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No. NSD701 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

BRUCE LEHRMANN

Appellant

NETWORK TEN PTY LTD & ANOR

Respondents

Appellant's Outline of submissions

Introduction

1. This is an appeal from the decision of Lee J in *Lehrmann v Network Ten Pty Ltd* [2024] FCA369. On 15 April 2024, Lee J gave judgment for Network Ten and Ms Wilkinson in the proceeding below.

The Imputations

2. The imputations conveyed by the publication are admitted and set out in the judgment at [43] as follows:

   (1) [Mr Lehrmann] raped [Ms] Higgins in Defence Minister Linda Reynolds' office in 2019 (**Imputation A**).

   (2) [Mr Lehrmann] continued to rape [Ms] Higgins after she woke up mid-rape and was crying and telling him to stop at least half a dozen times (**Imputation B**).

   (3) [Mr Lehrmann], whilst raping [Ms] Higgins, crushed his leg against her leg so forcefully as to cause a large bruise (**Imputation C**).

   (4) after [Mr Lehrmann] finished raping [Ms] Higgins, he left her on a couch in a state of undress with her dress up around her waist (**Imputation D**).

3. It was an agreed fact between the parties that, to prove the substantial truth of each imputation, the question on truth, the defamatory sting was whether Mr Lehrmann raped Brittany Higgins in Parliament House in 2019.

The case pleaded - a violent Rape

4. His Honour appeared to be determining the question "was there a rape?" as it was a subheading in his judgment above [502] and [506].

5. The broadcast refers to a violent rape, with numerous references to an assault and trauma with references to pain, forceful sex, a struggle with being sweaty couldn't get him off me, legs pinned open, a crushed leg with a large bruise, Ms Higgins crying telling Mr Lehrmann to stop and saying "no" at least half a dozen times. Her evidence also graphically describes a violent rape that included having an inability to scream like in a horror movie, audible slapping, rough, being pinned Mr Lehrmann going fast, legs pinned open between the side of the couch and other pinned open, there was sweat, shock and couldn't get herself up from the couch [1].
6. The principal question at the trial was whether Channel Ten and Ms Wilkinson had established that the particulars of truth were substantially true.
7. Channel Ten's pleaded a defence of truth at paragraphs [34] to [36] of its defence which also replicates in substance the version of events given by Ms Higgins in the broadcast and her evidence at the hearing[2].
8. Ms Wilkinson pleaded a defence of truth at paragraph [12] of her defence[3].
9. The "key differences" said to exist between Network Ten's case and Ms Wilkinson's case were not elaborated upon, except by making general reference to differences in the pleadings, which are relatively minor. Further, at the risk of repetition, there was no descent into the detail to identify various factual issues requiring exploration by Ms Wilkinson's counsel, which could not be explored by Dr Collins.
10. At the commencement of the hearing, HH raised the issue to the procedure to be adopted in the induction of evidence whereby two Counsels will not cross-examine one witness. Counsel for Network Ten to cross examine Mr Lehrmann and Counsel for Ms Wilkinson to cross examine Mr Lehrmann to the extent of any additional cross-examination concerning her client that does not traverse the topics Dr Collins cross-examined on. Ms Chrysanthou did not cross examine Mr Lehrmann to put to him any other case other than the one already pleaded in the defence. Ms Chrysanthou told the Court: *Well, as I said on the first day, there's no intention to cross-examine him in relation to anything to do with the justification defence or any of the events the subject of the justification defence in 2019..*[4]
11. The only version of the facts in the truth particulars alleging the rape was the evidence of Ms Higgins that was put to Mr Lehrmann in cross examination. No other version was put to Mr

[1] T629 line 29 to T630 line 31 Ms Higgins recollection of the alleged rape, AB pages 297-298 Transcript of the broadcast interview Ms Higgins recollection of the alleged rape
[2] Chennel Ten defence, AB pages 55-94
[3] Lisa Wilkinson defence AB pages 31-54
[4] T337 25-28

Lehrmann, or to the Court by way of submissions from Channel, Ten or Ms Wilkinson on the issue of truth.

12. At [625] His Honour was satisfied a rape of Ms Higgins by Mr Lehrmann took place in Ms Reynold's office, the truth defences were established, but he did not accept that Imputations B, C and D were established.

13. His Honour made findings that were inconsistent with Mr Lehrmann's version that there was no sexual intercourse and findings that are substantially inconsistent with Ms Higgin's version of events, different to the way the justification case was pleaded by both Channel Ten and Ms Wilkinson and put to Mr Lehrmann in cross examination. See examples in ***Annexure "A"*** to these submissions being a **comparison table** of the case His Honour found compared with what was put to Ms Higgins, Mr Lehrmann and pleaded by Channel Ten and Ms Wilkinson.

Ground 1 – Case Found Outside the Pleading; Denial of Procedural Fairness

14. The Justification Case was advanced on behalf of the two respondents. His Honour erred in upholding the defence of justification because:

    (a) the justification case as found had not been pleaded;
    (b) was different to the justification case which had been pleaded;
    (c) had not been the subject of submissions;
    (d) had not been argued by the respondents;
    (e) had not been put to the relevant witnesses;

15. This is easily demonstrated with comparing the justification case as found with the pleading of Network Ten set out in its defence which replicates Ms Higgin's version in evidence. In short, that pleading deals with a case of a rape in two parts. And the rape was a forceful and violent rape, with an assault causing bruising, with repeated (and obvious) statements refusing consent.

16. The first part of the rape pleaded involved an allegation that Ms Higgins was passed out, either asleep or unconscious and that BL knew that:

    (a) Ms Higgins was too intoxicated voluntarily to give her consent;
    (b) Ms Higgins was passed out, either asleep or unconscious; and
    (c) Ms Higgins had not communicated to Mr Lehrmann, either in words or by actions, any consent to having sexual intercourse with him.

17. At [38] of Network Ten's defence an alternative case, *based on knowledge of all of those three matters at (a)-(c)* is set out but with a consequential conclusion of recklessness or indifference as to whether or not Higgins had consented. Either way, the case is based upon someone being passed out and too intoxicated to give her consent and that Mr Lehrmann knew that. The case also focuses on there being no communication to Mr Lehrmann (either in words or by actions) that she did not consent and that Mr Lehrmann knew that.

18. In making some comparisons between the first part of the rape as pleaded by Network Ten and that found by the trial judge.

- **First**, the case pleaded at [34] involved "forceful sexual intercourse" but the case found involved no force.
- **Secondly**, the case pleaded at [34] involves Mr Lehrmann "audibly slapping against" Ms Higgins but the judge makes no such finding.
- **Thirdly**, the case pleaded at [34] involves Ms Higgins being awoken by a sharp pain in the thigh, but the case found does not involve Ms Higgins being asleep (or unconscious) or that Ms Higgins causes a pain to her thigh. Indeed the finding of the bruising to the thigh was not accepted at [559].
- **Fourthly**, the case pleaded at [35] involves Ms Higgins being raped whilst asleep or unconscious, but the judge finds merely that she was prone to drowsiness at [523].
- **Fifthly**, the pleaded case at [34] involves Mr Lehrmann's knee being crushed against Ms Higgins 's thigh, but the judge makes no such finding.
- **Sixthly**, the pleading at [34] refers to Ms Higgins legs being held open by Mr Lehrmann, but there is no such finding.
- **Seventhly**, the pleading at [34] refers to Ms Higgins being pinned into the corner of the sofa but the judge makes no such finding.
- **Eighthly**, the pleading at [35] says Ms Higgins was incapable of consent because she was too intoxicated, but the judge makes no such finding.
- **Ninthly**, the pleading at [35] says Ms Higgins was incapable of consenting because she was asleep or unconscious, but the judge makes no such finding.
- **Tenthly**, the pleading at [36] refers to no communication by words or actions of any consent, whereas the judge finds only that she did not consent at [586].
- **Eleventhly**, the pleading at [37] says that Mr Lehrmann knew that Ms Higgins was too intoxicated to consent but the judge makes no such finding.
- Other differences will also be mentioned.

19. The second part of the rape pleaded by Network Ten is even more starkly different from the case found by the judge. That second case involves Ms Higgins saying no half a dozen times and telling Lehrmann to stop. It also refers to her crying and being too intoxicated to give her consent. It also maintains that Mr Lehrmann knew that she didn't consent by reason of his knowledge of the following six matters:

(a) Ms Higgins had said: "No";

(b) Ms Higgins had said: "No";

(c) Ms Higgins had told him to stop;

(d) Ms Higgins was crying;

(e) Ms Higgins had been passed out, either asleep or unconscious, immediately before the words and actions particularised in subparagraphs (a)-(c) above;

(f) Ms Higgins was too intoxicated voluntarily and freely to give her consent; and

(g) Ms Higgins had not communicated to Lehrmann, either in words or by actions, any consent to Lehrmann continuing to have sexual intercourse with her.

20. An alternative at [44] of the pleading, based upon Ms Higgins knowledge of the matters in the previous paragraph was put with an averment that he was therefore reckless or indifferent as to whether or not she had consented. second aspect of the case is very different from the one found by the judge.
21. In consideration of the *Jones v Dunkel* rule with the exercise of fact-finding, His Honour cannot find facts if those facts were not put to Mr Lehrmann and Ms Higgins was not asked to give a version of the rape that His Honour found. His Honour should have inferred that there was no evidence that Ms Higgins could give that would have assisted the version he found. His Honour should have instructed himself to reject any information in relation to the case he found that was not put to Mr Lehrmann and Ms Higgins.
22. In *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, the NSW Court of Appeal extended by analogy the *Jones v Dunkel* rule to the situation where a party fails to ask questions of a witness in chief. In particular, Handley JA suggested that a court should not draw inferences favourable to a party where questions were not asked in chief. Ms Higgins was not asked to give a version the judge found, and it should be inferred that no evidence that she could give would assist that case. His Honour should have directed himself that any information in relation to the case he found should be rejected. If a judge finds the version for one party incredible and the version for the other party (who bears the onus of proof) incredible he should find against the party who bears the onus of proof (here Network Ten and Lisa Wilkinson).
23. Where a case is found by a judge against a party which is clearly outside the pleading and particulars, the judgment cannot stand, unless the other party is able to show that, notwithstanding the pleadings, the case was conducted "off the pleadings" with the result that the losing party had fair notice of what that unpleaded case was and therefore a fair opportunity of responding to that unpleaded case.
24. The justification defence as pleaded was rejected by the judge, Mr Lehrman did not have the opportunity to answer the case that His Honour found. Mr Lehrmann is entitled to judgment in his favour by reason of this ground alone. He was not cross-examined adequately on issues arising in the truth defence and accordingly, there has been a breach of procedural fairness to the extent we submit must result in the judgment against Mr Lehrmann being set aside.

<u>Ground 2:</u> Meanings conveyed to an ordinary reasonable person

25. His Honour has misconstrued the meaning of the imputation and in particular has misconstrued the meaning of the word 'rape' that appears in all the imputations. It was not open to His Honour to construe a 'rape' imputation otherwise than by reference to the publication and that the

meaning of "rape" to an ordinary person. The rape described graphically by Ms Higgins included allegations of violence, an assault, called out "no" on multiple occasions and numerous references to an assault and trauma. The ordinary reasonable reader would have, particularly in this context, would exclude rape by this form of non-advertent recklessness and would probably mean a violent rape with express lack of consent.

26. The judge's reasoning on the construction of the imputations begins at [562] where he notes that "submissions of all parties were less than helpful in relation to this aspect of the case". The judge's reasoning continues to [574].

27. The effect of the judge's reasoning is to treat the word "rape" in accordance with what he regards as "ordinary, contemporary conceptions of rape" (at [594]) and to find that it includes a rape involving non-advertent recklessness of the kind he has found, namely, a non-violent rape where the victim is conscious and does not expressly manifest lack of consent.

    [594] Much ink has been spilled and significant attention of law reformers and legislators has been directed in recent years to the issue of what constitutes recklessness as it relates to the fault element in sexual offences (although this topic, for reasons I have explained, was wholly unexplored in the submissions and the parties have not engaged with the question as to what recklessness means having regard to the ordinary, contemporary conception of rape).
    [595] Recklessness can, of course, mean different things, such as an awareness the complainant might not be consenting (possibility recklessness), indifference as to whether the complainant is consenting (indifference recklessness) and failure to give any thought as to whether the complainant is consenting (inadvertence recklessness) – although possibility recklessness might be best seen as a variant of indifference recklessness: see D A Smith, "Reckless Rape in Victoria" (2008) 32(3) *Melbourne University Law Review* 1007.

28. The arguments that an imputation must be judged in the context of the particular publication and the only meaning conveyed is the meaning which an ordinary reasonable viewer would garner from the publication is considered in the authority *Stocker v Stocker* [2020] AC 593.

29. The first proposition for which that case is authority is that the meaning of an imputation must be judged in the context of the particular publication. The problem is that the broadcast clearly suggests a violent rape, where the complainant was in tears and repeatedly refused consent, of which repeated refusal the perpetrator must have been aware. That is quite different from a non-violent rape involving inadvertent recklessness as to whether there was consent.

30. The second proposition for which *Stocker* is authority is that the only meaning conveyed is the meaning which an ordinary reasonable viewer would garner from the publication. A similar result obtains. The ordinary reasonable reader would not regard non-violent sexual intercourse with mere inadvertent recklessness as to consent as being within the ordinary meaning of "rape".

31. The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose

thinking and such a person also draws implications much more freely than a lawyer, especially derogatory implications[5].

32. His Honour's lawyerly analysis of rape is one that an experienced criminal lawyer or Judge would formulate and seems to go beyond that of the ordinary reasonable reader being "the ordinary person on the Belconnen omnibus". Belconnen being a suburb in the Australian Capital Territory also assumes the ordinary reasonable reader is confined to the ACT and is accustomed to the territory's criminal code, being the *Crimes Act* 1900, despite the publication being throughout Australia.

33. In *Stocker*

> [38] All of this, of course, emphasises that the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. And this highlights the court's duty to step aside from a lawyerly analysis and to inhabit the world of the typical reader of a Facebook post. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made, and it is to that subject that I now turn.
> [25] Therein lies the danger of the use of dictionary definitions to provide a guide to the meaning of an alleged defamatory statement. That meaning is to be determined according to how it would be understood by the ordinary reasonable reader. It is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made.
> [45] "… these points only emerge as a result of close analysis, or someone pointing them out. An ordinary reasonable reader will not have someone by his/her side making points like this."

34. Further in *Stocker*, the court redetermined the question of when it was appropriate for an appellate court to substitute its view for that of a trial judge on the meaning of a claimed defamatory statement [52] to [61]. Accordingly, we submit it is a matter for this Court to redetermine the meaning of "rape" to an ordinary person.

Ground 3 - The primary Judge erred in determining that the Respondents had established the defence of justification.

35. The credit of Ms Higgins and Mr Lehramn, the two key protagonists in this case was the central issue which ultimately animated the findings of fact made by His Honour. The difficulty with His Honour's application of *Briginshaw* is that he has found credibility issues with both Mr Lehrmann and Ms Higgins[6], and His Honour derived his own case theory as to the facts, creating the difficulty that his case theory had never been advanced by Ms Higgins in her evidence, was not advanced in argument by Network Ten and Ms Wilkinson and nor was it ever put to Mr Lehrmann in cross examination.

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[5] In *V'landys v Australian Broadcasting Corporation* [2023] FCAFC 80 at [74] considered the task of analysing the capacity of a publication to convey a defamatory imputation as considered in Kiefel CJ, Bell, Keane, Nettle and Gordon JJ explained in *Trkulja* 263 CLR at 160-161 [32]

[6] A table of credibility issues referenced from His Honour's judgment and evidence will be provided for reference as an aide at the hearing.

36. The judge misdirected himself as to the relevant principles concerning proof of a criminal matter in a civil proceeding in his fact finding. The judge refers to *Briginshaw v Briginshaw* (1938) 60 CLR 336, together with the relevant provisions of the *Evidence Act.* It was open to His Honour to take the cautious approach articulated by Dixon J in *Briginshaw* when the allegation of rape in this case is profoundly serious.

37. His Honour was required to determine whether the Court is reasonably satisfied or actually persuaded of the existence of a fact in issue on the balance of probabilities in any particular case will depend on

    (a) the nature of the cause of action or defence;

    (b) the nature of the subject matter of the proceeding; and

    (c) the gravity of the matters alleged in accordance with s 140(2) *Evidence Act 1995* (Cth).

    The more serious the consequences of what is in issue, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion[7].

38. The meaning of "*actual persuasion*" is explained in *Briginshaw*[8], Actual persuasion is not the product of a merely mechanical comparison of the probabilities. As his Honour said at 362:

    > [R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.
    >
    > At 363 When a question arises in a civil proceeding as to whether a crime has been committed, the standard of proof is the same as for any other civil issue, but weight should be given to the presumption of innocence and exactness of proof should be expected.

39. As stated in Ground 1, the case found by the judge was a case which had never been advanced by Ms Higgins in her evidence, was not advanced in argument by Network Ten and Ms Wilkinson and was never put to Mr Lehrmann in cross examination. Such an argument is further strengthened by the need for the appeal court to apply the *Briginshaw* standard.

40. At [132] of His Honour's judgment he states:

    > Of course, if I am ultimately unable to make a finding one way or another as to what actually happened, it is open to decide the issue on the basis that the party who bears

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[7] In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [30] per Weinberg, Bennett and Rares JJ,

[8] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363 per Dixon J

> the burden of proof on this issue (that is, the respondents) have failed to discharge their burden: *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 (at 955–956 per Lord Brandon, Lords Fraser, Diplock, Roskill and Templeman agreeing). Relatedly, and importantly, given my rejection of Mr Lehrmann's account of what went on, it must be borne in mind that a civil onus of proof is not discharged by mere disbelief in opposing evidence (see, for example, in the context of a criminal onus, *Liberato v R* (1985) 159 CLR 507 (at 515 per Brennan J)).

41. *Liberato* is a criminal case concerning a conflict between prosecution and defence witnesses, and His Honour erred in reliance on this case when the proper course is to follow *Rhesa Shipping Co SA* in that the respondents failed to discharge their burden.
42. This is an exceptional case, and it was open to His Honour to simply say "I just do not know" who to believe when he has made adverse credit findings against both Ms Higgins and Mr Lehrmann. See Morris [1988] 1 QB 493, 504:

> **"In the exceptional case, however, a judge conscientiously seeking to decide the matter before him may be forced to say 'I just do not know': indeed to say anything else might be in breach of his judicial duty." Morris [1988] 1 QB 493, 504**

43. The fundamental error, which is also identified by the House of Lords in *Rhesa Shipping Co* was that the judge had regarded himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other as virtually impossible, and failed to consider the third possibility which was open to him, of simply finding the claimant's case not proved: *Rhesa Shipping Co* [1985] 1 WLR 948, 957G
44. His Honour did not believe the account of either Mr Lehrmann or Ms Higgins.
45. Arguably, where the evidence is inadequate, it may simply not be possible to judge the likelihood that something happened reliably enough to reach a rational conclusion one way or the other on the balance of probabilities. This is a case where the evidence is so inadequate it is necessary to fall back on the rules that allocate the burden of proof.

<u>Ground 4</u> Damages

46. If Mr Lehrmann is successful in reversing the finding in respect of justification, it would be open to the court to consider whether his Honour's contingent damages award of $20,000 was adequate or not.
47. His Honour awarded $20,000 by way of damages on the hypothesis that the case was otherwise established, this is an inadequate amount of damages especially more so when there are matters of aggravation which should have led to an award of aggravated damages of a considerable amount.

Zali Burrows,

Solicitor, 3 March 2025

	HH Findings in Judgment	Ref	BH Version at Hearing	Ref	CH 10 Version aired on The Project	Ref	Put to BL at Hearing	Ref
1	**WHISKY**							
1.1	[460] There is no doubt that Mr Lehrmann had at least three bottles of whisky and other alcoholic beverages in the old Senate office, which he moved to the Ministerial Suite (T196.33–38; Ex 29 and 30; T191.18–193.33). If it was ever in doubt, which it is not, Ms Hamer and Mr Wotton confirmed this was the case (T1061.7–9; Hamer (at [6]); Wotton 28 September 2023 (at [38])). Hence the terms of the invitation given to Ms Higgins to accompany him to the Ministerial Suite.	[460]					All right. And you had bottles of whiskey in Minister Reynold's office as well?---I – I often did have whiskey at my desk, but in that office, I would have had them still in my box. You would have, sorry?---Still had them in my box as I hadn't completed unpacking. I see. So you had had bottles of whiskey in the Minister's office of the – when the she was the assistant minister in the Senate?---Yes. And you had packed up or someone had packed up the whiskey for you at the time of the move to Minister Reynold's office?---Yes. And the whiskey was in a box, which you had yet to unpack?---Yes.	T187.33-45
1.2	[516] One then comes to the question of what happened in the Ministerial Suite. Intuitively, given what had been happening, one would think it likely the drinking continued given what we know about Mr Lehrmann encouraging Ms Higgins to imbibe and the rationale given by him for them both to come back to the Suite. After all, Mr Lehrmann said he was going to show Ms Higgins whisky – not Qing Dynasty ceramics. Moreover, very shortly after the incident, and before any allegation of sexual assault was made, Mr Lehrmann represented to Ms Brown (Annexure B) that he came back to drink whisky and ended up drinking two glasses; "chatted" with Ms Higgins but "didn't wish to get into" anything else they did; and said "they [that is, Ms Higgins and Mr Lehrmann] had a whisky". [517] Despite these contemporaneous representations, additional drinking with Ms Higgins in the Ministerial Suite was not put to Mr Lehrmann in cross-examination because Dr Collins embraced the account given by Ms Higgins as to why she came back to Parliament House, which I have rejected. Mr Whybrow did not put additional drinking to Ms Higgins because it was the antithesis of his case theory. This is a good illustration of the difficulties with fact-finding when the only two witnesses to an event do not tell the whole truth. If I had my druthers, I would have liked to have seen Mr Lehrmann tested on his previous representations as to drinking with Ms Higgins and to hear Ms Higgins' response, but I understand forensically why that was not the case. Although I strongly suspect that additional joint drinking did take place in the Ministerial Suite, it is unnecessary for me to make a positive finding.	[516]-[517]						
1.3	[536] First, was what was said to Mr Dillaway during their first discussion after the incident, while Ms Higgins is still in the Ministerial Suite. Because of what was said during that discussion, Mr Dillaway recounted his impression as follows in the Master Chronology (as recorded in Annexure H to the affidavit of Mr Auerbach sworn 2 April 2024 (MC) (at 15)): I'd got the impression that she'd done - something had happened that she didn't want to tell me about. Um, but I wasn't sure what it was at that time, I probably assumed that maybe she just – she'd hooked up with another guy or something like that. Um, you know, had been out partying. Um, and then, you know, I was trying to- it didn't - it didn't - I remember thinking it didn't make any sense at all what she was telling me because she said, "They were out, then they went back to a minister's office to have drinks." And having worked in that building for a long time, like I know you just - you can't just go have a party in a minister's office. Like when Parliament's sitting, yeah, you can get people into an office pretty easy. But when Parliament's not sitting, you can't just go from a nightclub, zoom by Parliament and bring everyone from the bar and have a party in the minister's office. And kind of when she said that to me initially, I remember thinking like -you know, WTF, I'm like that doesn't make any sense. "What do you mean youse [*sic*] went back to the minister's office and had drinks and partied there?" I'm like, "That doesn't make any sense." And I think as I stated to probe those questions, um, she tried to kind of shut it down. And, you know, she said, "Look, I don't want to talk about it."	[536]						

	HH Findings in Judgment	Ref	BH Version at Hearing	Ref	CH 10 Version aired on The Project	Ref	Put to BL at Hearing	Ref
2	**THE ALLEGED RAPE**							
2.1	[553] As to the former, it is possible, for example, that Mr Lehrmann left Ms Higgins on the office ledge for a period as she asserts, but only while he obtained his whisky and glasses and was ready to usher her into the Minister's office – but I cannot be satisfied that this was the case. Although I suspect Ms Higgins was telling the truth about being on the ledge for some short period, it is also possible that they both entered the Minister's office and immediately started drinking, but again I have not reached the requisite level of satisfaction.	Judgment [553]	Do you have a recollection of being admitted to the suite?---I remember sitting on the ledge in the suite. I don't remember – I remember walking into the suite and being – sitting on the edge of the ledge by the windows, overlooking the Prime Minister's courtyard. That's – that's what I remember.	T626.19-22			She sat on one of the ledges overlooking the prime ministerial courtyard in the support staff area and looked out onto the ministerial courtyard?---No.	T317.28-29
2.2	[493] *Thirdly*, and in a quite different category, is a subtle tension between Ms Higgins' various accounts of the assault. As I said at the commencement of these reasons, the surest guide to what went on are the probabilities arising from the logic of events, the testimony of independent and honest witnesses, and contemporaneous and apparently candid representations. Falling within the last two of these categories, is the evidence of two assertions made by Ms Higgins, being a representation: (1) made only three days after the incident, and immediately after Mr Payne had asked "Did he rape you?", being her immediate and spontaneous response: "I could not have consented. **It would have been like f**king a log**" (T1422.39–43); (2) with her ex-boyfriend (noted in above Section F.7), again just days after the incident, where in response to his direct question "Did you hook up in there or did someone take advantage of you?", Ms Higgins replied: "Yeah**, it was just Bruce and I from what I recall. I was barely lucid. I really don't feel like it was consensual at all**" (Ex R99 (at 695)).	[493]	Can you tell his Honour what your recollection is?---Yes. So the first thing I remember when I woke up was a pain in my leg; that was the thing that kind of stirred me up. Bruce was on top of me. I was – so my head was in the back corner of the couch. He was on top of me, his arms were over the top of the couch. He was having sex with me at that point in time. And that was what I first woke up to at that point in time and is, like, the next touchpoint that I have. It's the next thing.	T628.23-28	BH: We went up the lift, into Minister Reynolds' suite. BH: I remember that he was taking a really long time with something so I got to the point where I don't know if he guided me there or if I went there myself, but I ended up laying down and passing out on the Minister's couch. LW: So what's the next thing that you remember happening? BH: The first thing that, sort of, awoke me, was I was in pain, my leg was kind of being crushed. The senior staffer was on top of me. He was clearly almost finished. Um. LW: Sorry. Was there sexual intercourse going on? Yeah. I was, I was. I woke up mid-rape, essentially. Um I, I don't know why I knew he was almost finished, but I, I'd felt like it had been going on for a while, or that he was almost done. He was sweaty, I couldn't get him off of me. At this point I started crying. LW: What did you say to him? BH: I told him to stop. LW: Did he? BH: No. LW: How many times would you estimate you said to him to stop? BW: I felt like it was like on a loop endlessly. Um, at least half a dozen. I was crying the whole way through it. And we, he didn't speak to me the entire time. I just remember him eventually…he stopped. And he got up. And he looked at me and I kind of looked at him, and I couldn't get up, and then he left. LW: You have a photo that you took of a bruise that developed from that night. What does that photograph show?	Annexure A to judgment 23 24 25 26 27 28 29 30 31 32 33 34 36	During part of the period between 1.41 am and 2.30 am – sorry, 1.48 am and 2.30 am on 23 March 2019, you had sexual intercourse with Ms Higgins on the couch in Minister Reynolds' office, Mr Lehrmann?---I did not. Ms Higgins was positioned on the Minister's couch with her head at the end closest to the door and her legs pointed towards the window of the Minister's office?---No, Dr Collins.	T317.42-44 T318.3-5
2.3	[554] Whatever be the true position as to additional drinking, I am convinced, however, that sexual intercourse did take place and that it took place with Mr Lehrmann on top of Ms Higgins on the couch in the Minister's office. I will come back below to whether I accept Ms Higgins' evidence she was not aware of what was happening when Mr Lehrmann commenced the sexual act.	[554]	You said to his Honour that you have a recollection then of being in the minister's suite. Do you mean the minister's private office?---That's correct.	T628.20-21			Okay. All right. Now, did you come into the support staff area and find Ms Higgins either semi-conscious or passed out?---No, she wasn't in that area. Did you enter the minister's office and find Ms Higgins on the minister's couch, either semi-conscious or passed out?---No, I didn't enter the minister's office.	T317.36-40
2.4	[554] Whatever be the true position as to additional drinking, I am convinced, however, that sexual intercourse did take place and that it took place with Mr Lehrmann on top of Ms Higgins on the couch in the Minister's office. I will come back below to whether I accept Ms Higgins' evidence she was not aware of what was happening when Mr Lehrmann commenced the sexual act. [555] I am also amply satisfied, in accordance with the inherent probabilities, that coitus (and any other physical contact) concluded quickly upon Mr Lehrmann ejaculating, and that he thereafter promptly left the Minister's office and the Ministerial Suite. It follows that it is far more likely than not that sexual intercourse occurred towards the end of the period when both Mr Lehrmann and Ms Higgins were in the Minister's office and at around, or shortly after, the time Mr Lehrmann's girlfriend was trying to telephone him.	[554]-[555]	And you said your head was on the couch. Are you able to tell his Honour where your head was?---I was lodged in between the armrest and the back of the couch. My head was jammed in the corner and he was on top of me, over – he wasn't looking at me, he was lurched over the top of me. I was spread open and exposed. I had one leg open, on the side of the couch, and then one open, which is where his knee was, in my leg.	T628.35-40			You spread Ms Higgins' legs so that you could penetrate her?---No. You propped her right leg up on the back of the couch?---No, Dr Collins. Your knee was on Ms Higgins' left leg, pinning it down on the couch?---No, this did not happen. You then penetrated Ms Higgins, your penis in her vagina?---This did not happen, Dr Collins. You were rough and forceful, slapping your body hard against Ms Higgins as you penetrated her?---This did not happen.	T.318.7-21

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2	**THE ALLEGED RAPE**							
					BH: It's quite a large bruise. It's just the weight, obviously of his leg pinning me down. LW: So, you've since learned that a security guard did come into the room after the alleged rape took place. BH: Yeah LW: Can you understand how someone whose job it is to keep Parliament House secure would not call for medical help? BH: No. I wrestle with it myself all the time. Um. Yeah. I don't know. LW: So when you finally woke up… BH: They were sort of yelling out to the office, just checking, cause they broadly, sort of, had an understanding that something had happened. Um. LW: Can you describe what state you were in? BH: My dress was up around my waist, the straps were kind of down. I was pretty dishevelled. I was scared that I was at work. My first thought was "oh my god, I'm at work", um. LW: How many security guards did you see on the way out? BH: I saw the two gentleman at the, um, ministerial entrance on the way out. LH: Did any of those security guards ask if you were okay? BH: No…No.	37 38 39 40 41 42 43 44 45 46 47 48 49	I put to you that you were aware that Ms Higgins was either passed our or semi-conscious?---No, Dr Collins.	
2.5	[556] Given the evidence I have already discussed and the weight I place on contemporaneous representations, I have not reached a level of satisfaction that during the sexual act Ms Higgins said, "no on a loop" and I think it is more likely than not that she did not, or was not, able to articulate anything. On balance, I find it is more likely than not that she was passive (as she later said, "like a log") during the entirety of the sexual act.	[556]	Can you describe what you recollect?---I told him "No", on a loop. I don't know how many times I said it. I told him to stop. I couldn't – I couldn't scream for some reason. I don't know, it was just, like, trapped in my throat; I couldn't do it. I know I felt really, like, waterlogged and heavy and I couldn't – I couldn't move. I was under the impression it had been going on for, like, a little bit of time. I use the expression, like, "I was – I was late to the party". Yes, I felt like it had been going on for a little while and I was only, kind of, coming to right at the end.	T629.29-35			I put to you, Mr Lehrmann, that you were approaching a climax when Ms Higgins came to, regaining a consciousness of her surroundings?---No, Dr Collins. DR COLLINS: You were sweaty and grunting?---No. Ms Higgins said "no" to you?---No, this didn't happen, Dr Collins. She said "no" to you at least six times?---No. Ms Higgins told you stop, but you did not stop; you kept going?---None of this happened, Dr Collins.	T318.23-24 T318.37-44
			You said you couldn't scream; did you try?---I don't know, I just – I couldn't – like, you think of a scream and you, like, want to – it didn't come out. I was saying "No" and I was telling him to stop, and there was an urgency to it, but I couldn't – I couldn't, like, scream like you see in, like, the horror movies, like, I couldn't – I don't know. I don't know why I couldn't.	T630.1-5				
			To your recollection, did Mr Lehrmann respond to you asking him to stop?---No, he didn't even acknowledge it.	T630 .7-8				
2.6			Are you able to say what it is that gave you that impression?---I just – it seemed like he was going quite fast and he kind of seemed a bit sweaty, or I don't know, maybe I was the one who was sweaty. But it, like, it wasn't – there was no, like – there was no, like – it – he was very much in the throes of it. It was very much rough and happening, and it didn't matter that I was talking or awake or whatever, it just felt like he was doing it and – like, it didn't matter, like, I was an afterthought, like, he was – it felt like he was going to climax soon or, like, it had been going on for a while and that he was – I don't know. I don't know if "speeding up" is the right word, I don't know. Yes, that's – that was my impression at the time. Yes.	T629.37-45				
2.7			You said you had the impression he was close to a climax. Do you have a recollection of how the incident ended?---I don't know, but I – I believe he finished and I believe he finished inside of me. Why do you have that belief?---I don't know. I just – it stopped suddenly and I don't remember him – I don't remember it being anywhere else, or him – I just remember when he stopped, it stopped and he got off me. And sorry to press it, but can you describe where your legs where at the time of the - - -?---Yes. - - - the sex?---So I was laying down. My head was obviously in the back, and my legs were pinned open. So he was on top of me. One leg was kind of pinned against the side of the couch and the other one was pinned open. And all of a sudden, once he finished, he stopped	T630.10-25			Eventually, you withdrew your penis, looked at Ms Higgins, and left the room?---No. I suggest to you that, when you left the Minister's suite, Ms Higgins was still on the Minister's couch?---Dr Collins, none of this happened.	T.319.1-4

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2	**THE ALLEGED RAPE**							
			and he got off me. So I don't believe he came anywhere else but inside of me.					
2.8			And when he stopped, do you have a recollection of what he did?---I remember him getting up. And I didn't say anything at that point. And he looked at me and then he left. Did any – was there any words spoken?---No, we didn't say anything. And what did you – when he left, do you have recollection of how he left?---I remember him walking through that back exit that you showed me photos of, leaving to that back slip door from the minister's office, not through the main doors, through that back slip door.	T630.27-36				
2.9	[557] I am further satisfied she felt unable to get up from the couch immediately following Mr Lehrmann leaving and she then passed out into a deep sleep. The fact she "passed out", at some time, is common ground in final submissions.	[557]	And after – after he left, what did you do?---I couldn't get up off the couch. I don't know if it was, like, shock, or if I was just so drunk that I physically couldn't get up, but I couldn't pick my body up off the couch. And then I passed out. Did you try to pick your body up off the couch?---I – I had no reason to want to stay there. So, yes, no, I didn't want to be there. Yes. I couldn't get up; I don't know why.	T630.38-44				
2.10			When Mr Lehrmann was having sex with you, do you have a recollection of what he was wearing?---He wasn't wearing pants. I think he still had his shirt on, but I'm not 100 per cent sure. But I'm pretty sure his shirt was still on.	T631.1-3			Ms Higgins was not wearing any underwear?---I did not have sex with her, so I can't answer that. I suggest to you you removed your pants, but kept your shirt on?---No.	T.317.46-318.1
2.11	When it comes to the dress, I accept the evidence of Ms Anderson, who encountered her about two hours later. It is unclear to me whether the dress had been completely removed prior to the sexual act, or during it, or had just been scrunched around the waist of Ms Higgins (thus exposing her breasts and genitalia). If it was the latter, then I think it is likely the dress was taken off by Ms Higgins at some time prior to the arrival of Ms Anderson, despite her not being fully aware of her surroundings, presumably to allow her to be unencumbered by it while sleeping.	[558]	And what about you?---I always thought that my dress was still on my waist - - - … THE WITNESS: Of course. Sorry. My top was exposed and my bottom half was exposed. I wasn't sure where my dress was. It seemed conceivable to me that it was around my waist, but I wasn't sure. I – I don't know. I don't recall. DR COLLINS: And what do you mean by your "top was exposed"?---My breasts were exposed. And how is that you have a recollection of that?---I don't know. Okay. And so you're not able to say whether you were still wearing the dress or not?---Yes, I'm not sure if it was scrunched around my waist or if it was completely taken off. I'm not sure where the dress was in that sequence of events.	T631.5 T631.18-29				

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3	**CONSENT / RECKLESS INDIFFERENCE**							
3.1	[586] At the risk of repetition, I am conscious of the fact that I must eschew inexact proofs, indefinite testimony, or indirect inferences and, in doing so, I am acutely aware that working out when a compromised witness such as Ms Higgins is telling the truth in one aspect of her evidence presents real challenges. But bearing all these matters in mind, I have reached a state of actual persuasion on the balance of probabilities that Ms Higgins: (a) was not fully aware of her surroundings when sexual intercourse commenced; and (b) did not consent to intercourse when she became aware Mr Lehrmann was "on top of her".	[586]						

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3	**CONSENT / RECKLESS INDIFFERENCE**							
3.2	[591] Given what I have found about it being likely Ms Higgins did not expressly voice her resistance, and the other findings I have made of their interactions (that Ms Higgins was "like a log"), I do not consider I can be positively satisfied on the balance of probabilities that Mr Lehrmann turned his mind to consent and had, at the relevant time, a state of mind of actual cognitive awareness that Ms Higgins did not consent to having sex.	[591]						
3.3	[600] Notwithstanding the need for pause, I am satisfied that it is more likely than not that Mr Lehrmann's state of mind was such that he was so intent upon gratification to be indifferent to Ms Higgins' consent, and hence went ahead with sexual intercourse without caring whether she consented. This conclusion is not mandated by, but is consistent with, my finding that intercourse commenced when Ms Higgins was not fully cognitively aware of what was happening. [601] In summary, I consider it more likely than not that in those early hours, after a long night of conviviality and drinking, and having successfully brought Ms Higgins back to a secluded place, Mr Lehrmann was hell-bent on having sex with a woman he: (a) found sexually attractive; (b) had been mutually passionately kissing and touching; (c) had encouraged to drink; and (d) knew had reduced inhibitions because she was very drunk. In his pursuit of gratification, he did not care one way or another whether Ms Higgins understood or agreed to what was going on.	[600] – [601]			Mr Lehrmann denied any sexual contact with Ms Higgins at all, obviating the need for any enquiry as to whether the intercourse described by Ms Higgins could have been consensual or as to whether his conduct was other than wilful or reckless (Crimes Act 1900 (ACT), s 54). If intercourse occurred as described by Ms Higgins, it was obviously rape. But putting that to one side, Mr Lehrmann said he did not at any stage seek to procure consent to have any sexual intercourse with Ms Higgins (T319.6-20). Further, Mr Lehrmann knew that Ms Higgins had had at least six spirit-based drinks at The Dock and then several further drinks at 88mph. If intercourse occurred, then having regard to those matters, his conduct in respect of consent to intercourse was at least reckless. If the Court is satisfied that Mr Lehrmann and Ms Higgins engaged in sexual intercourse while in Senator Reynolds' Ministerial Suite on 23 March 2019, then the intercourse constituted rape. Mr Lehrmann did not at any time seek Ms Higgins' consent to sexual intercourse: T319.6-20. In circumstances where Mr Lehrmann knew Ms Higgins had been drinking for several hours, had observed her drinking at least six spirit-based drinks at The Dock, and had seen had consume further drinks at 88mph, his conduct was at least reckless. To that may be added the unchallenged evidence that Ms Higgins was so drunk that she passed out while in the Ministerial Suite. On balance, having regard to the unchallenged evidence and objective circumstances, and assuming the Court forms the view that neither the evidence of the applicant or Ms Higgins is reliable, the Court would be satisfied that Mr Lehrmann was at least reckless as to Ms Higgins' consent to have sexual intercourse.	Ch10 Closing subs [458] Ch 10 Closing subs [1050] LW Closing subs [115]	All right. Now, Mr Lehrmann, did you at at any time seek Ms Higgins' consent to have sexual intercourse with you?---I didn't have sexual intercourse with her. - - - because you deny the fact sexual intercourse took place, and you deny you asked for any consent; is that correct?---Yes, yes. DR COLLINS: Did Ms Higgins, at any time, consent to having sexual intercourse with you?---I didn't get consent, because I didn't have sexual intercourse with her.	T319.6-7 T319.19-20 T319.43-44
3.4					37. Lehrmann knew that Higgins had not consented to sexual intercourse with him because he was aware, prior to penetrating Higgins' vagina with his penis, that: (a) Higgins was too intoxicated to voluntarily and freely give her consent; (b) Higgins was passed out, either asleep or unconscious; and (c) Higgins had not communicated to Lehrmann, either in words or by actions, any consent to having sexual intercourse with him. 38. Alternatively, because of his knowledge of the matters set out in the preceding paragraph, Lehrmann was reckless or indifferent as to whether or not Higgins had consented to having sexual intercourse with him. 43. Further, Lehrmann knew that Higgins did not consent to him continuing to have sexual intercourse with her because he was aware that: (a) Higgins had said 'no'; (b) Higgins had told him to stop; (c) Higgins was crying; (d) Higgins had been passed out, either asleep or unconscious, immediately before the words and actions particularised in sub-paragraphs (a) to (c) above; (e) Higgins was too intoxicated to voluntarily and freely give her consent; and (f) Higgins had not communicated to Lehrmann, either in words or by actions, any consent to Lehrmann continuing to have sexual intercourse with her. 44. Alternatively, because of his knowledge of the matters set out in the preceding paragraph, Lehrmann was reckless or indifferent as to whether or not Higgins had consented to him continuing to have sexual intercourse with her.	Ch10 Defence [37]-[38] [43]-[44]		
3.5					12.11. Lehrmann knew that Higgins did not consent to sexual intercourse with him given: (a) he knew she was intoxicated and unable to consent; (b) she was unconscious when he penetrated her; (c) when she woke, she told him to stop, and he did not; (d) when she woke, she cried while he continued to have intercourse with her, alternatively, he was reckless as to whether Higgins consented or not.	LW Defence [12.11]		

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4	**WAKING UP AFTER THE ALLEGED RAPE**							
4.1			And are you able to say what time of the morning this was?---I'm not exactly sure at that point. I'm not sure. And so after being sick in the Minister's bathroom and then sitting there for a time, what happened next?---I started to pull myself together, physically. I tried to, like, both make myself look presentable again and normal, and the next thing I kind of realised was my phone was flat, so I had to charge my phone. When you were in the Minister's bathroom being sick and then waiting, what were you wearing?---See, I don't remember waking up and being nude and then having to pick up my dress and put it on. Like, I don't remember that series of events clearly, so I always assumed it was still on my body, like, scrunched up around my waist, but I accept that that's not maybe right. So by the time I was sick, I was wearing my dress again because I don't remember being naked. I wouldn't be naked, walking around in the Minister's office. Yes. You describe starting to pull yourself back together again. What do you mean by that?---Like, fixing my hair and fixing my mascara, just trying to make myself not look like I had just been – just tried to make myself look presentable.	T632.5-23	LW: So when you finally woke up… BH: They were sort of yelling out to the office, just checking, cause they broadly, sort of, had an understanding that something had happened. Um. LW: Can you describe what state you were in? BH: My dress was up around my waist, the straps were kind of down. I was pretty dishevelled. I was scared that I was at work. My first thought was "oh my god, I'm at work", um.	Annexure A to judgment 42 43 44 45		

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5	**BRUISE ON LEG**							
5.1	[559] As to the bruise, I fall well short of being satisfied that Mr Lehrmann placed his leg against either of Ms Higgins' legs so forcefully as to cause a large bruise (particularly given my considerable doubts about the authenticity of the bruise photograph).	Judgment [559]	Yes. And where were they taken?---In the bathroom stall. And it looks like you're using a mobile phone, is it?---Yes. Yes. And what are we seeing in the first photo? We're on page 5294?---It's my leg and I have turned up the contrast so you can see the bruise more. And what do you say caused that bruise?---I wasn't sure about what it was. I thought it could have been either the assault or tripping up the stairs. But I wasn't exactly sure. But I thought it at least helped.	T672.4-13	LW: You have a photo that you took of a bruise that developed from that night. What does that photograph show? BH: It's quite a large bruise. It's just the weight, obviously of his leg pinning me down.	Annexure A to judgment 36 37		
5.2			You accept that that's a different answer to what you declared on 10 February 2021?---At the time, I believed it was caused by the assault, but with hindsight and with, you know, like, yourself in the criminal trial, put to me, it was possible that it came from another source, so I've now had to accept that it may not have necessarily come from the assault itself. It may have come from falling up the stairs, but I accepted that during the criminal trial, but at the time, I was 100 per cent sold on the – sold – that I – I thought it was because I was in pain when he was raping me, but because of the criminal trial, I've had to accept that I don't 100 per cent know it was from the assault. It could have been falling up the stairs, so that's where I'm at. But I take it your evidence today, having had all this review and memories, as I understand your evidence, slowly improving after this traumatic experience you say you went through, that as of today, you say you don't know what that photograph is – what anything shown in that photograph is – where the injury came from?---I know that it came on the night, but I don't – I can't definitively say it was from the assault. There is also a – like, it's also potential that it happened from the fall up the stairs.	T712.11-19 T712.43-713.2				