the Code within which it was placed[19], the notion of indecency was implicitly restricted in its terms to conduct involving actions or functions which included a component of sexual conduct.[20] So much may also be said for the operation of s 132(2)(a) of the *Criminal Code*.

[16] Nicholson J also examined the common law in order to throw light on the use of the word "indecent" or "indecently".[21] In particular, his Honour adverted to the New Zealand case of *Purves v Inglis*[22] in which the word was defined by reference to conduct "unbecoming or offensive to common propriety". The New Zealand case had been

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18 *R v Bryant* [1984] 2 Qd R 545.

19 Again, concerning "Offences against Morality".

20 *Drago v The Queen* (1992) 8 WAR 488 at 492 (per Nicholson J, Wallwork and Murray JJ concurring).

21 His Honour was at pains to note that his recourse to the common law was for that general purpose, and not to find how the law stood before enactment of the Code and then to see if the Code would bear an interpretation which would leave the law unaltered: see, for example, *Brennan v The King* (1936) 55 CLR 253 at 263; *R v Falconer* (1990) 171 CLR 30 at 65-67.

22 (1915) 34 NZLR 1051 at 1053.

distinguished in *Bryant* on the basis that it was concerned with indecent language and the formulation was not necessarily apt to other forms of indecent conduct. The court in *Bryant* had concluded that the jury should have been directed that for criminal responsibility to attach to the conduct there in question it was necessary to find that the accused had acted in a shameful manner and with an element of moral turpitude; particularly where the appellant contended he acted from innocent motives.

[17] In turn, Nicholson J distinguished the circumstances under consideration in *Bryant* on the basis that the offence of indecent act there under consideration did not carry any necessary implication of sexual misconduct. The Western Australian offence provision was differently framed. The word "indecent" appeared in direct juxtaposition with the words "deals with", which by their definition necessarily comprehended conduct involving the human body, bodily actions or bodily functions. In that context, the word "indecent" confined the actions or functions which might fall within the ambit of the offence to those involving sexual misconduct.[23]

[18] Given the language and context of s 189 of the Western Australian Code, the Full Court considered it unnecessary to stipulate a test which would circumscribe its operation by reference to notions of moral

23 *Drago v The Queen* (1992) 8 WAR 488 at 497 (per Nicholson J, Wallwork and Murray JJ concurring).

turpitude or blameworthiness. That was inherent in a finding that an accused carried out an act which by its nature constituted a sexual affront. The Full Court concluded that a consideration of whether conduct constituted by *touching* another person is unbecoming or offensive to common propriety in those limited circumstances "does not allow undue scope to varying standards in different juries"[24]; but different considerations might apply to legislation creating an offence by general language and with reference to "any indecent act".[25]

[19] The second principal assertion made on appeal in *Drago* was that the Crown was required to prove that the accused intended to commit an act which right-minded persons would regard as indecent, and that the jury should have been directed accordingly. The appellant's evidence was that he carried out the actions to calm the complainant and induce sleep rather than with any intention of sexual stimulation. This was asserted on appeal to be sufficient to support a finding of fact that the accused had an innocent intention. The appellant argued on the basis of the decision in *Court*[26] that where the facts were capable of supporting either an innocent or an indecent interpretation it was incumbent on the Crown to prove that the accused not only intended to

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24 *Drago v The Queen* (1992) 8 WAR 488 at 496-498 (per Nicholson J, Wallwork and Murray JJ concurring).

25 As was the case with s 203 of the *Criminal Code* (Qld) under consideration in *Bryant*.

26 *R v Court* [1989] AC 28.

commit the act, but also intended to commit an act which right-minded persons would think was indecent.

[20] In dealing with that assertion Nicholson J made reference to s 23 of the Western Australian Code. That provision operated such that both the result intended to be caused by an act, and a person's motive to do an act, was immaterial to criminal responsibility. On that basis, his Honour concluded that any direction concerning motive or result was unnecessary – at least for the purpose of establishing the requisite intention.[27]

[21] There is no provision in those same terms in the Northern Territory *Criminal Code*. However, s 31 of the *Criminal Code*, although rendered in different terms, is directed to the same general subject matter of criminal responsibility, acts independent of will and accident.[28] The requisite mental element under s 31 of the *Criminal Code* is that the act, omission or event was intentional[29] or performed by the accused with foresight of the possible consequence.[30] That

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27 *Drago v The Queen* (1992) 8 WAR 488 at 489 (per Nicholson J, Wallwork and Murray JJ concurring). Nicholson J essentially confirmed the view in *Harkin v R* (1989) 38 A Crim R 296 that where the act was an inherently indecent one proof of sexual motivation was unnecessary. He left open the question whether an act which was not inherently indecent could assume that character by reason of some sexual motivation, which issue was picked up by Murray J (see further below).

28 Section 31 of the *Criminal Code* applied in this case because s 132 is not a provision of the Code to which Part IIAA applied.

29 *R v McIver* (1928) 22 QJPR 173; *Drago v The Queen* (1992) 8 WAR 488.

30 Although this alternative basis of criminal liability is generally described in the Code jurisdictions as "recklessness" (see, for example, *Wilkinson v R* (1985) 20 A Crim R 230; *R v Vallance* [1960] Tas SR 51 at 132), s 31 of the *Criminal Code* (NT) requires something different. The foundation for the alternative basis of criminal liability under s 31 is foresight of the possible consequence of conduct, while recklessness at common law involved knowledge of probable consequence of conduct: see *R v Crabbe* (1985) 156 CLR 464 at 469; *Emitja v The Queen* [2016] NTCCA 4 at [82]-[85] per Barr J.

requirement is obviously met where the accused intended the act said to fall within the definition of "deals with". Broader questions of motive and result are immaterial to that calculus. As Windeyer J observed in relation to the relevant operation of the Tasmanian *Criminal Code*:[31]

> The common law … says that a man, who actually realises what must be, or very probably will be, the consequence of what he does, does it intending that consequence. The word "intentional" in the Code carries, I think, the concepts of the common law. It is, I may add, in my view undesirable to insist upon desire of consequences as an element in intention. There is a risk of introducing an emotional ingredient into an intellectual concept.

[22] The appellant's argument in this ground is slightly different. It is not that the Crown was required to prove that he intended to commit an act with the motive or result of indecency. It is that the Crown was required to prove that he dealt with the complainants' "indecently"; that the manner in which he touched the complainants was incapable of carrying a sexual connotation or constituting an offence against morality; and that his intention or motive in washing the complainants' legs was irrelevant to that inquiry. That is said to be particularly so in circumstances where the appellant was under a duty to take care for the welfare of students[32], and there was a plausible explanation for his conduct which was referable to the discharge of that duty.

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31 *Vallance v R* (1961) 108 CLR 56 at 82.

32 The aspect of the duty to which the appellant drew attention in this case was the obligation to ensure that any contaminants were removed from students to ensure that they did not suffer infection or some other

[23] That argument has its foundation in the common law principle that an act which is incapable of being regarded by a jury as indecent does not become so by reason of an undisclosed indecent motive or purpose.[33] Even where the conduct in question does not have an overt and necessarily sexual connotation, however, it may be characterised as "indecent" if accompanied by an intention to assault the victim in a manner that right-minded persons would clearly think was indecent.[34]

[24] The accused in *R v Court* was a shop assistant who had pulled a 12-year-old female customer over his knees and spanked her bottom over her shorts. When police asked for some explanation of his conduct he replied: "I don't know – buttock fetish".[35] The appeal court held evidence of that reply was admissible to establish the accused's motive, and the conviction was upheld. As Lord Griffiths observed:[36]

> If evidence of motive is available that throws light on the intent[37] it should be before the jury to assist them in their decision.

[25] In making that finding, the court reiterated the proposition that it is unnecessary to establish sexual motive where the conduct is inherently

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harm. During the course of his trial the appellant gave evidence that was his sole motivation in touching the complainants' legs as he did (discussed further below).

33 *R v George* [1956] Crim LR 52. In that case it was held that a perverse satisfaction derived by an accused from the repeated removal of a girl's shoe could not, in and of itself, amount to an indecent assault in the absence of some overt circumstance of indecency.

34 *R v Court* [1989] AC 28; *R v Kilbourne* [1972] 1 WLR 1365 at 1372; *R v Thomas* (1985) 81 Cr App R 331.

35 *R v Court* [1989] AC 28 at 36, 42 and 50.

36 *R v Court* [1989] AC 28 at 35.

37 His Lordship was there speaking of intention in the common law context.

indecent. With reference to a hypothetical assault which involved the removal of a woman's clothing, Lord Ackner said:[38]

> Those very facts, devoid of any explanation, would give rise to the irresistible inference that the defendant intended to assault his victim in a manner which right-minded persons would clearly think was indecent. Whether he did so for his own personal sexual gratification or because, being a misogynist or for some other reason, he wished to embarrass or humiliate his victim, seems to me to be irrelevant. He has failed, *ex-hypothesi*, to show any lawful justification for his indecent conduct.

[26] As the reasoning from *Drago* set out above makes plain, the *Criminal Code* does not require the Crown to prove an indecent motive in order to establish criminal responsibility. Motive is not *legally relevant* in determining whether the accused bears criminal responsibility for the act constituting the offence, but this is not to say that motive could not be *factually relevant* to the determination whether an act constituting the offence is "indecent". As Murray J observed in *Drago*:[39]

> In my opinion, in relation to an offence such as this, under the Code, s 23, the matter is very clear. Criminal responsibility for an indecent dealing will flow from an act which is willed, or done deliberately or consciously. In this case that had to be the act of running the biro over and about the child's penis. The offence defined in s 189 of the Code is not one with respect to which an intention to cause any particular result is expressly declared to be an element of the offence. Therefore it is the case that the result intended to be caused by the conduct of the appellant was immaterial to his criminal responsibility. So also, for the purpose of determining his criminal responsibility, was his motive for doing the act which he did. But of course his motive may have been factually relevant in other ways.

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38 *R v Court* [1989] AC 28 at 42–43. Similarly, in *Harkin v R* (1989) 38 A Crim R 296, it was alleged that the appellant had put his hand on the breast of an 11-year old girl on the outside of her clothes. Applying *R v Court*, the New South Wales Court of Criminal Appeal (Lee CJ, Wood and Matthews JJ) held that as the assault itself had a sexual connotation, the purpose or motive of the appellant was irrelevant.

39 *Drago v The Queen* (1992) 8 WAR 488 at 503.

> In my opinion, whether an act may be described as indecent because it offends against community standards of decency, may depend not only upon the nature or quality of the act in itself, but upon the motive or purpose of the act. That would be so under the Code in my view, just in the same way as at common law.
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> …
>
> ... there may of course be some conduct which the jury regards as so offensive to common standards of decency, that it should be regarded as indecent of itself, regardless of the motivation for the conduct. But where the act in question was capable of being regarded as innocent, but was not necessarily to be so regarded in itself, the motivation of the act might operate in one of two ways. It might of course confer the quality of indecency upon an act which might, differently explained, be held not to be so. On the other hand, the motive of the act might render innocent an act which otherwise, without explanation, might be regarded as indecent.

[27] It is instructive to consider at this point the evidence given by each complainant in relation to the appellant's conduct relevant to these particular charges.

[28] The complainant in respect of Count 1 gave pre-recorded evidence on 12 May 2015 which included the following account:[40]

> No? Alright. Now you told Officer Hancock about a time at the end of term when you and your friend [name of complainant redacted] were emptying some bins?---Yes.
>
> Can you remember why you were emptying the bins? How did that come about? ---We had just finished our project and we didn't have anything to do and so we asked him if like he had a job for us. And he said just empty all the bins into the big bin.
>
> ….
>
> Can you remember what was on your leg when you got out of the bin?---It was just dirt and rust from inside the bin.
>
> Alright. And whereabouts – was it just on your leg?---It was on my legs and on my hands.

40 Transcript of Proceedings, 12 May 2015, pp 94-99.

Okay. Can you remember whereabouts on your legs it was?---On my lower legs and then like just above my knees.

And you told Officer Hancock that you were wiping your legs to start off with. Where were you when you were doing that?---We were at the sink.

….

And what were you wiping your legs with?---Just a tissue.

Okay. So a tissue from a normal tissue box or another type of tissue?---Normal tissue.

….

Now whereabouts were you wiping your legs? Which part of your legs were you wiping?---The bottom of my legs, so my lower legs.

Okay. And can you remember how it came to be that BD was wiping your legs? --- Well he came over and said that I was doing it wrong and that like it wasn't getting it all off. And so he got out these blue cloths he had in the room and put some soap stuff on it and started wiping like above my knees. And then he pulled up my shorts but there was nothing up there and I said 'no sir that isn't appropriate'.

….

Can I just stop you there. So when he was wiping your legs. Were you standing? ---Yes.

And how did he – what was he doing to wipe your legs? How did – what did he do with his body?---He bent over to do it.

He bent – do you mean bent from the waist?---Yes.

Alright. And did he wipe your leg below the knee - - -?---Yes, he did.

- - - at any stage? He did?---Oh wait no. Not below the knee, no. No, above the knee.

…

So, [name of complainant redacted], I was just asking whether there was any wiping by BD below your knee?---Yeah.

There was?---No there wasn't.

Okay. Now when he wiped above your knee. You've already explained to Officer Hancock about the shorts you were wearing. Are you able to stand up in the room where you are now and show us with your hand, where he wiped above your knee? ---Where?

You might have to stand back a little bit?---Yes, well right there. So like above my knee.

….

> Sorry, go on?---And then he just, yeah, pulled my shorts up and wiped up there. Well like tried to but I said no.
>
> Alright. Show us where your shorts came to as best you can?---They were mid length, so about there.
>
> Okay. And show us the highest part that BD wiped your leg?---Well just down there. He didn't get a chance to wipe up here.
>
> So are you – just indicate that to us again please [name of complainant redacted] and leave your hand on the spot where his hand went?---There.
>
> Okay. And was that on the front of your leg as you're indicating to us now?---Yes.
>
> And was that the only place he touched you above your knee?---Well does pulling my shorts up count as touching?
>
> So he pulled your shorts up?---Yes.
>
> Are you able to explain how far he pulled them up?---Above my tan line which is about – well no, to my tan line which is about there.
>
> Alright. So he pulled your shorts up to your tan line?---Yes.

[29] The complainant in respect of Count 1 also gave evidence during cross-examination which was generally consistent with her account given in evidence-in-chief, although somewhat different in focus.[41] As would be expected, counsel for the appellant asked questions and elicited answers directed to demonstrating that the appellant's sole intention was to ensure that the complainants washed their legs properly; to suggesting that the contact stopped at a point not far above the complainant's knee; and to establishing that the appellant gave the washcloth to the complainant to wash herself as soon as she expressed concern.

41 Transcript of Proceedings, 1 March 2016, p 103.

[30] The complainant in respect of Count 1 also participated in a Child Forensic Interview with police on 10 January 2014. The account given in that interview was generally consistent with the account given during the course of the pre-recorded evidence.

[31] The complainant in respect of Count 2 also gave pre-recorded evidence on 12 May 2015 which included the following account:[42]

> Alright and you have told the police officer about an occasion when BD cleaned your legs. Can you just explain to us, if you can remember, what state your legs were in when you came back into class after being in the skip?---They had – they smelt pretty bad, because we had been in the bin. They had – I believe they had a bit of grease on them. I don't think they were that dirty from the knee up, yep.
>
> Now, you're using terms like I believe and I think, so if you can't remember clearly, just tell us, but you've referred to grease, was there grease on your legs?---I don't know for sure.
>
> Alright, can you remember if there were any visible marks on your legs from things in the bin?---I don't know.
>
> Can you remember cleaning your own legs and what you were cleaning from your legs at that time?---I remember cleaning my – the front of my legs with paper towel, soap and water and just there was a bit of grime on them.
>
> A bit of?---Grime.
>
> Grime, okay. Now, do you remember, on a previous occasion, you drew a picture to show where BD cleaned on your upper legs?---Yep.
>
> And have you got that picture there with you now?---Yeah.
>
> Now, there's actually two little pictures there, so if we just talk about the person, the headless person that's there. Does that represent you?---Yep.
>
> And the black square in the middle of the person, is that your skorts[43] - - -?---Yep - - -
>
> - - - that you described to the police officer. And that line sticking out the left side of the figure, with the words, 'cleaned up to about there,' what does that represent?---Where he cleaned up to my legs, the back of my legs.

42 Transcript of Proceedings, 12 May 2015, pp 108-109.

43 A combination skirt/shorts garment, which was described by the complainant as "like hockey pants".

> Okay, now, you able to, by standing up in the room and stepping back a little bit, able to show us where on the back of your legs that point is?---Yep.
>
> Can you do that for us please, Ms Hargrave?---So about here-ish.
>
> Okay and so that is how high up, if you like. How far around did BD touch your leg?---Here to about here.

[32] The complainant in respect of Count 2 also participated in a Child Forensic Interview with police on 14 January 2014. The account given in that interview was generally consistent with the account given during the course of the pre-recorded evidence. That account also included the following additional detail:

> … he started cleaning the back of our legs and then it was just a bit higher than necessary, I suppose, it was a bit, yeah, past student/teacher but me and [name of complainant redacted] just kind of looked each other and like, yeah, just let it go. So then, um, while – while he was doing that, um, he was almost finished then he's like, "Nice legs, girls", and that's pretty much it.

[33] In order to satisfy the element of indecency it was necessary to prove either that the dealing was indecent in itself, or that it was committed in circumstances of indecency. For the dealing to be indecent in itself it must be plainly and obviously indecent.[44] For that purpose, "indecent" imports a sexual connotation which:

> … may derive directly from the areas of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of

44 *R v Whitehouse* [1955] QWN 76.

> the assault. The genitals and anus of both male and female and the breast of the female are relevant areas ... [45]

[34] It is not necessary that the touching be directed to one of those areas in order to be capable of characterisation as plainly and obviously indecent. Lord Ackner's hypothetical example of an assault involving the removal of clothing might also be characterised as patently indecent even where there was no contact with those areas of the body which might inherently give rise to a sexual connotation.

[35] In this particular case, the touching involved at its highest the appellant washing an area on the complainants' legs between the knees and upper thighs with a washcloth and soap, and moving the hem of the shorts worn by one of the complainants up past the "tan line" ostensibly for that purpose. While it may be accepted that the appellant's conduct in that respect made the complainants uncomfortable, and might be considered inappropriate in context, it could not be characterised as plainly and obviously indecent.

[36] This is not to say that the dealings were incapable of being regarded by the jury as indecent in the relevant sense. The conduct described in the complainants' evidence, although capable of being characterised as innocent, was not of such a character as to be necessarily regarded as innocent or incapable of carrying a sexual connotation. It was still open to the jury to find that it was committed in circumstances of

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45 *Harkin v R* (1989) 38 A Crim R 296 at 301; cited by Nettle JA in *R v RL* [2009] VSCA 95 at [9].

indecency[46]; and for the purposes of that inquiry it was unnecessary that the act itself be plainly and obviously indecent.[47]

[37] Ultimately, the question whether the dealings were committed in circumstances of indecency was one of fact for the jury to decide according to contemporary standards of modesty and decency. If the appellant's conduct had a sexual motivation it was capable of characterisation as indecent. It was open to the jury, properly directed, to draw inferences concerning the appellant's motive and purpose from the evidence. For those reasons, the appellant's contention that the manner in which he touched the complainants was incapable of carrying a sexual connotation, and that his intention or motive in washing the complainants' legs was irrelevant, must be rejected. Leave to appeal is granted and this ground of appeal is dismissed.

Requisite direction – purpose or motive to obtain sexual gratification

[38] As already described, the second ground of appeal is that the trial judge wrongly failed to explain the significance of the appellant's assertion that the motive or purpose of his conduct was his duty as a teacher to the complainants; and so failed properly to direct the jury

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46 In *R v RL* [2009] VSCA 95 at [9], for example, Nettle JA noted that: "There is also some authority for the proposition that, even where an assault is not such as unequivocally to offer a sexual connotation, it may still constitute an indecent assault if accompanied by an intention on the part of the assailant thereby to obtain sexual gratification." In support of that proposition his Honour cited *Harkin v R* (1989) 38 A Crim R 296 at 301; *R v George* [1956] Crim LR 52 at 53; *R v Coombes* [1961] Crim LR 54 at 55; cf *R v Culgan* (1898) 19 LR(NSW) 166 at 167; *R v Court* [1989] AC 28 at 33 and 42.

47 *Beal v Kelley* [1951] 2 All ER 763; *R v Johnson* [1968] SASR 132 at 134.

that the asserted purpose or motive necessarily excluded indecency unless they could be satisfied beyond reasonable doubt that the appellant's purpose or motive was in fact to obtain sexual gratification.

[39] As the High Court has repeatedly observed, most recently in *Perara-Cathcart v The Queen*[48], the general responsibility of the trial judge to direct the jury on matters of law is as stated in *Alford v Magee*[49]; that is, the trial judge is obliged:

> … to decide what the real issues in the case are and to direct the jury on only so much of the law as they need to know to guide them to a decision on those issues.

[40] Similarly, in *R v Getachew*[50] French CJ, Hayne, Crennan, Kiefel and Bell JJ said:

> The directions to be given to a jury on a trial for rape are to be moulded in the light of the proper construction of the relevant provisions of the [*Crimes Act 1958* (Vic)] and, no less importantly, having regard to the real issues in the trial. As this Court has repeatedly pointed out, the judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury need to know to decide those issues.

[41] In this case the real issues for present purposes were whether the jury could be satisfied beyond reasonable doubt that the appellant's conduct was plainly and obviously indecent; and, if not, whether the jury could be satisfied beyond reasonable doubt that the appellant's touching of

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48 [2017] HCA 9; 91 ALJR 411.

49 (1952) 85 CLR 437 at 466.

50 [2012] HCA 10; 248 CLR 22 at 34-35 [29].

the complainants was sexually motivated and thus committed in circumstances of indecency.

[42] It is necessary first to consider the appellant's evidence. It established that at the material times he was a technical studies teacher at the school in question; that the complainants were students at year 7 level in one of his classes; and that he was also the school's occupational health and safety representative. He then gave evidence concerning the dealings the subject of these two counts.[51] The nub of the appellant's evidence was that his sole purpose in touching the complainants was to clean those areas of their legs which had been soiled while emptying the bins, and that this was a necessary part of his duty of care as a teacher to his pupils. Ranged against that, the Crown case was not that the touching in question was plainly and obviously indecent. The Crown case was that the appellant had touched the complainants' legs with the motive or purpose of satisfying his sexual interest, rather than to discharge any duty of care he had as a teacher.[52]

[43] During the course of her summing up the trial judge drew attention to the fact that the appellant had given evidence in circumstances where he was not obliged to do so, and that the jury might wish to give him some credit for that in their assessment. Her Honour then made the

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51 Transcript of Proceedings, 1 March 2016, pp 168-172.

52 Transcript of Proceedings, Crown opening remarks, 25 February 2016, p 10. It was put squarely to the appellant in cross-examination that his only purpose in wiping the complainants' legs was "to satisfy your sexual interest in them", which he denied: see relevant cross-examination at Transcript of Proceedings, 1 March 2016, pp 186-195.

orthodox point in the following terms concerning the acceptance or rejection of the appellant's evidence:

> You will approach the evidence of the accused in the same way as you will approach the evidence of all witnesses. You have the absolute right to accept or reject any evidence that has been given to you in this Court. You may accept the whole or reject the whole of any witness's testimony.

[44] Her Honour then addressed the assessment of the complainants' evidence in the following terms:

> It is a matter for you and I will return to the evidence of the four complainants in due course, but given the importance of their evidence with respect to the counts in the indictment that relate to the allegations they make, you will need to assess whether you accept a particular complainant as a truthful witness and whether you accept that her evidence, considered with other evidence that you may accept, persuades you beyond reasonable doubt that any of the charges have been proven or whether you have a reasonable doubt about the truthfulness of a particular complainant's testimony or of the evidence as a whole, as it relates to a particular charge.

[45] It may be noted in this respect that for the two charges presently under consideration there was little difference between the accounts given by the complainants and those given by the accused. There was some difference concerning the precise areas of the complainants' legs which the accused had washed, and a denial by the accused that he had at any stage pulled or pushed up the shorts worn by one of the complainants (although he did concede that in the act of washing he may have inadvertently moved the hem of the shorts). The appellant also accepted that after the cleaning process had been completed he said something like, "Nice legs girls". The principal contest lay not in

whether the touching as described took place, but in whether the appellant had a sexual motivation for doing so.

[46] Her Honour then introduced the question of the tendency evidence[53] in the following terms:

> I distinguish [the context evidence] from some of the evidence where, if you accept that evidence, it is permissible to use that evidence of proof that the accused acted, as alleged by the Crown, in particular way, namely, to have demonstrated a mind of sexual interest in these students and being prepared to act on that.
>
> This sexual interest and the tendency to act on it, the Crown says exists and it seeks to prove it. But it is, you must remember, only part of the case. To use that evidence, you must be satisfied that the tendency, such as the sexual interest that the Crown says exists, you must be satisfied that that exists beyond reasonable doubt.

[47] The trial judge then took the jury to the *aide memoire*, which provided in essence that the Crown was required to prove the following matters in relation to each complainant:

(a) the appellant touched and/or wiped the complainant's legs in a manner that constituted a dealing with her; and

(b) the appellant intended to touch and/or wipe the complainant's legs; and

(c) the complainant was a child under the age of 16 years; and

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53 The Crown had given notice pursuant to s 97(1) of the ENULA that it intended to adduce evidence that the appellant had, amongst other things, a tendency to touch or get physically close to female students in a way that a teacher normally would not, and a sexual interest in his teenage students upon which he was prepared to act. This tendency evidence was led during the course of the trial and said to be probative in the determination whether the accused had touched the complainants in an indecent fashion (discussed further below in the context of the third ground of appeal).

(d) the touching and/or wiping of the complainant's legs was indecent; and

(e) the touching and/or wiping of the complainant's legs was unnecessary force and not for the management of the complainant.

[48] The *aide memoire* also contained a definition section which provided the following explanation concerning the term "indecently":

> "Indecently" is not defined, and bears its ordinary English meaning. Whether any of the complainants have been "indecently" dealt with must be judged in light of all of the circumstances. The concept involves a degree of sexual impropriety according to the contemporary standards of the community.

[49] The terms of the *aide memoire* give rise to two matters of concern.

[50] First, the reference to unnecessary force and the management of the complainant introduced the issue of justification under s 27 of the *Criminal Code*, which provides relevantly:

> **27 Circumstances in which force not being such force as is likely to cause death or serious harm is justified**
>
> In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm:
>
> (p) in the case of a parent or guardian of a child, or a person in the place of such parent or guardian, to discipline, manage or control such child;

[51] That provision was clearly ill-adapted to the circumstances of these charges and the manner in which both the prosecution and the defence had conducted their cases. The appellant had never framed his case on

the basis that he applied force in the exercise of some power of discipline, management or control over the complainants. The case was that he was discharging his occupational health and safety obligations as a teacher rather than dealing indecently with the complainants.[54] The operative question was not whether the application of force was necessary or unnecessary.[55] It was whether or not the touching was indecent of itself or in the circumstances.

[52] The second matter of concern arising from the terms of the *aide memoire* is that the element of indecency, even with the explication by definition, gave no attention to the real issues in the case. As already identified, they were whether the jury could be satisfied beyond reasonable doubt that the appellant's conduct was plainly and obviously indecent; and, if not, whether the jury could be satisfied beyond reasonable doubt that the appellant's touching of the complainants was sexually motivated and thus committed in circumstances of indecency.

[53] The trial judge came back to the use which could be made of the tendency evidence towards the end of summing up. In that respect her Honour said:

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54 It may also be noted here that the effect of s 162(3) of the *Education Act* (NT) is that no member of staff at a school, or any person engaged to teach or support teaching in a school, may be taken to have any authority to discipline, manage or control a pupil using the application of force. Although the provision appears in a section titled "Corporal punishment" and should perhaps be limited in operation to punitive action, it does at least raise the question whether s 27(p) of the *Criminal Code* had any application at all in these circumstances.

55 This is not to say there are not other circumstances such as self-defence or defence of others which would justify an otherwise unlawful application of force.

> If you do find, that is find beyond reasonable doubt, that the accused had sexual interest in his female students and was willing to act on it, then you can use that to find it is more likely that the accused committed the offences. You must, as I have said, assess it with the other evidence and that is partly why I have also summarised some of the cross-examination there, and you must also assess it in the light of the evidence the accused has given you about that.

[54] This is consistent with what her Honour had earlier said concerning tendency evidence. Whilst the jury was appropriately directed that it had to be satisfied beyond reasonable doubt both that the acts said to establish the tendency did in fact occur, and that they did establish sexual interest, that direction had nothing necessarily to say about the appellant's purpose or motive in carrying out the acts charged in counts 1 and 2.

[55] The trial judge's summing up on the issue of indecency in relation to Count 1 was also couched in general terms of sexual impropriety and contemporary standards:

> Now, the definition of indecent, it is one of those standards that very much rests with you, ladies and gentlemen, bears its ordinary English meaning. Whether any of the complainants have been indecently dealt with, must be judged in the light of all the circumstances. The concept involves a degree of sexual impropriety according to the contemporary standards of the community.
>
> Now, I am not trying to urge you one way or the other, but if, for example, you were to find proven touching below the knee, you might have a particular view about whether that is indecent.
>
> If you did find beyond reasonable doubt there was touching of the thighs, you might have a particular view as to whether that was indecent. I am not referring to Count 1, but just in a general explanation of how these charges work, obviously there are cases where it is obvious with some parts of the body, such as the breast and genitals and so forth. Other areas, it may not be so clear as to whether it is indecent.

> I might say that touching is part of the ordinary incidents of life, as it were, which there is some evidence about, that is not part of the charges; tapping someone on the shoulder when you are waiting behind them in a line or something like that, that is not included. But of course, shouldering, you would not consider to be indecent. But in fact tapping someone on the shoulder is not considered, for example, to be an application of force in criminal law.
>
> So you need to apply contemporary standards as you understand them in the community. To the question of indecency, you apply that to the facts that you find proven.

[56] That approach was replicated in the summing up on the issue of indecency in relation to Count 2. That approach clearly left it open to the jury to determine whether the appellant's conduct was "indecent" in the application of contemporary standards, and clearly drew attention to the fact that different considerations might apply where the parts of the body under consideration were other than the breasts and genitals. However, it gave no attention to the question whether the touching in this case was in and of itself plainly and obviously indecent, and no attention to the significance of sexual motivation or purpose having regard to the manner in which the case had been run.

[57] The trial judge then dealt with the purported justification defence in the following terms:

> In relation to Counts 1 and 2, there is this further element that the touching or wiping of the legs or pulling the shorts up was unnecessary force and not for the management of [name of complainant redacted].
>
> What that refers to, ladies and gentlemen, is the situation that somebody who is a parent, guardian or someone who has the care of a child, such as a teacher, may do things that are not unnecessary but, if you like, necessary for the management of that child. You might think about things like with

small children, blowing noses and things like that. I do not want to try and give examples here. That is very much a matter for you.

When you are considering whether it was unnecessary force that was used, you need to consider in the definitions:

> Unnecessary force means the user of the force knows it is unnecessary for and disproportionate to the occasion or that an ordinary person similarly circumstanced to the person using such force would regard as unnecessary for and disproportionate to the occasion.

So you need to consider there, is it something that the accused knew was unnecessary and you have arguments about that and you have quite a deal of evidence about that. It is a matter for you what you want to look at, but you do have the evidence of the standards, the guidelines that are used by the Education Department as an admitted fact and you have some evidence about the interpretation and the application, as it were and you have evidence from the accused about that.

You ask yourself in that instance, 'would an ordinary person similarly circumstanced regard that force as unnecessary and disproportionate to the occasion?' You can look at the whole situation there, the evidence about, you know, the girls, what they looked like when they came back. Was it a situation that called for the actions of touching, as you find them.

[58] For the reasons already given, this justification had no application to these circumstances and its introduction to the jury was apt to draw attention away from the real issues and so to confound deliberations. It moved the focus away from whether the Crown had proved beyond reasonable doubt that the appellant had a sexual motivation to whether the Crown had proved beyond reasonable doubt that the touching was unnecessary.

[59] To the extent that the summing up dealt with the opposing contentions of professional duty and sexual motive, those matters were given attention in the general summary of the appellant's evidence-in-chief in the following terms:

> They had greasy black streak marks on their legs and on their arms and hands. They said they had got those in the bin with all the horrible rubbish because they had to try to get the wheelie bins out. The skip is used for garbage from all around the school, including from the metal work room, so there are cut-offs and there is sharp waste. He said he was annoyed because it is quite dangerous.
>
> He told the Court his son got a puncture wound in his finger that got infected. He had blood poisoning and had to go to hospital. It was cut open, drained and then at some stage he had to go back to hospital and spent 11 days there because of a small puncture wound and it got to the point where they were discussing whether to amputate his finger. He said he was aware of the possibility of a small cut or a scratch becoming seriously infected.
>
> …
>
> He said they asked if they could clean it and if they could go to the toilet. He said no. He said that was because the toilet is not a hygienic place to be cleaning if you have a cut or scratch. He said they wanted to go together and that was not allowed. They had all the facilities in the workshop. He was shown exhibit P19, the response he gave to the principal, and agreed that was his explanation.
>
> He said he had a duty of care as a teacher to make sure none of the students were injured. He said they had followed his instructions and gone to the bin and emptied the bin and getting into the bin was a little bit his responsibility for not supervising them in that capacity.

[60] The trial judge's summary of his evidence in cross-examination on the issue was as follows:

> Asked if he suggested that he wipe their legs and check them, he said, 'Yes.' Asked what parts of the leg he did check, he said all of their legs. Asked if this included the upper legs, the thighs, and he said, 'Yes.' Asked if there was no blood, he said, 'At the end, no.' He agreed the girls were 13 and was asked if he could assume they could shower and clean themselves and he said, 'You would think so.'
>
> He disagreed that he had no reason to have anything to do with their legs He denied this was to satisfy any sexual interest. He said his reason was the girls were not doing a proper job. He needed to have it done quickly before 3. They were taking their time, not taking it seriously and he thought he would do it quicker and find out if they needed to have any medical attention before the end of school.

[61] No attention was given to the significance of that evidence to the element of indecency.

[62] In most cases involving indecent dealing it will be a simple matter for the jury to determine the facts and decide whether the dealing is "indecent" in character having regard to current standards and the attitude of the community.[56] That is because the term "indecent" is an ordinary and well understood word and in most cases the conduct in question will on any objective appraisal be plainly and obviously indecent, have an obvious sexual connotation, and be clearly offensive to contemporary standards.[57] To the extent the jury requires any elaboration in those circumstances it will be necessary only to ask them to decide whether the conduct was contrary to ordinary community standards of morality or decency.[58]

[63] Different considerations applied here for the reasons already given. Having regard to those matters, the directions given to the jury were inadequate in that they failed to explain the significance of the motive or purpose of the appellant's conduct in context, and they were in error

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56 *R v Court* [1989] AC 28 at 42; *Purves v Inglis* (1915) 34 NZLR 1051 at 1053; *R v Nazif* [1987] 2 NZLR 122 at 127.

57 Experience shows that in the vast majority of trials for offences which involve an element of indecency the act in question will have been plainly and obviously indecent, and no question of sexual motivation will arise upon which the jury must be directed.

58 In *Harkin v R* (1989) 38 A Crim R 296, the New South Wales Court of Criminal Appeal confirmed that the test to be applied was whether the conduct was contrary to ordinary standards of morality or decency of respectable people in the community, and that it was not inappropriate to direct a jury accordingly. Similarly, in *R v RL* [2009] VSCA 95 Nettle JA observed that "in the end it is a question of fact for the jury to decide according to contemporary standards of modesty and decency".

in drawing attention to the defence of justification under s 27(p) of the *Criminal Code*.

[64] The appellant's right of appeal in this case is subject to the limitation imposed by r 86.08 of the *Supreme Court Rules* (NT). That rule provides:

> **86.08 Limitation on grounds of appeal**
>
> No direction, omission to direct or decision in relation to the admission or rejection of evidence of the Judge of the court of trial shall, without the leave of the Court of Criminal Appeal, be allowed as a ground for appeal, or for an application for leave to appeal, unless objection was taken at the trial to the direction, omission or decision by the party appealing or applying for leave to appeal.

[65] The limitation does not operate only in relation to the admission or rejection of evidence. It also has application to jury directions. The purpose of the rule is to ensure that the trial judge receives the assistance from counsel to which the judge is entitled in the task of giving appropriate directions to the jury.[59] An accused will be held to what was done for him or her at trial unless there is the possibility of real injustice.[60]

[66] In this case no objection was taken at the trial to the directions now under consideration. However, this is not a case in which the appropriate direction was not given because counsel for the appellant actively or intentionally abandoned the issues at trial. These were

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59 *R v Abusafiah* (1991) 24 NSWLR 531 at 536.

60 *R v DH* [2000] NSWCCA 360 at [115]; *Cant v R* [2003] NTCCA 5 at [41].

issues not properly identified during the course of the trial. As a result of that failure the appellant was found guilty on two counts in circumstances which give rise to the possibility of real injustice. For those reasons, leave to appeal is granted and the appeal is allowed on this ground.

[67] The course which follows appropriately from that allowance is discussed further below, and after the remaining grounds of appeal have been addressed.

Tendency evidence – significant probative value

[68] As already described, the third ground of appeal is that certain of the tendency evidence was erroneously admitted into evidence by the trial judge because it did not and could not as a matter of law have any or any significant probative value within the meaning of s 97(1)(b) of the ENULA.

[69] Section 97 of the ENULA provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. It provides:

> **The tendency rule**
>
> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note for section 97

The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

[70] The Dictionary in the ENULA defines "probative value" of evidence to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

[71] The general operation of the provision was described in *R v Grant* in the following terms:[61]

> [25] The regime for the admission of tendency evidence under the ENULA replaces the common law rules in relation to "propensity" or "similar fact" evidence. The common law rules in relation to this type of evidence no longer govern (but may inform) the assessment of the probative value and admissibility of tendency evidence under the ENULA. A number of matters warrant some preliminary comment in this context.
>
> [26] First, the common law generally required a "striking similarity" or "underlying unity" between the similar facts in order for them to qualify as admissible [see, for example, *Pfennig v The Queen* (1995) 182 CLR 461 at 485; *HML v The Queen* (2008) 235 CLR 334]. The ENULA creates its own regime for the admission of tendency evidence. The existence of

61 *R v Grant* [2016] NTSC 54 at [25]-[28].

"similarity" is not a necessary requirement for tendency evidence. That said, the consideration of similarity remains a guide in determining in some circumstances whether tendency evidence has sufficient probative value to pass the test for admissibility under the statutory regime [*R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89]. It may also be noted that the requirement for striking similarity or underlying unity remains important to the question of admissibility in cases where the identity of the offender is in issue, but is less significant in cases where the accused is known to the complainant and no issue of identity arises.

[27] Secondly, propensity and similar fact evidence is excluded under the common law where there is "a rational view of the evidence that is inconsistent with the guilt of the accused" [*Hoch v The Queen* (1988) 165 CLR 292 at 296]. In making that determination the trial judge was required to apply the same test as a jury. Where there was a rational view of the evidence consistent with the accused's innocence, the probative force of the evidence was considered to be automatically outweighed by its prejudicial effect. The ENULA introduces a legislative formulation for balancing probative value against prejudicial effect which displaces the "no rational view" test [*R v Ellis* (2003) 58 NSWLR 700 at [89]. Under that formulation, the probative value is to be assessed by the trial judge on the assumption that the jury will accept the evidence, thus precluding any consideration of whether the evidence is credible or reliable for that purpose [*IMM v The Queen* (2016) 90 ALJR 529 at [42], [43], [49]-[50] and [52] per French CJ, Kiefel, Bell and Keane JJ. It should be noted in this context that proceeding on the assumption the jury will accept the evidence does not preclude the trial judge from determining that the circumstances surrounding the evidence render it too weak to have any probative force.].

[28] Thirdly, under the common law it was necessary to exclude the possibility of contamination, collusion, concoction or other influence before propensity and similar fact evidence is admitted. Under the ENULA the possibility of concoction will not automatically or necessarily deprive propensity evidence of the requisite level of probative value to qualify it for admission [*IMM v The Queen* (2016) 90 ALJR 529 at [59] per French CJ, Kiefel, Bell and Keane JJ]. That notion notwithstanding, there may be objective facts and circumstances surrounding a particular piece of propensity evidence which renders it too weak or unconvincing to have any real probative force.

[72] The tendency sought to be proved by the Crown was the tendency of the accused to:[62]

(a) act in a particular way, namely:

- to be friendly and liberal (compared to other teachers);
- to make comments/jokes with an adult sexual flavour with students in a way that teachers normally would not;
- to pay special attention to a group, and female groups particularly;
- to give treats or privileges to select students or groups, particularly female;
- to touch or get physically close to female students in a way that a teacher normally would not;
- to ingratiate himself with a group of students, so that he could either opportunistically or deliberately target certain teenaged female students and touch them in an indecent manner for his sexual gratification; and

(b) to have a particular state of mind, namely a sexual interest in his teenaged students upon which he was prepared to act, at significant risk, when an opportunity arose.

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62 See *Notice: Tendency Evidence* at Appeal Book 4-11

[73] The Crown contended the tendency evidence which it sought to adduce could rationally affect the assessment of the probability of the existence of a fact in issue. That fact was whether the accused indecently touched each of the complainants in the counts here under consideration, and in the other four counts charged on the indictment. For the reasons already given in the context of the previous ground of appeal, for counts 1 and 2 that resolved to the question whether the appellant touched the complainants with a sexual motivation or for sexual gratification. That is reflected in the tendencies alleged in the tendency notice, which are in their culmination a tendency to touch students for sexual gratification and out of sexual interest, and is reflected in the manner in which the Crown framed its case at trial.

[74] The indictment had originally charged seven counts, including one offence alleged to have taken place in 2005. A *voir dire* hearing was conducted on 11 May 2015 to determine the related questions of whether the direct evidence in respect of each count was mutually admissible as tendency evidence in respect of each other count, and whether the other evidence identified in the Crown's tendency notice was admissible as such. On 12 May 2015, the trial judge determined in effect that the count concerning the 2005 offence should be severed from the other counts and tried separately, and that the direct evidence concerning that count was not admissible as tendency evidence in respect of the other counts and *vice versa*.

[75] On 12 May 2015, the trial judge also determined in effect that certain evidence identified in the Crown's tendency notice was admissible, some of which was said to demonstrate "grooming" or "normalisation" behaviours on the part of the appellant. Counsel for the appellant subsequently sought to re-open the issue of the tendency evidence to put further submissions going to the possibility of collusion or concoction. By written decision delivered on 15 March 2016, the trial judge determined that in the main there was no reasonable possibility of collusion or concoction, and that certain further evidence not described in the Crown's notice would also be admissible as tendency evidence.[63] The trial judge's reasoning was that:

> … while each of the items of evidence taken alone may not clearly fulfil the requirements of s 97 and s 101 of the Uniform Evidence Act, the proposed items of evidence taken together have a strong capacity to prove the sexual interest and tendency to act on it as contended by the Crown. The tendency sought to be proved was not prejudicial in the sense contemplated by the Uniform Evidence Act. Evidence of sexual interest is well amendable [sic] to orthodox directions. The danger of unfair prejudice is consequently significantly lowered if clear directions are given to the jury.[64]

[76] Following the severance ruling a fresh indictment was filed which contained the remaining six counts from the original indictment. Counts 1 and 2 are those with which this appeal is presently concerned. Counts 3 and 4 concerned a third female student complainant ("the third complainant"). The two acts charged in those counts were that

63 *The Queen v XZ* [2016] NTSC 14.

64 *The Queen v XZ* [2016] NTSC 14 at [10].

the appellant grazed his forearm along the third complainant's breast while purporting to measure a piece of wood for her, and that the appellant touched her breast with the back of his hand while purporting to take a woodwork piece from her. Counts 5 and 6 concerned a fourth female student complainant ("the fourth complainant"). The two acts charged in those counts were that the appellant touched the fourth complainant on the bottom when she asked if she could go to the toilet, and grazed his hand across her breasts in a horizontal motion upon her return.

[77] The effect of the trial judge's rulings made in May 2015 and March 2016 was that direct evidence in respect of each count was mutually admissible as tendency evidence in respect of each other count. The tendency notice also identified evidence from the complainants and other witnesses concerning events said to have taken place between 2007 and 2013 which established "grooming" or "normalisation" behaviours. The effect of the trial judge's rulings was that this evidence was admissible as tendency evidence in respect of all six counts, subject to a number of exclusions. As matters transpired, the jury found the appellant not guilty of the charges concerning the third and fourth complainants.

[78] The appellant does not assert in this appeal that the direct evidence of the acts said to constitute the charges against the third and fourth complainants was not mutually admissible as tendency evidence in

respect of counts 1 and 2. The complaint is made in respect of evidence concerning other events and dealings said to demonstrate "grooming" or "normalisation" behaviours adopted by the appellant. The tendency evidence said to have been wrongly admitted during the course of the trial is particularised in the schedule to the appellant's Second Amended Notice of Appeal.[65] Without seeking to replicate that schedule here, the evidence may be categorised broadly as follows:

(a) evidence from the complainants, and from other female students, that the appellant was nice and helpful to female students (in comparison to male students); spoke to female students in a soft tone; allowed students to chat, eat, play music and dance during class; and permitted students to leave class for various purposes (including leaving the school grounds) for which other teachers would not;

(b) evidence from the complainant in respect of count 1 that the appellant had rested his hand "very close to my bottom" during class;

(c) evidence from the complainant in respect of count 2 that the appellant had placed a chocolate on her chest and that it had subsequently dropped down the front of her shirt;

65 A version of that schedule containing amended references to the evidence was received during the hearing of the appeal.

(d) evidence from the fourth complainant that the appellant had on one occasion sent her to sit in a room by herself;

(e) evidence from the fourth complainant that the appellant had on other occasions touched her breasts and bottom when she had asked to go to the toilet (those acts were not charged); on another occasion had asked her to massage his shoulders; on another occasion had asked her to "twerk"[66]; on another occasion had asked her to sit on his lap; and on another occasion told her that her aunty should pick him up and "they would have fun";

(f) evidence from another female student that fourth complainant had told her of the lap incident described in (e) above;

(g) evidence from another female student that the appellant had tried to place a chocolate into her pocket;

(h) evidence from the aunt of the complainant in respect of count 1 (who was also a teacher at the school) that the complainant told her the appellant had once touched another student on the bottom during class (an uncharged act); and that the complainant told her the appellant had put his hand on her bottom during class (an uncharged act and an account different to that given by the complainant herself);

66 A dance or dance move involving thrusting hip movements and a low, squatting stance.

(i) evidence from another female student that on one occasion the appellant had driven her to McDonald's at Casuarina during the lunch break to get food;

(j) evidence from another female student that the appellant had on one occasion put his hand on her lower back to hurry her out of the door; that on another occasion the appellant had said "I will do anything for you; that on another occasion when she had hurt her knee the appellant had said, "I'd rub it better but I'm not allowed to"; and that the appellant had a tendency to get in her "personal space"; and

(k) evidence from another female student that the appellant was "touchy and odd"; that the appellant touched her on the shoulders; that the appellant had touched another female student's leg just above the knee; that the appellant had touched her upper left side to "push her along"; and that the appellant called her "babe".

[79] A distinction may be drawn between evidence which is admitted under the tendency rule on the one hand, and "relationship" or "context" evidence on the other hand. The operation of s 95 of the ENULA is that evidence cannot be used to prove that the accused had a relevant tendency unless that evidence is admissible under the tendency rule in s 97. Subject to that qualification, the evidence in question may also be admitted for a non-tendency purpose. The admissibility of evidence for those purposes is governed by the general test of relevance in s 55

of the ENULA, and the discretions and obligations contained in Part 3.11 of the ENULA (particularly ss 135 and 137).[67]

[80] One example of a non-tendency purpose commonly arising in sexual offence cases is "relationship" or "context" evidence that is not relied on for a tendency inference. In *HML v The Queen* various members of the High Court observed that evidence of other conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including:[68]

(a) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct, and to explain the offences charged; and

(b) to overcome a false impression that the event was an isolated one, or that the offence happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence.

[81] A further distinction was drawn in *HML* between general context evidence, relationship evidence showing a sexual interest in the complainant (which may demonstrate motive in the general sense), and relationship evidence showing a propensity to act on a sexual interest in the complainant (which must satisfy the tendency rule in the

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67 *R v Quach* [2002] NSWCCA 519; *Conway v R* (2000) 172 ALR 185; *FDP v R* [2008] NSWCCA 317; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356.

68 See, for example, *HML v The Queen* (2008) 235 CLR 334 at [6]-[7] per Gleeson CJ.

ENULA).[69] The common law test is that propensity (tendency) evidence is admissible only if it bears no reasonable explanation other than the inculpation of the accused in the offence charged or, to put it the other way, if an innocent explanation is objectively improbable. [70] The members of the court in *HML* adopted different views as to whether the *Pfennig* test continues to have operation in relation to the admission of tendency evidence in child sexual assault cases under the ENULA. Those differences notwithstanding, a clear majority of the court considered that the *Pfennig* test did operate where evidence of uncharged criminal conduct was relied on for propensity purposes.[71]

[82] There were suggestions made by the various prosecutors during the course of the *voir dire* hearings and the trial in this matter that some of the evidence proffered for tendency purposes might also qualify as context evidence or be admissible as part of the "narrative". Even if the evidence was capable of that dual characterisation, it was expressly admitted as tendency evidence and the jury was directed that it could

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69 *HML v The Queen* (2008) 235 CLR 334. See also *Wilson v The Queen* (1970) 123 CLR 334 at 344; *R v Beserick* (1993) 66 A Crim R 419; *R v Anderson* (2000) 111 A Crim R 19 at [30].

70 Commonly described as "the *Pfennig* test", from *Pfennig v The Queen* (1995) 182 CLR 461 at 481 per Mason CJ, Deane and Dawson JJ. The test in *Pfennig* first appeared in *Hoch v The Queen* (1988) 165 CLR 292 which itself adopted the test set out in *Sutton v The Queen; Perry v The Queen* (1982) 150 CLR 580. See also *Harriman v The Queen* (1989) 167 CLR 590 at 602.

71 See generally Tim Game SC, Julia Roy and Georgia Huxley, *Tendency, Coincidence and Join Trials*, Prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, 14 September 2015. Gleeson CJ, Crennan and Kiefel JJ considered that the *Pfennig* test would only have operation where the evidence is relied on for propensity purposes. Hayne, Gummow and Kirby JJ adopted the view that any evidence of uncharged criminal acts must pass the *Pfennig* test before it may be admitted, regardless whether its use is for context or propensity purposes. It is of some note having regard to the nature of the propensity evidence to which objection is taken in this appeal that their Honours were concerned only with evidence of uncharged criminal acts. It is not clear whether that was because the evidence under consideration in *HML* was of uncharged criminal acts, or on the assumption that only conduct which is criminal in nature may qualify as propensity evidence in child sexual assault cases.

be used for tendency purposes. That is plain from the extracts from the trial judge's summing up to the jury concerning the tendency evidence which are set out above in the context of the second ground of appeal.

[83] Against that background, the contention in this ground of appeal is that the "non-contact" evidence said to demonstrate tendency could not be probative in determining as a matter of fact whether the appellant cleaned the complainants' legs for his sexual gratification; and that the "contact" evidence said to demonstrate tendency (comprised by the various touching incidents) did not demonstrate the "underlying unity", "pattern of conduct" or "modus operandi" necessary to qualify as tendency evidence.

[84] The test of "significant probative value" in the tendency rule is higher than that required to establish relevance under s 55 of the ENULA.[72] The use of "significant" as a qualifier in this context connotes something more than mere relevance, but something less than a substantial degree of relevance.[73] This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the

72 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73].

73 S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120]; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

evidence is important in relation to the determination of the fact(s) in issue.[74]

[85] The question whether the evidence significantly bears on the facts in issue is "a matter of fact and degree, and will be influenced by the nature of the fact in issue sought to be proved (or disproved)".[75] That requires the conduct said to constitute the alleged offence to be identified with some specificity, rather than generalised in a manner which fails to have regard to the elements of the offence.[76]

[86] In this particular case the real fact in issue was not whether the accused touched the complainants. It was whether the accused did so with a sexual motive or purpose. It follows that the evaluation of probative value is directed to the capability of the tendency evidence to bear on the probability that the accused had that motive or purpose and acted on it in touching the complainants' legs. The operative question for these purposes, then, is whether the jury could rationally regard the tendency evidence in question as bearing to a significant extent on the probability that the appellant touched the complainants with a sexual motivation or for sexual gratification.

[87] The relevant test is whether the features of commonality between the conduct charged and the conduct described in the tendency evidence

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74 Odgers, op cit, [EA.97.120]; *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72].

75 *Semaan v R* (2013) 230 A Crim R 568 at [38].

76 *Sokolowskyj v The Queen* (2014) 239 A Crim R 528 at [44].

are significant enough logically to imply that because the appellant committed the previous acts or committed them in particular circumstances, he is likely to have touched the complainants with a sexual motive or purpose.[77] Otherwise, the evidence does no more than suggest that the accused is the sort of person who is overly nice to and "touchy" with female students, and does not ascend to the level of even rank propensity evidence.

[88] Unlike the evidence under consideration in *IMM*, the probative value of this evidence does not lie in its capacity to support the credibility of a complainant's account.[78] As already described, any probative value lies in its capacity to demonstrate that the appellant's interactions with female students had a sexual purpose or motive upon which he acted in the conduct charged. Once that characterisation is accepted, the tendency material identified by the appellant in the schedule does no more than raise the same question properly presented to the jury in determining whether the subject charges were made out; that is, whether in touching the complainants' legs the appellant had a sexual purpose or motive. The fact that dealings either foreshadowing or raising the same question may have taken place on other occasions does not answer or otherwise inform that question.

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77 *CEG v The Queen* [2012] VSCA 55 at [14].

78 *IMM v The Queen* (2016) 90 ALJR 529 at [62]-[64].

[89] This is not to say that evidence of what the prosecutor described as "grooming and of normalisation of physical proximity"[79] falling short of criminal conduct can never be admissible. It may be admissible as context evidence, subject to a specific direction precluding tendency reasoning. Evidence of grooming behaviours, or behaviour demonstrating sexual interest in children, may also be admissible for tendency purposes if the test of significant probative value is satisfied.

[90] In *BBH v The Queen*[80], the High Court considered the admissibility of evidence from a third party that during the course of a camping trip he had seen the complainant daughter undressed and bending down in front of the accused father while the accused had his hand on her waist and his face close to her bottom. The accused denied the incident had taken place at all, rather than seeking to posit some innocent explanation. A majority of the court held that there was no rational view of the evidence that was consistent with the accused's innocence, and that the evidence was admissible as propensity evidence.[81] Its probative value lay in its very clear capacity to support a finding beyond reasonable doubt that the accused had committed a sexual offence motivated by a sexual interest in his daughter. In the

79 Transcript of Proceedings, 11 May 2015, pp 16.

80 (2012) 245 CLR 499.

81 *BBH v The Queen* (2012) 245 CLR 499 at [104]-[108], [153], [196]-[199].

circumstances of that case, no practical distinction could be drawn between motive and propensity.[82]

[91] When considering the probative value and admissibility of evidence said to demonstrate grooming behaviours or sexual interest, care needs to be taken in assessing the inferences which may logically and rationally be drawn from the evidence. By way of example, "[i]t is logically erroneous to draw an inference that the accused had a sexual interest in the complainant from a piece of evidence which itself discloses no sexual interest but only when combined with the direct evidence of the commission of the offences could be interpreted as disclosing a sexual interest".[83] On proper analysis, that is the process by which the Crown argued in this case that the "grooming" and "normalisation" evidence disclosed a sexual interest. Moreover, it could not be said that the evidence bore no reasonable explanation other than the inculpation of the appellant on counts 1 and 2, or that the innocent explanation proffered by the appellant was objectively improbable.

[92] On the other hand, inferences of sexual interest could logically be drawn from the evidence concerning uncharged criminal conduct and the direct evidence of acts which were the subject of other counts on the indictment. Nor must the evidence disclose criminal conduct in

82 *BBH v The Queen* (2012) 245 CLR 499 at [153] per Crennan and Kiefel JJ.

83 See Tim Game SC, Julia Roy and Georgia Huxley, *Tendency, Coincidence and Join Trials*, Prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, 14 September 2015 at [5.7].

order to sustain an inference of sexual interest. It may disclose discreditable conduct which clearly indicates a sexual interest in a complainant, such as purchasing a G-string for the complainant or other evidence of grooming with plainly sexual content.[84]

[93] There may also be circumstances in which the evidence will clearly demonstrate a progression of behaviours by which an accused tests a child's reaction to non-sexual touching as a precursor to sexual misbehaviour involving contact with the genitals or breasts. That was not the case here. The evidence subject to appeal here involved ingratiating conduct and ostensibly non-sexual touching (subject to one exception discussed further below), which was admitted to inform the question whether the appellant had a sexual motive or purpose in touching the complainants' legs in a manner which was not of itself plainly or obviously indecent.

[94] To take another example, it is clear that "evidence that showed that [an accused] had a sexual interest in, and attraction to, adolescent boys [would have] probative value in respect of an allegation that he had sexually abused another adolescent boy".[85] In the application of that principle, evidence of grooming behaviours in the nature of minor sexual touching and fondling of one adolescent may have significant probative value as tendency evidence informing the question whether

84 See Tim Game SC, Julia Roy and Georgia Huxley, *Tendency, Coincidence and Join Trials*, Prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, 14 September 2015 at [5.12].

85 *Daov R* (2011) 278 ALR 765 at [187].

an accused engaged in a sexual act with another adolescent, even where there is a lack of similarity between the sexual acts with the different adolescents.[86] The grooming behaviours in question in both *Dao* and *PWD* involved actual sexual misconduct with children, and by that character supported tendency reasoning. As Simpson J observed in *Dao*, "[e]vidence of more serious [sexual] conduct may support allegations of less serious [sexual] conduct just as evidence of less serious [sexual] conduct may support allegations of more serious [sexual] conduct", despite the wide variety in the accused's sexual behaviour.[87] The tendency evidence in respect of which complaint is made in this appeal was not possessed of that character.

[95] It may also be noticed that the tendencies sought to be proved in this case were cast in broad terms. Those terms were, in effect, a tendency on the part of the appellant to ingratiate himself with female students in order to touch them, and a tendency to have a sexual interest in his teenage students. As the Victorian Court of Appeal has observed:[88]

> Ordinarily, the greater the generality with which a tendency is stated the less likely that evidence of the tendency has significant probative value in relation to a fact in issue. In the Crown's first tendency evidence notice, the tendency is stated in very general terms. To say that the accused had a tendency to have a sexual interest in female staff members who worked with him is indeed so general as to lack almost all probative value. For

86 *R v PWD* (2010) 205 A Crim R 75 at [86]-[88].

87 *Dao v R* (2011) 278 ALR 765 at [187] (Spigelman CJ, Allsop P, Kirby and Schmidt JJ agreeing).

88 *GBF v The Queen* [2010] VSCA 135.

> depending on what is meant by a 'sexual interest', one would have to allow that a very large proportion of the adult male population share the same tendency. Equally, to say that the applicant had a tendency to act upon his sexual interest in female staff members with whom he worked is so general as to be practically inutile. As expressed, it could mean no more than that the applicant was inclined to encourage conversation with female staff members or perhaps ask them out for a date.

[96] While different considerations no doubt arise when considering an asserted sexual interest in young female students, the observations concerning generality still have some application to these circumstances. Leaving aside the direct evidence concerning the other counts on the indictment, the evidence identified in the Crown notice in this case describes conduct which is not overtly indecent or sexualised, and which is not of a particular kind of act or of a particular kind of act committed in particular circumstances.

[97] The one possible exception is the evidence from the fourth complainant of uncharged acts involving the appellant touching her breasts and bottom when she had asked to go to the toilet. The principal basis of objection to this evidence is that it was not probative of any sexual interest on the part of the appellant in the complainants in counts 1 and 2. Given the common age of the complainants and the fact that all the incidents were alleged to have taken place in the classroom context, conduct of that type might properly be seen to evince a sexual interest in female students generally, and might properly inform the question whether the conduct the subject of Counts 1 and 2 was performed with a sexual purpose or motive.

[98] Even accepting that to be so, the evidence of this sexualised conduct with the fourth complainant formed only a small part of the material which was said to establish grooming behaviours or attempts to normalise touching. The fact that this evidence concerning the fourth complainant might legitimately have been admissible for tendency purposes has nothing to say about the admissibility of the other material said to qualify as tendency evidence and to which this ground of appeal is directed.

[99] It should also be noted for completeness that even if the fact in issue in the trial of the subject charges was whether the touching in question was plainly and obviously indecent in nature, that was a matter which fell to be determined having regard to the nature of the contact. Other evidence showing some tendency to touch female students in a manner which was not overtly sexual could not usefully inform that deliberation.

[100] For those reasons, and with the one possible exception discussed above, the tendency evidence identified under this ground of appeal did not have significant probative value and was not properly admissible as tendency evidence. Although it did not have significant probative value for the relevant purpose, the evidence did disclose a reckless laxity on the part of the appellant towards school standards involving such matters as students leaving designated classrooms and the school grounds. It might have suggested some partiality to female students

over male students, and inappropriate behaviours in that respect. It might have suggested some degree of arrested emotional development on the part of the appellant. It might have suggested that the appellant had something other than an orthodox perception concerning encroachment on personal space. It certainly suggested that the appellant was given to making inappropriate comments to and in the presence of students.

[101] That evidence is likely to have coloured the case against the appellant in a manner which gave rise to the possibility of real injustice. While it is possible that some of the evidence may have been admitted as context evidence for the purposes described in *HML v The Queen*[89], its use in that event would have been for different purposes and subject to different directions to the jury.

[102] For those reasons, the trial miscarried and the appeal is allowed on this ground. Again, the course which follows appropriately from that allowance is discussed further below and after the remaining grounds of appeal have been addressed.

Tendency evidence – probative value did not substantially outweigh prejudicial effect

[103] As already described, the fourth ground of appeal is that the probative value of the tendency evidence did not substantially outweigh its

89 (2008) 235 CLR 334.

prejudicial effect within the meaning of s 101(2) of the ENULA, and so could not be used against the defendant.

[104] Section 101 of the ENULA has application to criminal proceedings and provides, so far as is relevant for these purposes, that tendency evidence cannot be used against a defendant unless its probative value substantially outweighs any prejudicial effect. It provides:

> **101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution**
>
> (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
>
> (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
>
> (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
>
> (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

[105] This ground of appeal falls away having regard to the findings made on the third ground of appeal.

Compromise of the jury's deliberations

[106] As already described, the fifth ground of appeal is that the unanimous verdicts of guilty did not represent the true verdicts of the jury and/or the integrity of the jury's deliberations was compromised by unlawful or improper conduct and irregularities. It is said in the alternative that

the matters disclosed in relation to the jury's deliberations require an enquiry to determine whether there has been a miscarriage of justice.

[107] The trial of this matter concluded on Friday, 4 March 2016. On Monday, 7 March 2016 a person presented at the court and spoke to the jury manager. That person said words to the effect, "I couldn't sleep over the weekend because I feel that the wrong decision was made by the jury". The person handed the jury manager a document purporting to be a statutory declaration. The document was taken directly to the trial judge.

[108] The document appears on its face to have been made on Sunday, 6 March 2016. It does not include the name or address of the declarant, or any information that would identify the declarant beyond the fact that he or she was a member of the jury. The statutory declaration is unsigned. Those omissions notwithstanding, the jury manager knew that the person who provided the statutory declaration had in fact been a member of the jury in the appellant's trial. Neither party now disputes that fact, and no objection was taken to the admissibility of the statutory declaration for the purposes of this appeal. The real issue is whether the declaration has any probative value in this context.

[109] The statutory declaration contains the following material statements.

(a) Jury members had admitted they had read the *NT News* (presumably articles about the case) before conducting their deliberations.

(b) Jury members admitted they had searched the internet concerning the case during the course of the trial.

(c) Three of the jury members believed the appellant was not guilty of counts 1 and 2, but were "bullied" into a guilty verdict by the other members of the jury.

(d) The jury did not consider every element and every definition relevant to each count during the course of its deliberations, and did not agree in relation to each element.

(e) The not guilty verdicts in respect of the other four counts were unanimous.

[110] As the High Court has observed both recently and unanimously, "[i]t is a general rule of the administration of criminal justice under the common law that once a trial has been determined by an acquittal or conviction upon the verdict of a jury, and the jury discharged, evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict".[90] While it may be accepted that the exclusion does not operate in relation to evidence "extrinsic" to the jury's

90 *Smith v Western Australia* (2014) 250 CLR 473 at [1], citing *Nanan v The State* [1986] AC 860 at 872; *R v Mirza* [2004] 1 AC 1118; *Re Matthews and Ford* [1973] VR 199 at 209; *Minarowska* (1995) 83 A Crim R 78 at 84-85; *Medici* (1995) 79 A Crim R 582 at 591 – 592; *Millward* [1999] 1 Cr App R 61 at 65.

deliberations or to unlawful coercion[91], the statutory declaration in this case does not disclose any extrinsic influence which bore on the deliberations one way or another, or any unlawful conduct.

[111] As Martin CJ observed in *Smith* at Court of Appeal level, it is common for jurors to experience inter-personal pressure in the course of their deliberations, and possible that some jurors might be disposed to describe that pressure as coercion.[92] However, there is a clear line between robust debate and unlawful coercion, and something more than an allegation of "bullying" would be required to sustain a reasonable apprehension or suspicion of unlawful intimidation, and much more to sustain a conclusion in those terms.

[112] The statutory declaration in this case was written after the verdict had been taken. It is for that reason possibly not as probative of the juror's state of mind at the time the verdict was entered as would be a note made before or contemporaneously with the entry of the verdict. It is well-recognised that jurors may be subject to second thoughts after the event. Even leaving the matter of contemporaneity aside, it might be considered that the content of the statutory declaration does not give rise to any reasonable apprehension or suspicion of unlawful menace, benefit, promise, or threat of injury or detriment directed to a member of the jury. Again, however, it is unnecessary and inappropriate to

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91 See, in particular, s 95 of the *Criminal Code*.

92 *Smith v The State of Western Australia* [2013] WASCA 7 at [37].

decide or otherwise pursue the issue having regard to the findings made on the second and third grounds of appeal.

Disposition

[113] Section 411(1) of the *Criminal Code* provides that on an appeal against a finding of guilt the court shall allow the appeal if it is of the opinion that the verdict or judgment should be set aside on the basis, *inter alia*, that there was a wrong decision on any question of law or that there was a miscarriage of justice. The "proviso" has no application to these circumstances. The appeal is allowed on those bases.

[114] Section 411(2) of the *Criminal Code* goes on to provide that subject to the special provisions of the Division the court shall, if it allows an appeal against a finding of guilt, quash the finding of guilt and direct a judgment and verdict of acquittal to be entered.

[115] Section 413 of the *Criminal Code*, which appears in the same Division, provides that on an appeal against a finding of guilt the court may order a new trial if it considers that a miscarriage of justice has occurred and that such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other form of order.

[116] The general rule is that if the appellate court finds an operative error or miscarriage it will remit the matter for retrial. Provisions empowering the court to quash the conviction and direct a verdict of

acquittal as an alternative course appear in the criminal procedure legislation in all Australian jurisdictions. It would not appear that the terms of the Criminal Code leave open a third course, sometimes adopted in other jurisdictions, which is to direct that there should be no retrial without proceeding to direct a verdict of acquittal.[93]

[117] In deciding whether to order a new trial a court which has quashed a conviction must decide whether the interests of justice require a new trial, first considering whether there is admissible evidence of sufficient cogency to justify a new trial; and, if so, taking into account any circumstances which might render it unjust to the accused to make him stand trial again, while remembering also the public interest in the proper administration of justice.[94]

[118] In *R v Sams*, Hunt J described the exercise in the following terms:[95]

> There is thus a wide discretion to order or to refuse a new trial. Relevant to the exercise of that discretion are any circumstances which might render it unjust to the appellant to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual appellant. The authorities are collected in *Honeysett* (1987) 10 NSWLR 638 at 646-647; 34 A Crim R 277 at 285.
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> It is submitted by the appellant that no new trial should be ordered. The submission is put upon two bases: that the verdict was in any event unsafe and unsatisfactory; and that the delays involved in the case so far would necessarily render such a new trial an unfair one.

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93 *Peacock v The King* (1911) 13 CLR 619 at 674–675.

94 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627. See also *King v The Queen* (1986) 161 CLR 423.

95 *R v Sams* (1990) 46 A Crim R 468.

> Undertaking my own independent examination of the evidence, and making my own assessment of both the sufficiency and quality of the evidence at the trial, I would reject the submission that the jury, acting reasonably, ought to have entertained a sufficient doubt as to the guilt of the appellant. The two verdicts of guilty were not, in my view, unsafe and unsatisfactory.

[119] The approach adopted by Hunt J in relation to the evidentiary question was to consider whether it was open to a jury to enter a guilty verdict on that evidence, or whether to do so would be unsafe and unsatisfactory. In *King v The Queen*, Dawson J (in the majority) adopted a similar approach in observing:[96]

> It is well established that the discretion to order a new trial should not be exercised when the evidence in the court below was not sufficiently cogent to justify a conviction or to allow the Crown to supplement a case which has proved to be defective. In particular, the Crown should not be given an opportunity to make a new case which was not made at the first trial: *R. v Wilkes* [footnote admitted].

[120] That approach suggests that the test is whether the evidence was sufficiently cogent to justify a conviction. To put it another way, a new trial should not be ordered only if the evidence properly admitted is insufficiently cogent to sustain a guilty verdict (subject to a subsequent consideration of any countervailing factors concerning the interests of justice).

[121] Griffith CJ appears earlier to have adopted a different and more liberal test in *Peacock v The King*, in saying:[97]

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96 *King v The Queen* (1986) 161 CLR 423.

97 *Peacock v The King* (1911) 13 CLR 619 at 621.

> Assuming that the Court has power to grant a new trial in capital cases, under the *Victorian Crimes Act 1890*, sec. 482, this power should be used with great caution and should not be exercised as of course in every case where a conviction is set aside on the ground of an irregularity at the trial. If there was evidence to go to the jury, and the error was of such a nature that if it had not been made, the verdict would probably have been the same, a new trial may be granted. If on the whole case it is reasonably probable that, but for the error complained of, the verdict would or might have been different, a new trial should not be granted. In the present case, the failure of the Judge at the trial to give the jury the usual warning as to convicting upon the uncorroborated evidence of an accomplice, and the mere formal withdrawal of evidence admitted after objection, and afterwards held to be inadmissible, were matters to be considered in the exercise of the Court's discretion to grant a new trial.

[122] On that test, a new trial should not be ordered if there is a reasonable probability that the guilty verdict "would or might have been different" but for the error upon which the appeal is allowed. The test as expressed by Dawson J in *King v The Queen* is to be preferred, both because it had the endorsement of three other members of the High Court and because a retrial is *prima facie* appropriate as matter of principle where the evidence is capable of sustaining a verdict of guilty.

[123] The evidence which would likely be led at any retrial of this matter would in theory be capable of sustaining a guilty verdict. That is so even having regard to the fact that the bulk, if not all, of the tendency evidence previously admitted would be excluded (at least for propensity purposes); and to the fact that it might be considered unlikely any attempt would be made to adduce tendency evidence from one of the other former complainants alleging that the appellant had

touched her breasts in circumstances where unanimous not guilty verdicts were entered on the counts in the indictment concerning that complainant.[98]

[124] It is also the case that the evidence would be capable of sustaining a guilty verdict even if it is accepted that the appellant's conduct as alleged was not plainly and obviously indecent, and that it would be necessary for the Crown to establish a sexual motive or purpose. It would conceivably be open to a jury properly directed to find such a motive or purpose based on inferences that might reasonably and rationally be drawn from the evidence given by the complainants and the appellant (assuming he again gave evidence), and on objective facts which are not in dispute (including the fact that the appellant made the comment, "Nice legs, girls").

[125] Although it could not be said that the Crown case in any retrial would be a strong one, it also could not be said that the admissible evidence would be insufficiently cogent to justify a new trial. That calls up a consideration of any circumstances which might render it unjust to the appellant to make him stand trial again, while having due regard to the proper administration of justice. An example of that sort of

98 See, for example, *Washer v Western Australia* (2007) 243 CLR 492.

consideration may be found in the decision in *Director of Public Prosecutions (Nauru) v Fowler*, where the High Court observed:[99]

> The alleged misuse by the respondent of his position as a senior officer of the Phosphate Corporation might have been regarded as a reason in favour of granting a new trial, whereas, on the other hand, the facts that the respondent was no longer on the island of Nauru and that the offences were thought to warrant only one month's imprisonment and a small fine might have been thought to provide arguments to the contrary. These were matters that should have been weighed by the Supreme Court in deciding how its discretion should be exercised.

[126] It may be noticed that similar considerations arise here. On the one hand, the allegations involve an abuse of trust by the appellant in his role as a teacher. On the other hand, the appellant was sentenced to a total effective period of imprisonment for three months to be suspended after he had served two months, and he is no longer a teacher at the school or at all.

[127] In undertaking the same type of consideration in *R v Sams*, Hunt J observed:[100]

> The discretion which this Court has to exercise in determining whether or not to order a second trial is not so circumscribed [as when considering an application for a stay]. All of the circumstances must be looked at. I accept completely that the law required the appellant to face trial in April of last year despite the injustice which the law's delays had created. But I am unable to accept that he should be required to face a second trial, more than one year later, when the first trial miscarried through no fault of his. I do express surprise that the Crown Prosecutor did not support the appellant's application for a re-direction in relation to the prior inconsistent statement of the appellant's daughter — although there were a number of other problems with the trial as well, which it has not been necessary to

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99 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627.

100 *R v Sams* (1990) 46 A Crim R 468 at 474.

> deal with. But I do not reach my conclusion upon any basis that the blame for this further injustice can be laid at the Crown's door. It must regretfully be laid at the door of the criminal justice system generally.
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> I should refer also to the fact that the appellant has already spent almost 12 months in custody. That is not quite half of the minimum sentence as re-determined pursuant to the *Sentencing Act 1989* (NSW). There is, of course, an application for leave to appeal against severity, an appeal which in my view would have at least a substantial chance of success. The period spent by the appellant in custody is not itself reason to refuse to order a new trial in this case, but it is a matter which has to be taken into account.

[128] Again, similar considerations arise in the present circumstances. The events which are subject to counts 1 and 2 in the indictment are alleged to have taken place at some time between 23 July and 28 September 2012. For various reasons to do with the severance of the count involving a 2005 incident from the indictment, this matter did not proceed to trial until February 2016. Any retrial of the matter, if ordered, would not take place until some 18 months after the guilty verdicts were returned in the first trial on 4 March 2016, and approximately five years after the events in question. Fault for that is not to be attributed to either the appellant or the Crown. As with the circumstances under consideration in *Sams*, that delay is simply an incident of the operation of the criminal justice system in this case. It nevertheless operates in prejudice to the appellant's interests, and in a manner wont to give rise to injustice.

[129] As already recorded earlier in these reasons, the appellant was taken into custody on 15 March 2016 following sentence, and subsequently granted bail on 29 March 2016. He has already served two weeks in

gaol of what was to be a term of two months in respect of the offending. The court is also comfortably able to infer that the appellant has suffered a range of adverse consequences in the course of these proceedings, many of which will be irremediable regardless of the outcome of any retrial. The allegations themselves, and the ensuing guilty verdicts, have no doubt had a devastating impact on the appellant and his family. The cost of defending protracted criminal proceedings will no doubt have been substantial, and there is no real prospect that the appellant would be able to recover any of those monies. A retrial would no doubt extend, exacerbate and magnify those consequences, to a point where they might be seen to be disproportionate to the criminality of the conduct alleged even in the event that a guilty verdict was returned on a retrial.

[130] Finally, although the cogency of the Crown evidence is a threshold consideration in determining whether an order for retrial is appropriate in the circumstances, it is also a matter which may properly be taken into account in assessing whether the interests of justice militate in favour of an order for retrial. That is so even if on a *prima facie* assessment the evidence is theoretically capable of sustaining a guilty verdict. Two observations may be made in that respect.

[131] First, it would appear that the Crown's decision to prosecute these two counts was made on the basis that the case would be substantially bolstered by the admission of the tendency evidence described above

and concerning the earlier incident in 2005. For various reasons, the evidence concerning the 2005 incident was ruled inadmissible in the trial of these two counts. There would appear to have a concession by the Crown during the first *voir dire* hearing that were it not for the evidence of tendency arising from the 2005 incident it is unlikely that the conduct alleged in counts 1 and 2 would have been charged.[101] That concession, together with the finding made in this appeal concerning the tendency evidence, necessarily calls for a careful consideration of the appropriateness of ordering a retrial in these circumstances.

[132] Secondly, although a jury properly directed might conceivably infer that the appellant had a sexual motive or purpose, in order to do so it would need both to disbelieve the appellant without equivocation and to find positively and inferentially that the Crown had proved the motive or purpose beyond reasonable doubt. That involves a series of significant steps requiring a high degree of satisfaction.

[133] As already described, the provisions of the *Criminal Code* as they apply to the circumstances of this appeal appear to allow either an order for retrial or a judgment and verdict of acquittal to be entered. Having regard to the complex of factors detailed above, and the bases on which this appeal has been allowed, it is not readily apparent that an order for a new trial would be the most adequate remedy in the

101 Transcript of Proceedings, 11 May 2015, pp 16.

circumstances or that the interests of justice militate in favour of an order in those terms. We will hear the parties further in relation to the appropriate disposition in that respect.

Orders

[134] The following orders are made.

(a) Leave to appeal is granted in respect of the grounds identified at paragraphs 2(e) and (h) of the Second Amended Notice of Appeal.

(b) The appeal is allowed on the grounds identified at paragraphs 2(a) and (h) of the Second Amended Notice of Appeal.

(c) The findings of guilt in respect of counts 1 and 2 of the indictment dated 12 May 2015 are quashed, and we will hear the parties as to the appropriate disposition.
