HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S37 of 2021

Between:

Thomas Hofer
Appellant

and

The Queen
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The appellant's grounds of appeal raise two main questions:

   a. Was the majority (Fullerton and Fagan JJ) in the New South Wales Court of Criminal Appeal (CCA) (*Hofer v R* [2019] NSWCCA 244) correct in concluding that no miscarriage of justice was occasioned by the Crown Prosecutor's cross-examination of the appellant (the **impugned cross-examination**)?

   b. Was the majority in the CCA correct in concluding that there was no miscarriage of justice as a result of incompetence of counsel?

3. Two issues that emerge from these questions are as follows. *First,* what is the prejudicial effect on a trial of an allegation that an accused has recently fabricated his or her evidence on the basis that defence counsel has apparently not complied with the rule in *Browne v Dunn* (1893) 6 R 67 (***Browne v Dunn***)? *Secondly,* does such an effect depend upon an understanding by the tribunal of fact of the duty imposed by *Browne v Dunn*?

4. These two issues should be addressed by reference to the line of authority deriving from *R v Birks* (1990) 19 NSWLR 677 (***Birks***). This line of authority establishes that the "combination of errors" described by Gleeson CJ in *Birks* is, in significant part, concerned with a wrongful inference, which is made available to the jury, that the accused has fabricated evidence, drawn from the perceived fact of defence counsel's non-compliance with the 'duty' in *Browne v Dunn*, which is made explicit by the prosecutor, confirmed or not corrected by the trial judge, and not remedied by defence counsel.

5. The wrongful inference is *not* made available simply by an allegation of recent fabrication in connection with the failure by defence counsel to put a matter upon which the accused wishes to rely to a complainant or witness. That is an incomplete account of what was at issue in *Birks.* Rather, *Birks* is about a scenario in which a perceived failure by defence counsel to comply with the rule in *Browne v Dunn* is explained to be *probative* of the allegation of fabrication. In other words, *Birks* generally deals with a situation in which the purported significance, not just the fact, of non-compliance with *Browne v Dunn* is left to the tribunal of fact.

6. The significance of non-compliance with *Browne v Dunn* typically follows a reasoning process as follows. First, *Browne v Dunn* requires that "a cross-examiner put to an opponent's witness the matters in respect of which, or by reason of which, it is intended to contradict the witness' evidence": *Birks* at 686E. Secondly, in accordance with this duty, if defence counsel had been instructed about a matter upon which the accused sought to rely counsel would have put the matter to the complainant or other witness. Thirdly, if defence counsel did *not* put the matter it must follow that he or she was not instructed about the matter. Accordingly, this makes it more likely that the matter was fabricated. Absent a proper foundation, however (ie, one that establishes that instructions were not so given), such reasoning, if made available to a jury, can be unfair and unwarranted because there may be other explanations for why defence counsel would not put a matter other than not having been instructed about that matter.[1]

7. The appellant's statement of the issues in this appeal does not adequately capture this dimension of *Birks*. The appellant says that the appeal concerns a "persistent practice in criminal trial process; namely, cross-examination by a prosecutor of a defendant on purported inconsistencies of matter put (and importantly, not put) to prosecution witnesses in cross-examination by a defendant's trial counsel." The Crown Prosecutor is said to have improperly "cross-examined the appellant with regard to eight alleged instances of suggested non-compliance with the principles of *Browne v Dunn*" which "was plainly aimed at undermining the appellant's credibility, with the distinct implication that his evidence was a recent invention" (AS [5]).

8. The point of the CCA's judgment, however, is that the Crown Prosecutor did not,

[1] This is, in effect, the position taken by Fullerton J (CCA [115]-[116]: CAB 120) and Fagan J (CCA [203]-[204]: CAB 140). Even then, however, a question arises as to whether, in the circumstances of the case, the impugned cross-examination resulted in a miscarriage of justice because, for example, it took on an outsized significance in the trial.

effectually, cross-examine the accused with respect to alleged non-compliance with *Browne v Dunn.* The second and third premises (described at CCA [123]: CAB 122) respectively reflect the content of the duty imposed by *Browne v Dunn* and the expectation that counsel would act on that duty. It is the duty imposed by *Browne v Dunn*, and the belief that counsel would act upon that duty, that gives the allegation of fabrication based on a failure by defence counsel to put matters its prejudicial weight.

9. The appellant's case therefore depends in significant part on the acceptance by this Court that juries intuitively understand the inferences that may be drawn from a failure by defence counsel to put a matter, upon which the accused proposes to rely, to a complainant or other witness. Properly viewed, the appellant's approach necessarily imputes a degree of technical understanding of the advocate-client relationship – and of *Browne v Dunn* – that lay juries are generally not expected to have. This is what Fagan J meant when he said (at CCA [188]: CAB 137) that "*Birks* reasoning is not intuitive". Absent some explanation, juries would not be aware of, or reason upon (ie adversely to an accused), the duty imposed by *Browne v Dunn*.

10. The prejudicial effect of the impugned cross-examination of the accused in the present case falls to be assessed in the light of the fact that the probative significance of non-compliance with *Browne v Dunn* was, unlike in *Birks,* not explained to the jury. This absence of explanation – coupled with the fact that the allegations of fabrication were in part withdrawn and in part rebutted by the appellant in his replies to the impugned cross-examination, and largely related to peripheral matters, strongly support the Crown's position that the prejudicial impact of the impugned cross-examination on the trial was, at most, relatively marginal and did not result in a miscarriage of justice.

PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

11. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL CONTESTED FACTS

12. There are no material facts that are contested in the appeal.

PART V: ARGUMENT

Background

13. The appellant stood trial on an indictment alleging 11 counts of sexual intercourse without

consent. Counts 1-8 arose out of the appellant's meeting with the first complainant (**C1**) on 29 October 2014. Counts 9-11 related to the appellant's meeting with the second complainant (**C2**) the following evening. The jury convicted the appellant of Counts 2-7, 9 and 11 and found him not guilty of Counts 1 and 8. There was a directed verdict on Count 10 (as C2 did not give evidence of that act).

The Crown case: C1

14. C1 was a 23 year old American woman who had recently arrived in Australia on a working holiday visa (CCA [6]: CAB 97). She responded to the appellant's online advertisement for a flatmate in Glebe in inner Sydney, and agreed to meet him. The advertisement stated "1 room available", which C1 understood to mean a bedroom for her exclusive use, though she learned during the evening that the room was to be shared with the appellant. The appellant took C2 to two bars, where he bought her alcoholic drinks over approximately 3½ hours and encouraged her to drink them (CCA [134]-[135]: CAB 125). In the course of the evening, C1 sent a text message to a friend saying, "I feel weird with this guy. I want to come back to the hostel" (CCA [6]: CAB 97).

15. C1 reported feeling significantly intoxicated when she went to view the room. She described the appellant removing her dress and engaging in acts of sexual intercourse without her consent. C1 stated that she told the appellant, both before her dress was removed and thereafter, that she did not want to do anything. She also reported feeling incapable of responding properly at times, because of her level of intoxication, and because she was lapsing in and out of consciousness. At one point she went to the bathroom and sent a text message to her friend saying, "help" (CCA [137]-[138]: CAB 126). It was after C1 realised the appellant had not used a condom, and had been treated for chlamydia in the past, that she got dressed and left the house. The appellant hailed a taxi for C1 (CCA [8]: CAB 98).

16. The taxi driver Mr Ahmad gave evidence that C1 was crying and complained that the man was "taking advantage" of her and wanted to do "something like adult thing" (CCA [12]: CAB 98). When C1 arrived back at the hostel she was crying and upset. She complained to the manager Ms Haverkamp, who gave evidence that C1 said, "I think I just got raped" (CCA [13], [138]: CAB 98, 126). The following morning, C1 made a complaint to a police officer that the appellant "forced me" (CCA [14]: CAB 98) and she made a further complaint to Dr Pfeiffer during a forensic medical examination.

17. C1 was cross-examined extensively about her actions, including remaining with the appellant and accepting drinks, despite feeling uncomfortable with him; going to his house to inspect the room, after realising that it was to be shared with the appellant; and turning on music. C1 did not agree that she agreed to the appellant removing her dress, or that she said "yes" when the appellant asked about oral sex.

The Crown case: C2

18. C2 was 17 years old and had recently moved to Sydney from Queensland. She had been in a refuge and was staying temporarily with a friend. Like C1, she responded to the appellant's advertisement and agreed to meet him (CCA [15]: CAB 98). The appellant took C2 to two bars, bought her drinks and encouraged her to drink them. Early in the evening, the appellant told C2, "when you smile like that it makes me want to kiss you" and C2 replied, "Oh, I'm a lesbian, sorry, too bad" (CCA [16]: CAB 98). While they were at the second bar, C2 sent a message to a friend, Mr Mohamed, saying, "The guy is so weird I think he's getting me drunk so that he can … fuck me". CCTV footage from the second bar showed the appellant kissing C2. As they left the second bar to see the room, C2 was talking to Ms McKinnie, an Irish girl she had met there. Ms McKinnie gave evidence that C2 grabbed her hand and held onto her, however the appellant removed C2's fingers and pulled her away. This encounter was recorded by CCTV cameras (CCA [152]: CAB 128).

19. C2 gave evidence that she had never been as drunk as she was when she left the bar and could not walk properly. She said the appellant pushed her onto the bed, pulled down her pants and engaged in acts of sexual intercourse without her consent. Her evidence was that she said repeatedly, "No, I don't want to do this", and that the appellant held her and pushed her down (CCA [152]-[153]: CAB 128-129). At one point she sent a text message saying "help me" to a friend. During an act of penile/vaginal intercourse, C2 made or received a phone call from her friend Mr Mohamed, but she was unable to speak. Mr Mohamed gave evidence that he could hear mumbling, crying and heavy breathing noises. Later, C2 got dressed and the appellant walked her to a bus stop.

20. CCTV footage from the bus showed C2 and the appellant with their arms on each other as the bus arrived. C2 gave evidence that the appellant told her to kiss him goodbye and kissed her (CCA [20]: CAB 99). She got on the bus and waved and smiled at the appellant, which she said was a pretence because she was afraid and in shock (CCA [156]:

CAB 129). After the bus drove away, C2 started to cry inconsolably and pull at her clothing (CCA [157]: CAB 129). This behaviour, which was recorded on the CCTV footage from the bus, continued until she reached her destination in the city. When she got off the bus, she collapsed on the footpath. Mr Mohamed and another friend found her there, screaming "get him off me" and "he raped me" (CCA [27]: CAB 100). Mr Mohamed fetched a police officer, Constable Wallace, who found C2 crying hysterically and saying, "get him out, he's in me" and "he raped me". Constable Wallace described C2 trying to wash herself at the police station with boiling water. C2 made a further complaint when forensically examined by Dr Pfeiffer a couple of hours later. When police conducted an examination of the appellant's bedroom later that day, they found in the bed C2's acrylic fingernails, as well as one of her earrings.

21. C2 was cross-examined about her actions, including remaining with the appellant during the evening; laughing and smiling in the second bar despite him kissing her and touching her bottom and her concern that he may have been plying her with alcohol in order to have sex with her; and her actions at the bus stop. C2 denied removing her own top, getting on top of the appellant to have sex and offering to perform fellatio.

The appellant's evidence

22. The appellant gave evidence that at the time he was 47 years old, about 6 foot 3 inches tall and weighing 130kg (CCA [136]: CAB 125). He said he had consensual sexual activity with C1 and C2. With C1, he denied digital/anal intercourse (Count 1, of which he was acquitted) and penile/vaginal intercourse (Counts 6-7, as well as Count 8, of which he was acquitted). However he said he performed cunnilingus (Counts 3, 5) and placed his fingers in her vagina (Counts 2, 4). His evidence was that C1 expressly consented to the cunnilingus and removed her own dress (CCA [140]: CAB 126). He said C1 became very angry and left when he told her he had had chlamydia. With respect to C2, the appellant said C2 explicitly agreed to him performing cunnilingus. He said that afterwards C2 "crashed above me, grabbed the base of my penis and inserted … my penis into her vagina. She did not ask for my consent". C2 took a phone call while they were having sex. He then asked C2 to perform fellatio on him. She did so, and they then had penile/vaginal intercourse again and they both had an orgasm (CCA [158]: CAB 130). C2 left, saying she had to meet her friends and go home.

23. In cross-examination, the appellant indicated he did not believe chlamydia could be

transmitted by an infected person performing cunnilingus on an uninfected person. He was asked about matters about which he had given evidence that had not been raised with the Crown's witnesses in cross-examination. The cross-examination of the appellant began on Friday 29 April 2016 and continued on Tuesday 3 May 2016 (a juror having been unwell on Monday 2 May). The eight impugned areas of cross-examination were as follows. The impugned cross-examination on the first three areas took place on the first day of the cross-examination, the balance on the second day.

1. C1 had an orgasm during cunnilingus. The appellant gave this evidence in chief (T 453: AFM 249). In cross-examination, the appellant was asked whether he had heard it put to C1 in cross-examination, and he answered, "I can't recall big fat details of the question that was put to her or the answer that was put to her". A further question was objected to on the basis of relevance, and the evidence went no further (T 489: AFM 283). The Crown, in closing, when outlining the appellant's account of his dealings with C1, said, "The [appellant] then told us that he used his fingers while performing oral sex on her, that wasn't put to [C1] at any stage, and he also told us she might have had an orgasm, and that also is another detail that was never put to [C1] for her comment" (T 532-533: AFM 321-322) (CCA at [36]: CAB 106). The Crown did not otherwise refer to this evidence.

2. C2 stated she was bisexual, not that she was a lesbian. When the Crown put to the appellant that C2 had told him he was a lesbian, the appellant responded, "She told me that she was bisexual. There's a big difference between being a lesbian and being bisexual" (T 498.19: AFM 292). When asked whether he had heard that put to C2, the appellant initially responded, "I don't believe it has been put to her actually …" (T 498.31: AFM 292), and then, "I don't believe that has been put to her during the trial" (T 499.3: AFM 293). Later, he said, "She did not tell me at any stage she was a lesbian, and may be my barrister should have cross-examined her better" (T 503.1: AFM 297) (CCA [161]: CAB 131). This evidence was referred to briefly in the Crown's closing address (T 540.15: AFM 329), in the context of discussing C2's account of the evening, and her evidence that she told the appellant she was a lesbian to indicate she was not interested in him: "In that regard the [appellant] gave evidence that what [C2] told him was that she was bisexual. That was not a proposition, you might think, that was ever put to [C2] for her comment and I want to submit to you that you would accept [C2]'s evidence that she said to him that she was a lesbian, that she had a girlfriend, … and when you combine it

with the text messages that are in evidence … that [C2] sent to Ms Bogale about [C2] telling the [appellant] that she was her girlfriend … the Crown says that is powerful corroborative evidence that what [C2] told [the appellant] was that she was a lesbian, not that she was bisexual".

3. C2 used her tongue when they kissed. When asked in cross-examination whether C2's conduct suggested that what she was interested in doing at the second bar was dancing to the band, the appellant answered, "And kissing me and putting her tongue in my mouth". The appellant agreed that it had not been put to C2 that she had put her tongue in his mouth (T 499.30: AFM 293). Later, when it was put to the appellant that C2 gave no sign of sexual interest in him, the appellant again referred to C2 putting her tongue in his mouth, and he agreed that this was "the tongue kiss that was never, not once, put to [C2] for her to have the opportunity to comment on" (T 504.50: AFM 298). This evidence was not referred to in the Crown's closing address.

4. C2 performed fellatio on the appellant. The appellant gave this evidence in chief (T 469: AFM 263). When asked in cross-examination if he had heard that suggestion put to C2, he referred to having had a limited opportunity to brief his barrister (T 518.24: AFM 305). There were some further questions to the same effect, however a short time later the Crown acknowledged that defence counsel had in fact put that matter to C2 and apologised for his error (T 519.41: AFM 306). The Crown in closing did not refer to the impugned cross-examination, though the appellant's evidence that C2 performed fellatio on him was referred to in the context of considering the CCTV footage that showed the appellant pulling C2 away from Ms McKinnie outside the second bar (T 542.34: AFM 331).

5. The appellant asked C2 if he could ejaculate inside her. The appellant gave evidence of this in chief (T 470: AFM 264). When asked in cross-examination if he ever heard it suggested to C2 that he had asked if it was OK to come inside her, the appellant said, "That was not put to her by my barrister and again it should have been, and in front of my barrister is notes that I wrote on—" (T 519.20: AFM 306). The trial judge then requested a yes or no answer, and the appellant answered "no". The Crown did not refer to this impugned cross-examination in closing, though the appellant's evidence in this regard, like the fourth area above, was referred to in considering the CCTV footage of the appellant pulling C2 away from Ms McKinnie (T 542.36: AFM 331).

6. The appellant and C2 both had an orgasm. The appellant gave this evidence in chief (T 470: AFM 264), and again in a non-responsive answer in cross-examination (T 519.11: AFM 306). When asked if he had ever heard that suggestion put to C2 for her comment, the appellant answered "no" (T 519.36: AFM 306). When he was asked again, he agreed that he never heard any suggestion put to C2 that she had an orgasm, and denied that he was "essentially making your evidence up as you went along" (T 519.48: AFM 306). Like the fourth and fifth areas above, the impugned cross-examination was not referred to in the Crown's closing, but the appellant's evidence about the orgasm was raised in considering the CCTV footage of the appellant pulling C2 away from Ms McKinnie (T 542.37: AFM 331).

7. C2 was on the phone to her "unofficial boyfriend" while the appellant was having sexual intercourse with her. When asked in cross-examination about C2's demeanour on the CCTV footage after the bus pulled away, the appellant said, "she had been speaking with the person who was her non official boyfriend who had heard her breathing very heavily whilst we were having consensual sex" (T 523.48: AFM 310). The appellant agreed that he did not hear that put to C2 at any stage (T 524.2: AFM 311). He then denied "making things up as you go along" and "simply giving evidence and doing the best you can to meet what can be objectively proven by the Crown case". When asked again if the suggestion had been put to C2, the appellant said, "From her own words she stated that he was not her official boyfriend but she was indicating that there had been an effectual relationship, so it did not need to be – that did not need to be put to her by my barrister" and "A person's sexual history cannot be asked of them in court" (T 524.4: AFM 311). This evidence was not referred to in the Crown's closing address.

8. The police had coached the complainants as to their evidence. In cross-examination, the appellant stated his belief that there was "substantial coaching" of the complainants by police (T 520.23: AFM 307). When asked whether he heard those allegations put to police witnesses, he agreed that he understood he could have required the relevant officers for cross-examination, and said, "I did say that to my legal team and they thought it best not to and I'm reserving my right to take the New South Wales police force on in the Supreme Court" (T 521.33: AFM 308), before again agreeing he did not hear any questions put to witnesses about coaching (T 521.50: AFM 308). This evidence was not referred to in the Crown's closing address.

The closing addresses and summing up

24. The Crown closing address commenced at the conclusion of the appellant's cross-examination on 3 May 2016. The Crown submitted that the complainants' evidence was compelling and supported by powerful corroborative evidence, while the appellant's evidence was implausible, untruthful and should be rejected. It was submitted that the appellant's evidence of both complainants' enthusiastic consent to sexual intercourse with him did not have the ring of truth and was not consistent with CCTV footage of each complainant at the second bar. Further, it was submitted that the appellant's denial of penile/vaginal intercourse with C1 would be rejected as a lie, because the appellant's account of how both he and C1 reacted during the discussion about chlamydia makes no sense if he had only performed cunnilingus on her.

25. The defence closing address commenced after the Crown address and concluded the following day. The appellant's counsel made no comment about the impugned cross-examination, nor were submissions made as to why the jury would accept the appellant's evidence. Instead, counsel focussed on the complainants' evidence and emphasised those aspects of their conduct, either admitted or established by independent evidence, that could have communicated to the appellant a sexual interest in him.

26. The summing up commenced after the defence closing address, and concluded the following day. The jury were given a *Liberato* direction to the effect that they did not have to believe the appellant was telling the truth in order for him to be entitled to a verdict of not guilty (SU 9-10: CAB 19-20). On the second day, the trial judge summarised the addresses, assisted by written outlines provided by counsel (MFI 19 and 20). The trial judge told the jury, "The Crown submitted to you that Mr Hofer's account of what happened inside his room is implausible and should be rejected" and referred to the submissions made, including the submission about the chlamydia discussion (SU 35: CAB 45). There was no reference to recent invention. No direction was given or sought in relation to the impugned questioning.

The hearing in the Court of Criminal Appeal

27. Trial counsel gave evidence in the appeal hearing, confirming that he had instructions on the matters contained in the impugned cross-examination. The reasons he gave for not cross-examining the complainants about those matters were that they were potentially embarrassing for the witness, risked setting the jury against the appellant, and were in

some cases were offensive and irrelevant to the defence of consent (CCA hearing T56.22: AFM 511). While counsel did not offer an explanation for not addressing the impugned cross-examination, he indicated his assessment of the importance of those matters was informed by his emphasis on consent and the appellant's perceptions (CCA hearing T61.25: AFM 516).

28. The majority in the CCA concluded that there was no miscarriage of justice, but that if there was, they would apply the proviso. The minority (Macfarlan JA) disagreed, finding that there was a miscarriage and that the proviso was not available.

Ground 1: The trial miscarried as a result of the Crown Prosecutor asking impermissible questions and making improper comments when cross-examining the appellant

29. In the respondent's submission, a miscarriage of justice would not be expected to result simply from a cross-examination that alleges that an accused is lying in proximity to an observation that the accused's counsel did not put a matter upon which he or she relies to a complainant or other witness. What is needed to give such cross-examination its unfairly prejudicial force is some explication, before the jury, of why defence counsel's failure to put matters is probative of the allegation. The allegation needs to be given context and significance in the trial, by, for example, being taken up and expanded upon in the closing addresses or summing up. Because cross-examination along these lines creates the potential for an allegation to be given such context and significance, it may be undesirable, but without context and significance the allegation is, in effect, inchoate and cannot be understood as introducing a wrongful inference into the jury's decision-making.

30. Ground 1 is in effect an attack on the "three premises" formulated by Fagan J in the CCA in explanation of the reasoning in *Birks* and which informed the determination of the appeal. Those premises were, in summary, that: (1) the matter was not put to the Crown witness; (2) defence counsel had a duty to put to the witness in cross-examination all matters in respect of which instructions had been provided by the accused; and (3) that counsel fulfilled that duty (CCA [123]: CAB [122]). The inference to be derived by the jury, reasoning on these premises, is that "defence counsel must have had no instructions as to [the evidence] when conducting his cross-examination; therefore the accused must have fabricated his evidence on the matter after questioning of the Crown witness had concluded" (CCA [123]: CAB 122). Premises 2 and 3 clearly relate to counsel's duty under *Browne v Dunn.*

31. An understanding, by the jury, of the duty imposed upon counsel by *Browne v Dunn* is what relevantly gives an allegation of fabrication its prejudicial weight. The existence of the duty is the foundation for a wrongful inference that the accused did not refer to the matter in his or her instructions to counsel and therefore, during questioning, fabricated the matter in issue. The relevant inference is as follows: if the accused had instructed counsel of the matter, counsel would have put it to the complainant or other witness. Because the matter was not put, it can be inferred that the accused did not instruct counsel of that matter and that the matter was therefore fabricated.

32. That inference is wrongful because a perceived failure to comply with *Browne v Dunn* is not necessarily probative of the conclusion that the accused has fabricated the evidence. *Browne v Dunn* is an incomplete statement of the duties of counsel in a criminal trial. There are many other reasons (ie, beyond not having been so instructed) why an accused's counsel may not put a matter about which he or she has been instructed to a complainant or other witness. Therefore, reasoning on the basis that there exists this duty does not, without more, rationally advance the case for the appellant's guilt.

33. When this wrongful inference (see at [31]-[32] above) is made known to the tribunal of fact, and is not remedied, it can result in a miscarriage of justice. In *Birks*, "Gleeson CJ emphasised that the miscarriage of justice … resulted from a combination of factors, all revolving around counsel's failure to cross-examine the complainant. These included the conduct of the trial by counsel for the defence and the prosecution, and the directions of the trial judge": *R v Abdallah* (2001) 127 A Crim R 46 (***Abdallah***) at [29] per Sheller JA.

34. Further, as Gleeson CJ stated in *Nudd v R* (2006) 80 ALJR 614 (***Nudd***) at [18]-[20], quoting *Strickland v Washington* 466 US 668 at 687 (1984), "[i]t is important to note the significance of the *combination* of the errors, for [*Birks*] provides a good example of a failure of the trial process, or what O'Connor J called 'a breakdown in the adversary process'" (emphasis added). What is relevant are the "consequences that flowed" from the cross-examination: see *Birks* at 686.

35. The appellant is therefore wrong to say that Fagan J's three premises "represent[] a misunderstanding" of *Birks* (at AS [46]) and that "it is incorrect to say that a jury could usually only draw an adverse inference when the three features described by Fagan J had been established". The appellant further says (at AS [47]) that "ordinarily the third and second 'legs' [or premises] could never be put to an accused during cross-examination, because to do so would imply that an accused had a prior knowledge of the intricacies of

criminal procedure." The second and third premises were in fact put in *Birks*, but to the extent that the appellant's contention is true it is why the explanation of the rule in *Browne v Dunn* in closing address or summing up is often critical in the *Birks* line of authority.

36. The real thrust of the appellant's argument is apparent from AS [49]: the CCA is said to have erred "in concluding that the jury would not have appreciated the significance of the failure of the appellant's trial counsel to raise the issues with the two complainants." This submission should be rejected. Fagan J was right to observe that "*Birks* reasoning is not intuitive" (CCA at [188]: CAB 137) because it involves a degree of technical understanding about the rule in *Browne v Dunn* that must be explained to the tribunal of fact. This proposition may be demonstrated with reference to the authorities upon which the appellant relies. *Nudd* is one such example. The circumstances of that case were explained by Gleeson CJ (at [18]) relevantly as follows:

> "the prosecutor told the jury about the rule in *Browne v Dunn*, and invited the jury to infer, from counsel's failure to put it in cross-examination to the complainant, that the explanation … had previously been unknown to the accused's lawyers, and was fabricated by the accused in the witness box. The trial judge took the matter even further. He told the jury they could infer, both from counsel's failure to put the innocent explanation of the [matter] to the complainant in cross-examination at the trial, and from an earlier failure to raise the matter in cross-examination at the committal proceedings, that the accused had not instructed his lawyers about the incident … but had made it up in the witness box."

37. A similar issue arose in *RWB v R* (2010) 202 A Crim R 209 at [65]-[66], where the trial judge explained counsel's duty in detail and so "deflected from the course of the review of the Crown submissions to add his own endorsement, giving it the weight of judicial authority."

38. In *Birks,* it was repeatedly and explicitly put to the accused in cross-examination that counsel had a duty to put "their client's instructions to the appropriate witness" and the fact that the matter in question had not been put served to establish that the accused was lying: see eg *Birks* at 696F-G, 697A-G. As Lusher AJ explained, the Crown "saw fit to cross-examine the accused and to obtain his acquiescence as to counsel's duties in a trial … it is an altogether different matter to put to an accused the detail of the complexities of a *Browne v Dunn* situation and to his counsel's duties": *Birks* at 702G. This line of cross-examination left it "open to the jury to conclude that the accused could and should have controlled counsel, and he did not do so because he had misled him": at 703A.

39. The point may be further illustrated with reference to *R v Manunta* (1989) 54 SASR 17 (***Manunta***) and *Abdallah*. In both cases, the significance of counsel's duty was not only explained but emphasized to the jury, and in both cases alternative explanations for why the accused's counsel did not put a matter to a witness or complainant were ignored. In *Manunta*, the point of appeal was relevantly that "the learned trial judge erred in directions which he gave to the jury as to inferences which might be drawn from the failure of counsel for the defence to cross-examine the police witnesses as to certain matters": at 20. The directions included an explanation of the significance of *Browne v Dunn* to the jury's reasoning*:* see *Manunta* at 20-22.

10 40. *Abdallah* was similarly a decision in which "the crucial issue" was whether "the direction given by the trial judge was appropriate": at [16]. An inconsistency had arisen between statements made by defence counsel and evidence given by the accused. The trial judge commented to the jury that "competent Queen's counsel … would open a case on what he expected the accused to say based according to what instructions counsel had received from the accused" and explained the Crown's submission as being that "this inconsistency between what counsel expected the accused to say and what the accused did in fact say was not due to any incompetence on [counsel's] part, but to the fact that the accused could not get his story straight in relation to his knowledge of, or involvement with, the [matter]."

20 41. The risk identified in both *Manunta* and *Abdallah* was that by virtue of the directions given the jury would not consider the alternative explanations for why defence counsel had not put the matter. As King CJ explained in *Manunta* at 23*,* "there may be many explanations of the omission which do not reflect on the credibility of the witnesses." When "prominence" is given to such matters in summing up, alternative explanations must be given because "[j]urors are not familiar with the course of trial or preparation for trial and such considerations may not enter spontaneously into their minds." Similarly, in *Abdallah* Sheller JA explained, at [27], that alternative explanations must be given for the conduct of defence counsel relevantly said to support an allegation of fabrication but that "[t]he comment of the trial judge … allowed for no such possibility."

30 42. A similar combination of errors tending to establish and reinforce the wrongful inference (ie, wrongful in the sense that it is not properly available on the facts) is apparent from *R v Dennis* [1999] NSWCCA 23 (***Dennis***). In *Dennis,* the Crown prosecutor put explicitly to the accused that his counsel had not questioned the version of events given by a witness

even though counsel would have been given instructions about the accused's version of events: see [28]. The wrongful inference was reinforced by the trial judge, who explained counsel's duty under *Browne v Dunn* in detail in his summing up and stated precisely the nature of the inference: see [29].

43. The respondent's submission is not that counsel's duty must invariably be squarely put before the jury (whether by the prosecutor, trial judge or defence counsel) in order for a miscarriage of justice to result. What is significant is that the jury understand why it is said the fact that counsel did not put a matter to a complainant or other witness is probative of fabrication. Other impermissible uses can be made of an allegation of fabrication. In *Picker v R* [2002] NSWCCA 78, the Crown engaged in a "florid" closing address in which the appellant's evidence was described as "the best fantasy novel ever written" and as a "flight of fantasy." As the Court (Smart AJ, Beazley JA and Bell J agreeing) described, "[t]he address thus emphasised the fact of fabrication by the appellant and it covered the matters about which the appellant gave evidence and the complainant was not cross-examined": at [46].

44. At AS [38], the appellant relies upon *Llewellyn v R* [2011] NSWCCA 66 (***Llewellyn***) at [137(d)] for Garling J's proposition that, "[e]xcept in the rarest of cases and only where a proper basis exists, cross-examination of the accused in this manner is highly and unfairly prejudicial to the accused, with the potential to undermine the requirements of a fair trial." However, Garling J's proposition and his reference to "only in the rarest of cases" was the subject of subsequent disagreement in *Lysle v R* [2012] NSWCCA 20 at [41], see generally [40]-[44]; see also *R v Orchard* [2013] NSWCCA 342 at [43]-[44]. In any case, the respondent notes that this proposition recognises only the "potential" of such cross-examination to be unfair, and, as the plurality judgment in *Llewellyn* made clear, what was critical in that case was that the jury had itself raised a series of questions with the trial judge that required the court to address the issue of counsel's duties: see eg *Llewellyn* at [88]-[98] per Hall J (McClellan CJ at CL agreeing).

The CCA's decision

45. The CCA's judgment, and Fagan J's 'three premises', should be understood as faithful to the principles and authorities discussed above. What Fagan J sought to illustrate is that it would not ordinarily be enough – and was not enough in this case – to establish that a miscarriage of justice had occurred if the jury were left to reason only upon premise (1) (referred to at [30] above). That is because premises (2) and (3), which deal with the rule

in *Browne v Dunn,* were not communicated to the tribunal of fact.

46. Justice Fagan's reasoning may be equally encapsulated in his Honour's observation at CCA [130]: CAB 124 that:

> "the questioning impugned … was only a fragment of what would have been required to convey to the jury an implication of recent invention. It was inconclusive and ineffectual. It was not followed, either in the Crown address or in the summing up, by any invitation by the jury to reason that because matters were not put to Crown witnesses therefore the accused must have fabricated them. *No path of reasoning toward such an inference was articulated, at any stage of the trial.*" (Emphasis added).

47. The appellant says against this that the impugned cross-examination was "plainly aimed at undermining the appellant's credibility" (AS [33]). However, as Fagan J explained (at CCA [187]-[188]: CAB 137), it did not matter what the Crown intended if its cross-examination was based upon "an unfounded assumption about how the jury would have perceived the questioning in the absence of instruction about the fundamental premises and path of reasoning that are involved in a *Birks* comment upon credit. … *Birks* reasoning is not intuitive". Another way of putting this is that, because the jury were not instructed as to counsel's duty or the rule in *Browne v Dunn*, they would not be taken to have understood the significance of the impugned cross-examination in a way that would have meaningfully affected their reasoning.

48. The appellant is also wrong to suggest that the effect of the CCA's decision is that all three premises must be established in cross-examination (cf AS [22]-[23], [46]-[47]). Fagan J explicitly referred to the possibility of some aspects of the reasoning process being conveyed subsequently during the final address and/or summing up (CCA [124]: CAB 122), and to the need, where the cross-examination has addressed only one premise, for the other premises to be "presented to the jury at some point" (CCA [162]: CAB 131), or "suggested to the jury" by the Crown or the trial judge (CCA [194]: CAB 138).

49. The appellant also places significant reliance (at AS [50]) upon the fact that at two instances the Crown Prosecutor questioned whether the appellant was fabricating his evidence. At CCA [47]: CAB 108, these questions were relied upon by Macfarlan JA in his Honour's dissenting conclusion that the appellant had suffered significant prejudice. But the questions alleging fabrication need to be considered in their context in order to appreciate the effect they would have had upon the jury.

50. Here, the allegations were promptly rebutted by the appellant (CCA [176]-[177]: CAB

133-134) and CCA [182]-[183]: CAB 136), and were not returned to during the Crown's closing address (or commented upon by the trial judge in the summing up) (CCA [178], [183] and [185]: CAB 134). Moreover, the appellant repeatedly asserted or implied that he had instructed his counsel about the evidence (see CCA [167], [176]-[177], [180]: CAB 132, 133-134, 135). At CCA [177], Fagan J observed of one such exchange about fabrication that:

> "[t]he Crown did not during the question or in address challenge the [appellant]'s imputation of blame to his barrister. The concluding suggestion that the [appellant] was fabricating had no logical force without both an explanation to the jury that counsel was obliged to put to C2 any matters upon which the [appellant] had instructed him and a rebuttal of the [appellant]'s attribution of fault to counsel."

51. The majority therefore approached their analysis of the impugned questioning with the understanding that, absent some detail about counsel's duty or *Browne v Dunn* in the prosecutor's closing address or the judge's summing up, the jury would have taken due consideration of the responses the appellant gave to these questions and would not have made the logical connection the appellant asserts the Crown sought to draw between the failure by the appellant's counsel to relevantly question the witness and the fabrication of the evidence by the appellant. The majority's analysis of the impugned questioning had appropriate regard to whether "the point [was] legitimately open for the consideration of the jury": *Manunta* at 23.

The effect of the impugned cross-examination and answers

52. At no time was the content of the duty in *Browne v Dunn* explained to the jury. Furthermore, no explanation was given to the jury as to why defence counsel's failures to put the specified matters to C1 and C2 was probative of fabrication. Because there was no relevant follow-up in the closing address (in the sense of any explanation of *Browne v Dunn* or the significance of the impugned questioning) or summing up, what was left open for the consideration of the jury was to be ascertained wholly with reference to the impugned questioning and the answers given by the appellant. The answers are significant in considering the appellant's submissions that the questioning was unfair (cf AS [40], [42]).

53. The majority's analysis of the impugned questioning and their conclusion that it did not give rise to a miscarriage of justice was correct.

54. With respect to the first area of impugned cross-examination (as to C1 having an orgasm

during cunnilingus), the evidence "was immaterial to any issue in the case. At best, it was peripheral" (CCA [148]: CAB 128).[2] Moreover, the questioning had "no effect whatsoever" because the "[appellant] did not concede that the relevant matter had not been put to C1": CCA [144]: CAB 127.

55. Regarding the second and third areas (as to C2 saying she was bisexual and using her tongue in kissing), the questioning similarly "went nowhere" because, in each instance, it did not go beyond establishing that the question had not been asked of C2: CCA [162], [170]: CAB 131, 132. Further as to the second area, the submission in the Crown's closing address was about accepting C2's evidence as to what she had said to the appellant, because it was corroborated by a text message, not about recent invention on the appellant's behalf: CCA [162]-[164]: CAB 131.

56. As to the fourth area (C2 performing fellatio on the appellant), any potentially prejudicial effect was neutralised by the Crown's retraction and apology: CCA [174]: CAB 133. Further as to the second and fourth areas, and also the eighth area (police coaching the complainants), the Crown took no issue with the appellant's deflection of responsibility to his counsel: CCA [162], [174], [180]: CAB 131, 133, 135.

57. With respect to the fifth and sixth areas (asking C2 if he could ejaculate inside her and both having an orgasm), the appellant's attribution of blame to defence counsel as to the ejaculation evidence, combined with his denial of fabrication and the lack of explanation by the Crown as to why fabrication should be imputed was found by Fagan J to sap the allegation of fabrication of "logical force": CCA [176]-[177]: CAB 131, 133, 135.

58. Regarding the seventh area (C2 being on the phone to her "unofficial boyfriend"), Justice Fagan found that "if anything was implied to the jury by this passage it would only have been that the [appellant] responded to the Crown reasonably, with a sensible answer correcting the Crown's misapprehension" (CCA [182]-[183]: CAB 136).

The proviso

59. If this Court apprehends in the majority's analysis a departure from *Birks,* the respondent submits that it has not been shown to be incorrect in its application of the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) (CCA [189]: CAB 137).

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[2] Unless otherwise indicated, the CCA references in this section are to the reasons for judgment of Fagan J, with whom Fullerton J relevantly agreed: CCA [103].

60. The critical issue in this trial was whether the appellant was aware (or reckless) that each complainant was not consenting. The element of "lack of consent … was not in dispute on defence counsel's address and was established beyond reasonable doubt by the evidence of C1 and C2. Both were thoroughly corroborated by contemporaneous text messages and immediate complaint" (CCA [191]: CAB 138). The appellant's evidence that each complainant expressly agreed to certain of the sexual acts "was compellingly contradicted by [the evidence of] C1 and C2 and was irreconcilable with the manifest and extreme distress of each of them in the immediate aftermath" (CCA [191]: CAB 138).

61. As is made clear at [52]-[58] above, the impugned cross-examination generally dealt with peripheral issues, in contrast for example to the centrality of the matters complained of in *Picker* (CCA at [198]-[200]: CAB 139). Because the duty in *Browne v Dunn* was not explained by the Crown or the trial judge, any prejudicial effect of the impugned cross-examination was defused. Any prejudice created by the allegations of fabrication was further defused by the appellant's responses.

Ground 2: The trial miscarried on account of incompetence of appellant's counsel

62. Properly viewed, Ground 2 stands or falls on the answer given to Ground 1. If the cross-examination was not prejudicial in the sense asserted by the appellant, then no miscarriage can result from the asserted failure by trial counsel to remedy the situation.

63. No complaint is made, as in *Birks*, of incompetence in failing to comply with the requirements of *Browne v Dunn*. As Macfarlan JA recognised, there were legitimate forensic reasons for the appellant's counsel not to cross-examine on the relevant matters (CCA [45]: CAB 108). Defence counsel's error is instead said to be a failure to correct the allegations made by the Crown (AS [61]).

64. As Macfarlan JA explained in his Honour's dissent, *Birks* stands for the proposition that "as a general rule an accused is bound by the conduct of his or her counsel at trial and incompetence of that counsel is not a ground for setting aside a conviction" and that the "critical question … is whether there has been a miscarriage of justice" (CCA [93]: CAB 117). That view of *Birks* is undoubtedly correct. It "is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence": *Birks* at 685; see also *TKWJ v The Queen* (2002) 212 CLR 124 (***TKWJ***) at [79] (McHugh J).

65. To establish that defence counsel's incompetence has produced a miscarriage of justice,

two issues must be addressed: "First, did counsel's conduct result in a material irregularity in the trial? Secondly, is there a significant possibility that the irregularity affected the outcome?" (*TKWJ* at [79]-[80]). In the respondent's submission, neither condition is met because, consistently with the respondent's argument advanced in respect of Ground 1, the allegations by the Crown Prosecutor were ineffectual and not sufficient to communicate the wrongful inference that was of concern in *Birks.*

66. Unlike *Birks,* in which the matter not cross-examined on "was not only of importance in relation to the events leading up to the sexual assaults, [but] went to the whole issue in relation to the first charge" (at 685), the impugned cross-examination in the present case was on issues so peripheral to the core issue of whether the appellant was aware that the complainants had not consented that any failure by defence counsel could not have resulted in a material irregularity which affected the outcome of the trial.

67. Defence counsel's lack of response to the impugned cross-examination was consistent with the way the appellant's case was run, which was not seriously to challenge the complainants' lack of consent but to establish circumstances from which a reasonable belief as to consent in the appellant could be inferred. Any action taken would have highlighted aspects of the appellant's evidence that were likely to be unattractive to the jury and yet were peripheral to the question of the appellant's knowledge. Doing nothing in that context was a legitimate forensic choice and does not amount to incompetence (CCA at [118], [139]: CAB 121, 126).

68. The appeal should be dismissed.

PART VII: ESTIMATE

69. The Respondent estimates it will require not more than two hours for its oral argument.

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