JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	JEFFERY -v- THE STATE OF WESTERN AUSTRALIA [2018] WASCA 219
CORAM	**:**	BUSS P MAZZA JA ALLANSON J
HEARD	**:**	12 APRIL 2018
DELIVERED	**:**	14 NOVEMBER 2018
PUBLISHED	**:**	7 DECEMBER 2018
FILE NO/S	**:**	CACR 149 of 2017
BETWEEN	**:**	STEVEN JOHN JEFFERY Appellant AND THE STATE OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	SCHOOMBEE DCJ
File Number	**:**	IND 1090 OF 2016

Catchwords:

Criminal law - Appeal against conviction - Where appellant charged in 2015 with indecent dealing and sexual penetration of a child - Where alleged offending occurred in 2005 - Where appellant not adequately advised about giving evidence at trial - Where appellant did not testify - Where appellant willing to testify but relied on opinion of trial counsel that he should not - Where trial counsel formulated and pursued a case theory that was completely unsupported by the evidence - Whether a miscarriage of justice occurred

Legislation:

Criminal Appeals Act 2004 (WA), s 30(3)(c), s 30(5)
Criminal Procedure Act 2004 (WA), s 144(4)

Result:

Applications to adduce additional evidence granted
Leave to appeal on ground 1 granted
Leave to appeal on grounds 2 and 3 refused
Appeal allowed
Judgments of conviction set aside
New trial ordered

Category: B

Representation:

Counsel:

Appellant	:	Mr M J McCusker QC & Mr S Nigam
Respondent	:	Mr R G Wilson

Solicitors:

Appellant	:	Nigams Legal Pty Ltd
Respondent	:	Director of Public Prosecutions for Western Australia

Case(s) referred to in decision(s):

Anderson v The Queen (1991) 53 A Crim R 421
Craig v The Queen [2018] HCA 13; (2018) 92 ALJR 390
Director of Public Prosecutions (Nauru) v Fowler [1984] HCA 48; (1984) 154 CLR 627
Hanna v The Queen [2017] NSWCCA 168
Harman v The State of Western Australia [2004] WASCA 230; (2004) 29 WAR 380
Huggins v The State of Western Australia [2018] WASCA 61
Jiminez v The Queen [1992] HCA 14; (1992) 173 CLR 572
King v The Queen [1986] HCA 59; (1986) 161 CLR 423
Liberato v The Queen [1985] HCA 66; (1985) 159 CLR 507
Longman v The Queen [1989] HCA 60; (1989) 168 CLR 79
McMahon v The State of Western Australia [2010] WASCA 143
Nudd v The Queen [2006] HCA 9; (2006) 80 ALJR 614
Parker v The Queen [1997] HCA 15; (1997) 186 CLR 494
R v Birks (1990) 19 NSWLR 677
R v Kennedy [2017] SASCFC 170
R v ND [2003] QCA 505; [2004] 2 Qd R 307
R v Szabo [2000] QCA 194; [2001] 2 Qd R 214
R v Taufahema [2007] HCA 11; (2007) 228 CLR 232
R v Wilkes [1948] HCA 22; (1948) 77 CLR 511
RMD v The State of Western Australia [2017] WASCA 70
Rodi v The State of Western Australia [2017] WASCA 81; [2017] 51 WAR 96
TKWJ v The Queen [2002] HCA 46; (2002) 212 CLR 125
Vella v The Queen [2015] NSWCCA 148

REASONS OF THE COURT:

1 The appellant appeals against conviction.

2 On 9 March 2017, the appellant was convicted, after a trial in the District Court before Schoombee DCJ and a jury, of four counts in an indictment, each of which alleged sexual offending against a child, DL, who was over the age of 13 years and under the age of 16 years. On 26 June 2017, the appellant was sentenced to a total effective sentence of 3 years' immediate imprisonment. A parole eligibility order was made.

3 On 12 April 2018, this court heard the appeal.

4 On 25 May 2018, the appellant was granted bail pending the outcome of the appeal.

5 The appellant relied on three grounds of appeal. As amended at the hearing of the appeal, ground 1 is as follows:

> 1. The Appellant's trial was rendered unfair and the verdicts thereby unsafe and unsatisfactory on the grounds that his trial was incompetently conducted by his Counsel.
>
> **PARTICULARS**
>
> (a) Counsel appearing at the trial advised the Appellant that he should not give evidence as it would be merely 'self-serving' and that he would be 'torn to shreds' by the prosecutor.
>
> (b) [Abandoned at the hearing of the appeal.[1]]
>
> (c) Counsel failed to advise the Appellant that if he did not give evidence in the circumstances where his video record of interview was not put before the jury, there would be no evidence of his denial to refute the allegations made by the complainant.
>
> (d) As a result of the above, the Appellant was not able to make an informed decision regarding whether he should give evidence.
>
> (e) If the Appellant had been properly informed as to the above, he would have chosen to give evidence at the trial.

[1] Appeal ts 12.

(f) The failure of Counsel to properly inform the Appellant of the above, deprived the Appellant of having critical evidence before the trier of fact. He may thereby have lost the chance of an acquittal.

(g) Without the concurrence of the Appellant and without any prior consultation with him, Counsel conceded that the complainant had been sexually assaulted 'at some stage', never put that question in issue, and never questioned the complainant as to why she had waited 11 years before she made a complaint, or raised that question with the jury.

(h) Counsel failed to consider, or address, the question of whether the table at which the alleged offence[s] occurred had a tablecloth on it, as alleged by the prosecution, a question described by prosecuting counsel as 'quite crucial' (T.189). If there were a tablecloth it would have concealed the alleged assaults from the view of those at the table.[2]

(i) No competent Defence Counsel would have advised the Appellant that he should not give evidence.

(j) No competent Defence Counsel would have confined the Defence case to the case theory formulated and advanced by Defence Counsel.[3]

6 Although the ground refers to the verdicts being 'unsafe and unsatisfactory', senior counsel for the appellant confirmed that the ground should not be understood as relying upon s 30(3)(a) of the *Criminal Appeals Act 2004* (WA). Rather, by ground 1, the appellant alleged that he had suffered a miscarriage of justice within the meaning of s 30(3)(c) of the *Criminal Appeals Act* in the sense that his trial was unfair.[4]

7 Grounds 2 and 3 are as follows:

2. The learned trial judge erred in failing to properly direct the jury in terms of the warning required in such cases by the judgment of the High Court of Australia in ***Liberato v The Queen***.[5]

2. The trial miscarried by reason of the prosecutor, in his closing address, making submissions in respect of his own witnesses, calculated to impeach their credit.

[2] Particular (h) was inserted with the leave of the court at the appeal hearing; appeal ts 8.
[3] Particulars (i) and (j) were inserted with the leave of the court at the appeal hearing; appeal ts 89 and 93.
[4] Appeal ts 13.
[5] ***Liberato v The Queen*** [1985] HCA 66; (1985) 159 CLR 507.

8 On 14 November 2018, this court ordered that:

(1) each application to adduce additional evidence in the appeal filed by the appellant and the respondent is granted;

(2) leave to appeal on ground 1 is granted;

(3) leave to appeal on grounds 2 and 3 is refused;

(4) the appeal is allowed;

(5) the convictions entered by the primary judge on the four counts in the indictment on 9 March 2017 are set aside; and

(6) a new trial is ordered.

9 These are our reasons for making those orders.

Background to ground 1

10 The following appears to be uncontroversial. The appellant was born on 27 October 1959.[6] He had no prior criminal history.[7] He is, and was at all material times, married to Christine Jeffery. On 9 October 2005, the appellant and his wife held a lunch at their house which was, at the time, situated in the suburb of Warwick. Their guests were the complainant, DL, her sister, JM, their mother, KL, and Glyn Robert Counsel and his wife, Teresa Marie Counsel. Also present at the house were the appellant's two young sons.[8]

11 The State's case was that the appellant sat next to DL and, during the meal, he twice touched DL's vagina and twice digitally penetrated her vagina.[9]

12 On 9 December 2015,[10] the appellant was charged with sexual offences against DL. In due course, he was indicted in the District Court as follows:[11]

> (1) On 9 October 2005 at Warwick [the appellant] indecently dealt with [DL], a child over the age of 13 years and under the age of 16 years, by touching her vagina through her clothing.

[6] Indictment BGAB 1.
[7] Appeal ts 40.
[8] ts 23 - 24, 166 - 167.
[9] ts 23 - 24.
[10] ts 144, 226, 281; cf WAB 143 where the chronology states the appellant was charged on 7 December 2015.
[11] BGAB 1.

> (2) On 9 October 2005 at Warwick [the appellant] indecently dealt with [DL], a child over the age of 13 years and under the age of 16 years, by touching her vagina.
>
> (3) On 9 October 2005 at Warwick [the appellant] sexually penetrated [DL], a child over the age of 13 years and under the age of 16 years, by penetrating her vagina with his fingers.
>
> (4) On 9 October 2005 at Warwick [the appellant] sexually penetrated [DL], a child over the age of 13 years and under the age of 16 years, by again penetrating her vagina with his fingers.

13 On 9 December 2015, the appellant was interviewed by police officers. The interview was recorded on video. In the course of the interview, the appellant denied the allegations of sexual misconduct towards DL. The prosecutor declined to play the recording at trial.[12]

14 Sometime in the first half of 2016, the appellant instructed Ms Judith Fordham to act as his counsel. She was being assisted by another lawyer, Mr Nicholas Scerri.[13]

15 On 16 September 2016, the matter was listed for a trial to commence on 7 March 2017.[14] Ms Fordham was unavailable to appear on those days. Mr Scerri sought alternative counsel. He recommended an experienced barrister (the Practitioner).[15] The Practitioner has practised as a criminal lawyer for approximately 30 years.[16]

16 On 25 October 2016, the appellant and his wife met with the Practitioner. Mr Scerri was also present.[17] Neither Mr Scerri or the Practitioner took any notes of this meeting.[18]

17 Later in these reasons, we will return to what was allegedly said in this meeting.

18 The Practitioner was briefed to act on behalf of the appellant at the trial. Between 25 October 2016 and the commencement of the trial, the appellant, mainly through his wife, communicated with Mr Scerri, often

[12] Appeal ts 19.
[13] Exhibit A1, par 6.
[14] Exhibit A1, par 7.
[15] Exhibit A1, par 8.
[16] Appeal ts 47.
[17] Exhibit A1, par 9. Initially in the affidavits it appeared that this meeting was held on 7 November 2016, but later inquiries revealed it was 25 October 2016. See exhibit A2 par 2 and the Practitioner's oral evidence, appeal ts 32.
[18] The Practitioner's oral evidence, appeal ts 32 - 33; exhibit R2, par 7.

by email. Neither the appellant nor his wife met or spoke again with the Practitioner before the first day of the trial.[19]

19 On 24 February 2017, Mr Scerri proofed the appellant and his wife separately.[20]

20 On 1 March 2017, the final version of the appellant's proof of evidence was emailed to Mr Scerri by Ms Jeffery.[21]

21 In the proof of evidence, the appellant said that:[22]

(1) he 'vaguely' remembered the lunch;

(2) he knew Mr and Ms Counsel and KL through an industry in which they were involved, and considered them to be friends;

(3) he recalled that he sat at the head of the dining table with Mr Counsel to his left and he thought that DL and her sister sat to his right, with their mother, though he could not remember in which order they sat;

(4) he considered the occasion to be 'completely uneventful';

(5) he denied touching DL; and

(6) after the lunch, the appellant and his wife saw KL on a number of occasions and she did not mention that he had inappropriately touched her daughter.

22 The appellant's trial began, as scheduled, on 7 March 2017 before Schoombee DCJ and a jury. The appellant was arraigned and pleaded not guilty to all of the charges.[23] The Practitioner was his trial counsel, instructed by Mr Scerri.[24]

23 The prosecutor called as witnesses DL, JM, KL, Mr and Ms Counsel and one of the investigating officers, Detective First Class Constable Jason Roy Garratt.[25]

[19] The Practitioner's oral evidence, appeal ts 33; exhibit R2, pars 13 - 24.
[20] Exhibit R2, par 23; WAB 43.
[21] Exhibit R2, annexure E; WAB 59 - 64.
[22] Exhibit R2, annexure E; WAB 61 - 64.
[23] ts 8.
[24] Appeal ts 27.
[25] ts 31, 63, 81, 124, 141, 149.

24 The prosecution case closed at about 12.34 pm on 8 March 2017.[26] Shortly after this, the trial adjourned for lunch. Upon resumption, at about 2.05 pm, the Practitioner advised her Honour that '[the appellant] elects to call evidence …'.[27] The Practitioner called First Class Constable Lisa Jane Martin of the WA Police, Ms Christine Jeffery and Katrina Renae Walker to give evidence on behalf of the appellant. The appellant was not called to give evidence in his defence.[28]

25 The Practitioner closed the defence case at about 3.39 pm on 8 March 2017.[29]

26 On 9 March 2017, the appellant was found guilty of the four charges in the indictment by the unanimous verdict of the jury.[30]

Evidence led at trial

The State's witnesses

27 The State's case was that, on 9 October 2005, DL and JM accompanied their mother, KL, to a lunch at the house of the appellant and his wife. Another couple, Mr and Ms Counsel, were also present.[31] The appellant's two young sons were watching 'Finding Nemo' on television.[32]

28 KL and the appellant worked in the same industry. The State said that social occasions, such as the lunch, 'were relatively common'.[33] Because KL was a sole parent, she would take her children to these occasions.

29 The State's case was that DL sat at the dinner table with JM on her right and the appellant on her left. At some point, the appellant pushed his right hand under her skirt and started rubbing her genitals outside her underwear. Then he pulled her underwear to the side and started rubbing his fingers back and forth on her clitoris. The appellant then put one of his fingers inside her vagina.[34]

[26] ts 156.
[27] ts 158.
[28] ts 158, 165, 198.
[29] ts 199.
[30] ts 246.
[31] ts 23 - 24.
[32] ts 23.
[33] ts 23.
[34] ts 23 - 24.

30 Eventually the appellant left the table. While the appellant was away from the table, DL turned to JM and asked for help. JM said that she had seen the appellant's hand on her sister's thigh and up her skirt. JM told DL to go and sit in the car, but DL did not want to be by herself and so she stayed at the table.[35]

31 When the appellant returned to the table, he again put his hand under her skirt, touched her genitals outside her underwear and then penetrated her vagina with his finger.[36]

32 The State's case was that, on the drive home from the lunch, DL burst into tears and told her mother that the appellant had touched her. DL said that she did not want to go back to the appellant's house.

33 According to the State, KL did not confront the appellant about what had allegedly occurred and did not report the matter to the police or to anyone else. In essence, it was said that she was in a quandary about what to do, given that she and the appellant did business together and because DL did not mention the incident again.[37]

34 When the matter was brought to the attention of the authorities, police officers interviewed Mr and Ms Counsel. Mr Counsel recalled the lunch. By reference to his business diary, he was able to confirm that it occurred at the appellant's house on 9 October 2005. According to Mr Counsel, the appellant sat close to him and opposite KL and her daughters.[38]

35 Ms Counsel recalled that KL and her daughters sat on one side of the table to the right of the appellant, but she could not remember the exact order in which they sat.[39]

36 Neither Mr nor Ms Counsel noticed anything untoward during the lunch.

37 The State case relied 'overwhelmingly', as the prosecutor put it in his opening address, on the evidence of DL. However, the State alleged that JM's observations 'corroborate[d]' DL's evidence.[40] Moreover, the State alleged that DL's emotional state in the drive home from the appellant's house was 'consistent with what you would expect of a child

[35] ts 24.
[36] ts 24.
[37] ts 24.
[38] ts 24.
[39] ts 24.
[40] ts 26.

who had been violated in such an appalling way as [DL] will say she was'.[41]

38 In his opening address, the Practitioner said:[42]

> What we say is this is an unfortunate case of mistaken identity where a child who, as you've just heard, would attend at social occasions with her mother commonly.

39 The Practitioner went on to say that everything was disputed by the defence, apart from the fact that it would not be suggested that DL never came to the appellant's house.[43] The defence case was that 'nothing happened when the child came to his house and if something happened to her at a lunch she attended with her mother, it was a different lunch'.[44]

40 The Practitioner explained that he would 'enumerate a host of reasons as to why we say the occasion which is being described is a different occasion than the occasion of the lunch on 9 October 2005'.[45]

41 The Practitioner pointed to the evidence the State intended to adduce from Mr and Ms Counsel. He described them as being 'independent of both sides' and that they 'saw nothing untoward'.[46]

42 The Practitioner also pointed to the absence of evidence of DL 'squirming in the seat' or having a distressed look on her face.[47]

43 Later, the Practitioner told the jury:[48]

> There may, in this case, be no challenge to [DL's] honesty. But I tell you now, there is going to be a challenge to her accuracy. And one of the things that will immediately occur to you is we're now in 2017 and the case relates to allegations stemming back to 2005.

44 The Practitioner said that not only did KL not confront the appellant with the allegations at the time, but she continued to have dealings with him 'for many, many, many months afterwards'.[49]

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[41] ts 26.
[42] ts 27 - 28.
[43] ts 28.
[44] ts 28.
[45] ts 28.
[46] ts 29.
[47] ts 29.
[48] ts 30.
[49] ts 30.

45 DL's oral testimony was essentially consistent with the way the prosecutor had opened the State's case.[50]

46 On the first occasion the appellant digitally penetrated her vagina, she said, 'I wanted to scream but I couldn't. I was in shock. Like, I just froze. I couldn't do anything'.[51]

47 She said that the appellant got up from the table and when he returned, he did the same thing as he did before, touching her. After this touching occurred, she went to the toilet.[52] She said that she was 'terrified' and 'scared' to go to the toilet.

48 DL said that she went to the police on 6 August 2015.[53]

49 Under cross-examination by the Practitioner, DL said that she spoke to Police Constable Martin when she went to the police on 6 August 2015. She agreed that, at that point, she had not seen the person who had touched her since the day in question and that she did not name the offender.[54]

50 DL said that she accompanied her mother on business lunches 'every couple of months or so'. She estimated that she attended less than 20 such occasions.[55]

51 DL testified in examination-in-chief that the dining table was covered with a white tablecloth.[56] The Practitioner cross-examined her about the tablecloth. DL said that it came down the sides of the table.[57] He did not ask how far down the table the edges of the cloth were.

52 When the Practitioner asked DL whether the person who touched her did so over the course of a three to four-hour period, she answered in the affirmative and added, '[i]t was almost constant. It just didn't stop'.[58]

53 The Practitioner did not put to DL that there was a possibility that she was mistaken as to the occasion on which she had been interfered with.

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[50] See, in particular, ts 36 - 41.
[51] ts 38.
[52] ts 39 - 40.
[53] ts 42.
[54] ts 47 - 49.
[55] ts 52.
[56] ts 35.
[57] ts 54.
[58] ts 58.

54 In her testimony at trial, JM said that she recalled that she sat to DL's left and that the 'man' was seated to the right of her sister. She said that when the guests started eating lunch, she noticed that the man's hand was on her sister's thigh and, a short time later, she saw that his hand was up her skirt.[59] She said that DL whispered something to her, 'asking me to help her'.[60]

55 JM said that after lunch finished, DL told her that 'his hand was in her knickers'.[61]

56 JM said that on the drive home, her sister became upset. She described DL as 'crying hysterically'.[62]

57 In cross-examination, the Practitioner asked JM about the tablecloth. JM said that it covered the whole table.[63] She was not asked whether the tablecloth extended below the edge of the table.

58 She estimated that she saw the man's hand up her sister's skirt 'for probably just five seconds or so', but she did not see his hand on her private parts.[64]

59 KL testified that she and her daughters attended at the appellant's house one weekend for lunch, along with Mr Counsel and his wife.[65] She recalled that she sat at the head of the table and, to her left, were Mr and Ms Counsel and, to her right, were JM, DL and the appellant. She recalled that Ms Jeffery sat at the other end of the table.[66]

60 KL said that there was a tablecloth over the table.[67] She did not notice anything untoward or out of place during the lunch.[68] However, on the journey home, DL started crying and became 'really upset'. DL told her mother, 'I don't like the way he touched me. I don't like him'.[69] By the time they got home DL 'was calm'.[70] KL did not bring the matter back up again either with DL or the appellant. She said that she was in 'a very difficult situation' because the appellant was a client with

[59] ts 67 - 68.
[60] ts 68.
[61] ts 69.
[62] ts 70.
[63] ts 78.
[64] ts 78 - 79.
[65] ts 83 - 84.
[66] ts 86 - 87.
[67] ts 87.
[68] ts 87.
[69] ts 88.
[70] ts 89.

whom she had a business relationship. She was mindful that she had a mortgage to pay.[71]

61 In cross-examination by the Practitioner, she confirmed that she went to many work lunches, but she said the occasion at the appellant's was the first work lunch where she was accompanied by her children.[72] She disagreed with the proposition that she would commonly take her daughters to business lunches.[73] She initially said that this lunch was the only occasion that she took her daughters, but later, she said that her children accompanied her on '[p]erhaps a couple of occasions.'[74] The only other occasion was when she went to the home of Ms Nikki Green. Ms Green did not have a partner or children at that time.[75]

62 KL confirmed that after the lunch at the appellant's house she maintained a business relationship and a social relationship with him.[76]

63 In his cross-examination of KL, the Practitioner pressed her as to where the guests were seated at the lunch. KL maintained the evidence she had given earlier to the effect that the appellant was seated to DL's right.[77]

64 KL agreed that she would take her daughters to lunches she had with friends at their houses. She was unable to say how many times this occurred in 2005.[78]

65 The Practitioner put to KL that she was wrong when she said that DL complained to her after the lunch at the appellant's house. KL responded:[79]

> No, I'm not. I'm - I'm certain that that's the night, the day, that I drove off and she was absolutely just in tears and distraught. It was that day.

66 Later in cross-examination she said that she was not sure about details such as the table layout.[80]

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[71] ts 89.
[72] ts 91 - 92.
[73] ts 92.
[74] ts 92.
[75] ts 93.
[76] ts 95 - 96.
[77] ts 104 - 110.
[78] ts 118.
[79] ts 118.
[80] ts 119.

67 Mr Counsel testified that he and his wife were very close friends with the appellant and Ms Jeffery.[81] He produced an extract from his 2005 diary which included an entry on 9 October, 'Noon. Lunch at Steve and Chris plus [KL]'.[82]

68 He said that he recalled the seating arrangements around the table. He said that KL, DL and JM sat together and faced him, his wife and the appellant.[83] He recalled that KL and her daughters left at about 3.30 pm. He noticed nothing unusual about them.[84]

69 In cross-examination, the Practitioner tendered a photograph taken at the appellant's Warwick house which showed the table at which they had lunch on the day in question, as well as the kitchen and dining room.[85] Mr Counsel said that on the day in question the appellant was not in a position to have touched DL while seated at the table.[86] Mr Counsel said that, in the 23 or 24 years he had known the appellant, he had never seen him behave in a sexually inappropriate way.[87]

70 Ms Counsel said, in examination-in-chief, that she recalled the lunch in question. She said that the appellant sat at the head of the table; his wife sat at the opposite end. She recalled she and her husband sitting together, looking out onto the barbecue area and that KL sat to the appellant's right with her daughters being closest to the appellant's wife.[88] In cross-examination, she said that she and her husband sat in the same position around the table whenever they went to the appellant's house.[89]

71 Ms Counsel also said that the table had a vertical piece of wood around its edge that she referred to as a skirt.[90] She said that the appellant was not in a position to touch the legs of or to sexually touch DL or JM.[91]

72 The Practitioner did not ask either Mr or Ms Counsel whether the dining table from which they ate lunch had a tablecloth on it.

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[81] ts 127.
[82] ts 126; exhibit 10.
[83] ts 129.
[84] ts 130.
[85] ts 137; exhibit 12.
[86] ts 139.
[87] ts 139 - 140.
[88] ts 151.
[89] ts 154.
[90] ts 155.
[91] ts 156.

73 Detective First Class Constable Garratt testified that as part of the investigation he attended at an address at Warwick where the appellant and his wife had lived, and he took a number of photographs.[92] He also obtained, from the local authority, plans for the house built on the property.[93] He testified that on 9 December 2015, the appellant was charged with offences in respect of DL.[94]

74 In cross-examination, Detective Garratt confirmed that DL's first complaint to a police officer was made to Constable Lisa Martin.[95]

The defence witnesses

75 As we have already observed, the appellant did not give evidence, but evidence was adduced from other witnesses. The first defence witness was First Class Constable Martin. She described the process by which she obtained from DL her initial statement to police.

76 DL told her that the relevant incident occurred when she was 12 and at the end of year 7 at her school. DL told Constable Martin that the incident occurred in 2004.[96]

77 In examination-in-chief, Ms Jeffery said she remembered the lunch at her house when KL and her daughters and Mr and Ms Counsel attended.[97] She testified as to the layout of the Warwick house by reference to the house plans which had been tendered in evidence as part of the State's case.[98] The Practitioner asked Ms Jeffery to describe photographs of the house said to have been taken in early 2006, including a photograph of the dining table which was said to be the same dining table that the appellant and Ms Jeffery owned in 2005.[99] The table, as photographed, does not have a tablecloth on it. Ms Jeffery testified that she had not used a tablecloth 'in 20 years' and that, on the occasion of the lunch attended by KL and her daughters, there were only 'placemats and serviettes' on the table.[100]

78 Ms Jeffery was examined in chief at some length about a number of topics, including her recollection of what occurred at the lunch on 9 October 2005. Ms Jeffery said she had two 'very vivid memories of

[92] ts 142 - 145; exhibit 15; BGAB 13 - 15.
[93] ts 143; exhibit 16; BGAB 16 - 17.
[94] ts 144.
[95] ts 148.
[96] ts 163.
[97] ts 167.
[98] ts 168 - 169.
[99] ts 171; exhibit 12; BGAB 11.
[100] ts 173.

that day',[101] one of which was that she and the appellant sat opposite each other at the ends of the rectangular table and the other was that DL and JM were seated to her left, although she could not recall which of them was closer to her. She drew a plan of the table (exhibit 21) which showed that KL sat to the appellant's right and Mr Counsel to the appellant's left.[102]

79 In cross-examination, Ms Jeffery denied that she had tailored her evidence to protect the appellant.[103] She reiterated that she never used a tablecloth 'on any table'.[104] She confirmed she had two young boys, both of whom were home on the day of the lunch.[105]

80 The final defence witness, Ms Katrina Walker, testified that the appellant had an 'impeccable' reputation concerning his treatment of children and young female adults.[106]

The closing addresses

81 In his closing address, the prosecutor observed that DL had not been cross-examined to the effect that she was untruthful when she said that she had been sexually interfered with in the manner alleged. The prosecutor noted that the defence case was that DL had mistakenly mixed up the occasion on which she had been sexually abused with the lunch that occurred at the appellant's house on 9 October 2005.[107] The prosecutor submitted that the possibility she had mixed the occasions up was not credible. He drew the jury's attention to the similarities between 'what [DL] says happened and what we know is not in dispute about the events of 9 October 2005 …'.[108] The examples given by the prosecutor were:[109]

(1) it was a lunch party;

(2) it was on a weekend;

(3) it was a buffet lunch;

(4) lunch was served inside, not outside;

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[101] ts 182.
[102] ts 182 - 184; exhibit 21; BGAB 21.
[103] ts 188.
[104] ts 188.
[105] ts 192.
[106] ts 199.
[107] Closing address, ts 2 - 3.
[108] Closing address, ts 3.
[109] Closing address, ts 2 - 4.

(5) the householders were a married couple with two small boys;

(6) the boys were watching 'Finding Nemo', or an animated movie;

(7) the house was in the Warwick - Greenwood area;

(8) DL's description of the house and its layout were similar to the house the appellant and his wife owned; and

(9) there was one other couple at the lunch.

82 The prosecutor submitted that DL correctly identified the occasion on which she was sexually abused as being at the appellant's house and that the perpetrator was the appellant.[110]

83 The prosecutor submitted that while traumatic events 'stick in your mind', '[d]etails can fade'.[111]

84 The prosecutor submitted that the details of precisely how old DL was at the time the offences were committed, or what year the offences occurred, were matters of detail which you would not expect a young woman to recall.[112]

85 The prosecutor suggested that if the incident happened at the lunch on 9 October 2005, there was only one other adult man at that event, Mr Counsel, and it had not been suggested that he could be the offender.[113]

86 The prosecutor submitted that Mr and Ms Counsel were 'not disinterested witnesses, they're close friends of [the appellant and his wife]'.[114] He further suggested that it was implausible that Ms Jeffery, having hosted many lunches at her house, would recall the detail of the lunch on 9 October 2005, particularly when it was a 'non-event'.[115]

87 As to the existence or otherwise of the tablecloth, the prosecutor noted that DL, her sister and her mother said that there was a tablecloth

[110] Closing address, ts 4 - 5.
[111] Closing address, ts 7.
[112] Closing address, ts 7.
[113] Closing address, ts 8.
[114] Closing address, ts 10.
[115] Closing address, ts 11.

on the table and they had not been challenged on this point.[116] He also observed that Mr and Ms Counsel did not comment 'either way'.[117]

88 The Practitioner asserted, in his closing address, that what he had said to the jury in his opening address had turned out 'to be very much true'.[118] As he had said in his opening address:[119]

> We say this is an unfortunate case of mistaken identity where a child who, as you've just heard, would attend at social occasions with her mother commonly. We say that nothing happened when the child came to [the appellant's] house, and if something happened at a lunch she attended with her mother, it was a different lunch.

89 The Practitioner said that Ms Jeffery's evidence that the appellant was not sitting next to DL was confirmed by Mr and Ms Counsel. He reminded the jury that Ms Jeffery had testified to the effect that the appellant did not sit next to DL and that there was no tablecloth on the dining table.[120]

90 He also submitted, in effect, that if, as DL had said, the appellant was touching her almost constantly throughout the lunch, he would have been seen doing so. He said the best evidence of anyone seeing was JM saying 'on an occasion I saw a man put a hand on my sister's leg'.[121]

91 The Practitioner disavowed any suggestion that nothing had ever happened to DL. He said:[122]

> We don't suggest for a moment that nothing has ever happened to [DL]. You saw the anger in her eyes, the grimace on her face. She is clearly a young lady who at some time has been traumatised. We're not arguing about that. We are saying she's got the wrong house. We don't know what has gone on in her head.

[116] Closing address, ts 11 - 12.
[117] Closing address, ts 12.
[118] Closing address, ts 16.
[119] Closing address, ts 16, quoting from ts 27.
[120] Closing address, ts 16 - 18.
[121] Closing address, ts 18.
[122] Closing address, ts 18.

> What we suggest is that she is taking details from one lunch and she's transposing them onto the occasion when she was touched because she can remember the details of [the appellant's] lunch because at [the appellant's] lunch was a really nice lady. She can remember some details, but she's confusing two episodes, one where she was touched almost constantly for three to four hours by a man under a tablecloth and an occasion when she was at [the appellant's] house.

92 The Practitioner submitted that the similarities referred to by the prosecutor in his closing address, which we summarised at [81], were not unusual.[123] As to the evidence of the tablecloth, the Practitioner suggested that given the potential for children of a young age to pull at tablecloths, it would not be surprising that there was no tablecloth on the table as Ms Jeffery had said in her evidence. The Practitioner explained to the jury that he did not challenge DL about the presence of the tablecloth because the defence case was that she 'got the wrong house'.[124]

93 In support of the submission that DL's evidence as to the identity of the offender was mistaken, the Practitioner pointed to other aspects of her evidence which he suggested were vague, imprecise or wrong.[125]

94 The Practitioner submitted to the jury that the appellant was a man of good character who would not have committed the offences, and that to do so in 'full view of everyone' was 'professional suicide'.[126]

95 It was submitted that Mr and Ms Counsel were honest and accurate witnesses and that their testimony, in substance, gave rise to a reasonable doubt as to the appellant's guilt.[127]

96 The Practitioner suggested that KL's repeated contact with the appellant in the days and months after the lunch was inconsistent with the appellant having touched her daughter.[128]

97 The Practitioner highlighted KL's delay in reporting the matter to the authorities, and how that delay had hampered the defence.[129]

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[123] Closing address, ts 20 - 22.
[124] Closing address, ts 22 - 23.
[125] Closing address, ts 23 - 27.
[126] Closing address, ts 26 - 27.
[127] Closing address, ts 27, though the transcript refers to a doubt that the appellant is innocent.
[128] Closing address, ts 29 - 30.
[129] Closing address, ts 30 - 31.

The trial judge's directions

98 Apart from the specific complaint in ground 2, the appellant does not complain about the directions that the trial judge gave to the jury. It is unnecessary to summarise or refer to them.

Evidence led on appeal - the affidavit evidence

99 The appellant made four applications to adduce additional evidence in this appeal filed 2 October 2017,[130] 22 February 2018,[131] 3 April 2018 and 11 April 2018. By those applications the appellant sought to adduce evidence from:

(1) The appellant, in the form of three affidavits sworn 21 September 2017,[132] 22 February 2018,[133] and 29 March 2018.[134]

(2) Ms Jeffery, in the form of two affidavits sworn 26 September 2017[135] and 19 February 2018.[136]

(3) Mr Counsel, in the form of two affidavits sworn 13 February 2018[137] and 11 April 2018.

(4) Ms Counsel, in the form of an affidavit sworn 11 April 2018.

100 The State made an application dated 1 December 2017[138] to adduce evidence from:

(1) the Practitioner, in the form of an affidavit sworn 27 November 2017;[139] and

(2) Mr Scerri, in the form of an affidavit sworn 28 November 2017.[140]

101 All of the applications to adduce additional evidence were referred to the hearing of the appeal.

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[130] WAB 7.
[131] WAB 84.
[132] Exhibit A1; appeal ts 17; WAB 8 - 31.
[133] Exhibit A2; appeal ts 17; WAB 85 - 96.
[134] Exhibit A3; appeal ts 17.
[135] WAB 32 - 34.
[136] WAB 101 - 105.
[137] WAB 97 - 100.
[138] WAB 36.
[139] Exhibit R1, appeal ts 28; WAB 73 - 82.
[140] Exhibit R2, appeal ts 67; WAB 37 - 72.

102 At the hearing of the appeal, the appellant, the Practitioner and Mr Scerri gave oral evidence. The examination-in-chief of each witness predominantly comprised the affidavit or affidavits that had been sworn. The appellant was cross-examined by counsel for the State. The Practitioner and Mr Scerri were cross-examined by senior counsel for the appellant. Ms Jeffery, Mr Counsel and Ms Counsel were not required for cross-examination.

103 In accordance with this court's usual practice, all of the proposed additional evidence was received on a provisional basis, subject to questions of admissibility.[141]

104 It is as well to note at this point the observation made by Buss P in ***Rodi v The State of Western Australia***:[142]

> An appellate court does not examine whether a decision taken by the accused's counsel at the trial was, in fact, taken for the purpose of obtaining a forensic advantage or avoiding a forensic disadvantage. Rather, the appellate court is concerned only with whether counsel's decision is capable of explanation on that basis. That is, could there be any reasonable explanation for the decision? The test is objective in character. See ***TKWJ*** [17] (Gleeson CJ), [27] (Gaudron J, Gummow J agreeing), [107] (Hayne J, Gummow J agreeing).

105 The High Court observed in ***Craig v The Queen***:[143]

> The appellant's complaint is with the application of an objective test drawn from the judgments in ***TKWJ v The Queen*** to the Court of Appeal's determination that the incorrect advice did not occasion a miscarriage of justice. As the appellant observes, the analysis in ***TKWJ*** is concerned with challenges to forensic judgments that are within counsel's remit. The objective test that ***TKWJ*** holds is to be applied to the determination of challenges of that kind takes into account the wide discretion conferred on counsel under our adversarial system of criminal justice**.** A necessary consequence of that discretion is that the accused will generally be bound by counsel's forensic choices. It is only where the appellate court is persuaded that no rational forensic justification can be discerned for a challenged decision that consideration will turn to whether its making constituted a miscarriage of justice. (citations omitted)

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[141] Appeal ts 10.
[142] ***Rodi v The State of Western Australia*** [2017] WASCA 81; [2017] 51 WAR 96 [115], and cited in ***Huggins v The State of Western Australia*** [2018] WASCA 61 [379].
[143] ***Craig v The Queen*** [2018] HCA 13; (2018) 92 ALJR 390 [23].

The appellant's affidavit sworn 21 September 2017

106 In his affidavit sworn 21 September 2017 (exhibit A1), the appellant gave an account of the meeting on 25 October 2016 (in the affidavit, the appellant mistakenly gave the date of the meeting as 7 November 2016; it was common ground at the hearing of the appeal that the meeting took place on 25 October 2016)[144] with the Practitioner at which his wife and Mr Scerri were present. The appellant told the Practitioner that he was not guilty of the charges and he could not understand why the complainant had made the allegations against him.[145] The appellant said that the Practitioner said he was unsure whether he would call him to give evidence in his defence. According to the appellant, the Practitioner told him that his evidence would be considered 'self-serving' and there was no point in testifying. The Practitioner told the appellant 'that it would be sufficient if my wife gave evidence, as she was present at the time the alleged offences occurred'.[146]

107 The appellant said that after the meeting on 25 October 2016, up to the first day of the trial, the appellant and his wife did not communicate directly with the Practitioner. Rather, their contact was with Mr Scerri.[147]

108 On 15 February 2017, Mr Scerri sent an email to the appellant's wife in which the case theory developed by the Practitioner was put in these terms:[148]

> [The Practitioner] has decided that the case theory is probably best put as this (keep in mind this might change in trial as things can move very quickly):
>
> 1. [DL] may well have been touched by a man at a lunch that her mother took her to;
>
> 2. If this did happen then the only reason she has accused [the appellant] is because [KL] has said it was him;
>
> 3. [KL] took the girls to these events regularly so it could have been anyone that touched her;

[144] See exhibit A2, par 2 and the Practitioner's oral evidence, appeal ts 32.
[145] Exhibit A1, par 9; WAB 11.
[146] Exhibit A1, par 10; WAB 12.
[147] Appeal ts 33.
[148] Exhibit A1, annexure I; WAB 30.

> 4. The allegation was originally that she was 11 at the time because maybe she was OR they are mistaken about the event altogether (this is reasonable doubt);
>
> 5. [DL] has seen her friend receive money in a sex matter and realised there is money to be made;
>
> 6. [DL] has been told that she can get criminal injuries compensation by someone;
>
> 7. [DL] has champagne taste on a beer budget (tender the Instagram pics and hashtags); and
>
> 8. [DL] has picked [the appellant] as any man will do so long as she gets the cash.

109 On 5 March 2017, Mr Scerri advised the appellant and his wife that the Practitioner would probably not call the appellant to give evidence if the case was going well.[149] The appellant deposed that Mr Scerri was told by the Practitioner that '[the appellant] would be torn to shreds by the Prosecutor' and that his evidence would be regarded as 'self-serving' anyway.[150]

110 On 5 March 2017, Mr Scerri sent an email to the appellant. In answer to a question as to whether the appellant 'takes the stand last', Mr Scerri answered:[151]

> No. He [the appellant] would be first, if we use him. He may not be called if [the] case is going well. In that case we will only call [Ms Jeffery and Ms Walker].

111 On the morning of the first day of the trial on 7 March 2017, the Practitioner spoke to the appellant and told him that he (the Practitioner) would be taking a 'slightly different direction' in the running of the trial. The Practitioner did not, however, explain what this meant.[152]

112 The appellant claimed that he never agreed to the Practitioner running the defence case on the basis that DL had been sexually interfered with, but by someone else.[153]

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[149] Exhibit A1, annexure J; WAB 31.
[150] Exhibit A1, par 25; WAB 16.
[151] Exhibit A1, annexure J; WAB 31.
[152] Exhibit A1, par 26; WAB 16.
[153] Exhibit A1, par 27 - 28; WAB 17.

113 On what the appellant described as the last day of the trial, and after his wife and Ms Walker had given evidence, the Practitioner approached him and asked him if he wanted to give evidence. The appellant said he asked the Practitioner what he thought he should do. The Practitioner responded that the appellant should not give evidence. The appellant said that the Practitioner did not explain why he should not give evidence and did not tell him that, in the absence of evidence from him, the jury would have no direct evidence that DL's testimony was false. The appellant responded to the Practitioner's advice by saying, 'whatever you think is best'.[154]

114 The appellant said that had he appreciated that there would be no direct evidence on oath contradicting DL, he would have elected to give evidence in his defence and he would never have agreed not to testify. The appellant said that he was not afraid to give evidence and had never said that he was afraid to do so. He said, 'There was no reason for me to be concerned about giving evidence'.[155]

Ms Jeffery's affidavit sworn 26 September 2017

115 In her affidavit sworn 26 September 2017, Ms Jeffery confirmed the contents of the appellant's affidavit sworn 21 September 2017 insofar as that affidavit dealt with matters in which she was involved.[156]

The Practitioner's affidavit sworn 27 November 2017

116 The Practitioner confirmed that a conference took place in his chambers, on what he thought was 7 November 2016, which was attended by the appellant, his wife and Mr Scerri. The Practitioner denied saying that it was necessary to satisfy the jury that the complainant had a motive for making up the complaint, although he did say words to the effect that if a motive to lie could be demonstrated it would be forensically useful.[157]

117 The Practitioner agreed that there was some discussion about whether the appellant should be called in his defence. The Practitioner denied saying that there was no point in the appellant giving evidence, but he did say that it would be necessary for him (the Practitioner) to make an assessment closer to trial as to whether or not the appellant would be a good witness and he would take into account whether the

[154] Exhibit A1, par 30, 33; WAB 18.
[155] Exhibit A1, par 33; WAB 18 - 19.
[156] Affidavit of Ms Jeffery, sworn 26 September 2017; WAB 34.
[157] Exhibit R1, par 4; WAB 74.

appellant wished to give evidence. The Practitioner stated that he did not speak about it being 'sufficient' if Ms Jeffery gave evidence, but he raised the possibility that Ms Jeffery would be both a strong and impressive witness.[158]

118 The Practitioner accepted that there was some discussion about presenting character evidence on behalf of the appellant. He said that he expressed doubt whether such evidence would be helpful.[159]

119 Prior to trial, the Practitioner spoke to Mr Scerri about how the appellant was likely to be cross-examined at trial. The Practitioner thought that an experienced prosecutor would cross-examine the appellant by taking him through a numerically large number of propositions within the complainant's statement which were not in dispute, and then effectively say to the appellant that the complainant was accurate in so many of those details, and yet she got wrong the seating positions around the table and whether or not sexual touching occurred.[160]

120 The Practitioner stated that he informed the appellant and his wife before trial that his approach would be to say that this was a case of mistaken identity and, although the defence could not say that DL had never been sexually molested, it could say that she had not been molested by the appellant.[161] He did not state when he informed the appellant and his wife of this approach. The Practitioner explained why he did not cross-examine DL in a more confrontational style. In essence, he regarded DL as 'a remarkable witness' and that his impression was 'that the jury would be immediately sympathetic to [her] as a witness'.[162]

121 The Practitioner said that, 'it was very much understood that [Ms Jeffery] would be testifying, and that it was likely that [the appellant] would not expose himself to cross examination'.[163]

122 The Practitioner agreed that when the point in the trial was reached where it was necessary for the appellant to elect whether or not to testify, he spoke to the appellant. He said that he did so prior to the

[158] Exhibit R1, par 5; WAB 74 - 75.
[159] Exhibit R1, par 6; WAB 75.
[160] Exhibit R1, par 18; WAB 77.
[161] Exhibit R1, par 19(o); WAB 78 - 79.
[162] Exhibit R1, par 19(d) and (e); WAB 77.
[163] Exhibit R1, par 23; WAB 79.

other defence witnesses being called. The account the Practitioner gave in his affidavit about this conversation is as follows:[164]

> 24. Before formally being called upon to make the necessary election I spoke with [the appellant] to confirm that that was still the position. I agree that I approached [the appellant] and asked him if he wanted to give evidence and that he sought my advice as to whether he should do so. I gave advice that he should not give evidence. The reasons for that had been discussed as long beforehand as the November [sic] conference. I have no direct recollection of [the appellant] saying to me, 'whatever you think is best,' but accept that he is highly likely to have done so, and that I would have reassured him that my view was that the ideal course (in the sense of being persuasive yet not opening him up to cross-examination) was that we call his wife who would be an impressive witness who could speak directly to the facts.

123 The Practitioner said that he could not recall whether he told the appellant that in the absence of him giving evidence, the jury would have had no direct denial of the allegation by him. He said that he did not believe that he would have told him this.[165]

124 The Practitioner said that he was 'confident' that he had told the appellant that he was not concerned if he did not give evidence because he (the Practitioner) felt that the evidence of Mr and Ms Counsel and of Ms Jeffery would be sufficient to cast some doubt on the accuracy of DL's account.[166] The Practitioner said that at some unspecified time the appellant had indicated to Mr Scerri and him that he was willing to give evidence, if that was recommended, but he would prefer not to do so. The Practitioner agreed that the appellant never said that he was afraid to give evidence, nor did he indicate that he was unwilling to give evidence.[167]

125 The Practitioner stated that at no stage in the trial did the appellant suggest to him that the manner in which he had opened the defence case was not in accordance with his instructions and wishes, nor did he say he wished the Practitioner to take a different approach.[168]

[164] Exhibit R1, par 24; WAB 79 - 80.
[165] Exhibit R1, par 27; WAB 80.
[166] Exhibit R1, par 28; WAB 80.
[167] Exhibit R1, par 29; WAB 80.
[168] Exhibit R1, par 33; WAB 81.

Mr Scerri's affidavit sworn 28 November 2017

126 Mr Scerri described the meeting, which he originally thought had taken place on 7 November 2016, but which in fact took place on 25 October 2016, as being informal in nature. He said that he did not take notes at the meeting. He said that, prior to the meeting, the Practitioner had been provided with an electronic version of the trial brief.[169] He recalled that, during the meeting, the Practitioner said:

(1) The appellant's video record of interview might be inadmissible; that it contained denials 'and little else'. The Practitioner said that the trial judge might tell him that the interview was 'self-serving'.[170]

(2) Ms Jeffery presented well and that there was potential for the appellant to not give evidence if his wife dealt with the relevant matters in her oral evidence.[171]

127 According to Mr Scerri, the appellant said that he was prepared to give evidence if necessary.[172]

128 At some unspecified time after the meeting, the appellant decided that the Practitioner should be briefed.[173]

129 In his affidavit, Mr Scerri described various steps that were taken in the lead-up to the appellant's trial. It is unnecessary to describe them.[174]

130 Mr Scerri referred to the email he sent to the appellant's wife on 5 March 2017 in which, among the matters raised, was whether the appellant would take the 'stand' last. Mr Scerri confirmed that he responded, 'no, he would be first, if we use him. He may not be called if the case is going well, in that case we will only call you and Kat'. Mr Scerri said that he made these comments based on the informal meeting which he had thought was held on 7 November 2016.[175]

131 On 24 February 2017, Mr Scerri proofed the appellant and his wife separately. The proofs of evidence were emailed to the appellant and

[169] Exhibit R2, par 7; WAB 39.
[170] Exhibit R2, par 9; WAB 39.
[171] Exhibit R2, par 10; WAB 39.
[172] Exhibit R2, par 10; WAB 39.
[173] Exhibit R2, par 13; WAB 40.
[174] Exhibit R2, pars 14 - 27; WAB 40 - 44.
[175] Exhibit R2, par 22; WAB 42 - 43.

his wife. The appellant's proof of evidence was returned with minor edits and was marked with the letter 'E' in Mr Scerri's affidavit.[176]

132 On 4 March 2017, Mr Scerri met with the Practitioner and provided him with copies of the brief, the defence witness proofs and an evidence matrix which Mr Scerri had compiled.[177]

133 On the first morning of the trial, Mr Scerri met with the appellant and his wife in the lobby of the District Court at Perth.[178] He then went to collect a jury list. After doing so, he saw the complainant and observed that she was 'very distressed'. Mr Scerri advised the Practitioner of what he had seen. The Practitioner advised the appellant that, in these circumstances, it was best to take 'a non-aggressive approach to cross-examination'.[179]

134 As to the appellant's decision not to give evidence, Mr Scerri stated:[180]

> During the defence case, I observed [the Practitioner] approaching the appellant to take instructions on whether he wished to give evidence. I was not privy to that conversation, but I approached the appellant shortly afterwards and asked him what he had decided. The appellant commented to the effect that he would rather not give evidence but would do so if counsel thought it was necessary. I am not aware of the existence of any signed instructions to that effect.

The appellant's second affidavit sworn 22 February 2018

135 In the appellant's second affidavit, sworn 22 February 2018, the appellant:

(1) Reiterated much of what he had said in his affidavit dated 21 September 2017.

(2) Stated that the one and only meeting he had with the Practitioner prior to trial was the one which he thought had taken place on 7 November 2016, but which he accepted took place on 25 October 2016. He said that, on the first day of the

[176] Exhibit R2, pars 23 - 24; WAB 43.
[177] Exhibit R2, par 25; WAB 43.
[178] Exhibit R2, par 28; WAB 44.
[179] Exhibit R2, pars 29 - 30; WAB 44.
[180] Exhibit R2, par 32; WAB 45.

trial, he met very briefly with the Practitioner and only exchanged pleasantries.[181]

(3) Stated that he never met with the Practitioner to enable him to make an assessment of whether he would be a good witness.[182]

(4) Denied that the Practitioner informed him and his wife that his approach 'would be to say that this was a case of mistaken identity and that we could not say that the complainant had never been sexually molested'.[183]

(5) Stated that it was his understanding that he would be giving evidence and that he had been preparing himself to do so.[184]

(6) Denied that he discussed with the Practitioner the reasons why he should not give evidence, apart from at their first meeting.[185]

(7) Denied ever saying that he would 'prefer not to give evidence'. He stated that he took it that it would be his word against the complainant's and that he would be called as a witness.[186]

(8) Stated that he never told Mr Scerri that he would 'rather not' give evidence.[187]

Ms Jeffery's second affidavit sworn 19 February 2018

136 Ms Jeffery, in her second affidavit, sworn 19 February 2018, said:

(1) She was 'quite certain' that the Practitioner told the appellant that there would be 'no point' in him giving evidence because it would be 'self-serving'.[188]

(2) The initial conference with the Practitioner 'lasted for less than an hour' and that much of that time was taken up with the Practitioner speaking about his 'experience and success as a criminal barrister'. She also said that the Practitioner asked very few questions of the appellant and stated that it would be

[181] Exhibit A2, pars 2, 4; WAB 86 - 87.
[182] Exhibit A2, par 5; WAB 87.
[183] Exhibit A2, par 6; WAB 37.
[184] Exhibit A2, par 8; WAB 88.
[185] Exhibit A2, par 10; WAB 88.
[186] Exhibit A2, par 11; WAB 89.
[187] Exhibit A2, par 13; WAB 89.
[188] Affidavit of Ms Jeffery, sworn 19 February 2018, par 3; WAB 102.

necessary for him to make an assessment, closer to trial, as to whether or not the appellant would be a good witness.[189]

(3) The Practitioner did not inform the appellant that his approach at trial 'would be to say that this was a case of mistaken identity and that we could not say that the complainant had never been sexually molested'.[190]

(4) The Practitioner did not advise the appellant at any time prior to trial that he should not give evidence.[191]

The appellant's third affidavit sworn 29 March 2018

137 The appellant's third affidavit, sworn 29 March 2018, is brief. He stated that:[192]

(1) he was under the impression that he was going to give evidence at the trial; and

(2) he was never told by either the Practitioner or Mr Scerri that, in their opinion, he would not make a good witness if called to give evidence.

Mr Counsel's affidavits sworn 13 February 2018 and 11 April 2018

138 In Mr Counsel's affidavit, sworn 13 February 2018, he stated that, after he gave evidence, he sat in the public gallery of the courtroom, about 6 m away from where the appellant was seated in the dock. He stated that after Katrina Walker had given evidence, he saw the Practitioner leave the bar table, approach the appellant and ask him, 'Do you want to take the stand?' Mr Counsel said he did not hear the appellant's response. He said the conversation took around 15 seconds and that, when the Practitioner returned to the bar table, he advised the court that the defence case was closed.[193]

139 In Mr Counsel's second affidavit, sworn 11 April 2018, he said:[194]

(1) At no stage was he asked, either by the Practitioner or Mr Scerri, whether there was a tablecloth on the dining room

[189] Affidavit of Ms Jeffery, sworn 19 February 2018, par 4; WAB 103.
[190] Affidavit of Ms Jeffery, sworn 19 February 2018, par 7; WAB 103.
[191] Affidavit of Ms Jeffery, sworn 19 February 2018, par 11; WAB 104.
[192] Exhibit A3, pars 2, 4.
[193] Affidavit of Mr Counsel, sworn 13 February 2018, par 3(vii), (viii) and (ix); WAB 99 - 100.
[194] Affidavit of Mr Counsel, sworn 11 April 2018, pars 3 - 4.

table at the luncheon at which the offences were alleged to have taken place.

(2) Had he been asked, he would have said that there was no tablecloth and, on the numerous occasions he went to the appellant's house for meals, there was never a tablecloth on the table.

Ms Counsel's affidavit sworn 11 April 2018

140 Ms Counsel's affidavit, also sworn 11 April 2018, was to the same effect as the second affidavit sworn by her husband.[195]

Evidence led on appeal - the oral testimony

The appellant's cross-examination

141 The focus of the cross-examination of the appellant was upon his decision made in the trial not to testify. The appellant confirmed the evidence he had given in his affidavits, to the effect that the Practitioner approached him and asked him whether he wished to testify. The appellant agreed that he asked the Practitioner what he should do, and that the Practitioner told him he should not give evidence. The appellant agreed that he then said, 'Whatever you think is best.'[196]

142 The appellant explained that, up until the Practitioner spoke to him, his understanding was that he was going to testify.[197] The appellant said that, at the time, he did not think about the fact that, if he did not give evidence, the jury would not have his direct testimony contradicting DL.[198] He said that when the Practitioner told him that he thought it was best that he did not give evidence, he was 'too afraid, thinking about everything else that was going on …'.[199]

143 At one point in the cross-examination, the following exchange took place between Buss P and the appellant:[200]

> **BUSS P:** Mr Jeffery, I think what is being put to you is that when you accepted [the Practitioner's] advice to you not to give evidence, you knew that, as a result of his advice, and your, in effect, accepting his advice, the jury would not see or hear you give your account of what

[195] Affidavit of Ms Counsel, sworn 11 April 2018.
[196] Appeal ts 19 - 21.
[197] Appeal ts 20.
[198] Appeal ts 21.
[199] Appeal ts 21.
[200] Appeal ts 22, the transcript incorrectly attributes this to Allanson J.

> happened at that lunch in 2005?---I guess that is correct, your Honour, but I didn't think that far ahead where the jury is concerned.

144 Later in the cross-examination, the appellant said that it was not until after the trial he realised that, by not giving evidence, the jury would have no direct evidence contradicting DL's allegations.[201]

145 Towards the end of his cross-examination, he reiterated that, until the Practitioner advised him not to give evidence, he had always believed he 'was going to take the stand …'.[202]

146 The appellant denied the suggestion put to him by counsel for the State that he exaggerated in his affidavits when he said that he did not realise, at the time he was asked whether he wished to testify, that his failure to do so would result in there being no direct evidence to contradict DL.[203] In re-examination, the appellant said that, had he realised that the consequence of his failure to testify would have been that there was no direct evidence to contradict DL, he would have given evidence.[204] He described his state of mind at the time of the conversation with the Practitioner as, 'Very confused. Uneasy'.[205]

The Practitioner's cross-examination

147 Senior counsel for the appellant cross-examined the Practitioner and elicited these responses from him:

(1) The Practitioner did not put to Mr and Ms Counsel that there was no tablecloth on the table. He was unable to recall whether he made a deliberate decision to refrain from asking them about the tablecloth.[206]

(2) The Practitioner did not keep any record of the initial meeting with the appellant and his wife which took place on 25 October 2016. However, he discussed with the appellant, his wife and Mr Scerri 'case theory'. The Practitioner said that Ms Jeffery 'presented as a very good and strong witness'.[207]

(3) The Practitioner said that the meeting 'went for about an hour, maybe more' and that the discussion concerning case theory was

[201] Appeal ts 23 - 24.
[202] Appeal ts 24.
[203] Appeal ts 25.
[204] Appeal ts 26.
[205] Appeal ts 26.
[206] Appeal ts 31.
[207] Appeal ts 31 - 32.

'in very general terms, without going to the statements or in too much detail'.[208]

(4) The meeting on 25 October 2016 was the first and last time the Practitioner spoke to the appellant and his wife until the trial.[209]

(5) On the morning of the first day of the trial, the Practitioner said that he had a discussion with the appellant. He said that it was not a long or elaborate discussion, but it was more than simply 'hello'. The Practitioner was unable to recall what else was discussed.[210]

(6) At the conference on 25 October 2016, Ms Jeffery played a more dominant role and that the appellant was quiet and more passive.[211] The Practitioner said that, as a result of the meeting, he did not form an impression about the appellant as a witness, save that he did not think that the appellant would be 'a terrible witness'. He said that he relied on Mr Scerri's observations made over time about the appellant.[212]

(7) The Practitioner said that, at the meeting on 25 October 2016, he articulated the case theory that DL had been sexually interfered with in the manner she alleged, but by some other man on some other occasion than the lunch in question.[213]

(8) The Practitioner said that he made an assessment of whether the appellant would be a good witness based on the discussions he had with Mr Scerri.[214] The Practitioner said that, 'Mr Scerri expressed doubt that [the appellant] would be a good witness'.[215] The Practitioner was unable to say when he formulated an opinion based on what Mr Scerri had told him that the appellant would not be a good witness.[216] The Practitioner added that he had formed the view that the appellant had 'not performed particularly well' in the appellant's record of interview.[217] Yet,

[208] Appeal ts 32.
[209] Appeal ts 33.
[210] Appeal ts 33 - 34.
[211] Appeal ts 34.
[212] Appeal ts 34.
[213] Appeal ts 35.
[214] Appeal ts 37 - 38.
[215] Appeal ts 38.
[216] Appeal ts 38.
[217] Appeal ts 38.

the Practitioner conceded, he had wanted the appellant's video record of interview to be played at the trial.[218]

(9) The Practitioner said that he viewed the appellant's proof of evidence in the week before the trial and said that 'it wasn't strong', that there was 'some vagueness of recollection'.[219]

(10) The Practitioner said that he did not wish to expose the appellant to cross-examination because the prosecutor might take him through those aspects of DL's statement with which he had to agree.[220]

(11) The Practitioner agreed that he could have made a better assessment of the appellant as a witness had he conferred with him on the weekend before the trial and taken him through the proof, but he did not take this step.[221] The Practitioner said that he understood that Mr Scerri's view of the appellant as a witness was the same as his.[222]

(12) The Practitioner agreed with senior counsel for the appellant that he (the Practitioner) formed the view that there would be no benefit to the appellant's case by having him give evidence. The Practitioner accepted as fair comment the proposition that it was not that the appellant was a bad witness or likely to be an unimpressive witness, but simply that he could not say much.[223] The Practitioner agreed that he did not inform the appellant of his 'strong provisional decision' not to call the appellant, but he thought that decision was understood by him and his wife.[224]

(13) The Practitioner agreed that it was sound practice for counsel advising an accused person who elects not to give evidence to inform that person of the consequences of that decision. The Practitioner said that it was his normal practice to do so, but he did not on this occasion.[225]

(14) The Practitioner reiterated that he believed that it would be better for the appellant not to give evidence, having regard to

[218] Appeal ts 38 - 39.
[219] Appeal ts 39.
[220] Appeal ts 39 - 40.
[221] Appeal ts 41.
[222] Appeal ts 42.
[223] Appeal ts 42.
[224] Appeal ts 43 - 44.
[225] Appeal ts 44.

the risk that he would be exposed to 'damaging cross-examination'.[226]

(15) The Practitioner had no recollection of speaking to the appellant about his election to give evidence in the approximate hour and a half between the close of the State's case, at about 12.30 pm, and the resumption after the lunch adjournment.[227] However, based on his usual practice, the Practitioner said that he 'must have spoken to [the appellant]'.[228]

(16) The Practitioner accepted that he did not tell the appellant that, if he did not give evidence, the jury would not have heard his version of events.[229]

(17) The Practitioner agreed that, had the appellant been advised to give evidence, he (the appellant) would have done so.[230]

(18) In answer to a question from the bench, the Practitioner said that the following factors caused him to advise the appellant not to testify:[231]

(a) there was some vagueness in the appellant's proof of evidence;

(b) the prosecutor would, in effect, rehearse, in cross-examination, the prosecution closing address;

(c) the Practitioner had seen how the appellant had responded to police questioning in his video record of interview;

(d) the views of his instructing solicitor; and

(e) the Practitioner did not think he was going to get any benefit from calling the appellant.

(19) The Practitioner said he disagreed 'emphatically' with the proposition that the first time he approached the appellant about whether he would give evidence was after he had called the last

[226] Appeal ts 45.
[227] Appeal ts 51 - 52.
[228] Appeal ts 52.
[229] Appeal ts 53.
[230] Appeal ts 55.
[231] Appeal ts 56.

witness for the defence. However, he had no recollection of what he said to the appellant on the subject during the trial.[232]

(20) Senior counsel for the appellant referred the Practitioner to a portion of the cross-examination of DL in which DL said that, although she went to business lunches with her mother every couple of months, there was no lunch she went to where there were two young children present. Senior counsel put to the Practitioner that this answer constituted 'the death knell of your case theory'. The Practitioner responded that he did not think that it was, but he accepted that DL's answer was not 'helpful'.[233]

(21) The Practitioner accepted that there was no reason why he could not have run the defence case on two bases: the first being that DL was not telling the truth about being molested by the appellant; and the second being that DL was molested on another occasion and that she was mistaken as to the perpetrator. However, the Practitioner expressed the view that 'they don't operate well together'.[234]

(22) The appellant never wavered and was emphatic that the allegations were false.[235]

The Practitioner's re-examination

148 In the re-examination of the Practitioner, counsel for the State took the Practitioner to a number of parts of the transcript in which reference was made to the tablecloth and the issue of whether or not it was on the dining table at the relevant time.[236]

Mr Scerri's cross-examination

149 Mr Scerri, under cross-examination, said:

(1) At the initial meeting, Ms Jeffery was 'very impressive'. He said that there was discussion at the meeting of the potential for the appellant not to give evidence 'if his wife dealt with the relevant matters in her oral evidence'.[237]

[232] Appeal ts 57.
[233] Appeal ts 58 - 59.
[234] Appeal ts 57 - 60.
[235] Appeal ts 61.
[236] Appeal ts 64 - 65.
[237] Appeal ts 67 - 68.

(2) He did not form any initial view, based on the meeting in October 2016, of how the appellant would perform as a witness.[238]

(3) He did not have a memory of saying to the Practitioner that the appellant would not make a good witness. Mr Scerri said that he recalled saying to the Practitioner that if the appellant gave evidence, he would come across 'as the quintessential Aussie bloke and that that would be useful'.[239]

(4) No decision had been made up to the commencement of the trial about whether the appellant would give evidence. He expected that there would be a discussion during the trial 'at the relevant time'.[240] Mr Scerri testified that he was not part of any such discussion, but he spoke to the appellant afterwards. Mr Scerri was not able to say with precision when in the trial that discussion occurred.[241]

(5) While he had a 'gut feeling' that the discussion took place when the trial judge enquired from counsel as to whether the appellant would be giving or adducing evidence, he was unable to say 'for sure'.[242]

(6) The appellant told him, after the conversation with the Practitioner, that he would rather not give evidence. Mr Scerri explained that the impression he got from his conversation with the appellant was that 'he would give evidence but probably not something he wanted to do ideally'.[243]

(7) He had no recollection of telling the Practitioner that the appellant would not be a good witness. Mr Scerri said that he thought the appellant 'would perform okay. He's likable'.[244]

Findings of fact

150 In order to address ground 1, it is necessary to make some findings of fact. In doing so, we make these general observations:

[238] Appeal ts 69.
[239] Appeal ts 69.
[240] Appeal ts 70.
[241] Appeal ts 70 - 71.
[242] Appeal ts 71.
[243] Appeal ts 71 - 72.
[244] Appeal ts 72.

(1) While the appellant was cross-examined and aspects of his evidence were challenged, Ms Jeffery and Mr and Ms Counsel were not cross-examined on their affidavits.

(2) Our impression of the appellant, the Practitioner and Mr Scerri was that each of them gave honest, although not always accurate, evidence. The accuracy of all witnesses' recollections of the various conversations and meetings, particularly the Practitioner and Mr Scerri, was hampered by the absence of any contemporaneous note.

(3) There is no dispute that the appellant, at all times, denied the alleged offences.

(4) Up until the close of the State's case, no definite instruction had been sought by either of the appellant's lawyers as to whether the appellant wished to give evidence.

151 We turn first to the meeting of 25 October 2016. It is common ground, and we find, that:

(1) This was the first and only meeting prior to trial that the appellant had with the Practitioner.

(2) The meeting was attended by the appellant, Ms Jeffery, Mr Scerri and the Practitioner.

(3) At least from the perspective of the Practitioner and Mr Scerri, it was an informal meeting designed to see whether the appellant wished to brief the Practitioner as his counsel at trial.

(4) The meeting was informal and no one took contemporaneous notes.

(5) The meeting lasted approximately an hour.

(6) Mr Scerri provided the Practitioner with an electronic copy of the prosecution brief before the meeting.

(7) Both the Practitioner and Mr Scerri formed the view that Ms Jeffery would make a good defence witness.

152 Each witness agreed, and we find, that there was some discussion at the meeting about whether it would be necessary for the appellant to testify in his defence. In this connection, we find that the appellant, at

the outset, was aware that he had the right to choose to give evidence or not. We also find that no decision was made on the issue. This is hardly surprising, given that the Practitioner had not been briefed; the discussion took place in the context of an informal meeting to see whether the appellant wished to instruct the Practitioner; and the Practitioner had insufficient information upon which to give advice on the subject. The issue was left on the basis that the Practitioner would give advice closer to trial.

153 The appellant and Ms Jeffery recalled that in the meeting the Practitioner expressed the view that any evidence the appellant gave at his trial would be 'self-serving' and that there would be no point in the appellant testifying. The Practitioner denied using the expression 'self-serving' in connection with the appellant testifying or not. Further, he denied saying that there would be no point in the appellant testifying. Mr Scerri recalled that the Practitioner used the expression 'self-serving' when referring to the possibility that a judge would reject the tender of the appellant's exculpatory video record of interview. Mr Scerri did not give evidence as to whether the Practitioner said that there would be no point in the appellant testifying.

154 We accept the evidence of the appellant and Ms Jeffery that the Practitioner used the expression 'self-serving' in the meeting. The appellant and Ms Jeffery are not lawyers and had no previous experience with the criminal justice system. The expression is one which non-lawyers, such as the appellant and Ms Jeffery, would have considered unusual and therefore it is something which is likely to have stuck in their minds. However, based on Mr Scerri's testimony, we find that the appellant and Ms Jeffery were mistaken as to the context in which the expression was used.

155 The Practitioner is an experienced criminal lawyer. It is axiomatic that any accused person who gives evidence in their defence is testifying in a 'self-serving' way. The fact that an accused person's evidence has that inherent feature is not a basis upon which to advise a client not to testify. In our opinion, it is inherently unlikely that the expression was used in the context claimed by the appellant and Ms Jeffery.

156 It is much more likely, as Mr Scerri said, that the expression was used in the context of whether the appellant's video record of interview would be admissible at trial. In this regard, it is trite to observe that an accused person's out-of-court statement is only admissible if it contains

admissions against interest. If it does not have any such feature and is only 'self-serving', it is inadmissible. It appears from Mr Scerri's evidence that the appellant's video record of interview may have been thought to be inadmissible for this reason. As it turned out, the video record of interview was not adduced at trial because of its 'self-serving' nature.

157 In our opinion, the appellant and Ms Jeffery would not have been familiar with the legal issues surrounding the admissibility of the video record of interview. While they accurately recalled the use of the expression 'self-serving', they were inaccurate as to the context in which the expression was used.

158 We have not been persuaded that the Practitioner made the statement that there would be no point in the appellant testifying. As we have said, we do not think that any decision was made on the question at the meeting. It is more likely that what was discussed was the possibility that the appellant may not have to testify at the trial if there was nothing for him to add beyond his wife's evidence. We think it is unlikely that at this early stage, the Practitioner would have expressed the definite view that there would be no point in the appellant testifying. We accept his evidence that it was necessary for him to make an assessment closer to trial as to whether or not the appellant would be a good witness, and that in making that assessment he would take into account whether the appellant wished to give evidence.

159 Based on the evidence of the Practitioner, we accept that there was some discussion at the meeting of a defence case theory that involved the defence arguing that DL was assaulted on another occasion, but not at the lunch on 9 October 2005. Any discussion was brief and it is entirely possible that neither the appellant nor Ms Jeffery has any recollection of it.

160 Between the meeting on 25 October 2016 and the first day of the trial, the appellant and his wife had no direct contact with the Practitioner. Rather, their point of contact was Mr Scerri, with whom they communicated frequently. Mr Scerri developed a good rapport with both the appellant and his wife. As a result of the contact he had with the appellant, he was able to form a view as to whether the appellant would make a good witness. We accept Mr Scerri's evidence to the effect that he considered that the appellant would be a satisfactory defence witness, and that he would come across well to a jury as 'likeable' and 'the quintessential Aussie bloke'. We find that

Mr Scerri informed the Practitioner of his views. We find that insofar as the Practitioner understood that Mr Scerri had formed an unfavourable view of the appellant as a witness, that understanding was mistaken.

161 At some time prior to 15 February 2017, the Practitioner and Mr Scerri discussed the case. In this discussion, the Practitioner articulated the case theory that was in the email Mr Scerri sent to the appellant's wife on 15 February 2017.[245]

162 We find that the Practitioner did not, prior to the first day of trial, meet with the appellant to assess whether he would make a good witness, nor did he discuss with him the advantages and disadvantages of giving evidence. We also find that Mr Scerri had no such discussion with the appellant. It appears that he regarded the matter as an issue on which the Practitioner would give advice.

163 It appears from the evidence, and we find, that, by the time the trial had commenced, the Practitioner had formed the view that it was unlikely that the appellant would decide to give evidence. The Practitioner understood that the appellant had the same view. As to this, the Practitioner was in error. The appellant understood that he would in all likelihood give evidence.

164 We find that, prior to the close of the prosecution case, neither the Practitioner nor Mr Scerri discussed with or gave advice to the appellant on whether he would or should give evidence, nor were any instructions sought from the appellant on the issue. The Practitioner continued to understand, wrongly, that it was unlikely that the appellant would decide to give evidence, while the appellant continued to understand that he would in all likelihood give evidence.

165 There is no serious dispute that, at some point after the State closed its case, the Practitioner approached the appellant and sought instructions from him as to whether he should give evidence. There is, however, a divergence between the Practitioner, on the one hand, and the appellant, on the other, as to when this conversation took place. According to the Practitioner, it occurred before the trial judge asked him if the appellant intended to give or adduce any evidence.[246] According to the appellant, the conversation took place after Ms Walker had given evidence. The appellant's recollection as to the timing of the conversation is supported by Mr Counsel and to some

[245] See [108] above.
[246] See s 144(3) of the *Criminal Procedure Act 2004* (WA).

extent by Mr Scerri, who witnessed the Practitioner approach the appellant 'during the defence case'.

166 The trial transcript shows that the prosecutor closed the State's case at approximately 12.34 pm on 8 March 2017.[247] The trial judge then adjourned proceedings for lunch to 2.00 pm.[248] At 2.05 pm, the trial resumed. Her Honour asked the Practitioner if the appellant elected 'to give evidence or present evidence', to which the Practitioner said that the appellant elected 'to call evidence'.[249] The Practitioner then called First Class Constable Martin.

167 Although the appellant was granted overnight bail during the trial, he did not have lunchtime bail.[250] Accordingly, the appellant would have spent the lunchtime adjournment in the detention facilities of the District Court. The appellant, the Practitioner and Mr Scerri did not testify that there was a discussion in the detention area during the adjournment about whether the appellant would testify in his defence. We find that, despite the fact that the appellant's lawyers had ample opportunity to discuss the matter with the appellant during the adjournment, they did not do so.

168 Instead, we find that the Practitioner spoke very briefly to the appellant in the courtroom at about 2.00 pm, when the appellant was in the dock, prior to informing the trial judge that the appellant elected to call evidence, but not to give evidence himself. We have arrived at this finding because, in order for the Practitioner to accurately answer her Honour's question, he must have, by then, sought and received the appellant's instructions as to whether he elected to give evidence. Further, the Practitioner would have been well aware of the requirement in s 144(4) of the *Criminal Procedure Act 2004* (WA) that, if an accused person intends to give evidence as a witness, he or she must give evidence before any other witness is called by the accused person unless the court permits otherwise for a good reason. It may be inferred that if, for some reason, the Practitioner thought that the appellant might give evidence after the last defence witness, it is a matter which he would have raised with the trial judge at the outset of the defence case.

[247] ts 156.
[248] ts 157.
[249] ts 158.
[250] ts 22 - 23.

169 Regardless of the precise point in the trial when the conversation between the Practitioner and the appellant took place, most of its content is not in any real dispute. The Practitioner asked the appellant if he wished to give evidence; the appellant sought counsel's advice; counsel advised that the appellant should not give evidence; and the appellant responded, 'whatever you think is best'. We find that the conversation was very brief. There was no discussion of the advantages and disadvantages for the appellant in giving or not giving evidence, and the Practitioner did not explain why he thought the appellant should not testify. The Practitioner did not, as prudent practice would dictate, seek or take written instructions from the appellant on the issue. He did not explain to the appellant that, without his testimony, there would be no sworn or unsworn evidence from the appellant contradicting the complainant.

170 Based on the evidence of the appellant, we accept that until the Practitioner advised him not to give evidence, the appellant believed that in all likelihood he would be testifying in his defence. Further, we find that the appellant was willing to give evidence. Also, we find that the Practitioner's advice was not advice that the appellant expected and that he was, at the time, confused and uneasy. Finally, when he accepted the advice, the appellant did not appreciate its ramifications, including that the jury would not see or hear his version of what occurred at the lunch during which it was alleged he committed the offences.

Disposition - ground 1

171 As argued before this court, the appellant's case on ground 1 boiled down to two principal contentions. The first contention concerned the case theory run at trial by the Practitioner. In effect, the appellant alleges that the case theory was misconceived and no competent counsel would have run the defence case on such a basis. The second contention concerns the appellant's decision not to give evidence. The appellant alleges that he was inadequately advised on the issue. He also alleges that no competent counsel would have advised the appellant not to testify.[251]

172 The general principles relating to a ground of appeal which alleges a miscarriage of justice by reason of the conduct of defence counsel are well established and are uncontentious. They were recently stated by

[251] Appeal ts 77 - 79.

this court in ***Huggins v The State of Western Australia***.[252] This statement was primarily derived from the decisions of the High Court in ***TKWJ v The Queen***[253] and ***Nudd v The Queen***,[254] and of this court in ***McMahon v The State of Western Australia***.[255] We adopt what was written in ***Huggins***, without repeating it.

173 For the purposes of this case, it is enough to make these points. It is neither a necessary nor sufficient requirement for the establishment of a miscarriage of justice on the basis of counsel's conduct to characterise what counsel did or did not do as incompetent. The focus of any inquiry is upon the consequences of counsel's conduct and the extent to which it caused a miscarriage of justice. The focus is not upon why any error occurred but on the objective features of the trial. Why defence counsel acted or did not act in a particular manner is not relevant unless it provides an explanation of an objective feature which establishes or diminishes an apparent miscarriage of justice. The concept of the 'flagrant incompetence' of defence counsel has been understood as a reference to 'conduct incapable of rational explanation on forensic grounds'. See ***Vella v The Queen***.[256] See also ***Hanna v The Queen***.[257] A miscarriage of justice may occur as a result of 'flagrant incompetence' of defence counsel, but may also arise from 'some other cause'. See ***R v Birks***.[258]

174 An appellant who seeks to demonstrate that the conduct of counsel caused a miscarriage of justice undertakes a heavy burden which is not easily discharged. In general, an accused person is bound by counsel's conduct. Counsel has a broad discretion as to how an accused person's defence is to be conducted. A non-exhaustive list of decisions which are within counsel's discretion include what witnesses to call; what questions to ask or not ask; what lines of argument to pursue and what points to abandon. An apparently rational decision made by counsel on such matters does not result in a miscarriage of justice simply because, with the benefit of hindsight, it appeared unwise or not carefully considered, or it produced consequences which operated to the accused person's disadvantage.

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[252] ***Huggins*** [375] - [383].
[253] ***TKWJ v The Queen*** [2002] HCA 46; (2002) 212 CLR 125.
[254] ***Nudd v The Queen*** [2006] HCA 9; (2006) 80 ALJR 614.
[255] ***McMahon v The State of Western Australia*** [2010] WASCA 143.
[256] ***Vella v The Queen*** [2015] NSWCCA 148 [90] (Beech-Jones J; Gleeson JA & Hidden J agreeing).
[257] ***Hanna v The Queen*** [2017] NSWCCA 168 [17] (Basten JA).
[258] ***R v Birks*** (1990) 19 NSWLR 677, 685 (Gleeson CJ; McInerney J agreeing).

175 If an appellate court finds that a decision made by counsel is capable of reasonable explanation on the basis that it was taken to obtain a forensic advantage, or avoid a forensic risk, it will not give rise to a miscarriage of justice.

176 This last statement is subject to the caveat identified by Gaudron J in ***TKWJ v The Queen***, that:[259]

> It may be that, in the circumstances, the forensic advantage is slight in comparison with the importance to be attached to the defect or irregularity in question. If so, the fact that counsel's conduct is explicable on the basis of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice. (footnote omitted)

177 Where a forensic choice taken by counsel was unreasonable, it will be necessary to demonstrate that there is a significant possibility that it affected the outcome of the trial.

178 In the present case, the decision taken by counsel to pursue the sole line of defence that DL had been assaulted at some other lunch and had mistakenly identified the appellant as the offender was, in our opinion, if reasonably open, having regard to the evidence and his instructions, a matter within counsel's discretion and subject to the principles to which we have just referred.

179 However, the decision of an accused person to give or not to give evidence falls into a different category of decision. As acknowledged by the High Court in ***Craig v The Queen***, the choice is one ultimately to be made by the accused person.[260] It may be assumed that this is in recognition of the importance of this choice which, as the court in ***R v Kennedy***[261] correctly said, 'is very often the most central and important choice to be made in a criminal trial'.[262] A failure by counsel to adequately advise an accused person with respect to the exercise of that choice will, in some circumstances, give rise to a miscarriage of justice.[263] In our opinion, such a failure will ordinarily deprive the accused person of a fair trial according to law and will ordinarily give rise to a miscarriage of justice. This is irrespective of whether there is a

[259] ***TKWJ v The Queen*** [28].
[260] ***Craig v The Queen*** [26].
[261] ***R v Kennedy*** [2017] SASCFC 170.
[262] ***R v Kennedy*** [63].
[263] ***Craig v The Queen*** [26].

significant possibility that counsel's conduct may have affected the outcome of the trial.[264]

180 The question as to whether adequate advice was given requires an objective assessment of all the relevant circumstances of the particular case. As Thomas JA put it, in ***R v Szabo***:[265]

> It is impossible to lay down in advance the extent of detail that needs to be discussed or what will amount to reasonable discussion for the purpose of assisting the client to make the necessary election. It should be recognised, however, that too much forensic discussion may be bamboozling, and that it is not a lawyer's duty to educate the client to the equivalent of a trained lawyer. Generally speaking it should be sufficient to mention the main points that should guide the particular decision. It is then for the client to accept or reject the advice.

181 An example of a case in which it was held that an appellant had been given inadequate advice is ***R v ND***,[266] a case which has some similar features to the present case.

182 In ***R v ND***, the appellant was convicted after trial of two counts of rape and two counts of incest. The appellant's written instructions to his legal advisers were that he denied the alleged offences. He was advised not to give or call evidence and chose not to do either. The appellant alleged that, as a result of this advice and his acceptance of it, he suffered a miscarriage of justice. He argued that it was reasonable for him to be guided by his legal advisers, but a sworn denial would have been a powerful means of rebutting the complainant's evidence or, at least, causing the jury to have a reasonable doubt about his guilt.[267] The appellant was not advised of the importance of making a sworn denial before the jury.[268]

183 The ground of appeal was upheld. Holmes J, with whom McPherson JA agreed, concluded that the appellant had been given fundamentally flawed advice in two respects. The first was that the appellant had been given wrongly to understand that if he testified he was at risk of harming his case through being portrayed as an abusive and neglectful parent and, second, that he was not advised of the

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[264] ***R v Kennedy*** [64].
[265] ***R v Szabo*** [2000] QCA 194; [2001] 2 Qd R 214 [40].
[266] ***R v ND*** [2003] QCA 505; [2004] 2 Qd R 307.
[267] ***R v ND*** [4], [21].
[268] ***R v ND*** [25].

advantages of putting his version on oath. As to this latter point, her Honour said:[269]

> As a result the jury was presented with only one sworn version. Although there were particular matters in the complainant's evidence which might have caused doubts, taken as a whole and uncontradicted, it justified the jury in reaching a conclusion of guilt beyond reasonable doubt. The situation might have been very different had they had the appellant's denial on oath; and the evidence of his father might also have assisted. In the circumstances of this case there is every reason to fear that a miscarriage of justice has occurred.

Miscarriage of justice in relation to the election not to testify

184 It is convenient to begin with the contention that the appellant suffered a miscarriage of justice in relation to his election not to testify. It was submitted on behalf of the appellant that there was no forensic reason or advantage for defence counsel to have advised the appellant that he should not testify in his defence. It was also submitted that the appellant had never said to his lawyers that he did not wish to give evidence and that his lawyers had never suggested to him that he would not be a good witness. He had no prior convictions and there was, in effect, no forensic reason to not call him as a witness.[270]

185 Further, the appellant was inadequately advised about the advantages and disadvantages, particularly the disadvantages, of choosing not to testify. In this regard, the appellant emphasised, and we accept, that he was not warned that unless he gave evidence there would be no direct evidence to refute the allegations of DL.[271]

186 The State submitted that at all times the appellant appreciated that he had a right to give evidence. It is said that the decision not to give evidence was forensically justified, having regard to this combination of factors:[272]

(1) It was readily apparent from the way in which the defence case was conducted that the appellant denied touching DL.

(2) It was apparent from the appellant's proof of evidence that his recollection of the lunch was vague.

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[269] ***R v ND*** [40].
[270] Appellant's submissions, par 7; WAB 112 and par 15; WAB 114.
[271] Appellant's submissions par 8; WAB 112.
[272] Respondent's submissions, pars 13 - 16; WAB 126 -127.

(3) Had the appellant given evidence, he would have been subject to cross-examination by the prosecutor which highlighted the contrast between the appellant's apparent lack of memory as to the lunch and his 'relatively clear recollection' as to the seating arrangement at the table.

(4) Given the evidence of Mr and Ms Counsel and Ms Jeffery concerning the seating arrangement, there was no need for the appellant to add his voice to this evidence and thereby expose himself to cross-examination on the point.

187 The State submitted that the appellant was adequately advised by his lawyers as to his right to testify. It was said that the appellant's claim that he had not been told that the jury would not hear his denial on oath, was no more than a statement of the obvious and that it beggared belief that, had he been told this, he would have given evidence.[273]

188 The State submitted that the appellant's case amounted to no more than an allegation by an appellant that he made the wrong election at trial which, given the outcome, he now regrets. The State denied that the appellant suffered a miscarriage of justice.[274]

189 We accept that the appellant was aware that he had a choice as to whether he testified. The issue was raised generally at the informal meeting on 25 October 2016. The issue could not have reasonably been resolved at that meeting and was not, as a matter of fact, resolved on that occasion. No decision was made on the issue. It was left for counsel to assess and advise upon closer to trial. Of course, it was not a decision counsel could make without an adequate discussion with and advice to the appellant.

190 Remarkably, the appellant's legal advisers did not discuss the matter with the appellant until the Practitioner spoke very briefly to the appellant, while the appellant was in the dock, after the prosecutor had closed the State's case and shortly before the trial was to resume after the lunch adjournment.

191 In his evidence before this court, the Practitioner set out the factors which caused him to advise the appellant not to testify.[275] None of those factors were discussed with the appellant. All of them were

[273] Respondent's submissions, par 20; WAB 128.
[274] Respondent's submissions, par 20; WAB 128.
[275] See [147], point (18).

debatable. One of them, concerning Mr Scerri's view of the appellant, was incorrect. The point to be made is that, in the context of the present case, adequate advice as to the appellant's election required the Practitioner to have discussed these matters with the appellant and to have advised him on them at some point prior to or at the close of the State's case. A further matter relevant to the question of what was adequate advice in this case was the Practitioner's perception of how well (or not) the case had gone. For some unexplained reason, the Practitioner did not discuss the relevant matters with the appellant or advise him on them during the lunchtime adjournment after the State's case had closed. Even if the Practitioner had been unable to speak to the appellant during the lunchtime adjournment, he should have sought an adjournment from the trial judge so that the issue could be adequately discussed, advice given and instructions obtained. Ordinarily, if not invariably, a trial judge would grant an adjournment for such a purpose.

192 It is no answer to the allegation of a miscarriage of justice to point out that the appellant took the Practitioner's advice and elected not to testify. Nor is it an answer that the appellant had said to Mr Scerri, after speaking with the Practitioner, that he would prefer not to give evidence. The Practitioner put the appellant in an invidious position of having to make a decision immediately and without discussion with or adequate advice from his lawyers, on a matter of great importance in the trial. Practically speaking, there was no real alternative for the appellant, other than to accept the Practitioner's advice.

193 While in retrospect it may be said, as the State submits, that it was obvious that if the appellant elected not to testify, there would be no direct evidence contradicting DL, that was not a matter to which the appellant had turned his mind when he gave instructions to his counsel. In our opinion, that is understandable, given the situation in which he had been placed. We accept that the appellant had never said to his lawyers that he did not wish to give evidence and that his lawyers had never suggested to him that he would not be a good witness. He had no prior convictions. We are satisfied that, on an objective assessment of the relevant facts and circumstances, there was, in substance, no forensic reason to not call him as a witness. Neither Ms Jeffery nor any of the other witnesses who were actually called as part of the appellant's case at trial was able to contradict DL's account of the alleged offending. The absence of any direct evidence contradicting DL meant that, on an objective assessment of the record at the close of the State's case, there was a significant prospect that the appellant would be

convicted as charged. We find that, had it been drawn to the appellant's attention that if he did not give evidence there would be no direct evidence from him contradicting DL's testimony, he would have testified in his defence.

194 In our view, the appellant has demonstrated that he suffered a miscarriage of justice because of the inadequate advice given to him by his legal advisers.

Miscarriage of justice in relation to the defence case theory

195 We now turn to the contentions concerning defence counsel's case theory.

196 Earlier in these reasons (at [108]), we set out part of Mr Scerri's email of 15 February 2017 in which the case theory was described, subject to changes which may occur at trial. The central plank of the case theory was that KL regularly took her daughters to business lunches, and that DL was 'touched' at one of these lunches, but not the lunch at the appellant's house on 9 October 2005. DL had only identified the appellant as the offender because her mother had 'said it was him'. The email of 15 February 2017 described other aspects of the case theory, but it is unnecessary to consider them because they were not pursued at trial.

197 The genesis of the case theory appears, having regard to the Practitioner's evidence in the appeal, to have been raised by him at the meeting on 25 October 2016. There is nothing in the evidence to suggest that it was prompted by the appellant or his wife. The evidential base for the case theory, at that point, appears non-existent.

198 It is clear that between the decision to brief the Practitioner and the email on 15 February 2017, the appellant and his wife provided Mr Scerri with information about DL, and why she may be motivated to have accused the appellant of the offences. However, there remained no evidence to suggest that DL had been assaulted at some other lunch she had attended with her sister and mother. On the morning of the trial, the Practitioner told the appellant that he would be taking a 'slightly different direction' in the running of the trial.[276] Exactly what that meant is unclear.

199 The Practitioner opened the case on the basis that DL had mistakenly identified the appellant as the perpetrator. However, the

[276] Exhibit A1, par 26; WAB 16.

Practitioner did not open on the basis that it was accepted that DL had been assaulted elsewhere on another occasion. In fact, the Practitioner said that everything was disputed apart from the fact that it would not be suggested that DL had never been to the appellant's house. It was only in his closing address that the Practitioner told the jury that the defence 'don't suggest for a moment that nothing has ever happened to [DL]'.[277]

200 It is true that there is no evidence that the appellant voiced any objection to the case theory set out in the email of 15 February 2017. Nor was there any objection from the appellant after the Practitioner had opened the defence case. However, the appellant had effectively put himself into the hands of his legal advisers as to the conduct of his case. It was not unreasonable for him to do so, and to rely upon his lawyers to provide him with proper legal advice, including as to the defence case theory. Further, by the time the appellant's case was opened, the die was cast. It would have been forensically damaging to the defence case to change course after the opening address.

201 The formulation of the defence case theory is ordinarily a tactical question for counsel. If the decision to adopt the case theory was an objectively rational decision to make there would ordinarily be no miscarriage of justice.

202 An advantage of the approach taken by the Practitioner was that it obviated counsel cross-examining DL on the basis that she was dishonestly accusing the appellant of assaulting her. Rather, DL could be cross-examined on the basis that she was merely mistaken. Such a cross-examination may not have been as confrontational or upsetting for DL and, in turn, may have been less prone to alienating the jury.

203 However, the case theory suffered from an insurmountable defect: it was completely unsupported by the evidence. There was no evidence that DL had been assaulted at any other lunch she attended with her sister and mother. The fact that DL had gone to other lunches on other occasions with her mother where other men may have been present was insufficient to support the case theory developed by the Practitioner. All of the surrounding facts and circumstances of the alleged offence, as articulated by DL, her sister and her mother, were very specific, and, when considered together, could only have concerned the lunch held at the house of the appellant and his wife on 9 October 2005. In our opinion, the case theory developed by the Practitioner and pursued by

[277] Closing address, ts 18.

him at trial was no more than speculative. The adoption of such a tenuous case theory made it arguably more important for the appellant to testify in his defence.

204 There is a further problem with the way in which the case theory was run at trial. As opened, the defence case theory did not involve a concession that DL had been assaulted at some previous lunch. However, the Practitioner closed in a manner which, in substance, conceded that DL had been assaulted. There is no evidence that the appellant instructed the Practitioner to make this concession. While, generally speaking, factual concessions may be made by counsel without instructions, a concession as important as the one made by the Practitioner ought not to have been made without instructions from the client. The concession made by the Practitioner in his closing address had the effect of substantially bolstering the complainant's credibility.

205 In our opinion, no competent counsel would reasonably have formulated the case theory which the Practitioner put before the jury in his opening statement and which he developed and pursued throughout the trial. No rational forensic justification can be discerned for counsel's strategy. Indeed, the only conclusion reasonably open in the circumstances is that counsel's strategy is incapable of rational explanation on forensic grounds. The appellant has suffered a miscarriage of justice. There is a significant possibility that the Practitioner's error on such a crucial aspect of the defence case affected the outcome of the trial.

206 Leave to appeal on ground 1 should be granted. The ground has been made out.

The tablecloth

207 Particular (h) of ground 1 concerns an allegation that defence counsel failed to consider or address the question of whether the table at which the alleged offence occurred had a tablecloth on it. As we have found that ground 1 has been made out for other reasons, it is unnecessary to deal with particular (h). However, given the attention the allegation attracted in the appeal, we will briefly deal with it.

208 In our opinion, there is no merit to the allegation in particular (h). The Practitioner cross-examined DL and JM about the tablecloth. While he did not ask either Mr or Ms Counsel about whether the dining table from which they ate lunch had a tablecloth on it, the Practitioner adduced evidence from Ms Jeffery to the effect that she had not used a

tablecloth in 20 years and she did not have a tablecloth on the table on the day in question.

209 The Practitioner dealt with the question of the tablecloth in his closing address, suggesting that, in substance, Ms Jeffery's evidence on the point was credible.

210 The Practitioner submitted that whether or not the table was covered with a cloth was 'crucial'. It was argued that if there was no tablecloth, it made DL's evidence less likely to be accurate because there would have been nothing to obstruct anyone seeing the appellant assaulting her. On appeal, it was essentially argued that the Practitioner should have made more of the point by, for example, asking Mr and Ms Counsel about the tablecloth, who would have confirmed the evidence of Ms Jeffery.

211 In our opinion, the issue of whether or not there was a tablecloth covering the table was adequately dealt with by the Practitioner at the trial. How far to take the issue was a matter for the Practitioner to decide. While, in hindsight, it might be said that more could have been made of the issue, that does not amount to a miscarriage of justice.

A new trial should be ordered

212 Section 30(5) of the *Criminal Appeals Act* applies in the case of an appeal against a conviction by an offender. It reads, relevantly:

> If the Court of Appeal allows the appeal, it must set aside the conviction of the offence (***offence A***) and must -
>
> (a) order a trial or a new trial; or
>
> (b) enter a judgment of acquittal of offence A; or
>
> (c) if -
>
> (i) the offender could have been found guilty of some other offence (***offence B***) instead of offence A; and
>
> (ii) the court is satisfied that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender was guilty of offence B,
>
> enter a judgment of conviction for offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A.

213 In ***Director of Public Prosecutions (Nauru) v Fowler***,[278] Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ noted that the power of an appellate court to grant a new trial is discretionary in character. Where an appellate court quashes a judgment of conviction it must decide whether it is in the interests of justice to order a new trial. Two broad issues arise for consideration in making that decision. First, the court must assess whether the admissible evidence adduced at the original trial was sufficiently cogent to support a conviction. If it was not, a new trial should not be ordered because it would give the prosecution an opportunity to supplement a defective case. Secondly, if the court determines that the admissible evidence adduced at the original trial was sufficiently cogent to support a conviction, the court must take into account 'any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused'.

214 In ***King v The Queen***,[279] Dawson J reiterated that the discretion to order a new trial should not be exercised 'when the evidence in the court below was not sufficiently cogent to justify a conviction or to allow the Crown to supplement a case which has proved to be defective'. His Honour noted, in particular, that 'the Crown should not be given an opportunity to make a new case which was not made at the first trial: ***R v Wilkes*** [(1948) 77 CLR 511, at p 518)] (433)'. See, to similar effect, the observations of McHugh J in ***Jiminez v The Queen***,[280] where his Honour held that a new trial should not be ordered because 'a second trial would allow the Crown to make a case different from that which it put to the jury at the first trial'. See also ***Parker v The Queen***.[281]

215 In ***R v Taufahema***,[282] Gummow, Hayne, Heydon and Crennan JJ cited, with apparent approval, the observations of Gleeson CJ (Finlay J & Slattery AJ agreeing) in ***Anderson v The Queen***[283] that:

(a) there is a public interest in the due prosecution and conviction of offenders; and

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[278] ***Director of Public Prosecutions (Nauru) v Fowler*** [1984] HCA 48; (1984) 154 CLR 627, 630.
[279] ***King v The Queen*** [1986] HCA 59; (1986) 161 CLR 423, 433.
[280] ***Jiminez v The Queen*** [1992] HCA 14; (1992) 173 CLR 572, 590.
[281] ***Parker v The Queen*** [1997] HCA 15; (1997) 186 CLR 494, 520 (Dawson, Toohey & McHugh JJ).
[282] ***R v Taufahema*** [2007] HCA 11; (2007) 228 CLR 232 [49], [51].
[283] ***Anderson v The Queen*** (1991) 53 A Crim R 421, 453.

(b) it is desirable, if possible, for the guilt or innocence of an accused to be finally determined by a jury.

216 In ***Taufahema***, Gleeson CJ and Callinan J (who with Kirby J dissented in the result) said that the references by Dixon J in ***R v Wilkes***,[284] and by Dawson J in ***King***,[285] to 'a new case' must be 'to the particulars of the charge, and to the nature of the evidence that will be adduced in support of it, not to the elements of the offence'.[286]

217 Gleeson CJ and Callinan J also said in ***Taufahema***[287] that the general rule that 'litigants are bound by the conduct of their counsel, a rule essential to the adversarial system, applies with at least as much force to the prosecution as to the defence'. Their Honours explained:[288]

> The considerations identified in ***Crampton v The Queen*** [(2000) 206 CLR 161 at 172 - 173 [15] - [20]] as reasons for the rule confining the circumstances in which a new point may be taken in this Court on a criminal appeal by an accused person are relevant in this context also. In particular, the adversarial procedure of criminal justice, which is bound up with notions of judicial independence and impartiality, and according to which the issues at trial are chosen and defined by the parties and their counsel, is at the heart of the matter. It is the executive branch of government that decides whether to prosecute, and what charges to lay. A trial is fought as a contest between the executive government and a citizen. The judge presides neutrally over that contest. Counsel for the respective parties define the issues, decide what witnesses will be called and what questions will be asked, and decide what arguments will be pursued and what will be abandoned.

218 Gummow, Hayne, Heydon and Crennan JJ, who constituted the majority in ***Taufahema***, reviewed the decisions in ***Wilkes***, ***King***, ***Jiminez*** and ***Parker***, and said that these authorities suggest that 'the difference between the case relied on in a first trial and the case to be relied on in a second trial must be substantial if the difference is to stand as a bar to an order for a second trial'.[289]

219 Although we are of the opinion that the judgments of conviction on the counts in the indictment must be set aside, we are satisfied that the interests of justice favour an order for a new trial on those counts. After examining the trial record, in the context of the additional

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[284] ***R v Wilkes*** [1948] HCA 22; (1948) 77 CLR 511, 518.
[285] ***King*** (433).
[286] ***Taufahema*** [35] - [36].
[287] ***Taufahema*** [37].
[288] ***Taufahema*** [37].
[289] ***Taufahema*** [67].

evidence adduced at the hearing of the appeal, we are unable to conclude that the State has no reasonable prospect of success on any of the counts at a new trial. Indeed, on our evaluation, the State has a reasonable prospect of persuading a properly instructed jury that, on the evidence adduced at the original trial and any evidence the appellant may give at the new trial, the jury could be satisfied beyond reasonable doubt as to the appellant's guilt on each of the counts. An order for a new trial would not allow the State to make a case different from the case it put to the jury at the original trial. We have taken into account, in deciding where the interests of justice lie, that the appellant has served a significant part of the total effective sentence imposed by the trial judge. The facts and circumstances of the case do not render it unjust to make the appellant stand trial again.

A final word on ground 1

220 The outcome in this case emphasises the importance of an accused person's decision whether or not to give evidence. An accused person must be given proper advice and have a reasonable opportunity to reflect on that advice and make a decision.

221 It is prudent practice for defence counsel to obtain written instructions from an accused person on the issue. In his evidence, the Practitioner accepted this, although, for unknown reasons, it did not occur here. The adoption of a practice to obtain written instructions ensures, as far as is possible, that the issue is addressed, the relevant advantages and disadvantages are laid out, and the accused person's instructions are clearly obtained.

Grounds 2 and 3

222 It is unnecessary to deal in detail with grounds 2 and 3, neither of which was formally abandoned, but neither of which was pressed with any vigour.

223 Ground 2 alleges that the trial judge erred in failing to give a ***Liberato***[290] direction in circumstances where the victim, her mother, and her sister gave evidence that the appellant was sitting next to the victim, and was therefore physically close enough to commit the offences alleged, when the appellant's wife and two other witnesses gave evidence that he was not. Such a direction is not required as a matter of law.[291] And, in this case, the trial judge clearly directed the

[290] See ***Liberato***.
[291] ***RMD v The State of Western Australia*** [2017] WASCA 70 [165].

jury that they must be satisfied beyond reasonable doubt about the truthfulness, accuracy and reliability of the evidence of DL, JM and KL before they could convict the appellant.[292] The direction was repeated, in combination with what is commonly referred to as a ***Longman*** warning.[293]

224 The direction given was both clear and sufficient. Ground 2 has no reasonable prospect of success.

225 Ground 3 also has no reasonable prospect of success. A prosecutor who has called evidence from witnesses whose evidence is inconsistent is entitled to invite the jury to believe one or the other.[294]

226 It was proper for the prosecutor to call Mr and Ms Counsel as witnesses, but to invite the jury to accept the evidence of DL, JM and KL where it was inconsistent with the evidence of Mr and Ms Counsel. The comments of the prosecutor on how the jury might approach the conflicts in evidence did not go beyond what was proper in the circumstances.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

AW
RESEARCH ASSOCIATE TO THE HONOURABLE JUSTICES MURPHY & MAZZA

7 DECEMBER 2018

[292] ts 225.
[293] ts 227 - 228; and see ***Longman v The Queen*** [1989] HCA 60; (1989) 168 CLR 79, 90 - 91.
[294] ***Harman v The State of Western Australia*** [2004] WASCA 230; (2004) 29 WAR 380 [110].