SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collins* [2018] QCA 277
PARTIES:	**R** **v** **COLLINS, John** (appellant/applicant)
FILE NO/S:	CA No 209 of 2014 DC No 1017 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 15 July 2014; Date of Sentence: 16 July 2014 (Shanahan DCJ)
DELIVERED ON:	16 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2018
JUDGES:	Morrison and Philippides JJA and Flanagan J
ORDERS:	**1. Application to adduce evidence refused.** **2. Appeal against conviction dismissed.** **3. Application for leave to appeal against sentence granted.** **4. The appeal be allowed.** **5. The sentences imposed in respect of counts 8 and 9 are varied to the extent of reducing the period of seven years and eight months to a period of seven years in each case.** **6. The sentences imposed on 16 July 2014 are otherwise affirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of nine counts of sexual offences against three women – where each of the three complainants gave evidence that they had responded to an advertisement placed by the appellant for a job as a nanny aboard his yacht, were drugged and then awoke to find either the appellant engaging in sexual intercourse with them or was rendered unable to resist being raped – where the aftermath of the assaults was different for each complainant, except that each of them spent time on the yacht and had difficulty escaping – where the similarities in

the administration of a stupefying drug in order to commit an indictable offence caused the offences for all three complainants to be heard in one trial – where the appellant submitted the evidence of the complainants does not accord with logic or common sense, is fundamentally flawed and implausible particularly in the sense that each of them would remain in his presence after what was said to have been a drug-induced rape, and that the three complainants were liars – whether the verdicts were unsafe and unsatisfactory as being unsupported by the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – COLLUSION OF WITNESSES – where the appellant contended that the complainants had brought their complaints because of "ulterior and untoward motives", referring to the payment of victims of crime compensation to at least two of the complainants – where the appellant submitted that the complainants had concocted three similar but false accounts – where the complainants were asked whether they had contact with, knew of, or met the others before telling the police or anyone else what had happened – where each said they had not – whether the learned trial judge properly "raised the question of the possibility of collusion" before the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – OTHER MATTERS – where the trial was delayed due to the publication of a media report – where counsel and the learned trial judge discussed how to resolve the issue in order to proceed with the trial – where the jury were warned to ignore any press reports that they might have seen or that they might see – whether the learned trial judge failed to adequately direct the jury regarding media reports which surfaced during the trial

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was sentenced to seven years and eight months' imprisonment for counts 8 and 9 and each of those offences was declared to be a serious violent offence – where the learned sentencing judge took the view that the appropriate starting point was 11 years' imprisonment, but that should be reduced by six months because of the applicant's mental health issues and his age – where a period of two years and 10 months had been spent in custody, but that time could not be declared – whether the learned sentencing judge failed to be mindful of the period of pre-sentence custody when fixing the head sentences and the complications that follow where a serious violent offence declaration is made

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
R v Ferguson; Ex parte Attorney-General (2008) 186 A Crim R 483; [2008] QCA 227, cited
R v NQ [2013] QCA 402, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: The appellant/applicant appeared on his own behalf
D Nardone for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** The appellant was convicted on 15 July 2014 on a total of nine counts of sexual offences. Because they concerned three different complainants it is convenient to group them in the following way:

(a) complainant WEM: count 1, administering stupefying drug with intent to commit an indictable offence; count 2, unlawful and indecent assault; and count 3, rape;

(b) complainant PFM: count 4, administering a stupefying drug with intent to commit an indictable offence; count 5, rape; and count 6, rape;

(c) complainant DAN: count 7, administering a stupefying drug with intent to commit an indictable offence; count 8, rape; and count 9, rape.

[2] The appellant was sentenced the following day in respect of all convictions. The sentences imposed were as follows:

(a) counts 1, 4 and 7 (administering a stupefying drug), five years' imprisonment;

(b) counts 3, 5, 6, 8 and 9 (rape), seven years and eight months' imprisonment; a serious violent offence declaration was made on counts 8 and 9; and

(c) count 2 (indecent dealing), imprisonment for three years.

[3] The appellant challenges his convictions on a number of grounds, set out below. He also seeks to challenge his sentence on the ground that the sentencing discretion miscarried in respect of counts 8 and 9 (serious violent offences), specifically in relation to the allowance for pre-sentence custody.

The grounds of appeal against conviction

[4] The main ground of appeal was that the verdicts were unsafe and unsatisfactory as being unsupported by the evidence. This was the subject of the appellant's oral submissions. In a separate outline there were a number of additional grounds, listed below.

[5] Ground 1 contended that there were misstatements or misdirections in respect of the test for consideration of similar fact evidence. This was said to derive from a passage where the learned trial judge referred to a prosecution argument that "the facts are so similar that when judged by experience and common sense, that either they must be true or they have arisen from a common cause in relation to each of

the complainants". This was said to inaccurately summarise the principles derived in *R v Boardman*.[1]

[6] Ground 2 contended that there had been an improper narrowing of considerations relating to the scope within which the jury should consider the similarity of the stories of the complainants, and particularly in relation to their possible collusion. At the centre of this argument was a reference by the learned trial judge to the "three strikingly similar accounts of the events" and that, in respect of the three complainants, "most significantly, none of them knew each other at the time or at the time of their initial complaints to those close to them". It was contended that the judge's statements had the effect of limiting the jury's consideration to the time of the offences and when initial complaints were made, rather than all other times when collusion might have occurred.

[7] Ground 3A and 3B both contended that the verdicts were unreasonable and could not be supported by the evidence. Ground 3A dealt with the credibility of witnesses, and Ground 3B dealt with evidence that was illogical, inconsistent and absurd, or could be shown to be lies.

[8] Ground 4 contended that it was incumbent upon the learned trial judge to reconsider the joinder of the three complainants during the trial. This was said to be at various points where "the consistent illogicalities of the complainants and the 'mixing up' of evidence should have led the trial judge to raise the question of the possibility of collusion".

[9] Ground 5 contended that there was a miscarriage of justice by reason of bias, corruption and collusion. Central to this contention was that the complainants had "brought grievances against the appellant out of ulterior and untoward motives, and that these matters have improperly and unjustly led to the initiation of the complaints against the appellant and his eventual incarceration". The matters raised in respect of this ground included the payment of victims of crime compensation before the appellant was charged, the contact between the complainants at various times, and the influence one complainant may have had upon the others.

[10] Ground 6 sought to adduce new evidence from the committal proceedings. This was said to reveal "the full extent of the relationships between the many complainants and their partners and families", revealing possible collusion and bias.

[11] Ground 7 raised a failure by the learned trial judge to direct the jury in relation to media reports. This concerned an occasion when it became apparent that a news reporter had reported in print and online media, contrary to restrictions imposed on the trial. The contention was that the content of the reported material could reasonably have had a prejudicial effect on the trial.

Application to adduce new evidence

[12] The appellant applied for leave to adduce new or fresh evidence. As they were listed in the application what was sought to be adduced fell into three categories. The first was statements in oral evidence given at the committal.[2] The second was

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1 [1975] AC 421.

2 Five items in the list fell into this category.

referred to simply as "statements in oral evidence" of nine witnesses. The third was the "private doctor report" in respect of the complainant DAN.

[13] In the course of the appeal each of the items was examined individually. In the case of the five items consisting of statements in oral evidence at the committal, the appellant accepted that it was evidence known to his legal team during the trial, and that they made a decision not to use it.

[14] In respect of eight out of the remaining ten which consisted of statements in oral evidence of witnesses, the appellant confirmed that they were all in the category of evidence which the appellant's legal team had prior to the trial, and they chose not to use them.

[15] In a somewhat separate category were two items, consisting of the statement in oral evidence of the complainant in a previous trial[3] and that of the complainant's mother. Once again, the appellant accepted that this was evidence in the possession of his legal team at the trial the subject of this appeal, and his legal team made a choice as to whether to use it or not.

[16] In a separate category was the item consisting of "private doctor report" in respect of the complainant DAN. At the hearing of the appeal the Court reserved the question of its admissibility. Having reviewed its contents, the report is not admissible and would not have been admissible at the trial. Its contents do not persuade me that there would have been any utility in attempting to tender the report, or use it in cross-examination.

[17] None of the evidence sought to be adduced in the application falls into the category of fresh evidence.

[18] The application to adduce further evidence should be refused.

Background

[19] Each of the three complainants gave evidence that they had responded to an advertisement placed by the appellant, for a job as a nanny aboard his yacht. WEM responded in January 1987, PFM in around 1990 or 1991 and DAN in December 1999. Each of the complainants gave evidence that they drank some alcohol which the appellant provided. Each of them was drugged and either awoke to find the appellant engaging in sexual intercourse with them[4] or was rendered unable to resist being raped.[5]

[20] The aftermath of the assaults was different for each complainant, except that each of them spent time on the yacht and had difficulty escaping.

[21] The similarities in the administration of a stupefying drug in order to commit an indictable offence caused the offences for all three complainants to be heard in the one trial.

Evidence of WEM

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3 The first trial in time.
4 In the case of WEM and PFM.
5 In the case of DAN.

[22] WEM said she had just turned 21 when she responded to an advertisement to be a governess nanny aboard the appellant's yacht. The advertisement was for someone to look after the appellant's son, who was doing year six studies.

[23] She was driven to the yacht by her cousin, WJR. There she met the appellant and his son. They spoke about the job and what the son's requirements were. In the course of getting to know the son, the son took her for a short sail in his sabot, and then they returned to the yacht.

[24] Once back aboard the yacht the three of them had dinner together, in the course of which WEM had a glass of wine. The appellant poured her a second drink as a result of which WEM felt "really groggy, dizzy, disorientated … like, having come out of an anaesthetic, drugged".[6]

[25] WEM said that she had never felt that way before, nor since. She thought she was feeling seasickness and decided to have a shower and go to bed. The appellant told her that the main shower was broken and that she would have to use the shower in the main cabin (which was his cabin). While she was having a shower the appellant came in and put his arms around her. She told him to stop and to get out but he refused, putting his hands on her breasts, then moving them down her body and between her legs. Having done that WEM said that the appellant parted her labia.[7] During this time she was telling him to stop, but he refused.

[26] The next memory she had was of lying on the bed, with the appellant on top of her. His hands were on her shoulders pinning her down and he was having sex with her. She was, at that time, "feeling disgusted, groggy, sick, repulsed". She repeatedly asked him to stop but he did not.[8]

[27] When she woke up she was beside the appellant on his bed. She crawled over him to get off the bed, went to the shower and then retreated to the far end of the yacht, locking herself in a cabin there. By mid-morning she was still in the cabin and the appellant was outside the door telling her that she could not stay in there. Eventually she came out, but was still feeling quite ill. At that time there was another woman and her daughter aboard the yacht, for the purpose of the daughter being interviewed for the job. She said that the appellant introduced her to those people as his girlfriend and:

> "I was still … feeling sick. I didn't know what to do. He had his hands and that all over me. I was just completely – I've never been in a situation like that. I didn't know what to do. I didn't know how to handle it. I was unequipped."[9]

[28] She felt uncomfortable with the people there and went downstairs to get away from them. Later when she came back up on the deck of the yacht it was heading out to sea. That only lasted several hours after which they returned to Mooloolaba. The others left and the appellant, his son and WEM went to the Mooloolaba Yacht Club for lunch. While watching the son doing something with his boat, the appellant brought her another drink said to be a lemon, lime and bitters. WEM drank it and her next memory was waking up aboard the yacht again, at night time. She went to the end cabin at the bow of the yacht, locked the door and jammed a shoe under it. She remained

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6 Appeal Book (**AB**) 28.
7 AB 29.
8 AB 30.
9 AB 32 ll 7-10.

there until the appellant came banging on the door in the middle of the next morning.

[29] The appellant told her that WEM was embarrassing him, that the appellant could not get in, and asked what his son would think. He said that someone had rung to say that WEM had been offered a job in the Department of Education. WEM asked to use the phone to respond to that offer, and in the course of doing so spoke to her parents. Her mother was not going to come and pick her up, so WEM asked the appellant to drive her back to her parents' house. He did so, going via some other places to carry out chores.

[30] Eventually they arrived at WEM's parents' house, with the appellant's son and his daughter. WEM said that her mother "was quite put out because it was lunchtime and she didn't know that she was going to have visitors". WEM had thought that the chores would take longer than they did, and had told her mother that they would be out for lunch. Her mother was "quite miffed with me".[10]

[31] After the appellant and his children left, WEM's mother asked questions about what had happened and whether she had slept with the appellant. WEM lied because she "didn't want to admit to myself what had happened … I just could not admit to myself what had happened".[11]

[32] Three to four weeks subsequently WEM met the appellant again and struck up a relationship with him which lasted about five weeks. During the course of that relationship they went and stayed at some motels, the appellant sent her flowers and telephoned her.[12]

[33] WEM first told someone about what had happened in 1988. The person she told was the man who became her husband. She told him "that I'd been raped – drugged and raped on board a yacht".[13] She also told two of her friends that she'd been drugged and raped aboard a yacht.[14]

[34] In cross-examination WEM agreed that when she first met the appellant aboard his yacht it was a hot day and he suggested that she could cool off in front of the air conditioner. She denied that she lifted up her shirt to do so, saying that she'd only lifted her shirt up enough to cool off, but not to expose her breasts or her bra.[15]

[35] It was put to WEM, and she denied, that she and the appellant had slept in different cabins that night, and that there had been no sexual activity that night. She said her memory was that there was a lock on the door of the shower, and when confronted with a previous police statement that said she could not remember there being a lock on the door and that she had left the door unlocked, said that she could not remember how she answered.[16]

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10 AB 34.
11 AB 34 l 22.
12 AB 34.
13 AB 35 l 26.
14 AB 35 l 34 to AB 36 l 15.
15 AB 39-40.
16 AB 46-47.

[36] Then, when confronted with what she had said on a previous occasion,[17] she said that "sounds like something I would have said", and "I now believe that there was a lock on the door".[18]

[37] WEM agreed that she had previously said that the door on the shower opened outwards and that there was no room for the door to open inwards. She agreed that the photograph of the shower showed the door opened inward.[19] She explained the discrepancy by saying that she had made mistakes but that when she had given evidence on the previous occasion she wanted her evidence to be the same as the statement she had made. She put down that error to being naive and stupid.[20]

[38] It was put to WEM that the shower incident did not occur, which she denied. She explained why, when she eventually woke up and climbed over the appellant to get out, she had gone to have a shower in the same shower. She said she had an urge to get clean.[21] She said that in the morning she was in no doubt that she had been raped, but she was "still very groggy … feeling sick, very dopey, very uncoordinated, very unwell … I was not myself … I was struggling to think, to act … I was not in control of my normal faculties".[22]

[39] She explained that the following day when she was at the Mooloolaba Marina, she left the yacht to go to a toilet, accompanied by the son. She explained that there was nothing there except a small brick toilet block, no shops, a few empty cars in a carpark and no telephone. She explained that she had not left even though there was nothing stopping her from leaving, saying "where was I going to go? … I had no money, no way of leaving. I didn't know the area that I was in. I was away from anywhere that I knew, and no way of contacting anybody".[23]

[40] In cross-examination she referred to the second occasion when she was drugged, saying that she woke up to find the appellant was having sex with her again. She said she knew she was raped again because there was semen running down between her legs.[24] When confronted with the fact that on a previous occasion she had said she did not clearly remember the circumstances of the second rape, she explained that she didn't have a photographic memory, but she got "flash backs", and could remember some things.[25]

[41] WEM denied the suggestions to her that after they had been at the Mooloolaba Yacht Club she had told the appellant that she really liked him, that he asked WEM if she could be part of his life, that WEM said yes to that question and then the two of them went to his cabin and had consensual sexual intercourse.[26] In cross-examination WEM agreed that on the way to her parents' place she had asked to use a pay phone and the appellant pulled over and let her do so. Further, she used that

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17 That if the door could have been locked she would have locked it.
18 AB 47.
19 AB 55-56.
20 AB 57 ll 12-29.
21 AB 58.
22 AB 59 ll 5-10.
23 AB 60 ll 27-31.
24 AB 64 ll 6-31.
25 AB 65 l 3.
26 AB 65.

opportunity to ring her cousin.[27] However, she said that the cousin did not answer, and she had to leave a message on his answering machine.

[42] WEM denied the suggestion that when they were WEM's parents' house, she went for a walk with the appellant's daughter, telling the appellant's daughter that she was in love with the appellant.[28] She explained the fact that she entered into a relationship with the appellant subsequently, which involved staying at a number of hotels and receiving flowers from the appellant, by saying that she was impressed with his apparent wealth:[29]

> "I was – yeah. I was impressed. It was not something I was unfamiliar with. I was certainly overwhelmed by the flowers. I'd never – it was something that only happened in movies. Certainly nothing I'd ever envisage would ever happen to me."

[43] In cross-examination WEM denied the proposition that her cousin had not accompanied her to the yacht, that the appellant did not introduce her to others on the second day as his girlfriend, and that it was only after they had returned from the Mooloolaba Yacht Club on the second day that they had had consensual sex.[30] She agreed that during the course of the later relationship, she would spend weekends with the appellant at hotels and had sexual intercourse with him consensually. She explained it this way:[31]

> "Yes. I can't explain – well, I was in a state of denial. I could not accept it to myself what had happened. To me, sex happened between consensual adults, and therefore I had obviously consented. And so I had to be in a relationship with him. That was the only way I could rationalise it in my own mind."

[44] She denied the suggestion that the appellant had proposed and that she had accepted his proposal.

[45] Further, she also denied in cross-examination that there were any real opportunities to escape, saying that she was under the influence of something, struggling to be in control of her own faculties, and:[32]

> "I could have got off and on to the cement mooring, but where would I have gone from there? … Into the water with all the pollution and that around. … There's more to getting away. … [T]hen you've got the rest of your safety and … where are you going to go, what are you going to do? … I was not equipped to go or do anything else."

Evidence of WJR

[46] WJR was the cousin of the complainant WEM. His evidence was that he drove her to the yacht and stayed close by while she went for an interview. He was not sure that he went aboard the yacht. He could not remember whether he had a discussion

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27 AB 67.
28 AB 68.
29 AB 69 ll 26-30.
30 AB 82.
31 AB 83 ll 16-20.
32 AB 85 ll 31-41.

with the man aboard the yacht and explained his previous answer "No" to the question "Did you meet anyone on the yacht?", by saying that it was possible he didn't meet him, but "I can't see myself letting [WEM] go on the yacht without seeing the person and where she's going".[33]

Evidence of WBF

[47] WBF was the father of the complainant WEM. His evidence was short, essentially confirming that WEM had applied for a teacher position, but in the interim had applied for the position on the yacht. He could recall her arriving at their house in the appellant's vehicle, the appellant being accompanied by some children.

Evidence of RJM

[48] RJM was the husband of the complainant WEM. His evidence was that in 1998 WEM told him about the events concerning the appellant:

> "She told me that she had been for a job interview for a position as a nanny on a boat and that during the course of that interview she had been required to stay overnight. And during that night after dinner she had had a glass of wine and started to feel quite unwell and quite tired. She went to have a shower but the shower in the main part of the boat, wherever that was, was broken for some reason and she had to shower in [the appellant's] cabin where there was another one. She was in the shower and he came in. And he wouldn't let her out. And then he raped her. She was struggling to stay conscious and eventually passed out."[34]

Evidence of GLH

[49] GLH was one of the friends of the complainant WEM. Her evidence was that she had been told by WEM, in the presence of another friend BAJ, that years ago she had applied for a job tutoring on a yacht and the man on the yacht had drugged and raped her. She said that WEM was upset and shaking when she said that, and said that she had received flowers from the man on the yacht when she got her teaching job.[35] In cross-examination she was confronted with what she had said on a previous occasion. She agreed that she had previously said that WEM had said she could not get off the yacht because she couldn't see land. GLH said she could remember being told that WEM couldn't get off the boat when they were out at sea. She could remember WEM saying that she wanted to get off the yacht, but she could not because she was drugged. She wasn't sure if WEM said it was in the middle of the ocean, but accepted that she had previously used that phrase in recounting what she had been told.[36]

Evidence of BAJ

[50] BAJ was the second friend of the complainant WEM. Her evidence was in relation to the occasion when WEM had revealed the events concerning the appellant. She

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33 AB 91.
34 AB 97 l 33-41.
35 AB 99.
36 AB 100.

said that WEM had spoken how, when she was out at sea, she felt like she had been drugged and had been raped.[37] When pressed for further details, she said she could remember "only that they were out at sea when she had been raped, so she had nowhere that she could go".[38]

Complainant PFM

[51] PFM said she responded to an advertisement in 1990 or 1991, when she was about 20 or 21 years old. It was for a nanny position on a yacht. The interview was at the Park Royal Hotel. As a consequence of that interview a couple of days later she went to Bundaberg to meet the appellant, and drove to the yacht. The only persons on the yacht were the appellant and his son. During the course of discussions with the appellant he poured her a drink. PFM said "that's really all I could remember".[39] The next thing she recalled was "coming to with him having sex with me".[40] She was lying on the bed in the main cabin, naked, and the appellant was having sex with her. She said she passed out again and could not remember anything else. She woke up in the morning feeling "really, really sick and very confused". She felt "really dizzy, disorientated, like I was going to throw up … really very, very strange".[41] At that point the yacht was still moored in Bundaberg, and it left to sail to the Sunshine Coast. PFM said she could not remember much of that trip, apart from feeling really sick and playing with the little boy. At one point the appellant opened a cupboard and passed her some contraceptive pills saying that they were from his ex-girlfriend.

[52] PFM said that on the way to Mooloolaba the yacht got stuck on a sandbar, but eventually got off and they proceeded. When they got to the Mooloolaba Marina the three of them left the yacht to go to the yacht club where they sat and had a couple of drinks. PFM explained that she didn't have any money and asked the appellant if she could phone her parents. She couldn't remember if she was given the money to use the phone or whether she used his mobile phone. She managed to phone her parents.

[53] After having had some drinks with others at the yacht club they returned to the appellant's yacht. PFM said:

> "It was certainly late afternoon or evening by that stage because it was dark when we got back to the yacht. They sat and had a couple of drinks. We were on the top deck. And eventually it was time for me to take [the son] in to bed which I did do, and then I can't remember anything after that. … My next memory is him having sex with me again".[42]

[54] She said when she woke to find the appellant having sex with her the appellant said "they can hear us" and she could remember hearing the other girls (who had been at the yacht club) talking. PFM said that she passed out again. Her next memory was

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37 AB 103 l 25.
38 AB 103 l 33.
39 AB 107 l 29.
40 AB 107 l 41.
41 AB 108 ll 15-26.
42 AB 110 ll 24-30.

"coming to in the morning again and feeling really, really sick … very ill … nauseous, disorientated, dizzy, just very, very confused and very ill".[43]

[55] She went up on deck to get some fresh air, then back downstairs. The appellant came to the cabin and told her that she had to clean the cabin naked. He closed the door. She was screaming but eventually calmed down because she didn't want to upset the appellant's son. Then the appellant came back and "was shouting at me to get my clothes off. He undressed me". Eventually the appellant gave her some clothes and she got changed.[44]

[56] PFM could not remember where the boat was at that point in time, or whether it was travelling or moored. She could recall that they went to the Southport Yacht Club. There she called a friend who came and met them for a drink. She did not tell that friend what had happened. The appellant was very drunk and went to bed while the friend was still there talking to her. Even then she said nothing.[45] Eventually she went to the main cabin and got her bag, wrote a note to the appellant's son and then went to another friend's house. Her friend was not there at the time but a flatmate was there. She did not tell the flatmate what had happened. Eventually she went back to her mother's house. She said the only person she had told about what happened was her husband, PFP. That was some time prior to January 2000.

[57] In cross-examination she denied the suggestion that the appellant told her at the interview that he was looking for somebody who could be in his life as well. She also denied the proposition that the appellant had reimbursed her for the cost of travelling to Bundaberg. She also denied that when she arrived on the yacht in Bundaberg she had, that night, engaged in consensual sex:

> "And I suggest that during the course of this chatting and the two of you getting acquainted, a period of time had elapsed – a number of hours had elapsed?---Possibly.
>
> Do you accept that?---Yeah. Quite possibly.
>
> And that discussion turned to matters of a sexual nature?---No.
>
> And that you said things to him to indicate that you enjoyed sex?---That's completely not true.
>
> And one thing led to another, and the two of you then went off to his cabin and had sex?---Not true.
>
> And that that was something that, in fact, you instigated?---Not true.
>
> And on that occasion, I suggest to you, in his cabin, you and he had consensual sexual intercourse?---Not true."[46]

[58] PFM denied the suggestion that she had not been raped, and also denied as "complete rubbish" the proposition that on the trip south from Bundaberg she stayed every night in his cabin and had consensual sex with him.[47]

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43 AB 111 ll 12-18.
44 AB 111.
45 AB 112.
46 AB 117 ll 14-31.
47 AB 119.

[59] PFM also denied the proposition that when they were at the Mooloolaba Yacht Club she drank so much alcohol that she was sick and vomited.[48] She said that she was sick, but not from alcohol. She also denied the proposition that the reason the appellant asked her to clean the cabin was because she had vomited on herself.

[60] She explained that she could not get away when in Mooloolaba because the appellant was with her all the time, she didn't have any money, and she didn't have access to her bag.[49] She also explained that when the other women were on the yacht in Mooloolaba she had not said anything to them, but the appellant was there the entire time, "so it's very unlikely I could say anything to them".[50] PFM denied the suggestion that she shared the appellant's cabin whilst at Mooloolaba, and reiterated that she believed she had been drugged.

[61] She was cross-examined about the fact that when they were at the Southport Yacht Club she made no attempt to separate herself from the appellant.[51] She agreed, and agreed with the proposition that she could have done so if she had wanted to.[52] She also agreed that she did not warn her friend of the danger that lay on the appellant's yacht, saying that she waited until she had gone and then left the yacht.[53]

Evidence of PFP

[62] PFP was the husband of the complainant PFM. His evidence was that in about 1999, just before they were married, she told him about being raped upon a yacht. He said that because she was getting upset he tried to change the subject, even though maybe he should've thought differently.[54]

Evidence of the complainant, DAN

[63] The complainant, DAN, said that in December 1999 she answered an advertisement for a position on the appellant's yacht, doing day trips to the coast and being a nanny. She went for an interview, taking her seven year old daughter. The interview was at the Gold Coast. When arranging the interview the appellant had suggested she bring a spare set of clothes to sleep the night, if it got late.[55] After some discussions he told her that she had the job and that she would be looking after the daughter of one of his friends. While waiting for that friend to arrive the appellant poured her a glass of champagne with Midori. Having finished the drink DAN said she felt "dizzy, and my legs felt all heavy and wobbly … just instantly drunk".[56] They all went to a fish and chip place but when DAN stood up she had trouble "sort of staggering all the way up to get fish and chips because … my legs felt jelly and funny in the head".[57]

[64] After they had gone back to the yacht a friend and her daughter went somewhere else to watch a movie and DAN's daughter went into another room. The appellant

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48 AB 121.
49 AB 123.
50 AB 125 l 23.
51 AB 130.
52 AB 130.
53 AB 131.
54 AB 137.
55 AB 150.
56 AB 152 l 43.
57 AB 153 l 2.

was talking about the job. DAN got up to go to the toilet and the appellant told her that the main toilet or bathroom wasn't working so that she had to go in to his ensuite area. She said that when she went in there she shut the door, but when she came out she felt "just not well", and the appellant pushed her down onto the bed. She said the appellant either pushed her onto the bed or she collapsed, and then "he's forced himself on me".[58] She described that she was feeling "disorientated, funny in the head, my legs were still funny, just not myself".[59] She described the appellant trying to take her clothes off, and her resisting and fighting him off. The appellant told her to "Be quiet. It will all be over and done with".[60] The appellant succeeded in taking her clothes off and despite her resistance he put his penis in her vagina. She then said:

> "What did you do?---I just mentally detached. I was in shock. I couldn't believe what was happening.
>
> Do you know how long this went on for?---A couple of minutes. I don't remember what happened after that. I fell asleep.
>
> Sorry. Why don't you remember?---I don't remember what happened after that.
>
> Why?---Because I was drugged."[61]

[65] DAN said her next memory was waking up the next day with a really sore head. She said she had had hangovers before, but "this was a lot worse". She realised she was late for work in Brisbane and, as they walked to a McDonalds, she asked the appellant's friend to ring DAN's employer and explain that she wouldn't be at work. She said she did not say anything to the friend because "I didn't understand her thing with him that she had", and that she "was trying to suss out with what she knew about him or whatever and what her relationship was with him".[62]

[66] After she and the friend had taken their children to the beach they went back to the yacht where they showered the children. The others wanted to have a sleep and DAN thought that she would wait for the appellant to go to sleep and then leave. She then explained what followed:

> "Okay. So did [the friend] go to sleep?---Well, I don't know. They've all lied down and I was lying down in the bed with him, and then he's trying to rip my clothes off again and he's managed to get them as far as – he said he wanted to get my clothes off so he could take them off and wash them, but I wasn't going to be without clothes and stuck on this boat, so – yeah. He's managed to get my pants and my long pants as far as my knees, then he's proceeded to rape me again like he did the night before.
>
> When he was trying to take your clothes off, were you saying anything to him?---I was saying no, stop it.
>
> Was he saying anything to you?---Oh, be quiet. It'll all be done with."[63]

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58 AB 153.
59 AB 154 l 5.
60 AB 154 l 37.
61 AB 155 ll 17-25.
62 AB 156 ll 11-16.
63 AB 156 ll 25-35.

[67] She thought she would take her chance to leave and told the appellant that she had to go and get her daughter some underwear because they hadn't brought clothes for the next day. The appellant would not let her take her daughter with her and so she was forced to go to a local shopping centre to get a carton of beer which he had requested. When she got back the appellant had some visitors. By then it was dark. She asked the appellant where her portfolio was, but the appellant would not let her have it. The portfolio had her birth certificate and all her other certificates in it. She left it behind, taking her daughter and drove back to Brisbane.[64] The following day she rang him to tell him she was coming to get her portfolio. She took her partner, but did not tell him because she knew her partner would not let her on the boat. He waited on the jetty while she went in and retrieved her portfolio. They then drove to a park where she told her partner that she had been drugged and raped.[65] Her explanation of what she told the partner was as follows:

> "As best you can recall. Did you give him any more detail?---Yeah. I just said I think I've been drugged and raped. I said I just didn't feel right and---Where did you go after telling him?---We drove – we drove back to Brisbane and then we went back to my place. He got out the yellow pages…and looked for some sort of rape centre or crisis centre to go to…[h]e drove me up to the Royal Hospital where it was. They did a rape kit thing. They did swabs and gave me antibiotics."[66]

[68] DAN also gave evidence that prior to speaking to counsellors she engaged, and to the police about the appellant's conduct, she was not aware of the other complainants.

[69] In cross-examination DAN said that she could not see the drink which the appellant poured. She explained discrepancies between that account and what she might have said in a previous statement could have been the product of when she gave the statement she had been "there for hours and hours … it was pretty traumatic". She was still feeling ill from the events when she gave her statement.[67]

[70] DAN said she could not say why it was that she had a second drink, but reiterated the effects she felt, with her legs feeling wobbly, heavy and instantly drunk.[68]

[71] DAN denied the proposition that she had gone down to meet the appellant on a day prior to taking her daughter down, describing those suggestions as "crap" and "rubbish".[69] At that point it was evident that DAN was reacting with frustration and annoyance at the line of questions. She also denied the proposition put to her that after the children were put to bed she was being affectionate and started to cuddle the appellant, asking how much longer it was going to be before they went to bed. The passage put to her and her responses were as follows:[70]

> "But prior to him going to bed, you were sitting down with him and you were being affectionate towards him?---Oh, that's rubbish.

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64 AB 158.
65 AB 158.
66 AB 159 ll 1-9.
67 AB 162-163.
68 AB 165.
69 AB 168.
70 AB 169 l 30 to AB 170 l 19.

> And that you were starting to, well, touch him in an affectionate sort of way?---I'm sorry, I don't know where you got that crap from.
>
> You were starting to cuddle him?---Oh, don't be repulsive. I was 24 and he was, what, 58? I was in a committed relationship. I was there for a job interview. I don't think so.
>
> Okay. I suggest that after he went off to bed, you and [the friend] stayed up, chatting and talking and drinking for a bit longer?---No.
>
> And that then he came back out some time after?---No.
>
> And asked you how much longer you were going to be before you came into bed with him?---Sorry, no. No.
>
> And that you told him you wouldn't be very long?---Nope.
>
> And then he went off to bed?---No.
>
> And that then some time after that, you went into his cabin, I suggest?---No.
>
> And you hopped into bed with him?---No.
>
> And that you were naked?---No.
>
> And then you woke him up?---No.
>
> And that the two of you then started getting intimate with each other?---No, I can't believe this crap. No.
>
> And then proceeded to have sex?---No.
>
> And that you had sex with him consensually?---No, it definitely was not consensual. Why would I be kicking him off and losing my feet in his guts?"

[72] DAN rejected the proposition that the appellant did not rape her, but she did agree that the following morning she woke up in the appellant's bed. She explained that when she, the friend and the children went to get some breakfast in the morning she was still in shock and disbelief, "my head was hurting so hard … I couldn't get my head around what had happened".[71] She agreed that there was no difficulty in taking her daughter with her when she went to the McDonalds and that the appellant had not tried to stop her from taking her daughter with her. However, she said that the appellant would not let her have her portfolio back and she needed that, and she was not going to let him have her birth certificate.[72]

[73] DAN explained that she did not talk to the friend about what was going on "because I thought they were in a relationship or something … so I didn't tell her what happened".[73] She explained that one of the reasons why she just didn't get into her car and head home was because "the brain is not always rational when shit like that happens" and she was experiencing "the worst hangover ever".[74] She adhered to her account that she had decided to wait until he was asleep before leaving and that she was concerned about her portfolio. She explained why she went and laid down on the bed with the appellant:[75]

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71 AB 173.
72 AB 173.
73 AB 175 l 33.
74 AB 177.
75 AB 178 ll 26-38.

> "So are you saying that you went and laid down with this violent rapist again because you didn't know where your portfolio was and you wanted to get it?---No. No, I was scared, and he kept making excuses not to let me leave, and I thought perfect opportunity. They want to have a lie down. I will – and he caught me. This bastard caught me trying to leave, and then [the friend] … one of them said to me, oh, we don't keep secrets here, and he told her [the friend] that I was trying to leave. So there you go.
>
> I suggest it was then, once you went into the bedroom with him, that you again had sex with him?---I didn't have sex with him.
>
> Well, do you say that on this occasion … that he raped you again?---Yes, that's what I say."

Evidence of MDA

[74] MDA was the partner of the complainant DAN. He gave evidence of having come across the advertisement for the job and giving it to her. He said that some days later she told him that she had to go down to the Gold Coast to pick up her resume, and he accompanied her down there. He waited for her while she went on the yacht and when she came back she had her resume with her. They went to a local park and that is when DAN told him that she had been raped after being offered a drink. He remembered some of the detail of what he'd been told, which was that she had gone to the yacht, met the appellant and another lady, had a drink and then felt "really, really woozy, felt really drunk straight away" and was then raped.[76]

[75] In cross-examination MDA agreed that DAN had told him that she had had three or four drinks during the night, that the appellant had carried her to the bed, and that she had woken up periodically during the night to find him having intercourse with her.

Evidence of the psychologist

[76] Ms Barry gave evidence that she worked in the Brisbane Sexual Assault Service in December 1999. She met the complainant DAN who told her that she had been raped. She could not recall the specific day, but it was before 19 January 2000.

Evidence of Ms Rodwell

[77] Ms Rodwell was the manager of the Sexual Assault Crisis Service in 1999. Her evidence was that she met the complainant DAN, who told her that she had been raped by a man on a boat when she had been applying for a job.[77] Ms Rodwell could not remember what had been said verbatim but "basically she told me … she'd been raped and that it had happened very recently. She told me she was upset, distressed; she told me she was worried about her health".[78]

Evidence of Mr Poiderman

[78] Mr Poiderman was a long-time acquaintance of the appellant. He recalled an occasion where he took his wife to the appellant's boat in order to introduce his

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76 AB 189.
77 AB 198.
78 AB 198.

wife to the appellant. He could not recall the exact year when it was, except that it was about 2001. He recalled that they met the appellant and then two ladies arrived with two children. He said the women were introduced to him, and they said they had a good time at the beach. He continued:

> "[They were discussing [the appellant's] new lady, as he called her, and they were going to the [B]arrier [R]eef on a working holiday. The two of them were on the vessel and they were accompanying [the appellant] …"[79]

[79] Mr Poiderman said that he and his wife remained there for several hours and the group were laughing and joking. Shortly before that at one point one of the women went across to McDonalds with her daughter and bought food and drinks back. The woman with the younger baby stayed, but the other told the appellant she was leaving.

[80] In cross-examination Mr Poiderman was asked what he observed of the interaction between the appellant and the women. He replied:

> "With the one lady with the elder baby, he openly stated that he'd … fallen in love with this lady and they were going to become man and wife and she was liking and carrying on. And they were very loving to each other while we were there. Normal sort of stuff."[80]

[81] He said that the two women were going away together with the appellant.

Evidence of Ms Bunting

[82] Ms Bunting was the other woman at the appellant's yacht when DAN attended with her daughter. She said that she had met him while working at a restaurant and he offered her a job on his yacht, assisting him to write a book. She had a daughter about one year old. After discussing the job with him for a week or two she moved to live on the yacht at Marina Mirage. She was there for about four weeks ending just before Christmas 1999.

[83] She could recall a young woman with a child attending the yacht. This was DAN and her seven year old daughter. She said that the appellant had suggested that a nanny be hired to take care of Ms Bunting's daughter, as she was helping the appellant to write the book. She was aware of an ad being placed, and DAN responding and being interviewed on the boat.

[84] She recalled on the occasion when DAN and her daughter were on the yacht that she (Ms Bunting) put the children to bed after dinner. She then described what she observed of DAN:

> "I remember that she had had a few drinks. I remember she needed to go to the bathroom. I remember waiting for her to come back. [The appellant] had helped her go to the – show her where it was, which was up near his bedroom. And then he came back to me and he said come and have a look at this. He took me down to his bedroom and showed me and she had passed out on his bed. I

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79 AB 200.
80 AB 201.

> suggested that perhaps I help, you know, take her to my bed because that was the agreement and he said to me, no, don't worry about her. She'll be fine. Just let her sleep. And so I left her there."[81]

[85] She saw DAN the next morning, at which time she was "really unwell" and said that she had a big headache. Ms Bunting offered to ring DAN's work for her and say she wouldn't be in that day. After that they had a really quiet day and DAN went home and that was the last that Ms Bunting saw of her.

[86] In cross-examination Ms Bunting agreed that when she moved onto the yacht she made it clear to the appellant that she was not attracted to him and would not be having a sexual relationship with him. However, after a week or so he started making remarks of a sexual nature which became more sexually explicit. She responded by telling the appellant that sexual contact was not going to happen.

[87] As to the events with DAN, she agreed that DAN had had a bit to drink, but said it was not like DAN was drunk. She said that when the appellant called her to look at DAN having passed out on his bed, that was about ten minutes after she went to the bathroom. During that night she did not hear any noises coming from the other end of the yacht. The next morning it was clear that DAN was sick. She could recall vaguely going to a local shopping centre with DAN, but said that she could not recall whether other friends of the appellant came to the yacht while she was there.

Evidence of the appellant's daughter

[88] The appellant's daughter could remember an occasion when she met a woman WEM in the company of her father. Her father picked her up when he was heading to the Gold Coast and WEM and her younger brother were in the car. She could recall they went to WEM's family home. She said that she and WEM walked along a fence line for a while. In cross-examination she said that WEM told her that she really enjoyed being in the appellant's company, that she liked the son, that she thought he was a good young man, and she thought that she might be in love with the appellant.[82]

Police evidence

[89] Several police officers were called to give evidence as to how statements were taken from WEM, to confirm the date upon which a complaint was received from DAN, and as to searches conducted on the yacht, the results of drug analysis done on the contents of bottles, and photographs taken on the yacht.

Evidence from the defence

[90] The appellant neither gave nor called evidence in his defence.

Formal admissions

[91] A number of formal admissions were made in the course of the trial.[83] The admissions were that in time periods that matched the dates on the indictment, the appellant engaged in sexual intercourse with each of the complainants, and in each

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81 AB 204 l 46 to AB 205 l 6.
82 AB 215.
83 AB 463.

case the sexual intercourse included penetration of the complainant's vagina with his penis.

Unsafe and unsatisfactory verdicts

[92] The appellant provided a large volume of material detailing what he contended were the deficiencies in the evidence of the complainants, and the evidence more generally, that would compel the conclusion that the verdicts were unsafe. Many of the submissions were repetitive and tendentious. Many of them demonstrated a confusion about the proper role of an appellate court hearing a challenge to a conviction after a trial. On numerous occasions the appellant tried to refer to evidence which was not before the jury, either because it was in previous trials or committals, or was the appellant's account of what had occurred, even though he did not give evidence in the trial.

[93] That said, the appellant's complaints can be grouped into a number of categories:

(a) that the evidence of the complainants does not accord with logic, common sense or the collective experience of human behaviour; it was not clear, logical, compelling, internally consistent or inherently reliable;

(b) the evidence of the three complainants was fundamentally flawed and implausible, particularly that each of them would remain in the presence or company of the appellant after what was said to have been a drug-induced rape;

(c) the three complainants were liars; and

(d) the three complainants had colluded with one another to fabricate the claims, as the admitted sexual intercourse with each of them was consensual.

[94] The principles governing how this task must be approached are not in doubt. In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[84] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[95] In *M v The Queen* the High Court said:[85]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it 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. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the

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84 (2011) 243 CLR 400 at [20]-[22]; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.

85 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.

> benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[96] *M v The Queen* also held that:[86]

> "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. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

[97] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[87]

Assertion of collusion

[98] An assertion made on a number of occasions during the course of the appellant's submissions was that the three complainants had colluded with one another in order to present three similar but false accounts. There is simply no evidence of collusion in the material presented at the trial. At the end of the evidence in chief from each of the complainants they were asked whether they had contact with, knew of, or met the others before telling the police or anyone else what had happened. Each said they had not.[88] No such suggestion was put to any of the complainants in cross-examination.

[99] Further, in the summing up the learned trial judge directed the jury:[89]

> "In considering that, you must be satisfied that the evidence of each of the complainants is independent and I direct you that you cannot use the evidence of the complainants in combination unless you are satisfied that there is no real risk the evidence is untrue by reason of concoction. The value of any combination – and likewise, any strength in numbers – is completely worthless if there is any real risk that the complainants – that what the complainants said is untrue by reason of concoction between them. You must be satisfied there is no real risk of concoction; a real risk is one based on the evidence and not one that is fanciful or theoretical."

[100] There is nothing in this point.

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86 *M v The Queen* at 494.
87 (2016) 258 CLR 308 at [65]-[66]; internal citations omitted.
88 WEM at AB 36; PFM at AB 114; DAN at AB 160.
89 AB 274.

Drugging of the complainants was implausible

[101] The appellant contended that if the circumstances were looked at from his perspective there was no discernible point in drugging the three complainants. The central theme of this attack was that if drugging the complainants in order to render them incapable of resistance was his modus operandi, he was not very good at it because they each claimed to have woken up or been aware that the appellant was having sex with them.

[102] Further, the appellant submitted that had he followed that modus operandi, he would hardly have been frank and open with them in the days following about the fact that he had had sexual intercourse with them.

[103] The submissions are not compelling. They proceed on the rather bizarre basis of making a virtue out of the fact that the complainants were not rendered insensate by the drugging. Each of the complainants gave evidence of what occurred to them upon being given drinks by the appellant. The evidence of each was consistent, that their condition was the result of stupefaction, and not merely alcohol. It was open to the jury to accept the evidence of the complainants that their condition was a result of what they had been given by the appellant. That they were not rendered totally insensate is hardly a factor compelling the rejection of their evidence.

Implausibility about the failure to escape

[104] The appellant made the point time and again that all three complainants did not avail themselves of the various opportunities to escape, nor did they make any complaint to others with whom they came in contact. The appellant characterised their excuses as lies.

[105] The fact that in a confused state they did not immediately escape from the yacht, does not compel rejection of their evidence. That is particularly so given that each of the complainants gave evidence of reasons why they could not immediately escape, either from the yacht or from the appellant's presence. Each of them was in a state of disbelief about what had occurred, confused as to how to deal with it, and limited in their options to get away. In my view, it was open to the jury to accept that evidence as explaining the aftermath of the attacks upon them, and explaining why they followed that course.

[106] WEM gave evidence that in the aftermath she felt sick and didn't know what to do as she had never been in a situation like that before. On her evidence she did try to get away from the appellant, albeit whilst they were on the yacht at sea, by locking herself in one of the cabins. When eventually she made contact with her parents she did not tell them what had happened because she didn't want to admit it to herself. In the immediate aftermath she said she was struggling to think and to act, and was not in control of her normal faculties. When there was a period on-shore at the Mooloolaba Marina she explained why she didn't then try to escape by reference to the fact that she had no money, did not know where she was, or know the area she was in and had no way of contacting anyone. She explained her later relationship with the appellant as being because she was in a state of denial and could not accept what had happened to her. She rationalised it as being that sexual intercourse happened between consenting adults and therefore since there had been sexual intercourse she must have consented.

[107] The complainant PFM explained that in the aftermath she felt very ill and nauseous, disorientated, dizzy and very confused. She could obviously not escape while the vessel was at sea. She explained that she could not get away when in Mooloolaba because the appellant was with her all the time, she had no money and didn't have access to her bag. She also explained that when at the Southport Yacht Club she delayed leaving until a friend had left the yacht.

[108] The complainant DAN described feeling disorientated, mentally detached and in shock as a result of what happened. She gave evidence that the appellant would not let her take her daughter with her and refused to give her the portfolio she had brought. Eventually, she left the portfolio behind, taking her daughter and driving back to Brisbane. She returned the following day with her partner in order to retrieve it.

[109] The explanations are all ones which a jury might accept. Whether they did or not no doubt depended upon their assessment of the three complainants. That all three might feel disorientated and unsure about how to handle the situation is hardly surprising. That they might not try to escape when they were without funds and in a strange place is also not surprising. There is no reason to conclude that the jury should have come to the view that their failure to escape spoke such implausibility as to suggest they were liars, or that they must necessarily reject their evidence.

Evidence of lies

[110] The appellant spent considerable time on his outline and in oral address pursuing the contention that inconsistencies in the complainants' evidence should have compelled the jury to conclude that they were lying. I will not attempt to comment on all of the examples. A few will suffice to make the point that there is nothing in the contention.

[111] An oft repeated assertion about the complainant WEM was that she had lied to the court when she said that her evidence changed in relation to whether her mother was aware that she was coming home. It was said that her first account was that she had rung her mother about her intention to come home. Then, according to the contention, WEM changed her story and said that her mother wasn't aware she was coming home. There is nothing in this contention as the appellant has confused the evidence. What WEM said was that she spoke to her parents, they were not going to pick her up, so she talked the appellant into driving her back to her parents' house.[90] On the way there the appellant's son was dropped off and he picked up his daughter. That is the context of WEM's evidence that when they got to her parents' house her mother was put out because it was lunchtime and "she didn't know that she was going to have visitors".[91] The distinction is clear. On her first account her mother might have expected WEM to arrive home, but did not expect that there would be others, particularly at lunchtime. It hardly bespeaks lies.

[112] A second example which the appellant characterised as lies is the inconsistency in the evidence of WEM about whether the door on the shower in the ensuite on the yacht opened inwards or outwards. There is no doubt there was a change in WEM's evidence on that topic. As well as that inconsistency, WEM's evidence was that she had previously gone on oath with an account that had matched her statement, but

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90 AB 33.

91 AB 34 l 2.

explaining why she did so when it was not true, WEM said "that's what I thought I had to do". She explained that she had, at the time of the earlier evidence, thought that she should or was expected to give evidence in accordance with her statement. That explanation having been given, it was open to the jury to treat the differences as inconsistencies, rather than evidence of lying.

[113] In a similar vein are the inconsistencies between WEM's evidence given on a previous occasion, and the evidence at trial, as to whether she lifted her shirt up in front of an air conditioner. At the trial the subject of this appeal she denied that she had done that, but agreed that she had previously said she lifted her shirt up. The difference was, WEM explained, that even if she lifted her shirt she did not expose her breasts. That amounts to simply an inconsistency in the evidence which did not have to be necessarily treated as lies by the jury.

[114] Similar inconsistencies occurred in the evidence of PFM. None of them, either individually or cumulatively, necessitate the conclusion that PFM was a liar. Even the appellant accepted in his submissions that it was natural that human memory was imperfect and flawed. That is precisely what the jury could have reasoned when considering PFM's evidence.

[115] Some of the inconsistencies in PFM's case were relatively minor, such as whether she had checked the door of a cabin and where her clothes were. Others were not so minor, such as telling her husband that the drugging and raping occurred whilst the vessel was at sea, whereas her evidence was that it first occurred when the vessel was moored at Bundaberg. However, they are simply inconsistencies which were the provenance of the jury to decide.

[116] DAN gave evidence that conflicted with that of Ms Bunting. Examples of that are whether she brought her daughter on the first occasion of responding to the ad, or whether she came alone and then returned a couple of days later with the daughter. Another concerned the timing of events. However, they were simply inconsistencies which might normally be expected when two different witnesses try to recall a series of events some years down the track. The jury was by no means compelled to conclude that DAN was a liar simply because her evidence varied from other evidence.

[117] The same is the case where there were differences between DAN's evidence and that of Mr Poiderman. It simply means that two people recall events differently. It by no means compels the conclusion that there were lies being told.

Central illogicality

[118] Where the challenge to a conviction is on the basis that the verdict is unreasonable or cannot be supported by the evidence, the challenge will fail if "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the [appellant] was guilty".[92] In carrying out an assessment of the whole of the evidence, an appellate court operates within a legal system that accords special respect and legitimacy to jury verdicts, and juries deciding contested factual questions concerning guilt.[93] The primacy of the jury as the arbiter of fact has been recently reinforced.[94]

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92 *MFA v The Queen* (2002) 213 CLR 606 at 615.

93 *MFA v The Queen* at 624.

[119] It must also be recognised, as it was in *MFA v The Queen*,[95] that it is not uncommon in most criminal trials for there to be unsatisfactory aspects of the evidence, but:

> "Experience suggests that juries, properly instructed on the law (as they were in this case) are usually well able to evaluate conflicts and imperfections of the evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention."

[120] This was undoubtedly a case where the Crown case depended upon the jury's acceptance of the evidence of each of the three complainants, both as to their credibility and their reliability. The summing up makes it plain that the jury were told just that. The jury was also directed to examine the complainants' evidence with great care before arriving at any conclusion of guilt.[96] The need for that care was explained and the jury was warned that it would be dangerous to convict upon the complainant's testimony alone unless, having scrutinised that testimony with great care, and considered the circumstances relevant to the evaluation of that testimony, and having paid heed to the warning, the jury was satisfied beyond reasonable doubt as to the truth and accuracy of the testimony.

[121] The appellant raised a considerable number of matters which he contended were inconsistent or illogical, so much so that they could have compelled the jury to the conclusion that the complainants were liars, or to at least reject their evidence. I am unable to agree with those contentions. The evidence of each complainant was given in a clear and consistent way. Their credibility was supported by the evidence from the preliminary complaint witnesses. Variances in their evidence, either within the trial or by comparison to what was said on a previous occasion, were simply that. They did not serve to destroy the narrative of any of the complainants. Further, the evidence of each complainant was striking for the similarity it revealed in the way in which events were initiated and unfolded. Such inconsistencies or discrepancies as there were did not reveal any that were destructive, in my view, of the overall quality of the evidence.

[122] It must be borne in mind that in each case sexual intercourse was admitted, and on the defence case each complainant had consented to sexual intercourse within a very short period of time after arriving on the yacht. That was suggested to have been the position by the second day in the case of WEM;[97] within a few hours in the case of PFM, and instigated by her;[98] and within a few hours in the case of DAN, and instigated by her.[99] The jury therefore did not have to grapple with whether sexual intercourse had occurred, but how it did, whether it was consensual, and whether the complainants had been drugged. Absent any suggestion of collusion there was a striking similarity between their accounts of what occurred. The jury were directed that if they were sure there was no real risk of concoction between the complainants then they could use their evidence in combination.[100] There was no suggestion of

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94 *R v Baden-Clay* (2016) 258 CLR 308.
95 At 634.
96 AB 273.
97 AB 63-65, 82.
98 AB 117.
99 AB 169-170.
100 AB 274.

concoction. It was open to the jury to take the evidence of the three complainants as credible and reliable.

[123] The jury were well placed, having regard to the fact that they saw and heard the evidence of all three complainants, and saw or heard the evidence of other witnesses, to make a judgment on whether that evidence convinced them beyond doubt of the appellant's guilt. This Court does not enjoy the benefit of having seen and heard the evidence, and must recognise that as to why respect should be paid to the jury as the arbiter of fact.

[124] On a review of the whole of the evidence, and taking into account the various complaints raised by the appellant, it is my view that it was open to the jury to accept the evidence of the complainants and find the appellant guilty. I do not consider that there is a significant possibility that an innocent person has been convicted.[101]

Conclusion – unsafe and unsatisfactory verdicts

[125] For the reasons given above this ground of appeal lacks merit.

Other grounds of appeal

[126] The outlines raised several other grounds of appeal, distinct from that dealt with above. They can be dealt with in short order.

Misstatements to and misdirection of the jury

[127] The contention here was that the learned trial judge misdirected the jury in relation to the application of a test for consideration of similar fact evidence. There is nothing in this point. That part of the summing up relied upon for this point is in fact a recitation by the learned trial judge of a prosecution contention. It was neither a misstatement nor a misdirection.

Improper narrowing of considerations

[128] As noted in paragraph [6] above the central contention here was that the learned trial judge's statements about the strikingly similar accounts of the three complainants would have limited the jury's consideration to the time of the offences and when the initial complaints were made, rather than at all other times "when collusion might have occurred".

[129] Once again the contention is misplaced. The passage about which complaint is made is part of the learned trial judge's summary of the prosecution's arguments. It was not a direction to the jury.

Improper joinder – reconsideration during the trial

[130] The contention here was that it was incumbent upon the learned trial judge to reconsider the joinder of the three complainants during the course of the trial. This was said to flow because of the illogical aspects of the complainants' evidence and the mixing up of evidence. This ground was not developed in oral argument and

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101 *MFA v The Queen* at 623.

appears in only one of the appellant's outlines. No authority was cited to support the contention, and it suffers from the fact that the appellant's very experienced Senior Counsel made no such application.

[131] A secondary point under this ground was that the deficiencies in the complainants' accounts "should have led the trial judge to raise the question of the possibility of collusion". That contention is dealt with above in paragraphs [98] to [100].

Miscarriage of justice – bias, corruption and collusion

[132] The central theme of this ground was that the complainants had brought their complaints because of "ulterior and untoward motives" which "have improperly and unjustly led to the initiation of the complaints". The central contention here was that the payment of victims of crime compensation to at least two of the complainants pointed to the possibility of collusion. The contention should be put aside. No such matters were raised in the course of the trial. The appellant's outline relies upon statements made at the committal proceedings and to matters not in evidence before the jury. None of that supports this ground.

[133] Therefore, there is no foundation for this ground.

Failure to direct the jury regarding media reports

[134] The contention here is that the learned trial judge failed to adequately direct the jury regarding media reports which surfaced during the trial. That there were some media reports was a matter discussed between the learned trial judge and counsel for each side.[102]

[135] There are several features about the exchange which put the matter in context:

(a) when it was raised by the prosecutor, Senior Counsel for the appellant said that he would have to consider his position;[103]

(b) the learned trial judge was concerned about proceeding with the trial without the issue being resolved;[104]

(c) the trial was delayed while investigations occurred; that showed that the only publication was in the Sunshine Coast Daily News; the distribution of that publication of the offending reports of the Sunshine Coast Daily News was restricted to 28 papers that went to the GPO in Brisbane, and six other outlets that ordered one to three papers each; in the case of the six outlets, those papers were not made available for general sale; no more than 40 papers came to Brisbane and only 22 of them were sold before that edition was withdrawn from circulation;[105]

(d) in addition there were email subscribers to the Sunshine Coast Daily News, totalling about 104 subscribers, only two of which were from Brisbane; of those two in the Brisbane one was the Property Council of Australia and the other at an address in George Street;[106]

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102 AB 73-81.
103 AB 74 ll 14-17.
104 AB 74 l 41.
105 AB 77.
106 AB 77.

(e) having taken instructions, the appellant's Counsel elected not to make an application for a mistrial;[107] no application for a mistrial was made by the prosecutor;

(f) having given some reasons concerning the publications, the learned trial judge enquired of the appellant's Counsel as to whether the jury should be given a warning at that stage or whether such a warning may simply draw their attention to the fact that there was a newspaper article causing concern;[108]

(g) Senior Counsel for the appellant suggested that it might be better managed at a time which did not connect the fact of the publications with the delay in the trial; that was the position adopted.

[136] Ultimately, Senior Counsel for the appellant urged the learned trial judge to only say something about the publicity aspect at a subsequent time.[109] At the end of the following day the Crown case closed and the learned trial judge reiterated his warning to the jury to ignore any press reports that they might have seen or that they might see.[110]

[137] In the course of his summing up, the learned trial judge reminded the jury that they were obliged to decide the case on the evidence which was what was placed before them during the trial itself. Early in the summing up the learned trial judge said this:

> "In deciding whether the accused is guilty, you should ignore anything which you might have heard about the case outside of the courtroom. I think that there have been some media reports about it, but as I have told you a couple of times during the course of the trial, you should ignore them. They are inevitably a summary. You have heard all the evidence in the trial and each of you has either sworn or affirmed to decide the case according to that evidence. So you should ignore anything that you might have heard about the case outside of the courtroom."[111]

[138] At the end of the summing up Senior Counsel for the appellant did not seek any further or other direction on that topic.

[139] Those directions were sufficient to dispel any concern. As was said in *R v Ferguson; Ex parte Attorney-General*:[112]

> "… there is an abundance of authoritative statements that even where a trial is accompanied by adverse publicity, even adverse publicity concerning the accused's previous criminal convictions, the court should be slow to conclude that the resultant risk of unfairness to the accused is intractable because the jury is unlikely to be amenable to

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107 AB 78.
108 AB 79 l 43 to AB 80 l 2.
109 AB 142 l 8.
110 AB 228 l 43.
111 AB 250 ll 38-44.
112 [2008] QCA 227 at [26].

> the directions of the trial judge to ignore the adverse publicity and render their verdict based on the evidence."

[140] In the circumstances outlined above, there was no necessity to go further than was done by the learned trial judge. The prospect of any of the media reports actually being seen by the Brisbane jury was small, and in any event adequately dealt with by the directions given.

Conclusion on the conviction appeal

[141] None of the grounds raised to challenge the convictions has any merit. The appeal against conviction in that respect should be dismissed.

The application for leave to appeal against sentence

[142] The two grounds raised in respect of the application for leave to appeal against sentence are:

(a) that the learned sentencing judge should not have exercised his discretion to declare the convictions on counts 8 and 9 to be convictions of serious violent offences; and

(b) there was an error in failing to adequately take into account a period of non-declarable pre-sentence custody when imposing the sentences for counts 8 and 9.

[143] In the outline prepared by Mr Copley QC on behalf of the appellant, only the second ground was argued. A short summary will demonstrate the point raised.

[144] On each of counts 8 and 9 (rape against the complainant DAN) the sentence imposed was seven years and eight months' imprisonment, and each of them was declared to be a serious violent offence. The learned sentencing judge took the view that the appropriate starting point was 11 years' imprisonment, but that should be reduced by six months because of the appellant's mental health issues and his age. A period of two years and 10 months had been spent in custody, but that time could not be declared. As a consequence the learned sentencing judge took the view that the only way to recognise that period was to reduce the head sentence from 10 and a half years to seven years and eight months in respect of those offences which attracted the lengthiest terms. The learned sentencing judge also took the view that it was appropriate to declare that the convictions on counts 8 and 9 were serious violent offences.

[145] It was contended that the learned sentencing judge correctly reduced the head sentence to reflect the period of non-declarable pre-sentence custody.[113] However, the learned sentencing judge failed to be mindful of the period of pre-sentence custody when fixing the head sentences and the complications that follow where a serious violent offence declaration is made. Had the appellant received a term of 10 and a half years' imprisonment on each of counts 8 and 9, he would have been required to serve 80 per cent of those terms before being eligible for parole.[114] On that basis his parole eligibility would have arisen after he had served eight years and five months.

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113 *R v Carlisle* [2017] QCA 258 at [46].

114 *Corrective Services Act* 2006 (Qld), s 182.

[146] The requirement that the appellant serve 80 per cent of the reduced term of seven years and eight months means that he will have to serve six years and a little over one month before he is eligible for parole. When that period of six years and one month is added to the two years and ten months of pre-sentence custody, the appellant will be effectively required to serve a total period of eight years and 11 months before being eligible for parole. That is six months longer than had a sentence of 10 and a half years been imposed. It was therefore contended that it was appropriate to vary the sentences imposed on counts 8 and 9 by reducing the length of them to seven years. If that variation was made the appellant would serve eight years and five months before being eligible for parole.

[147] For the Crown, Mr Nardone conceded the error in respect of the sentence. It was accepted that the complications of a non-declarable pre-sentence custody period, when the serious violent offence declaration was made, should be dealt with according to the approach of this Court in *R v NQ*.[115] Adopting the approach in *R v NQ*, the notional sentencing start point of ten years and six months (or 3,837 days) is to be reduced by an adjusted figure for the pre-sentence custody period, namely 1,300 days.[116] That would bring the period of sentence to 2,537 days, or six years, 11 months and 10 days. That would effectively mean a fulltime release date of 26 June 2021, 20 days short of seven years from the date of sentence.

Discussion

[148] *R v NQ* was a case where a sentence was the subject of a serious violent offence declaration. Pre-sentence custody of 22 months was to be taken into account. The approach to be taken in such a case is reflected in the judgment of McMurdo P, with whom Mullins J agreed:[117]

> "The sentencing judge next properly took into account the applicant's 22 months of pre-sentence custody which could not be declared part of the sentence. His Honour rightly treated this as a 27 month period of pre-sentence custody as, had it in fact been part of the notional 12 year sentence, the applicant would have been eligible to apply for parole after serving 80 per cent of it."

[149] That course was not followed in the sentencing. Given the concession made by the Crown it is appropriate to vary the sentences imposed in respect of counts 8 and 9 by reducing them from seven years and eight months in each case, to seven years.

Disposition and orders

[150] For the reasons given above the appeal against the convictions ought to be dismissed.

[151] The application for leave to appeal against sentence, error being conceded by the Crown, must be granted and the sentence varied.

[152] The orders I propose are as follows:

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115 [2013] QCA 402.

116 The actual period was 1,040 days, but that figure should be treated as 80 per cent of the period to actually allow, because had it been part of the notional sentence, the appellant could apply for parole after serving 80 per cent of it.

117 [2013] QCA 402 at [16].

1. Application to adduce evidence refused.

2. Appeal against conviction dismissed.

3. Application for leave to appeal against sentence granted.

4. The appeal be allowed.

5. The sentences imposed in respect of counts 8 and 9 are varied to the extent of reducing the period of seven years and eight months to a period of seven years in each case.

6. The sentences imposed on 16 July 2014 are otherwise affirmed.

[153] **PHILIPPIDES JA:** I have had the advantage of reading the reasons of Morrison JA. I agree with those reasons and the orders proposed by his Honour.

[154] **FLANAGAN J:** I agree with the orders proposed by Morrison JA and with his Honour's reasons.