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REVISED

IN THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

JUDGE TUPMAN

THURSDAY 4 MAY 2017

2013/00242040 - R v Luke Andrew LAZARUS

JUDGMENT

HER HONOUR: This is the verdict and judgment in the judge alone trial involving the accused Luke Andrew Lazarus. Can I remind all present that there are in place a series of no publication orders. One is in relation to anything which might identify the complainant. I have not referred to the names of any of the complainant's friends who have given evidence in the trial so there would be no way in which their names could be used, and where necessary to specify one of them, I have used initials. There are also no publication orders in relation to a number of witnesses called by the accused and a number of names appearing in the list of names on the accused's phone. Those no publication orders continue until further order.

The accused is before the Court charged with one count in an indictment dated 3 April 2017. It is a charge contrary to s 61I of the *Crimes Act*,*1900* alleging that on 12 May 2013 at Potts Point the accused had sexual intercourse with the named complainant, without her consent and knowing that she was not consenting. The accused had faced trial with a jury in the District Court on this same charge in January 2015 and was convicted and sentenced by the trial judge. His conviction and sentence were overturned on appeal to the New South Wales Court of Criminal Appeal by judgment delivered 12 April 2016. That decision was based on what was found to have been an

erroneous direction about how the jury was to approach their consideration of the accused's state of mind when deciding whether or not the Crown had proved one of the essential elements of the offence beyond reasonable doubt. The conviction was quashed and an order made for retrial pursuant to s 8 subs 1 of the *Criminal Appeal Act, 1912*.

It was that retrial which came before me on 3 April 2017. There had been considerable media publicity surrounding this charge and the various Court proceedings, particularly after the sentencing proceedings for the first trial. Following his successful appeal on 7 October 2016, the accused filed an election pursuant to s 132 of the *Criminal Procedure Act*, *1986*, to be tried by judge alone. The Crown opposed this course, but by judgment delivered on 28 March 2017, by another judge of this Court, a finding was made that it was in the interests of justice that the trial proceed by way of judge alone and such an order was made.

The is no provision within s 132 of the *Criminal Procedure Act, 1986* to revisit or reverse such a judge alone trial order and thus, when the matter came before me for trial on Monday 3 April 2017, I had no choice but to proceed on that basis. I make it clear that if I had had such a choice I would have reversed that order.

If this had been a jury trial it is likely that the jury would have known that this was a subsequent trial, but they would not have been informed that the accused had previously been convicted by a jury, sentenced to prison and had his conviction and sentence overturned. It is a peculiarity of a judge alone trial that, as the judge of the law, I am aware of those facts, but they are not relevant and cannot be taken into account by me as the Tribunal of Fact. It is a matter however to which I may return in due course.

There were some pre-trial rulings which I was required to make, as the judge of the law, which meant it was necessary for me to become aware of a number of matters which are not before me by way of evidence in the trial and which would not have been known to a jury.

One of the pre-trial rulings arose because the evidence of the complainant in the trial before me was given pursuant to s 306B of the *Criminal Procedure Act, 1986* which provides that, in circumstances where a conviction has been overturned and a new trial ordered in proceedings for prescribed sexual offences, which is what this trial is, the whole of the pre-recorded evidence of the complainant in the previous trial is to be the evidence at any retrial, provided the Prosecutor has satisfied various conditions. Those conditions were satisfied in this trial and the evidence of the complainant given at the earlier trial became the evidence in this trial. There are limited circumstances pursuant to s 306D of the *Criminal Procedure Act, 1986* in which a complainant may be recalled to give further evidence. These require both the agreement of the complainant, which was given in this trial, and the leave of the Court.

One of those pre-trial rulings, to which I have referred, which was made on application of the Crown without any opposition by the defence, was for further oral evidence from the complainant about a particular issue, namely some clarification surrounding evidence relating to a list of names on the accused's phone. That leave was granted. There was evidence tendered by the Crown in support of that application including statements from the complainant dated 29 March and 30 March this year. Leave was granted, but those statements tendered on the voir dire in support of that application were not tendered or called, in large part, before me as evidence in the trial proper.

The complainant did however give further oral evidence on this topic, pursuant to that leave, but not in the full way that is contained in those affidavits in support of the application.

Once that leave had been granted there was also an application on behalf of the accused for the complainant to give further oral evidence to clarify the content of her original police statement, about which there had been no cross-examination at the earlier trial. That leave was granted with further leave to the Crown to obtain evidence in chief on that topic in the interests of fairness. Again the material founding that application was not before me as such in the trial proper.

There was also an application brought by the accused pursuant to s 8 of the *Court Suppression and No Publication Orders Act*, *2010* in relation to the names of witnesses who were to give evidence of good character in the trial on his behalf. That order was made. In the course of that application it was necessary for me as the judge of the law to read and take into account a very large volume of material involving publicity and commentary which surrounded the earlier trial proceedings and in particular which followed the earlier sentence hearing. It is also in the category of material which would not have been known to a jury and is not before me by way of evidence in this trial. It cannot be taken into account by me as the Tribunal of Fact in this trial in any way. Again, however, it is a peculiarity of a judge alone trial that I am in fact aware of this material and I may return to this in due course.

As I would direct a jury, to do my task as the Tribunal of Fact, I must decide what facts have been established by an analysis of the evidence. Just as a jury would, I am entitled to give individual parts of the evidence the weight which I think they deserve. When engaging in this analysis I will, and should,

take into account the submissions made by each of the counsel, that is the Crown and counsel appearing for the accused, as to what facts have been established by the evidence. I am not bound however only by those submissions. I may either reject or accept their submissions about the facts but equally as the Tribunal of Fact I am entitled to take a different approach to the facts than either of them has suggested, at least within the confines of ensuring natural justice is extended to each. It is important however that as the Tribunal of Fact I ensure that this task is undertaken as a rational and logical exercise on the basis of the evidence called. I am not entitled to speculate or guess about facts if they have not been the subject of evidence called in the trial. Equally I must reach my conclusions of fact totally excluding any considerations of sympathy, bias, distaste, prejudice or of any other emotion.

As the Tribunal of Fact one of the most important tasks I have is to decide whether the evidence given by each of the witnesses is reliable evidence. That is whether I can safely act on that witness's evidence.

That involves an analysis of the truthfulness of witness. That is their credibility as a witness and also an assessment of the accuracy of their evidence. I do not however have to accept any particular witness as being either totally reliable or totally unreliable. As the Judge of the facts, I am entitled to accept part of a witness' evidence but reject other parts, if there are reasons to do so. In considering a witness' credibility or honesty, I am entitled to take into account not only the content of his or her evidence. I am also entitled to take advantage of my observation of that witness in the witness box or by the pre-recorded evidence, in the case of the bulk of this complainant's evidence, and take into account the way in which he or she gave that

evidence, namely, their demeanour or the overall impression that that witness had on me when the evidence was being given.

A further step in assessing the overall reliability of a witness who I have determined to be giving what he or she believes to be honest evidence, is to look at whether or not the evidence is accurate. Witnesses who are doing their best to tell the truth, may at the same time not be accurate. I should look to issues such as the circumstances in which a witness made a particular observation, to decide whether or not the observation was adversely affected in any way, including the opportunity for observation, lighting, distances, sound levels and similar. Also whether or not the witness' capacity to make an observation accurately was adversely affected in any of the ways which can affect a person's capacity to make an accurate observation, such as excitement, fear, boredom, anxiety, pre-occupation or similar matters.

I should also determine how well a witness' observation of a particular event has been retained in their memory over time, taking into account the fact that there are some things which at the time they occurred, appeared so insignificant that they are unlikely to be recalled for any length of time. Whereas, there are some other matters which were so significant at the time, that they are likely to be recalled forever.

Another factor in assessing overall reliability of witnesses is whether or not a particular witness gives a consistent or inconsistent version of the same event, when speaking of it on different occasions. Consistency of evidence may indicate reliability. Inconsistency may indicate unreliability. However, a witness who gives the same version of one event on more than one occasion, may just have an unconscious or conscious desire to maintain an untruthful story. Whereas, a witness who gives different versions of the same event,

might be reliable and credible, and the inconsistencies may be errors of recollection, which are inconsequential or important. The issue of what are said to be inconsistencies has been raised on the part of the accused in this trial, in relation to differing versions of events given by a complainant to different people on different occasions, but is a matter to which I will refer in due course.

So to arrive at my verdict in this trial, I must assess the evidence of the witnesses, bearing in mind the issues to which I have just referred, to determine what if any, from each of them, I accept as reliable.

Before turning to that assessment, it is important that I record that which is possibly the most important direction that is given in any criminal trial and it must remain in the forefront of my deliberations. That is a direction about the onus and standard of proof. The burden of proof lies on the Crown to prove the guilt of the accused and to prove it beyond reasonable doubt if they can. The burden remains on the Crown throughout the trial, whether or not the accused has given or called evidence, which he has done in this trial. The accused is not required to establish his innocence and I am not called on to determine his innocence. I must decide whether or not the guilt of the accused has been proved beyond reasonable doubt.

It is a fundamentally part of our system of justice that people tried in these courts are presumed to be innocent of the crime alleged against them until the tribunal of fact, be it a jury or a judge in the judge alone trial, has been satisfied by the Crown beyond reasonable doubt that they are guilty of that crime. The accused is thus entitled to the benefit of any reasonable doubt in my mind. Suspicion is not a substitute for proof beyond reasonable doubt and even grave suspicion cannot suffice as proof beyond reasonable doubt. I

should record that the term, “reasonable doubt”, or, “beyond reasonable doubt”, are three simple words which should be given their simple everyday meanings.

Not everything of which evidence has been given in the trial must be proved beyond reasonable doubt. It is the essential elements which must be proved beyond reasonable doubt.

This offence of sexual intercourse without consent, knowing that the complainant was not consenting, has three essential elements which must be proved beyond reasonable doubt before there could be a conviction. They are as follows: One, that the accused had sexual intercourse with the complainant; Two, that the complainant did not consent to that sexual intercourse and; Three that the accused knew that the complainant was not consenting to that sexual intercourse.

Dealing with the first element first, there is no dispute in this trial that the accused had anal intercourse with the complainant by placing his penis into her anus in the early hours of 12 May 2013, just after 4am, whilst they were both in the laneway called Hourigan Lane, behind the Soho Nightclub in Kings Cross. The complainant gave evidence that this occurred and the accused gave evidence admitting that this occurred. There were two medical reports tendered which are both part of exhibit K. One covers the physical examination of the complainant at hospital on 12 May at about 3pm, and the other is an opinion from the same doctor in a report dated 20 March 2014. There is nothing put in dispute, on behalf of the accused, in relation to either of these reports. They fall into the category of expert evidence.

I accept the observations and opinions of the doctor. As such, I accept that there was physical evidence of four small skin splits in the peri-anal skin,

that the anal verge was circumferentially upgraded and that the examination was extremely tender. From this evidence, I accept that there had been penetration of the complainant's anus within the preceding 72 hours, consistent with penetration by an erect penis. This is not in dispute. I also accept from the opinion offered by the doctor, that it is not possible, from these physical signs, to determine whether or not the penetration was consensual or non-consensual. On this brief summary, and without there being any dispute, I am satisfied beyond reasonable doubt that the first essential element is made out.

I then turn to the second element, namely, the Crown must prove beyond reasonable that the complainant did not consent to this sexual intercourse. The accused does not have to prove that the complainant consented. It is for the Crown to prove beyond reasonable doubt that she did not. What then is meant by consent? A person consents to sexual intercourse if he or she freely and voluntarily agrees to have sexual intercourse with another person. That consent can be given verbally and expressed by actions. Similarly, absence of consent does not have to be in words. It also may be communicated in other ways such as the offering of resistance, although this is not necessary, as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse, is not by reason only of that fact, to be regarded as consenting to the sexual intercourse. Consent, however, that is obtained after persuasion is still consent, provided, ultimately, that it is freely and voluntarily given.

There are many factors referred to in the evidence in this trial which I must consider in deciding whether or not the Crown has proved beyond reasonable doubt that the complainant did not consent. Amongst those

matters, is a specific matter contained in a provision of the *Crimes Act* s 68HA(6)(a) which provides, and I quote:

> "The grounds on which it may be established that a person does not consent to sexual intercourse, includes if the person has sexual intercourse while substantially intoxicated by alcohol or any drug."

Thus, in considering whether the Crown has proved beyond reasonable doubt that the complainant in this trial did not consent, I may have or I am entitled to have regard to the following matter, if I find it proved on the evidence before me, namely that the complainant had sexual intercourse whilst substantially intoxicated by alcohol.

The Crown has argued that I would make such a finding on the evidence and take this into account in considering the issue of lack of consent. The accused has argued that the evidence in the Crown case of itself, let alone anything called by or on behalf of the accused, does not allow for such a finding.

I will deal with this issue of intoxication soon. Even if I do not accept however that the evidence establishes that the complainant was substantially intoxicated, that does not mean that the Crown has failed to prove lack of consent. There is other evidence in this trial relied on by the Crown which I must consider.

My task in addressing this second element is to decide in fact whether the Crown has proved beyond reasonable doubt that the complainant did not consent to the sexual intercourse. Which means that the Crown must prove that the complainant did not freely and voluntarily agree to have sexual intercourse with the accused.

I will just now turn to summarise the legal position in relation to the third element which must be proved beyond reasonable doubt. If I come to a

finding that the Crown has proved beyond reasonable doubt that the complainant did not consent to the sexual intercourse, the third element necessary for the Crown to prove in relation to this offence is as provided by s 61HA(3).

The Crown and counsel for the accused have usefully provided a draft direction to me which is marked as MFI 6 in this trial. I have viewed that draft direction as the judge of the law and in particular in this trial I have looked at the way in which the Court of Criminal Appeal in this case reviewed the authorities in relation to this third element, in the light of their finding that this issue was the basis on which the original conviction was overturned and the new trial ordered.

I accept that if it becomes necessary to determine whether or not the Crown has proved the third element beyond reasonable doubt, the legal principles are as follows. The Crown can succeed in proving the third element if it proves beyond reasonable doubt anyone of the following states of knowledge namely:

1. That the accused knew that the complainant was not consenting to the act of penile anal sexual intercourse or;

2. That the accused was reckless as to whether the complainant was consenting to the act of penile anal sexual intercourse, either because;

a. He realised there was a possibility she was not consenting to that particular act but went ahead and performed it anyway or;

b. He did not even think about whether the complainant was consenting to penile anal sexual intercourse, in other words he did not care whether she was consenting or;

3. The accused had no reasonable grounds for believing that the

complainant was consenting to the act of penile anal sexual intercourse.

In relation to the third possible way of establishing knowledge of lack of consent, I may decide that he might have believed although wrongly that the complainant was consenting to intercourse with him. Whether that belief amounts to a guilty state of mind depends on whether the accused honestly believed it and if so whether he had reasonable grounds for that belief.

Therefore if I am not satisfied that the accused either knew the complainant was not consenting or was reckless as to whether the complainant was consenting, the Crown must prove one of two facts before I could find the accused guilty, either;

a. That the accused did not honestly believe that the complainant was consenting or;

b. That if he did have an honest belief in consent that he had no reasonable grounds for that belief.

It is for the Crown to prove that the accused had a guilty mind and so if there is a reasonable possibility that the accused did honestly believe on reasonable grounds that the complainant was consenting, then I would have to find that this third element of the offence is not made out and return a verdict of not guilty on this charge.

If any one of the alternate states of knowledge is proved by the Crown beyond reasonable doubt, then the law provides that the accused is taken to have known that the complainant did not consent to the act of penile anal sexual intercourse and the third element will have been established and provided I have already found that the Crown has proved beyond reasonable doubt that the complainant did not consent then I would be obliged to convict the accused of this offence.

In this case there is evidence about the accused's state of intoxication at the time of sexual intercourse, but in considering his state of mind when determining whether or not the Crown has proved the second of the two ways in which they could prove knowledge of lack of consent, namely recklessness, I cannot take into account the fact that the accused was intoxicated where that intoxication is the result of the voluntary ingestion of alcohol or non-prescribed drugs and the intoxication here was voluntary.

It is important also that I do not elide the two propositions contained in the third way in which the Crown is entitled to prove knowledge of lack of consent, that is that the accused had no reasonable grounds for believing that the complainant was consenting to the act of penile anal sexual intercourse.

It is the belief of the actual accused which I must consider not what some other person or hypothetical person faced with the same circumstances might have believed. The consideration of whether or not, even if that belief was honestly held by the accused, it was based on reasonable grounds must be objectively assessed on the basis of the evidence.

In assessing this third way of determining the accused's state of mind and whether or not he has a guilty state of mind as argued by the Crown, I am entitled to take into account his level of self-induced intoxication, especially in deciding whether or not it was an honestly held belief, but also whether or not there were reasonable grounds for holding such a belief.

To address the second element, and for that matter the third element too if that becomes necessary, it is necessary to make findings of fact about what occurred that night. In relation to the events immediately before, during and after the sexual intercourse there are two witnesses, one is the complainant and the other is the accused.

There is some other evidence relied on by the Crown said to be supportive of the complainant in the nature of complaint evidence which I will address in due course, but the evidence of the complainant is vital in establishing the Crown case and the evidence of the complainant and the accused are the vital and significant pieces of evidence in relation to what actually happened at the time the alleged offence occurred.

These versions are similar in some details but also different and in fact, I adopt a submission made by counsel for the accused during his address, that it is the differences which are the real issue in this trial and are probably determinative of guilt or a finding of reasonable doubt. So I now turn to what is going to be a relatively lengthy analysis of the evidence.

I will first of all deal with all of the matters that are not put in dispute. In the Crown case, there was evidence from the complainant, her sister and three of her friends, about what occurred leading up to the visit to the Soho Nightclub. I do not propose to go through the evidence, witness by witness, or line by line. I propose to analyse the evidence in summary form, referring to all of those witnesses. Most of the evidence as amongst those five witnesses is not in dispute, except for the issue of intoxication which I will come to in due course. From that combination of evidence, I do make findings about what occurred, leading up to the complainant's last visit to the Soho Nightclub in the early hours of 12 May.

In addition, there was CCTV footage from five sites in Kings Cross on the evening and early morning of 11 and 12 May: First from Kings Cross McDonald's on the evening of 11 May between 22:50:00 and 23:18:00; footage from Darlinghurst Road immediately thereafter; footage from inside and outside Soho Nightclub on 12 May at 03:32:00; footage outside and inside

Soho Nightclub from 03:55:00 to 4:02:00, including the security entrance, the dance floor, the stairs down to the cloakroom area at the back door, and immediately outside the back door and footage from the area outside and inside of the entrance to Kings Cross Railway Station, from about 04:35:00 and 04:45:00 on 12 May. I accept, from that combination of evidence, that the complainant and four or five of her girlfriends and a couple of young men had planned to come down to Sydney on 11 May 2013, from the Central Coast, for a night out to celebrate the 19th birthday of one them. This was the first time that the complainant and some of the others, had been to nightclubs in Kings Cross, although they had previously been out together to pubs and clubs to celebrate. The complainant was 18 at the time and all her friends were 18 or older. The complainant's older sister lived in Sydney in an apartment on the lower North Shore, and the complainant and three of the girls were to stay at that apartment overnight. The complainant's sister was away for the night. They were late leaving the Central Coast and three of the girls had to go to another part of Sydney to see a relative. Most of them caught the train down but the complainant and her friend, who I will refer to as, "BW", took everyone's belongings to the sister's flat first, with plans to meet up at the Town Hall later, and others went off to visit the family member in Sydney.

The complainant and BW arrived at the sister's apartment somewhere around 9 or either a little earlier or a little later - nothing turns on that. One or other of the complainant or her friend, BW, had taken a bottle of bourbon with them to the sister's apartment. The brand is irrelevant. It was a 700ml bottle of Bourbon, I accept, which contained 20 standard drinks. Their plan was to save money by having some drinks before they went to any nightclub later in the night. This is a common event amongst young people which is well-known

to the Court. They did this by discarding some coke from two 600ml coke bottles and topping those bottles up with Bourbon so that it looked just like a bottle of coke. They used almost the whole bottle of bourbon, leaving just a small amount and leaving that at the sister's apartment. What they did pour into the coke bottles, they divided equally. So I accept that each coke bottle probably contained something close to ten standard drinks, perhaps a little less. While there were some initial differences in relation to this next piece of evidence, overall I accept that neither the complainant nor her friend drank any of this alcohol whilst at the apartment.

When they were there, they got ready to go out and then caught the train to Kings Cross, changing the original plan to meet up with their friends at the Town Hall because their friends were running late. They went to McDonald's at Kings Cross to wait for them. There is CCTV footage from McDonald's Kings Cross which shows the complainant and BW sitting opposite each other at a table. I accept that they arrived some time shortly before 22:50:00 because that is when the CCTV footage commences. Each of them has a 600ml coke bottle in front of her which they had brought from the sister's apartment and the bottles appear to be full at 22:50:00. Each of them drinks from her bottle whilst they sit there over the next 27 minutes, waiting for their friends. The complainant appears to drink more than BW. At 23:17:00, the friends, at least three girls and two young men, can be seen arriving at McDonald's, and both the complainant and BW greeted them. All of them then left McDonald's. One of the friends took the two bottles from the table and the bottles are never seen again in evidence.

At the stage that the bottles were removed from the table, the bottle from which the complainant had been drinking, appears to have about a quarter of

the dark liquid remaining and that which has been used by BW, appears to have more. I make that as a finding of fact and that is contrary to some assertions made in evidence that all of the contents of the coke bottles were consumed by both the complainant and BW whilst they were at McDonald's. I accept from other evidence, that neither the complainant nor BW drank from those bottles again that night and more probably than not, they were discarded.

During that 27 minutes, as observed on the CCTV footage, whilst drinking, the complainant seems to be behaving fairly normally. She seems to be talking to BW. The footage is jumpy, in the way that CCTV footage often is, and it is not possible to get an accurate picture of her behaviour but she appears to be sitting, talking, sometimes leaning on her elbows, drinking from the bottle and looking around. After her friends arrive, she stands up without apparent difficulty and walks over to her group of friends. They have a group hug and they all walk away. The CCTV footage then, from Darlinghurst Road, shows the group walking out of McDonald's, along Darlinghurst Road, towards the World Bar. The complainant seems to be walking normally. They all seem to be smiling and happy. There is nothing in the CCTV footage or on Darlinghurst Road, on my finding, to indicate that the complainant was particularly drunk at that stage.

That of course is not the only evidence in relation to this topic of intoxication because there are observations made by two friends who gave evidence in the trial, but so far as the objective video evidence is concerned, there is nothing to indicate a particularly high level of intoxication at this stage. I accept by the time the complainant left McDonald's and walked down Darlinghurst Road towards the World Bar, she consumed about seven

standard drinks. That finding is based on the fact that almost all of the bottle of bourbon was shared out equally between her and BW, so that is a little less than ten standard drinks, and she appears to have left about a quarter of the liquid in the bottle when she left McDonald's.

From this same combination of evidence I accept that what happened next was that the whole group went to the World Bar. There the complainant and BW went to the toilet and lost contact with their friends. When they came back out, as I have said, they could not find their friends so they went to the bar and ordered and drank a teapot cocktail. These, I now know from other evidence called in the trial, are cocktails served in a teapot designed to be shared between two people and I accept from evidence called in the Crown case from the current owner of the World Bar, that there are about ten different combined cocktails served as teapot cocktails and that has been the ongoing situation since 1999. I also accept from this same source of evidence however that despite the number of different types of alcohol advertised to appear in each teapot cocktail, in fact each teapot cocktail contains less alcohol than a schooner of beer. The Court can and does take judicial notice of the fact that a schooner of beer is 422 mls and represents less than two standard drinks. The complainant and BW shared that teapot cocktail equally between them.

It is clear from the evidence of BW and the complainant that they thought these teapot cocktails contained much more alcohol, as much as four shots, but I accept that this is not the case on the objective evidence now provided in the Crown case.

The view of BW and the complainant about the amount of alcohol that they thought they had consumed when sharing one of these teapot cocktails is amongst the reasons why the Court often has difficulty accepting a person's

self-assessment of levels of intoxication, based on what was thought to be the amount of alcohol consumed. The Court is aware that self-assessment of levels of intoxication based on that process of reasoning is notoriously inaccurate. In the Court's experience that often occurs, or most often occurs, where someone underestimates the amount of alcohol they have consumed. In this case both the complainant and BW overestimated the amount of alcohol they had drunk, at the very least at the World Bar the first time they were there, because it seems to me they thought they were sharing a fairly strong cocktail containing between two to four standard drinks but in fact they were sharing a drink which contained less alcohol than a schooner of beer, so well less than two standard drinks.

The complainant and BW then went to the Soho Nightclub in Victoria Street. They arrived after midnight and there met up again with their friends. They danced for about twenty minutes, went to the toilet again, and again, when they came back, they could not locate their friends. They went to the bar on the second floor at the Soho Club and each bought and drank a vodka and cranberry juice drink. I accept that this would have involved their consuming one standard drink each. They then left and went back to the World Bar where again they bought and drank another drink, this time a vodka and orange. Again I accept one standard drink each. They danced and talked to people at these venues and walked between them. There is a map showing the distances tendered in evidence. They then made plans to meet up with their friends who they had been missing throughout the evening. Their two girlfriends wanted to end their evening and go back to the complainant's sister's flat to sleep for a while before, later that morning, heading back to the Central Coast, but they had to get the address from the complainant because,

unlike the original plan, they had not gone to the apartment with the complainant and BW at the beginning of the evening. The complainant and BW went back to McDonald's sometime between about 2.30 and 3.00 am to meet up with them.

Unfortunately there was no CCTV footage obtained of this visit to McDonald's, although presumably it would have been equally available as that obtained from the period earlier in the night. The complainant and BW ate some food whilst there at McDonald's. It seems to me immaterial what that food was or at the very least there is no evidence which makes what was eaten relevant. The complainant typed her sister's address into her friend's phone and the friends caught a taxi back. She apparently either remembered or was able to find and type that accurately, because the friends caught a taxi back there and were there asleep on the lounge when the complainant and BW arrived there later in the morning around 6.00 am. The complainant and BW decided to stay at Kings Cross for a little longer and then went back to the Soho nightclub. Neither the complainant nor BW drank any more alcohol after leaving the World Bar at about 2.30 am.

After their friends left McDonald's on the second occasion the complainant and BW then walked back to the Soho nightclub and entered through security at 3.55. Part of Exhibit D is CCTV footage showing them both walking along the street to the entrance to the club and being ushered through the door by security, apparently showing wrist bands, which I accept they would have obtained on their earlier visit during the night. The complainant seems to be walking normally, not swaying or stumbling and in the evidence she gave at the earlier trial she agreed with this. Just before getting to the door on the CCTV footage she appears to sidestep to avoid bollards on the

footpath and does so without any apparent difficulty to my observation. She shows her wristband to security and appears to walk normally into the nightclub.

I accept from the CCTV footage that follows, the complainant and BW then dance together on the dance floor for a few minutes. The CCTV footage depicts this. It is not of particularly good quality and the complainant is to the very right hand side of the screen and not always in shot, but from what can be seen it seems to me that she is dancing in much the same way as everyone else on the dance floor is dancing, not in an unusual or odd manner that would indicate a significant level of intoxication. On my finding there is nothing in that footage to indicate that she is particularly intoxicated or more relevantly substantially intoxicated.

Up until this stage there appears to be no dispute as between the Crown and the accused about what happened in the lead up and no dissimilarity of versions. After this stage there are some differences between the evidence of the complainant and the evidence of the accused and I will, where possible, try to refer to both in this overall analysis of the evidence. As I have said the complainant's evidence was that after arriving at the Soho nightclub BW started to dance with a young man and the complainant danced with them too.

The complainant said that after a short time the accused came up and spoke to her. This is shown briefly on the CCTV footage. The complainant said he asked her if she had met the DJ and she said she had not. She said that he took her to meet the DJ and told her that he was a part owner of the Soho nightclub. She expressed some disbelief and he showed her some card or other which, in her evidence in chief, she said she did not see properly but I accept from other evidence, which I will address shortly, that in fact the

accused showed her a staff card and a driver's licence. In any event I accept from her evidence that she did see something that convinced her that he was involved in some way with the ownership of the club.

I accept, in fact, that the accused told her that his family owned the club, not that was a part owner but again, I accept the complainant could easily have confused that and the accused has agreed, and accepted, that he was trying to impress the complainant and was indicating to her that he had some sort of special or VIP status within the club. I make these findings even though there are some differences amongst this other evidence and the evidence of the complainant and also taking into account evidence of what the complainant said to BW, shortly after the sexual intercourse occurred, the text she sent to her sister at about 9.30 that morning and what she said to police in the statement she made that day.

At this stage, as judge of the law, I must note that the accused gave evidence in this trial under oath. He did not have to do so. He could have elected to exercise his right to silence which he did at the police station on 8 August 2013 when he was arrested. He did not do that in the trial. He both called and gave evidence. In giving evidence, he became a witness like any other in this trial, available for scrutiny and analysis, bearing in mind however that he does not have to prove anything in this trial, but having decided to give evidence, that evidence must be scrutinised and analysed in the same way that the evidence of any other witness is, to decide what if anything, I accept is reliable, that is credible and accurate, from the evidence he gave. His evidence does not attain any different or special status simply because he is the accused. But there is one important matter which I must always bear in mind when conducting this analysis which is, that although in relation to some

crucial aspects of the evidence in this trial, there are two differing or different versions, one from the complainant and one from the accused, My analysis of the evidence does not amount to a contest between them, for me to decide which one I prefer. The Crown must prove the elements beyond reasonable doubt and I must accept the complainant's evidence as truthful and reliable beyond reasonable doubt before I could convict the accused.

So I return to the events on the dance floor. The accused's evidence in this regard is largely the same as the complainant. He gave evidence that he had gone to two parties before coming to the club that night. They were 21st parties or other sorts of birthday parties for young people, friends, roughly his own age. He gave the names of those people and there is at least one text message to one of those people later in the day on 12 May. He had been drinking mixed spirit drinks at those parties and as I understand it, his assessment was that he had had about seven drinks or so. Whether or not they were standard drinks is unknown because they were private parties, not being poured by professional bar staff with RSA obligations. It seems to me more likely than not that the drinks were stronger than those which would have been bought at nightclubs where such RSA obligations apply. He said he was moderately drunk when he left the second party at about midnight and went to the Soho Nightclub, arriving at about 12.30.

The Crown has argued that he purposely underestimated the amount he had drunk and his level of intoxication at the time he arrived at the club and for a period thereafter. I accept that this is probably correct, taking into account the content of the two text messages he sent the following day and something he said to a staff member at the Soho Nightclub later in August. However, in relation to those text messages, the term he used, "loose", I accept from his

evidence, did not just mean drunk. He used that term when referred to being in a taxi on the way to the club with two others who had been to the second party. He gave evidence that when he used that term, it was also a description of behaviour which he described as horseplay or which might be described by others as high spirits or high jinks. I also accept from the evidence that the promotions staff member who gave evidence in the Crown case, that her observation of him throughout the evening, from the time he arrived about 12.30 until about 3.30am, was that he was drunk and lively, in fact she thought, on a scale of 1 to 10, he was about 7 out of 10, but went on to clarify that as being her belief that this was about the norm and the same as she had seen him before. She did not form the view from the time she had seen him after 12.30 and up to the time that they walked together, out the backdoor of the club, around back and in through the front door, that his level of intoxication, although apparent, was preventing him from walking or talking or making proper judgments.

I accept from his evidence that the accused had two more alcoholic drinks at the club but also I accept his evidence that he stopped drinking alcohol from about 2am because the following day was Mother's Day and he did not want to be too hung-over. That has, it seems to me, the ring of truth about it and in fact it was the same reason that the two young friends of the complainant had left earlier to go back to her sister's flat to sleep, because each of them had Mother's Day obligations on the Central Coast later that morning. The accused's evidence was that for the last 2 hours of his night at the club, he drank water. There is CCTV footage of him leaving the rear door of the club with the promotions staff member, to whom I have already referred, and who gave evidence in the Crown case, holding what appears to be a red

plastic cup. This was at about 3.30am. He said that had water in it and he was drinking water. There is no evidence to counter that proposition and I accept that this was the case. He denied that his level of intoxication on the night was such that it adversely affected him in any way. He denied that he was stumbling or slurring his words and he denied that his level of intoxication prevented him from being able to understand his surroundings.

Such objective evidence as there is, in the nature of CCTV, and the evidence from the promotions staff member, seems to support that proposition. He was however, I accept, at least moderately drunk when he arrived and perhaps more than that. He had however begun to sober up by 4am but was still affected by alcohol to an extent. It is important that I note here that it is not open to take into account the accused's level of intoxication in determining whether or not his state of mind amounted to recklessness.

Turning back then to the events on the dance floor. I accept from the complainant's evidence that she ultimately agreed with the accused to go into the DJ area, having been convinced that he was some sort of VIP at the club and to meet the DJ. The DJ booth was very close to where she was dancing. She walked over there with the accused and I accept more probably than not on the evidence that they held hands on the way and kissed before they got into the booth. Whilst the complainant did not give this evidence initially, I accept that whilst in the DJ booth area, the accused and the complainant kissed each other passionately for a short time.

The complainant's evidence was that the accused then asked her if she would like to go somewhere more private. She agreed and accompanied the accused down a flight of stairs to an area outside the cloakroom of the club adjacent to the back door. From CCTV images of that area, I accept that they

walked to the bottom of the stairs holding hands for a few seconds just before 04:02. As I have said, the complainant entered the club at 03:55.

The complainant stopped at the bottom of the stairs and I accept from the CCTV footage, first the accused and then the complainant put their heads into the cloakroom. The accused gave evidence that he did this to say goodnight to a staff member working there who he called Erin and that he introduced the complainant to that staff member, but did not use the complainant's name in doing so.

The Crown put to the accused that he was not talking to anyone there but rather searching for something or lifting something up. He denied that. The accused was asked to look at the CCTV footage of this event and to agree that he was lifting up something in the cloakroom. He did not agree that that is what it showed. I do not see that on the CCTV footage either.

The complainant then on the CCTV footage turns around with the accused and the accused starts to go out the back door of the club. The complainant points up towards the stairs where she has just come down. At the trial she was never asked to explain why she did that, either at the first trial, nor was there an application by the Crown to clarify that evidence with her in the trial before me. There is no evidence to explain that and no submissions put on either side.

The accused was asked in cross-examination by the Crown but said either that he did not know or could not remember. I make that point because of the Crown's submission in this trial that the complainant, in pointing up towards the dance floor, was pointing up towards her friend and the accused knew that. There is no evidence to support that proposition, no questions put to the complainant in either the first trial, nor an application to clarify that in this

trial. The only evidence there is comes from the accused in cross-examination, whose evidence was that he did not know why she was pointing upstairs.

What happened next on the CCTV footage was that the accused started to move toward the back door. The complainant had turned around and put her hand on the wall alongside the stairs. The complainant was never asked to explain why she put her hand on the wall in the first trial, nor was there any application in this trial to clarify that evidence.

It is submitted by the Crown that was because she was unsteady on her feet and that I would draw that inference from CCTV footage. As I have said, she was never asked to explain herself why she did that. The accused was not touching nor holding her at that stage and was not pulling her away. She appears to be smiling and perhaps laughing. The accused was asked in cross-examination by the Crown for his observation and it was suggested that the complainant was putting her hand on the wall to steady herself and that he knew that was because she was substantially intoxicated. He denied that.

The complainant then moved her left hand in a way that may indicate some reluctance for a brief moment but by that stage the accused had reached the back door and was starting to open it. There was also apparently another person present in the immediate vicinity at the time and that person's head can be seen walking across the bottom of the screen. There is no evidence about who that person was. As I said, for a moment the complainant held up her left hand for a reason that I must infer amounted to her indicating some reluctance. Again, she was never asked about this in the first trial. It was never explored with her in her evidence and there was no application to clarify this at this trial.

The accused was asked about this in cross-examination and denied that he took this as a sign that she was not consenting to accompany him. Almost immediately after that, the accused then extended his right hand towards the complainant and indicated for her to come with him out the door he was holding open. She then reached forward and took his hand, walked a step or two forwards towards him and they walked out of the door together.

The Crown has submitted that this section of the CCTV footage depicts a very drunk complainant being led out into the alley way. The accused in cross-examination denied that this was his belief or understanding of the situation. He said he thought that the complainant was happy, having fun and agreeing to come with him.

I have watched this footage many times in my role as tribunal of the fact. It is very brief, it lasts for about 30 seconds. The footage overall also shows the complainant descending the stairs with the accused apparently walking without a problem, standing alongside him whilst he put his head into the cloakroom and then doing the same herself, turning around and gesturing upstairs for a reason that I do not know on the evidence, putting her hand on the wall in a way that may signify that she was unsteady on her feet but which may be for some other reason, because it is not explored in the evidence. It then shows her accepting the accused's outstretched hand as he held open the door, while she was either smiling or laughing and walking forward towards him to take his hand to walk out the back door. I accept that she did not know at that stage she was walking into an alleyway. She did not know I accept where the accused was taking her other than that she had previously agreed to go somewhere private with him.

In addition to the CCTV footage, the Crown has tendered a number of

stills taken from this CCTV footage for reasons not entirely clear. They are exhibit M. Three of them are of the interaction between the accused and the complainant outside the cloakroom just before they went out the door but those three are not all of the stills capable of being taken from this CCTV clip relevant to this particular interaction. In particular, this exhibit does not contain a still of the video at 04:02:17 which shows the complainant reaching her arm forward to accept the accused's hand and taking a step towards him and the door. The three stills of this interaction tendered as part of exhibit M cannot be viewed in isolation and must be viewed in the context of the whole of that very short clip of about 35 seconds. Attempting to look at only three frames does not accurately depict what occurred between the complainant and the accused moments before they left the club, particularly when one of them, for some reason or other, is omitted from the exhibit.

There is then a final part of that particular CCTV footage taken from the motion sensor CCTV camera just outside the backdoor showing the door opening from the inside and both the complainant and the accused emerging into what is effectively the landing. The complainant walks slightly ahead of the accused who turns to close the door. At that point, the complainant looks behind at the closing door. At that stage, the accused is not touching or guiding her. One frame only from this section is the last photo forming part of exhibit M.

The Crown has suggested that this frame depicts a substantially intoxicated young woman who is confused. Again, for reasons unknown, there is just one frame tendered as a still from this section of the CCTV footage and again, I do not accept that this still accurately reflects the entire three seconds of that CCTV footage. In addition, it is of poor quality and for example, that still

does not show what the CCTV footage shows, namely the accused standing just behind but next to the complainant and closing the door. That can only be seen by viewing the CCTV footage. It seems to me that this still also cannot be viewed in isolation and that the best representation of what actually occurred as the accused and the complainant left the club via the back door comes from viewing the whole of the CCTV footage.

It is what happened next where there are the greatest differences. The complainant's evidence is that she walked down the metal ramp with the accused, apparently without incident. She said she then went down the laneway with the accused to a spot about 50 metres from the end of the lane.

The accused, in his evidence, said they jogged or moved quickly towards that spot. There is no CCTV footage of this part of the interaction. Whether they jogged or walked or moved quickly, it seems to me, is not of great significance. I accept from the evidence, in fact given by both the complainant and the accused, that the complainant accompanied the accused down the alleyway by consent to a point about 50 metres from the end, where they stopped and started to kiss passionately. The complainant referred to this as "aggressive hooking-up" which she explained meant that it was vigorous. The complainant made some concessions in her evidence about these events, whilst maintaining that she did not in her mind, consent to sexual intercourse.

The accused's evidence was that in the laneway for several minutes after they stopped, they kissed passionately, they touched each other's bodies, they rubbed their bodies against each other, that the complainant kissed him back and that he had an erection which he presumed she could feel because they were pressing their bodies closely.

The complainant did not give this precise evidence in her evidence

in-chief, but in cross-examination, whilst saying she did not recall that this had happened, did allow for the possibility that this might have occurred. The complainant then gave evidence that she decided she should go back to her friend and said to the accused, “I should go back to my friend”, and turned to go. She gave evidence that the accused said to her, “no stay with me, your friend won’t miss you”, or words to that effect. The complainant’s evidence was, at that stage, the accused put his hands under her skirt and started to pull her undies and stockings down from her waist but only a short distance. She said about 3 inches. She did not assert that he did this roughly. She pulled them up again. The accused gave similar evidence about the conversation between them, that is about the complainant saying she should go back to her friend, but denied trying to pull down her undies. I accept more probably than not that he do this, in an attempt to persuade her to stay and in doing this, he was making his intentions clear. I accept that at this stage, he was attempting to persuade her to remain with him so that he could have further sexual connection with her.

The accused’s evidence is that after this event, the complainant turned back to him and that they continued to kiss passionately for a few minutes, including the same sort of close body rubbing and touching. The complainant in her evidence in-chief, denied that this occurred, but in cross-examination she agreed that this may have occurred, so she allowed for the possibility that this is what happened. The complainant’s evidence was that at this stage, after she had pulled her undies back up and presumably turned around again to face the accused, he told her, in her words, “put your hands against the fucking wall”. The accused also gave evidence and agreed that he asked her to put her hands on the wall or fence but denies swearing.

The fact that he used a swear word does not, it seems to me, in the context of other evidence, advance this situation to any extent. The complainant's evidence was that up until then that the accused's tone had been conversational. His request to stay with him was conversational, not forceful nor aggressive. He was, I accept, attempting to persuade her to stay, but not with threats nor in a forceful tone. Her evidence was that when he told her to put her hands on the fence or wall, his tone changed to one of greater impatience and was more directive, but she did not say that he became aggressive or that he did it in an intimidatory manner.

The accused's evidence is that after the complainant said she wanted to go to her friends, and he asked her to stay, which I have found occurred at about the same time as he tried to pull down her undies and she pulled them back up again, in fact she did stay. She had turned around to go, but had then turned around towards him and there was more kissing and it was his view that their interaction would lead to sexual intercourse. His evidence was that in order to make that occur, he either asked or perhaps told her to put her hands on the fence, so facing her buttocks towards him, and he then pulled down her undies and stockings to a point below her buttocks, whether to her knees or ankles, it seems to me, is of little moment. The complainant agrees that when she was facing away from him with her hands on the fence, the accused pulled down her undies and stockings but on this occasion, she did not pull them up again. She was facing towards the fence with her buttocks facing him. The accused's evidence was that he had asked her to do this because he intended for there to be sexual intercourse by his penetrating her vagina with his penis from behind. The complainant's evidence was that when doing these things, she was not her own mind, consenting to have sexual intercourse with him

At the trial the complainant was not asked to explain why she agreed to stay, why she agreed to turn and face the fence, why she did not pull her undies up the second time the accused pulled them down and why she took no other action to leave, except for that portion of her evidence where she said, as I understand it, that she felt scared and did not know what to do. I bear that evidence in mind and take it into account, but I also accept that the accused had not acted towards her in any physically aggressive way to make her feel scared and, to the extent that she might have later on that day provided information to other people, including police in her statement, or to the doctor who examined her, or to others, that the accused was forceful or aggressive towards her, I accept by her evidence at trial that she did not mean that. It seems to me there are a number of explanations for that material, either that she did not mean it or that it was misunderstood by those who make those reports, or perhaps there are other reasons, but it has never been the complainant's evidence at trial that the accused acted aggressively or roughly, or used any form of physical restraint or force against her, to persuade her to stay. She made that point quite clear in her evidence. So whilst she said she felt scared and that was why she did what she did, that fear was not as a result of any physical force being used by the accused, nor aggressive or forceful tones.

No doubt, she was by then, starting to feel that she was in a difficult situation but I accept the evidence of the accused, that when he asked the complainant to turn and face the fence, she did so and she pointed her bottom towards him after he pulled down her undies and she did not try to pull them up again, nor did she try to stand away from the fence or take any other physical action. Of course, as I have already said, in considering whether or

not the Crown has proved lack of consent, the law provides it is not necessary for a complainant in such a case to offer resistance or take any physical action. It is a matter, however, that I do take into account. That, of course, is an assessment of the situation from a consideration of the complainant's state of mind.

From the point of view of assessing the accused's state of mind, his evidence was that he took these actions on the complainant's part, as an indication that she was consenting to continuing the sexual interaction with him to the point of sexual intercourse.

The complainant's evidence, some of which I have already recited, was that she said she needed to go back to her friend. She turned to do that, the accused pulled down her undies and she pulled them up again. At about that time he said *"no, stay with me, your friend won't miss you"* and that she turned back to him.

As I have said, her evidence was that he then told her to put her hands on the fence, which she did. Her evidence continued that immediately after that, apparently without more, he told her to get down on the ground on all fours and arch her back, which she did, and that was after pulling her undies down as I have already outlined.

Again she did not say that he used any physical aggression or force against her to do that, nor that his tone of voice was particularly forceful or aggressive, and as I have said, to the extent that that might appear in other evidence and in particular the history given to the doctor later that day, the complainant's evidence is not that he used any force on her and that she got down onto the ground on all fours and arched her back of her own accord. Again she said she obeyed this request because she was scared and did not

know what to do.

She was never asked at the earlier trial, nor was there any application at this trial to seek to clarify, why it was, even if she felt compelled to get onto the ground as requested or did so because she was scared, she then arched her back in the way she did. Her evidence is that she did not do this because in her mind she was consenting to sexual intercourse, but the fact is that she did in fact get onto the ground and arched her back as requested by the accused. Her evidence is that when she did that the accused immediately put his penis into her anus. She said *"ow"*, he said *"shit you're tight"* and she said *"what do you expect, I'm a fucking virgin"*.

I find this particular piece of evidence particularly difficult to reconcile with the complainant's overall version of events. Leave was granted to allow this evidence to be called at the earlier trial, because it would otherwise offend the provisions of s 293 of the *Criminal Procedure Act* ,*1986* but what she meant by this was never explored and nor was there application to clarify this at this trial.

If the complainant's version is accepted as reliable, it is then capable, in my view, of two meanings. One is that she had never had penile/vaginal sexual intercourse before. Or, given the circumstances in which the complainant claims to have said it, that she had never had anal sexual intercourse before. She claims that the accused said *"shit"* in response to her words *"what do you expect, I'm a fucking virgin"* but continued to penetrate her.

As I have said I find this evidence very hard to understand, particularly so in the light of evidence given by the accused about this part of the evening, and also some of the other evidence called in the Crown case. It seems to me an unlikely scenario that a young woman who had never had any form of

penetrative sexual intercourse previously, who had just had her anus penetrated, and in response to being told that she was tight would reply, in those circumstances, *"What do you expect, I'm a fucking virgin?"*. It is much more likely that there would be such a response if what was occurring was an attempt to penetrate the vagina of such a woman in my view.

The accused's version of these events, as I have said, is that he directed her to turn to the fence. He pulled her stockings down. She did not try to pull them back up again. She had her hands on the fence and was pointing her buttocks at him. His evidence was that he tried to penetrate her vagina from behind with his penis but was unsuccessful. She was a little taller than him and they were both standing up. His evidence is that he said to her, *"Shit, you're tight"* at that stage. To which she replied, *"What do you expect, I'm a fucking virgin?"*

At that he told her to get onto her hands and knees and arch her back which, as I have already found, she did. His evidence was that this was because he wanted to make penetration of her vagina easier.

His evidence was that he took her actions in getting onto all fours and arching her back as requested as a sign that she was consenting to a continuation of the earlier attempt to have penile/vaginal intercourse. He said that he then tried to penetrate her vagina with his penis while she was in that position and that as he was trying to do that she was pushing back towards him, which made him think that she was trying to assist him to penetrate her vagina. Again he was unsuccessful in penetrating her vagina, even in that position.

His evidence was that he then moved his penis towards her anus, and his evidence is that as he started to penetrate her anus she moved backwards

towards him in a way that has assisted him to do so and which he thought was done to assist him to penetrate her anus.

He then had sex with the complainant in this position for a few minutes, which he described as his pushing forward and backwards into her anus and the complainant pushing back towards him and forward in a way that he took as being her consent to continue the sexual intercourse.

The complainant says that this occurred for about ten minutes. Whilst I accept that she is doing her best to assess the time, I do not accept that this is likely to have occurred for ten minutes. It is much more likely, in my view, to have been for a shorter period of time, perhaps closer to the five minute estimate of the accused, or perhaps even shorter. Whatever the length of time however, the evidence of both the complainant and the accused is that whilst ever this anal penetration and anal intercourse was occurring, the complainant did nothing physical to prevent the sexual intercourse from continuing.

The accused ejaculated. The complainant was not sure about this but the accused in his evidence was, and there is evidence to establish that he did.

The complainant then pulled up her underwear and the interaction then occurred about her writing her name into the notes section of his phone which I will come to in due course.

She stayed in the company of the accused for a few minutes while this happened and then left, trying to get back into the club through a doorway which she thought might have been the one that she left, but was not able to do so. I accept, more probably than not, they were doors that automatically closed and could not be opened unless with a key.

She then left the alleyway finding her way onto Darlinghurst Road where

she ultimately met up with BW and they waited together until the station door opened at Kings Cross Railway Station. I will deal with this issue soon in relation to complaint evidence.

There is a distinct difference then between the complainant and the accused about how the anal intercourse actually occurred. I need to resolve that difference.

As I have said, another portion of the complainant's evidence is that she claims after the accused made the comment that she was tight and she said she was a virgin, the accused said, *"Shit really".* The accused did not deny saying that but said he could not remember. I accept more probably than not that he did, and that at that stage he knew she was a virgin, which I infer means that he assumed that she had never had sexual intercourse before.

There is another piece of evidence which I regard as relevant in relation to resolving this particular disputed fact, namely the DNA and forensic evidence. There were swabs taken from the complainant's anus and vulva and tests done to test for the presence of semen from both swabs and also for the presence of DNA from both swabs. Semen was detected in the anal swab and the DNA analysis indicates DNA found.

The test for semen in the vulval swab however was inconclusive. There has been no evidence called about that, but I accept that this means that the analyst could not say whether semen was present or not in the complainant's vulval area, which is an area of the female genitalia between the anus and urethra, outside, but in the area of the vagina.

Even though the test for semen in this area was inconclusive, the swab revealed the presence of DNA which appeared to emanate from the complainant herself, which of course would be obvious, and also from the

accused. There was DNA detected in the anal swab indicating the accused and the complainant as being the most likely contributors.

As I have said, the test for semen in the vulval area was inconclusive but the swab revealed the presence of DNA which appeared to emanate from the complainant and the accused. This in my view is consistent with the accused's assertion that he tried to penetrate the complainant's vagina with his penis from behind once when she was standing up, and once when she was on the ground, therefore touching her vulval area with his penis, but was unsuccessful.

It also seems to me that this factual scenario, as given in evidence by the accused, is a much more logical explanation for the complainant's comment to the accused that she was a virgin. It not only accords with what evidence there is, but also, in my view, with the application of logic and common sense.

The complainant in her evidence, when asked whether the accused may have tried to penetrate her vagina initially said that she did not recall this but in cross-examination allowed for the possibility that this might have occurred. Equally and quite importantly in this trial, she said that it was possible, and therefore allowing for the possibility, that she may have pushed back towards the accused when he put his penis into her anus and continued to push back and forwards during the act of anal intercourse.

When all of this is taken together, it seems to me that the complainant's evidence of how the actual act of sexual intercourse occurred is not reliable, albeit that she was not attempting to mislead in her evidence. I accept, taking into account the evidence given by the accused, together with the complainant's concessions that she may have done some of the things suggested, together with the DNA and forensic findings, that the way events

occurred was much as the accused said, namely, she was standing at the fence, he pulled down her underwear, she didn't try to pull it up, he tried to penetrate her vagina from behind but was unsuccessful. There are several reasons why this may have occurred, including that, according to her comment to him, she was a virgin. I accept that he said she was tight and I accept, in response to that at that stage she said, *"What do you expect, I'm a fucking virgin"*.

I find it unlikely in the extreme that she said this in response to the commencement of penetration of her anus. I find it also unlikely that the complainant's alleged response to the penetration of her anus would be to comment that she was a virgin, if in fact she were a virgin, namely that she had never had penile vaginal sexual intercourse. In my view, that does not make sense, but particularly so when taken together with the evidence given by the accused, which does explain both the comments made and some of the other evidence.

None of this means that by acting as she did and saying what she did, the complainant was necessarily consenting to sexual intercourse in her own mind, but it does present some issues in relation to my assessment of the reliability of her evidence overall, that she did not consent to anal intercourse. It does cast some doubt over other parts of her evidence about what she claims to have said during this sexual intercourse. That is a matter that I will address soon, but what is perhaps of greater note in relation to this evidence is what was in the accused's mind about the complainant's consent to sexual intercourse when these events occurred. The comment "What do you expect, I'm a fucking virgin" it seems to me does not on its face necessarily indicate lack of consent to a continuation of sexual intercourse. When in response to

that as I have found, the accused said to get on the ground and she did, this has a bearing on what his state of mind was about her consent to sexual intercourse. When, as I accept she did, the complainant moved backwards when the accused was trying to penetrate her vagina and then as again I find, moved backwards and forwards when he successfully then penetrated her anus, that too is relevant in assessing his state of mind about her consent to a continuation of their sexual intercourse, namely anal intercourse, even if at the same time, in her own mind, the complainant was not consenting to this.

There are two other parts of evidence that might have a bearing on both of these things. The complainant claimed that at the point the accused penetrated her anus, she said *"stop"* and throughout the continuation of that anal intercourse, which she said continued for about ten minutes, she kept saying that she had to get back to her friend. The accused denies that either of these were said by the complainant. I do not accept that the complainant's evidence in relation to this is reliable. Part of my finding in relation to that is based on what I have now found to be the unreliability of the complainant's evidence in relation to how the actual intercourse occurred. Part of that finding is connected to what I will soon develop, namely evidence in relation to the accused's good character and how he's entitled to have that taken into account and part is based on the application of common sense.

As I have said, none of this means that in acting in this way the complainant herself believed that she was consenting to sexual intercourse. She has given some reasons for why she did what she did. As I understand them, they are mainly because she felt scared and did not know what to do but whether or not she consented is but one matter. Whether or not the accused knew that she was not consenting is another.

I accept from the evidence of both the complainant and the accused that after the sexual intercourse ended, the complainant pulled up her undies and stockings. There was then an event giving rise to a body of evidence which in my view took up far too much time and became too complicated. The accused I accept from his evidence immediately regretted what had occurred, albeit being of the belief that it had happened with the consent of the complainant. The complainant's feelings I accept were even stronger and according to her evidence, she believed she had just been raped.

When the intercourse ended, the accused asked her to put her name into his phone and handed it to her with the notes section of the phone opened. There was a great deal of debate in the trial about whether that was on a page which already had a list of names on it or whether it was on a new open and empty notes page. For the moment, that does not require a finding. I accept that he did that, that is he handed the complainant his phone and asked her to put her name in it. She did so, typing both her given and family names into the phone using a space and capital letter for the surname which I accept requires using a special key.

The accused gave evidence about why he asked her to do this and this evidence discloses an unpleasant fact about him, namely that he had a list of girls' names on his phone or the names of young women on his phone which on his own evidence he was prepared to accept that he regarded as a trophy list. There were around fifteen or so names on it and nine of those names also appear in the contact list of his phone. As I have said, he said he immediately regretted what had occurred after the intercourse ended, that he believed he had disregarded the complainant, but that he could not remember her name.

He wanted to remember it and asked her to record it. The Crown had argued that this was an indication that he was very drunk because he could not recall her name. The accused did not accept this but did agree he could not remember her name. He met the complainant at around about 4am, so not very long before this request was made for her to write her name in his phone.

On the evidence that he gave the complainant had only told him her given name up until then. His evidence was that he introduced himself to her using his given name and she told him her given name. There was no evidence that he ever used that name again from the time he met her on the dance floor until the time after the intercourse ended. The complainant did not actually remember being introduced to the accused by name nor giving him her name, but allowed for the possibility that this might have occurred. It is an unusual given name.

Events had occurred or escalated rapidly in the alleyway. Intoxication is not the only reason in my view why he had forgotten her name. He gave her his phone and asked her to record her name after she'd pulled up her underwear. She took the phone and wrote her name in the notes section. When she was asked to explain why she did that, if she believed she had just been raped, the complainant's evidence was that she didn't know what to do, she didn't want there to be any fuss and that she did so just so that she could leave without fuss. That may be a feasible explanation.

The accused suggests that this behaviour is a matter I should take into account in determining whether or not in fact the complainant had consented to the sexual intercourse that had just occurred. The argument is that if the complainant genuinely believed she had just been raped, in other words, she had not given consent to the anal intercourse that had just occurred, the last

thing she would have done would be to have any contact with the accused at all, that she would have left as quickly as possible, particularly as there is no suggestion that the accused was doing anything to prevent her from leaving. That is a matter which I will take into account in my overall determination of whether or not the Crown has proved beyond reasonable doubt that the complainant did not consent. It is a relevant matter that is appropriate to raise and take into account.

On the other hand on behalf of the accused it is argued that this evidence, that is, her writing her name in the notes section of his phone on a list already opened, or a new notes page, assists in my determination of the accused's state of mind. It is argued that if the accused's state of mind after the intercourse was that he either knew or believed that the complainant had not consented to the sexual intercourse, in other words, if he knew or believed that he had just raped her, then the last thing he would do would be to create a link between him and the complainant by having her name recorded on his phone. That is an argument too that I will take into account in due course.

The last issue in relation to this list of names is whether or not the complainant typed her name onto a list or onto a blank page. The evidence in relation to this unfortunately became quite unsatisfactory and it is quite clear that up until the trial before me everyone seemed to have been labouring under a misapprehension that the list, which is in fact Exhibit 4 in this trial, is the list which appeared on the accused's phone when the police took it on the day of his arrest on 8 August 2013. The police evidence initially was that this list, which comprises Exhibit 4, was the list which they had downloaded from his phone on 8 August 2013.

Evidence in this trial makes it clear that this is not the case. That list was

in fact a screenshot of the list of names in the phone and that screenshot is one that the accused himself took on about 12 June - I might have that date wrong - but certain 12 or 15 June 2013, so about a month after the event. He had not been arrested by then and did not and could not have known the specifics of any allegations made against him by the complainant.

He was aware on his own evidence, however, within days or weeks of 12 May 2013 that the police had been to the Soho nightclub that day and made enquiries about an alleged sexual assault that had occurred in the early hours of that morning and he came to the view that this list may have been important.

I accept from his evidence and the evidence of the Cellebrite analysis of the phone, taken at the police station in August 2013, that he took the screenshot over two pages and these photographs remained on his phone in the photo album up until the time, at least, that it was seized from him by the police on 8 August 2013. It is that quite clearly which the police copied on that day, not the download of the notes. That is because an additional name appeared on the download which obviously had been added sometime after 12 June up to 8 August. That much is clear from the Cellebrite examination that occurred that day. Unfortunately, some time was taken up in the trial confirming this. There is also evidence that an alteration was made to that list on 15 May, three days after the alleged offence. There is no evidence about what that alteration was, but I infer that whatever it was, it was done by the accused. I accept on the evidence that the notes application of an iPhone allows notes to be added by alteration, deletion, addition and the like, including pasting a note from another section and that if this occurs the date of the note changes to the date of the most recent change. I also accept from the

Cellebrite examination of the phone that this is able to determine the date on which this particular list of names, this particular note, was first created which was a date in October 2012. From the screenshot of the phone taken on 12 June 2013, I accept that the most recent change before that was 15 May. However, the evidence does not enable any finding about what that change was. The accused's evidence is that, whilst accepting that this change must have been made, he cannot recall what it was.

There is also evidence, which I accept, that when notes are deleted from the note section of a phone either intentionally or I accept as a result of a period of time, they go into a folder entitled Recently Deleted Notes. Presumably if there were relevant Recently Deleted Notes on the accused's phone the Cellebrite examination of them would have indicated that. There is no evidence about any recently deleted notes on the phone in this trial. The relevance of this is because of the dispute here as to whether or not, when the accused handed the complainant his phone, he asked her to put her name on what was effectively the bottom of that list that was open or whether he gave her a new empty notes page.

LUNCHEON ADJOURNMENT

LYNCH: Your Honour, just before your Honour starts, can I raise one matter. The complainant in this matter on leaving Court at about 12 o'clock left through the main entrance. A photographer raised his camera and appeared to take a photograph of her and she is quite distressed. Perhaps your Honour should remind them--

HER HONOUR: I do not blame her. Not only is she quite distressed but it should never have happened.

LYNCH: Exactly, perhaps your--

HER HONOUR: What is it about non-publication orders that are so hard to understand?

LYNCH: Perhaps you've got to remind any media representatives here that

that--

HER HONOUR: I am sure I do not have to remind the media representatives in Court. I know some of them by face and I know that not one of the people here in Court is likely to make such an error but Mr Crown, have you been able to identify who that person was and what outlet they came from?

LYNCH: We will see if we can do that, your Honour.

HER HONOUR: Because if you do, bring them to Court and I will give them the rounds of the kitchen because that is entirely unacceptable behaviour, completely unnecessary. I have never really understood why it is necessary to take pictures of anybody emerging from Court in any event. I know that pictures tell a story but exactly what story they think they are telling I do not know. Is anybody here in Court related to the person who took the photograph? Each of you has probably got people downstairs have you? Has anyone got people downstairs?

SPEAKER: Yes.

HER HONOUR: Well, can I suggest that you send a message down to that person immediately that they will not take photos of people emerging from Court unless they are absolutely certain that that person is not the subject of a non-publication order. There are ways of dealing with these people. There are ways of dealing with what amounts possibly to a contempt of the Court's order. Is she okay or not?

LYNCH: She is okay, yes.

HER HONOUR: Of all of the people in this case, they should not have done that to her!!

So I was just before the lunch break dealing with a list of names on the phone and the dispute that emerged in evidence between the evidence of the complainant that she put her name on a blank notes page and the evidence of the accused that he gave her a notes page with a list of names and she put her name on the bottom of it. The accused in his evidence was adamant that he asked the complainant to put her name at the bottom of a list. As I have said, the complainant claims that it was a blank notes page. This was the area in relation to which the Crown sought to recall the complainant. In her evidence before me, she claimed that the first time she had ever seen that list of names was when it was shown to her in cross-examination by counsel then

appearing for the accused at the first trial.

Given that it was her evidence-in-chief at the first trial that she was asked by the accused to put her name on his phone and so far as I recall, some of the evidence she gave at that first trial was something she told the police in the statement she made to them on 12 May 2013 and the fact that by the time of the first trial, the police had that list and the list that they had was one that had her name at the bottom of it, it seems unusual in the extreme that she had never been shown that list before she came to give evidence. However, that was the evidence that she gave. When she was shown the list of names at the first trial, it is clear on the record that she became distressed and it would appear to have been the only time in her evidence that she became quite so distressed. She denied that she had put her name at the bottom of that list on the night but during her evidence in that first trial, never offered an explanation that this was a list she had never seen before.

However, the evidence she gave to this effect at this trial does not sit well with the evidence she gave at the earlier trial. When asked by counsel in appearing for the accused whether she saw the other names, she said, *"I don't recall"*. She said *"I don't recall"* to another group of similar questions and then she was also asked. *"You put your name at the bottom of list of girls names"* and she said, *"That's correct"*. That answer, taken in context then, may not be as clear cut as it seems.

She maintained in her evidence before me that she had never seen that list of names until she was shown at the earlier trial, that this had made her upset and that she was confused and shocked when she saw that list. She never offered that explanation in Court at the last trial. She was asked to explain more than once why she was so upset at seeing it at the trial in the

context of it being put to her that it was because she realised she was on a list. She never offered as an answer or explanation for this that she had never seen it before. This emerged as an issue because it was suggested on behalf of the accused that the reason she made what the accused says is a false allegation of sexual assault, in circumstances where at least to his belief she had consented up till then, was because she saw the list of names and realised she was part of what he himself has been prepared to accept as a trophy list. Her name in fact appears at the bottom of exhibit 2 which is the screenshot of the notes page as it existed on 12 June 2013.

The accused said that when she did this her demeanour changed. She became less friendly and it was suggested by way of submission and proposition in the last trial that it was at this stage that she understood she was a trophy, that she felt demeaned and that she then made what was effectively a false allegation, namely that she had not consented to the sexual intercourse that had just concluded.

At the first trial the complainant did not agree that her demeanour had changed in the way suggested. However, when she gave evidence before me on this issue, her explanation for not answering the questions about this in a way that indicated that she had never seen that list before, was that she felt shocked and confused. Shocked, she said, because she had never seen it before. She said she was scared and shocked and when asked if by that she meant confused and shocked she agreed.

It was suggested to her that the reason why she was confused was because what she saw in front of her at the first trial did not accord with her memory. It was then suggested to her that maybe in fact her memory was wrong but she would not agree with that.

This is a hard dispute to resolve. As I said at the beginning of this judgment, the evidence which formed the basis of the Crown's application to recall on this point is actually not before me at this trial by way of evidence and the complainant was not re-examined in detail on some of these matters at the earlier trial. The Crown's case is that I would not accept the accused's evidence about this and that in fact it is a lie. The only evidence there is that the complainant put her name into a blank note, rather than at the bottom of a list, comes from the complainant. All of the other evidence shows that at least on 12 June 2013 her name was at the bottom of the list and that at least after 12 June 2013 that list had not been altered in any way except to add the name Lisa sometime between 12 June and 8 August 2013.

The Crown's argument is that I would accept the complainant's evidence about this, and infer that the accused more probably not on 15 May, the last time the note was altered before 12 June, cut and pasted the one-off name from another note to the list. There is no expert evidence from within the Cellebrite examination to support this. There is no evidence before me at trial that there was ever any separate note containing the name only of the complainant and as I said earlier, the evidence is that deleted messages are generally kept in an index to the notes. There was no evidence that there was a deleted message in that way.

This is a case where the accused was not charged until 8 August 2013 and would have no way of knowing as at 15 May or even 12 June what the allegation against him was, nor the contents of the complainant's statement.

On balance, I accept that the complainant in fact put her name at the bottom of the list and her evidence about this particular issue amounts to a mistake on her part.

I accept that if I am to accept the Crown's assertion that this was a lie by the accused, it follows that I am being asked to find that as at 15 May 2013 the accused, through it must be said some sort of consciousness of guilt, was already constructing a false trail of evidence to provide some basis on which he might assert in later proceedings, which at that stage he did not even know were to commence, that the complainant had a motive to make a false allegation against him. I do not accept that the evidence allows me to make such a finding. There are some other aspects of this list of names which are relevant and which I will come to in due course.

I am now going to turn to the issue of intoxication and in particular, the asserted levels of intoxication of the complainant. The Crown argues that I would find the complainant was substantially intoxicated and that this is one of the reasons why I would be satisfied beyond reasonable doubt that she did not consent to the sexual intercourse. I have already said, even if I do not make that finding, does not mean that the Crown has failed to prove lack of consent. There is other evidence relied on in this trial. The defence argues that this finding should not be made. In this case, when deciding whether the complainant did consent to anal intercourse, I am entitled to have regard to the evidence concerning whether that happened while the complainant was substantially intoxicated by alcohol. The Crown and the accused again have helpfully composed a direction or settled on a direction, which they provided to me jointly, in relation to the issue of substantial intoxication. I accept that that draft direction which is marked as MFI 7, reflects the law. The term, "substantially", is not defined in the relevant section setting out this provision. In my view, it means this, something of real importance or considerable value. In this context, it can only mean something which was of such importance that

it was capable of adversely affecting the complainant's ability to give free and voluntary consent to sexual intercourse. I do not accept that the evidence here reaches that level.

There is no evidence of an expert nature in this trial about the levels of alcohol which might have been present in the complainant's blood and the likely impact it would have had on her levels of functioning, physical and cognitive. The Court is well aware that this sort of expert evidence is readily available and is called frequently in this Court. It was not called in this trial and in any event, any such expert may have had difficulties on the evidence in determining the amount of alcohol which had in fact been consumed and therefore formulating an opinion. I must base my findings on the evidence of the complainant and her friends who gave evidence and observations I make from the CCTV evidence, particularly at McDonald's between 10:50:00 and 11:18:00, at the Soho Bar before 4am and the application of common sense and experience of the world. In applying my experience of the world, as a single member of the tribunal of fact, that includes my experience as a trial court judge of more than 21 years, hearing and observing a very wide variety of human behaviour from that perspective. I accept that the complainant had drunk approximately ten standard drinks between about 10.45:00 and 2.30am but did not drink alcohol after that. She had some food in the 30 minutes to 1 hour after the last time she drank. She spent the whole night in the company of her friend, BW, and some of the night in the company of her other friends who gave evidence. During the hour to 90 minutes before the sexual intercourse occurred, the complainant was able to perform some physical and cognitive tasks, including walking from the World Bar to McDonalds to get some food, without any apparent difficulty, catching up with her friends there,

remembering and, apparently accurately, typing her sister's address into her friend's phone, walking back to the Soho Bar with her friend, BW, again, apparently without any apparent difficult, getting through security just before 4am without apparently alerting them to any obvious signs of substantial intoxication, walking into the club in a way which on the CCTV does not indicate any difficulty in doing so, dancing on the dance floor in a way which I have already found does not seem any different to anybody else and which in any event, does not seem to involve her stumbling or falling, talking to the accused on the dance floor, giving him her name, at least her given name, expressing some disbelief that he had a family connection with the club, but apparently looking at a card and being satisfied that he did. The complainant was also, as observed on the CCTV, able to negotiate the stairs down to the backdoor of the club, apparently put her head into the cloak room with the accused, walk out the back door, negotiate the quite steep metal ramp from the back door into the laneway and go with the accused to a point about 50 metres from the end of the laneway.

None of this I stress necessarily indicates that the complainant was consenting to the sexual intercourse which occurred. It is however relevant evidence to contrast against the evidence she gave herself that she was highly intoxicated at the time. This evidence does not support her own assessment of her level of intoxication in my view.

Further she was able to give what she agreed was consent to accompanying the accused to the DJ booth and she allows for the possibility that there was passionate kissing and body touching there which it follows must have been with her informed consent. She also agrees she gave consent to accompanying the accused to a more private place which involved

walking down the stairs. She agrees that when she got to the end of that point she again gave informed consent to being involved in passionate kissing with the accused including some body touching but her evidence is that she did not want things to go further and her informed consent did not extend to anal intercourse.

She did not give an impression on CCTV footage that she was staggering. Her friends who all gave evidence in the Crown case, to one extent or another, said that they did not notice that she was staggering or slurring her words or behaving in a way that they thought indicated substantial intoxication. She had drunk enough alcohol I accept to be intoxicated but not to the extent that I would accept she was substantially intoxicated.

To that extent then I do not accept that the evidence establishes that she was substantially intoxicated and that is not a matter that I take into account in my overall assessment of whether or not the Crown has established lack of consent beyond reasonable doubt. As I also said however, that is not the end of the matter. There is a great deal of other evidence from which the Crown in this case seeks to establish that she did not consent.

One of those bodies of evidence is in the category of complaint evidence. First of all I will deal with a very small piece of evidence by way of cross-examination in the first trial, which did not appear to be given prominence in this trial, but which is the evidence before me because of the way in which the evidence was called. It was put to the complainant in the first trial that she did not make a complaint to anyone other than her friends and family and did not make any complaint to any authorities until about 3pm the same day or a little later. It was put to her that the opportunity existed for her to make a more immediate complaint, particularly to somebody in some form of authority on

her way back to Darlinghurst Road where she met BW because she had walked past the Holiday Inn and somehow or other it seemed to be suggested that that was where she might have gone to make a formal complaint. Perhaps more significantly it was pointed out to her in the CCTV footage of that time of day, that there were a considerable number of police cars with blue lights flashing in Darlinghurst Road and it would have been open to her to go to one of them to make a complaint to a person in authority.

The purpose of this cross-examination no doubt was to raise some doubt about whether or not, in the absence of such immediate complaint to authorities, when the opportunity existed, there was some doubt about whether or not she in fact had consented. I make nothing of that evidence in terms of assessing lack of consent.

I further note that there are many good reasons why complainants in matters like this do not make complaint to the first person they see and in some cases why they do not make complaint for some considerable period afterwards, sometimes not for many years. Those reasons are many and varied. In this case I accept from other evidence that the complainant became hysterical as she was walking down Darlinghurst Road but because she had managed to contact BW she knew that she was about to meet up with a trusted friend, would be able to go to the safe haven of her sister's apartment and there to compose herself. In any event, there was an almost immediate complaint to BW. This area of cross-examination, which I must say was not pursued in this trial by way of submission, counts as nothing my view in relation to assessing whether or not lack of consent has been proved.

I now turn to the complaint evidence relied on by the Crown. The Crown relies on what the complainant said to a number of people about the alleged

assault by the accused on her as additional evidence that such an assault did occur. The Crown is entitled to do that and I am entitled to treat this complaint evidence in such a way.

The Crown relies on what the complainant said to these people about the alleged assault as evidence that such an assault did occur. The complainant made almost immediate complaint about these events to a number of people that day. I am just going to summarise this evidence and not go through it in any great detail.

The first of these was BW. She met up with her in Darlinghurst Road not long after she left the laneway and they then waited for the Kings Cross Station to open for the first train at about 4.45 and for the first train to arrive at 5.20. They walked to the sister's apartment from the station arriving around 6am and saw the other two girls sleeping on the lounge. They went and slept in the sister's bedroom and were woken by the other two girls around 9.30. She told the other two girls something about what had happened at that stage before they left. She then sent a text to her sister, the content of which is in evidence before me, and told her something of what had happened. Her sister took her to the police station later that day and she there made her first statement to authorities and in that statement gave a version of what had happened. She was then forensically examined at the hospital and she there gave a history complaining of the assault to the doctor.

All that evidence, and what the complainant said, is relied on by the Crown in this category of complaint evidence. There would appear to be no real dispute about what she said to BW, her sister and the two friends. So far as the contents of her first complaint to the police officer and her history to the doctor, the complainant does not recall saying some of those things, but I

accept more probably than not that the record that they each made of them is what she said.

The Crown not only relies on what she said to BW but particularly relies on the condition in which she presented to BW when she made that complaint. As I have said it was an almost immediate complaint. BW said that when she first saw the complainant at about 4.30 she was crying hysterically. She said she had met a guy who was the part owner of a nightclub. She said that the complainant said to her:

> *"I know a guy he told me he was part owner of the nightclub and wanted to show me the VIP area to meet the DJ. He took me behind. He took me out a door and it was an alleyway. She told him she wanted to go back and find her friend and he then said, "Your friend won't miss you put your hands on the wall and arch your back". Then I asked her if they had sex and she said, "No he didn't go in my vagina". I asked her who he was, what he was like and then she stared crying and I just hugged her. It's basically all I can really say"*.

BW also continued that the complainant told her that even though the accused did not penetrate her vagina he, in her words, "went in the back" which she understood to be an allegation of anal penetration.

BW described her at the time as crying and a mess. She was hunched over and could not stand because she was very upset. They stayed together. They did not discuss the event much after that because there were people around. The complainant told BW that she was in pain and when they got back to her sister's flat she checked to see if there was bleeding and there was.

The complainant then made those other complaints to which I have already referred to her two friends that morning at about 9.30, in the text which is in evidence to her sister and then to the police and the doctor at the hospital.

I am entitled to use this evidence of what was said in these complaints, if

I find them to have been made, as some evidence that the assault did occur. I am entitled to use them as some evidence independent of the evidence given by the complainant that the incident did occur. The law allows me to do so and I am entitled to use this complaint evidence as some evidence of the truth of what the complainant alleges in this trial. I am entitled to find that the complaint was made at a time and in a manner that would indicate that the allegation was reliable, that is the allegation is less likely to have been fabricated and more likely to be accurate. Whether or not I do draw that conclusion in this particular case and treat the complaint as evidence of the alleged assault is up to me on an analysis of the evidence and again it is a matter for me to determine what weight I give to that complaint evidence.

The Crown also relies on this complaint evidence for another purpose, whether or not I use it as some evidence of the truth. The Crown contends that the fact that the complainant raised the allegation against the accused at the time and in the way she did, would lead me to accept the evidence she gave in the witness box. In other words it makes her evidence more believable than if she had not raised the allegations. If I am satisfied that the complaints were made largely as asserted, and as I have said there appears to be little dispute about that, the question I need to ask is whether or not the complainant acted in a way I would expect her to act if she had been assaulted as she claimed she was, that is engaged in anal intercourse without her consent.

I am to ask is what she did the sort of conduct I would expect of a person who has been assaulted in that way. I am entitled to use it in that way as providing some sort of consistency between the conduct on making the complaint to these various people and the allegation that she makes against

the accused.

On behalf of the accused, as I understand it, it was conceded that this area of complaint evidence is a strong part of the Crown case to prove lack of consent. However, it was submitted that there are significant differences and omissions within the complaints which would lead me to view them as having less weight and at the very least it is argued that I would not use them in any significant way as separate independent evidence to prove lack of consent.

This issue relating to complaint evidence does not in my view go to the third element, that is, the accused's state of mind, but to the second element, the issue of whether or not the Crown can prove that the complainant did not consent to the sexual intercourse. It is put on behalf of the accused that each version is slightly different, most versions lack some of the important details, particularly, it is argued, those details which might cast the complainant's assertions in a different light. They do not contain on the whole details of passionate kissing in the laneway and that degree of intimate contact with the accused. Further, it is argued, and I am reminded, that the versions apparently given to the police officer initially and to the doctor add details of force or aggression which are not in fact part of the complainant's evidence. I take those matters into account, and to that extent I reduce the weight that I give to that complaint evidence, in deciding whether or not to use it as some additional evidence of proof of the allegation made. However, it appears to me that central to all of these pieces of complaint evidence, although some of the surrounding details are not given, is an underlying theme, and that is that the complainant complained to all these people that there had been sexual intercourse with the accused to which she did not consent.

One area relating to this evidence of complaint, which was raised on

behalf of the accused, goes to the issue which I have already found, namely, whether or not I am satisfied that the complainant said *"stop"* at the time that anal penetration occurred. I have already found that I am not satisfied that the evidence of the complainant in this regard is reliable in the context of a finding that the whole of her evidence surrounding the actual time of intercourse is unreliable for some of the reasons I have already stated.

There is some material in this complaint evidence that takes that further. When the complainant was cross-examined in the earlier trial about some of this complaint evidence, it was put to her that she never said *"stop"* to the accused, and she disagreed with that. She agreed that she had never said *"no"* when the anal intercourse was occurring. She agreed to that proposition. So she was taken to her first witness statement made at the police station on 12 May 2013, one of the pieces of complaint evidence that the Crown relies on. She gave the narrative and said, *"I continued to tell the male I needed to go back to my friend, but he didn't respond".* She said*, "I think at one point I told him to stop, but mostly I was saying that I need to go back to my friend".*

It was pointed out to her in cross-examination that her saying that she thought she had said something was different to asserting positively that she did say "stop". She did not agree that, in context, there was any difference. I accept that there is a difference and that she was not prepared to accept that and make a concession in her cross-examination. That is a matter in relation to the complaint evidence, but it is also a matter which adds to my previous finding that I was not satisfied that she said "stop" as opposed to thinking that she said stop.

I have attempted, during the course of analysing the evidence, to incorporate the evidence of the accused, where relevant, as I went through

each topic. There was further evidence, however, and other matters to take into account when setting out the factual matrix here. As I have already said, the complainant apparently made her first complaint to authorities when she went to the police on 12 May 2013 in the afternoon. They then went to the Soho night club that afternoon. They there spoke to the duty manager and he located for them the CCTV footage which is now part of exhibit D, from inside the Soho club on the dance floor and at the bottom of the stairs at the back door.

The police who attended did a canvass of CCTV cameras in the area. There was a sensor camera outside the Soho club which appears to have produced the very small portion of CCTV footage at the end of exhibit D, which lasts for about three seconds, as the complainant and the accused were leaving the door. There was a CCTV camera in an adjoining building, but it was not working. The police did not then identify any other CCTV cameras, but later discovered there were CCTV cameras on a building on the other side of the laneway. They then discovered that they were not working. The accused himself, after being arrested in August 2013, had conducted a canvass of the street. He had gone to the same building on the other side of the laneway, and there spoke to somebody who told him that the cameras were not working. It would appear that he was the first person, that is the accused was the first person to conduct a thorough canvass of the laneway to investigate the possibilities of other CCTV cameras.

There are some photographs of the back lane taken by the police on 12 May when they attended. There are some photos of the back lane taken on 12 August and another larger group of photographs taken, all of which are in evidence. The police went back again to the club on 2 and 3 August. In the

meantime they had instituted a lawful intercept of the accused's phone from a date in late July 2013. On 2 and 3 August they spoke to the duty manager at the club and asked for a DJ list on the night of 11 and 12 May and he provided that.

They identified the DJ who had been on duty on that evening and interviewed her but she did not remember anything about that particular night. They apparently did not ask the manager for the staff list of people working that night to ascertain who, if anyone, was working in the cloakroom around 4am.

Presumably in August 2013 that was information that the manager could have given to the police but he was not asked and there would appear to have been no attempt to locate any such person and thus there is no independent evidence in relation to whether or not any person was rostered to work in that capacity that night and if so the name of that person.

They went back to the club on 3 August, but neither the owner nor the accused was present. By arrangement with the police the accused attended Kings Cross police station on 8 August 2013 where he was arrested for this offence. He was cautioned and exercised his right to silence which was his legal right.

Nothing can be made of the fact that he exercised his right to silence and it cannot be used in any way in determining whether or not the Crown has proved his guilt beyond reasonable doubt. The accused did consent to a forensic buccal swab procedure which produced DNA samples for comparison with samples taken from the complainant and various items of clothing on 12 May 2013.

Further, in relation to the list of names that appeared on the phone, there

was evidence given by the accused in cross-examination in this trial. I indicate that I have no knowledge of what, if any, evidence was given by the accused at the earlier trial and there do not appear to have been any suggestions put to him that he gave evidence in this trial inconsistent with anything that might have been said at an earlier trial.

In relation to the list of names, it is a list mostly of given and family names although there is, at least, one if not two who are just given names and one is initials. The accused agreed that all of the people on that list were women. He was asked questions about these people in cross-examination in the trial before me. As I have said, they were what he called a conquest or trophy list and he was asked to provide some detail about what interaction he had had with some of these people. As I said also there were nine people in that list who were also in is contacts list with telephone or other contact details alongside them.

During the trial I was made aware that there had never been any attempt by the police to contact any of these people. It was potentially unfair to allow specific questioning about them in cross-examination of the accused and possibly ultimately irrelevant because the answers to be given by the accused were always going to be the end of the matter, as the Crown had not sought to call any such material in its case, but in any event I allowed general evidence about this.

This produced the following: That whilst most of the people on that list were people with whom he had sex, he had not had sex with all of them; he had had sex with one of those people on the list other than the complainant after just having met her; he had had anal sex with another person on that list and that he had had sex in the alleyway behind the Soho nightclub with

another of them. The relevance of this evidence called, as I say, in cross-examination by the Crown, it seems to me is to put an assessment of the accused's claimed state of mind and belief into context.

The accused also called evidence which falls into the category of evidence of good character. I referred earlier to the fact that I had taken that into account, to an extent, in making some of the findings I did in relation to the circumstances in which the sexual intercourse occurred. The accused has called evidence to establish that he is a person of good character. That evidence is in two categories. The first is that he is a person with no prior criminal convictions. In addition he has called evidence from a number of witnesses who attest to his good character generally, but most of whom have also given evidence of his good character in a specific respect, namely in relation to his interaction with women and specifically his interaction in sexual circumstances with women.

Also there was evidence by way of cross-examination of the promotions staff member called by the Crown. She was called in the Crown case to give specific evidence about her interaction with the accused on the early morning of 12 May, but in cross-examination she gave evidence which fell into the category of good character evidence in relation to the accused. She had been a friend for some period of time. She had not spoken to the accused since 12 May 2013 because she was advised not to do so because she was a witness for the Crown. She gave evidence, the same as the other character witnesses, attesting to his general good character. She also gave evidence of good character in a specific respect, namely his interaction with women, and in particular said that she had never seen him interacting with women in an improper or inappropriate way, and added further that for those who worked at

the club, he was the person they would turn to for assistance. If they were being bullied or badly treated by patrons, he would come to their assistance by pretending to be their boyfriend so as to avoid the unwanted attention. All of that evidence called by the accused of good character and that cross-examination evidence called in the Crown case has not been challenged by the Crown, therefore I am entitled to accept the fact that the accused is a person of good character.

The evidence called by the accused is in this category. One comes from an older man, a friend of the family, who gave general evidence of his good character. The others are young men and young women, his friends of a similar age. All of these young people were, of themselves, apparently ordinary young members of the community and I accept the submission made on behalf of the accused that they were all people with firm solid foundations in ordinary community standards and outlooks for people of that age.

The men were described by counsel for the accused as impressive young men, capable of having a good time no doubt and skylarking and carrying on, but they were not criminals, they were not violent. They all described the accused as being someone who was popular, who got on well with young women, better than most, and they all suggested that he was not the sort of person who would force himself on someone, even when he was sexually excited. They all gave general character evidence, but as I have said, were specifically asked about their observation of him with women, and in particular whether they had observed him acting in a sexually inappropriate way with young women, trying to force himself on them, and they denied that.

They had all, on their evidence, been shown a copy of the Crown opening at the trial before me, so they knew exactly what it was that was being

alleged against him. In each case they were asked whether their view of him as a person of good character was any different, given what was alleged, and what they therefore knew he had admitted doing, namely, having anal intercourse with a young woman after knowing her for only a matter of minutes, in the back alley, without a condom, but in circumstances where he said he believed she was consenting. All of them said no, so long as it was by consent, which I accept meant, from their perspective, as long as he genuinely believed that it was with consent, and they offered further that they were of the view that he was not the sort of person, in any event, who would have sexual intercourse with someone unless he genuinely believed that she was consenting.

One of these witnesses I found particularly compelling in relation to this aspect of character in a particular respect. She had been involved in a more intimate relationship with the accused than any of the others. She was about the same age. She was a regular at the Soho night club, including back in 2012. She had met the accused on a number of occasions from then and there were a few occasions after that when they had had some intimate contact, which fell short of sexual intercourse, but which involved passionate kissing.

On his birthday in 2012 she was at the Soho night club and she went back with him to a room he had booked for the night at the Holiday Inn nearby. It was clearly the intention of them both at the time that there would be sexual intercourse. She said they were in bed together, he was on top of her, they had been involved in passionate kissing and touching each other, he was aroused, he had an erection and put on a condom. For her own reasons, at that stage, she said stop and he stopped, got off, went to the other side of the

room, did not try to continue, they talked and eventually parted company that evening.

She gave another piece of evidence which I will summarise now, which was relevant to another issue in the trial, not necessarily to the character evidence. I will however outline it now. This piece of evidence was given in cross-examination by the Crown, did not go to character, but provides in my view some objective insight into contemporary morality. She gave all the appearances of being a good young woman who was apparently a student and led a life fairly typical of young people her age. She was cross-examined by the Crown at the end of her character evidence and asked the same question as all the other witnesses about whether her view of the accused's good character was the same, even after she knew what was alleged against him. She was asked this question, *"Do you regard that sort of person as a person of good character?"* Her answer was this,

> *"I know for me, I've had anal sex with guys knowing them just that night, and there was consent. So whether or not, if there was consent there, then I have no problem with it"*.

Again, I accept that by that she meant whether the accused believed there was consent.

Her character evidence is relevant in relation to good character generally, and also in a specific respect, namely, his good character in sexual relationships with young women. It is called to indicate that he is not the sort of person who would continue to have sexual intercourse with someone after they had said stop. It was admitted in the category of evidence of good character.

But as a judge of the law, I also allowed it to be before the tribunal of fact, to be used to engage in tendency reasoning. Whether or not the tribunal of

fact does so, in any case, is a matter for that tribunal. I admitted it for that purpose as a judge of the law, but in my deliberations as the judge of the facts, I decline to reason in that way.

I have come to the conclusion that whilst it is capable of amounting to a tendency in the way the law understands that, in this case I will not use it in that way in my reasoning process, because it is just one event and there are sufficient dissimilarities between it and the facts in this trial for it to be relevant for tendency reasoning. However, I do recognise that this is something of an over-intellectualisation of this distinction. It is relevant evidence in relation to his good character both generally and in the specific respect I have outlined.

As to good character, the law provides that I am entitled to take evidence of an accused good character into account in his favour on the question of whether the Crown has proved the accused's guilt beyond reasonable doubt. The fact that the accused is a person of good character generally and in a specific respect is relevant to the likelihood of his having committed the offence alleged and in this trial that means it is relevant to the likelihood either that he knew that the complainant was not consenting to the act of penile anal sexual intercourse or that he was reckless as to that fact in the way that I have already summarised or that he had no reasonable grounds for believing that she was consenting to the act of penile anal sexual intercourse. I am entitled to take into account the accused's good character by reasoning that such a person is unlikely to have committed the offence charged by the Crown, but whether I do so is a matter for me.

Further, I am entitled to use the fact that he is a person of good character to support his credibility. He has, as I have said, given evidence in this trial under oath and been available for cross-examination. I am entitled to reason

that a person of good character is less likely to lie or give a false account but whether I do so is a matter for me to determine. I have taken this into account to an extent as part of the overall assessment of his evidence and in relation to the way I have viewed some of his evidence, in particular, in relation to circumstances surrounding sexual intercourse. None of this means, of course, that good character provides the accused with some sort of defence. It is only one of the many factors which I take into account in determining whether or not I am satisfied beyond reasonable doubt that he is guilty. The weight that I give it is a matter to be assessed by me but the accused is entitled to have it taken into account in the two ways that I have outlined and I have done so.

There is one more thing that I now propose to add in relation to this good character direction. As the judge of the law, as I have said, I became aware of all of the publicity that surrounded the previous sentence proceedings, much of which it seemed to me appeared to focus on the fact that this accused apparently comes from a privileged background, went to an expensive private school, had many advantages and probably even, according to his own counsel at the trial before me, had a sense of overdue entitlement that night at the Soho bar and certainly was showing off as a VIP.

This trial has nothing to do with that. There is nothing relevant to the determination I need to make that has any connection at all with any of those matters. The evidence is, and the matters which I take into account are, that he is a person of good character in the way that I have outlined, that he was a young man who at the time was a student, who also worked part time as a promoter for his father's nightclub business and also worked as a barman in a hotel in the Eastern Suburbs.

Taking all of this account, I then turn to the findings I need to make in

relation to the two remaining elements, the second being whether or not the Crown has proved beyond reasonable doubt that the complainant did not consent. There are some factors which militate against such a finding beyond reasonable doubt as to whether or not the complainant consented, but I have ultimately determined that there are explanations for those. The immediate complaint made by her to a number of people are not the same in all respects but in relation to the basic issue, namely, whether or not, in her own mind, the complainant was consenting, there are similarities. That immediate complaint and her presentation to BW are compelling evidence in support of the Crown's assertion that the complainant did not consent to the sexual intercourse. In addition, she has given evidence that she did not, in her own mind, consent to the sexual intercourse. I accept that in relation to some of the actions that she undertook she did not, in her own mind, intend to convey consent to sexual intercourse.

My assessment in relation to the second element is to determine what the complainant's state of mind was. As I have said there are some aspects of her evidence which require some thought, in particular, the writing of her name in the phone on request and other matters to which I have referred in greater detail. However, I have ultimately decided that the evidence does establish, beyond reasonable doubt that the complainant, in her own mind, did not consent to the anal sexual intercourse that occurred and thus the second element of the offence is established.

That, however, is not the end of the matter. I now move on to the third element which I have summarised as being that the Crown needs to prove beyond reasonable doubt one of the following three states of knowledge to establish that the accused knew that the complainant was not consenting. The

first is that he knew that the complainant was not consenting to the act of sexual intercourse. There is no evidence to support such a proposition.

The second is that the accused was reckless as to whether the complainant was consenting, either because he realised there was a possibility she was not consenting to the act but went ahead and performed it anyway or, he did not even think about whether she was consenting to the penile/anal sexual intercourse. In other words he did not care whether she was consenting.

The evidence from the accused in relation to this issue of recklessness, which I note I must take into account without any consideration of his state of intoxication, does not in my view support an assertion that he was reckless. It does not appear to have been a large plank of the Crown's case that recklessness could be established on the evidence.

The whole of the Crown's case in relation to this element, it would appear, is based on an assertion that they can prove beyond reasonable doubt that the accused had no reasonable grounds for believing that the complainant was consenting to the act of penile/anal sexual intercourse.

The first part of that task is to determine whether or not the accused had a genuine and honestly held belief that the complainant was consenting, that is an assessment of his subjective state of mind and I accept that the evidence establishes that the accused had a genuine and honest belief that the complainant was consenting to the sexual intercourse. He has said so in his evidence, he said so in texts sent to friends the following day and he said so in intercepted telephone conversations between the manager of the Soho Nightclub and with his father in the period immediately before his arrest.

My task remains to determine whether or not that was a reasonable

belief, in other words, and to ensure that I do not reverse the onus, whether or not the Crown can prove that the accused had no reasonable grounds for believing that the complainant was consenting to the act of penile/anal sexual intercourse.

Before determining that finally I comment that during the course of submissions and by way of questions asked of witnesses, the Crown from time to time would appear to have sought to categorise the very event itself and the way in which the sexual intercourse occurred as an event which, without more, would exclude any possibility that this belief could be a reasonable one. I do not accept that to be the case and particularly so when looking at the event together with the evidence of the young people who gave character evidence and especially the young woman to whose evidence I have just recently referred. Their evidence allowed some insight into the contemporary morality of that group of young people. In the end I have come to the determination that the Crown has not established that there were no reasonable grounds for believing that the complainant was consenting to the act of penile/anal sexual intercourse.

I stress that I do not accept that the complainant, by her actions, herself meant to consent to sexual intercourse and in her own mind was not consenting to sexual intercourse. But by way of summary this is what occurred. The complainant accompanied the accused downstairs intending to go somewhere private with him after she had been kissing him passionately in the DJ box. She went outside with him willingly, albeit not knowing at the time where she was going. When she got outside and realised she was in an alleyway she walked towards the end of the laneway and there continued to kiss him passionately. She decided she wanted to stop and told him she

wanted to go and see her friend but he persuaded her to stay and she stayed. Just before that, as she was turning to go away, he pulled down her undies, it seems to me clearly indicating what his intentions were and she pulled them up but it was at that time that he persuaded her to stay and she stayed.

The complainant kissed him again after she had turned around and stayed and when he asked her or even told her to put her hands on the fence she turned around and did so and he pulled her undies down and she did not pull then up. He tried to penetrate her vagina, she did nothing physically to avoid that. When he said that she was tight she told him she was a virgin but it was in the context of being told that she was tight. After that when she was told to get down on the ground on all fours and arch her back, she did so as requested and participated in a further attempt to penetrate her vagina by moving back and forward as the accused attempted to do that. When that did not work and he started to insert his penis into her anus she pushed back towards him and then back and forwards as the anal intercourse took place.

As I have found she did not say “stop” or “no”. She did not take any physical action to move away from the intercourse or attempted intercourse, either when they were standing up, or when she was down on the ground on all fours. I stress that by none of that behaviour, in her own mind, was the complainant consenting to sexual intercourse and I have already found that the Crown has proved lack of consent beyond reasonable doubt, but I accept that this series of circumstances on the early morning of 12 May 2013 amounts to reasonable grounds, in the circumstances for the accused to have formed the belief, which I accept was a genuine belief, that in fact the complainant was consenting to what was occurring even though it was quick, unromantic, they had both been drinking and in the case of both of them may not occurred if

each had been sober.

Thus I am not satisfied that the Crown has made out the third element, namely to prove that the accused had no reasonable grounds for believing that the complainant was not consenting to the act of penile/anal sexual intercourse and as such the accused is acquitted on the charge in the indictment.

Are there any matters that I now need to deal with?

LYNCH: No your Honour.

BARROW: No your Honour.

HER HONOUR: I return the exhibits.