SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dunrobin* [2012] QCA 209
PARTIES:	**R** **v** **DUNROBIN, Shannon Robert** (appellant/applicant)
FILE NO/S:	CA No 275 of 2011 DC No 80 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	17 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2012
JUDGES:	Fraser JA, Mullins and Ann Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to adduce evidence refused.** **2. Appeal dismissed.** **3. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant found guilty of five counts of rape and one count of assault occasioning bodily harm whilst armed and sentenced to 14 years imprisonment on counts 1, 4, 6 and 7 and to four years and eight years respectively on counts 2 and 3 – where appellant contended that verdicts of jury were not reasonable or cannot be supported having regard to evidence – where appellant contended that a reasonable doubt necessarily arose from a variety of circumstances – where appellant contended that prosecution could not exclude beyond reasonable doubt that appellant honestly and reasonably, but mistakenly, believed that complainant consented – whether verdicts of jury were not reasonable or cannot be supported having regard to evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where

appellant sought to adduce new evidence that was said to show a miscarriage of justice – whether leave should be granted to allow new evidence – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where appellant contends that directions given as to uncharged sexual acts and uncharged acts of violence were insufficient – where appellant contends that trial judge failed to give appropriate directions about certain evidence of the complainant's demeanour and erred in leaving this evidence as corroboration of the complainant's account – where appellant contended that trial judge's directions as to appellant's record of interview were deficient – where respondent contended trial judge's directions were sufficient as prosecutor did not rely upon appellant's record of interview as constituting lies or revealing consciousness of guilt – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant contended that hearsay evidence of complaints made by complainant to police officer were inadmissible insofar as it concerned offences which occurred before that date – where no objection to the evidence at trial – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant found guilty of five counts of rape and one count of assault occasioning bodily harm whilst armed and sentenced to 14 years imprisonment on counts 1, 4, 6 and 7 and to four years and eight years respectively on counts 2 and 3 – where appellant also sentenced to concurrent terms of four years imprisonment for offences to which he pleaded guilty – where counts 1, 4, 6 and 7 were automatically declared serious violent offences and convictions on counts 2 and 3 also declared serious violent offences by sentencing judge – where appellant had bad criminal history of sexual offending – where appellant had difficult early life – where appellant had completed Cognitive Skills course and Ending Offending program – where appellant lacked remorse – where offences produced seriously adverse consequences – whether sentences were manifestly excessive

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A(2)
Penalties and Sentences Act 1992 (Qld), s 161A

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited
M v The Queen (1984) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v DAF [2004] QCA 368, considered
R v Flynn [2010] QCA 254, considered
R v McMullen [2011] QCA 153, cited
R v PAD [2006] QCA 398, considered
R v Soper [1994] QCA 254, considered
R v WO [2006] QCA 21, cited
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: P E Smith for the appellant/applicant
T A Fuller SC for the respondent

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

[1] **FRASER JA:** The appellant was found guilty by a jury after a five day trial in the Bundaberg District Court of five counts of rape and one count of assault occasioning bodily harm whilst armed. The appellant has appealed against his convictions and he has applied for leave to appeal against sentence.

Appeal against conviction

[2] The complainant in each count was RJ. On the complainant's evidence, he was 17 years and 11 months old at the time of the first offence, the first count of rape in the indictment, and he was 18 years old at the time of each other offence. The appellant was aged about 29 and 30. The prosecution case was that the appellant committed the offences on separate occasions during a period of about 18 months. The complainant also gave evidence, without objection, that there were numerous other episodes of oral and anal sex to which he did not truly consent because his consent was obtained by force, threats, intimidation, fear of bodily harm, and by the appellant exercising authority over him. The complainant said that the appellant had often assaulted and threatened him to get what he wanted. Some of that evidence was given in general terms, without reference to particular dates or occasions, but the complainant gave detailed evidence of some such matters, including in relation to some of the counts charging the appellant with rape (counts 1, 3, 4, 6 and 7) and the count of assault (count 2). The complainant's evidence was not capable of supporting one of the charges of rape (count 5) and the appellant was acquitted of that count, as directed by the trial judge.

[3] The respondent gave the following summary of the Crown case on the counts of which the appellant was convicted:

> "Count One
>
> This occurred at the house of AL and was the first ever act of anal sex between the complainant and the appellant. The complainant said he was asleep on his stomach. The appellant lay on him and moved the complainant's arms under his stomach so he couldn't move and placed the complainant's head into a pillow to muffle any screams.
>
> Count Two
> The appellant punched the complainant and then burnt him on his chest just below his nipple with a lighter.
>
> Count Three
> This occurred at BK's house after an incident at C's house where the appellant made the complainant go into the appellant's car. This was an incident of oral sex where the appellant penetrated the mouth of the complainant.
>
> Count Four
> This was also at BK's house but after an incident where the complainant left AL's house to go to his grandmother's but was instead made to get into a car by the appellant. This count involved anal sex.
>
> Count Six
> This incident of anal sex occurred in a caravan and was particularised by reference to SD being given a notice to quit which caused the appellant to borrow a caravan and clean it up.
>
> Count Seven
> This was an incident of anal sex. It occurred on the morning before members of the family of the complainant turned up at the caravan to take the complainant away from the appellant."

[4] The appellant did not give or call evidence. His detailed version was contained in a lengthy record of a police interview conducted on 5 May 2010 which was tendered in the prosecution case. The appellant told police that he and complainant regularly engaged in consensual oral and anal sex, initiated by each of them, in the course of a loving relationship. He said that the complainant preferred oral sex but also readily agreed to the appellant's requests for anal sex. The appellant denied that he had committed the assault charged in count 2 of the indictment, or any assault (apart from a minor and irrelevant one). He said that the complaint to police was only made after the complainant's family members turned up at the place where they were living and took the complainant away from the appellant. Defence counsel argued that the complainant was embarrassed by his sexual preference for the appellant and that family pressure was the real reason for the complaints which led to the charges against the appellant. The respondent instead characterised the evidence that the complainant ceased the relationship only after his family intervened as demonstrating that the appellant's hold upon the complainant was so strong that the complainant could not break it without assistance.

[5] It was in issue at the trial whether there was any sexual act before the complainant turned 18, but otherwise the real issue in relation to the alleged sexual offences was

whether the prosecution proved beyond reasonable doubt that the complainant did not freely and voluntarily consent to the sexual acts. The trial judge also directed the jury that the prosecution was obliged to prove beyond reasonable doubt that the appellant did not have an honest and reasonable, but mistaken, belief that the complainant consented, but the focus at the trial and in the summing up was very much upon the issue of consent. The issue in relation to the assault charged in count 2 was whether the prosecution proved beyond reasonable doubt that the appellant committed that assault.

Ground seven: the verdicts of the jury were not reasonable or cannot be supported having regard to the evidence

[6] It is appropriate first to consider the appellant's contention in appeal ground seven that the verdicts of the jury are not reasonable or can not be supported having regard to the evidence. This ground of appeal obliges the Court to embark upon an independent assessment of the sufficiency and quality of the evidence and to determine whether it was open on the evidence for the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences.[1] In *M v The Queen*[2] Mason CJ, Dean, Dawson and Toohey JJ explained the task in a passage which was subsequently approved by McHugh, Gummow and Kirby JJ in *MFA v The Queen*[3]:

> "... where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[7] I will outline the evidence in the prosecution case which is of particular relevance under this ground of appeal.

[8] The complainant did not have a stable place of residence during the period covered by the indictment. He gave evidence that he lived for about a month at AL and her partner TC's house at 44 SB, Bundaberg, before he moved out to his grandmother's house for a short time, during which he turned 18 in mid-April 2009. (In cross-examination, he estimated that he was at SB for a month and a bit or about two months.) The complainant said that AL's three sons also lived in the house and that he was also there when her fourth son was born. AL and TC both gave evidence that the appellant arrived at their house on 30 August 2008 and stayed there for some time, but her evidence was that her fourth son was born in July 2009. TC gave evidence that the complainant moved out just before his 18th birthday. The

---

1 *SKA v The Queen* (2011) 243 CLR 400 at 406, 409 per French CJ, Gummow and Kiefel JJ.
2 (1984) 181 CLR 487 at 494-5.
3 (2002) 213 CLR 606 at 623-624.

complainant gave evidence that after he left the SB house he lived for a period at 32 AC with RB and RD, with his grandmother for a couple of days during which he had his 18th birthday, for about a month at 7 SM where AL and TC had moved, with the appellant at BK's place at SS, with the appellant at SD's house at ST, and finally with the appellant in a caravan at 18 SCT.

[9] Count 1 was alleged to have been committed at the SB house of AL and TC. The complainant gave evidence that he woke up one morning in his bed to find that his hands were pushed under his stomach with the appellant on top of him pulling his pants down. The appellant committed indecencies and engaged in anal sex. The complainant gave evidence that he did not say anything at this time because the appellant pushed his head into the pillow. The complainant tried to scream but he could not scream loudly. He felt really sick in the stomach and felt that he was going to vomit. Afterwards, the appellant told the complainant that if he told anyone the appellant would hurt him. The complainant was scared because he knew the appellant was a boxer. He did not say anything the next day because he was angry with himself and scared of the appellant. In cross-examination the complainant said that this event probably happened in March 2009, the day after he had first met the appellant when the appellant came to the house. The complainant agreed that he did not scream at times when his head was not pressed into the pillow and that the appellant did not hit him during that first occasion. He agreed that he heard AL and TC get up from time to time to use the toilet or get a drink of water. There was just a curtain on the doorway to the room the complainant and the appellant shared. The door itself was never shut.

[10] On the evidence to which I have so far referred it was open to the jury to find that, despite the appellant's contrary version, the prosecution had proved beyond reasonable doubt that the appellant engaged in the anal sex charged in count 1 without the complainant's consent. The complainant gave consistent evidence of the alleged offence, the absence of his consent, and that the appellant, having pinned the complainant's hands underneath his body, held him down, pushed his head into the pillow, committed the sexual act despite the complainant's attempts to scream, and afterwards threatened the complainant if he complained. That evidence also allowed the jury safely to exclude both any possibility that the complainant consented and that the appellant believed, or had reasonable grounds for believing, that the complainant consented.

[11] The complainant gave evidence that the appellant thereafter had sex with him at least twice a day. The appellant had oral and anal sex with the complainant in the bedroom or in the bathroom. The appellant told the complainant not to tell anybody or the appellant would hurt him. The complainant gave evidence that the appellant made similar threats every three or four days. The complainant felt very angry with himself because "…I couldn't do anything and scared of him because what I got told"; "…I felt real - really, really, really sick in my stomach".[4] The complainant had not ever wanted to have sex with the appellant. The appellant would punch him if he did not get his way. The reason why he had sex with the appellant was because he was afraid and scared. In addition to the complainant's general evidence on those topics, he gave evidence, for example, of a particular occasion when the appellant punched him in the mouth and hit him around the legs with a broom because he had swept the house incorrectly. The complainant said that if he did

---

4 Transcript 2-72, 2-73.

something wrong, such as making the breakfast wrongly, the appellant would punch him in the face, the ribs and the kidneys. The appellant would also do that if the complainant did not get his way in sleeping with him. he complainant gave evidence that when he said "no, no, no", the appellant would punch him in the mouth and make his mouth bleed until the complainant said "yes".

[12] In cross-examination, the complainant agreed with defence counsel's suggestion that at one time the appellant hit him when the complainant, whilst cleaning up, spilt some water or caused some water to flow onto the carpet; but the complainant disagreed with the further suggestions that it was not a solid blow and that the appellant only ever hit him once. The complainant also consistently maintained that the appellant had threatened to hurt him and others. When it was put to the complainant in cross-examination that on each occasion when he stayed with the appellant he chose to do so, the complainant denied that suggestion and said that he had nowhere else to go. The appellant would punch him in the mouth. The appellant would unlock the bathroom door with a knife whilst the complainant was having a shower. If the complainant told the appellant to get out of the bathroom, the appellant would just laugh.

[13] The complainant gave evidence that TC found him and the appellant lying together when at the SB house. (This was not the occasion of count 1.) AL and TC gave similar evidence of an occasion when they saw the complainant and the appellant "spooning" on a bed in the room which the complainant and the appellant shared. In the appellant's record of interview, he denied that this event occurred. He told police that he had met the complainant at AL and TC's house, that they were friends and slept in the same room, but that there was no sexual contact in that house and the first intercourse occurred two weeks after the complainant's eighteenth birthday, when the appellant was living at SS.

[14] The complainant gave evidence that he continued to see the appellant two or three days a week after the complainant moved to the R' house in AC. He said that the appellant would "come around and hassle me". The appellant would ask him to go in the car with the appellant and the complainant refused. The appellant persisted in his requests.

[15] In cross-examination the complainant agreed that whilst he was living at R's house, the appellant visited him there and the complainant sometimes refused to go for a drive with the appellant, but on occasions did go for a drive with the appellant. The complainant gave other evidence of attempting to evade the appellant's attempts to be with him but the complainant agreed that sometimes the appellant drove him to school. He agreed that the appellant told him that he cared about him, and, on one occasion or possibly more than one occasion, that he loved him. It does not follow that the jury should have harboured a doubt that the appellant used the threats and violence, of which the complainant gave evidence, to effect the sexual acts charged in the indictment.

[16] In preliminary complaint evidence, to which no objection was taken, AL said that, at a time which is not very clear from the transcript, the complainant told her that the appellant had been raping him and that it had started in the SB house. AL said that the complainant said he needed help and he showed her cigarette burns on his body; there were four or five distinct burns, one underneath his right nipple, another below his collarbone, one on his stomach, and one around the middle of the solar

plexus. The complainant said that the appellant did to him whatever the appellant wanted to do and whenever he wanted to do it. The burns were healing progressively, but not all at the same time, and the burn underneath the nipple was still weeping. TC gave similar evidence, also without objection, that when the complainant was living at the SM house he told TC that the appellant was forcing him to have sex with him and that it had started at the SB house. TC said he reported this to the police who came to his home on the same day. He gave evidence that the appellant told him that he was in a de facto relationship with the complainant, and TC replied that the complainant had told him that he did not want anything to do with the appellant.

[17] A police officer, Murray, gave evidence that he spoke to the complainant at the SM house on 10 August 2009 and the complainant made allegations of a sexual nature. The officer passed on the recording and that was the end of his involvement. No statement was prepared at that time. A question by the prosecutor indicated that the tape was inaudible.

[18] AL gave evidence of an occasion when the appellant and the complainant had an argument on the front lawn and the police were called by someone. The appellant said something to police and they tackled the complainant to the ground. AL told the police that the complainant was the victim. The complainant gave evidence that whilst the appellant was driving off after the police had told him to leave, the appellant had threatened him that he had better watch out. (There was no other evidence of that threat.) A police officer, Craven, gave evidence that on 18 August 2009 she attended the SM house. The complainant appeared upset and did not want to speak to police. Another police offer, Adamson, gave similar evidence.

[19] Both TC and AL gave evidence of another occasion when, after the appellant came and fought with TC, the complainant left their house and got into the appellant's car. The complainant gave evidence that after the disturbance, when AL woke him up, he saw the appellant hit TC and TC fall to the ground. The complainant said that he put his shoes on intending to leave to go to his grandmother's but when he went outside the appellant, and three others, told him to get into the appellant's car. The appellant told him that he was lucky that he did not have to go into the house and use the weapons. The complainant then went with the appellant back to BK's house at SS for about a month.

[20] BK gave evidence that the appellant was her first cousin and she had known him all her life. Her evidence was that the appellant and the complainant moved into her house and lived there for a while, which she thought was about seven or eight months. She said that they asked permission to come and stay with her and, in the presence of herself, the appellant, and his mother, the complainant said that he and the appellant were "partners or de facto". The jury could reasonably prefer the different evidence given by the complainant. He gave evidence that he was at a friend's house when the appellant and RB persuaded him to get into a car with the appellant, and they went to the SS house. In cross-examination, the complainant denied BK's version. On his evidence, it was the appellant who told KB that he and the complainant were in a relationship.

[21] N was described as the complainant's father, but in his evidence he did not unequivocally agree that he was the complainant's father. He gave evidence that either the complainant or the appellant told him that they were in a relationship. This evidence was vague and, so far as the transcript reveals, unconvincing.

[22] In relation to count 3, the complainant gave evidence that he and the appellant slept together in one of the rooms at BK's house. The complainant said that the appellant wanted to have oral sex. The appellant punched the complainant first "so I couldn't say anything…", pulled the complainant's pants down "and suck me off and then he's say things like 'I fucked off. It's your turn to do me'." In relation to count 4, the complainant gave evidence that on the next day they had anal sex in the shower. The complainant gave evidence that it occurred on the same day that the complainant went to the SM house to look at AL and TC's baby (who was born in late July 2009). The complainant said that "he'd jump in the shower with us". The complainant could not recall if the appellant said anything to him on that particular occasion, but in cross-examination the complainant denied that he had sex with the appellant, saying that "he had sex with me." The appellant then drove him to school.

[23] Again, on the evidence so far mentioned, it was open to the jury to conclude beyond reasonable doubt both that the complainant did not consent and that the appellant could not have believed that the complainant had consented to count 3. In relation to count 4, despite the appellant's apparent inability to recall what the appellant did to procure the complainant's co-operation on that particular occasion, the complainant's evidence of the violence used by the appellant on the previous day, and of the appellant's frequent violence and threats, allowed the jury to find that the complainant did not consent and that the appellant must have appreciated that the complainant did not consent.

[24] The complainant gave evidence that on one occasion at the SS house someone from Family Services came to the house. BK and the appellant told him to hide, which he did. BK gave evidence that she could not remember where the complainant was when the Child Safety people came and spoke to her and to the appellant. She asked the appellant and the complainant to leave not long after that. On this evidence, and again having regard to the evidence of the appellant's frequent violence and threats, the jury were not bound to treat the complainant's failure to complain to the Child Safety officers as giving rise to a doubt whether the complainant consented, or the appellant believed he consented, to the appellant's sexual acts. BK's further evidence, that while the complainant was living in her house he seemed alright, might reasonably have been treated by the jury as having little weight.

[25] The complainant and the appellant moved into Ms SD' house at ST with the appellant. She is AL's sister and the appellant's cousin. The complainant gave evidence that they stayed in a shed at the back of that place until about the 19th or 20th of November 2009. The complainant gave evidence that in this period the appellant treated him "like his wife", giving him orders to make him toast, get him a beer, and get him cigarettes. The complainant gave evidence that whilst living there with the appellant, the appellant punched him in the mouth and burnt him with a lighter and a cigarette (count 2). The complainant said that after the appellant lit his cigarette, he shaped to hit the complainant, the complainant put his hand up to block the hot lighter, and the appellant burnt him on the right nipple with the lighter. The complainant still had the scar.

[26] The complainant also said that the appellant burnt him twice on each of his left and right arms, leaving marks. In cross-examination the complainant denied that the burn marks came from him burning himself with a cigarette lighter or something else. He admitted that he had burnt himself once and that he had gone through

a phase where he was burning himself leaving lighter burns on his arms, but he denied that he had given himself any lighter burn on his chest. Dr Kamenoff, a general practitioner, gave evidence that he examined the complainant on 12 August 2011. There was a lot of scar tissue around the complainant's body. Dr Kamenoff saw lesions on the complainant's left forearm and burns around the right nipple. In cross-examination the doctor agreed that, when specifically asked, the complainant had no complaints about bleeding, bruising, pain or otherwise concerning the anogenital area. There was nothing unreasonable about the jury accepting the complainant's evidence about count 2 and rejecting the appellant's denials in his police interview.

[27] A police officer, Lynch, gave evidence of an occasion on 3 November 2009 when he was in a police car with a police liaison officer, Johnston. He spoke to the appellant and the complainant in their car. Lynch asked the complainant his name and the appellant answered the question, giving the complainant's name and saying that he had not done anything wrong. Johnston gave similar evidence.

[28] Both police officers also gave evidence of a subsequent occasion, when Johnston spoke to the complainant for a very brief time whilst he was alone in a car. Johnston's evidence was that the complainant said that he was okay, but that he hung his head down and tried to look away from her as he spoke. After one or two seconds, two other people returned to the car and Johnston left. The complainant agreed in cross-examination that on the 3rd of November 2009 he and the appellant were in a car which was pulled up by police for a random breath test and licence check. He knew the police officer and thought of her as a trustworthy person to whom he could talk. He agreed that she asked him if he was alright and that he answered "yes". This evidence provided some support for the appellant's version that he was in a consensual relationship with the complainant, but the jury might reasonably have concluded on the whole of the evidence that the complainant's reactions in these encounters were influenced by his fear of and domination by the appellant.

[29] The complainant gave evidence that the appellant had anal sex with him once or twice a night at SD' place at ST. He said that he could not recall how that came about. Count 6 on the indictment concerned an occasion when the complainant said that he and the appellant were in the process of moving to SCT. The appellant borrowed a caravan which was placed at the back of the house. The complainant gave evidence of the appellant having anal sex with him inside the caravan. The complainant said that he was not able to give any more information about that occasion. Count 7 charged another occasion of anal sex on the following day, also in the caravan. He said that after the anal sex, he made some toast and gave it to the appellant, who punched him in the mouth because the toast was cold and not made properly.

[30] The prosecution case on counts 6 and 7, like that on count 4, was not as strong as on counts 1, 2 and 3. The complainant – apparently through a failure of recollection – did not give evidence that on the occasions of counts 4, 6 and 7 the appellant used violence or that the complainant expressed his objection to the appellant's sexual acts. But it remained open to the jury to act upon the complainant's consistent and apparently persuasive evidence that he did not consent to those or any of the other sexual acts, he had not ever wanted to have sex with the appellant, the appellant punched him if he did not get his way, the appellant frequently assaulted and

threatened him, and the reason why he had sex with the appellant was because he was afraid and scared.

[31] On the complainant's evidence, the sexual act in count 7 occurred on the morning of the day that the police executed a search warrant at the SCT property. A police officer, Schneider, gave evidence that a search warrant was executed at the SCT property on 24 November 2009. The appellant and the complainant were present, as were others, most of whom were the appellant's family or associates. Schneider asked the complainant whether he was able to come and go freely and the complainant said that he was able to and that he had a support network. Schneider agreed in cross-examination that the complainant said that he was not under any duress to stay. Police records indicated that the complainant said that he went to see his mother and his grandmother from time to time but chose to be at the SCT property. Another police officer, Turner, who attended the house with Schneider gave evidence that, after the search warrant was executed on 24 November 2009, he became aware that the complainant wanted to provide a statement to police.

[32] The complainant gave evidence to similar effect; that when the police came to the SCT property, he answered "yes" to a question by police whether he was alright and safe. In assessing the effect of this body of evidence, it is necessary to bear in mind the complainant's evidence that he made that statement because the appellant's mother and another person were behind him and he was scared. Shortly afterwards the appellant's aunt and other relatives arrived and took the complainant from the house. The appellant pleaded with him not to leave but the complainant wanted to go. The complainant subsequently gave a statement to police, after staying with the police liaison officer, Johnston, for four days.

[33] Johnston gave evidence that, after the complainant was collected from SCT he stayed with her for four days, during which the complainant told her that the appellant had raped him anally and the complainant did not want it. The complainant told her that he had met the appellant at a party at SB, and that after the complainant had gone to bed the appellant had hopped into the bed and had sex with him. The complainant said that if he did not give the appellant sex the complainant would be assaulted, either by being flogged or sometimes being burnt by a cigarette. The complainant told her that sometimes he was made to have sex up to six times a day, and it happened all the time, everyday. The complainant told her that he was not game to say anything because if he said no or did not want to do it he would get into trouble; he would always get assaulted. The complainant said that if he did not do what the appellant wanted or tried to run away the appellant said that he would hurt the complainant's family, mainly his grandmother. Johnston gave evidence that the complainant showed her scarring on his arm and a badly scarred bottom lip. The complainant told her that his lips came to be as they were because the appellant had assaulted him.

[34] In support of the contention that the guilty verdicts were unsafe, it was submitted for the appellant that a reasonable doubt necessarily arose from a variety of circumstances. It was submitted that the prosecution could not exclude beyond reasonable doubt that the appellant honestly and reasonably, but mistakenly, believed that the complainant consented to the sexual acts the subject of the indictment. Both in that respect and in relation to the issue whether the prosecution proved beyond reasonable doubt that the complainant did not consent, the following points were emphasised: the complainant kept returning to where the appellant lived

and stayed with him; there were no injuries associated with the alleged rapes; although the medical evidence was consistent with the complainant's evidence of being burned by a cigarette lighter, the complainant himself admitted having burned himself with cigarette lighters; the complainant's own evidence was that on 24 November 2009 in SCT he said that he could do what he wanted to do and he was not constrained by the appellant; it seemed from some of the complainant's evidence that there was at least a mutual oral sex; on the complainant's evidence the appellant took him for drives, invited him to visit, drove him to school, and expressed his love; and one witness (KB) gave evidence that the complainant said that he and the appellant were partners or de factos.

[35] This was far from being a straightforward prosecution case, but none of those circumstances, taken singly or in combination, required the jury to give credence to the conclusions contended for by the appellant. Some of the complainant's evidence was given in general terms and some of it was confusing (particularly in relation to dates and places), but that was explicable by the complainant's circumstances and the transient lifestyle he apparently led when he was 17 and 18 years old. I see no real reason to doubt that it was open to the jury to treat the complainant's evidence as credibly and reliably demonstrating that, in relation to each of the sexual acts charged in the indictment, the complainant was so dominated and overborne by the appellant's violence and threats that he was unable to give a free and voluntary consent to those sexual acts. The jury could find that the complainant's inability to extricate himself from the appellant's dominion was attributable to the same causes and the unequal nature of their relationship. The complainant's evidence, if accepted by the jury, entitled them to exclude a proposition put for the appellant that the complainant's conduct was instead attributable to him being a young man who was confused about his sexuality, and embarrassed because he was in a homosexual relationship with an older man who he was trying to keep from disapproving members of his family.

[36] As I mentioned earlier, in addition to the issue of consent, the trial judge directed the jury that the prosecution was obliged to prove beyond reasonable doubt that the appellant did not have an honest and reasonable, but mistaken, belief that the complainant consented to the sexual acts charged in the indictment. However, if the jury accepted the substance of the complainant's evidence and rejected the appellant's contrary version, as they must have done to be satisfied that the complainant did not consent to any of the sexual acts charged against the appellant, the question whether the appellant believed that the complainant consented was rather more theoretical than real. In the appellant's police interview, he spoke of a friendship which escalated into an equal, reciprocating and loving sexual relationship. That version was given in lengthy and detailed terms, which did not leave any scope for a theory that the appellant was mistaken in thinking that the complainant consented. Conversely, the complainant's evidence was that the appellant initiated the first sexual act by surprising the complainant, assaulting him, pinning him down, and forcing himself upon him; and the appellant then procured the complainant's silence, and his subsequent acquiescence to the appellant's repeated sexual demands over a lengthy period, by threats of violence, by actual violence, and by so overbearing the complainant that he felt he had no real choice but to give in. Although the trial judge gave the conventional directions to the jury that they could accept or reject the whole or any part of what a witness said, and that the jury should form their own view of the evidence, the guilty verdicts reflect the jury's acceptance of the prosecution case, as it was put by the trial judge, that the

complainant's consent was not freely and voluntarily given because it was obtained by the appellant's violence and threats.

[37] Thus, the possibility that the appellant mistakenly believed that the complainant consented to the sexual acts the subject of the charges in the indictment was not realistically open either on the appellant's version, the complainant's evidence, or on any version of the facts which is reconcilable with the jury's satisfaction beyond reasonable doubt that the complainant did not consent to any of the sexual acts charged in the indictment. So much was understood by the prosecutor and defence counsel who, as the trial judge reminded the jury, both submitted to the jury that the real issue was whether the prosecution satisfied the jury on all the evidence that the anal and oral intercourse between the appellant and the complainant occurred without the complainant's consent.

[38] In any case, the complainant's apparently credible and reliable evidence justified the jury in concluding both that the complainant did not consent and that the appellant could not have believed, or had reasonable grounds for a belief, that the complainant did consent to any of the sexual acts charged in the indictments.

[39] Count 2, the charge of assault, was based upon the complainant's evidence, which provided direct support for that count. The evidence about the complainant's scar was consistent with the complainant's evidence. There was no evidence to the contrary, other than in the record of the police interview with the appellant.

[40] This is a case in which the jury's advantage in seeing and hearing the evidence unfold was significant. Bearing that in mind, I am persuaded that it was open upon the whole of the evidence for the jury to be satisfied beyond reasonable doubt that the appellant was guilty of each of the offences of which he was convicted.

Ground two: the appellant pursuant to s 671B of the *Criminal Code* wishes to adduce new evidence which he contends shows that a miscarriage of justice occurred

[41] In support of this ground of appeal, the appellant filed an application for leave to adduce evidence in the appeal in the form of affidavits by the appellant and an affidavit by Mr Bray, a solicitor who represented the appellant at the committal hearing and the trial. The additional evidence was submitted to cast doubt upon aspects of the complainant's evidence.

[42] In examination-in-chief, the complainant said that, whilst he was living at the 44 SB house, the appellant had sex with him at least two times a day. When the complainant was asked for how long, he responded "since I been in that house". When he was asked whether he remembered what period of time that covered, he answered, "Probably the start of the [sic] March, oh a little bit of March until the end of March."[5] The complainant's evidence was that he had left that place before his 18th birthday on 15 April 2009. In cross-examination the complainant gave evidence that he had lived at that place for a month and a bit or two months. Defence counsel asked the complainant how many times the appellant had raped him by the time he moved from SB on around 8 April 2009. The complainant answered that it "Would've been about 63 times". He added that this was not precise and that "I'm not really precise." He explained that he worked this out

5 Transcript 2-70.

because the appellant "didn't do it on the 1st of March or that, he did it on the 2nd - I might as well say the 2nd until just before I left…[a]nd there's 31 days in March…times by two is 62 plus the first time he done it to me, equals 63." The complainant agreed that this was twice a day for a month plus the first time.

[43] The additional evidence which the appellant seeks to introduce on appeal mainly comprises records of the appellant's employment, bank statements, and Centrelink records. It was submitted that the records created real doubts about the complainant's credibility and reliability, particularly because they were inconsistent with the complainant's evidence about the sexual acts occurring before the complainant's 18th birthday. That was submitted to be a matter emphasised by the prosecutor which might have been of importance in the jury's overall assessment.

[44] The complainant gave his evidence in September 2011 and it clearly appears from the terms of his evidence that his assessment of the frequency within which sexual acts occurred two and a half years earlier was a necessarily imprecise estimate based upon recollection. It would be very surprising if the jury treated it as being other than the complainant's best recollection of very frequent sexual acts. Furthermore, the additional evidence concerned only the "uncharged acts" of which the complainant gave evidence.

[45] It was submitted for the appellant that the effect of the additional evidence was that, whereas the work records available at the trial demonstrated that the appellant was absent from Bundaberg in Emerald on 16 - 18 March, 7 - 16 April, 18 - 19 April, and 28 - 30 April, the banking records tended to show that the appellant was in Bundaberg perhaps between 19 - 23 March, 21 - 22 April, and 27 April, and the Centrelink records disclosed that he was not in Bundaberg on 5 - 6 March, 12 - 13 March, 27 March, 2 April, 20 April and 23 - 24 April. The submission overstates the effect of the evidence. The bank records reveal transactions on the appellant's bank account using an ATM or EFTPOS on 5, 6, 12, 13 March and 2 April. An entry for 27 March shows ATM and EFTPOS transactions in Labrador. However, the 20 April entries show transactions both in Emerald and Bundaberg and the 23 and 24 April entries show transactions in Emerald and Clermont. Six entries on 27 April show transactions in each of Emerald, Clermont and Bundaberg, reinforcing the conclusion that the appellant's presence in Emerald did not preclude him from being in Bundaberg on the same day. Since the appellant also could have driven from Brisbane or Labrador to Bundaberg in the course of a day, the bank records do not justify a conclusion that the appellant was absent from Bundaberg altogether on days when he was at Brisbane or Labrador. In the result, the bank records relevantly establish no more than that the appellant was probably absent from Bundaberg altogether on 5 and 12 March (because the records show transactions in Brisbane on 5 and 6 March and 12 and 13 March, making it unlikely that he returned to Bundaberg on 5 or 12 March).

[46] The Centrelink records take the matter no further. They did not reveal whether the appellant made contact with Centrelink in person or by telephone. Nor are they inconsistent with the appellant having driven from the relevant office in Brisbane to Bundaberg after making contact with Centrelink, if that did occur in person.

[47] This additional evidence would have been available to the appellant at the trial if it was thought to be significant. The appellant swore that he believed that he suggested to his lawyers that it was necessary to obtain the bank records and Centrelink records, but that he "did not chase them up as I believed I had a good chance of winning the trial." That rather suggests that the appellant deliberately

refrained from obtaining the records. The solicitor's affidavit did not deal with the question whether he was instructed to obtain these documents, but the appellant's counsel frankly informed the Court that the solicitor had no recollection of being requested to obtain the records and that there was no file note related to that topic.

[48] The additional evidence would be of marginal relevance and it was available to the appellant by the exercise of reasonable diligence at the trial. The evidence would not give rise to an apprehension that there may have been a miscarriage of justice. In my opinion, leave should not be granted for this evidence to be admitted on appeal.

Ground three: the directions given as to the uncharged sexual acts and uncharged acts of violence were not complete

[49] Ground 3 concerns the sufficiency of the directions given by the trial judge about the evidence "uncharged sexual acts and uncharged acts of violence".

[50] The appellant argued that the summing up was inadequate because the trial judge did not direct the jury that, in order to rely upon the evidence of the "uncharged sexual acts", the jury must first accept the complainant's evidence as reliable evidence. In my respectful opinion, the summing up made this point. The trial judge gave and repeated clear directions that the jury could only use the complainant's evidence of those sexual acts if they were satisfied beyond reasonable doubt that they occurred. The trial judge also directed the jury that the prosecution case stood or fell on the jury's assessment of the complainant's evidence, and the trial judge drew the jury's attention to defence counsel's submission, and evidence upon which defence counsel relied for the submission, that the complainant's evidence might not be reliable.[6]

[51] The appellant also contended that the trial judge erred in failing to direct the jury that they could not use the complainant's evidence of acts of violence and sexual acts which were not charged against the appellant to reason that the appellant was a person who was likely to have committed the offences charged. The respondent argued that such a direction was unnecessary and inappropriate in this case because it was not in dispute that the other sexual acts occurred and the issue concerned consent. The respondent also submitted that the trial judge appropriately directed the jury that they could only use this evidence for a very specific purpose and that the directions were favourable to the appellant.

[52] Near the start of the summing up, the trial judge reminded the jury, as I have mentioned, that both the prosecutor and defence counsel had submitted that the real issue was whether the prosecution satisfied the jury that the anal intercourse and oral intercourse was without the complainant's consent. After giving various conventional directions the trial judge commented that the jury might think that the way in which defence counsel put the case to the jury was that they would not be satisfied beyond reasonable doubt that the complainant was reliable when he said that he did not consent to the sexual acts with the appellant. The trial judge directed the jury that the essence of the prosecution case was that, if the jury considered that the complainant consented, the jury nevertheless would not be satisfied that the consent "…was freely and voluntarily given because it was obtained by force, by threats or intimidations, by fear of bodily harm or by exercise of authority …". The

---

6 Transcript 5-8 to 5-11.

trial judge directed the jury that that was what had to be proved in relation to each of the counts of rape charged in the indictment; defence counsel was right in submitting that it was not enough for the jury to find that it was possible or even probable that the complainant was overborne to the extent that he could not voluntarily and truly give consent; and it was only if the jury were satisfied that the evidence showed that he was "…so overborne that he was unable to freely and voluntarily give consent, and if he did give consent, it wasn't consent voluntarily and freely given so it wasn't consent at all" that the jury could convict.

[53] After the trial judge summarised the evidence relating to each separate count, and gave directions about evidence of the complainant's demeanour, the judge gave the directions, which are challenged in ground 3. In relation to the evidence of sexual acts which the complainant said involved rape and which were not the subject of charges in the indictment, the trial judge commenced by reminding the jury of his earlier directions to consider each charge separately and, if they had a reasonable doubt about an element of the charge (the relevant element being consent), they must find the appellant not guilty of that charge. After referring to the complainant's evidence of other incidents of being raped, the trial judge directed the jury that they could only use that evidence if they were satisfied beyond reasonable doubt that the incidents occurred; if the jury did not accept that, then that finding would bear upon whether they accepted or did not accept the complainant's evidence relating to the charges beyond reasonable doubt.

[54] The trial judge went on to direct that if the jury did accept that those other acts of a sexual nature occurred, the jury could only use them against the appellant in relation to the charges if they were satisfied that the evidence demonstrated that the appellant had a sexual interest in the complainant. As the trial judge immediately went on to remind the jury, however, the appellant frankly agreed that he had a sexual interest in the complainant, which he acted upon.

[55] The trial judge then identified the real issue joined between the parties as being whether the complainant consented to the other acts of sexual intercourse. The trial judge continued:

> "If you're persuaded beyond a reasonable doubt by this other evidence, that on these other occasions there was sexual intercourse between [the appellant] and [the complainant], without [the complainant's] consent, then you may think it's more likely that the [appellant] did what is alleged in the actual charges that we're considering."

[56] That was correct. The complainant's evidence of a pattern of frequent, separate occasions of anal and oral intercourse, procured by the appellant's violence and threats, put in context and made more credible the complainant's evidence that he did not consent to the acts of sexual intercourse charged in the indictment which themselves formed part of the pattern. The evidence also had a more direct relevance to the charges of the rape, particularly in relation to counts 4, 6 and 7, as evidence which tended to prove both that the complainant did not consent and that the appellant did not believe and did not have reasonable grounds for believing that the complainant consented.

[57] The trial judge then directed the jury that the complainant's evidence "…of being constantly bashed, punched in the face, punched in the ribs, and burnt with the cigarette lighter" could only be used by the jury if they were satisfied of it beyond

reasonable doubt. The trial judge directed the jury that if they did not accept that evidence, that would bear on whether or not they accepted the complainant's evidence relating to the actual charges. If the jury did accept the evidence beyond reasonable doubt, it could only be used by the jury in relation to the charges in relation to the issue of consent; "that is, why [the complainant] acquiesced to these acts of intercourse, and didn't make a complaint because he was being assaulted and on occasions being burnt with cigarettes, by the [appellant]." The trial judge completed the challenged directions as follows:

> "So, that is how you have to use that evidence of other acts of a sexual nature, of what I described as other acts, the prosecution says amounted to assaults. …
>
> Now once again, as [defence counsel] you might think properly submitted, if they were in a consensual homosexual relationship, and they were seen in that position, of course it's completely consistent with innocence. So it's only if you find that occurred beyond a reasonable doubt, and you're satisfied it occurred in the context of this abusive relationship, could you use it against the defendant."

[58] The trial judge did not give a "general propensity" warning directing the jury that, if they did accept the complainant's evidence of the incidents which were not the subject of any of the charges, that they must not use that evidence to conclude that the appellant was someone who had a tendency to commit the kind of offence with which he was charged; that it would be quite wrong for the jury to reason that because, if it be the case, the jury was satisfied that he did those acts on other occasions, it was likely that he committed one or more of the charged offences. (Such a direction was given, for example, in *Roach v The Queen*.[7])

[59] Where evidence which may show propensity is admitted for a different purpose, the jury should be given careful directions as to the use to be made of it.[8] In *R v WO*[9], Williams JA, with whose reasons de Jersey CJ agreed, and Keane JA, applied High Court authority in concluding that, whilst there is no absolute rule that a trial judge must always give a propensity warning where evidence is not admitted to prove propensity but may suggest a propensity to commit the offence, such a warning will ordinarily be required. The same approach is evident in more recent decisions after the High Court's decision in *HML v The Queen*[10]. It has been held that the omission to give a satisfactory direction on this topic amounts to an error of law which will often, although not invariably, result in allowing the appeal and setting aside the convictions, unless the court considers that no substantial miscarriage of justice has actually occurred.[11] Nevertheless whether the omission to give a warning against propensity reasoning occasioned a miscarriage of justice depends upon an assessment of the overall circumstances of the particular case.[12]

[60] The trial judge directed the jury that the complainant's evidence was critical to the prosecution case; that the prosecution case "…stands or falls on your assessment of

---

7 (2011) 242 CLR 610 at [48].

8 *Roach v The Queen* (2011) 242 CLR 610 at [47], [48]; *HML v The Queen* (2008) 235 CLR 334 at [132].

9 [2006] QCA 21 at [15]-[20] and [37]-[46].

10 (2008) 235 CLR 334. See, for example, *R v CAU* [2010] QCA 46 at [96].

11 *R v McMullen* [2011] QCA 153 at [85], [88], [89].

12 See, for example, *R v PAO* [2012] QCA 8 at [55]-[57], per McMurdo P, Mullins J agreeing.

his evidence"; and that before the jury could convict they would have to be satisfied beyond reasonable doubt that the complainant was both truthful and reliable in saying that he did not consent. Because the evidence of the appellant's discreditable conduct was given only by the complainant, and the trial judge appropriately emphasised the significance of the credibility and the reliability of his evidence of the charged offences, the risk of impermissible propensity reasoning was a relatively slight one.[13] Furthermore, in relation to the most significant aspect of the discreditable conduct, the complainant's evidence that the appellant regularly bashed him and burnt him with a cigarette lighter, the trial judge clearly directly the jury that it was relevant only to explain why the complainant acquiesced in the acts of intercourse and did not make a complaint about them; and that it was only if the jury was satisfied of that evidence beyond a reasonable doubt that the jury could use it against the defendant, as bearing upon their assessment of his account in relation to the actual charges.

[61] In light of the way the trial was conducted, and especially having regard to the trial judge's directions clearly limiting the jury's use of that evidence, the trial judge's omission to give a general propensity warning did not create a miscarriage of justice in the particular circumstances of this case. Further comfort for that conclusion may be found in defence counsel's omission to seek such a warning.

[62] At the hearing of the appeal, there was some discussion about the sufficiency of the trial judge's directions concerning s 24 of the *Criminal Code*, although this topic was not raised by any ground of appeal. The trial judge directed the jury in the following terms:

> "…I also have to give you another direction, which you may think is unusual in the circumstances of the case, that if you find yourself in this position, you are satisfied beyond a reasonable doubt that the incidents as described by [the complainant] did occur, and that he didn't consent, then you have to consider whether the defendant honestly and reasonably, but mistakenly, believed that he was consenting.
>
> Now, once again, the defendant doesn't have to prove that he had an honest and reasonable but mistaken view that [the complainant] was consenting. In fact his case is that [the complainant] was consenting. But it arises on the evidence, depending on your view of the evidence, and I can't anticipate how you're going to make findings.
>
> Once again, it's for the prosecution to satisfy you beyond a reasonable doubt, and if you find yourself in that position that the defendant did not have an honest and reasonable but mistaken view that [the complainant] was consenting, if you accept [the complainant's] evidence beyond a reasonable doubt, then you probably think - and in fact having regard to the defendant's own account, you probably think that the prosecution would have satisfied you beyond a reasonable doubt that he didn't have an honest or reasonable but mistaken belief that [the complainant] was consenting"

[63] I was initially concerned that this direction should have been expanded, particularly by relating it to the relevant evidence. Closer study of the record has persuaded me

---

13 Cf *R v Wackerow* [1998] 1 Qd R 197 at 201-202 per Macrossan CJ, and at 208-209 per Byrne J.

that the direction did accurately reflect the real issues in the case. The real issue was consent. If the jury accepted the prosecution case that the appellant procured the complainant to acquiesce in the sexual acts by violence and threats, that excluded any real possibility that the appellant believed, mistakenly, that the complainant consented: see [36] and [37] of these reasons . No real risk of injustice was occasioned by the absence of more comprehensive directions.

Ground four: the evidence led as to "demeanour" should have been the subject of a further direction and not left as corroboration of the complainant's account

[64] The appellant contended that the trial judge did not give appropriate directions about certain evidence of the complainant's demeanour at various times and erred in leaving this evidence as corroboration of the complainant's account.

[65] The appellant gave various examples of the evidence the subject of the directions which were submitted to be insufficient. Notably, the appellant referred to the evidence of SJ, who had known the complainant for four or five years, that in 2009 she saw the appellant shouting at the complainant and, after the appellant went into a shop and the complainant went into a newsagent, she could see that the complainant was scared because he kept looking over at the shop entrance to see if anyone was coming out. A week or two later she saw the complainant in a shop while the appellant was paying for what he had bought, and the complainant looked like "'Can you get me away? Take me with you' kind of thing". Ms SJ could see in his eyes that the complainant was scared and was trying to talk, but nothing would come out. The complainant's cousin, Karley Fisher gave similar evidence that she could see in the complainant's eyes that he was scared for his life.

[66] The complainant's mother, RL, gave evidence that when she saw the complainant and the appellant together (at a time which she could not specify) the complainant looked frightened; "he was looking on the ground, and I knew he couldn't talk [sic] me straight in my eyes." She also gave evidence that she noticed a change in the complainant. The complainant's mother gave evidence that she saw a burn mark on his chest and, whilst the appellant was standing next to the complainant, the complainant said that he had accidentally burnt himself. The complainant's mother gave evidence that she visited BK's place on occasions when the appellant and complainant were there, and that sometimes the appellant would collect her and take her back to BK's place.

[67] The complainant's aunt, BD, gave evidence of the occasion when she and other of the complainant's relatives arrived to take the complainant from the SCT property. She said that the complainant "…just looked very intimidated"; he was "looking … on the corner of his eye back at [the appellant]". He just looked scared …". BD gave evidence that, after she and others had taken the complainant to his grandmother's house, the complainant said that the appellant had raped him and that if the complainant ever left him the appellant would kill the complainant's grandmother. BD agreed in cross-examination that, before the complainant had decided to leave the SCT property, he said words to the effect that he was over 18 and could do what he wanted, at that point the complainant was staying at the house, but eventually he was persuaded to leave.

[68] RB, a director at a learning centre attended by the complainant, gave evidence that, by about the middle of 2009, the complainant's motivation disappeared. On one occasion the complainant appeared very agitated, looking over his shoulder all the

time and giving the impression that he wanted to be somewhere else. The police liaison officer, Johnston, in giving evidence of the conversation she had with the complainant during 2009 whilst he was in the car with the appellant and others, gave evidence that she saw the complainant hang his head down and that he "really didn't want to talk to me much … [he] … was a bit frightened to tell me anything". BAK gave evidence that she leased the property at 84 ST, Bundaberg to SD. In November 2009, she saw two men in the shed at the property. She gave evidence that the younger person "looked as though he was embarrassed. He was shy; he was hiding his head. He was quiet … he was subdued". She said that in her opinion the younger man was "dominated" by the other man and looked intimidated.

[69] The appellant argued that opinion evidence of this character was not admissible because "the causal connection or apparent relationship between the distressed condition and the matter of complaint is 'tenuous or remote' …";[14] but the evidence was not the subject of any objection at the trial and, notwithstanding that submission, the appellant's complaint under this ground of appeal is not that the evidence was inadmissible or should have been taken from the jury. The complaint is that the trial judge's directions were not sufficiently strong and wrongly left the evidence as corroboration of the complainant's account.

[70] The trial judge did not leave this evidence as corroboration of the complainant's account. On the contrary, the trial judge clearly directed the jury that defence counsel was quite right in the submission that this "demeanour evidence" was in the form of opinions "…which really have no weight, when you think about it." The trial judge directed the jury that they had to act "…on the facts". The trial judge elaborated upon those directions, observing that demeanour can be very misleading and the jury had to be very careful about acting on the opinions of people who formed the view that the complainant was frightened or indoctrinated by the appellant. The trial judge told the jury that they would know from their own experience that they had to be very careful about drawing conclusions from what people thought about how someone was feeling or the way someone was acting, or about the nature of the relationship between the appellant and the complainant.

[71] The jury were clearly directed to focus upon the facts and, in effect, to disregard the opinion evidence. The trial judge's directions obviated any risk of a miscarriage of justice arising from the admission of this body of evidence.

Ground five: inadmissible evidence was led surrounding preliminary complaint evidence and no direction was given as to this

[72] The appellant contended that the hearsay evidence given of complaints made by the complainant after he had spoken to a police officer, Murray, on 10 August 2009 was inadmissible insofar as it concerned offences which occurred before that date.

[73] Section 4A(2) of the *Criminal Law (Sexual Offences) Act* 1978 makes evidence of "…how and when any preliminary complaint was made by the complainant about the alleged commission of the [sexual] offence by the defendant…" admissible in evidence, regardless of when the preliminary complaint was made. The term "preliminary complaint" is defined in s 4A(6) to mean a complaint other than:

> "(a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or

---

[14] *R v H* [2001] QCA 563 at [22]; *R v Williams* [2008] QCA 411.

(b) a complaint made after the complaint mentioned in paragraph (a)."

[74] The appellant's argument is that the evidence of Murray was evidence of the complainant's "first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence …". Although there was some discussion of that aspect of the definition early in the trial, it was not contended by defence counsel that the statements made to Murray amounted to the "first formal witness statement to a police officer …". Defence counsel's omission to advance that argument is understandable. The evidence about the statements to police officer Murray does not rise above his assertion that "there was an allegation of a sexual nature" during his conversation with the complainant. The tape of the conversation proved to be inaudible. No other evidence was admitted about the conversation. The evidence at trial therefore did not justify a conclusion that the conversation might have constituted a formal witness statement or that it was given in or anticipation of a criminal proceeding in relation to any of the offences subsequently alleged in the indictment. It follows that the evidence of the complainant's subsequent complaints of those alleged offences was not rendered inadmissible by the fact that the complainant had earlier spoken to Murray.

[75] The appellant also argued that all of the evidence of complaints of violence and threats was inadmissible hearsay because those complaints were not "about the alleged commission of the offence by [the appellant]", within the meaning of s 4A(2).

[76] The charged offences of rape alleged that the appellant committed sodomy without the complainant's consent. The offence was committed only if, relevantly, the complainant did not consent to, and s 24 of the *Criminal Code* did not excuse the appellant from being criminally responsible for, the acts of sodomy. The complainant's statements to various witnesses alleging numerous assaults and threats by the appellant directly related to the issues whether the complainant consented, or the appellant reasonably believed that the complainant consented, to the alleged acts of sodomy. It is therefore arguable that those statements constituted complaints "about" the alleged commission of the offences. In the course of oral argument, the appellant's counsel conceded that complaints about assaults and threats, if "bundled up with a complaint about a rape", could constitute preliminary complaint evidence within s 4A.

[77] In any event, this evidence was not the subject of any objection, and the omission to object may have been a forensic decision aimed at highlighting suggested differences between the terms of the preliminary complaint evidence and the terms of the complainant's evidence at the trial. Bearing that in mind, and having regard also to the trial judge's strong directions to the jury about the central importance of the complainant's evidence of the offences, even if the preliminary complaint evidence was inadmissible, it did not produce a miscarriage of justice.[15]

Ground six: no directions were given as to purported lies told by the appellant in his interview

[78] In the appellant's written submissions it was contended that statements by the appellant in his record of interview (in which he denied having cuddled the complainant, as was alleged by the complainant, AL and TC and he stated that he

---

15 See *R v Riera* [2011] QCA 77.

worked throughout March when the employment records showed that he worked only on three occasions) might have been regarded by the jury as lies. It was submitted that the trial judge's directions were deficient because they did not include a direction which explained the legitimate way in which the jury might use a conclusion that the appellant had lied.

[79] As the respondent submitted the prosecutor did not rely upon statements by the appellant in his record of interview as constituting lies or as revealing any consciousness of guilt of the offence by the appellant. In those circumstances, it was not necessary for the trial judge to give a direction in accordance with *Edwards v The Queen*,[16] concerning the manner in which a jury may use a lie to reason towards guilt. Furthermore, in the absence of any suggestion at the trial that the appellant lied in his police interview, no miscarriage of justice was occasioned by the omission of the trial judge to give a direction that, if the appellant deliberately did lie, that was relevant only to his credibility. The jury was emphatically directed to focus upon their assessment of the complainant's credibility and reliability in relation to the alleged offences. This is not a case in which there was a serious risk that the jury might engage in a circular or otherwise impermissible process of reasoning from supposed lies towards guilt.[17]

Sentence application

[80] The appellant was sentenced to 14 years imprisonment on counts 1, 4, 6 and 7 and to four years and eight years imprisonment respectively on counts 2 and 3. He was also sentenced to concurrent terms of four years imprisonment for offences to which he pleaded guilty. Counts 1, 4, 6 and 7 were automatically declared to be convictions of serious violent offences.[18] The sentencing judge also declared that the convictions on counts 2 and 3 were convictions of serious violent offences. The appellant has applied for leave to appeal against his sentences.

[81] The offences in the trial indictment were committed on separate occasions during a period of some 18 months. The appellant was 32 years of age when sentenced and he was aged between 29 and 30 when he committed the offences. The sentencing judge found that the appellant committed the offence in count 1 just prior to the complainant's 18th birthday. As was implied by the jury's verdicts, the trial judge found that the sexual offences were often accompanied by violence and intimidation; that the complainant was in fear of the appellant; and that the appellant's offending probably would have continued were it not for the complainant's family's determination to free him from the appellant's grip. The appellant's conduct in relation to count 2 was, the sentencing judge observed, of a particularly sinister kind and was consistent with the control the appellant had over the vulnerable young complainant. The sentencing judge concluded that, given the appellant's knowledge of the complainant's background which was referred in the appellant's extensive record of interview and given the appellant's criminal history, he must have appreciated that the complainant was extremely vulnerable at the time when the appellant first raped him; the appellant controlled the complainant

---

16 (1993) 178 CLR 193. See *Zoneff v The Queen* (2000) 200 CLR 234 at 244: "As a general rule, however, an *Edwards*-type direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because … 'the accused knew that the truth … would implicate him in [*the commission of*] the offence' and if , in fact, the lie in question is capable of bearing that character."

17 cf *Zoneff v The Queen* (2000) 200 CLR 234 at 245 [22] – [23].

18 s 161A *Penalties and Sentences Act* 1992.

and so overbore him by violence, threats of violence, and intimidation, that the appellant overcame the complainant's ability to make a voluntary choice as to whether he wished to engage in sexual relationships. The sentencing judge also found that the appellant had not shown a "scintilla of remorse", and that the appellant's offending had a major impact on the complainant, emotionally and psychologically.

[82] Before the trial on the present indictment, the appellant pleaded guilty to an offence committed on 13 January 2009 of indecent treatment of a 14 year old boy, R. The appellant was living with the boy and his family. The complainant, who wanted to go back to sleep after having eaten breakfast, described the appellant having laid him down on the bed on one side and starting to massage him. As the massage progressed the appellant massaged the complainant's bottom and squeezed his penis. On the agreed facts it was expressly agreed that it was not clear whether contact was skin on skin or through the clothing. The squeezing occurred for about five seconds, after which the complainant told the appellant that he needed to go the toilet, left the room, and subsequently complained. R's victim impact statement revealed that the offence had had a significant impact upon him.

[83] When the appellant was found guilty of the charges in the present indictment, he pleaded guilty that he unlawfully and indecently dealt with D, a child under the age of 16 years, and he had D under his care for the time being. The 14 year old complainant went to the appellant's residence on the night in May 2010 with a friend to look for two other friends who they knew were there. The other two friends left and the complainant and his friend stayed. After the complainant had dinner and had played for about half an hour, he became tired and lay down on the appellant's bed to go to sleep. At about 2.30 am he awoke to find the appellant's hand down his pants masturbating his penis. The complainant was scared. After he was able to move he got up and went to the toilet. The appellant participated in an interview with police and made admissions. He told police that he had rubbed the complainant's penis for 10 to 15 minutes and that he knew that what he was doing was wrong. The prosecutor was unable to obtain a victim impact statement from D.

[84] The prosecutor informed the sentencing judge that at the time of both of those offences the appellant was a reportable offender under the *Child Protection (Offender Reporting) Act* and was prohibited from having unsupervised contact with children. The appellant committed the indecent treatment offence when he was also on bail for the trial indictment offences.

[85] The appellant has a bad criminal history. He had prior convictions for sodomy and for indecent treatment of children. He was sentenced to three years imprisonment for an indecent treatment offence, in which he had indecently dealt with an 11 year old boy who was asleep. The appellant had also committed two sodomy offences on eight and nine year old boys, taking advantage of his position as an indigenous dance instructor. The appellant was convicted of a further sodomy charge in relation to a 12 year old boy, again taking advantage of his connection with indigenous dance. On that occasion, the appellant gave the child marijuana before committing the offence. The appellant's criminal history included three further indecent treatment charges concerning a 12 year old boy. The appellant fellated that child and procured him to suck on the appellant's penis.

[86] The appellant had what he described as an unfortunate early life. He was raised by a variety of people including child welfare agencies and in foster homes. He ran

away from foster homes and was abused himself between the ages of five and 16. He did not receive much education and completed Year 10 in prison. He obtained some trade qualifications including in tyre fitting and carpentry, and he had tickets to operate various equipment. During a recent period of incarceration he finished the Cognitive Skills course and Ending Offending program and, when released from prison in April 2008, expressed optimism that he would be better. He was an amateur boxer who was said to have been selected for the Olympics but did not participate because he was incarcerated.

[87] After referring to the appellant's criminal record, and the fact that the Adult Sexual Offenders Treatment program did not change the appellant's perverted attitude to sexual matters, the sentencing judge concluded that the appellant represented a significant danger to young males in particular, that he was probably a genuine paedophile, and that denunciation, protection of the community, and personal and general deterrence loomed large in the exercise of the sentencing discretion.

[88] It was accepted for the appellant that it was difficult to find a case which was in all fours with the present case, but it was submitted that having regard to the authorities the sentence imposed was at least two years too high. The appellant submitted that *R v Flynn*[19], in which a sentence of 15 years imprisonment was imposed, was a worse case than the present and did not support the sentence imposed upon the appellant. The appellant referred also to *R v Soper*[20], *R v PAD*[21], *R v DAF*[22], and *R v Chinfat*[23]. The submission for the appellant was that *Chinfat* tended to establish that the appropriate penalty for the offences in the trial indictment was between eight and 10 years imprisonment, and that it and the other decisions suggested that the appropriate head sentence, taking into account all offences, was between 10 and 12 years imprisonment.

[89] The respondent agreed that it was difficult to find directly relevant authorities of assistance. The respondent submitted that, having regard to the particular circumstances of the indecent dealing and indecent treatment offences, the appellant's antecedents, and the facts that he was a reportable sexual offender on bail who had only recently been interviewed by police and charged with respect to serious sexual offending, a sentence in the order of five to six years imprisonment could have been imposed for the offences to which the appellant pleaded guilty, although it was conceded that credit for the plea should be reflected in the head sentence. The respondent argued that, allowing for considerations of totality, an effective overall sentence of 14 years imprisonment was appropriate.

[90] In *PAD*, an effective sentence of 12 years imprisonment was imposed after a trial for offences which notably included maintaining a sexual relationship with the child and two counts of rape. The offending was worse than in this case in so far as the unlawful sexual relationship was maintained whilst the complainant was only 12 years of age and the rape led to the complainant giving birth, but that offender had not previously been jailed for similar offending nor undergone the intensive rehabilitation program which failed to deter the appellant. *PAD* does not support the proposition that the effective head sentence of 14 years imposed upon the

---

19 [2010] QCA 254.
20 [1994] QCA 254.
21 [2006] QCA 398.
22 [2004] QCA 368.
23 [1995] QCA 508.

appellant was manifestly excessive. *DAF*, in which the offender was sentenced to 12 years imprisonment for sexual offences against six different children over a period of 10 and a half years is distinguishable for much the same reasons, and particularly also because that offender pleaded guilty.

[91] *Soper*, in which an effective sentence of 11 years imprisonment was imposed for offences of rape and indecent assault committed on one occasion is not inconsistent with the sentence imposed upon the appellant. That offender, who had been following the 17 year old complainant, invaded the shower cubicle in the caravan park where the complainant lived and violently assaulted and raped her. He had an extensive criminal record, although only one prior conviction for a sexual offence committed many years earlier. The sentencing judge reduced a notional head sentence of 12 years imprisonment to 11 years to take into account a variety of factors, including the plea of guilty which saved that complainant from giving evidence both at trial and on sentence. The appellant emphasised the brutality involved in those offences, but that sentence of 11 years imprisonment was imposed upon a plea of guilty to offences committed on one occasion, whereas the effective head sentence of 14 years imprisonment was imposed upon the appellant after a trial and took into account his criminality in five separate counts of rape (counts 1, 3, 4, 6 and 7), at least two of which were accompanied by further violence, a separate count of assault (count 2), and the two additional sexual offences to which the appellant pleaded guilty. Overall, as the sentencing judge observed, the offending in *Soper* must be regarded as being less serious than the appellant's offending and, in relation to the appellant's most serious offences, he is not entitled to the mitigation afforded to Soper on account of his pleas of guilty.

[92] In *Flynn*, the application for leave to appeal against sentence was confined to concurrent terms of eight years imprisonment imposed for counts concerning that offender's conduct in taking indecent photographs of two complainants. Those sentences were reduced on appeal to four years imprisonment and three years imprisonment, leaving undisturbed the effective head sentence of 15 years imprisonment. That offender was convicted of maintaining an unlawful sexual relationship with a child under 16 years and a count of rape of the same child. That child was aged between 10 and 12 years during the 12 month period charged in the serious maintaining offence and was 11 years old at the time of the offence of rape. The head sentence also took into account the offence of taking an indecent photograph of the first complainant's half sister, who was seven years old at the time. The offender was given concurrent terms of imprisonment of 15 years for maintaining an unlawful sexual relationship with an unrelated child, who was aged between 11 and 14 years during the three year period of that offence, and two counts of rape. He had a criminal history, having previously been in prison for sexual offending against children on two occasions, once being sentenced to three years imprisonment about 11 years before the relevant offences and on another occasion being sentenced to four years imprisonment some five or six years before the subject offences. *Flynn* was a worse case than the present case, especially because the two complainants in the very serious offending were children, but the sentence of 15 years imprisonment imposed by the sentencing judge in that case does not establish that the sentencing judge's sentence of 14 years imprisonment in this quite different but also very serious case was manifestly excessive.

[93] Importantly, there is no challenge to the sentencing judge's conclusions, that denunciation, protection of the community, and personal and general deterrence all

loomed large in the sentencing discretion. The appellant's criminality was of a very high order, he lacked remorse, his offences produced seriously adverse consequences, he has a bad record of sexual offending, and, regrettably, his prospects of rehabilitation are not shown to be promising. Although the sentence of 14 years imprisonment is very severe, it was within the sentencing judge's discretion in those circumstances.

[94] The appellant also submitted that the concurrent sentences of four years imprisonment imposed for the offences to which the appellant pleaded guilty (indecent treatment and indecent dealing) were manifestly excessive and should instead have been in the range of two years imprisonment. The submission might have more substance in a different context, but the appellant committed both offences at a time when he was a reportable offender who was prohibited from having unsupervised contact with children, he committed the indecent treatment offence when he was on bail for the trial indictment offences, the consequences for the complainant of the indecent treatment offence were significant, and the appellant stood to be sentenced on the footing that he had a bad criminal history for sexual offending. These concurrent sentences were not manifestly excessive.

Proposed orders

[95] The application for leave to adduce evidence in the appeal should be refused. I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

[96] **MULLINS J:** I agree with Fraser JA.

[97] **ANN LYONS J:** I agree with the reasons of Fraser JA and with the proposed orders.