SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCI* [2019] QCA 202
PARTIES:	**R** **v** **CCI** (appellant)
FILE NO/S:	CA No 325 of 2018 DC No 264 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 29 November 2018 (Chowdhury DCJ)
DELIVERED ON:	4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2019
JUDGES:	Sofronoff P and Mullins and Davis JJ
ORDERS:	**1. Allow the appeal.** **2. Quash the convictions.** **3. Order a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of two counts of rape – where photographs of extracts of the complainant's diary were admissible under s 93A of the *Evidence Act* and tendered during the trial – where the jury were shown the evidence of the complainant's diary again after they had retired – where the trial judge gave the jury a direction as to the use to be put to the diary evidence – whether the learned trial judge erred by not referring the jury specifically to the cross examination of the complainant on the diary APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES INVOLVING MISCARRIAGE – MISDIRECTION – where the appellant made statements the morning after the alleged offence denying the offending – where the statements could only be proved to be lies by proof of the charged offences – where the Crown prosecutor put to the jury that the statements of denial were lies and showed a

consciousness of guilt – whether the learned trial judge erred by leaving to the jury the conduct and statements of the appellant the morning after the offence as post-offence conduct – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the Crown case was dependent upon acceptance by the jury of the evidence of the complainant – where the appellant submitted that it was not open to the jury to accept the complainant's evidence beyond reasonable doubt having regard to all of the evidence and competing arguments – whether it was open to the jury to find the appellant guilty

Criminal Code (Qld), s 668E
Evidence Act 1977 (Qld), s 21AK, s 93A

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, followed
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, followed
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, followed
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Coughlan [2019] QCA 65, followed
R v FAE [2014] QCA 69, cited
R v GAO [2012] QCA 54, cited
R v PBA [2018] QCA 213, cited
R v SCG [2014] QCA 118, cited
R v Tesic [2019] QCA 195, cited
R v Zheng (1995) 83 A Crim R 572, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: C F C Wilson, with K E McMahon 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 the reasons of Davis J and the orders his Honour proposes.

[2] **MULLINS J:** I agree with Davis J.

[3] **DAVIS J:** On 29 November 2018 the appellant was convicted by jury[1] in the District Court at Beenleigh of two counts of rape[2] committed upon his biological granddaughter.

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1 On a retrial; a jury in April 2018 having been unable to agree on verdicts.
2 *Criminal Code* s 349(1), (2)(b).

[4] He appeals against those convictions.

Background

[5] The complainant was 14 years of age at the time of the events the subject of the indictment. She lived with her three sisters, her mother and her stepfather.

[6] About two weeks before the events in question, the complainant's nuclear family moved to a new home in Shailer Park.

[7] On 3 October 2014 there was a gathering at the new home. Present was the complainant, her sisters, her mother, her stepfather and the appellant and his wife, the complainant's grandmother.

[8] During the evening the adults were drinking. The family were dancing on the deck and bathing in the spa. When everyone retired for the evening, the appellant's wife shared a bed with the complainant's older sister in her room and the appellant slept in a bed with the complainant in the complainant's room. The sleeping arrangements of the others in the house is not relevant.

[9] The complainant alleged that in the early hours of Saturday 4 October 2014, some time before sunrise, the complainant awoke to the appellant licking her vagina[3] and penetrating her with his finger.[4] When the complainant protested, the appellant left the room. The complainant then went into the room occupied by her grandmother and older sister and made complaint to her grandmother.

[10] The complainant's mother saw the appellant, her father, at about 7.00 am the next morning (Saturday) pacing on the deck and looking agitated. The appellant told his daughter that "[the complainant] was acting crazy and nuts and I had to leave the bedroom to tell my wife to sleep with [the complainant] instead of me because of what she was saying."[5] He also had a conversation with his son in law when he said "[the complainant's] crazy. She's lost it. I woke up to her screaming. She had no underpants on so I got angry with her. Threw her underpants back at her, told her to put them back on. And then I left the room."[6]

[11] Later on Saturday the appellant and his wife left the house. The complainant made complaint to two of her sisters and then to her mother. Police then became involved.

The course of the trial

[12] As the complainant was a child, statements made by her contained in a document are admissible by force of s 93A of the *Evidence Act* 1977. There were three such documents.

[13] In the first recorded interview with police made on 11 October 2014 (the complainant's first s 93A statement),[7] the complainant described how she had been raped by the appellant. She said that she could see what the appellant was doing

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3 Count 2 on the indictment.
4 Count 1 on the indictment.
5 Transcript 1 - 41.
6 Transcript 2 - 7.
7 Exhibit 1; a transcript is MFI "B".

because she had a bedside lamp which had been turned on.[8] The complainant later told her mother that her statement that the lamp was on was untrue.

[14] A second interview with police to explain the story about the lamp was conducted on 15 December 2014 (the complainant's second s 93A statement).[9]

[15] Some short time after the events in question the complainant wrote a version in her diary. This was correctly treated as a statement admissible under s 93A of the *Evidence Act*. At common law the diary would be treated as a prior consistent statement only admissible if the complainant's evidence was challenged as a recent fabrication.[10] Section 93A made her statement admissible in proof of the truth of what the complainant said. Photographs of extracts from the diary were tendered.[11]

[16] Given the age of the complainant and the nature of the charges against the accused, the complainant was an "affected child" for the purposes of the *Evidence Act* and gave evidence which was recorded before the trial (the pre-recorded evidence).[12]

[17] The complainant's younger sister, to whom she had made complaint gave a statement which was also admissible by force of s 93A of the *Evidence Act*. That statement was admitted in the trial[13] but she did not give evidence and was not cross examined.

[18] The complainant's older sister to whom she had also made complaint was 16 years of age at the time of the incident the subject of the indictment and almost 20 years of age at the time of the trial. She was called at the trial, sworn and gave evidence.

[19] The complainant's mother gave general evidence about the family gathering on 3 October 2014, gave evidence of the complaint made to her by the complainant, and gave evidence of the conversation with the appellant on 4 October 2014.

[20] The complainant's stepfather gave some general evidence and evidence of his conversation with the appellant on 4 October 2014.

[21] A police officer gave short evidence proving the photographs of the complainant's diary and produced a diagram of the house prepared in her presence by the complainant's younger sister.

[22] Apart from the recordings pursuant to s 93A and 21AK of the *Evidence Act*, the photographs of the complainant's diary, and the diagram drawn by the complainant's younger sister, the only other exhibits were various photographs of the house and the complainant's clothing.

[23] The appellant did not give evidence and did not call any witnesses.

The grounds of appeal

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8 Appeal Book 231 - 232.
9 Exhibit 2; a transcript is MFI "C".
10 *Nominal Defendant v Clements* (1960) 104 CLR 476 at 479.
11 Exhibit 7.
12 *Evidence Act* 1977 s 21AK, Exhibit 3 and Transcript MFI "D".
13 Exhibit 8; Transcript MFI "E".

[24] By an amended Notice of Appeal, three grounds were raised and subsequently argued. They are:

> "1. A miscarriage of justice was caused because the Judge erred by not directing the jury to the cross-examination about the account contained in the complainant's diary.
>
> 2. A miscarriage of justice was caused because the Judge erred by leaving to the jury the conduct and statements of the appellant the morning after the offence as post-offence conduct.
>
> 3. The verdict was unreasonable and cannot be supported by the evidence."

[25] Grounds 1 and 2 rely on "the miscarriage of justice" ground prescribed by s 668E of the *Code*, and ground 3 relies on two grounds namely that the verdict "was unreasonable" and that it "cannot be supported by the evidence", which grounds are often considered together.[14]

Ground 1: Failure to give a direction concerning the diary

[26] There was no mention of the diary in the complainant's first s 93A statement but there was mention of it in the second. There, this was said:

> "SCON STACE:[15] And speak to you. Um one more thing I'm sorry about that I forgot, um I spoke to your mother as well and she told me about your diary, tell me about the diary?
>
> COMPLAINANT: I don't know I just, I just wrote some stuff down.
>
> SCON STACE: Tell me about what you've written?
>
> COMPLAINANT: I just wrote what happened and stuff.
>
> SCON STACE: Ah what happened, what do you mean what happened?
>
> COMPLAINANT: I was, I just wrote that about that night and then how, and now, and how I feel.
>
> SCON STACE: Which night are we talking about?
>
> COMPLAINANT: Um the night when granddad came over our house and it all happened.
>
> SCON STACE: Hm hm. And when did you write about it?
>
> COMPLAINANT: Ah I wrote about it after it happened.
>
> SCON STACE: How soon after?
>
> COMPLAINANT: Um probably a week after.
>
> SCON STACE: What makes you think it was about a week after?

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14 *SKA v The Queen* (2011) 243 CLR 400 at [11] - [14], *MFA v The Queen* (2002) 213 CLR 606 at [58], *R v Coughlan* [2019] QCA 65 at [291] - [295].

15 A reference to Senior Constable Natalia Stace, a detective stationed at the Logan District Child Protection and Investigation Unit.

COMPLAINANT: I don't know I just, I'm positive it was a week.

SCON STACE: Hm hm. And you said that you wrote about your feelings and, was it just, did you write about the feelings or --

COMPLAINANT: Yeah.

SCON STACE: Something else, or you described what actually happened then?

COMPLAINANT: Oh yeah I described what happened and then I wrote the feelings.

SCON STACE: Hm hm. Did you show the da, diary to anyone?

COMPLAINANT: Um no I kept it to myself.

SCON STACE: And describe the diary to me please that you wrote in?

COMPLAINANT: Pardon?

SCON STACE: Describe the diary to me that you used to write your thing, your feelings in?

COMPLAINANT: Oh describe what the diary looked like?

SCON STACE: Hm hm.

COMPLAINANT: It's just black with red.

SCON STACE: Black with red?

COMPLAINANT: Yeah.

SCON STACE: Where is red?

COMPLAINANT: The corners.

SCON STACE: Hm hm. Um did you show this diary to anyone?

COMPLAINANT: No.

SCON STACE: How did mum know about it?

COMPLAINANT: Um she, my diary was sitting on my bed one day because I forgot to put it away.

SCON STACE: Hm hm.

COMPLAINANT: And my mum saw it saw some stuff and yeah.

SCON STACE: Mm. Did you speak to her about it?

COMPLAINANT: Um no."

[27] Photographs of the diary were admitted through the complainant in her pre-recorded evidence. Various photographs of the house were shown to her and tendered:

> "MR CHURCHILL: Now, just some more photographs, [complainant]. Just a few more. Did you, around the time that you say these things happened to you, did you keep a diary?---Yes, I did."

[28] The complainant was then shown five photographs of the diary and these were admitted. At the trial, the relevant passages appearing in the diary were displayed on a projector and read to the jury:

> "Everything seemed so good until everything came crashing down on Friday the 3rd of October. This is about my granddad and how close we were and how he tore apart everything. All the trust I've had for him is now ruined. So on this Friday, he and nan came over. We were supposed to have a fantastic night, which we did with a hot spa, and me and granddad were dancing on the deck afterwards until midnight came and we decided to go to bed.
>
> But during the night, early in the morning, approximately 1.30 to 2, I felt an uncomfortable pain which I woke up from. I saw my granddad at the end of the bed doing stuff down there using his tongue and fingers. I was shocked and I couldn't believe my eyes. Just a minute later, granddad had just noticed I woke up. I put my head down and said, "What are you doing" and I started crying my eyes out. He kept saying how crazy and weird I was and he said I was dreaming. He walked out my door and yelled, "Go to bed, go to bed. I will sleep on the couch and you sleep in here". I told him that I couldn't sleep because I was scared.
>
> I walked in [older sister's] room where nan was sleeping. I woke her up crying. Nan said what was wrong. Before I could say anything, granddad had interrupted me, so I locked myself in the bathroom for hours. I heard something so I came out and saw my stepdad…, who came out of bed and walked out on the deck. After that I went back into my room and sat on my bed. From then I fell asleep. From all this that had happened that night had made me feel disappointed that our trust was broken - very shocked and sad. Life will never be the same again."

[29] The learned trial Judge then gave a direction in these terms:

> "HIS HONOUR: Thank you. Ladies and gentlemen, you'll have the photographs with you when you retire to consider your verdicts, but you saw the photographs as they went through on the screen. And the parts of the diary that were just read out by my Associate forms part of the evidence of [the complainant] as well. But you appreciate, of course, that [the complainant's] evidence is seriously challenged by the defence. Thanks. Yes, Mr Muir[16]."

[30] The complainant was cross examined in the pre-recorded evidence about the diary but only very briefly:

> "Okay. You've also been shown that diary?---Yep.
>
> When did you write that entry?---I wrote that - I don't exactly remember but I think it was a week from when it happened.

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16 The Crown Prosecutor.

> Okay. And how long was it in between the night of the incident and when you spoke to the police?---I - I don't remember. I think it was - I don't remember. Sorry.
>
> Was the diary written before or after you went to the police?---I also don't remember."

[31] The only mention of the diary in the summing up was during his Honour's summary of the respective addresses of counsel. His Honour reminded the jury of the Crown Prosecutor's submission that the diary showed a consistency in the version of the complainant. The Judge told the jury in the summing up that all exhibits would be with them in the jury room. Later, when reminding the jury of the Crown Prosecutor's submissions, his Honour told the jury specifically that the photographs of the diary would be with them during their deliberations.

[32] After the jury retired at 3.07 pm this exchange occurred:

> "HIS HONOUR: Any redirections?
>
> MR McGHEE[17]: I have no redirections, your Honour.
>
> HIS HONOUR: Mr Muir?
>
> MR MUIR: No, your Honour. My learned friend and I were discussing the photographs of the diary.
>
> HIS HONOUR: Yes.
>
> MR MUIR: Before they watched it with them. I suppose, ultimately, they are 93A statements, so on that basis they should stay here - - -
>
> HIS HONOUR: All right.
>
> MR MUIR: - - - as opposed to going in there. And it could be read aloud quite quickly and easily anyway, so - - -
>
> HIS HONOUR: Yes. And so – did I make some mention that they might have those photos with them? I can't recall.
>
> MR MUIR: I think your Honour did just – just now, sort of five – five, ten minutes.
>
> HIS HONOUR: Yes. Do you - - -
>
> MR MUIR: As part of – sorry, your Honour.
>
> HIS HONOUR: Do you want me to bring them in and just explain that they won't be having them, or just leave it alone?
>
> MR McGHEE: I think at this stage they can be probably left alone.
>
> HIS HONOUR: Yes, all right.
>
> MR MUIR: If there's a question about it then it can be read aloud and explained - - -
>
> HIS HONOUR: Yes, that's true.

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17 Defence Counsel.

MR MUIR: - - - at that time. I'm satisfied with that, your Honour."

[33] A note from the jury was received at 3.38 pm and at 3.39 pm the jury returned and this occurred:

> "HIS HONOUR: Thanks. Ladies and gentlemen, I've got your note that you'd like to see the photographs of the diary. I may have mistakenly said to you in my summing up that you'll have those photographs with you. But that's wrong. Because they constitute part of the evidence of the complainant, under the law they can't go in the jury room. But you're entitled, of course, to see them here in court and have my associate read it out to you again. So that's what we'll do. So what exhibits were they? All right. So ladies and gentlemen, I'll get my associate to read out what the diary says. And then if you want to actually see it up on the visualiser for yourselves, just let me know. Thanks, Madam Associate."

The entries in the diary were read to the jury and then his Honour continued:

> "HIS HONOUR: So, ladies and gentlemen, I might just put all of that up on the visualiser so you can see for yourselves. Just leave it there for a minute, Mr Muir.
>
> MR MUIR: Yes. Thank you, your Honour.
>
> HIS HONOUR: Perhaps – can you just enlarge it a bit? All right. Thanks. Can everyone see that clearly? I'll just leave it up there for a minute so you can read it. Has everyone read that? All right. We'll put the next photograph up. Has everyone had a chance to read that now? Thanks. May we have the next photograph. All right. Everyone's had a chance to look at that? You'll recall that at the commencement of [the complainant's] recording of her evidence in court, the then-Prosecutor showed her those photographs. And her evidence was that that was from her diary. And that seems to be all the evidence about the diary. Was there anything else in cross-examination about the diary that counsel can recall?
>
> MR McGHEE: Not that I can recall, your Honour.
>
> HIS HONOUR: All right.
>
> MR MUIR: Only the detail that the complainant wasn't sure whether she made the entry before or after her first police interview. That's the only thing that - - -
>
> HIS HONOUR: Was that in cross-examination?
>
> MR MUIR: No, your Honour. I think that was in the second of the two police interviews?
>
> HIS HONOUR: Was it?
>
> MR MUIR: So it was made some – approximately a week after the incident.
>
> HIS HONOUR: I'll just have a look. I just want to – just remind the jury of what- - -

MR MUIR: Page 9, your Honour, of the transcript.

HIS HONOUR: Thanks for that, Mr Muir.

MR MUIR: The second interview.

HIS HONOUR: So it's in her second interview with - - -

MR MUIR: Police.

HIS HONOUR: Detective Stace said she wrote about her diary. She wrote what happened and stuff. She wrote it – about it after it happened. Probably a week after.

Question:

What makes you think it was about a week after?

Answer:

I don't know. I'm just – I'm positive it was a week.

She described what happened. When asked if she'd shown the diary to anyone else she said:

No, I kept it to myself.

Thanks. Ladies and gentlemen, I just need to give you a direction. Having had the diary entries read out to you again and having seen them on the photographs, you should be careful not to place too much weight on, having heard it again and seen again. And when you do consider what weight you give to the diary entries, you should have regard to whether the information put in the diary by [the complainant] – whether that was contemporaneous with the events that occurred and whether [the complainant] had any incentive to conceal or misrepresent the facts. All right. Thanks, ladies and gentlemen. And I ask you to continue your deliberations."

The jury retired at 3.49 pm, and then:

"HIS HONOUR: Are there any redirections from what I've just said?

MR McGHEE: No. I think what your Honour has directed on is appropriate. I mean, ordinarily if - - -

HIS HONOUR: I want to give it – yeah. Once the jury see a 93A statement again I have to give them directions under section 102 of the Evidence Act. But if you think there was anything else I need to say?

MR McGHEE: No.

HIS HONOUR: Mr Muir?

MR MUIR: No, your Honour.

HIS HONOUR: All right. I just thought it important to refer the jury to what the witness said about the diary when it was made. So I appreciate your assistance, Mr Muir.

MR McGHEE: Yes."

[34] Contrary to what counsel told his Honour, there was cross examination about the diary as I have set out. The cross examination did not though challenge what the complainant said about the diary and the only point of the cross examination was to establish that the complainant could not say whether the diary was written before or after the complainant's first s 93A statement.

[35] Section 102 of the *Evidence Act* referred to by his Honour is in these terms:

> "**102 Weight to be attached to evidence**
>
> In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[36] The jury again retired at 3.49 pm.

[37] The jury returned verdicts of guilty at 4.38 pm.

[38] The point that was argued was somewhat different to that expressed in the Notice of Appeal. In the Notice of Appeal the complaint was that the judge did not remind the jury of the cross examination of the complainant on the topic of the diary. In argument the complaint was that the learned trial Judge did not remind the jury of the defence case after having the extracts from the diary read to them. That submission is founded in the High Court's decision in *Gately v The Queen*[18] and subsequent decisions of this court where the principles laid down in *Gately* have been applied.

[39] In *Gately*, like here, the central evidence was given by a child through the tendering of recordings of evidence given pursuant to s 93A and 21AK of the *Evidence Act*. After the jury retired to consider its verdict, a request was made for the video tapes. The recordings were played to the jury in the absence of the judge and counsel but under the supervision of the bailiff. Although the appeal was dismissed, that process was found to be irregular. Importantly for present purposes, Hayne J said:

> "[96] The purpose of reading or replaying for a jury considering its verdict some part of the evidence that has been given at the trial is only to remind the jury of what was said. The jury is required to consider the whole of the evidence. Of course the jury as a whole, or individual jurors, may attach determinative significance to only some of the evidence that has been given. And if that is the case, the jury, or those jurors, will focus upon

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18 (2007) 232 CLR 208.

> that evidence in their deliberations. While a jury's request to be reminded of evidence that has been given in the trial should very seldom be refused, the overriding consideration is fairness of the trial. If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the *Evidence Act* and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. *Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused.* It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW.[19] Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence." (emphasis added)

[40] In each of *R v GAO*[20] and *R v FAE*[21] appeals against conviction were allowed when evidence admitted through s 93A of the *Evidence Act* was replayed to the jury without a warning being given that they were not to give the recordings disproportionate weight. In *R v SCG*[22] another appeal was allowed. There, the cases were reviewed by Morrison JA[23] who said:

> "[35] *Gately*, *GAO* and *FAE* do not lay down immutable standards. Each case depends upon its facts. In each case, the overriding consideration must be fairness and balance, giving rise to the need to guard against the risk that undue weight might be given to a complainant's evidence where it is played a second time without a warning, or where no reminder is given to the jury about the competing evidence. In making a judgment about that question various factors will be relevant, including: the time that has elapsed after completion of the defence evidence; the time that has elapsed since the conclusion of the summing up; the character of the complainant's evidence, including the manner in which it is given; the course of the trial, in particular the stage of deliberations that the jury has reached; and the length of time that the relevant evidence occupies. In terms of the need to remind the jury of the defence evidence, one factor might be the manner in which that evidence was given; where that is relevant it is likely to have been a matter referred to by the Crown in their address. No doubt there are other matters that may arise."

[41] Here there was no unfairness. The jury called for access to the photographs of the diary about half an hour after they retired to consider their verdicts. The trial judge told the jury in the summing up that all exhibits would be with them, but as I explained earlier, a decision was then correctly made that the photographs of the diary should not go to the jury room. The inference to be drawn is not that the jury

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19 Directions in accordance with s 21AW were given by the judge in the summing up.
20 [2012] QCA 54.
21 [2014] QCA 69.
22 [2014] QCA 118.
23 With whom Gotterson JA and Jackson J agreed.

were giving the diary undeserved weight, but rather that they realised they did not have the photographs.

[42] The defence case was that the complainant's account was false, perhaps the product of a dream. As I explain later when considering ground 3, there were legitimate bases on which defence counsel could launch an attack upon the complainant's credit and reliability. The diary was relied upon by the Crown as showing a consistency of the complainant in her version. The detail of her account though was contained in the two s 93A interviews and her pre-recorded evidence. The jury did not seek to be reminded of that evidence, but as any jury would, sought to be reminded of the contents of the diary, no doubt to consider it's consistency with the earlier versions.

[43] Against that background, the direction given by the trial judge after the jury returned at 3.39 pm was completely appropriate. His Honour warned the jury against placing too much weight on the diary and reminded them to consider whether the complainant "had any incentive to conceal or misrepresent the facts." In other words, the judge reminded the jury of the central issue in the trial which was the reliability and credibility of the complainant. In that way the defence case (that the complainant was untruthful) was put. His Honour reminded the jury that in the second s 93A statement the complainant said that she wrote the diary entries about a week after the incident the subject of the indictment. That had not been seriously challenged in cross examination so no unfairness occurred by the learned judge not referring specifically to the cross examination.

[44] The first ground of appeal is not established.

Ground 2: Post offence conduct

[45] In evidence in chief, the complainant's mother said the following about a conversation with her father on the deck of the house on 4 October 2014:

> "Okay. So you woke up the following morning and what happened then?---So I'd gotten up and - - -
>
> Do you remember what time?---Roughly between 6 and 7 am.
>
> What did you do when you woke up?---I'd gotten up. I had seen my father pacing up and down on the deck."

The witness was shown a photograph, and then:

> "So there's a two-seater couch here?---Yep.
>
> Is this the one you're talking about?---So behind there he was walking up and down there. Like, pacing. His arms were, like, up like this and - - -
>
> So you were just gesturing then with your arm - with both arms - - -?---Yep.
>
> ---with your hands moving up and down - - -?---Yeah.
>
> - - - sort of from your waist up to around your chin level?---Yep.
>
> Is that what you were trying to - - -?---Yeah.

- - - depict?---Yeah.

Okay. So you saw him pacing up and down and moving his hands in that way - - -?---Yep."

Then later:

"Okay. All right. Now, how long did that behaviour go on for?---Well, he hadn't seen me straight away because I'd gone and made a coffee in the kitchen. And then I was still watching him kind of, like, from the kitchen and then I'd come back and that's when he first locked eyes and saw me.

So how long was it between your first observing this behaviour and him locking eyes with you?---Within minutes, you mean? Like, how many minutes?

In whatever - - -?---Okay.

- - - measurement of time you can use?---Probably a minute or two."

And later:

"So you're saying he was covering the length of the two-seater couch and then - - -?---Yeah, like, he had his head down a little bit and then he'd - like - and he was just pacing like this, like, these kind of movements with his lips.

So, again - so the - we need to - you need to verbalise your answers - - -?---Okay.

- - - Just for the benefit of the record. So can you describe the action you were just doing with your jaw?---So it was, like, almost, like, biting your lip a little bit. Like, a - - -

HIS HONOUR: So what you're describing is him repeatedly pulling in his lower lip and - - -?---Yeah.

Into his mouth and biting on it?---Yeah."

And later:

"All right. Did you notice anything else about his behaviour at that time?---Just, like, very fidgety and - you know, it was very quick movements up and down. Like - it was like he had something on his mind. Like - - -"

And later:

"All right. So you made eye contact. What happened then?---It was - he spotted me, very quickly approached me, like, frantically approached me and - - -"

And later:

"All right. Okay. So you locked eyes. Now, so and then he came over to you---Yes.

> All right. How long did it take for him to get over?---Well, pretty much as soon as he made contact - his eyes saw me, he frantically just came over to me."

And later:

> "All right. Now, to that point, had you exchanged any words?---I didn't even get any words out at first. He was the one wanting - doing the talking. It was very - - -"

And later:

> "So before he moved over toward you after you locked eyes, had there been any words exchanged between the two of you?---No.
>
> All right. So okay, he moved over quickly. What happened next?---He then - then said, "[the complainant] was acting crazy," or something like that, along those lines, "and I - I went to go sleep on the couch," along those lines, I - he said and then I - I didn't pay too mu - like, he was talking but I wasn't - I was still kind of like half, you know, dazey and that, but he was just saying, "[the complainant] was acting crazy and weird. Does she normally do this?" and I just – I didn't think anything of it really. I just thought "Oh yeah," maybe it was, you know, [the complainant] being [the complainant], I suppose, and she's just going to be silly and so - - -"

And later:

> "Now, … can you say anything about the accused's voice at that time, how he sounded?---Yeah, it was very, like, a scared kind of a talk. Like a… you know, like, when he saying - saying, "Oh," like he was were - like a worried talk. Like a - I'm - - -"

And later:

> "All right. So he's speaking fast?---Mmm.
>
> Okay. How long did this conversation last?---It was pretty short. Yeah, short.
>
> All right. Did you notice anything about his body language during this conversation?---Yeah. It - what I could see was - was him acting, like, his whole body language was very, like, a stressed kind of body language. You know, like - like, this kind of thing, you know?
>
> So you were just demonstrating your head moving side to side? ---Yeah, it's easier for me to demonstrate than it is to say the word - - -
>
> Sure?--- - - - because I'm not sure of the word, but very - - -
>
> HIS HONOUR: It's all right? --- - - - very - - -
>
> I think Mr Muir, the witness has clearly described - - -
>
> MR MUIR: Yes.
>
> HIS HONOUR: - - - the agitation of the defendant."

[46] Then in cross examination:

> "Okay. All right. Now you say that you've seen my client - - -?---Yes.
>
> - - - out by the deck?---Yes.
>
> And you describe that he's pacing?---Yes.
>
> Up and down the deck?---Yes.
>
> That he's biting his lip and moving his jaw and he's a bit fidgety?---Yes.
>
> And then you say that he's frantically approached you?---Yes.
>
> All right. Is it the case that, really, all that happened was this: you saw him pacing up and down. You made yourself a cup of coffee and came out onto the deck and he took a look at you and, as soon as you walked out on the deck, he immediately approached you and said something like, "[the complainant] was acting crazy and nuts and I had to leave the bedroom to tell my wife to sleep with [the complainant] instead of me because of what she was saying." Do you agree?---No, not - not with all of that, no."

And later:

> "So what I've just read word-for-word is from your statement to the police. You disagree with the way you've described it in your statement, or do you agree?
>
> HIS HONOUR: Well, first of all. Sorry - - -?---I'm just - - -
>
> - - - first of all, do you agree that that's what you said in your statement to police? Perhaps, Mr McGhee, you should read it to her again.
>
> MR McGHEE: Certainly, your Honour. I will read it from the start?---Yes.
>
> Continuing:
>
> > *I got up between 6 and 7 am on Saturday, the 4th of October. My dad was already up. I saw that he had a cup of coffee in his hand - - - ?*---Mmm.
>
> Continuing:
>
> > *- - - and he was walking up and down on the deck, like, he was pacing.* ?---Yes.
>
> You agree with that?---Yes.
>
> Continuing:
>
> > *I was in the kitchen and could see him walking up and down the deck*. ?---Yes.
>
> Continuing

I know that he usually paces around when he talks on the phone.

That's what you said in your statement?---Yes, yes.

Continuing:

Or if he is stressed about something. ?---Yes.

Continuing:

That morning, he was not talking on the phone. He was just pacing. ?---Yes.

Continuing:

He was not giving me any eye contact.

Do you remember saying that?---Yes. Not at first, no. There was no eye contact at first.

No?---Yes.

You then go on to describe what he was wearing and he was in some shorts?---Yes.

And a T-shirt. You didn't pay much attention to what he was wearing?---Yes, that's correct. Yeah.

Continuing:

I made myself a cup of coffee and came out on the deck.

You agree with that?---Yes.

Continuing:

That was when my dad first looked at me that morning.

?---Yes.

Continuing:

As soon as I walked out on the deck, he immediately approached me. ?---Yes.

Do you agree that's how you described it?---Yes.

Yes:

And said something like, "Oh, [the complainant] was acting crazy and nuts and I had to leave the bedroom to tell my wife to sleep with [the complainant] instead of me, because of what she was saying."

?---Yes, yes. No, sorry, I got it - I thought you meant as in he'd approached my mum straight away. I thought - I thought that's how you were meaning it. He didn't approach my mum until when [the complainant] had tried to open the door to get to my mum and then he - - -

Yes?--- - - - followed her. That's when he told her, yes.

Yes. I'm not asking - sorry, yes?--So I was getting confused sorry.

HIS HONOUR: Sorry, [complainant's mother]. The first point is do you agree that you said that in your statement to police?---Yes.

That conversation?---That conversation you just - yes.

Right. Thanks, Mr McGhee.

MR McGHEE: Thank you, your Honour. Do you agree that you went on to describe it this way:

> *He was very animated when he was talking to me*.

?---Yes.

Continuing:

> *He has his arms up to his shoulders. His palms were facing me. He was moving his arms*.

?---Yes.

This is the way you described it:

> *It looked like he was in disbelief*.

Do you remember signing off on a statement that described it in that way?---Yes.

Yes. Do you agree that, generally speaking, people's memories don't improve with time - they get worse?---For the - yes, that's somewhat true. But there's a lot of things in what happened that stick out.

Yes?---And I'll never forget, so - - -

Well, do you remember that the statement that I've just read from, you gave to the police on the 18th of October 2014? So over four years ago?---Mmm.

Do you agree - - -

HIS HONOUR: You just have to speak your answer. Yes?---Yes, sorry.

MR McGHEE: Do you agree with that?---Yes.

Do you agree that in that statement, you don't make any reference or give any description of him biting his lip or moving his jaw? That's not in your statement, is it?---No, it's not.

You don't make any reference in your statement of him frantically approaching you, do you?---No, I don't.

No. Or being abrupt towards you, do you?---No."

[47] The complainant's stepfather gave evidence about the conversation he had on Saturday morning with the appellant. In examination in chief:

> "All right. Do you know what time you woke up the next day?---I don't know what time I woke up, no. I can't recollect that. But I woke up. I was dizzy from alcohol. I had the dry - the alcohol dry [indistinct] so I was just leaning on the pool gate, having my cigarette out on the deck.

And later:

> "Okay. And what's your next memory after that?---[the appellant] coming out to have a cigarette with me - which, at the time, was normal. You know, morning ciggies after a night on the piss - a night on the alcohol. Excuse my French. Yeah, and then he came out and said what he said to me about [the complainant].
>
> Okay. So what did he say to you about [the complainant]?---Okay. Now, to the best of my recollection, that he came out and said. "That [complainant's] crazy. She's lost it. I woke up to her screaming. She had no underpants on so I got angry at her. Threw her underpants back at her, told her to put them back on. And then I left the room." And then my reaction to that as - I was still dizzy. I was still looking out, just enjoying my cigarette. And it was just something that I didn't want to register. If you - it's - yep.
>
> HIS HONOUR: Sorry - sorry, could you just concentrate. Did you make any comment in reply?---I think I - I think I just shrugged. I just shrugged.
>
> Okay?---It wasn't something that I wanted to register. It wasn't something - it wasn't - it's not the best conversation starter. It's not the best - you know. I'm having my cigarette. I hear something like that. And I remember thinking to myself, going - - -
>
> Instead of what you were thinking, sir?---Yep.
>
> Did you make any comment to him?---I can't honestly remember.
>
> All right. Thanks.
>
> MR MUIR: [witness], before [the appellant] said these things to you?---Yep.
>
> Did you say anything to him?---Maybe "good morning". I can't remember.
>
> Okay. All right. In the course of this conversation, did you notice anything about [the appellant's] behaviour?---In the course of this conversation?
>
> Yes?---Yeah. Well, just generally nervous. Just like - - -
>
> Okay. What did you observe?---Well, fast talking. Just fast, quick talking, you know. Like he wanted me to know about it but I didn't.
>
> Okay. All right. Now, what happened after that?---I can't remember much after that. But I think - I think he just went inside."

[48] Then in cross examination, the only mention of the conversation on the deck was:

> "Yes. Yes, just in relation to the next day - you've spoken of a conversation you had with my client in the morning?---Yep.
>
> Now, you didn't do anything about that, did you?---No, I - - -
>
> You've gone about your business for the day?---Yep."

[49] The evidence of the conversations on the deck the next morning was potentially probative in the following ways:

(1) It partially corroborated the complainant's version. She said that when she awoke to being raped, the appellant told her she was "crazy". He told the complainant's mother and stepfather the next morning that the complainant was "crazy", and told the complainant's stepfather that the previous night the complainant had woken without underpants on and had an altercation with him. That was at least some support for the complainant's version that there had been some incident with the appellant;

(2) The agitated state of the appellant could be regarded by the jury as reflecting a consciousness of guilt;

(3) The statements made by the appellant were denials of guilt;

(4) The appellant has lied to his daughter, and son in law out of consciousness of guilt.

[50] After the Crown case was closed, the appellant was called upon and indicated that he would not give or call evidence, and the jury retired while his Honour discussed with counsel various aspects of the summing up. On the question of the conversation on the deck, the Crown Prosecutor told his Honour this:

> "MR MUIR: When, on my case, she[24] detects him and becomes aware of what's happening. It's a continuation of that same behaviour, a continuation of the behaviour that involved him going into the - into [the complainant's older sister's] room to frustrate the complainant. So the way that I intend to close on it is as a continuation of the same conduct that is capable of proving consciousness of guilt. So it's the conduct as well as what's - as well as what's said.
>
> HIS HONOUR: Yes, all right.
>
> MR MUIR: So from this - the early hours of the morning until the adults wake up, they find the accused ready to put his version effectively.
>
> HIS HONOUR: Yes.
>
> MR MUIR: So it's all in those circumstances that I've led it in the trial and that I - - -
>
> HIS HONOUR: Sure.
>
> MR MUIR: - - - intend to close on it.
>
> HIS HONOUR: All right.

---

[24] A reference to the complainant.

> MR MUIR: So I think the cleanest way to deal with that, your Honour, would be some kind of modified direction number 50.
>
> HIS HONOUR: Yes.
>
> MR MUIR: As - rather than confining it to lies, necessarily, it could all just be dealt with as post-defence conduct demonstrating consciousness of guilt.
>
> HIS HONOUR: Yes, yes. I'll have - what I might do is I'll try and type something up as the directions for the parties are going to have a look at that.
>
> MR MUIR: Thank you, your Honour."

[51] The Crown Prosecutor's reference to "direction number 50" is a reference to a draft direction appearing in the Supreme and District Courts Bench Book. The draft direction is entitled "Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt".

[52] Defence counsel responded:

> "MR McGHEE: And I've no difficulty with the other post-offence conduct direction - - -
>
> HIS HONOUR: Yes.
>
> MR McGHEE: - - - being given. Because obviously tied into that is the alternative interpretation that the jury might make of that conduct.
>
> HIS HONOUR: Yes.
>
> MR McGHEE: Which is part of the direction.
>
> HIS HONOUR: All right. Well, I'll try and get something in writing."

[53] His Honour produced a draft of the proposed direction concerning consciousness of guilt and this was delivered to counsel. The draft is not contained in the appeal record but presumably was in terms of the direction ultimately given. Both counsel then addressed the jury.

[54] The Crown Prosecutor in his closing address said these things on the topic of consciousness of guilt:

> "The accused made it clear from an early stage that he intended to frustrate the complainant's attempts to disclose the offending to get help. And as I said, that began from the moment the complainant awoke, realised what was happening. Obviously she was asleep, the accused's immediate reaction was to tell the complainant that she was stupid, that she was crazy, to put her clothes back on. He tried to convince her that she'd been dreaming. That she'd dreamed it up. And as I say, what the evidence demonstrates in its entirety is that that conduct continued from the moment the accused knew he was caught. Continued to the following morning when he confronted [the complainant's mother] and [the complainant's stepfather] out on the

> deck with the exact same story that the complainant was crazy, she'd had a nightmare, taken her clothes off by herself in the middle of the night."

And later:

> "Now it's important, members of the jury, that I am clear here, about the way I say you would use this part of the evidence, about the way he behaved immediately after the offence, up to the following morning. And, ultimately again, it's a matter for you to assess and use this evidence, as you determine appropriate. That's a matter for you. All I can tell you is the way that - or the reason that I'm putting it forward. And that's because it forms part of the Crown case, as proof of the accused's guilty conscience immediately after the offending. Calling the complainant crazy, stupid. Telling her she'd been dreaming. That she removed her own clothes in the night, despite that had never happened before, ever. Following the complainant into [the complainant's sister's] room to frustrate her intention disclosing the offending. Ambushing [the complainant's mother and stepfather] I should say, the first thing in the morning, ensuring that he got his story in first. You heard evidence about his behaviour. The pacing up and down on the deck. The head down. Hands fidgeting, moving quickly, speaking fast. And ultimately, of him pedalling the same lies to [the complainant's] parents, as he tried to sell to her when she woke up, to find him raping her. Now I ask you, members of the jury, is [that] the behaviour of a loving grandfather who woke to find his granddaughter, clearly and visibly disturbed by a nightmare. Does it make sense? Particularly bearing in mind their special relationship before the offences that the accused would respond to this situation by immediately calling into question [the complainant's] mental health, calling her stupid, crazy. If all that really happened, if all that really happened was a misunderstanding in a nightmare, if all that really happened was that he was confronted by a child for whom he cared greatly, who'd had a bad dream, is that conduct that fits with that scenario."

[55] Defence counsel responded in his address:

> "Oh dear, oh dear, ladies and gentlemen. What are we dealing with now. We are now dealing with an ambush the following morning. We've gone from evidence of [the complainant's mother] saying that my client, when she spoke to the police, was in a state of disbelief, when he was recounting what had happened the night before with [the complainant], to an evolution of that story, by [the complainant's mother] saying in court yesterday, that he was frantic and abrupt, who's chewing on his lips, something we've never heard of before, to my learned friend now saying of that morning, there was the ambush, an ambush of [the complainant's mother] and [the complainant's stepfather]. How ridiculous this story has become, that a man having a coffee, pacing up and down on the deck, is now being accused by the Crown of ambushing his own daughter, and his son-in-law, to tell them the version of events.

> Be careful of exaggeration, ladies and gentlemen. Be careful of exaggeration on the part of witnesses, and be careful of exaggeration on the part of my learned friend, the Crown Prosecutor. Because there was no ambush. It's ridiculous to suggest that anybody was ambushed the next morning. All I suggest we were dealing with, is a man who was in a state of disbelief as to what had been said by his granddaughter [the complainant]. But over four years, we have seen the evolution of the story. She couldn't stick to the same story for two months, before her mother dragged her back to the police station to get her to admit that she'd lied to the police - lied through her tongue to the police, about all of these wonderful details that she'd come out with."

And later:

> "Now, his Honour's going to direct you on this. What my learned friend's trying to lead here is that my client has acted in a way that's demonstrative of some sort of consciousness of guilt. That he's trying to get in first. That he's trying to push - push this version. But his Honour is going tell you that, in absolutely no uncertain terms, that you can only use that evidence, that this conversation and this behaviour was an act demonstrative of some sort of consciousness of guilt, if, if there is no other explanation for his conduct. And his Honour will tell you these words, and I want you to listen out for them, the other explanations you will be told about when considering acts like this or considering someone's behaviour like this is in situations where there's been a wrongful accusation. Listen out for that word, a wrongful accusation. Or where a defendant is upset about a complainant's behaviour.
>
> Now, when you look at the evidence of [the complainant's mother] when my client's supposedly in a state of disbelief. Where, even on the defence case which you know through the way that Mr Wilson[25] cross-examined [the complainant], that there had been - this was a wrongful accusation. And he got upset about it. And he raised it the next morning. Here's the kicker, he raises it the next morning to both of their parents. And neither of the parents do anything at all. Nothing. They have a barbecue. This poor bloke, the next morning, upset about what's happened talks to both of her parents. They did nothing. Isn't that - what's the point of that? Isn't that consistent with the fact that my client was in this state of disbelief? That there was some sort of level of confusion? Both of the parents just let it go."

[56] The direction given by his Honour was as follows:

> "I'll now come to the evidence that the prosecution wish to rely on to indicate that the defendant had a consciousness of guilt in respect of his behaviour immediately following the rapes of [the complainant] and then later that morning, out on the back deck. So just to remind you briefly, the prosecution rely on [the complainant's] evidence, as

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25 Defence counsel who conducted the cross examination in the pre-recorded evidence.

> I summarised it earlier today, that he was telling [the complainant] she was dreaming, she was crazy, she was stupid and put her clothes on. And you will recall the defendant's daughter, [the complainant's mother], talking about seeing him out on the deck pacing up and down on the deck near the pool, agitated, continuously biting his lip and complaining about [the complainant] being crazy. You recall the conversation she gave evidence of, and then also - excuse me, [the complainant's stepfather] giving evidence of the conversation he had with the Defendant in a similar vein, of him, you know, [the complainant] not having any clothes on and screaming and that she was behaving in a crazy manner.
>
> The Prosecution submits that this conduct is evidence of his awareness of his guilt of the offences, and that you can use it in support of the Complainant's evidence. But before you can use that evidence in that way, you would have to find that the Defendant did those things and said those things because he knew he was guilty of the offences charged. You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways. For example, as the result of panic, fear, or other reasons having nothing to do with the offences charged. And you must have regard for what is being said by this by Mr McGhee in his closing arguments and I will summarise both competing arguments shortly.
>
> Moreover, before the evidence of the Defendant's conduct can assist the Prosecution, you would have to find, not only, that is motivated by an awareness of guilt on his part, and also that what was on his mind was guilt of the offences charged and not some other misconduct. For example, upset that when he woke up he was in bed with his granddaughter and she had no pants on, something that would alarm any sensible adult.
>
> If, and only if, you have reached the conclusion that there is no other explanation for his conduct, such as panic, or fear of wrongful accusation, or upset over the Complainant's behaviour, you are entitled to use that finding as a circumstance pointing to the guilt of the Defendant to be considered with all the other evidence in the case. Standing by itself it could not prove guilt."

[57] Conduct by an accused after the commission of an offence may be probative of guilt. Lies told by an accused are a specific type of post-offence conduct. Post-offence lies by an accused may be relevant to a jury's consideration in different ways. The lies may do no more than impact upon the credit of an accused who has given a version consistent with innocence.[26] Lies may be directly probative of guilt but only when the lie is post-offence conduct performed from a consciousness of guilt.[27] In *Edwards v The Queen*[28] the High Court identified the preconditions which must be met before a statement by an accused is probative of guilt, as opposed to merely going to his or her credit. These are:

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26 *Zoneff v The Queen* (2000) 200 CLR 234.
27 *Edwards v The Queen* (1993) 178 CLR 193.
28 (1993) 178 CLR 193.

(1) The accused has given a statement;

(2) The statement is untrue;

(3) The statement was deliberately untrue; a lie;

(4) The lie concerned some circumstance or event connected with the offence;

(5) The lie was told from a consciousness of guilt and a knowledge that the truth would implicate the accused in the commission of the offence.[29]

[58] Difficulties arise when proof of the falsity of what was stated by the accused can only be achieved by proof of the offence.[30] A denial of the offence may be a false denial, but it is not a confession.[31] These considerations arose in *R v Zheng*[32]. There, the accused was charged with three counts of supplying heroin. As to the first count, the Crown alleged that the appellant agreed with co-offenders to supply heroin by having another person leave the drug under a brick. The plan was for yet another person to collect it. As to the second and third counts, the Crown alleged that the appellant placed packages of heroin in a car that was parked in a car park. Police officers gave evidence that they saw the appellant place the packages in the boot of the car. The appellant admitted being in the car park, but denied placing the packages in the car and explained his presence as being for the purpose of washing cars in the car park. That statement was left as a lie told from a consciousness of guilt.

[59] Hunt CJ at CL[33] on appeal, held that the lie was left to the jury as probative of proof of the act of placing heroin in the boot of the car. The lie told from consciousness of guilt, was that he did not place the heroin in the car, so proof of the falsity of the statement required proof of the act (placing the heroin in the boot of the car) which was the act, proof of which the lie was said to be probative.

[60] In ruling that the appellant's alleged lies as to what he did in the car park should not have been left as evidence supporting counts 2 and 3, his Honour said this:[34]

> "The argument put is this. A lie will be available for that purpose only if the jury is satisfied, amongst other things, that the statement in question was in fact false. In the present case, the only logical way in which the jury could have been satisfied that the appellant was lying was if they accepted as true the evidence of the Crown's witnesses who observed his conduct. So much was conceded by the Crown Prosecutor at the trial in the argument of his which I have earlier rehearsed. Once the jury were satisfied that the evidence of those witnesses was true for that purpose - particularly when they had been directed that they had to be satisfied beyond reasonable

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29 *Edwards v The Queen* (1993) 178 CLR 193 summarised in *R v Quist* (2017) 127 SASR 471 at [169].

30 *Edwards v The Queen* (1993) 178 CLR 193 at 199 where Brennan J (his Honour then) considered the test laid down by Lord Lane CJ in *Reg v Lucas* [1981] QB 720 at 724 and *R v Mercer* (1993) 67 A Crim R 91.

31 *Edmunds v Edmunds and Ayscough* [1935] VLR 177 at 186, cited in *Edmunds v The Queen* (1993) 178 CLR 193 at 201, and by Lovell J in *R v Quist* (2017) 127 SASR 471 at [303] - [305] when considering the probative value of multiple, inconsistent exculpatory statements; *R v Amato* [2013] VSCA 346 at [48].

32 (1995) 83 A Crim R 572.

33 With whom Smart and Studdert JJ both agreed.

34 At 576 - 577.

> doubt that the appellant had told lies - they would necessarily have been so satisfied that the appellant had in fact done what those witnesses had said that he did, and thus of the set of facts which the judge had told them was an essential part of the Crown's case in relation to each of the counts.
>
> Once the jury had reached that conclusion concerning the appellant's conduct, there was nothing further which the Crown had to establish relating to that particular conduct of the appellant. For the jury to be invited to conclude that the appellant's lies concerning his conduct in the car park was available as evidencing a consciousness of guilt, which could then in turn be taken into account in some way in determining whether the appellant had in fact conducted himself in that way is a wholly circular argument.
>
> In other words, the appellant's lies as to what he did in the car park could not logically be established without first reasoning that the appellant had in fact done in the car park what the Crown's witnesses said that he did, where their evidence was the only evidence that he so conducted himself. This circular process of reasoning was necessarily erroneous in relation to the second and third counts, where that was the only conduct concerning the appellant which the jury had to consider. Lies should not have been left at all in relation to those two counts.
>
> So far as the first count is concerned, however, the Crown also had to establish by way of inference - based in part upon that conduct - that the appellant had earlier agreed with Johns and others to supply the heroin which was the subject of that charge. There was other conduct of the appellant - including a meeting with Johns the previous evening - which the Crown had to prove in order to establish that inference. The appellant's consciousness of guilt arising from the fact that he had told lies about his later conduct in the car park (if established) could have been relevant to establishing the truth of the evidence relating to that other conduct, and as assisting the jury to draw the necessary inference as to the existence of that agreement." (Citations omitted).

[61] *Zheng* has been consistently followed and followed recently.[35]

[62] The statements by the appellant to his daughter and son in law were denials of the complainant's version. Proof of the falsity of those statements could only be found in acceptance of the complainant's version. Upon acceptance by the jury of the complainant's version, the counts on the indictment were proved. The statements made by the appellant to the complainant's mother and stepfather could not be left to the jury as lies told from a consciousness of guilt. In other words, the statements could not be used in proof of the charges because proof of the charges was necessary to show the statements as lies. If the statements were left for consideration by the jury as lies, then an error has occurred.

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35 *R v Lane* (2011) 221 A Crim R 309, *R v Duckworth* [2017] 1 Qd R 297 and *R v Quist* (2017) 127 SASR 471.

[63] The Crown submitted both at trial and on appeal that the probative value of the evidence of the statements made on the Saturday morning was not dependent upon a finding by the jury of untruthfulness of the statements. Those submissions ought to be rejected.

[64] The Crown Prosecutor put to the learned trial Judge that the statements were "to frustrate the complainant". By frustrating the complainant, the Crown Prosecutor really meant that the appellant was putting forward his innocent version thus contradicting and "frustrating" the complainant in her truthful complaint. All that makes no sense, unless the jury first accepts the complainant's version and can then see the appellant putting an alternative, false version.

[65] In his address to the jury, the Crown Prosecutor said that the appellant told the complainant that she was dreaming and was crazy and then repeated the statements to the complainant's mother and stepfather the next morning. There is no probative value in the statements made the next morning, unless the Crown establishes that the complainant was not dreaming, she was raped, and the appellant knew those facts.

[66] Later, the Crown Prosecutor spoke of the appellant "ambushing" the complainant's mother and stepfather with his story. Ambushing a person with a truthful account can hardly be an incriminating act. The Crown Prosecutor then spoke of the appellant "pedalling the same lies" to the complainant's mother and stepfather that he had told the complainant, namely that she was dreaming and was crazy. In order to accept that the appellant was "pedalling lies", the truth of the complainant's account must be accepted.

[67] Defence counsel was then drawn into a defence of the truth of what his client said to his daughter and son in law. The statements were made, he said in his closing address to the jury, because his client "was in a state of disbelief as to what had been said by his granddaughter…" In other words, the explanation for the appellant's denials was that the complainant's version was false.

[68] In reality, the Crown Prosecutor put to the jury that the statements made to the complainant's mother and stepfather were lies and showed a consciousness of guilt. The jury could not have rationally understood the submissions in any other way. Defence counsel put to the jury that they were not lies. That was the real contest concerning the evidence of the complainant's mother and stepfather. Putting aside issues of the burden of proof, that was the ultimate contest in the trial; the appellant was guilty of the counts on the indictment if the complainant's version was accepted or, his denials were true and he was not guilty.

[69] The learned trial Judge went to some trouble to ensure that he understood the Crown's case concerning the evidence of the conversations on the deck so that he could draw the appropriate direction. The Crown Prosecutor apparently did not understand that the submissions he intended to make were, no matter how he styled them, dependent upon the jury finding that the statements made by the appellant were untrue.

[70] His Honour, by directing the jury to give consideration to statements of the appellant "complaining about [the complainant] being crazy", and "[the complainant] not having any clothes on and screaming and… behaving in a crazy

manner", was inviting the jury to conclude a consciousness of guilt by the appellant telling untruths.

[71] It follows then that the jury was invited to embark upon the circular reasoning criticized in *Zheng*. The statements were not capable of being put as consciousness of guilt lies, were so put, and there has been a misdirection.

[72] Here, the ground of appeal is that the misdirection has resulted in a miscarriage of justice.[36] While miscarriage may occur in many ways[37], a conviction must fall where the misdirection may have influenced the result of the trial.[38]

[73] The statements by the appellant to his daughter and son in law, were denials of the charges against him. While the appellant bore no onus, the fact is that there were competing versions before the jury; the complainant had said she had woke to being raped and the appellant said that the complainant awoke acting irrationally. The Crown led the exculpatory statements and the appellant could rely on those statements as evidence of the truth of what he said.[39] Before convicting the appellant, the jury would have to reject the appellant's version given to his daughter and son in law beyond reasonable doubt.[40]

[74] The complainant made preliminary complaint to her mother and sisters. A direction was properly given by his Honour that the jury could consider those statements as bolstering her credit. On the other hand, the direction on post-offence conduct wrongly invited the jury to consider the appellant's statements (his denials) as statements indicating guilt.

[75] Below, I conclude that it was open to the jury to convict the appellant so that a retrial should be ordered. As the analysis of ground 3 shows, the credibility and the reliability of the complainant's version was very much in issue and there was evidence upon which the complainant's evidence could be criticized. The misdirection which effectively converted a denial to a potential admission[41] by the appellant caused a miscarriage of justice and I would allow the appeal.

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

[76] The principles governing an appeal court's approach to this ground were explained in *M v The Queen*[42] where the Court said:

> "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

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36 There was no application for any redirection; *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38], *R v Huston* [2017] QCA 121, *R v Knight* [2017] QCA 98.

37 *Weiss v The Queen* (2005) 224 CLR 300 and *Baiada Poultry Pty Ltd v The Queen* (2012) 86 ALJR 459, both cases considering the proviso, *Criminal Code* s 668E(1A).

38 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38].

39 *R v Soma* (2003) 212 CLR 299 at [31].

40 See the *Liberato* line of cases; *Liberato v The Queen* (1985) 159 CLR 507 and the review of the cases considering that case by Buss P in *RMD v Western Australia* (2017) 226 A Crim R 67 at [161] - [163] and see *R v Armstrong* [2006] QCA 158 at [35], *R v McBride* [2008] QCA 412 at [30] approved in *R v PBB* [2018] QCA 214 at [28].

41 Held fatal to the conviction in *R v McBride* [2008] QCA 412 at [30].

42 (1994) 181 CLR 487.

> 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 benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."[43]

[77] While this court must conduct an independent examination of the evidence to ascertain whether it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty[44], the position of the jury must be respected. In *R v Baden-Clay*[45], the High Court observed:

> "65 It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact." Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> 66 With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[46]

[78] This court's assessment then must be conducted against the two principles there identified, namely that primarily the determination of the facts of the case is for the jury, not a court of appeal, and secondly, due regard must be had by a court of appeal to the jury's advantage in seeing and hearing the witnesses. Given modern criminal practice where evidence may come to the jury in the form of electronic recordings of witnesses giving evidence, the advantage enjoyed by a jury over a court of appeal may be less than in the past.

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43 At 493 and reaffirmed in *MFA v The Queen* (2002) 213 CLR 606 and *SKA v The Queen* (2011) 243 CLR 400.

44 *SKA v The Queen* (2001) 243 CLR 400 [20]-[22] and *R v PBA* [2018] QCA 213 at [80].

45 (2016) 258 CLR 308.

46 (2016) 258 CLR 308 at [65] and [66] and see also *R v Sun* [2018] QCA 24.

[79] The Crown case was completely dependent upon acceptance by the jury of the evidence of the complainant. In her first s 93A interview, the complainant said this:

> "COMPLAINANT: Um, um I came down today to talk to you about um what happened on Friday, last Friday.
>
> SCON STACE: Hm hm.
>
> COMPLAINANT: With my granddad.
>
> SCON STACE: Yep.
>
> COMPLAINANT: Um so on that Friday night my granddad was drunk and so was my stepdad.
>
> SCON STACE: Hm hm,
>
> COMPLAINANT: And so we were dancing on the deck and stuff.
>
> SCON STACE: Mm.
>
> COMPLAINANT: Like earlier that night like being funny and silly and stuff and then um about twelve o'clock midnight we decided to go to bed and um, and me and my grandad um he slept with me 'cause obviously we were so close and stuff and then um, so earlier in the morning probably about one o'clock one thirty like I was actually fast asleep and at two o'clock I woke I think at one thirty two o'clock something I woke up and I saw my grandad at the end of the bed.
>
> SCON STACE: Hm hm. What happened next?
>
> COMPLAINANT: Um yes I saw him at the end of my bed and I was shocked 'cause I was looking at him because and my pants were off and he was doing something down there and I just was so shocked and I started crying really bad and I said what are you doing, what are you doing, what are you doing. And then he told me that it was just a dream and that I'm dreaming and that I'm crazy I'm stupid, don't know what I'm talking about and stuff like that, and then, and then my granddad um said oh you just sleep in the bed I'm going to go out on the couch and he walked away.
>
> SCON STACE: Hm hm.
>
> COMPLAINANT: And then I ran out of my room and I went into um my Nan's room 'cause my Nan well its [the complainant's older sister's] room but Nan was sleeping in there.
>
> SCON STACE: Hm hm.
>
> COMPLAINANT: Went in there and I started crying and I woke Nan up and I said Nan, Nan, Nan, um and I was just about to tell her but then granddad came rushing out and he um interrupted me.
>
> SCON STACE: Hm hm.
>
> COMPLAINANT: So I was sort of scared so I um I hid in the bathroom for a long, long, long time and I couldn't get out I was just

so scared and I was crying, screaming, I was, and then I saw um my stepdad come out of his room he just went on the deck.

SCON STACE: Hm hm.

COMPLAINANT: And I saw him and then after that I um, I just went in my room again and just sat on my bed and then I fell asleep.

SCON STACE: Hm hm.

COMPLAINANT: And then the following morning I slept until mid ah midday yeah. And then, and then I just stayed in my room for the whole day because mum had friends over, and then mum could tell that I was behaving differently."

Later, she said:

"SCON STACE: All right. Um what happened once you went to bed?

COMPLAINANT: Well once I went to bed I um was just laying in bed and going to sleep so I fell fast asleep and that's when it happened like I didn't know at all what he was doing. But then when I woke up, like I didn't wake up like because you know sometimes like from a fast sleep I just I woke up because I felt something like it was pain and I didn't know what it was so I woke up --

SCON STACE: Hm hm.

COMPLAINANT: In a shock and then I saw him.

SCON STACE: You said that you woke up at around one thirty or 2 A M?

COMPLAINANT: Yeah.

SCON STACE: What makes you think it was that time?

COMPLAINANT: Um because it was like, it was like morning and I knew that we went to bed at twelve and yeah I just think it, it should have been one thirty two o'clock it was around then I, I assumed it was around then.

SCON STACE: Hm hm. How was it outside?

COMPLAINANT: Outside of the house?

SCON STACE: Hm hm. Like was it dark or what time of the day was it?

COMPLAINANT: Um it was dark still, but it was early in the morning I know that.

SCON STACE: What makes you think that?

COMPLAINANT: Um because when I went to bed it was morning 'cause [INDISTINCT]

SCON STACE: Hm hm. All right. Now you said to me and you should be as detailed as possible okay.

COMPLAINANT: Okay.

SCON STACE: You said you were fast asleep um you didn't know what was happening but then you felt pain?

COMPLAINANT: Yeah.

SCON STACE: Tell me everything about that pain that you felt?

COMPLAINANT: Okay. It was just pain like someone was inside me like I didn't know what it was like I just felt some pain like right here like in my, in my lower tummy here.

SCON STACE: Hm hm.

COMPLAINANT: And that's when I woke up in a shock and then I was so surprised to see granddad doing that to me at the end of it.

SCON STACE: So when you said that it was um you said like it was inside of me in the lower tummy?

COMPLAINANT: Yeah.

SCON STACE: Okay. And um what, what type of pain did you feel?

COMPLAINANT: Like, it was just like a quick pain like someone was doing something to me like, I, I just --

SCON STACE: Quick pain?

COMPLAINANT: Yeah it was really quick pain like --

SCON STACE: What, how did it feel like?

COMPLAINANT: It felt, it felt like I don't know it just felt like someone was doing something to me and, and I thought I was just I don't know, I thought I was just like dreaming or something like that, but it wasn't a dream. I didn't know like a hundred percent it wasn't a dream.

SCON STACE: Now you said that um you felt a pain and you woke up?

COMPLAINANT: Yes.

SCON STACE: Describe the position you were in.

COMPLAINANT: Oh I was just flat on the bed. And I was [INDISTINCT] woken up as well.

SCON STACE: Flat on the bed?

COMPLAINANT: Yes. Just flat on the bed.

SCON STACE: On your, on your back or --?

COMPLAINANT: Yeah on my back.

SCON STACE: What about your, describe the positions of your legs?

COMPLAINANT: My legs were open.

SCON STACE: Describe more to me?

COMPLAINANT: Um my, well my legs were flat and just open and he was in there.

SCON STACE: How far apart were they open?

COMPLAINANT: Probably like here and here.

SCON STACE: So um I'm just trying to picture it so you've a you've got a Queen bed?

COMPLAINANT: Yeah Queen bed.

SCON STACE: Um you're sleeping on your back, you, you woke up on your back with your legs spread apart?

COMPLAINANT: Yes.

SCON STACE: Okay. Um now and you said then you saw granddad at the, at the end of the bed?

COMPLAINANT: Yes I did.

SCON STACE: Well tell me everything about his position how he was like?

COMPLAINANT: Oh well he was on his knees.

SCON STACE: Hm hm.

COMPLAINANT: At the time and yeah his head was down.

SCON STACE: Hm hm. So his head was down on the knees. How did you know it was him?

COMPLAINANT: Because um I looked at him and I saw I just knew that it was him because [INDISTINCT] he wasn't there and I looked down and I saw him show his head like I know it was him, and I [INDISTINCT] for a second and then he noticed me as he looked up and then that's when he said it was a dream it, it was a dream [INDISTINCT] like that. And then he yelled at me and said go to bed, go to bed, go to bed.

SCON STACE: Hm hm. So when you woke up like okay so you're lying down you feel the pain you woke up you could see that someone was down there?

COMPLAINANT: Yeah.

SCON STACE: And you said you saw the head oh his shape, ah sorry the shape of his head.

COMPLAINANT: Yeah.

SCON STACE: Were you still lying down when you saw it?

COMPLAINANT: Um well I was [INDISTINCT] and then I put my head up.

SCON STACE: Hm hm.

COMPLAINANT: And looked like that.

SCON STACE: No worries. Um tell me exactly what he was doing in as many details as possible when you said he was doing a thing to me, describe that?

COMPLAINANT: He was doing stuff like probably like licking and stuff like that down there and I was yeah and when he looked up that's when I was in pain as well.

SCON STACE: When you say probably licking what do you mean by that exactly?

COMPLAINANT: Well he no like he was licking there like he was.

SCON STACE: How did it feel like?

COMPLAINANT: It felt disgusting.

SCON STACE: Ah well besides disgusting what sensation was it when he was licking, how did you know it was him licking?

COMPLAINANT: 'Cause I saw it, ah yeah I just saw it all.

SCON STACE: Hm hm. What was he licking with?

COMPLAINANT: Um his tongue.

SCON STACE: Did you see his tongue?

COMPLAINANT: Yes.

SCON STACE: And where exactly was he licking you?

COMPLAINANT: Um like up here and stuff like that.

SCON STACE: Where is it up here?

COMPLAINANT: Like up on my leg like up near my legs and stuff it felt it felt like up here.

SCON STACE: Any particular part there's like on your off your legs he was licking? Which part of the body was he licking?

COMPLAINANT: Um my private part."

[80] The complainant in that first interview went on to further describe what she could see and feel the appellant doing.[47] She was then asked by the police officer how she could see what he was doing because presumably the room was dark as it was night time. Then:

"COMPLAINANT: How could I see --

SCON STACE: Inside the room?

COMPLAINANT: How could I see inside the room?

SCON STACE: Yeah it would be pretty dark.

---

47 Including penetrating her vagina with his finger; count 1.

COMPLAINANT: Oh well I did see it because um the light like I have a light switch like if my light was off but I actually have like a lamp.

SCON STACE: Hm hm.

COMPLAINANT: I think, so obviously he turned it on so he could do that and then --

SCON STACE: Did you, so when you woke up was, was the light on?

COMPLAINANT: Yeah the lamp was not the whole light, just the lamp.

SCON STACE: The lamp. Hm hm.

COMPLAINANT: Yeah."

[81] As already observed, the second interview was initiated because the complainant had told her mother that she had told police that the lamp was on while the appellant was raping her, when in fact it was not. In her second s 93A statement, the complainant spoke about the lamp:

"SCON STACE: And why did you tell us it was on and in fact it wasn't.

COMPLAINANT: Um I don't know I, I um I don't know I freaked out a little bit.

SCON STACE: Hm hm.

COMPLAINANT: When the question was asked.

SCON STACE: Tell me more about that?

COMPLAINANT: Um yeah so when the question was asked I just yeah freaked out and then I said that but um yeah it wasn't on.

SCON STACE: Do you remember what question was asked at the time?

COMPLAINANT: Um I don't remember. I think it was um I think it was briefly how did you see him if it was dark something like that.

SCON STACE: Hm hm. Okay. So and why what made you to freak out?

COMPLAINANT: Like um I don't know I just didn't think about it.

SCON STACE: Tell me about you freaking out tell me more about that? What do you mean by that?

COMPLAINANT: Ah I don't know I just didn't think of that question being asked and yeah.

SCON STACE: So why didn't you tell us initially the truth that the light wasn't on?

COMPLAINANT: I don't know.

SCON STACE: What do you think would have happened if you said to me that it wasn't on?

COMPLAINANT: I don't know I just didn't think that anyone would believe me.

SCON STACE: And tell me more about that?

COMPLAINANT: I don't know.

SCON STACE: So going back to the question if the light wasn't on how did you know it was your granddad?

COMPLAINANT: Oh um the lamp wasn't on but um I saw I knew it was him.

SCON STACE: Hm hm.

COMPLAINANT: By his, by his voice and I saw the outline of him when I woke up."

[82] In her pre-recorded evidence under cross examination, the complainant admitted that she had a history of lying to her mother, stepfather and her sisters.[48] She also admitted that she would truant from school and would lie to both her mother and the school about where she had been.[49] She admitted lying about the lamp being on[50] and admitted that she had behavioural issues at home that were so bad that for a time she lived in a foster home.[51]

[83] Although she accepted that she had told police that "I thought I was just like dreaming or something like that" in relation to the incident, she asserted that she was not dreaming and that the events actually occurred.[52]

[84] The applicant was cross examined about how she lost her night clothing during the incident. She said, under cross examination:

"Okay. Because you also told the police about what you saw when you woke up, [the complainant], and part of that was your grandfather saying to you, "You were dreaming and crazy," or something like that?---Yep.

Because you woke up with no pants on?---Yes.

And you accused your grandfather of taking your pants off?---Yes.

And he said to you "No, I didn't," and actually threw pants at you to put them on, didn't he?---No. He told me to put my clothes on.

Okay. So - - -?---He said, "Put your clothes on. Put your clothes on," but - no - he didn't throw anything at me.

But he was saying to you immediately, "You must be dreaming. You're crazy. That didn't happen"?---Yes.

Okay. Do you remember - and I'm asking you specifically about who you talk to about these things before you spoke to the police - okay - [the complainant]. I want to ask you about the people that you told about what happened. Okay. So - - -?---Okay.

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48 Appeal Book 270.
49 Appeal Book 271.
50 Appeal Book 276 - 277.
51 Appeal Book 272.
52 Appeal Book 280.

> - - - I know you spoke to [the complainant's younger sister] briefly but you didn't tell her any details, did you?---No, I didn't.
>
> You told her to go and get [the complainant's older sister]?---Yes, I did.
>
> Now, where did this conversation with [the complainant's older sister] about the allegations happen?---In my bedroom." [53]

[85] She then said there were two pairs of underwear and the ones she wore to bed were not totally off her when she awoke:

> "Now, when you woke up that evening, can you tell us what – were you wearing those pants and underwear?---I wasn't wearing those underwear. They were on the floor, at the side of my bed. I – the pants that I was wearing to bed was down to my feet, because I was laying flat on my bed."

[86] She was further cross examined on that topic:

> "Okay. Now, part of my job, [the complainant], is to suggest to you what your grandfather says happened. Okay? And I want to do that now, [the complainant] and you have the opportunity to respond to that and you can tell me if I'm right or wrong, half-right, or whatever you'd like to say. Okay? This is your opportunity to respond to those - that version of events. Okay? Now, what I want to suggest to you is that, when you woke up, your grandfather was still asleep at that time?---When I woke up? No.
>
> I want to suggest to you that you had taken your own pants off, [complainant]?---No.
>
> It's - obviously, I'm suggesting to you that these things that you said about him touching you in a sexual way, you're wrong when you say that those happened?---No.
>
> When he woke up, you said something to him, or you accused him of taking your pants off?---Yes.
>
> And did he respond and say, "What are you talking about?" or something like that?---Yes.
>
> And you accused him of taking your pants off and he denied it and told you to get dressed?---Yeah. He told me to put my clothes back on.
>
> And it was actually him that went to tell your grandmother straightaway, wasn't it, [the complainant]?---I was the one who walked into nan's room first.
>
> Did he go in second, did he?---Yeah. And then he interrupted and went in after me - - -
>
> And I don't want you - - -?--- - - - and just told her to go back to sleep and don't worry about it.

---

53 Appeal Book 282.

> But he went in there - and I don't want you to tell us about the conversation but he went in there and had a conversation with your grandmother?---Yes.
>
> And that's obviously very soon after these things happened, isn't it, [the complainant]?---Yes.
>
> And then he went to sleep out in the lounge room?---Yes."[54]

[87] The complainant was cross examined about the complaint she made to her sisters and mother in these terms:

> "Okay. Now, I want to ask you, while I'm asking you about specific answers you gave to police, about another one. Okay. Now, I want to read this to you. It's from page 9 of that first 93A, about halfway down. And I think you were talking about - to police about when you told [the complainant's older sister] about these things. You said to her not to tell your mother?---Yes.
>
> And then she went and told your mother, anyway?---Yeah.
>
> And then you said this, [the complainant] - I want to ask you about it:
>
> > And then Mum came in and she said, "[the complainant], is it true? Is it true? It is true?" And I said - and I said, "No." I said, "I told [the complainant's older sister] not to tell you. I told [the complainant's older sister] not to tell you."
>
> Now, that's the first part of that paragraph there, [the complainant]. Do you remember giving that answer to police?---Yes, I do.
>
> Now, part of it was - and this is the part I want to ask you about - don't you say during the course of that answer that, "No," it wasn't true?
>
> HIS HONOUR: Do you need it read back to you, [the complainant]?---Yes. Yes, please.
>
> MR WILSON: I'm happy - I'm happy to read it again, [the complainant]. I understand why it's difficult and I'm quoting it here:
>
> > And then Mum came in and she said, "[the complainant], is it true? Is it true? It is true?" And I said - and I said, "No." I said, "I told [the complainant's older sister] not to tell you. I told [the complainant's older sister] not to tell you."
>
> Now - now, part of that is you saying, it seems, to your mother that these things weren't true?---Yeah. I didn't want her to know at all.
>
> Okay?---Yeah.
>
> So is it the case that you might've told your mother at least straightaway that these things weren't true?---I - I said "no" first and then I told her the truth and told her everything that had happened.

---

54 Appeal Book 285.

> Okay. So - so if you told you mum, "No, it didn't happen," was that a lie… But that must've been a lie?---Yes. Yes, that was a lie."

[88] The evidence of the complainant was capable of legally proving the two offences. Her evidence, if accepted, established each and every element of each of the two charges.

[89] The question then is whether it was open to the jury to accept the complainant's evidence beyond reasonable doubt having regard to all of the evidence and the competing arguments.[55] The appellant submitted that it was not and pointed to:

(i) The complainant's history of lying;

(ii) The specific lie about the lamp;

(iii) The inconsistent versions as to whether her pants were down around her ankles or completely removed;

(iv) The fact that her complaint may be regarded as somewhat reluctant;

(v) Despite the fact she said she screamed, no other witness in the house seemed to have heard her;[56]

(vi) The fact that she initially told police that she thought she was dreaming.

[90] It is obvious that there was an incident during the night time involving the complainant and the appellant. The appellant accepts that, and the complainant's older sister remembered someone coming into her room during the night. There is also no doubt that there was opportunity for the appellant to do the things the complainant alleged he did. They were sharing a bed together.

[91] While there may be some inconsistencies in the complainant's account, in the main, it is fairly consistent.

[92] While there had been occasions in the past where the complainant had been dishonest, she made complaint at an early opportunity indeed, virtually immediately after her grandparents had left the house. She made complaint to her sisters. The fact she initially did not wish her mother to know what had occurred may be understandable. She would no doubt realise that telling an adult was likely to escalate the situation. The fact is that she confided in her sisters.

[93] There may have been reasons for the jury to consider doubting the complainant. She did initially say that she thought she was dreaming, but she then gave a detailed account of what she felt and saw. She was open and forthright about her initial untruthful statements about the lamp being on. The fact that no one in the house heard her scream does not necessarily establish that she did not scream. In fact the appellant told his son in law on Saturday morning that the complainant screamed when she awoke. Something startled or scared her because she went into the room where her grandmother and older sister were sleeping.

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55 *SKA v The Queen* (2011) 243 CLR 400 at 409 and *R v Tesic* [2019] QCA 195 at [24] following *R v Black* [2019] QCA 114 at [36].

56 The complainant's mother's evidence T 1-47, the complainant's stepfather's evidence T 1-71, and the complainant's older sister's evidence T 1-29.

[94] My assessment of the evidence as a whole and, having particular regard to the weaknesses in the complainant's evidence identified by counsel for the appellant is that there is nothing which necessitated the jury having a reasonable doubt as to the appellant's guilt. In my view, it was open to the jury to be satisfied beyond reasonable doubt that the complainant was telling the truth. It therefore follows that it was open to the jury to find the appellant guilty of the two counts on the indictment.

[95] Ground three has not been established.

Orders

[96] The trial has miscarried due to submissions made by counsel and directions made by the learned trial judge concerning the post-offence conduct and the convictions must be quashed. Given though that it was open to the jury to convict, had they been properly directed, a retrial ought to be ordered.

[97] I would:

(1) Allow the appeal.

(2) Quash the convictions.

(3) Order a retrial.