Supreme Court of Queensland - Court of Appeal

R v Kovacs [2008] QCA 417 (23 December 2008)

Last Updated: 15 September 2009

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kovacs* [2008] QCA 417
PARTIES:	**R**
	v
	KOVACS, Melita
	(appellant)
	R
	v
	KOVACS, Zoltan
	(appellant)
FILE NO/S:	CA No 378 of 2007
	CA No 379 of 2007
	SC No 2 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	23 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2008
JUDGES:	de Jersey CJ, Muir and Fraser JJA
	Separate reasons for judgment of each member of the Court,

each concurring as to the orders made

ORDERS: **1. Appeals allowed**
2. Verdicts of guilty on counts 2, 3, 5 and 6 set aside
3. Retrials ordered

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellants appeal against their convictions for intentionally possessing a slave (counts two and five) and intentionally using a slave (counts three and six) – where the appellants are husband and wife – where the appellants brought the complainant to Australia from the Philippines to work and live with the appellants – whether the primary judge misdirected the jury as to the elements constituting the offence of slavery under s 270.3(1) *Criminal Code* 1995 (Cth)
CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the primary judge directed the jury that it was necessary to find that the appellants "intentionally possessed" or "intentionally held" the complainant – where the primary judge gave general directions as to the nature of circumstantial evidence – whether the primary judge failed to give adequate directions to the jury in relation to the fault element necessary to prove an offence of slavery under s 270.3(1) *Criminal Code* 1995 (Cth)
CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellants were convicted of intentionally possessing and using a slave between 27 August 2002 and 5 February 2003 – where the offence of slavery can be constituted by a course of conduct over a period of time – whether there had to be unanimity as to the facts from which the jury derived their conclusion in relation to the appellants' guilt – whether the primary judge erred in directing the jury that to find the appellants guilty they did not have to be satisfied that the complainant was in the condition of slavery for the duration of the period charged
CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellants brought the complainant to Australia from the Philippines to work and live with the appellants – where the complainant was given her own room and was not prevented from leaving the appellants' store or house – where monies were being paid directly to the complainant's family in the Philippines – where the complainant attempted to escape unsuccessfully – where there was evidence which detracted

from the strength of the prosecution case – whether, on the

from the strength of the prosecution case – whether, on the whole of the evidence, it was open to the jury to be satisfied beyond a reasonable doubt of the appellant, Melita Kovacs' guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL FO SEVERAL PERSONS – where the appellant's were tried together – where there were allegations of rape against the appellant, Zoltan Kovacs only – where the evidence admissible against Zoltan Kovacs but inadmissible against Melita Kovacs was discreet and severable – whether the primary judge erred in failing to order separate trials

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where a witness at trial gave evidence of complaints made by the complainant of sexual abuse by the appellant Zoltan Kovacs – where evidence of recent complaint is admissible as an exception to the exclusion of hearsay and self-serving statements – where some of the witness's evidence was in the nature of inadmissible general complaint and did not relate to the appellant's sexual conduct – where defence counsel failed to object to the evidence – where the primary judge gave directions as to the use which could be made of the evidence of sexual complaint – whether the primary judge erred in failing to give a direction to the jury as to what use could be made of the more general complaint evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellants' daughter gave evidence at trial – where pursuant to s 21A(2)(a) *Evidence Act* 1977 (Qld) the primary judge directed that a screen be placed so as to obscure the view between the daughter and the appellant Zoltan Kovacs – where the judge in these circumstances must instruct the jury in accordance with s 21A(8) *Evidence Act* 1977 (Qld) – where the direction did not address the probative value of the evidence or the weight to be given to it as required under s 21A(8) *Evidence Act* 1977 (Qld) – where defence counsel did not object to the direction – whether the primary judge erred in failing to direct to the jury as required by s 21A(8) *Evidence Act* 1977 (Qld) constituting an error of law

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where there were material inconsistencies in the evidence of the complainant and other important witnesses – where there were significant challenges to the credit of some witnesses – where there was also other evidence which substantially weakened the prosecution case – whether this is an appropriate case for the application of the proviso pursuant to s 668E(1A) *Criminal Code* 1899 (Qld)

Criminal Code 1899 (Qld), s 668E(1A)

Criminal Code 1995 (Cth), s 4.1(2), s 5.2(1), s 270.3

Evidence Act 1977 (Qld), s 21A(8)

Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, cited

Britton v Commissioner for Road Transport (1947) 47 SR (NSW) 249, cited

Crampton v The Queen (2000) 206 CLR 161; [2000] HCA 60, considered

Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, applied

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, applied

KBT v The Queen (1997) 191 CLR 417; [1997] HCA 54, considered

Kilby v The Queen (1973) 129 CLR 460; [1973] HCA 30, considered

Nominal Defendant v Clements (1960) 104 CLR 476; [1960] HCA 39, considered

R v Davidson [2000] QCA 39, applied

R v Dunrobin [2008] QCA 116, cited

R v Jarvis & Anor [1991] Crim LR 374, considered

R v King (1995) 78 A Crim R 53; [1995] QCA 48, cited

R v Osborne [1905] 1 KB 551, considered

R v MBE [2008] QCA 381, considered

R v Michael [2008] QCA 33, applied

R v Tang (2008) 82 ALJR 1334; [2008] HCA 39, considered

R v Wei Tang [2007] 16 VR 454; [2007] VSCA 134, cited

R v Zorad (1990) 19 NSWLR 91, cited

Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited

Suresh v The Queen (1998) 73 ALJR 769; [1998] HCA 23, considered

The Commonwealth v Cleary (1898) 172 Mass 175, considered

COUNSEL: D C Shepherd for the appellant, Melita Kovacs

G P Lynham for the appellant, Zoltan Kovacs

W J Abraham QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellants

Director of Public Prosecutions (Commonwealth) for the respondent

[1] de JERSEY CJ: I have had the advantage of reading the reasons for judgment of Muir JA, with which I agree. I agree with the orders proposed by His Honour.

[2] MUIR JA: After a trial in the Supreme Court the appellant, Melita Kovacs, was convicted of the following offences:

(a) Arranging a marriage between G, the complainant, and Balint Olasz for the purpose of assisting the complainant to get a stay visa; (count 4)

(b) Between 27 August 2002 and 5 February 2003, at Weipa, intentionally possessing a slave, namely the complainant; (count 5)

(c) Between 27 August 2002 and 5 February 2003, at Weipa, intentionally exercising over a slave, namely the complainant, a power attaching to the right of ownership, namely the power to use. (count 6)

[3] She was sentenced on count 4 to one years imprisonment and to four years imprisonment for each of counts 5 and 6. The sentences were to be served concurrently and a non parole period of 18 months was fixed.

[4] The appellant, Zoltan Kovacs, who was tried at the same time as his wife Melita Kovacs, was convicted and sentenced as follows: arranging a marriage (count 1) – one years imprisonment; possessing a slave (count 2) – eight years imprisonment; using a slave (count 3) – eight years imprisonment. The sentences were to be served concurrently and a non-parole period of three years and nine months was fixed.

[5] Mrs Kovacs appealed against her convictions on counts 5 and 6 on four grounds. On the hearing of the appeal leave was given to amend the notice of appeal by abandoning those grounds and substituting the grounds discussed below.

[6] Mr Kovacs appealed against his convictions on counts 2 and 3. He also abandoned many of the grounds in his notice of appeal and relied only on the three grounds referred to below. They are discussed after consideration of the grounds relied on by Mrs Kovacs. Before going to the grounds of appeal it will be useful to summarise briefly the evidence led by the prosecution. The defence did not adduce any evidence.

Evidence concerning the circumstances of the complainant's coming to Australia and her treatment whilst in Australia.

[7] Evidence was led on the trial, which it was open for the jury to accept, to the following effect. The

appellants, husband and wife, had a shop in Napranum near Weipa. They planned to bring a Filipino woman to Australia with a view to having her work in the shop and provide them with domestic services in their home. Mr Kovacs proposed that he and a friend, Mr Olasz, would travel to the Philippines and identify a suitable woman. Part of the proposal was that Mr Olasz, an Australian citizen, would marry the person selected so as to entitle her to a permit to enter Australia. After a failed attempt to implement the plan, Mrs Kovacs approached a woman whom she knew in the Philippines to identify a suitable person. The woman suggested her niece, the complainant, who was working with her aunt in a sewing factory and earning a little over $10 a week. She was then 25 years of age and living in Manila with nine other family members in a one room, galvanised iron shack with no electricity, running water or telephone. The complainant was unmarried and had a son who was ill. The complainant's mother, who was also in poor health, when approached by the appellants about their obtaining the complainant's services, encouraged the complainant to go to Australia with the appellants so that the family could be helped financially.

[8] The appellants told the complainant that she would be doing domestic work in Australia for which she would be paid $800. She made the assumption that this amount would be paid monthly. The complainant was informed that she would not receive the full amount of her wage as some money would be deducted to cover expenses incurred in bringing her to Australia. Mr Kovacs told the complainant that she would have to work for five years before she could leave Australia. She was not told the amount of the alleged expenses, or that in addition to working in a shop, she would be required to provide domestic services.

[9] The complainant received no regular wage. The only payments received by her from the appellants were those referred to later, a payment of $400 and another of $60. The complainant gave Mr Kovacs $350 of the $400 sum to take to her family in the Philippines. The complainant admitted also that about 7000 pesos (approximately $180) had been given to her family in the Philippines by the appellants and that the appellants had paid for her son's medication. She was unable to say what other money may have been sent by the appellants to her family. The complainant was told that she would need to marry a white Australian man in order to assist in obtaining a visa, but that the marriage would be fake.

[10] The complainant and Mr Olasz, an Australian national, were married in the Philippines on 8 January 2001. Mr Olasz returned to Australia in February 2001, after which there was no communication between him and the complainant until September 2001 when Mr Olasz returned to the Philippines with a view to obtaining the complainant's visa. On 28 August 2002, the complainant arrived in Cairns where she was met at the airport by Mr Kovacs. He took her to a motel where, in the course of the next few days, he raped her on three occasions. She was then driven to Weipa by Mr Kovacs where she was put to work in the shop and in the appellants' house. Her working hours in the shop were from 6 am to 6 pm Monday to Friday and from 6 am to noon on Saturdays. Normally, after finishing work at the shop the complainant did domestic work until between 10 pm and 11 pm each night. She had no work-free days allocated to her.

[11] Mr Kovacs had sexual intercourse with the complainant at the shop two to three mornings a week before the arrival at work of another employee, Ms Kris. On some of these occasions he gave her twenty or thirty dollars, which he described as "pocket money". He also sexually assaulted her in the house when his wife was absent. The complainant made no complaint because her mother was sick and she did not want her to worry. Also, Mr Kovacs had told her not to say anything to the police because, if she did, they would all go to jail.

[12] In October 2002 the complainant attempted to escape from the appellants. She caught a taxi to the home of Ms Kris, who was the only person in the area known to the complainant, apart from the

Kovacs.

[13] The appellants located the complainant and forcibly took her back to their house in their car. Her passport was taken from her and kept by the appellants. At Christmas 2002, the Kovacs' estranged daughter, Ms Fabian, visited the appellants' home during the absence abroad of Mr Kovacs. She drove the complainant to the shop on a few occasions. On the third of these occasions the complainant told Ms Fabian that she had been raped by her father and asked for Ms Fabian's help in escaping. She agreed to help and was assisted by Ms Kris. Using money given to her by Mr Kovacs and monies provided by Ms Fabian, she flew to Cairns.

Ground 1. The learned trial judge erred in his directions to the jury in respect to the offence of slavery under s 270.3(1) of the Criminal Code 1995 (Cth) in that he:

(a) Misdirected the jury as to the elements constituting the offence of slavery under s 270.3(1);

(b) Failed to direct, or give adequate directions to, the jury as to the fault element necessary to prove an offence of slavery under s 270.3(1).

[14] The learned primary judge directed the jury in respect of the two slavery offences as follows[1]:

"Firstly, and I will use the term 'complainant' for the person concerned, must have been reduced to the condition which would constitute her a slave as defined by the Act. That is, you must be satisfied that she had had powers exercised over her as though she was mere property with the result that she had been reduced to the status of mere property, a thing over whom powers attaching to the right of ownership could be exercised.

Secondly, the accused must have known that the person concerned, the complainant, had been reduced to a condition where she was no more than property, a thing over whom persons could exercise powers as though they owned her.

Thirdly, the accused must have intentionally possessed the worker. That is, must have intentionally held her in his or her custody or under his or her physical control. That is, possessed the complainant, that is must have intentionally held her in his or her custody or under his or her physical control.

Fourthly, the accused must have possessed the worker in the intentional exercise of what constitutes a power attaching to a right of ownership, namely the power of possession. For that to be the case, the accused must be shown to have regarded the person as though she were mere property, a thing, thereby intending to deal with her, not as a human being who had free will and a right to liberty, but as though she were mere property. Now that situation is to be contrasted with other situations such as an oppressive and exploitative employer acting towards a vulnerable and dependent employee by making that person work very long hours, by even taking advantage of the position of employer towards her so as to exploit her sexually, or to treat her in an abusive and similar manner. As long as he or she intends to act towards the other and treat that person in that way because of his or her position as employer of that person, that is not sufficient to constitute this offence."

Mrs Kovacs' counsel's contentions in respect of ground 1(a)

[15] The four elements of the offences of possessing or using a slave identified by the primary judge were taken from the reasons of Eames JA, with which the other members of the Court of Appeal agreed, in R v Wei Tang.[2] On appeal, the High Court held that the fourth element identified by Eames JA and adopted by the primary judge was not an element of the offence. The directions of the primary judge thus amounted to a misdirection which caused a miscarriage of justice.

[16] Unless it is demonstrated that the misdirection did not affect the verdict of the jury, the appeal should be allowed.[3] Whilst it may be argued that the misdirection favoured the appellant, the task of the primary judge was to instruct the jury about the elements of the offences, to identify the issues in the case and to relate the law to those issues.[4] In Fingleton v The Queen[5] McHugh J observed:

"As Diplock LJ pointed out in *R v Mowatt* [51] , the 'function of a summing-up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the *issues of fact* on which they must make up their minds in order to determine whether the accused is guilty of a particular offence'. (Emphasis added.)

A summing-up is radically defective unless it adequately explains 'to the jury the nature and essentials of' the offence with which a person is charged [52] . Where the offence involves statutory terms, it is usually 'imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining' whether particular conduct is within the terms of the section [53]."

[17] It cannot be concluded that had there been no misdirection the jury, necessarily, would have convicted Mrs Kovacs of the two slavery offences. The misdirection was capable of confusing the jury as to what they needed to be satisfied of in order to return a guilty verdict. At the very least, the jury may have been distracted as to the issues of fact which they needed to resolve in order to determine guilt or innocence. There was a perceptible risk that the verdict of the jury was affected by the error.

Consideration of ground 1(a)

[18] There was a misdirection as alleged but contrary to the argument advanced on behalf of Mrs Kovacs, the misdirection had no potential to mislead or confuse the jury. At most, it gave the jury an additional, unnecessary, element to consider. The element was not one which the prosecution needed to establish in order to prove its case and the direction was thus favourable to Mrs Kovacs. And, as counsel for the respondent pointed out, by the time the jurors came to consider the fourth element they would have needed to be satisfied of the previous three elements. Requiring the jury to consider the unnecessary fourth element would not have distracted them or otherwise impaired their due consideration of elements 1, 2 and 3. Counsel advanced no submissions explaining how any such distraction or impairment could have arisen.

[19] The respondent has established that "if there had been no error [as alleged] the jury would (or must) have come to the same conclusion"[6] and that the misdirection "could not reasonably be supposed to have influenced the result."[7] Consequently, this ground fails.

Mrs Kovacs' counsel's contentions in respect of ground 1(b)

[20] Section 30(2) of the Criminal Code (Cth) codifies the general principles of criminal responsibility with respect to Commonwealth offences. In Tang the High Court confirmed that the only physical element of the offence of slavery under s 270.3 of the Code is "Conduct"[8]. "Conduct" is defined in the Code to mean "An act, an omission to perform an act or a state of affairs".[9] Pursuant to s 5.2(1) of the Code, "A person has intention with respect to conduct if he or she means to engage in that conduct."

[21] It is imperative that jury directions be comprehensible and avoid over-subtle distinctions[10] and must provide practical guidance as to the critical issues the jurors must decide.[11] The offences of slavery are very serious, carrying a maximum penalty of 25 years imprisonment and very clear directions were required.

[22] Although the primary judge directed the jury that it was necessary for the Crown to prove that each appellant "intentionally possessed", or "intentionally held", or possessed in the "intention or exercise" a power attaching to a right of ownership over the complainant, the primary judge failed to direct adequately on the meaning of "intention" as the term is defined under s 5.2(1) of the Code. Nor did he provide any or any sufficient directions as to how the jury might infer the requisite intention.[12] Additionally, the jury was not directed properly by reference to s 5.2(1) as to the meaning of "intention" or as to how the element of "intention" was to be related to the physical element of "conduct". In particular, there was no sufficient direction that:[13]

"The conduct, which is to say the act or state of affairs, in question in this matter was possessing a slave or using a slave. To establish the relevant fault element ... it was necessary to show that the [appellant] meant to engage in the conduct, in respect of each complainant, of exercising powers attaching to the right of ownership."

[23] The appellant did not give evidence and the jury was thus required to determine the appellant's intention and how it related to the appellant's conduct solely by reference to the evidence before them which they accepted. The primary judge, although giving a standard direction as to circumstantial evidence and the drawing of inferences, otherwise gave no direction or assistance to the jury as to how the Crown might prove intention by inferential reasoning drawn from the facts found by the jury.

[24] The primary judge re-directed the jury as follows:[14]

"So you have to consider in the end, "Am I satisfied beyond a reasonable doubt that the prosecution have established that a condition of slavery existed?" And as I have explained to you, we are dealing here with a very serious situation where a person is treated as though that person were property. You have to be satisfied beyond a reasonable doubt that the accused knew of that condition and that the accused knowingly, while she was in the condition, used her, intending to use her or knowingly possessed her, intending to possess her."

[25] In this redirection the primary judge did little more than direct the jury on the elements of the offence identified by Eames JA without providing appropriate directions as to how the jury might relate the fault element of intention to the acts, omissions or the state of affairs relied on by the prosecution to prove the physical element of the conduct. The directions were thus insufficient to explain to the jury what had to be proved for them to be satisfied that the appellant had "intentionally" possessed or "intentionally" used a slave.

Consideration of ground 1(b)

[26] The summing-up in relation to intention was limited to a brief general direction at the commencement of the summing-up as to circumstantial evidence. In that regard the primary judge said:[15]

"Now, ladies and gentlemen, evidence may be direct or it may be circumstantial. Direct evidence is evidence which of its own force proves or tends to prove or disproves or tends to disprove a relevant fact. Circumstantial evidence is not of that character but it is evidence which allows you to draw an inference about a relevant fact. If there is more than one inference rationally open and any one of those inferences is consistent with innocence, then you must draw the inference consistent with innocence."

[27] As submitted, it would have been preferable if the primary judge had further explained to the jury how, in the absence of an admission by a person, that person's intention could be deduced or inferred from that person's conduct. It would have been desirable also that any such explanation be made referable to the facts of the case. Normally, in a summing-up "... the law should be given to the jury not

merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case."[16] I do not consider, however, that the failure to give such an explanation caused the jury's deliberations to miscarry.

[28] The "fault element" is "intention". It is defined in s 5.2 of the Code as, "means to engage in that conduct." The words used by the primary judge in the passage in the part of the summing-up of which the appellant complains[17] states succinctly that the jury had to be satisfied beyond reasonable doubt that the appellant was aware of the complainant's condition of slavery and that she knowingly used her, intending to use her, or knowingly possessed her, intending to possess her. The definition of "intention" in s 5.2 gives the ordinary meaning of the word. The word is a commonplace one, the meaning of which is most unlikely to be misunderstood by jurors. The substitution of "means to engage in" for "intends to" would not have materially assisted the due consideration by the jury of the elements of the offence of slavery.

[29] In oral submissions Mrs Kovacs' counsel contended that the directions given by the primary judge concerning the need to be careful not to confuse overly controlling or overbearing conduct in an employment relationship with conduct constituting slavery, although given in relation to the fourth, and erroneous, element of the offence of slavery, were not given in relation to the first element.

[30] The primary judge, contrary to these submissions, was at pains to explain in his summing up that conduct capable of establishing the offences under consideration was in a different category to, and should not be confused with, for example, the conduct of an exploitative and/or overbearing employer. His explanations were not confined to the fourth element.

[31] Addressing written requests for further directions from the jury commencing with one stating: "Judges opening statement, especially description of slavery as opposed to overbearing et cetera" the primary judge directed:[18]

"What I was doing was distinguishing between the situation which you would have to be satisfied existed before you reached a conclusion that there was slavery and other situations which might be thought to bear some comparison with them but fall into a different category on the other side of the line. And I mentioned an oppressive and exploitative employer who might act in an overbearing way towards an employee who is in a position of subordination and vulnerable and might even be abusive in the sense of taking advantage of his position to exploit an employee sexually.

As long as that person was doing those things however reprehensible they are because of his or her position as employer of that person that is insufficient to constitute the offence. The offence of slavery is qualitatively different and requires proof of very serious conduct. It was said more is required than that the person be shown to have been exploited, abused or humiliated whether physically, emotionally or financially. To be a slave the person must be in a state where she is dealt with by others as though she were mere property, a thing. And that is a serious state of affairs as I am sure you will understand that has to be established.

You have asked 'How does psychological figure in slavery?' This may, I take it, have arisen from something the Prosecutor said in the course of his address where he spoke about different forms of repressive treatment, different forms of restrictive treatment and that one might be psychological. Nobody suggests that psychological mistreatment alone or pressure alone could constitute the condition of slavery. But it is said it is a factor to be taken into account with all of the other matters for you to consider when you address the very serious issue of whether a condition of slavery existed. That is its relevance. It is a background, it is a factor, but it is not suggested that it is something which alone could constitute or bring about a condition of slavery."

[32] Similar directions had been given earlier and at some length.[19] They were not confined to count 4 either. Accordingly, this ground has not been made out.

Ground 2 – the primary judge erred in directing the jury that to find the appellant guilty they did not need to be satisfied that the complainant was in the condition of slavery for the duration of the period charged

[33] The primary judge's directions were:

"The next matter is - if I take it verbatim, 'Definition of slavery 24/7 for five months.' I take it I am correct when I say I have understood that as meaning whether it is necessary for a condition of slavery to be found to exist in this case that it be found to exist 24 hours a day, seven days a week for the whole of the period that she was there. The answer to that is, no. What you have to be satisfied beyond a reasonable doubt of is that during that period she was at some time or times in a condition of slavery and that at the time or times she was in a condition of slavery she was possessed or used by the accused in the way specified in the material you have.

Having said that it is not a case of course in which it is alleged she was there and left and was brought back or came back. It is alleged that almost from the time she went there the conduct started and continued which it is said adds up to the condition of slavery. But you do not have to be satisfied that 24 hours a day, seven days a week that condition existed.

If you were satisfied that it existed for some of that time and that during that time she was possessed or used in the sense that that has been explained to you that would be sufficient. 'Definition given, do we relate it to each allegation or to confirm evidence given?' Well, ladies and gentlemen, let me emphasise the facts of the matter are for you. And in the written material there is set out the matters that the prosecution rely upon for the various things to show the alleged condition of slavery, to show possession, to show use.

Now these are matters of fact. It is for you to decide whether you accept on the evidence that all of them have been made out or that any have been made out. And it is when you determine what the facts are you apply the law as I have told it to you to be to those facts and that is how you reach a verdict. More specifically you look at the facts as you accept them, find them to be on the evidence and say, does that amount to the condition of slavery? Am I satisfied from those facts? Am I satisfied from those facts that the accused possessed her if I am satisfied on the issue of slavery. Am I satisfied from those facts that the accused used her if I am satisfied on the question of slavery.

So you do not look as it were at each of those separately and say, does this one amount to the condition of slavery or possession or use? You look at them all and you determine what you consider has been made out as a matter of fact on the evidence and you apply the definition of slavery and possession and use to those facts as you found them to be and you ask yourself, am I satisfied beyond a reasonable doubt on those facts that a condition of slavery existed? That if it did, the accused possessed her. That if it did, the accused used her.

Now, finally, you have asked for the definition of ownership as used in the definition of slavery. Ownership is not defined in the legislation. So let me give it to you what is basically, my definition, largely taken from the dictionaries. Ownership is the right to property, that is, the legal right or title to property and the rights incidental thereto, such as, the right to use, to possess. It would include, although it is not suggested it is relevant here, the right to sell or otherwise deal with it. It embraces a number of rights associated with title, which is another word, I suppose, for ownership, the legal right to it and the various other rights that flow from that. Here, what we are concerned with is possession and use.

So you have to consider in the end, 'Am I satisfied beyond a reasonable doubt that the prosecution have established that a condition of slavery existed?' And as I have explained to you, we are dealing here with a very serious situation where a person is treated as though that person were property. You have to be satisfied beyond a reasonable doubt that the accused knew of that condition and that the accused knowingly, while she was in the condition, used her, intending to use her or knowingly possessed her, intending to possess her.

If you are satisfied beyond a reasonable doubt of those things, the verdict is guilty.

Mrs Kovacs' counsel's contentions in respect of ground 2

[34] The Crown's case against the appellant was that the complainant had been reduced to the condition constituting her a slave from the time she first arrived in Weipa until the time she escaped to Cairns by being forced to work long hours, seven days a week, both in the shop and at the Kovacs' residence, by receiving no remuneration for her work, by being prevented from escaping and by being restricted in her communications. This conduct was alleged to have been a "continuation", and it was on that basis that the jury was initially directed.[20]

[35] The statutory definition of "slavery" can be satisfied only if the person alleged to be a slave is in the "condition of slavery", which can be created only by someone exercising over the person any or all of the powers attaching to the right of ownership. That, in turn, requires both an identification of what constitutes a right of ownership and what constitutes the powers that "attach to" that right.

[36] Reducing a person to the condition of slavery, involving as it does the complete subjection of a person, cannot be transitory in nature. That is, consistent with the concept of legal ownership of property, which has as a fundamental feature a claim of absolute right over the property, such ownership must continue from the moment the property comes into the possession of the owner until ownership is relinquished.

[37] Having regard to the way in which the Crown case was particularised, it sought to make out a case that the complainant's condition was the same for the whole of the time during which she was at Weipa. The primary judge thus erred in directing the jury as he did.

[38] This ground was also relied on by Mr Kovacs. His counsel argued additionally that the directions given by the primary judge left open the real possibility that different members of the jury were satisfied about different factual circumstances in reaching their verdict. It was submitted that the jury should have been told that they had to be satisfied unanimously about the facts which constituted the offences.

Consideration of Mr Kovacs' ground 2

[39] The argument advanced by counsel for Mr Kovacs must be rejected.

[40] KBT v The Queen[21] was cited as authority for the proposition put forward on behalf of Mr Kovacs. In KBT, the Court considered s 229B(1) of the Criminal Code 1899 (Qld) which establishes the offence of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years. In order for the offence to be committed, sub-section (1A) requires it to be shown that the offender, during the alleged period of maintenance of the relationship, has done a prescribed act on three or more occasions. Brennan CJ, Toohey, Gaudron and Gummow JJ in their reasons, explained that, unlike offences of trafficking in drugs or keeping a disorderly house in which the actus reus is the course of conduct which the offence described, that was not so with the offence created by s 229B(1).[22]

[41] Their Honours continued:

"Rather, it is clear from the terms of sub-s (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. Once it is appreciated that the actus reus of the offence is as specified in sub-s (1A) rather than maintaining an unlawful sexual relationship, it follows, as was held by the Court of Appeal, that a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more illegal acts."

The offence of slavery is not one constituted by the doing of prescribed acts. It is an offence which, in this case at least, is constituted by a course of conduct which comprises a number of acts over an extended period. The jury had to be satisfied of the elements of the subject offences beyond reasonable doubt; not of all of the matters relied on by the prosecution in proof of such elements. There was no requirement for the jury to achieve unanimity as to the facts from which they derived their ultimate conclusion.

[42] Returning to the argument advanced by counsel for both appellants, defence counsel did not object to the re-direction by the primary judge in response to the jury's question. That is most probably because counsel did not understand the primary judge to be conveying by his direction that during the period charged the complainant's condition might fluctuate between that of slavery and one which did not meet the definition of slavery. The way in which counts 5 and 6 were framed, between one specified date and another, is the conventional way of indicating that an offence is alleged to have been committed at some time between two stated dates. The wording of the count would not, in the absence of some clear indication to the contrary by the prosecution in the conduct of its case, convey that the case was dependent on establishing that the alleged conduct occurred on every day between the two stated dates.

[43] The prosecution argued on the trial that the conduct of the appellant from the time the complainant arrived in Weipa in August 2002 to her departure on 5 February 2003 fulfilled the elements of the alleged offences. That, however, did not, of itself, require the prosecution to establish that the subject offences occurred on every day between the dates alleged. No other conduct by the prosecution was pointed to in order to show that the prosecution assumed the burden of proving that on every single day during the charged period, the elements of the offence had been made out. There has been no miscarriage of justice or lack of procedural fairness. This ground has not been made out.

Ground 3 – the verdicts are unreasonable and against the weight of evidence

[44] In support of this ground, counsel for Mrs Kovacs relied on evidence to the following effect. The complainant resided in her own room in the appellants' house. Its door could be locked from the inside but not the outside. She was provided with a television. She was not prevented from leaving either the store or the house. She had access to a telephone and sent and received letters. Although not in receipt of wages directly, she was aware that monies were being paid directly to her family in the Philippines.

[45] Counsel submitted that on the whole of the evidence, particularly having regard to the evidence identified, it was not open to the jury to be satisfied beyond reasonable doubt of the female appellant's guilt.

[46] These submissions suggest the existence of a degree of personal freedom inconsistent with the existence of slavery as defined in the Code. But there was evidence which, if accepted by the jury, showed any such freedom to be largely illusory or non-existent.

[47] The complainant's family were in circumstances of dire poverty. The receipt of money from the

appellants was important in alleviating the effects of that poverty. The complainant knew this and had allowed herself to be persuaded to come to Australia in order to provide financial assistance to her family. The complainant's mother was sick and the complainant did not want to let her down or trouble her. The complainant gave evidence to the effect that Mr Kovacs told her not to say anything to the police or they would all go to jail. Having regard to the manner in which she had gained entry to Australia, Mr Kovacs' warning would not have appeared exaggerated.

[48] Other factors operating to the complainant's disadvantage were: her limited knowledge of the English language, at least in the first few months of her stay; her lack of Australian friends or associates; the unspecified amount of debt of which she had been informed and the remote location of the shop and house. Despite all of these matters, the complainant attempted to escape from the appellants in October 2002 in the circumstances outlined earlier. She was forcibly returned by the appellants to her home and her passport confiscated. Those two matters were significant aspects of the prosecution case. In my view, notwithstanding later observations in relation to aspects of the evidence which detract from the strength of the prosecution case, this ground has not been made out.

Ground 4 – the primary judge erred in failing to order separate trials

[49] A pre-trial application for a separate trial by Mrs Kovacs was heard in Cairns and dismissed on 19 September 2007. No such application was made to the trial judge. Nevertheless, it is submitted that a separate trial should have been ordered.

[50] The foundation of Mrs Kovacs' argument in this regard is that the allegations of the male appellant's rapes of the complainant were "so serious and so different to the allegations ... against the appellant that the prejudice caused to the appellant could not be cured by a direction given to the jury." The allegations of rape formed an integral part of the Crown case against the male appellant. As Mrs Kovacs' counsel accepts, it was not part of the Crown case that the female appellant was involved in the rapes or was even aware of them.

[51] It may be accepted that even in a case involving joint offences it may be appropriate to order separate trials where, for example, the evidence admissible against each accused is extremely difficult to disentangle and the evidence against one accused is highly prejudicial to the other. Also, there may be cases in which there is a perceived risk that a jury may have difficulty in following the judge's directions, having regard to the extremely prejudicial nature of the evidence.[23] This was not one of those cases. The evidence admissible against Mr Kovacs but not admissible against Mrs Kovacs was quite discreet and easy to separate. It could not be thought that the jury would have any difficulty in following or applying the primary judge's directions. Moreover, in the light of the uncontested evidence of the female appellant's lack of complicity in the rapes and knowledge of them, there is no good reason to suppose that members of the jury may have been prejudiced against Mrs Kovacs because of the evidence against her husband in relevant regards. It is perhaps more likely that they may have felt some sympathy to her as a wronged spouse.

[52] As de Jersey CJ and Davies JA said in R v Davidson:[24]

"Generally there are strong reasons of principle and public policy why joint offences should be tried jointly (*Webb v R* [1994] HCA 30; (1994) 181 CLR 41 at 88, 89, 56) and the mere fact that one result of joinder will be that evidence admissible against one but inadmissible against the other accused will be before the jury is not a reason for ordering separate trials. *R v Harbach* (1973) 6 SASR 427 at 432; *R v Lewis and Baira* [CA No 252, No 253 and No 290 of 1996, 18 October 1996]".

[53] Most of the significant evidence in this case was admissible against both appellants. It has not been shown that the discretion in not ordering separate trials miscarried and this ground of appeal is

also unsustainable.

Ground 5 – the primary judge erred in failing to direct the jury as required by s 21A(8) of the Evidence Act 1977 (Qld).

[54] Counsel for Mrs Kovacs belatedly embraced this ground which was relied on by Mr Kovacs.

[55] For the reasons given later, non-compliance with the requirements of s 21A(8) of the Evidence Act 1977 has been established, in consequence whereof the conviction can be upheld only by application of s 668E(1A) of the Criminal Code.

Mr Kovacs' ground 1 – the primary judge erred in directing the jury that to find Mr Kovacs guilty they did not need to be satisfied that the complainant was in the condition of slavery for the duration of the period charged

[56] This ground has already been discussed and rejected.

The primary judge erred in admitting evidence of the complaints made by the complainant to Ms Fabian – Mr Kovacs' ground 2

[57] The submissions of counsel for Mr Kovacs are to the following effect. A number of witnesses gave evidence of complaints made by the complainant of sexual abuse and general bad treatment of her by Mr Kovacs. This evidence was irrelevant and its prejudicial effect outweighed any probative value. The offences before the court were not ones of a sexual nature. Accordingly, evidence of complaints of sexual abuse were inadmissible at common law and did not come within s 4A of the Criminal Law (Sexual Offences) Act 1978 (Qld). Although the primary judge directed the jury that the complaints could be used only to evaluate the complainant's evidence and were not proof of the facts set out in the complaints, the jury may have been left with a view that her state of mind as to her own condition was relevant to proving that she was in a state of slavery.

[58] Counsel, on trial, did not object to the evidence now submitted to be inadmissible. But in this case the primary judge considered the admissibility of the evidence.[25] Counsel's failure to object thus became irrelevant except in the sense that the failure to object deprived the primary judge of any argument against admissibility.

Consideration of ground 2

[59] Evidence of early or recent complaint is admissible as an exception to the Evidentiary Rules excluding hearsay evidence and self-serving statements. The principles underlying admissibility of such evidence were discussed at some length by Barwick CJ, with whose reasons McTiernan, Stephen and Mason JJ agreed, in Kilby v The Queen.[26] Referring to authorities cited by Jordan CJ in Smith v Commonwealth Life Assurance Society Ltd[27] Barwick CJ said:[28]

"In my respectful submission neither of these cases lends support for either of these propositions. *Halsbury* (1952), 3rd ed., vol. 10, p. 468, par. 859, in my opinion, puts the matter in proper perspective when it is there said:

'*The admissibility of the particulars of a complaint made soon after the commission of an alleged offence in the absence of the defendant by the person in respect of whom a crime is alleged to have been committed is peculiar to rape, indecent assault and similar offences upon females, and also offences of indecency between male persons*. This evidence is not to be taken in proof of the facts complained of, but only as matter to be borne in mind by the jury in considering the consistency, and,

therefore, the credibility, of the complainant's story, including the consideration of the question of consent if the prisoner raises that as a defence.'" (emphasis added)

[60] The Chief Justice continued[29]:

"*The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence*. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence." (emphasis added)

[61] In Nominal Defendant v Clements[30] Windeyer J also treated the evidence of recent complaint in sexual assault cases as sui generis. His Honour said in that regard:[31]

"In cases of rape and sexual assaults, evidence is admitted of complaints made shortly after the occurrence. Such evidence and that of the kind here in question are often referred to together, because each provides an exception to the rule that earlier statements by a witness consistent with his testimony in the box are inadmissible. But, otherwise than as exceptions to the same rule, the two classes of evidence are not related. *The historical origin of the rule about complaints, and the grounds on which it is commonly justified, are peculiar to it*; and it operates to make evidence of the complaint admissible in chief to support the credibility of the testimony of the complainant. The doctrine here in question is, on the other hand, concerned with evidence admissible to restore the credit of a witness, after it has been impugned in a particular fashion, by letting in evidence that ordinarily would be excluded." (emphasis added)

[62] In his reasons Windeyer J cited with approval Britton v Commissioner for Road Transport[32] in which Jordan CJ had referred to evidence of timely complaints "in the case of sexual offences" as one of two well established exceptions to the inadmissibility of self-serving statements.

[63] Fitzgerald P in R v King,[33] also treated evidence of recent complaint as an exception to general evidentiary principles which applied only to proceedings for sexual offences. A like view is advanced in Phipson on Evidence[34] and Halsbury's Laws of England.[35] The same conclusion is expressed in the judgment of the court in R v Osborne[36] in which the following passages from the reasons of Holmes J in The Commonwealth v Cleary[37] were approved:

"The rule that in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal--Glanville, xiv. 6; Bracton, fol. 147 a; Fleta, 1, c. 25, § 14; St. 4 Edw. 1, St. 2." [38]

[64] The court in R v Jarvis & Anor,[39] discussing evidence of recent complaint, said:

"There are three exceptions to the general rule of evidence: first, where the statement is part of the res gestae, or where the suggestion is made that the witness had invented evidence or, in sexual cases, recent complaint. The rule of evidence as we have just summarised it was recently repeated by Lord Lane, CJ, in *R v Beattie* 89 Cr App Rep 302 at page 306. The statement of the complainant did not fall within any of the exceptions. In our view the exception of recent complaint is not relevant here.

Lord Lane said at page 306 of the report in Beattie: 'The second exception is complaints made in sexual cases, complaints which are made at the first opportunity and admissible to show consistency'.

We should draw attention to observations of the learned editor of Cross on Evidence, Seventh Edition, at page 284, where he wrote,

'From time to time attempts have been made to extend the extension beyond sexual criminal offences, now that the principal purpose is to support the consistency of the witness's story. This view was espoused by Chapman J in *R v McNamara* very soon after *Osborne* had made such rationale explicit. In Canada it was also applied to cases involving illegal confinement, even in the absence of any overt sexual purpose. In England there are dicta in *Jones v South Eastern and Chatham Railway Company's Management Committee* suggesting extension to any complaint of violence whether in criminal or civil proceedings. There are clear isolated examples of complaints not being unreservedly rejected, and even admitted, in other cases. It is, however, submitted that the rule does not in England extend beyond sexual offences, whatever the sex of the victim. The best justification for singling out such offences is that more hinges on questions of the credibility of the participants than in most other areas, just because sexual activity tends to take place in private and is usually kept secret, thus restricting the amount of other evidence which is likely to be available. It is upon that basis that the rule of practice requiring corroboration warnings, again in relation to both sexes, is still maintained, and it might seem right to admit any other evidence which can perhaps help the jury to resolve the customary conflict of testimony.'

We entirely agree with and adopt this opinion."

[65] There is thus a substantial body of authority in support of the view that the recent complaint exception to the exclusionary rule applies only in sexual offence cases. But no case was brought to the attention of the Court in which consideration was given the application of the exception to a case like the present where, although the offences on the indictment are not sexual offences, part of the prosecution case involved proof of acts which would establish the commission of such offences. The rationale for the exception, explained in cases such as R v Osborne, R v Jarvis and Anor, R v Kilby, R v King and Britton v Commissioner for Road Transport, is equally applicable to a case in which the doing of acts constituting a sexual offence is a particular of a charged non-sexual offence as it is to a case in which a sexual offence is charged. That is particularly so where, as is the case here, the role of the alleged sexual conduct is to assist in establishing the true nature of the accused's behaviour in relation to the complainant.

[66] It is unnecessary, however, to decide whether the exception extends or should be extended to cases such as this. Mr Kovacs was represented at the trial by experienced counsel. No objection was taken to the leading of evidence of recent complaint. The primary judge gave conventional directions as to the use to which such evidence could be put and there was no objection to those directions. The failure to object was readily explicable as a forensic decision taken by counsel with a view to highlighting delays by the complainant in the making of complaints and her failure to take earlier opportunities to complain. As a general rule litigants are bound by the conduct of their counsel.[40] In Crampton v The Queen[41] Gleeson CJ said:

"[17] Thirdly, it is usually difficult, and frequently impossible, for a court of appeal to know why trial counsel did, or failed to do, something in the conduct of the case. Decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge may have no way of knowing that. Ordinarily, a barrister knows more about the strengths and weaknesses of his or her client's position than will appear to a judge, whose knowledge of the case is largely confined to the evidence.

[18] Fourthly, as a general rule, litigants are bound by the conduct of their counsel. This principle, which is an aspect of the adversarial system, forms part of the practical content of the idea of justice as applied to the outcome of a particular case. For that reason, courts have been cautious in expounding the circumstances in which an appellant will be permitted to blame trial counsel for what is said to be a miscarriage of justice."

[67] McHugh J in Suresh v The Queen[42] said that it would:

"... undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics had failed to bring about the accused's acquittal."

[68] Consequently, the admitting into evidence of the complaints of rape did not constitute a miscarriage of justice. It remains necessary though to consider the consequences of the admission of Ms Fabian's hearsay evidence which did not concern allegations of sexual misconduct. Ms Fabian gave evidence that on an occasion when she drove the complainant to work, the complainant cried and said that Mr Kovacs had raped her and had treated her badly. Asked if the complainant said anything else, Ms Fabian responded:[43]

"And she just treated bad and she's tired, she's working long hours and go home and she still have to do everything else at home, looking after three kids and serving everybody and she don't feel like she have any freedom or anything and she said yeah, she was doing this for couple of months already and she think that's her chance now, my father's not in town, and this is the time – maybe easier for her to get away."

[69] Asked if Ms Fabian agreed to help the complainant, she responded:[44]

"Did you agree to help her?-- Yeah, I - I said to her I help her but I want her to, you know, do something about it, like she should maybe go ask help for somewhere else, maybe. But at that stage, yeah, she was just scared. All she wanted - just to get out from Weipa before my father get back."

[70] Ms Fabian swore that she gave the complainant money to help her purchase a ticket for a flight to Cairns.

[71] It can be seen from these passages that Ms Fabian's evidence was directed, not merely to Mr Kovacs' sexual conduct, but to the element of the slavery offences. The first of the above passages contains hearsay evidence. The second contains evidence which is hearsay or inadmissible non-expert opinion evidence or a combination of both.

[72] There was no basis for the admission of the hearsay and opinion components of this evidence. The primary judge directed the jury that the evidence of sexual mistreatment of the complainant was evidence only in the case against the male accused. He emphasised that this evidence could not be used by the jury when considering the case against Mrs Kovacs.[45] The primary judge also gave a conventional direction as to the use to which the evidence of the complainant about Mr Kovacs' sexual behaviour could be put. The direction, however, said nothing about the use of the evidence now being discussed. Counsel for the respondent in her written submissions, submitted that what the complainant did or omitted to do in respect of "the conduct towards her is a relevant matter". The submission continued:

"That is so whether or not the actions included a complaint of rape or any other matter. Whatever the complainant said to the others in this context was admissible simply because it included a complaint of rape, a separate offence. In any event, the complainant was cross-examined about the opportunity she

had to speak to people including those who came into the shop (for example a police officer). The only basis for that cross-examination is to support an argument that if she was being treated as she said (irrespective of the rape) she had the opportunity to complain about it."

[73] Counsel for Mrs Kovacs in cross-examination suggested to the complainant if she had wanted to, she could have told a police officer who visited the shop "at some stage ... to speak to [her]" about what Mr Kovacs was doing to her. It is reasonable to conclude that as the conduct referred to was only that of Mr Kovacs, he intended, and the complainant understood, that the question related to the allegations of sexual misconduct. There is thus no factual foundation for the respondent's counsel's submission and it is not sound in law.

[74] The only exceptions to the rule against the admissibility of self-serving statements, where the statements are not part of the res gestae, are evidence of recent complaint in sexual assault cases and evidence in rebuttal of allegations of recent fabrication.[46] The evidence was prejudicial. If accepted, it was capable of providing some evidence of deprivation of freedom and the keeping of the complainant in circumstances which were not explicable by the existence of an employer – employee relationship.

[75] The failure by defence counsel to object to the evidence is not readily explicable as the product of a forensic decision or decisions. I do not consider, however, that the possibility that counsel may have decided not to object to this evidence with a view to contrasting it with the absence of complaint to others and so attacking the credit of the complainant and Ms Fabian, is remote.

[76] But, if the failure to object was a deliberate choice of defence counsel, it was still incumbent on the primary judge to direct the jury to ignore the evidence, unless, perhaps, after discussion with counsel the primary judge decided that it would be inadvisable to remind the jury of the evidence by expressly referring to it. The transcript does not reveal that any discussion of this nature occurred. In the absence of an appropriate direction by the primary judge, although Ms Fabian's evidence of a complaint of rape could be used only for the limited purpose directed by the primary judge, the more general complaint evidence could be used for any purpose. In my view the primary judge erred in law in failing to give an appropriate direction.

The primary judge erred in failing to direct the jury as required by s 21A(8) of the Evidence Act 1977 (Qld) – Mr Kovacs' ground 3

[77] After hearing submissions of counsel and perusing a psychologist's report in relation to the Mr Kovacs' daughter, the primary judge directed that a screen be placed in front of the dock so that eye contact between the witness and her father would not be possible while she gave her evidence. The primary judge directed the jury:[47]

"Now I emphasise as strongly as I can you don't draw any adverse inference of any kind against the accused because I've taken that course and I'm sure as fair minded men and women you wouldn't do so. It says nothing whatsoever about the case against the accused man. It's simply a measure I've taken in the circumstances of the case given the nature of the – given that the witness is the accused's daughter and the information that has been placed before me. I repeat, you draw no adverse inference of any kind against the male accused because of it."

[78] Section 21A of the Evidence Act relevantly provides:

"(2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1 or more of the following orders or directions—

...

(a) in the case of a criminal proceeding –

that the person charged ... be obscured from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;

...

(8) If evidence is given, or to be given, in a proceeding on indictment under an order or direction mentioned in subsection (2)(a) to (e), the judge presiding at the proceeding must instruct the jury that —

(a) they should not draw any inference as to the defendant's guilt from the order or direction; and

(b) the probative value of the evidence is not increased or decreased because of the order or direction; and

(c) the evidence is not to be given any greater or lesser weight because of the order or direction."

[79] The term "special witness" means:

" ...

(b) a person who, in the court's opinion:

(i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or

(ii) would be likely to suffer severe emotional trauma; or

(iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court."

[80] The definition of "relevant matter" in s 21A(1) includes "relationship to any party to the proceeding, the nature of the subject matter of the evidence, or another matter the court considers relevant." It seems plain enough from the record that the primary judge was treating Ms Fabian as a "special witness" within the definition in s 21A(1). Counsel for the respondent did not contend to the contrary and did not submit that the primary judge erred in this respect.

[81] Counsel for the respondent submitted that although the words of s 21A(8) had not been used "the spirit and intent of the section" was conveyed to the jury by the primary judge's direction. She submitted that there was no obligation for the direction to be in terms of the words of subsection (8).

[82] So much may be accepted and it is the case also that the primary judge's direction was a strong one. It is arguable that the direction satisfied requirement (a) in sub-section (8). In my view though, the warning against drawing adverse inferences did not satisfy the requirements of sub-section

(8)(b) and (c). The direction did not address the probative value of the subject evidence or the weight to be given to it.

[83] The following discussion of Chesterman and Mullins JJ with whose reasons McPherson JA

agreed, although directed to the evidence of a child given about an offence of a sexual nature in a courtroom from which "non-essential persons" have been excluded (s 21AU); the evidence of an "affected child" provided with a "support person" (s 21AV) and the videotaped evidence of an affected child (s 21AM) has general relevance to the evidence given in the way permitted by s 21A:[48]

"The manner in which an affected child's evidence is to be given pursuant to s 21AU and s.21AM and, to lesser extent, s.21AV, is a marked departure from the conventional manner in which evidence is presented before a tribunal of fact for its evaluation. Convention may be a slender foundation for the justification or continuation of a practice or procedure, but experience has shown that evidence is best tested, and a true verdict reached, when the evidence in support or defence of a case is put before a court, judge or jury, and is explored for signs of inconsistency or insincerity in the presence of the tribunal of fact. The process is assisted by the solemn requirement that a witness' testimony be given on oath or affirmation and be open to public scrutiny.

Division 4A has provided, for reasons which Parliament deems sufficient, that a different procedure should be followed in cases involving a certain class of witness. The difference is such as is likely to surprise jurors who have some knowledge, whether first or second hand, of ordinary court proceedings. Without the benefit of the instructions required by s.21AW(2) that surprise may well turn into conjecture adverse to an accused. The subsection is intended to dispel the surprise and to prevent the conjecture. That that occurs is clearly of the utmost importance to a fair trial. Parliament cannot have intended that the new procedures should prejudice the fair trial of an accused. It has enacted that, to ensure a fair trial, the jury must be instructed how to evaluate evidence led in this way.

To exclude an accused from the complainant child's presence, or to protect the child from the accused's presence is likely to give rise to speculation by a jury that the measure has been undertaken because of some particular characteristic of the accused which is likely to be associated with his guilt. It is essential that that speculation be quashed and directions specified in s.21AW(2) are designed for that purpose."

[84] Counsel, in the course of her submissions, made reference to the failure of the appellant's counsel to complain about the form of the direction. But, as pointed out, in the reasons of Keane JA, Holmes JA and Mullins J agreeing in R v Michael,[49] decisions of this Court establish that failure to comply with a provision couched in the mandatory terms of s 21A(8) is an error of law which renders the trial irregular notwithstanding the failure of counsel for the accused at trial to seek a direction in conformity with the provision. Accordingly, this ground has been made out. The consequences of the failure to comply with the requirements of s 21A(8) are that the conviction can be upheld only by application of s 668E(1A) of the Criminal Code.

The application of s 668E(1A) of the Criminal Code

[85] It is incumbent on this Court to determine for itself, upon its review of the record, that there has been no substantial miscarriage of justice.

[86] The Court's role is that explained in the reasons of Gleeson CJ, Gummow, Heydon and Crennan JJ in Darkan v The Queen:[50]

"An appellate court invited to consider whether a substantial miscarriage of justice has actually occurred is to proceed in the same way as an appellate court invited to decide whether a jury verdict should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond

reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty [95]."

[87] The discussion in relation to Mrs Kovacs' ground 3 is relevant to the question now under consideration and I do not propose to repeat it.

[88] There were material inconsistencies in the evidence of significant witnesses capable of creating doubts about the witnesses' reliability. There was also evidence which, if accepted, weakened the prosecution case. Ms Fabian admitted having a "bitter hatred" of her father and a perusal of Ms Mathiot's evidence leaves one with the impression that she was favourably disposed to the complainant but by no means well disposed to Mr Kovacs. Her evidence as to the complainant's working hours conflicted with the evidence of the complainant, Ms Kris and Mr Morvai. In cross-examination Ms Fabian conceded that she may well have expressed doubt in her evidence on the committal hearing as to whether the complainant had complained to her of rape.

[89] In cross-examination by Mr Kovacs' counsel, the complainant admitted that in a statement to the Australian Federal Police given on 19 August 2005, she said that she was raped by Mr Kovacs "about twice a week" and that "every time he ... would give me some money, mostly $20, sometimes 30, sometimes 50."[51] Questioned as to why, if this evidence was correct, the amount paid by Mr Kovacs would not have amounted to $750, she responded that she was only able to save "over $200" and that Mr Kovacs was not giving her money all the time.

[90] The complainant admitted that she had not told Ms Kris that she had been raped. She said that she had told her that "John [Mr Kovacs] molested me". She said that as far as she was concerned, the word "molested and rape is the same."[52] In cross-examination by Mrs Kovacs' counsel, the complainant admitted that her main complaint with Mrs Kovacs was that "she used to yell at you all the time". In response to another question, however, she said that she became "very afraid" and that Mrs Kovacs was always critical of what she was doing. She had previously said that she had never had a day off work. She admitted that she was fed by the appellants, that she had no restrictions placed on her ability to send letters, or on her freedom to make phone calls from the shop and from the home. No restrictions were placed on her movement at the shop or, for that matter, when at the house.

[91] The complainant accepted that Mrs Kovacs insisted on the appellant having lunch breaks.[53] She agreed that she came to refer to the appellants as "Uncle and Aunty" and she admitted that Mrs Kovacs treated her like one of the family but said, nevertheless, that Mrs Kovacs "was always angry at me". She agreed that Mr and Mrs Kovacs were very hard workers themselves and worked very long hours.[54]

[92] Counsel for Mr Kovacs put to the complainant that she didn't tell Ms Fabian that she had been raped. In the course of his cross-examination on that topic, he referred the complainant to a statement she had given to the Australian Federal Police in which she had said that she didn't mention being raped to Ms Fabian.

[93] Ms Fabian's evidence, as has been seen, was that there was a complaint of rape. The complainant's evidence was that she had sexual intercourse with Mr Olasz only once. Mr Olasz swore to regular sexual intercourse.[55] At the committal hearing the complainant had sworn that there had been no intercourse with Mr Kovacs in the Philippines but her evidence on the trial was that she had been raped there by Mr Kovacs.

[94] Ms Mathiot gave evidence of going on a camping trip with the Kovacs' family, the complainant and Mr Morvai. Ms Mathiot accepted that on that trip all present had attended to duties of a domestic nature. Her evidence was that at the end of the trip the complainant drove back to Weipa with Mr Morvai and her. There was no suggestion that she wasn't free to travel with whoever she selected.

[95] Ms Kris was an important witness in that she had worked with the complainant in the shop for the duration of the complainant's stay with the Kovacs. She gave no evidence of observing sexual contact or familiarity between Mr Kovacs and the complainant or of witnessing signs of stress or distress in the complainant on her arrival at work. She saw the complainant use the phone a couple of times a week. She was not asked to guard the complainant or keep an eye on her. She accepted that the complainant made no complaint to her except that before asking for assistance to go to Cairns, the complainant had said that Mr Kovacs had been "trying to get on to her." She said that the appellants treated her and the complainant the same way and that on Wednesdays the complainant would go home at 3pm. She also said that there were busy periods and quiet periods at the shop but that the complainant never took the opportunity to walk into the township even though there was nothing preventing her from doing so. The complainant's evidence was similar and she agreed that the appellants' children helped out in the shop after school.

[96] The nature of the assessment required in order to determine whether the elements of the slavery offences were proved beyond reasonable doubt can be more readily appreciated after consideration of the reasons in R v Tang.[56] In his reasons Gleeson CJ warned against confusing powers of control in the context of slavery with "powers of a kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of the kind that are no more than an incident of harsh employment, either generally or at a particular time or place."[57]

[97] The differences between exploitative employment and slavery were further touched on by Gleeson CJ in the following passage from his reasons:[58]

"[44] . . . The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services."

[98] Gummow, Heydon, Crennan and Kiefel JJ agreed with the reasons of

Gleeson CJ and with those of Hayne J. In relation to the concept of ownership and possession, Hayne J said:[59]

"[138] . . . Both "ownership" and the "powers attaching to the right of ownership" must be understood as ordinary English expressions and applied having regard to the context in which they are to be applied. The chief feature of that context is that the subject of "ownership", the subject of the exercise of "powers attaching to the right of ownership", is a human being.

[139] Because "ownership" cannot be read in s 270.1 of the Code as a technical legal term whose content is spelled out by a particular legal system, it is a word that must be read as conveying the ordinary English meaning that is captured by the expression "dominion over" the subject matter. That is, it must be read as identifying a form of relationship between a person (the owner) and the subject matter (another person) that is to be both described and identified by the powers that the owner has over that other.

...

[145] The condition that must be proved is that the person meets the description "a slave". The offence is intentionally to possess a slave or intentionally to exercise over a slave any of certain powers. The condition of slavery (which is what provides the content of the term "a slave") is defined as the

condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. It thus follows that proof of the intentional exercise of *any* of the relevant powers over a person suffices to establish both that the victim is a slave and that the accused has done what the legislation prohibits.

[146] The next step to take is to observe that the Code's definition of "slavery" in s 270.1 speaks of "the *powers* attaching to the *right* of ownership" (emphasis added). Section 270.3 of the Code shows that possessing a slave is one particular power attaching to the right of ownership. And it is also clear that possessing a slave is not the only power attaching to the right of ownership. So much is made clear by the use of the word "other" in the phrase "*other* powers attaching to the right of ownership". But s 270.1 does not further identify what those powers are."

[99] After discussing United States decisions about legislation giving effect to the Thirteenth Amendment to the United States Constitution, his Honour observed:[60]

"[156] Asking what freedom a person had may shed light on whether that person was a slave. In particular, to ask whether a complainant was deprived of choice may assist in revealing whether what the accused did was exercise over that person a power attaching to the right of ownership. To ask how the complainant was deprived of choice may help to reveal whether the complainant retained freedom of choice in some relevant respect. And if the complainant retained freedom to choose whether the accused used the complainant, that freedom will show that the use made by the accused of the complainant was not as a slave. But it is essential to bear three points at the forefront of consideration.

[157] First, asking what freedom a person had is to ask a question whose focus is the reflex of the inquiries required by ss 270.1 and 270.3 of the Code. It is a question that looks at the person who it is alleged was a slave whereas the definition of slavery in s 270.1 looks to the exercise of power over that person. The question looks at freedom, but the Code requires a decision about ownership.

[158] Secondly, what is proscribed by the Code is conduct of the accused. An absence of choice on the part of the complainant may be seen to result from the combined effect of multiple factors. Some of these, such as the complainant's immigration status or the conduct of third parties, may be present independently of the conduct of the accused. Such factors are part of the context in which the conduct of the accused falls to be assessed. However, it is that conduct which must amount to the exercise by the accused of a power attaching to the right of ownership for the offence to be made out.

[159] Thirdly, because the Code requires consideration of whether the accused exercised *any* of the powers attaching to the right of ownership, it will be important to consider the particular power that it is alleged was exercised and the circumstances that bear upon whether the exercise of that power was the exercise of a power attaching to the right of ownership. To ask only the general question - was a complainant "free" - would not address the relevant statutory questions."

[100] Referring to discussion of the concept of "possession" in the He Kaw Teh v The Queen,[61] Hayne J said:[62]

"[147] . . . And as Dawson J pointed out in the same case[156], "[p]ossession may be an intricate concept for some purposes, but the intricacies belong to the civil rather than the criminal law". That is why, in the criminal law, "possession" is best understood as a reference to a state of affairs in which there is[157] "the intentional exercise of physical custody or control over something". In considering s 270.3(1)(a) of the Code, however, it will also be important to recognise that the right to possess a subject matter, coupled with a power to carve out and dispose of subsidiary possessory rights, is an important element in that aggregation of powers over a subject matter that is commonly spoken of as "ownership".

[148] Just as the word "ownership" evokes notions of the dominion of one person over another, to speak of one person possessing another (in the sense of having physical custody of or control over that other) connotes one person having dominion over the other. Or to put the same point in different words, possession, like ownership, refers to a state of affairs in which there is the complete subjection of that other by the first person."

[101] The jury, having seen the witnesses and having observed the prosecution case unfold, were in a position to assess the credibility of the witnesses and determine the weight, if any, which should be given to aspects of their evidence which they judged to be significant. This Court does not have that facility. Although no evidence was called on behalf of the appellants, there were substantial challenges to the credit of witnesses in cross-examination, some of which appeared to have substance. The jury's verdict depended on the analysis of the types of matters discussed in the above passages from the reasons in Tang. The jury, after considering all the evidence and weighing it, formed an overall impression of the state in which the complainant had been held, the manner in which she had been used, and the inferences which could be drawn as to the appellants' states of mind.

[102] Those processes are difficult, if not impossible, for this Court to carry out on the record. The particulars of the prosecution case against Mrs Kovacs provided to the jury in writing were that the complainant was reduced to a condition of slavery by:

(a) The female accused causing her to live at the home of the two accused at Weipa.

(b) The female accused restricting her freedom of communication and movement away from the home or the shop conducted by the accused at Napranam.

(c) The female accused preventing her from escaping from their home in Weipa.

(d) The female accused taking and retaining her passport thus limiting her freedom of movement including a right to return to the Philippines.

(e) The female accused requiring her to work long hours at the shop and in the home of the accused without any adequate recompense."

[103] The same particulars were provided in relation to Mr Kovacs with the addition of:

"(e) The male accused repeatedly using her for sexual gratification against her wishes."

[104] It was also alleged in the same document that each appellant was aware of his or her particularised actions and of the other appellant's particularised actions, except that Mrs Kovacs was not alleged to be aware of Mr Kovacs' sexual misconduct.

[105] It will be apparent from the earlier discussion that there is a strong body of evidence contradicting particular (b). Even the complainant's own evidence does not support it. The evidence in support of particular (c) is not entirely favourable to the prosecution. Ms Kris's evidence is that on the first occasion on which the complainant fled to her house, the complainant said that Mr Kovacs "... had kicked her out of the house." The complainant said that after this incident Mrs Kovacs had said, "Let's try to forget whatever happened" and she and Mrs Kovacs spoke to the complainant's aunt in the Philippines by telephone and discussed the complainant's "circumstances". The aunt, who gave evidence by telephone, said that the complainant was laughing during the telephone call. The complainant agreed that she wasn't forced to stay after her return to the appellants' residence.

[106] The evidence in relation to the taking and retention of the complainant's passport offers cogent

support for the prosecution case but that is only one aspect of the dealings and relationship between the complainant and the appellants. The evidence of the paltry sums paid to the complainant or on her account also provides support for the prosecution case even when regard is had to monies allegedly owing to the appellants by the complainant on account of the costs of bringing her to Australia. If a claim formulated against the complainant by the appellants is to be believed, those costs may have been to the order of $5,000.[63] In my view, however, the "natural limitations" on this Court's ability to evaluate and find the relevant facts prevent a finding of guilt beyond a reasonable doubt and make this an inappropriate case for the application of the proviso.

[107] For the above reasons I would allow the appeals, set aside the verdicts of guilty on counts 2, 3, 5 and 6 and order retrials.

[108] FRASER JA: I agree with the orders proposed by Muir JA and with his Honour's reasons for those orders.

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[1] Record 491, 492.

[2] [2007] VSCA 134; (2007) 16 VR 454.

[3] *Simic v R* [1980] HCA 25; (1980) 144 CLR 319 at 326-327 and at 330-331.

[4] *R v TN* (2005) 153 A Crim R 129 at 147; *R v HAB* [2006] QCA 80; *R v DM* [2006] QCA 79; *R v Hellwig* [2006] QCA 179; [2007] 1 Qd R 17; *R v SAW* [2006] QCA 378.

[5] [2005] HCA 34; (2005) 227 CLR 166 at 79 and 80.

[6] *Simic v R* [1980] HCA 25; (1980) 144 CLR 319 at 326-327.

[7] *Stokes v The Queen* [1960] HCA 95; (1960) 105 CLR 279 at 284, 285.

[8] *R v Tang* [2008] HCA 39; (2008) 82 ALJR 1334 at [46] and [47].

[9] *Code* s 4.1(2).

[10] *Zoneff v R* (2000) 200 CLR 234 at 260 and 261 per Kirby J.

[11] *Doggett v R* [2001] HCA 46; (2001) 208 CLR 343 at 346; and *Melbourne v R* [1999] HCA 32; (1999) 198 CLR 1 at 52 and 53.

[12] R 491 – 492.

[13] *R v Tang* [2008] HCA 39; (2008) 82 ALJR 1334 at [134].

[14] R 637.

[15] R 479.

[16] *Alford v Magee* [1952] HCA 3; (1952) 85 CLR 437 at 466 and see also *Fingleton v R* [2005] HCA 34; (2005) 227 CLR 166 at 196; *R v Zorad* (1990) 19 NSWLR 91 at 105; and *R v Dunrobin* [2008] QCA 116 at para [38].

[17] R 637 – 638.

[18] R 633, 634, 635, 636 and 637.

[19] R 597 – 599.

[20] R 497.

[21] [1997] HCA 54; (1997) 191 CLR 417.

[22] *KBT v The Queen* [1997] HCA 54; (1997) 191 CLR 417 at 422.

[23] See eg *R v Davidson* [2000] QCA 39 at [13].

[24] [2000] QCA 39 at [12].

[25] R 305.

[26] [1973] HCA 30; (1973) 129 CLR 460.

[27] (1935) 35 SR (NSW) 552.

[28] *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460 at 471- 472.

[29] *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460 at 472.

[30] [1960] HCA 39; (1960) 104 CLR 476.

[31] [1960] HCA 39; (1960) 104 CLR 476 at 492-493.

[32] (1947) 47 SR (NSW) 249.

[33] [1995] QCA 48; (1995) 78 A Crim R 53 at 54.

[34] (15th ed, 2000) [11-65].

[35] 4th ed para [40].

[36] [1905] 1 KB 551.

[37] (1898) 172 Mass 175.

[38] [1905] 1 KB 551 at 560.

[39] [1991] Crim L.R 374.

[40] *Crampton v The Queen* [2000] HCA 60; (2000) 206 CLR 161 at 173 and *R v Birks* (1990) 19 NSWLR 677 at 683 – 685.

[41] *Supra* at 172 – 173.

[42] [1998] HCA 23; (1998) 72 ALJR 769 at 774.

[43] R 294.

[44] R 294.

[45] R 480.

[46] *Britton v Commissioner for Road Transport* (1947) 47 SR (NSW) 249 at 251.

[47] R 288.

[48] *R v Hellwig* [2006] QCA 179; [2007] 1 Qd R 17 at [21] – [23].

[49] (2008) 181 A Crim R 490 at 495 – 496.

[50] [2006] HCA 34; (2006) 227 CLR 373 at 399.

[51] R 196.

[52] R 216.

[53] R 268.

[54] R 242.

[55] R 91.

[56] [2008] HCA 39; (2008) 82 ALJR 1334.

[57] Paragraph [32].

[58] *R v Tang (supra)* at para [44].

[59] *R v Tang (supra)* at paras [138]-[139] and [145]-[146].

[60] *R v Tang (supra)* at paras [156]-[159].

[61] [1985] HCA 43; (1985) 157 CLR 523 at 585.

[62] *R v Tang (supra)* at paras [147]-[148].

[63] Exhibit 21.
