SUPREME COURT OF QUEENSLAND

CITATION:	*R v Schafer* [2017] QCA 208
PARTIES:	**R** **v** **SCHAFER, Norman** (appellant)
FILE NO/S:	CA No 198 of 2016 DC No 21 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bundaberg – Date of Conviction: 28 June 2016 (Shanahan DCJ)
DELIVERED ON:	19 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2017
JUDGES:	Fraser and Philippides JJA and Boddice J
ORDERS:	**Appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty by a jury of three counts of rape – where the appellant was alleged to have supplied the complainant and another person with alcohol and cannabis at the appellant's house – where the appellant engaged in sexual acts with the complainant and another person – where the complainant did not consent to the sexual acts – where the sexual acts involved both penile and digital penetration – whether the appellant was under an honest and reasonable mistaken belief that the complainant consented to the acts constituting rape – whether it was reasonably open to the jury to be satisfied beyond reasonable doubt of each element of those offences *R v Clapham* [2017] QCA 99, cited
COUNSEL:	S G Bain for the appellant V A Loury QC for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA AND BODDICE J:** On 24 June 2016, the appellant pleaded not guilty to three counts of rape. Each count related to the one female complainant, aged 14 years. On 27 June 2016, a jury found the appellant guilty of each count. The appellant was convicted and sentenced to an effective head sentence of eight years imprisonment. The appellant appeals his convictions. The sole ground of appeal is that the verdicts of the jury were unreasonable in that it was not reasonably open to the jury to be satisfied of the appellant's guilt on each of the counts of rape, beyond reasonable doubt.

Background

[2] The appellant was born on 27 April 1972. The complainant was born on 23 December 1999. All three offences were committed on 13 May 2014. Apart from the appellant and the complainant, there was also present a second female, the complainant's friend, NE ("NE"). She was born on 5 August 1996.

[3] The Crown case was that on 13 May 2014, the complainant and NE went to the appellant's house. Whilst there, the appellant supplied each of them with cannabis and alcohol. Thereafter, the appellant engaged in sexual acts with both the complainant and NE. The sexual acts with the complainant all occurred without her consent.

[4] The appellant did not give or call evidence at trial. The defence case was that no sexual acts whatsoever occurred between the appellant and the complainant and NE. The defence contended the complainant made up the allegations.

Trial

[5] The first count of rape was particularised as having occurred prior to the complainant taking a shower. The appellant put his penis in the complainant's vagina without her consent.

[6] The second and third counts of rape were particularised as having occurred after the complainant had taken a shower. The second count of rape was particularised as having occurred when the appellant put his finger or fingers in the complainant's vagina without her consent. The third count was particularised as having occurred when the appellant again put his penis in the complainant's vagina without her consent.

[7] The Crown further alleged that, if the event the jury could not exclude the possibility that the appellant was acting under an honest and reasonable mistaken belief that the complainant consented to the acts constituting rape, the jury must consider alternate charges of unlawful carnal knowledge in respect of the first and third counts and indecent treatment of a child under 16 in respect of the second count.

Complainant's evidence

Section 93A statement

[8] The complainant made a complaint to police on 13 May 2014. On that day she was interviewed by police. That interview was recorded and admitted in evidence under s 93A of the *Evidence Act* 1977 (Qld).

[9] The complainant initially gave an overview of the relevant events. The complainant said her friend. NE, wanted to go and see an old friend, the appellant. The complainant knew the appellant. She first met him at the end of 2013 when she went over to the house of a girl she had met. The appellant was that girl's father. She had met him only once or twice. She had a bit of a conversation with him. She had not seen him for about eight months until that day. The complainant described the appellant as weird and creepy. He would wink and do movements in the air imitating sex. The appellant had gone through the complainant's "friend list" on Facebook when she saw him a second time, about 10 months ago. The appellant said "you've got a lot of nice chicks on your Facebook".[1] The complainant told the appellant they were only 14 and 15. The appellant replied he didn't care, he was into younger girls.

[10] When NE and the complainant arrived at the appellant's residence, the complainant and NE had some cannabis. The appellant then went out and bought alcohol. The complainant had two drinks. The appellant then "went all weird",[2] saying they had sexy little bodies and were perfect girls. The complainant said the appellant was becoming really creepy. The complainant said the appellant pushed them both into his bedroom and onto his bed. He took off their clothes. He started having sexual intercourse with NE first. The appellant moved from NE to the complainant and back to NE before coming back to the complainant. The appellant returned to NE and ejaculated on NE's stomach. The appellant walked out of the room.

[11] The complainant and NE both had a shower and got dressed. The complainant then found a mask in the cupboard. The complainant was trying it on in the mirror. The appellant said he had another one which he handed to NE. The complainant and NE started swapping those masks. The appellant then grabbed both of them. He started feeling them up and putting his hands down their pants. He pushed them back onto the bed and started having sex again with each of them. The complainant told him to get off because he was hurting her. The appellant then walked out of the room.

[12] The complainant and NE put their clothes back on. The complainant told NE to make up an excuse that her mum was waiting for them. They told the appellant and left. They walked to a carpark and then to an address to see the complainant's sister and her boyfriend. They were not at home. The complainant and NE stayed talking to their housemates. The complainant and NE then left and went to NE's house. They made some food and contacted the police.

[13] The complainant then provided further detail of those events that day. In the morning, the complainant made NE breakfast and fed the cats and dogs. After the complainant had a shower, NE called someone. NE said they were going out. NE wanted to see an old friend who she had not seen in ages. She wanted "weed".[3] The complainant said that since NE had broken up with her ex-boyfriend, NE was back into drugs. That was the main reason NE went to the appellant's house. NE must have called the appellant because she did not know where the appellant lived, and had to ask for directions.

[14] The complainant said when they arrived at the appellant's house, they sat in his lounge room watching TV. The appellant provided them with cannabis which they smoked using a water bottle with a hose through it. They smoked a few cones at the

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1 AB 342/15.
2 AB 39/5.
3 AB 340/20.

appellant's house. The complainant was really down and that is why she took the drugs. When she smoked the drugs she did not feel depressed, she felt happy. The amount she smoked was a lot less than what she used to do. The complainant blanked out. After about half an hour, the complainant started talking to NE and the appellant. The complainant watched some weird show. At one point, the three of them left and walked to a Dan Murphy's store to purchase alcohol. The appellant had his arm around the complainant. The complainant stayed outside while NE went into Dan Murphy's with the appellant. They returned with alcohol. The appellant and NE walked past the complainant and went back to the appellant's house. The complainant saw a friend, Trent, who lived across the road. They spoke for about five minutes. When the complainant arrived back at the appellant's house, the appellant said to the complainant "I thought you were going to go have sex".

[15] The complainant sat down on the couch and started drinking one of the Cruisers they had purchased at the Dan Murphy's store. The appellant was going on about playing spin the bottle. The complainant and NE said no, they were going to play truth or dare, the kiddies' one. The appellant said no, get the adult ones. When NE and the complainant would not play truth or dare the appellant "cracked the shits".[4] He walked off into his bedroom. The appellant sat in his room for a few seconds and then came back out.

[16] The complainant did not know what the appellant and NE then did for about half an hour. The complainant blanked out. She was angry with the appellant. The complainant said she drank two pink raspberry cruisers.[5] The appellant then went weird. He kept winking at the complainant, touching her knee and legs. He kept rubbing his hands up and down her belly and back and around her waist. He grabbed the complainant and kissed her. The appellant sat in the middle of the couch between the complainant and NE. He started touching the complainant and then started touching both of them.

[17] The complainant kept staring at NE. NE knows that when the complainant stares at her, the complainant is uncomfortable. However, NE did not get it this time. The complainant was really uncomfortable. The appellant was a really old man and she did not class him as a mate. The complainant said when the appellant kissed her, he grabbed her by the hair, pulled her back and gave her a kiss. The complainant would not kiss him back. The appellant "kind of got a little bit shitty with that".[6]

[18] The complainant said earlier the appellant told them they were pretty girls. NE had said she was fat. The appellant said "no you're not, you've got a sexy body, you look yummy". The appellant said the complainant also had a sexy body and that they were both pretty girls. The complainant had told NE during a previous telephone conversation that the appellant had said if she wanted a good time she should come to his place. That conversation was a couple of days after she first met the appellant.

[19] The complainant said NE and the complainant went to get a water bottle out of a fridge near the couch. The appellant came up and grabbed them by the waist. Both the complainant and NE were standing at that time. The appellant was pushing them. The complainant was trying to push back, digging her heels into the ground.

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4 AB 347/15.
5 AB 347/10.
6 AB 350/12.

The appellant pushed harder. At one point, the complainant stopped walking altogether. For a minute, the appellant was practically dragging her. He was saying "come on girls, come on … don't fight it, just come on girls".[7]

[20] The complainant said when the appellant was first pushing them towards the room she thought she heard someone knocking at the door. The complainant said she was talking double dutch saying random words to see if someone was there but they just kept knocking. The complainant was freaking out, switching off because she was too scared to do anything. The complainant cannot really defend herself when she freaks out. She goes silent, really quiet and very still. She switched off when the appellant was pushing them. She knew something was going to happen.

[21] The complainant was unable to describe further how the appellant had dragged her as she said she blanked out. NE had told her the appellant dragged the complainant.[8] Both the complainant and NE were pushed onto the bed by the appellant. The appellant undressed whilst the complainant and NE lay diagonally across the bed. The appellant was holding the complainant and NE down. He was rubbing his hands up and down everything.

[22] The complainant described the appellant's position/actions, "Well practically he's like, me and [NE] were here, like right beside each other. He put one leg around me and one leg around her. And was basically holding us down like that".[9] The complainant and NE's shoulders were touching while they were lying on their backs on the bed. The complainant said they could not move. The appellant was sitting in between them with his legs around both of them. He was facing towards them.

[23] The complainant said the appellant had to get off to try and undress her. He was holding her down while undressing the complainant. NE tried to go and the appellant pulled the complainant's pants off all the way and then grabbed NE and undressed her. The appellant put his head up the complainant's shirt and then grabbed her underwear and tights and pulled them down. The appellant was determined to do it. He got really excited and was in a hurry to do it. The appellant threw their pants on the ground.

[24] After the appellant had undressed the complainant, he took NE's shirt and bra off and was playing with her breasts. The appellant was on top of NE when he took her shirt off. The complainant was right beside NE. The appellant was sucking NE's breasts. He grabbed her underwear and pants and pulled them off as fast as he had pulled off the complainant's pants and underwear. He threw them behind him. He then "put his dick in her".[10]

[25] The complainant said just before the appellant put his penis in NE he was throwing her legs around to try and get her in a position he wanted. NE was completely naked, as was the appellant. The complainant first noticed the appellant was naked when he was on top of NE. NE was laying down and the appellant was on his knees. The appellant put his penis in NE's "girlie parts".[11] The complainant said another term for girlie parts was vagina. The appellant started raping NE. The complainant was looking at NE who was just staring back at the complainant.

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7 AB 353/22.
8 AB 354/15.
9 AB 355/10.
10 AB 357/20.
11 AB 359/4.

[26] After about 10 or 20 seconds, the appellant switched to the complainant. He did the same to the complainant. The appellant grabbed the complainant's legs and was pulling her towards him. He moved her to get into a comfortable position. The appellant was positioned the same way as with NE. The appellant then put his penis inside the complainant's vagina and started having sexual intercourse. He then moved behind her and continued doing the same. The appellant still had his penis in the complainant's vagina but pulled the complainant's leg over his head and moved behind her so her legs were together. He was basically spooning the complainant.

[27] The complainant was facing NE. NE was facing the complainant. The appellant kept raping the complainant. It hurt her because he was going really hard, going fast. The complainant said to NE he was hurting her and NE said "I know". After that the appellant pulled out and went to NE. The appellant put NE's leg up on his shoulder. She was still laying on her back. The appellant then came back to the complainant. He went from behind again. The complainant said that did not last very long.

[28] The complainant said the appellant went back to NE. He put NE's legs back over his shoulders. About 10 seconds later, he pulled out his penis and started rubbing it up and down. He then ejaculated on NE's belly. NE was in a "curl ball". The complainant was beside the appellant. NE was really disgusted. She had a weird look on her face. She said "Ew". The appellant walked out of the room.

[29] The appellant came back into the bedroom and walked them to the shower. He showed them where the towels were held. He then closed the door behind them. The complainant and NE walked into the shower. They washed their bodies and dried themselves. The appellant brought their clothes. As the complainant opened the door, the appellant said "if youse were in there for one minute longer, I would have come in and joined youse".

[30] The complainant said as she was leaving the bathroom the appellant was standing at the door. He had his arms out and would not let her out. He was standing in a star shape. The complainant noticed one of his cupboard doors was open. She saw a mask inside the cupboard. The cupboard was practically right next door to the bathroom but in the bedroom. It had sliding doors. The mask was a red glittery one. There were two masks, like fancy dress marks. The other was a quarter white, a bit purple and then another colour or two. The complainant was trying on the red mask but it was too big for her so she swapped with NE. NE had the red one and the complainant had the other one. They were doing this in the bathroom mirror.

[31] The appellant started rubbing them up and putting his hands down their pants while they were trying to put on the mask. He kept touching everywhere on the complainant's body, just going up and down. He kept kissing NE's neck. He tried kissing the complainant's neck but she would not let him. The appellant put his hands down the complainant's pants and up and down her shirt. He put his hands everywhere.

[32] The complainant said when the appellant started to kiss her on the neck and touch her everywhere, he put his hand down her pants inside her underwear. His fingers went inside of her vagina. He started fingering the complainant and then went to NE. He kept going between the complainant and NE. Everything the appellant did

to the complainant he did to NE. The fingering did not last long because he was too busy with NE.

[33] The complainant and NE were trying to push him away. They kept knocking him back with their backs. After two minutes the appellant dragged them back to bed. The complainant said they just kept pushing back, like walking backwards and then walking forwards fast to see if he would let go. The appellant did not let go. The appellant kept leaning over and kissing NE's neck. He also lent over to kiss the complainant's neck but she kept moving her head. She was leaning on NE. She was going in front of NE practically. The appellant moved onto NE.

[34] The appellant dragged them both back into the bedroom. He grabbed them by the waist, the exact same way. He said "come on girls, just come on". He had his hand on the complainant's lower back and wrapped around to the front. The appellant grabbed NE's underwear and pants and ripped them off fast. The appellant was standing at the edge of the bed. The complainant was next to NE, lying diagonally across the bed. They were on their backs.

[35] The appellant grabbed the complainant's underwear and pants. The complainant did a dance stretch manoeuvre called "the frog". She spread her legs to try and stop her pants being pulled off. The appellant forced her legs up, he grabbed her legs, pushed them together and then quickly took off the pants. The appellant grabbed the complainant by the thighs. The complainant was trying to fight but it did not work. She was trying to hold her legs down but the appellant was pushing her legs up. He succeeded after a minute because the complainant gave up.

[36] The complainant described the frog position as putting your feet together and pulling your legs in as far as you can and pushing them down to stretch a lot. The knees are bent. The complainant said her legs stayed bent until the appellant went to NE. The complainant then moved and the appellant grabbed her. As the appellant took the complainant's pants off they got stuck. The appellant got "shitty" as they would not come off the complainant's foot. He was pulling too hard. The appellant said "like for fuck sake, just let me do it".[12]

[37] When the appellant ended up getting the complainant's pants off her legs, the appellant put his penis in the complainant's vagina and starting raping her. He kept the complainant's knees bent. He pulled her legs apart and was holding them there until he got his penis into her vagina. The appellant was positioned in front of her on his knees. The appellant went with the complainant for a couple of seconds and then moved to NE. The appellant moved behind NE and started spooning her. He climbed over the complainant and NE and got behind NE. NE and the appellant were lying on their sides. The complainant was on her back. The appellant was just going for it, taking advantage of NE who was just lying there.

[38] The appellant then moved back to the complainant. Initially, the appellant tried spooning her. He tried going behind but the complainant would not let him. He kept trying to roll the complainant on to her side but she was just laying there and would not move. The appellant tried to move his hand onto her back so he could move her but it did not work because the complainant put all her weight on it. The appellant then got in front of the complainant. He put his penis into her vagina. He started raping her again.

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12 AB 371/25.

[39] The appellant was on his knees. The complainant's knees were bent. She was trying to get them straight but he kept pulling them so they were bent. He put both of the complainant's knees together and grabbed them. She could not really move her legs then. The appellant went really rough and it hurt. He was going really fast. The complainant got pains "all up her belly" and then her vagina started hurting. The complainant got up on her elbows. She told the appellant he was hurting her. The appellant kept going for a bit then stopped and left the room.

[40] The appellant remained in the lounge room. NE and the complainant remained in the bedroom. They put their clothes on. The complainant got NE to go along with the idea that the complainant's mother was waiting for them. Both girls went back into the lounge room. NE said they were meant to meet mum. The complainant pretended to call her mother. She went to a door near the bedroom to pretend to make the phone call. She then sat down in the lounge room.

[41] The appellant was looking at NE weirdly, like the appellant did not want NE to go. NE looked puzzled. They watched TV. After five minutes the complainant said "mum's waiting" and they left the house. The time was either 1 or 2.30 when they left the house. The complainant said she got a message on her phone from her boyfriend Josh. She said "shit we've got to go". They then left the house. The appellant hugged them normally when they left the house.

[42] The complainant and NE went to see the complainant's sister and her boyfriend but they were not home. They spoke briefly to the sister's flatmates. The complainant did not tell them what had happened. She was intending to speak to her sister about what had happened at the appellant's house. They then returned to NE's house. The complainant called the police when they went to see if the complainant's sister was home. They were meant to come to the sister's house but as the complainant and NE went back to NE's house, they rang the police again and told the police to meet them at NE's house.

[43] The complainant said when the appellant put his penis inside her vagina it felt like he went all the way. When asked whether apart from saying "you are hurting me" she actually said for him to stop, the complainant replied "I shut down, I couldn't. But no, [NE] didn't".[13] The complainant said she wanted to but she was too scared. The appellant knew how old she was as the appellant's daughter and NE told him from day one. She was 14 when she first met the appellant. She had not had a birthday in between first meeting him. The complainant told the appellant her age the first day she met him. He was giving her weird looks and she said "I'm like, I'm fourteen, fuck off".[14] The appellant told her he thought the complainant looked 17. The complainant's Facebook profile also had her date of birth, 23 December 1999. The complainant said she did not ever give the appellant permission to have sex with her. The appellant never asked if he could have sex with her.

[44] The complainant told her carer about what had happened to her. She texted her once they left the house. The text said "I know I've done wrong but I really need you guys right now". The carer did not reply until the police had arrived at the house. The complainant also told Josh, who was like a brother to her. She told him something happened and that she would talk to him about it later. Josh is 18.

[45] The complainant had not told anybody else what had happened to her at the appellant's house. NE said something about not talking to anybody about what had

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13 AB 381/1.
14 AB 382/5.

happened. NE was not going to talk to anyone. NE later said "let's get him charged for this" once they left the house. The complainant thought NE would call the appellant telling him what they were going to do.

At trial

[46] In evidence, the complainant said that when the appellant was trying to kiss her and she wouldn't let him kiss her the complainant was telling him to "fuck off".[15] She said that quite a few times to the appellant. That was what she meant by her comment that the appellant "kind of got a little bit shitty with that". It was in response to what she was saying to him.

[47] The complainant further explained that when she said in her s 93A statement that the appellant was pushing them and kept pushing them, she was holding her ground, digging her feet into the ground so he could not move her, the complainant was freaking out and switched off. She was too scared to say anything. She couldn't find the words. This all occurred before they had a shower.

[48] The complainant was shown some CCTV footage from the Dan Murphy's security cameras. She identified herself in that footage as well as NE and the appellant. The complainant also identified photographs of the appellant in his unit, of one of the Cruisers she had been drinking at that unit, of the bong they used to smoke cannabis, and of the appellant's shower and toilet, including the body wash she had used and some conditioner or shampoo. They were the bottles she described in her s 93A statement. She identified the towels NE and her had used after the shower.

[49] The complainant also identified photographs of two masks they had been trying on in the appellant's bedroom. The complainant picked up the red one first. She gave it to NE because it was too big for the complainant. She then picked up the other mask. The masks were originally in his cupboard with two sliding doors open. She identified that cupboard in a photograph. The complainant also identified photographs of a blanket and bed. The complainant said that was the blanket on the appellant's bed. She described it as a leopard print style blanket.

[50] In cross-examination, the complainant accepted she had been a foster child for her whole life. She accepted she had been involved in cutting herself. She denied having hallucinations in the past but agreed she had flashbacks and nightmares. She agreed she had been to hospital on a number of occasions for self-harm and overdosing. She had previously heard voices, but not recently. She had them from the age of 10. They stopped at 14 years of age but came back when she was 15. They stopped a year ago.

[51] The complainant met NE in foster care in about 2013. They shared accommodation. They stayed in a residential facility called Lifestyle Solutions. They became friends. NE later moved into Crofton Street. The complainant stayed there for a couple of nights here and there. She stayed there on the night before 13 May 2014. She did not stay there after 13 May 2014. She went back to her placement at Bargara. They are no longer friends. NE just vanished one day. She stopped talking to everyone and moved out of Bundaberg. NE deleted her Facebook account and no-one has had any contact with her.

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15 AB 392/40.

[52] The complainant agreed she knew a girl named SN. She is the appellant's daughter. She met her in about 2011, through Child Safety. They became best friends. For a month or two they lived in the same house. SN did not get along with the appellant. The complainant believed they did not have anything to do with each other.

[53] The complainant agreed she was a forceful person who can stand up for herself. She would have stood up for herself in 2014 but at that time she had too much going through her head. She was too stressed out, she was freaking out. She could not stand up for herself because she blanked out. She was still going through all of her mental health issues. She suffered post-traumatic stress disorder, anxiety and depression. She was treated for those conditions. It is only recently that she had fully recovered.

[54] The complainant called the police on 13 May 2014 once they left the appellant's house. She did not recall where she was when she called the police. She was fairly sure it was on NE's phone. She went to her sister's house straight away. They waited out the back of the unit for her sister to return. When she did not arrive after 15 or 20 minutes they returned to NE's house.

[55] The complainant dialled 000 to speak to the police. The arrangement was they were going to come and see her at her sister's house. The complainant called the police again and told them to go to NE's house.

[56] The complainant said they were at NE's house for no more than five minutes when police arrived at that residence. The complainant said when police arrived she gave them a very short statement. They made arrangements for her to go to a medical centre. She changed her clothing between the time of the incident at the appellant's residence and seeing the doctor. Police asked her to take them off for evidence. She gave the clothes to the police. The complainant went to see a doctor on 13 May 2014. She could not remember if she had shown the doctor self-inflicted cuts on her arm and leg. She could not recall that after one of the acts of intercourse she felt bleeding from her vagina. She denied there was no vaginal penetration by the appellant that day.

[57] The complainant agreed the cannabis she smoked that day was provided by the appellant from a clip seal bag. She smoked it through a bong that was already at the house. NE and her shared the bong. The appellant also smoked cannabis. The complainant denied the appellant was acting like he had consumed an amount of alcohol. If he had it must not have been much because he was not acting "too stupid". She agreed she had not met the appellant much before but said she knew how to tell if someone had been drinking. The complainant agreed that when they arrived at the appellant's residence there was another man in the unit. She had met him once before when he was doing a drug deal for her friend. The man left out the front door not long after they entered the house.

[58] The complainant accepted she drank two drinks whilst at the appellant's house. She denied NE and her brought the drinks to the house. The appellant went and purchased alcohol after they had consumed the cannabis at his residence. She denied the appellant went down to buy the alcohol on his own. They all went together. There was some time gap after they smoked marijuana, probably about half an hour. The complainant could not remember what she was talking to the appellant about at that time.

[59] The complainant denied it was her suggestion they buy some alcohol. It was the appellant's idea. The complainant told the appellant to buy more pot, not alcohol. They all went for a walk to the Dan Murphy's store. The complainant stayed out the front while the appellant and NE went in and purchased the alcohol as she was underage. The complainant has never gone into a hotel or liquor barn herself and bought alcohol. It was maybe midday, late morning, early afternoon. The complainant stayed outside near the front entrance.

[60] When the appellant and NE came out they walked back to the appellant's residence together. On the way there the complainant met her ex-boyfriend, Trent. He lived in a street nearby. He had seen her walking up the street and came running after her. They had a very quick chat. The complainant did not recall saying to police that she had called Trent. She recalled Trent ran out on seeing her. She accepted she told police that she had gone to Trent's home for five minutes and that she then went back to the appellant's house on her own. The complainant said her recollection was that she saw Trent for a quick second, went to the Dan Murphy store and then as they were going to leave went to Trent's before returning to the appellant's home.

[61] The complainant thinks she drank the whole bottle of Cruiser whilst sitting in the appellant's lounge room. She could not recall if there was a conversation about playing spin the bottle. She remembers there was a suggestion by the appellant they might play a game of truth and dare. The complainant thinks a six pack was bought at Dan Murphy's.

[62] The complainant agreed she was blanking out that day without any warning. It still happens without warning. That was why she could not remember some things. It was also because of her depression. She could not recall how many drinks NE had in the lounge room. Her answers to police were given when she was under the influence of marijuana. When asked whether it was the case that when she was talking to the police she was making up the story as she went along the complainant replied "I don't know … But if I was it was because I was under the influence of marijuana and I was highly under the influence of marijuana that day".[16] She denied her version of events could be quite wrong because of the influence of marijuana.

[63] The complainant agreed that when she was in the lounge room before going into the bedroom she felt something odd was going to happen but did not do anything about that feeling. She agreed she probably could have walked out the front door but did not do so. She agreed NE also did not get up.

[64] The complainant could not recall in evidence how she found herself in the bedroom. She was fully clothed when she was pushed into the bedroom, as was NE. She did not recall the appellant trying to kiss her in the bedroom or the complainant trying to kiss the appellant. She was sure the appellant said "we have sexy little bodies".[17] She could not remember where he said that and in relation to what events. When the appellant was undressing them he was holding both the complainant and NE down at the same time.

[65] The complainant said when they were both lying on the bed the appellant held them down and undressed them. She could not recall who he undressed first. He started

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16 AB 441/45.

17 AB 445/10.

on the bottom half of the complainant's body. She could not recall the appellant putting his head up under her shirt or top at any stage. The appellant was undressing NE free willingly. NE did not refuse. The complainant was not willingly removing her clothes.

[66] The appellant had his leg on NE while he was removing the complainant's clothes. Once he removed the complainant's clothes he put his leg on the complainant as he removed NE's clothes. NE then "did it for him".[18] Once the appellant had removed her upper garments, the complainant was completely naked. She next remembered the appellant holding her down by her shoulder with his arm. The appellant had both his legs in close proximity to the complainant's body. NE did not have any restraint. It was mainly the complainant that was restrained the whole time. The complainant agreed there was nothing to stop NE getting up and going out of the room.

[67] The complainant said when the appellant put his arm on her shoulders and was holding her down he started raping her by putting his penis inside the complainant and moving back and forth. She did not agree to that act. She does not know how long it lasted. She could not recall the appellant saying anything to her whilst he had his penis inside her. When the appellant moved to NE he kept holding the complainant down. He made NE move up onto the bed closer to the complainant so he could keep holding the complainant down while "he was fucking [NE]". The only connection between the appellant and NE at that stage was that he was inserting his penis inside NE.[19]

[68] When the appellant asked NE to move up closer to the complainant she moved up and lay horizontally so she was really close to the complainant. Her right arm was all over the complainant. The complainant's head was pretty much going underneath NE's back or sliding under there while they were having sex. NE stayed there while the appellant came back to the complainant. She was not being restrained at all. NE could have got up and gone outside. The appellant came back to the complainant and then went back to NE. When he came back to the complainant he was still holding the complainant down by the shoulders.

[69] The complainant agreed the appellant had sex with her twice and sex with NE twice before he pulled out and ejaculated onto NE's belly. After a couple of minutes the appellant got up and moved around the room. The complainant thinks he went back into the lounge room. The complainant and NE went for a shower in the ensuite off the bedroom. They showered together. They both then got dressed. As the complainant left the ensuite she saw the masks in the appellant's cupboard. She saw two masks. She thinks she picked up a red and black mask first. It was too big for her so she gave it to NE. The complainant then picked up the other one and tried it on. The complainant thinks they went back into the bathroom to look at what the masks looked like. The complainant next remembers the appellant pushing them back into bed. She later remembered leaving the house. NE said "bye" and they walked out.

[70] The complainant denied NE and her brought alcohol to the house. She denied the appellant had asked NE to put her bong down. She denied the appellant yelled at them for touching the masks. She denied the appellant saw a cut on NE's arm and asked her to get out. She denied they both left immediately after the mask incident.

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18 AB 453/20.

19 AB 455/10.

She denied they returned sometime later and had an altercation with the appellant. She denied NE and her agreed to punish the appellant for some transgressions towards his daughter. She denied NE and her cooked up the arrangement to do something bad to the appellant.

NE's evidence

[71] NE was 17 at the time of the offences. She knew the appellant through his daughter. She met the complainant in a foster placement when she was 16. The complainant stayed at her house on the evening of 12 May 2014. The next morning they called the appellant. He gave them directions to his new house. NE thought she had known the appellant for about a year at that time. She had previously been with him and the complainant at the same time. NE told the appellant the complainant was 14. She did not remember any response by the appellant.

[72] NE said they walked to the appellant's house to catch up with him and to smoke weed. NE asked the appellant if they could have cones. They had a couple of cones. They smoked them in his lounge room through the appellant's bong. The appellant gave them the bong to smoke the cones. The complainant smoked through the bong. It was given to her by the appellant. The weed was chopped up in a bowl on a table. The appellant smoked with them.

[73] NE said after they had smoked weed, the three of them walked to the Dan Murphy store. They left the complainant outside. The appellant and NE went in to purchase alcohol. They bought Cruisers and Jack Daniels. The three then walked back to the appellant's house. They had a couple of drinks and a couple more cones at the house. NE and the complainant were drinking Cruisers. The complainant and NE had a couple of drinks each. It did not take long to drink them. The appellant was drinking Jack Daniels. All three smoked more cones.

[74] At one point, the appellant suggested they play games. The complainant was not sure but they agreed. At this time, the appellant was rubbing the complainant's legs in the thigh area. Nothing was happening between the appellant and NE. Whilst the appellant was touching the complainant he was saying "she's pretty gorgeous" and that kind of stuff. He was saying the same to NE. The complainant did not say anything back to the appellant.

[75] NE said they played truth and dare. During the game, the complainant and NE were dared to lose their clothes by the appellant. The appellant then took them to his bedroom. He had his arms around both of them. The complainant and NE were on either side of him. The appellant laid them both down next to each other. They were naked as they had lost their clothes during the game in the lounge room. The appellant was still clothed.

[76] When the appellant placed them both on the bed, he played with the complainant's hair. The appellant was calling them names like "beautiful and pretty and really pretty girls". When asked if the appellant was holding the complainant down NE replied "No. Not aggressively or anything … Just lightly".[20] The appellant had his hands on the complainant's arms. The appellant was not touching NE at that point. He was just holding the complainant's arms down. Both NE and the complainant were on their backs.

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20 AB 138/45 – AB139/1.

[77] NE said after the appellant was holding the complainant's arms down he decided to have sex with them. He had sex with NE first. She was lying on her back. He was on top. It lasted about five minutes. The appellant did not say anything during that time.

[78] After the appellant finished having sex with NE, he switched over. He went to the complainant and had sex with her. The complainant was lying on her back at that point. The appellant then came back to NE, in the same position. It lasted for five or ten minutes. The appellant then went back to the complainant. Nothing different happened at that time. The appellant used the same position. The appellant was not holding the complainant at that point.

[79] NE said after the appellant had sex with the complainant for a second time he came back to NE. He then pulled his penis out and started to "jack off".[21] He was using his hand up and down his penis. The appellant ejaculated on NE's stomach. It made NE feel pretty gross. She did not say anything. The complainant said "ew".[22] The complainant at one point during the second occasion of intercourse said it hurt. NE said when the appellant was having sex with each of them he was doing it quickly with some force. At one point, he put NE's leg on his shoulder.

[80] NE said after the appellant had ejaculated on her stomach the complainant and NE went for a shower together in the adjacent bathroom. They used body wash to wash themselves. After they had finished showering, they played with some masks. NE did not think they had their clothes on at this point. They were just in towels, obtained from the rack. NE could not remember where the masks came from. They just found them. They were playing with the masks in the mirror of the bathroom.

[81] NE said the appellant came into the bathroom and got the two of them. He took them back into the bedroom, to his bed. He had sex with them again. On this occasion, the appellant had sex with each of them only once for a short time. In the lead up, the appellant was kissing NE on her lips. He was also kissing the complainant on her lips. NE did not push him away. She did not see the complainant push the appellant away.

[82] The appellant had sex with NE first, on her back. The appellant was on top. Again, it was for about five minutes. The appellant then had sex with the complainant for about the same time. He was not holding the complainant down. It was on this occasion that the complainant said it was hurting her, to stop.[23] The appellant stopped not long after and walked back to the lounge room. He did not stop straight away. The two girls got dressed and went back to the lounge room. The girls' clothes were in the bathroom.

[83] NE said when they went back to the lounge room they had another cone. The complainant was writing messages to NE on her phone saying they should say her mum was coming and they needed to go. That is what they told the appellant. As they left the appellant gave them a hug. They went to see a friend the complainant was looking for, someone she considered a sister. That person was not there. They went back to NE's house. Whilst there they telephoned the police. NE spoke to police. NE did not wish to make any complainant.

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21 AB 140/25.
22 AB 140/35.
23 AB 143/39.

[84] In cross-examination, NE accepted that in May 2014 she considered she was close friends with the appellant's daughter. NE had stayed at her house. NE also considered the complainant a friend. She was still friends with her, although she had not seen or spoken to her since last year. NE agreed she had had problems in her life. She had been foster care for some years. She used to have an imaginary friend she would speak to on occasions. She had that friend in 2014. NE knew the complainant used to cut herself. NE also cut herself in that same period. There had been an incident in 2013 when they had both been taken to hospital because they had cut themselves. They did it to get a lift into town. NE agreed she was a constant visitor to the Bundaberg Hospital for cutting herself. She had been taken to hospital in the past due to suicidal intentions. She had also had altercations with police. She had previous convictions for assault occasioning bodily harm and receiving tainted property.

[85] NE agreed that before these incidents the complainant and NE had smoked cannabis together. NE denied bringing any Cruisers with them to the appellant's residence. NE denied that when they arrived at the residence, NE asked to use the appellant's toilet. As they arrived they saw a man leaving the house. The first thing she did on arrival was to ask the appellant for some cones. She personally smoked two or three cones. The complainant probably smoked two cones. The appellant was also smoking cones. The three were sharing the one bong. NE was fine after she had had three cones.

[86] NE said they discussed getting alcohol while they were smoking the cones. The appellant suggested going down to Dan Murphy's. All three walked together to the store. She did not recall the complainant speaking to anyone whilst there. The complainant stayed outside. NE said they thought it would not be a good look if the complainant came inside the store. NE bought the Cruisers. It was a pack of 10. No other alcohol was purchased that day. The appellant paid for the alcohol. When they went outside the complainant was still there. She was not with anyone. They walked directly back to the appellant's residence.

[87] NE said they started drinking straight away. NE and the complainant drank a Cruiser. The appellant had Jack Daniels. The Cruiser pack was put in the refrigerator in the lounge room. Neither the complainant nor NE went to the fridge to get water at any stage. Whilst they were drinking alcohol, they also smoked cones. She had a couple, two or three, at that time. NE also drank a second Cruiser, as did the complainant. The complainant appeared to smoke a similar number of cones. The appellant was also smoking cones.

[88] NE said they ended up in the bedroom after they had started playing truth or dare. The appellant did not speak to her about the game, it just happened. NE did not feel anxious or concerned and the complainant did not say anything to her about being concerned. The appellant grabbed her hand and pulled them up. He took them into the bedroom. He placed both of them on the bed. They were both lying vertically across the bed. Their clothes had already been taken off during the game of truth and dare. The appellant was just lightly holding the complainant down. NE was lying there watching it. She agreed the complainant was younger and she did nothing about it.

[89] NE said the appellant had sex with her first, then the complainant. He had sex with NE two or three times. He had sex with the complainant the same number of times. They then had a shower. After the shower, they stayed in the bathroom. There was

a second lot of sex after the shower. They got dressed in the bathroom after the second lot of sex. Their clothes were given to them.

[90] NE said after they got dressed, they did not stay in the unit long. The appellant gave each of them a hug. She thought that a little strange. After they left the unit, a young man named Trent came up in the street and put his arm around the complaint. They stopped and had a chat. They then went to find NE's sister. When she was not at home they went back to NE's place. They telephoned the police when they got back to her house.

[91] NE agreed she knew the appellant's daughter was not getting along with her father and that she disliked him. She denied that the appellant's daughter and the complainant decided they were going to get the appellant by putting up a cooked up story so he would be harmed. She denied ever discussing with the complainant that they would frame the appellant. She agreed she was the more forceful person between her and the complainant. She agreed she had a relationship with the appellant's daughter for about a week. They were girlfriends. She denied the appellant never had sex with her or the complainant that day.

Other evidence

[92] Malcolm Locke visited the appellant at his residence on 13 May 2014. He arrived at about 7.30 or 8 o'clock in the morning. He took a bottle of rum. They were drinking rum and watching a DVD. He was asked to leave when two young girls arrived at the appellant's residence. He recognised one of the girls as NE. Locke returned about 40 or 50 minutes later. He stayed that night. The next day police arrived at the residence. The appellant and Locke were smoking cannabis. The cannabis was on a plate but it had been on the coffee table earlier that morning.

[93] In cross-examination, Locke accepted he was drinking 80 per cent rum and smoking cones on the morning of 13 May 2014. He accepted he had smoked cones all morning and had had at least six rums. He recollected the girls arrived at 5.30 but said he had been told he had got his times wrong. He accepted that by the time lunchtime came around he was pretty well affected by the alcohol and smoking of marijuana. Locke accepted that when he returned in the afternoon of 13 May 2014, he drank more rum and smoked more cones.

[94] Locke denied that when he awoke the next morning he started drinking rum again. He did smoke cones. He could not say how many cones he had smoked between when he woke up and the arrival of the police. He agreed that when he made a statement to the police he was stoned. He agreed he had previously been convicted of a number of offences of dishonesty. He denied his story that he saw the girls and was then told to leave was wrong.

[95] SN, the appellant's daughter, was born on 10 November 1996. She knew NE and the complainant through foster care. They both happened to be staying in the same temporary housing after the 2013 floods. At that time, she found out the complainant knew her father. She told the appellant the complainant was 14, on a couple of occasions, not long after the complainant turned 14. She last saw NE two or three years prior to giving evidence.

[96] In cross-examination, Schafer said the conversation with her father occurred in the make-up area created after the floods. She was staying with a friend there. They had multiple conversations. She agreed she was a friend of the complainant at that

time. After the floods, they became friendlier. The complainant stayed where she was living at Burnett Heads a couple of times. She did not accept the conversation about the complainant's age came up when the appellant asked "Why is a girl of 16 knocking around with a girl of 14?".[24] She denied he was concerned about her age influencing a younger girl.

[97] Schafer last saw the complainant about three weeks before 13 May 2014. She denied ever meeting the complainant with NE. She agreed she does not get along with the appellant and had not done so for some time. Once of the reasons for falling out with the appellant was her relationship with a man called Robbie. The appellant did not approve of that relationship.

[98] Schafer agreed that on the weekend before 13 May 2014 she had a large argument with the appellant. The appellant had kicked Robbie out. The appellant gave her an ultimatum, either Robbie or the appellant. Schafer said she was more than happy to leave. She packed and left the residence. She said the relationship with the appellant had been poisonous for a long time before that argument. She denied she wanted to get back at him. She denied she came to an agreement with the complainant to cook up a plan to make false allegations the appellant had sex with the complainant.

[99] Matthew Hunt, a forensic scientist, analysed some samples obtained from the complainant as part of a sexual assault investigation. The samples contained swabs taken from the complainant's vagina and vulva. He also received a DNA reference sample in relation to the appellant and the complainant. Hunt said the high vaginal swab taken from the complainant tested positive for the possible presence of blood but negative for spermatozoa. The high vaginal swab also tested positive for the possible presence of seminal fluid, which occurs when a man ejaculates.

[100] Seminal fluid will not always contain spermatozoa. There may be medical reasons, such as a low or no sperm count. If the male has undergone a vasectomy you will also obtain seminal fluid alone. As there was no spermatozoa found, it was not possible to detect DNA in that sample. A possible explanation for the lack of spermatozoa was that if the man had previously ejaculated on someone's stomach but later that day had sex by putting his penis into the female's vagina, a small amount of seminal fluid may be left in the vagina from when he had ejaculated at that earlier stage. Seminal fluid can be detected in the vagina for days after an act of vaginal intercourse. It is unlikely to be detected after seven days.

[101] Hunt said testing of the vulva swab also did not detect spermatozoa. The vulva swab tested negative for the presence of seminal fluid. DNA analysis revealed a mixed DNA profile indicating the presence of DNA from two contributors. Whilst the complainant was one contributor, the information contained within the profile analysis excluded the appellant as a possible contributor of DNA to that mixed DNA profile.

[102] Dr Ilian Kamenoff, a medical practitioner, undertook a sexual assault examination of the complainant at around 5 o'clock in the afternoon on 13 May 2014. The complainant told him she and her friend went to visit the father of another friend. Alcohol was offered and the man then pulled them into the bedroom and had sex with both girls. The type of alcohol was a vodka cruiser. The complainant also

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[24] AB 175/35.

mentioned she had smoked marijuana that day. The man pushed them into the bedroom. He put his finger in and kissed her genitals. After that he had sex first with one girl and then the other girl.

[103] After the man had ejaculated, the girls had a shower. When they came out of the shower the man pushed them back into the bedroom and started to have sex with them again. The complainant told him to stop. The man stopped. The complainant left and went to the police. The complainant reported bleeding from the genital area. She had last had sex about a month before that sexual contact. That sex had been with somebody else. The complainant had a long term contraceptive inserted in her arm.

[104] Dr Kamenoff performed an examination. He took a swab from the complainant's vulva and vagina. On the high vaginal swab there was fresh blood. His examination revealed the complainant was not completely sexually developed at that time. Her genitals were dry and free of any secretion. That would be expected as she had had a shower. Her hymen was intact. Kamenoff could not find any signs of injuries to the genital areas. The fact the hymen was intact did not mean much. The hymen in young girls is quite elastic and can accommodate objects.

[105] In cross-examination, Dr Kamenoff agreed that on his examination he noted superficial self-inflicted injuries on the complainant's left forearm and right front of her thigh. The complainant told him they were self-inflicted and had been done the previous day. He accepted his examination did not find any signs of vaginal penetration but said that did not mean the complainant did not have sexual contact. His examination was inconclusive as to whether vaginal penetration had occurred on 13 May 2014.

[106] Michael Glover, a police officer, attended the appellant's residence on 14 May 2014. He had spoken to the complainant and NE the day before at NE's residence after being notified of a request for police attendance. When he first arrived at NE's residence the complainant was wearing pants, a top and underwear. At some stage he asked the complainant to change her clothing so those clothes could be seized by police.

[107] The complainant told him she had called the police because she had gone over to the appellant's house for "a couple of drinks and shit".[25] As they stood up after lying on the couch talking to each other, the appellant started pushing them into his room. He started undressing them and "basically raped us for like ten, fifteen minutes".[26] The appellant pulled out and ejaculated over NE.

[108] The complainant and NE went for a shower together. When they got out and got dressed the complainant looked in the appellant's cupboard. She liked some masks and asked to try them on. The appellant said yes. After they tried them on the appellant started wrapping his arms around the complainant and NE. He started putting his hands down their pants. He pushed them back into bed and raped them again. The complainant told the appellant he was hurting her and to stop. The appellant did so. The appellant then walked outside. The complainant and NE put on their clothes. They sat there for like five minutes and then started pretending the complainant's mum was where they had to meet so they could go. The complainant said it had happened about an hour or two before the police came to see her.

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25 AB 475/10.

26 AB 475/12.

[109] Glover also spoke with NE at the time he spoke to the complainant. NE was not interested in making a complaint to police. Glover seized NE's clothes, which consisted of a singlet, bra, pair of jeans with cuts in the legs and a pair of underpants. The complainant's clothes, which were also seized, consisted of a silver top with blue sleeves, black tights, a bra and underwear. No forensic testing was done on the clothes.

[110] Glover later took the complainant to a medical centre for examination. They arrived at the centre at 4.24 pm. After the examination, Glover took the complainant back to the child protection unit. She commenced giving her statement at 5.49 pm that evening. The interview lasted almost two hours. In Glover's opinion, the complainant was not affected by cannabis at the time she gave that interview.

[111] Glover attended the appellant's residence at about 1.35 pm on 14 May 2014. Whilst there, he seized a number of items of property consistent with what property had been described by the complainant in her statement. That property included Vodka Cruiser bottles, a bong, face masks, a bottle of body wash from the shower, two towels, a blanket and sheet from the appellant's bedroom and some cannabis. The appellant claimed ownership of the cannabis. When he arrived at the appellant's unit Michael Locke was present. A statement was subsequently taken from Locke. Glover thought Locke was in a fit state to give a statement. He did not appear to be adversely affected by marijuana at that time. In his experience, a cone generally means a small amount of marijuana placed in a receptacle and smoked through a water pipe.

[112] Glover subsequently attended the Dan Murphy's store and obtained copies of CCTV footage from 13 May 2014. He obtained a receipt for the purchase of a Jack Daniels Double Jack can 375 mls and Vodka Cruiser mixed 10 pack from Dan Murphy's at 11.16 am on 13 May 2014.

Appellant's submissions

[113] The appellant submits the verdicts of the jury were unreasonable because the complainant's evidence was implausible and starkly inconsistent with NE's evidence, an eye witness to the events that day. Whilst on both the complainant and NE's account, the appellant swapped between having sexual intercourse with each girl on the same bed, NE's account was inconsistent with the complainant's allegation that she was forced into the bedroom by the appellant, stripped and held down whilst being raped several times on two separate occasions.

[114] Further, on the complainant's account there were opportunities for the complainant to leave the bed whilst the appellant was engaged in sexual intercourse with NE. On the complainant's account, after the first episode of sexual intercourse with both girls, the complainant and NE showered together and played with masks before allegedly being dragged back into the bedroom where the appellant again had sexual intercourse with the complainant without her consent.

[115] The differences in the two accounts were not explained by differing recollections. There was no basis for the jury to reject NE's account. That being so, there was no basis on which the jury could be satisfied beyond reasonable doubt that the acts of sexual intercourse occurred without consent. The verdicts of guilty of rape ought to be set aside with verdicts of guilty of indecent treatment substituted in their place.

Respondent's submissions

[116] The respondent submits the verdicts of the jury were not unreasonable. The complainant made a prompt complaint to police. Her initial complaint, s 93A statement and evidence at trial all consistently alleged multiple acts of intercourse against her will on two separate occasions whilst she was at the appellant's home on 13 May 2014. Those allegations included the acts of intercourse occurred in circumstances where the appellant was also having sexual intercourse with NE, interchanging with the complainant.

[117] The respondent submits the complainant's various accounts were consistent. Each account referred to both girls having a shower, after the first episode of multiple acts of sexual intercourse. Each version referred to the girls trying on masks before further acts of sexual intercourse involving both girls on the bed, in circumstances where the appellant had again pushed them into the bedroom and had intercourse with the complainant without her consent.

[118] The respondent submits there were multiple features of NE's evidence which were supportive of the complainant's account. NE's account supported multiple acts of sexual intercourse, switching between NE and the complainant before the appellant ejaculated onto NE's stomach. NE gave an account of both girls showering and playing with some masks before they were again taken into the appellant's bedroom for further acts of sexual intercourse interchanged between each girl. NE's account referred to the complainant complaining that on the second occasion it hurt before the girls dressed, made up an excuse for having to leave the house and left the residence.

[119] The respondent submits that whilst there were inconsistencies between the two accounts, such as how and in what circumstances the girls came to be naked, those differences are explained by the passage of time and the consumption of cannabis and alcohol. Those inconsistencies did not compel a jury to have a reasonable doubt as to the reliability and credibility of the complainant's account that sexual intercourse had occurred on multiple occasions without her consent.

Applicable principles

[120] The principles to be applied in determining whether a verdict is unreasonable or cannot be supported having regard to the evidence were recently restated in *R v Clapham*[27]:

> "The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the "starting point … is that the jury is the body entrusted with the primary responsibility of

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27 [2017] QCA 99 at [4]-[5].

determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses", but:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."

In *R v Baden-Clay* the High Court emphasised that the jury is "the constitutional tribunal for deciding issues of fact" and observed that, "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial", "a court of criminal appeal is not to substitute trial by an appeal court for trial by jury", and "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'." (Footnotes omitted)

Discussion

[121] As the appellant properly concedes, there was ample evidence upon which a jury could be satisfied beyond reasonable doubt as to the reliability and credibility of the complainant's account that the appellant engaged in the three charged acts of penetrative sexual intercourse with the complainant whilst she was at his residence on 13 May 2014. The complainant's account of those acts occurring was supported by the accounts given by NE and by independent evidence. The scientific evidence also established the presence of seminal fluid in the complainant's vagina when she was examined hours after the events.

[122] The central question to be determined on appeal is whether it was reasonably open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that each of those acts occurred without the complainant's consent. Whether the Crown proved to the same standard that the appellant did not honestly and reasonably believe that the complainant consented was also in issue, but the appellant's case on that issue was markedly weaker. (The defence proposition at trial was that the appellant did not engage in any act of sexual intercourse with the complainant).

[123] The Crown case upon both issues centrally depended upon the complainant's evidence, so it is right to start with the observation that the essence of the complainant's account of the offences remained consistent throughout the initial summary in her s 93A statement, her subsequent and very detailed account in that statement, and her detailed evidence. Upon the face of the statement and the transcript that account appears persuasive. During a lengthy and searching cross-examination, the complainant maintained her account of the offences. She did make some concessions but that did not detract from the Crown case. Rather, the jury could regard the complainant's responses in cross-examination as supplying support for her credibility. The jury reasonably could, and evidently did, regard her account of the offences as being honest and reliable.

[124] Whilst the appellant has identified aspects of the evidence that required the jury to consider very carefully the reliability of the complainant's evidence about the issue of consent, there is no reason to think that the jury did not conscientiously fulfil that task. Some of the inconsistencies upon which the appellant relied do not directly relate to the immediate circumstances of the offences and are readily explicable in a way that did not require the jury to doubt the accuracy of the complainant's account of the offences themselves. The most significant of that category of inconsistencies concerns whether the girls undressed during a game (as NE said) or whether the appellant later undressed them in the bedroom (as the complainant said). In relation to that and other inconsistencies the jury reasonably could conclude on the evidence, and take into account, both that the complainant's recall of some details was affected by stress she suffered as a result of the appellant's unwanted conduct (the complainant spoke of "freaking out", for example) and that her and NE's recall of some details may have been affected in different ways by their consumption of alcohol and cannabis.

[125] Of more significance are the inconsistencies between the accounts of the complainant and NE concerning resistance by the complainant and the application of force by the appellant to facilitate his sexual acts with the complainant. In particular, NE's evidence was in some respects not consistent with the complainant's account of her resistance and the degree of force the appellant applied to facilitate his offending, including dragging and forcefully holding down the resisting complainant. In assessing the significance of those inconsistencies it must be borne in mind though that NE's evidence did support some aspects of the complainant's account:

(a) The jury could conclude that the complainant's evidence that she was pushed into the bedroom by the appellant was supported in material respects by NE's account. NE gave evidence that after the complainant and NE returned with the appellant from the Dan Murphy store and they had commenced consuming the alcohol purchased there, the appellant told both girls they were "pretty gorgeous"[28] and was touching the complainant's legs;[29] the appellant took both the complainant and NE into his bedroom by walking with his arms around both their waists; when they were being taken from the lounge room the appellant grabbed their hands and "pulled us up"; when they were in the bedroom the appellant "placed us both on the bed"; and that whilst NE and the complainant were on the appellant's bed the appellant was holding the complainant down (albeit lightly, on NE's account, although it is not clear that she could reliably express a view about the degree of force applied to the complainant).

(b) NE gave evidence that was consistent with the complainant's account of how the first occasion of sexual intercourse ended and about the subsequent sexual intercourse. NE said that the appellant ejaculated onto her stomach to the disgust of both girls and thereafter both girls showered and played with masks before being taken back into the bedroom by the appellant; the latter part of her evidence was to the effect that the appellant "took them" back to the bedroom and

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28 AB 134/15.
29 AB 134/1.

had sex with each of them. The material differences between the complainant's evidence and NE's evidence upon those points are not very significant.

(c) NE gave evidence supporting the complainant's account that on the second occasion the appellant engaged in sexual intercourse with the complainant in a manner that was hard and fast, resulting in a complaint of pain by the complainant and her request that the appellant stop, which was complied with shortly thereafter.

[126] In considering this issue, it is also necessary to take into account the combination of circumstances that: NE had consumed alcohol and cannabis supplied to her by the appellant; whereas the complainant gave a contemporaneous, detailed, and apparently compelling account of the events, NE gave her pre-recorded evidence some two years after the events; and NE's evidence suggests that she gave the appearance of acquiescing in the appellant's sexual acts with her. The jury's assessment of the significance of the differences between NE's evidence and the complainant's evidence presumably reflected in part different perceptions the complainant and NE had of the appellant's conduct in holding each of them, as the complainant said he did, given that the complainant's evidence was that she opposed and was stressed by it, whereas NE gave the appearance of acquiescing in it. In part the jury's resolution of this issue presumably reflected a conclusion, reasonably open to the jury, that the complainant's account of her memories of what the appellant did to her were fresher and more vivid. In these circumstances, bearing in mind the importance of the jury's role in assessing the evidence, the inconsistencies do not justify a conclusion that it was not open to the jury to accept beyond reasonable doubt that the essence of the complainant's account was truthful and reliable, despite the differences between that account and NE's evidence. There is a sound basis for concluding that the jury reasonably could regard NE's evidence as not justifying a reasonable doubt that the complainant did not consent and the appellant did not believe that she consented.

[127] The appellant also relies upon the complainant's evidence that, between the first and second episodes of sexual intercourse, she and NE showered and then played with masks in the appellant's wardrobe after the complainant had asked the appellant for permission to do so. In that respect the jury could take into account the complainant's young age and her vulnerability. The complainant was only 14 years old, she had consumed cannabis and alcohol supplied to her by the much older appellant, she was in the company of a friend older than her, to whom the complainant said she looked for support, but who instead gave the appearance of acquiescing in the appellant's sexual acts, and it could not be assumed that the complainant anticipated that the appellant would commit further sexual acts with her and NE. Whilst the evidence relied upon by the appellant could be deployed in a submission to the jury that they should doubt the complainant's account that she did not consent to sexual intercourse with the appellant, the jury was not bound to accept that submission. It was pre-eminently a jury question whether this conduct by the complainant should be regarded in these particular circumstances as giving rise to a doubt about the accuracy of the complainant's account of the offences. Evidently the jury did not form that view and there is no basis for this Court to find that this was not reasonably open.

[128] The appellant does not challenge the appropriateness of the trial judge's directions to the jury about the onus upon the Crown to prove beyond reasonable doubt that each alleged act of sexual intercourse occurred, each such act occurred without the consent of the complainant, and the appellant did not have an honest and reasonable but mistaken belief that the complainant consented to any such act. In considering whether it was reasonably open to this properly directed jury to be satisfied beyond reasonable doubt as to the elements of the three offences, it is necessary to consider the cumulative effect of the various imperfections and inconsistencies upon which the appellant relied in the context of the evidence as a whole, and also in the context of the assertions put by defence counsel to the complainant and NE, and denied by each of them, that no acts of sexual intercourse occurred at all. Once the jury concluded that each alleged act of sexual intercourse by the appellant with the complainant occurred (a conclusion that was amply supported by the evidence of the complainant and NE, and other independent evidence), the evidence as a whole supplied a sound basis for the jury to find that the Crown had proved beyond reasonable doubt that the appellant engaged in each such act without the complainant's consent and the appellant did not honestly and reasonably believe that the complainant consented to any of those acts.

Conclusion

[129] Upon the whole of the evidence it was reasonably open to the jury, to be satisfied beyond reasonable doubt that the appellant was guilty of each count of rape.

Proposed order

[130] The appeal should be dismissed.

[131] **PHILIPPIDES JA:** The issue on the appeal in the present case is whether this Court, as an appellate court, is of the opinion that the verdicts of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence pursuant to s 668E(1) of the *Criminal Code*. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court must always be whether the court thinks "that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".[30] That concerns the determination of a question of fact, which as was emphasised in *SKA v The Queen*:[31]

> "… is one … which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."

[132] A determination of that question by this Court "involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials".[32] Accordingly, a failure to disclose the Court's own assessment of

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30 *R v Baden-Clay* (2016) 258 CLR 308 at [66], citing *M v The Queen* (1994) 181 CLR 487 at 494-495 per Mason CJ, Deane, Dawson and Toohey JJ.

31 *SKA v The Queen* (2011) 243 CLR 400 at 406 per French CJ, Gummow and Kiefel JJ, citing *M v The Queen* (1994) 181 CLR 487 at 492-493. Per Mason CJ, Deane, Dawson and Toohey JJ.

32 *MFA v The Queen* (2002) 213 CLR 606 at 624 [59] per McHugh, Gummow and Kirby JJ.

the sufficiency and quality of the evidence renders the Court's decision impeachable on the basis that it failed to make an independent assessment of the evidence in determining that it was open to the jury to convict the accused.[33]

[133] The principles in *SKA*, *MFA v The Queen*[34] and *M v The Queen*[35] were set out in *R v SCH*,[36] which has most recently been adopted in *R v Krezic*.[37] Bearing those principles in mind, the reasons expressed by Fraser JA and Boddice J, which I have had the benefit of reading, reflect why, on my own independent assessment of the evidence as a whole, I consider that it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty as charged, and why I agree that the appeal should be dismissed.

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33 *GAX v The Queen* [2017] HCA 25 at [25].
34 (2002) 213 CLR 606.
35 (1994) 181 CLR 487.
36 [2015] QCA 38 at [7]–[8].
37 [2017] QCA 122.