SUPREME COURT OF QUEENSLAND

CITATION:	*R v RBA* [2018] QCA 338
PARTIES:	**R** **v** **RBA** **(appellant)**
FILE NO/S:	CA No 250 of 2018 DC No 35 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – [2018] QChC 24 (Morzone QC DCJ)
DELIVERED ON:	7 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2018
JUDGES:	Sofronoff P and Philippides JA and Boddice J
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – TEST TO BE APPLIED – where after a judge alone trial the appellant was acquitted of one count of rape (count 1) and convicted of one count of rape (count 2) – where the appellant and complainant were drinking with friends on a beach at night when they left the group, kissed, the appellant touched the complainant's breasts, they went for a walk and the appellant put his fingers in the complainant's vagina (count 1) and had sex with the complainant (count 2) – whether the verdict of guilty for count 2 was unreasonable or cannot be supported having regard to the evidence CRIMINAL LAW – EVIDENCE – OPINION EVIDENCE – OTHER MATTERS – where the complainant gave evidence that after she left the beach, she went home to have a shower and then went to the hospital to be examined by a doctor who gave evidence that there was redness in the groin areas consistent with skin on skin rubbing – where the trial judge

found that significant weight should be afforded to medical opinion – whether the trial judge erred in finding significant weight should be afforded to the doctor's evidence

CRIMINAL LAW – PROCEDURE – TRIAL HAD BEFORE JUDGE WITHOUT JURY – GENERALLY – where the appellant submitted that the trial judge erred in stating that the evidence of the complainant's distressed condition provided strong support of the complainant's account – where the trial judge failed to direct himself in accordance with Benchbook Direction as to distressed condition – whether the trial judge erred in holding that the evidence of distressed condition provided significant support such that there was a miscarriage of justice

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Papakosmas v The Queen (1999) 196 CLR 297; [1999] HCA 37, cited
R v AW [2005] QCA 152, cited
R v Foster [2014] QCA 226, cited
R v GS [2005] QCA 376, cited
R v McDougall [1983] 1 Qd R 89, cited
R v NM [2013] 1 Qd R 374; [2012] QCA 173, cited
R v PAS [2014] QCA 289, cited
R v RH [2005] 1 Qd R 180; [2004] QCA 225, cited
R v Roissetter [1984] 1 Qd R 477, applied
R v Rutherford [2004] QCA 481, considered
R v S [2000] 1 Qd R 546; [1998] QCA 303, cited
R v Van Der Zyden [2012] 2 Qd R 568; [2012] QCA 89, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied

COUNSEL: D A Holliday for the appellant
C N Marco for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Philippides JA and the order her Honour proposes.

[2] **PHILIPPIDES JA:** The appellant was charged with two counts of rape; count 1 being digital penetration and count 2 being penile penetration. On 14 September 2018, after a judge alone trial in the Children's Court of Queensland, the appellant was acquitted on count 1 and convicted on count 2.

[3] The charged offending concerned events that occurred on 12 December 2017 between the complainant and appellant, which took place when they had gone away from a gathering of people on a beach at Cairns. The issue in contention was

whether the prosecution had proved that the complainant had not consented to the intercourse and had excluded a defence under s 24 of the *Criminal Code* (Qld). The appellant gave evidence and said that it was consensual.

[4] Three grounds of appeal are raised in the amended notice of appeal.

1. The trial judge erred in determining the relevance of distressed condition.

2. The trial judge erred in determining that "significant weight" should be afforded to medical opinion.

3. The guilty verdict was unreasonable and cannot be supported having regard to the evidence.

Trial judge's findings of facts

[5] The complainant and the appellant were known to each other and had been friends. They had previous social media and flirtatious interaction, including sharing a kiss about a year previously.[1]

Meeting on the beach

[6] On the evening of 12 December 2017, the complainant was drinking with her girlfriends and had dinner. The complainant said that her brother drove her and her friends to a beach where they were greeted by other friends. The trial judge did not draw any inferences, as urged upon his Honour, from the complainant having invited the appellant to the gathering on the beach.[2] The trial judge found that the complainant was drinking bourbon and coke during the evening and that she became increasingly jovial, boisterous and uninhibited.[3] However, the complainant was not so intoxicated as to lose control over her behaviour or to have impaired memory. None of the witnesses testified that she demonstrated indicia of impairment by intoxication, for example, that she was unstable on her feet or incoherent in her behaviour or speech immediately before and after separation from the group with the appellant at the beach.

[7] The complainant gave evidence that the appellant was touching her and trying to kiss her during the night and that she would stand up and walk away. The appellant accepted that he kissed and touched the complainant while lying down, but contended that the contact was mutual. He denied that he touched her as she described when standing. F, who was also lying next to the complainant, accepted that he "grabbed her ass", but he did not see, nor did others see, the appellant do so. The trial judge found the complainant was mistaken about the appellant's touching her buttocks at that stage.[4]

[8] During her cross examination, the complainant denied she was "drunk", but described her state as tipsy. His Honour found that the complainant had candidly

---

1 *R v RT* [2018] QCHC 24 (Reasons) at [9].

2 Reasons at [9].

3 Reasons at [12].

4 Reasons at [14].

agreed that she was dancing including "twerking" to lewd musical lyrics. She also accepted that she had pulled down her top in front of the girls, but with her back to the boys, and suggested going skinny dipping with the girls. The trial judge observed that this behaviour was also more or less described by the other witnesses, including the appellant, present at the time. The group were variously dispersed around the bonfire and were also listening to music, drinking, interacting and dancing. His Honour found that there were some differences in the description of each other's drinking during the evening, including the complainant's drink preparation, but that there was little material difference in her observable behaviour.[5]

[9] The trial judge referred to the following evidence of the complainant as to how she and the appellant separated from the group:[6]

> "15. Da was up doing some cartwheels and cheerleading stuff and was attempting to teach the boys some backflips and things. I think the time was about 12.30am, I saw that [the appellant] was on his own closer to the water and I went down to see if he was okay. I stood in front of [the appellant] and faced him and asked if he was okay. [He] grabbed me by two hands around my throat and forcibly kissed me on the lips. I kissed him back, but he was squeezing my neck really tight and I pushed him away."

[10] In cross examination, the complainant clarified that the appellant "grabbed [her] by the neck forcibly and kissed [her]", and then had "One hand was around [her] neck. The other one was squeezing [her] nipple very hard", but she denied that her top was down showing the appellant her breasts. She agreed to the proposition that "At this point [the appellant] was rubbing [her] on the outside of [her] shorts between the legs?" saying "Forcibly yes, when [she] told him not to and pushed him away."

[11] His Honour noted that the appellant denied that he put both hands around the complainant's neck and forcibly kissed her and gave the following evidence as to what occurred when he was alone with the complainant at the water's edge:[7]

> "And you were – at this point, you'd moved away with [the complainant]?---Yes.
>
> All right. So just [tell] his Honour about that?---Yeah. Well, we were in a group and then, yeah, as you said, people got up to dance and that. Me and [the complainant] then walked down to the water's edge and we could see the other people, the boys and girls, like doing cartwheels and that and we were down at the water's edge.
>
> And can you estimate how far away from the fire you were?---I'd say 15 to 20 metres.

---

5 Reasons at [16].

6 Reasons at [17].

7 Reasons at [19].

…

> Now, while you were down at the water's edge, what were you and [the complainant] doing?---First, we started talked and then, yeah, we just started kissing, making out again. We got into it. I was feeling her boobs, her arse. I could feel that she was getting more into it, as she was rubbing my groin and that, around my legs and that. So I thought, yeah, nothing was wrong, kept kissing and that. And then a short time after, yeah, we went off for a walk.
>
> You were – you said you were grabbing her breasts. Was that over the clothing or under?---Yeah. At first, it was over it and then she did take her top down at the water's edge. I started – yeah, I licked her tits. Yeah.
>
> Was that for long?---Not too long, no. Not that long at all. But – yeah.
>
> You've heard [the complainant] say that you put your hands around and – both of your hands around her neck and were forcibly kissing her at the water's edge. Did you do that?---No. That's not true at all."

[12] The trial judge noted that other witnesses had different vantage points and variously described this interlude between the complainant and the appellant, but none of them testified about exposed breasts at that point, or the appellant grabbing or licking her breasts, or mutual rubbing as described by the appellant.[8] Their evidence about light, distances and position varied but no witness was able to see the two clearly or closely. One of the boys, C, called out in effect "Go get a room". But the trial judge was not satisfied that one of the girls yelled out "[the complainant] is getting dick," or something like that, which was attributed by Da to Ka; but this was denied by Ka and not supported by the others present.

Count 1 – rape (digital)

[13] The trial judge referred to the following evidence from the complainant's police statement relied on as constituting the charge of digital penetration (count 1):[9]

> "16. [The appellant] then said he wanted to talk to me about something. I got up and we walked away about 10-15 metres from where everyone else was.
>
> 17. The beach was pitch black. The only light was coming from the fire that we made. As soon as we walked away from the fire, we stopped at a palm tree that was sloped down.
>
> 18. Once we were away from the group [the appellant] forcibly tried to put his hands down my pants, he managed to get his

---

8 Reasons at [20].

9 Reasons at [21].

> hands in my pants and as I only had my body suit on he was able to get one of his fingers in my vagina. I think he got his finger in my vagina about twice. It was sore and I was trying to push him away but he was using his other hand to try and undo my belt. He got my belt unbuckled.
>
> 19. I said to him "Stop, come on, we are just here to talk."

[14] His Honour recorded that the appellant's evidence was as follows:[10]

> "Okay. Now, you said you walked away. Where did you go?---We would have went about, yeah, 50 metres away from the group, 30 to 50 metres, just up under a palm tree, but they couldn't see us.
>
> Now, if you're facing the water?---Yeah.
>
> Which direction did you walk?---Up to the right.
>
> To the right?---To the left [indistinct] sorry.
>
> To the left?---Facing the water, yeah.
>
> And was there any light up there?---No. You couldn't see.
>
> Whereabouts did you walk to?---We would have walked up – up a bit of the beach and then, yeah, walked up, like, so under a little palm tree.
>
> Now, what do you say happened when you got to the palm tree?---Yeah. Again we just started making out, kissing again. Yeah. I was rubbing the outside of her vagina. We were getting into it more and more. She was rubbing my groin and that, outside of my pants. Yeah. We were just getting into it and that's when I asked, 'Did you want to fuck?'
>
> You said you were rubbing the outside of her vagina. Did you at any point put your hands - - -?---Yeah.
>
> - - - inside her pants?---Yes, I did.
>
> What did you do when you did that?---I fingered her, one finger, and it was fine, kept going and then after that – a short time after, that's when I asked, 'Did you want to fuck?'
>
> All right. And what did she say to that?---First, she said, 'No –' she asked if I had a condom.
>
> And what did you say?---And I said, 'No.' I said, 'No.' And then, yeah, we just kept continue to make out."

[15] The complainant denied that she consented to the appellant putting his hands inside her pants and putting his finger in her vagina. She insisted that she told the

---

[10] Reasons at [23].

appellant to stop, and "pushed him away". The trial judge found that the complainant's pre-recorded evidence was consistent with her statement and that the timing of her remark, "Stop, come on, we are just here to talk" seemed to coincide with the last penetration of his finger into her vagina as she pushed him away.[11] His Honour noted the complainant denied any mutual sexual touching, but in response to the question, "But you kept making out", she replied, "He kept forcibly kissing me, yes".

[16] His Honour found that:[12]

> "At some point, the [appellant] propositioned her, as put to the complainant in cross-examination – '[the appellant] asked you if you wanted to fuck?', and she said 'And I said no', which is consistent with the [appellant's] recall but did not feature in the complainant's statement."

Count 2 - rape (carnal knowledge)

[17] The trial judge referred to evidence in the complainant's police statement which described "the persistent and escalating aggressive and rough conduct" relied upon for count 2 as follows:[13]

> "20. He just kept going, he was grabbing at my boobs and it was hurting a lot. He kept trying to kiss me forcibly.
>
> 21. I fell back and as I sat down, he grabbed me hard by my right shoulder and turned me around and pushed me face down onto my chest into the sand. Held me by his right hand on the back of my neck forcing my face in the sand and using his other hand he forced my pants down from behind. He got my right leg out of my pants and used his leg to forcibly spread my legs apart. He was now on top of me from behind and he pulled my body suit to the side.
>
> 22. As he held my neck [the appellant] said 'Shut the fuck up' he said this angrily and aggressively.
>
> 23. He forced his penis into my vagina, it really hurt. I was grabbing the sand and trying to push myself up but he had his hand against my neck and I couldn't move.
>
> 24. He was moving his penis in and out of my vagina and it happened so quickly.
>
> 25. I think he ejaculated as I felt it land on my foot.
>
> 26. I kicked him in the knee with my right foot.

---

11 Reasons at [24].

12 Reasons at [25].

13 Reasons at [26].

…

29. [The appellant] was holding the back of my neck to hold me down. I wasn't saying anything, I was emotionless and shocked what was happening as It was happening so quickly. [The appellant] was so heavy on top of me I couldn't even move.

30. I kicked [the appellant] on his knee and got him off me. I stood up and pulled my pants up and I walked away."

[18] The trial judge also observed that, in stark contrast, the appellant described a course of consensual intercourse after the complainant positioned herself on her hands and knees on the sand as follows:[14]

> "When you said you didn't have a condom, what did she say about having sex?---She – yeah, at first, yeah, she didn't want to without a condom and then after we kept making and that, she just said, 'Fuck it,' got onto her knees – hands and knees. I got behind her, put my jeans down just around my ankles and, yeah, put it in and started thrusting, had hands – my hands on both of her arse cheeks. And then, yeah, a short time, I cummed. Only 30 seconds, a minute, I cummed, pulled out to the one side. She got up like she was angry. She looked like she had a sour look on her face and then she said, 'Yeah. Is that it?' And then she then, yeah, took off away from me, like she didn't want to be near me.
>
> All right. Just pause there. When you – what was [the complainant] wearing?---She had a one-piece suit on with, like, little denim shorts, I think they were.
>
> When you were – you said that she got down on her hands and knees. Was she clothed or unclothed? Just tell the judge about that?---No. She had, like, her one piece on, but she took her shorts down, just so they were around her knees and I could just – yeah, I moved her one piece to the side so I could put it in.
>
> …Well, after we've had sex, yeah, she's got up. She said, 'Is that it?' to me and I said, 'Yeah.' And then she's then, yeah, walked off. She had a sour look on her face. You could tell by her face she wasn't happy. She seemed angry, took off away from me and then, yeah, I was behind her and – yeah.
>
> Where was she walking to?---Back to the bonfire where everyone else was.
>
> You followed her back?---Yes."

---

[14] Reasons at [27].

[19] His Honour observed the complainant's denial that she said, "Fuck it" and had consensual intercourse as described by the appellant.[15] The trial judge found that the appellant's version was also inconsistent with the complainant's cross examination evidence as to the presence of sand on her face, hair, chest and legs.

[20] The trial judge referred to the complainant's evidence that she returned to the others at the bonfire and heard the appellant say to one of the other boys, "Alright C your turn".[16] Another girl, Ka, also testified that [the appellant] said words along the lines of "C, it's your turn now". However, the appellant denied saying anything like that, and the trial judge remained "doubtful that the appellant uttered those words". The complainant also gave evidence, referred to by the trial judge, that:[17]

> "32. It all happened so quickly I couldn't believe it happened. I sat down on the sand and balled my eyes out. That's when the girls came over. I told L and De what had happened.
>
> 33. L called my big brother N and told him that I was upset and something had happened with [the appellant]."

Distressed condition

[21] The trial judge referred to the prosecution's reliance on evidence of the complainant's distressed condition in support of the evidence that the complainant was raped by the appellant.

[22] His Honour noted the evidence of one of the boys, F, that he saw the complainant:[18]

> "… came back probably five minutes later and then she wanted to leave. … she started kicking out the fire and saying, like – like, 'We're leaving.' And, yeah, she just looked, like – yeah, she just looked like she wanted to leave. [Asked how she looked] … A bit upset. ... Just kicking out the fire, just wanted to leave straight away. Didn't know why."

[23] His Honour observed that:[19]

> "Other similar observations were made by L, De, Da, Ka and C in varied perspectives to see the complainant's face at the beach, and later observations of the house. They variously described the complainant: walking (quickly with a large gait) or running, upset and angry, upset in the face, very shaken up, crying or tears in her eyes or watery eyes and not crying or breaking down in tears, head down, hands on her face, packing up and gathering our belongings, panicked, rushing through her words and was trying to pick up

---

15 Reasons at [28].

16 Reasons at [30].

17 Reasons at [31].

18 Reasons at [33].

19 Reasons at [34].

> everything really fast, and red marks on her legs and then she had, like, raised welts."

[24] His Honour noted the defence contention that there were other explanations for the distressed condition at the time, especially, for example, the complainant's expression of regret for her infidelity, or her disappointment in the appellant's premature ejaculation. However, the trial judge did not accept that submission, stating:[20]

> "It seems to me that the evidence shows the complainant's immediate, spontaneous and genuine distress on her return to the bonfire, which provides strong support of her account. It was a greater reaction and incongruous with the [appellant's] suggestion of regret or disappointment. And I am unable to discern any indicia of pretence on the complainant's part."

[25] His Honour referred to evidence that the complainant's brother arrived at the beach to collect the complainant and her girlfriends, after briefly confronting the appellant and his friends, and that:[21]

> "The complainant also testified about returning home, talking to her brother, friends, and calling a telephone helpline and police, before telling her mother and going to the hospital. As with the other girls, the complainant also stated that she showered because 'I just felt so dirty and disgusting. I just needed to wash it all off.'"

[26] His Honour referred to the complainant's description of her condition:[22]

> "47. My upper thighs had massive big red welts and are now bruised from where [the appellant] pulled my shorts down. I have the cut on my vagina and my vagina has been bleeding from the assault. In the hospital I was throwing up and I am still feeling constantly like I'm going to throw up again. I'm emotionally and physically drained from the attack I thought [the appellant] was my friend."

[27] His Honour noted that, during her evidence, the complainant marked areas of faint bruising on photographs taken some time later on 14 December 2017.[23] The complainant's mother also testified that when the complainant woke her in the early hours of 13 December 2017 she could see she had red welts across the front of her legs and red marks, and she demonstrated an area across the top of her thighs and front of her upper thighs.

Evidence of Dr Griffiths

---

20 Reasons at [35].

21 Reasons at [36].

22 Reasons at [37].

23 Reasons at [38].

[28] Evidence was given by Dr Griffiths, a medical practitioner employed by Queensland Health as a forensic medical officer, which was not subject to challenge or contradiction.

[29] His Honour observed that the doctor found no signs of injury, except redness that was in both of the inguinal (groin) areas, which he said the complainant had earlier identified, which was like "chaffing" and consistent with skin on skin rubbing.[24] The doctor found no injury to the complainant's vagina, but he considered this would not be uncommon in his experience.

[30] The signs of injury were significantly less obvious than, but were consistent with, those seen by the complainant's mother. The trial judge was satisfied that "those facts have been sufficiently established to afford significant weight to the doctor's opinion" and that there was "no other evidence, which casts doubt on his expert view".[25]

[31] The complainant's clothes were taken for DNA analysis on 13 December 2017. The DNA evidence was the subject of admissions.

Preliminary complaint

[32] The trial judge directed himself that the evidence of the preliminary complaint was to be considered for the limited purpose of assessing consistency or inconsistency of the complainant's statement or conduct[26] or to buttress, or otherwise, the complainant's credibility about the commission of the offence,[27] but that it had no probative value or capacity to independently prove anything.[28]

[33] The trial judge compared, for this limited purpose, the other witnesses' accounts as follows:[29]

> "(a) L testified about the complainant's [return] to the group after being away 'five. 10 minutes' saying – '… She was walking rapidly. … He was about a metre behind her. … She storms past the bonfire and sat down. … Upset and angry. … The way she was walking, you could tell she was angry and because she had her hands over her face, you could tell she was upset. … [De] and I walked up to [the complainant] and I sat on her left side and she sat on her right side. … She was crying. … I asked her what happened. … And then she said, "[The appellant] raped me."… I got up and grabbed her mobile phone and I called her brother, N. … we started packing up

---

24 Reasons at [40].

25 Reasons at [41].

26 *R v AW* [2005] QCA 152; *R v Foster* [2014] QCA 226.

27 *R v NM* [2013] 1 Qd R 374; *R v PAS* [2014] QCA 289.

28 *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4A; *R v Van Der Zyden* [2012] 2 Qd R 568; *R v S* [2000] 1 Qd R 546; *Papakosmas v The Queen* (1999) 196 CLR 297; *R v RH* [2005] 1 Qd R 180.

29 Reasons at [43].

the bonfire – Ka, Da, De, and I started packing up and gathering our belongings. … We walked up to the fence post, which is halfway between the sand and the Esplanade. … [the complainant] stopped and she said, again, "[The appellant] raped me." … She started crying.' (L also referred to a sketch of where exchanges occurred").

(b) De gave evidence about events following the complainant's [return] to the group – 'So maybe like around seven minutes later, she walked back from where she was, straight past the fire … […how did she look?] Distressed. … She wasn't making eye contact with us, she had her head down and she was walking – like, her steps were, like, big. … both L and I followed after [her] [And what did you say to her?] "Hey, what's wrong?" or something along those lines. … She was like, "I just got raped." … She was really upset. … Just like in the tone of her voice. … It was dark where we were – where she was sitting, but she had her head down and, like, her arms, like – her hands on her face.'

(c) Da described the complainant's absence with the appellant and her return after 'Around 20 minutes. …She ran back and just told us to pick up our stuff. [… how did she look?] … Panicked. … Because she was rushing through her words and was trying to pick up everything really fast. [Da did not see the appellant] … Then we got our stuff and we went up to where the grass area is and L called [the complainant's] brother. … We asked her what happened, and she started breaking down in tears and told us what happened. … She said [the appellant] grabbed her by the back of the neck, pushed her to the ground, ripped her shorts off of her and raped her. [Did you say anything to provoke that conversation?] … Yeah, I asked her what happened. She said, "He just raped me."'

(d) Ka also testified about the complainant's remarks when the complainant returned to the group saying – 'We were there for roughly 10 minutes and then [the appellant] walked back towards the group. … [The complainant] was upset. … She looked very shaken up and she had tears in her eyes. [Did she say anything while she was in the car?] Yes. … She said that he raped her. ... [the appellant]. … She was crying.'

(e) C, one of the boys, testified that when the complainant – 're-entered the group. …Couldn't have been too long. Say, five minutes, maybe. Between four to six, something like that. … I could see she, like – she wasn't the same as before she left. … Like, she wasn't crying but I could see .. she was upset in the face but, like. She didn't say nothing, that's how we didn't

know what was – we didn't know what was wrong at that time. She just looked to her friend and said we're going out of here. Started kicking sand on the fire. … Her and her friends went, like, back to the, I think, it was close to the car park. … but I spoke to her myself. … Well, I went up to her just to see, you know, what was going on … the boys weren't with me. I said, like, "What's wrong?" …She – It's hard to yeah, sort of, explain but yeah. She was sort of like your friend tried, like, pulling me down and fucking me. Push – holding me down and fucking me. … she was sad. … she wasn't happy. You know, she wasn't smiling, she wasn't smiling, she had like – yeah, I don't know. … I don't know how to explain something like,… she was upset. I'd say upset. [Asked how she displayed that she was upset] Maybe just her tone of voice, I could tell she was upset. Yeah, tone of voice. I could just tell she was upset, just from her tone of voice and she wasn't even really talking, so … she normally talks. … I'd seen her face …, her eyes might've been a little bit watery but she wasn't crying. So I didn't know what was going but her eyes … Might've been a little bit watery, yeah, but she wasn't crying.'

(f) Ka remarked about later at home saying – 'So she'd come into the bathroom, and we were all standing with her. She told us what had happened. She said that [the appellant] came up to her, asking to speak to her and – so she went for a walk with him, as she trusted him. She said that they eventually sat down to talk and he pushed her shoulder into the sand. … She said that he'd told him to shut up. … She said that he came. [And how was she when she was telling you?] She was crying. … [A]fter that he had told her to shut up and basically she just said that he had pulled down her pants and entered her.'

(g) During cross-examination Ka elaborated in answer to defence counsel's questions as follows:

> 'At [the complainant's] house, you have – you say that there was a conversation with [the complainant] in the bathroom with all of the girls present?---Yeah.
>
> You say [the complainant] told you that [the appellant] had asked her to go for a walk and they were – they had – they sat down together?---Yeah.
>
> And that he pushed her shoulder?---Mmm.
>
> You agree that she also told you that [the appellant] had – sorry. That – I withdraw that. That [the complainant] had kicked [the appellant]?---She had tried to pull out of his restraint. Yes.

> Yeah. That he pushed – pushed her shoulder and forced her face into the sand and said, "Shut up." And that she's then told you that, "I kicked him and tried to move away"?---Yes.
>
> Yeah, "And then he forced my pants down"?---Yeah.
>
> Okay, "And then I could feel him inside me"?---Yes.
>
> And that he came?---Yes.
>
> And the kick was before forcing the pants down?---Yes.
>
> In addition to calling the Kids Helpline and the police, [the complainant] also called her boyfriend?---I don't recall that. Sorry.'

(h) De also testified about events at the house: '…So when we went back, [the complainant] was confused on what to do and we tried comforting her and we told her to tell her mum what happened and ask her what to do. … She was, like, upset. She didn't know what to do. … She said she just – she thought they were going to talk and then as soon as they got there, he pulled down her pants and his pants and then he did – he did it. … "He put his wet dick in me." The first person she called was her boyfriend. … a kids helpline.'

(i) During cross-examination De further testified in answer to defence counsel's questions as follows:

> 'When all of you girls were back at [the complainant's] house and she told you what happened, you were all together as a group when that happened?---Yes. Yes.
>
> And was that in the bathroom?---Yes, the bathroom and outside in the living room.
>
> And did she – did [the complainant] say to you, when she was telling you what happened, that she was walking along the beach with [the appellant] and they chose to sit down?---Yes.
>
> That you talked about he placed his wet thing inside her. Did – before that, did she tell you that she'd kicked him before he tried to – or before he did put his wet thing inside her?---I can't remember now but that's all I remember her saying that he stuck it in.'

(j) L also spoke about events at the home saying – 'We all had a shower. … She had a shower also and then she was sitting in the lounge room. … She called her boyfriend at the time. … She also – also called Lifeline and Lifeline told her to hang up and call the police.' During cross examination L further

elaborated in answer to defence counsel's questions as follows:

> 'When you got back to [the complainant's] house, was there a point in time where [the complainant], yourself, and all the other girls were in the bathroom?---Yes.
>
> And [the complainant] was telling you what she said happened between her and [the appellant]?---Yes.
>
> And you recall her saying along the lines of [the appellant] had come to her and told her that he needed to tell her something?---Yes.
>
> And so she went for a walk with him?---Yes.
>
> You agree?---Yeah.
>
> And that they walked down the beach and then they chose to sit down together?---Yes.
>
> And then that he pushed her shoulder and forced her into the sand - - -?---Yes.
>
> - - - said, "Shut up"?---Yes.
>
> She then kicked him - - -?---Yes.
>
> - - - and tried to move away?---Yes.
>
> And it was at that point then he forced her pants down - - -?---Yes.
>
> - - - and had sex with her?---Yeah.'

(k) In her evidence, Da remarked that once at home – '… [the complainant] had a shower and then she called Kids Helpline and Lifeline.' She was apparently out of earshot of other conversations.

(l) The complainant's brother, N, testified how the complainant woke him after he brought the girls to the house. He said – 'Later that night, she texted me to see if I was awake. She then came and knocked on my door and then I had a chat with her then … about 2 am. … [the complainant] just asked me if I could take her into hospital to get a rape test. … I told her to go wake mum up. … She said she didn't want mum to know, but I insisted that she go and wake mum up.'

(m) The complainant's mother testified that the complainant woke her just after midnight into 13 December 2017. She described the complainant was sitting on the side of the bed crying and told her that something bad had happened and that she'd been raped. She also recalled the complainant saying that it

> 'happened so fast and – and that's when she told me that [the appellant] had raped her.' In cross-examination she said: 'She had red marks on her legs and then she had, like, raised welts. She told me that that's where [the appellant] forced her shorts down so it was from that force that had like raised welts from the – the shorts being forced down.'"

[34] The trial judge found that, when comparing those accounts with the evidence of the complainant, in the limited way permitted, the accounts of the complainant's immediate complaints, conduct and flight from the beach were "entirely consistent with the complainant's evidence in relation to the conduct subject of count 2".[30]

[35] The defence counsel argued that all accounts differed between the preliminary complaint witnesses. In that regard, amongst other differences, defence counsel pointed to Ka's reference (and affirmed by L) that the complainant said that in the secluded area they chose to sit down and that she kicked him before he tried to or before he penetrated as being disordered and inconsistent with the complainant's version.

[36] His Honour found:[31]

> "Inconsistencies as between the witnesses and vis-à-vis the complainant's evidence do emerge in the accounts at the house. The mere existence of inconsistencies does not mean that of necessity I must reject the complainant's evidence. Some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time. So much is clear when comparing the accounts at the beach to those at the house, and when comparing the accounts of N, the girls and the complainant's mother. Contextually, at the house, the complainant's friends (Da, De, Ka and L) were focused on consoling and counselling her about what to do, including calling the help line and telling her mother. As defence counsel described the atmosphere was of '*big drama*'. It seems to me that that dynamic accounts for the recipients of her complaint, although all present to hear her, being less focused on the detail of her complaint, not being present at the same time, and recalling [slightly] different versions. However, the accounts of the other witnesses are still confined to the conduct relied upon in count 2."

[37] Taking those matters into account, his Honour found that the other witnesses' accounts of the complainant's statements and conduct buttressed the complainant's credibility about the commission of the offence especially in relation to count 2.[32] In particular, the nature and extent of those events "apparently overwhelmed the earlier conduct relied upon for count 1".

---

30 Reasons at [44].

31 Reasons at [46].

32 Reasons at [47].

Cross examination as to motive to lie

[38] His Honour referred to the cross examination of the complainant as to a motive to lie in her account of the appellant's conduct, in particular that the account "was spawned by the complainant's personal embarrassment and regret for her infidelity, or her disappointment in the [appellant's] premature ejaculation".[33] His Honour considered that "the complainant's immediate and spontaneous reaction to the events as she did with returning to the bonfire with haste, emotional distress with her face in her hands, disclosure of the offending conduct, packing up and leaving" were disproportionate and incongruous to the motives attributed by the defence.[34]

[39] His Honour also rejected defence counsel's argument that the complainant's initial complaint had set the matter on a course that could not be stopped.[35] His Honour observed that there were multiple opportunities for the complainant to retreat from or stop an insincere complaint, "she need not have made the help line call, or woken her brother or her mother, or even attended hospital for intimate examination".[36] His Honour thus rejected the motive to lie put forward on behalf of the defence.

[40] His Honour rejected the contention that the complainant's testimony and conduct was "nonsensical", finding:[37]

> "She did withstand the rigour of cross-examination, and her version was entirely plausible having regard to her tactile character, friendship with the [appellant], disinhibited state and immediate complaint and distressed condition."

[41] In particular, in finding that the complainant was both truthful and reliable in her evidence, his Honour stated:[38]

> "[The complainant's] written statement to police recorded causative events at the earliest opportunity, and it was essentially consistent with her pre-recorded evidence, preliminary complaints, and physical presentation. The accounts of the preliminary complaint witnesses are not infallible indicators of the complainant's reliability. In my view the nature and extent of the inconsistencies do not warrant the rejection of the complainant's evidence. It seems to me that some inconsistency, cross-pollination and blurring is to be expected in the unusual circumstances of this case where the complainant spoke to others together and in groups over a short time. The complainant impressed me as a trusting, straightforward, sincere, unrehearsed, spontaneous, honest and reliable witness. Her account on critical maters

---

33 Reasons at [48].

34 Reasons at [50].

35 Reasons at [50].

36 Reasons at [50].

37 Reasons at [52].

38 Reasons at [53].

> was generally consistent with the other witnesses who were present from various perspectives and distances, and other objective and expert evidence."

Appellant's evidence

[42] His Honour, having directed himself appropriately as to the fact of the appellant giving evidence, observed:[39]

> "This is a case often described as one of 'word against word'. But this does not call for a choice of the competing evidence as between the complainant and the [appellant]. Indeed, it is not a pre-requisite to an acquittal for the [appellant] to be believed.
>
> The [appellant] presented as a calm and rehearsed witness, but I think he exaggerated the mutuality of the complainant's lewd conduct. I find myself unconvinced about the [appellant's] evidence after comparing it to other evidence, including the complainant's evidence, which I do accept for the reasons discussed above. I'll set it aside, and consider on the rest of the evidence whether I was satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence."

Ground 1: The trial judge erred in his determination of the relevance of distressed condition

Appellant's submissions

[43] The appellant argued that the trial judge erred in his determination of the relevance of distressed condition on the basis that his Honour stated that the evidence of distressed condition provided "strong" support of the complainant's account.[40] That was said to be an error of law because, if evidence of distressed condition is found to be genuine, that evidence may only be used as evidence that "supports" the complainant's account.[41] Further, his Honour failed to direct himself in accordance with Benchbook Direction 67.1. Relevantly, his Honour failed to articulate that he had considered whether "little weight" should be attached to distressed condition because it can be easily pretended. It was accepted that the trial judge did state that the distressed condition was "genuine" and, hence, must have considered whether it was something other than genuine, namely that it was pretended.

[44] By referring to the complainant's evidence of distress as "strong", his Honour erred as to the weight and relevance that could be given to distressed condition in the overall assessment of a complainant's account. Given the nature of the evidence at trial, in particular the evidence relating to intimacy being observed between the complainant and appellant only a short time prior to the act of sexual intercourse occurring, the use of the word "strong" was an erroneous finding of fact as to the weight of the evidence of distressed condition. It was submitted that in a case of

---

39 Reasons at [56]-[57].

40 Reasons at [38].

41 See *R v Rutherford* [2004] QCA 481 at [32]; Queensland Benchbook Direction 67.1.

"word against word", and where, as was asserted to be the case here, the evidence did not support the complainant's account in important respects, such as what occurred at the water's edge, the trial judge erred in placing too much weight and relevance on the complainant's distressed condition when she returned to the bonfire.

Consideration

[45] In *R v Roissetter*,[42] McPherson J made the following cautionary observations in relation to evidence of distressed condition:

> "At the foundation of the court's reluctance to allowing evidence of a distressed condition to be left to the jury without some particular warning as to its reliability there is evidently a fear that the condition in question may be feigned so that the jury may be led astray by a consideration of it. Such distrust hardly seems compatible with the traditional role of the jury as the assessors of matters of credibility and fact at a criminal trial. To require even that, unless the circumstances are 'special', there be a specific warning in particular terms against relying upon evidence of distress as a possible form of corroboration has the effect of elevating to the status of a rule of law a matter which in the end, is necessarily and entirely one of fact or inference or simply credibility."

[46] The following remarks made by his Honour as to the use of evidence of distressed condition capable of affording corroboration are apposite in the present case:[43]

> "… the matter of the inferences if any to be drawn from, and the weight if any to be allowed to, a state of distress in a complainant is pre-eminently one for the jury. No fixed verbal formula is capable of being laid down for determining what direction should be given by judge to jury, or whether any specific direction as to the weight or lack of it is necessary or desirable in a particular case."

[47] The appellant does not dispute the finding by the trial judge that the complainant's distressed condition could support or corroborate the complainant's evidence. It seems that the appellant's complaint was that the trial judge did not inform himself that "little weight" should be attached to distressed condition because it can be easily pretended as is contained in the Benchbook direction.[44] As is apparent from *Rossiter*, such a direction is not mandatory. Furthermore, as the respondent submitted, while the particular risk that the direction is concerned to mitigate may not be apparent to a jury, it would be known, and was known, by the trial judge in this case.[45] It is not claimed that the omission gave rise to a miscarriage of justice. The trial judge excluded the other possible explanations for the complainant's

---

42 [1984] 1 Qd R 477 at 482.

43 *R v Roissetter* [1984] 1 Qd R 477 at 482.

44 Benchbook Direction 67.1 – distressed condition.

45 *R v McDougall* [1983] 1 Qd R 89 at 91 [E] and *R v GS* [2005] QCA 376 at [33].

distressed condition.[46] It was a matter for the trial judge, as the relevant fact finder, to assess the weight to be attributed to distressed condition. Limiting the treatment of evidence of distressed condition in the manner contended for by the appellant is not supported by authority. The trial judge's finding of fact that the evidence of distressed condition provided "strong" support for the complainant's evidence was one that was open to his Honour.

[48] There is no basis for this Court to interfere with that finding. His Honour distinguished between the support that evidence of distressed condition may provide as a matter of law and the weight his Honour considered appropriate to accord that evidence in the present case as a matter of fact.

Ground 2: The trial judge erred in determining that "significant weight" should be afforded to the doctor's opinion

Appellant's submissions

[49] This ground concerned evidence given by Dr Griffiths that the only injury he observed was redness which was like "chaffing" and consistent with "skin on skin rubbing". The appellant argued that it was unclear why or how his Honour considered that "significant weight" should be afforded to the doctor's opinion, given that the doctor did no more than note that there was redness to the groin which could have been consistent with either the complainant or the appellant's version. The appellant placed emphasis on the complainant's failure to complain to the doctor and the doctor's failure to observe any other injuries she gave evidence of having suffered; bruising from where her shorts were pulled down, a cut to her vagina and bleeding.[47] The complainant stated in her evidence that she had a cut and her vagina had been bleeding.[48] It was contended that, in those circumstances, there was nothing to attach "significant weight" to in respect of the doctor's evidence.

[50] A further complainant was that the trial judge dealt with evidence of the "injuries" under the heading of distressed condition. The "injuries" are not evidence of distressed condition but needed to be separately considered as to whether they provided support for the complainant's account.

Consideration

[51] Despite the omission of a separate heading, the reasons do not suggest that the trial judge considered the complainant's or the doctor's evidence when arriving at his conclusions in respect of the evidence of distressed condition.[49]

[52] His Honour's finding that "significant weight" should be afforded to the doctor's evidence is to be considered with regard to the "expert evidence direction" of which

---

46 Distinguish *R v Rutherford* [2004] QCA 481 at [4] and AB at 198 [35].

47 Reasons at [47].

48 AB2 at 155.30-35.

49 Reasons at [35].

his Honour informed himself.[50] The doctor's opinion, summarised in his Honour's reasons, was that it is not "uncommon in his experience" where a sexual assault was alleged that no injury to the complainant's vagina was found.[51] It is also important to bear in mind that a good deal of emphasis was placed by defence counsel on the absence of injury. As the respondent submitted, his Honour's finding may be understood as also directed to the doctor's opinion concerning the absence of injury, which he accorded "significant weight" to in view of the doctor's accreditations, experience and independence.

Ground 3: The guilty verdict was unreasonable and cannot be supported by the evidence

Appellant's submissions

[53] It was contended that, on the evidence, it was not open to the trial judge to have been satisfied beyond reasonable doubt that the appellant was guilty.[52] In that regard, it was submitted that the complainant's evidence was contradicted in a number of important ways, in particular the intimacy displayed between her and the appellant prior to walking away from the group. In addition, the appellant submitted that the trial judge rejected the complainant's evidence in two important respects, which it was said substantially undermined the complainant's credibility, these being the complainant's evidence that the appellant had touched her on the buttocks at the bonfire[53] and that the appellant said on returning to the bonfire "C, it's your turn now".[54] The rejection of the complainant's evidence on those matters was said to be of material significance to the complainant's overall credibility, since they concerned important pieces of evidence as to the appellant's actions both prior to and after the alleged offending.

[54] The appellant also contended that it was not open to the trial judge to be satisfied beyond reasonable doubt that the appellant was guilty when regard was had to the evidence of pre-existing mutual attraction between the complainant and appellant (the complainant admitted in cross examination that they had previously mutually kissed) and the evidence of witnesses that the complainant and appellant were lying down together at the bonfire being intimate. Further, it was submitted, that the complainant appeared to have consumed more alcohol at the party than she admitted to, including the way in which she measured the alcohol and there was evidence that the complainant was acting in a disinhibited way at the gathering.

[55] It was argued that the complainant's evidence of any contact being forced on her could not be accepted as credible. The complainant's account of how she came to be at the water's edge was inconsistent with the evidence of other witnesses, who observed the complainant and appellant being intimate at the water's edge (such that the comment was made for them to "go get a room"). The appellant also pointed to

---

50 AB2 at 177.33-37, the trial judge indicated that he needed to be cognisant of the expert evidence direction. Benchbook Direction 58.1 - expert witnesses.

51 Reasons at [40] and evidence AB2 at 159.1-7.

52 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v the Queen* (2002) 213 CLR 606 at 615.

53 Reasons at [14].

54 Reasons at [30].

what was said to be the implausibility of the complainant's account that she would go into a remote area with the appellant if he had been violent to her at the water's edge (which was not observed by any witness). Further, the complainant's admission that the appellant "asked her for a fuck" was said to be materially inconsistent with the complainant's version of events and that there were inconsistencies between the preliminary complaint evidence and her other evidence. In addition, to the extent that the evidence of the complainant's friends supported her account, they could not be accepted as credible and reliable, given the whole of their evidence and that they did not accept material points that were potentially adverse to the complainant that even the complainant admitted occurred. Any distressed condition had other possible explanations, such as regret. There was no medical evidence to support the complainant's account that she had a cut to her vagina and was bleeding, and the minor redness to the complainant's groin was equally consistent with consensual sexual intercourse as described by the appellant.

Consideration

[56] In relation to the appellant's contention that the verdict of the trial judge was unreasonable or cannot be supported having regard to the evidence, it is necessary for this Court to undertake an independent review of the record and to determine whether it was open, upon the whole of the evidence, for his Honour to be satisfied beyond reasonable doubt of the appellant's guilt.[55] In so doing, this Court is required to allow special respect and legitimacy for his Honour's verdict as the finder of fact.[56] Setting aside a verdict on this ground is "a serious step, not to be taken without particular regard to the advantage enjoyed by the judge over a court of appeal which has not seen or heard the witnesses called at trial".[57]

[57] I am unable to accept the argument that the conclusion that the complainant was mistaken as to the appellant touching her buttocks rendered her evidence incapable of belief, particularly, as the respondent submitted, her evidence that another person was touching her buttocks was supported by another witness. His Honour's finding did not require him to reject the complainant's evidence of not consenting to intercourse or the conduct of the appellant constituting the rape. Likewise, so far as concerns the trial judge's rejection of the complainant's evidence that the appellant said following the rape, "C, it's your turn", that finding did not compel a conclusion that the complainant's evidence in its entirety should be rejected. His Honour was entitled to conclude that the complainant's evidence was relevantly consistent internally.

[58] Such matters as the inconsistencies in the complainant's evidence, for example, such as the number of hands the appellant had around her neck when he forcibly kissed her, the weight to be given to the evidence, such as it was, of an alleged pre-existing romantic relationship between the complainant and the appellant, the extent to which the complainant was intoxicated and its effect on her reliability, were for the trial judge as the arbiter of fact to determine. His Honour's finding that the

---

55 *M v The Queen* (1994) 181 CLR 487 at 493 and 494.

56 *MFA v The Queen* (2002) 213 CLR 606 at [59].

57 *R v Baden-Clay* (2016) 258 CLR 308 at 329.

complainant's intoxication was not such as to impair her memory or to cause her to lose control were open on the evidence.

[59] As already mentioned, it was open to the trial judge to find that the complainant's evidence was corroborated by the evidence of others as to her distressed condition and, in that regard, that the evidence of the complainant's spontaneous and immediate distress provided strong support of her account. Further, as the respondent submitted, the evidence of distressed condition was exhibited before her disclosure of what had occurred and, on the evidence, was what prompted inquiry by the complainant's friends. His Honour was also entitled to take into account, in her favour, that the complainant was candid in making concessions regarding her disinhibited behaviour. While there were some differences in their evidence, as the respondent submitted, there was no compelling reason to resolve inconsistencies between the complainant and the appellant's friends in favour of the latter, given their bias and the inconsistency between them and the appellant.

[60] The finding that the complainant did not consent to digital penetration, but that the appellant had an honest and reasonable belief that she did, was open to the trial judge, given that the complainant followed the appellant willingly down the beach despite his forceful advances. As the respondent submitted, after the complainant's voicing and demonstrating her lack of consent to digital penetration, it was open to the trial judge to find that an honest or reasonable belief that she was consenting to penile penetration of her vagina had been excluded. It was thus open to his Honour to acquit the appellant of count 1 but to convict him on count 2.

[61] On my own independent review of the evidence, there is no warrant to interfere with the conviction on the basis that it was unreasonable or could not be supported by the evidence.

Order

[62] In my view, the appeal against conviction should be dismissed.

[63] **BODDICE J:** I agree with Philippides JA.