

# SUPREME COURT OF QUEENSLAND

CITATION: *R v DBE* [2012] QCA 270

PARTIES: **R**  
**v**  
**DBE**  
(appellant)

FILE NO/S: CA No 21 of 2012  
DC No 76 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: 5 October 2012

DELIVERED AT: Brisbane

HEARING DATE: 1 August 2012

JUDGES: Margaret McMurdo P, Fraser JA and Douglas J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal allowed.**  
**2. Set aside verdict of guilty.**  
**3. Enter a verdict of acquittal.**  
**4. Application to adduce further evidence refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL ALLOWED – where appellant found guilty by jury of rape and sentenced to five years and six months imprisonment – where appellant argued verdict of jury was unreasonable – where inconsistencies between multiple police interviews of complainant – where inconsistencies in evidence of complainant and other witnesses – where delay in complaint being made to police – where appellant’s description of alleged scene inconsistent with photographic and video evidence – where photographs of alleged scene available on social networking website – whether the guilty verdict is unreasonable or cannot be supported having regard to the evidence

*Criminal Code* 1899 (Qld), s 668E(1)

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited  
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53,  
 cited

COUNSEL: P J Callaghan SC for the appellant  
 D L Meredith for the respondent

SOLICITORS: Bernard Bradley & Associates for the appellant  
 Director of Public Prosecutions (Queensland) for the  
 respondent

- [1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for allowing this appeal against conviction, setting aside the guilty verdict and instead entering a verdict of acquittal.
- [2] The complainant's allegations that the appellant raped her in March 2008 may well be true. But she made no complaint to police for at least seven months. There was, therefore, no medical or other evidence to support her complaint. She said that the first person she told about the rape was her then boyfriend in late April or May 2008. He did not give evidence at the trial. The complainant's evidence as to her complaint of rape to her friend, TE, differed from TE's evidence. The complainant's evidence was internally inconsistent on peripheral issues. Her description of the upstairs area of the unit where she said the rape occurred differed from the unchallenged evidence given on this point by the appellant, his mother and sister. The complainant's evidence about the layout of the unit was available on the MySpace account of the appellant's sister. The complainant was her friend on MySpace and once commented on her photographs. The appellant voluntarily took part in a police interview in the presence of his solicitor in December 2008 and vigorously denied the charge. He also gave sworn evidence at trial to that effect. There was nothing implausible about his account. Significantly, his mother gave evidence that she was home when the alleged rape occurred and the complainant did not go upstairs. On her account, the offence could not have occurred.
- [3] I have found the question whether the guilty verdict is unreasonable or cannot be supported having regard to the evidence under s 668E(1) *Criminal Code* 1899 (Qld) a most difficult one to answer. In doing so, this Court must determine whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. See *M v The Queen*.<sup>1</sup> In the end, even after giving full weight to the jury verdict and the fact that the complainant must have been a convincing witness, I am left with a reasonable doubt as to the appellant's guilt.
- [4] I agree with the orders proposed by Fraser JA.
- [5] **FRASER JA:** After a three day trial in the District Court, the appellant was found guilty by a jury of the rape of CD at a suburb on the Sunshine Coast on an unknown date between 15 February 2008 and 1 April 2008. The appellant was sentenced to imprisonment for five years and six months.
- [6] The appellant has appealed against his conviction on the following grounds:

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<sup>1</sup> (1994) 181 CLR 487, 493.

- Ground 1: The verdict of the jury was unreasonable.
- Ground 2: A miscarriage of justice occurred by reason of the failure by the trial judge to address the jury adequately as to:
- (a) the manner in which they should assess the evidence of primary complaint;
  - (b) the need for the witness DT to be proven beyond reasonable doubt to be either dishonest or completely unreliable before they could convict;
  - (c) the need, in the light of all the evidence, for the testimony of the complainant to be scrutinised with great care.
- Ground 3: A miscarriage of justice occurred by reason of the fact that:
- (a) the appellant was unable to gain access to the records of, or even make inquiries of the complainant's treating doctors and psychologist;
  - (b) the jury did not hear evidence that the complainant had previously made to the witness TE statements which:
    - (i) reflected adversely on her credibility; and
    - (ii) manifested evidence of attention seeking behaviour.

[7] He has also applied for leave to adduce further evidence.

**Ground 1: the verdict of the jury was unreasonable**

[8] The first ground of the appeal raises the question whether the verdict was unreasonable or cannot be supported having regard to the evidence: s 668E(1) *Criminal Code* 1899 (Qld). This ground requires the court to review the record of the trial and decide whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence.<sup>2</sup> If that review results in this Court having a reasonable doubt about the appellant's guilt the conviction must be set aside, unless the doubt is capable of being resolved by the jury's advantage over this Court in seeing and hearing the evidence as it was given.<sup>3</sup>

**The evidence**

- [9] At the time of the alleged offence the then 20 year old appellant worked as a chef at a restaurant in Noosa. The then 15 year old complainant also worked at the restaurant. The appellant was a friend or acquaintance of the complainant's brother CA. The complainant was a friend of the appellant's sister DC.
- [10] The complainant's evidence was contained in police interviews recorded on 29 October 2008 and 5 April 2009, which were admitted in evidence under s 93A of the *Evidence Act* 1977 (Qld), and in her testimony at the trial in January 2012. In the first interview the complainant first told police about an event which was not charged against the appellant. The complainant said that the first time the appellant had done something wrong was after a staff Christmas party on 11 December 2007, the day before her brother CA left to go to Brisbane to catch a flight to Europe. After the party, the complainant was walking along a beach with the appellant away from a surf club. The appellant put his arm around her and then started rubbing his

<sup>2</sup> *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.

<sup>3</sup> *M v The Queen* (1994) 181 CLR 487 at 494.

hand on her waist. The complainant told him to stop, saying that he knew that she had a boyfriend. He said that it did not matter and they were just friends. He stopped what he was doing but again put his arm on her waist. He put his hand in the side of her jeans, moving his hand down so that it was touching her hip under her clothing. The complainant told him to stop. The complainant turned away and walked back to the surf club. The complainant said that after she had returned to the surf club car park she sat with her brother. She did not tell police what, if anything, she said to her brother about the appellant's conduct.

[11] The complainant then told police that the appellant had raped her about a week before she quit her job at the restaurant in March 2008. The complainant's mother drove the complainant to work that day and asked the appellant if he would be able to bring the complainant straight home after work because she (the complainant's mother) did not want her to be too late. The appellant told the complainant's mother that he would bring the complainant home. When they finished work at about 9.00 pm, the appellant told the complainant that he wanted to go out that night, that he would go home to shower and change first, and that he would then drop the complainant to her home before he went out. The complainant agreed. She sent a text message to her mother saying that they were going to the appellant's home first and that they would come to her home straight after. The complainant's mother telephoned the complainant and asked what she was doing and where she was. The complainant told her that she was driving back to the appellant's house. The complainant's mother was angry because the complainant would be late. In response to the complainant's mother's question about how long they would be, the complainant enquired of the appellant and then told her mother that she would be home in about half an hour. When they arrived at the appellant's house, the complainant first said that she would wait in the car, but when the appellant said that he was going to be awhile she decided to go inside.

[12] The complainant then gave the following account to police:

“And when he was in the shower I was just sitting in his room and waiting for him. And then um he asked if I wanted anything to drink or and I just said that I was fine and that I'd just wait. And then when he got out of the shower he came in and he's had a towel on. And then he I was sitting on the bed and then like he pushed me back. And then he started um like he started touching me and stuff. And I told him to stop it. And I told him that I had a boyfriend and stuff and that he knew and I said that he was like my big brother. And then um once I said that he got up and he just walked away. But then when he came back in he just got on top of me and he when he pulled my pants off I didn't know what to do and then I he just started having sex with me. And I didn't know what to do. And I kept telling him to stop and I was crying and he wouldn't. And then after all that then when he um when he stopped and he got dressed and stuff he told me if I told anyone he'd make sure I didn't forget who he was. And so I that's why I didn't say anything to anyone 'cause I was scared.”

[13] The complainant elaborated upon that account in response to questions by the police officer. She said that when she went into the appellant's house the appellant introduced her to his mother who was watching TV, before she walked upstairs to the appellant's room with him. When she arrived upstairs the appellant was taking

his shoes off. The appellant said he would not be long and that he was just having a shower. He asked the complainant if she wanted anything to drink. She said that she did not and that she would just wait. She sat on the bed waiting while the appellant had a shower.

- [14] The complainant estimated that she waited about 10 minutes while the appellant was in the shower. He returned to the room wearing just a towel and leant over her. She told him to stop "... 'cause it was weird 'cause he's like my big brother and because I have a boyfriend". She thought the appellant was trying to kiss her. She told him to stop. She said that it was weird and that the appellant knew that she was seeing HJ (her boyfriend). She was "...like laughing because it was weird". The appellant walked out of the room in the direction of the bathroom and not long after that walked back in and started touching her leg. He leant over her again and tried to kiss her and she stopped him. Then he sat beside her, on her left side, and rubbed the inside of her leg with his right hand. The appellant "...kind of like leant his body in towards mine and put his right like leant on his left arm and put no his right arm and put his left arm around me and then pushed me back on to the bed." The complainant said that she was scared and did not know what to do. The appellant was kissing her neck and undoing her pants. He undid two buttons and the zip while she was lying down. The complainant did not know what to do and the appellant started taking off her pants. The complainant pulled her pants up and told him to stop. He responded that it was just fun and that it did not mean anything. The appellant pulled her underpants off with one hand. She pulled them up and told him to stop, but the appellant pulled them down to past her hip on one side. The appellant told the complainant that he was not going to hurt her. She was looking at him and got really upset and had tears in her eyes. The appellant kept pulling her pants down and saying that the complainant would be fine.
- [15] The appellant was pushing against her by leaning his body on top of hers whilst he was kissing her, and "then he started having sex with me." When the police officer asked the complainant what she meant by that, she said that the appellant put his dick inside her vagina; that "...he just held it and put it inside me like pushed it inside me. And then I told him to stop it 'cause it hurt." The appellant was not wearing any protection. The complainant "had my hands on his chest. And I pushed like I pushed my arms out and told him to stop it 'cause it hurt"; "I stop said stop it hurts". The complainant said her hands were being squashed against her. The appellant looked at her and asked her if she was sure and "I was like yeah it really hurts". The complainant said that after that "...he just spat on his hand and then put like put it on himself. And then he pushed it in to me again." The complainant said she kept telling the appellant to stop. The appellant did not say anything after that at all, but just kept going. When the complainant tried to push him off, the appellant held her wrists beside her. The complainant said that she was crying but did not scream. She told the appellant that he was "supposed to be my big brother" and "you just said that you wouldn't hurt me". The complainant started crying and the appellant stopped, put his towel back on and walked out of the room. The complainant said that the appellant did not ejaculate.
- [16] The appellant came back into the room wearing his black jeans and behaved as if nothing had happened. He asked the complainant to pick out a shirt for him. She did not move. She had already got dressed and was lying on the bed. The appellant also asked the complainant to get him a pair of socks and asked her what shoes he should wear. The appellant asked the complainant why she was not talking to him. The complainant said that she looked at him and did not say anything. She had

tears in her eyes. Once the appellant was changed he took the complainant home. In response to a question whether the complainant saw the appellant's mother again, she said that she had said goodbye to her. The complainant said that on the way home in the car the appellant looked at her and said "if you tell anyone ... I swear I'll make sure you don't forget me." The appellant asked the complainant to look in the car for money (the restaurant takings) which the appellant had to drop off at their boss's house. The complainant said that she would not look for it and would not talk to the appellant. The appellant looked at her and said "oi" twice. The complainant said "what?", and the appellant said "I swear if you tell anyone ... you won't forget I'll make sure you don't forget who I am." The complainant said that she was very scared and did not want to say anything because she thought that the appellant might try to do something again. The complainant did not say anything to the appellant after that. When they arrived at the complainant's house, the appellant said, "tell your mum I said hello and sorry that we were late". The complainant said that she undid her seatbelt, got out of the car, and thanked the appellant for the lift. When the complainant walked into the house she said hello to her mother. Her mother asked her how her work was, to which the complainant responded that it was fine. The complainant said that she did not tell her mother what had happened because she was scared and thought that if her mother tried to do something or say anything that the appellant would hurt her as well. The complainant had a shower and went to bed.

- [17] The complainant told police that she quit her job afterwards because she wanted to avoid the appellant. If she knew that the appellant was not working at the restaurant she would go in and see her friends there. She had seen the appellant around a few times since but had never spoken to him again. The complainant said that the first person she told about the appellant raping her was her boyfriend GD, when they started seeing each other towards the end of April or in May. When she told GD that the appellant had raped her GD told her that she had to tell her brother and that if she did not tell her brother he would. The complainant said that she told her brother, probably about a few weeks after she had told GD. Her brother told her that she had to go to the police. She put that off for a long time because she was scared of what the appellant had told her. She told her brother that she was not ready. The complainant said that she had told her brother about a week after her boyfriend had moved away, which was about two weeks before the police interview, that she wanted to go to the police. Her brother took her to the police station but it was shut on two occasions.
- [18] The complainant told her mother the day before the police interview that at the staff party the appellant had sexually assaulted her and that, on the time when he had driven her home, he had raped her. She did not go into any detail. Her mother took her to the police station. The complainant had not wanted to tell her mother at all because her mother had been really sick and the complainant knew that she got stressed and it would "stress herself out even more because it was someone that was close to our family". The complainant said that she had not come to the police earlier because the appellant had told her that if he found out that she had told anyone then he would make sure that she would not forget who he was. She was scared. The complainant told police that she had told her friend TE in August. She did so because TE had asked her to the restaurant for dinner and the complainant had to tell her why she would not go to the restaurant. She told TE that she did not want to go to the restaurant because the appellant had raped her. The complainant said that TE reacted by yelling at her, complaining that she had not told her.

- [19] During the interview, the police officer asked where the shower was in relation to the appellant's bedroom. She answered that it was directly opposite the appellant's sister's room. She said that she thought that the bathroom was next to the appellant's room. The complainant described the appellant's bedroom as having a double bed, or a bed that was not a single bed, a closet with mirrors as sliding doors, a dark quilt or sheet on the bed, and heaps of shoes on the floor near the door. She could not remember any posters on the wall, surfboards, guitars, or anything else about the room.
- [20] In the complainant's second interview with police, on 5 April 2009, the police officer exhorted the complainant to tell exactly what happened in as much detail as she possibly could. The complainant described the exterior of the house in considerable detail and her movements in entering the house, including leaving her shoes at the front door. During the interview the complainant drew rough sketches of the layout of the rooms and furniture on the first (ground) floor, the floor above (which included the room which the complainant said was the appellant's room), and a sketch of the layout and furnishings in the appellant's room.
- [21] The complainant said that when she and the appellant entered the ground floor, the appellant's mother was lying on the couch holding a glass of wine. The appellant introduced the complainant to his mother. The complainant told police that the appellant then said that he was going to go upstairs and have a shower and get ready quickly. The complainant said she did not know what to do. She stood there for a bit. She then went outside to a patio area where there was also a garden. The complainant was asked how long she stood outside for. She did not know. It was awkward because the appellant's mother was not talking to her, "so probably about ten minutes." The complainant leant against the door watching TV. The complainant said that the appellant's mother left the couch, went into the kitchen, returned, and sat again on the couch. The appellant subsequently called out to the complainant to come upstairs if she wanted to, and help him to pick something to wear. The appellant's mother laughed at that.
- [22] The complainant described the stairs and a "turnaround platform" which was probably a metre square. After the platform there were about ten more steps. The complainant said that there was a surfing poster in the appellant's room. She drew on the sketch of the appellant's room the location of that poster. She said that there were four or five pairs of shoes in the appellant's room, which she indicated on the sketch as being near the door. She described some of the shoes in detail and others generally. Amongst other items the complainant referred to a piece of furniture which included drawers, a table on top, and a mirror, she said that there was a bed which was "like a mattress" without a frame.
- [23] The complainant said that when she arrived upstairs the appellant was waiting outside the bathroom, having just had a shower. He was wearing a towel. The appellant indicated DC's room and then he went in to the other room. (The room which the appellant said was the appellant's bedroom.) The complainant followed and sat on the bed. The appellant then went back into the bathroom. The complainant stayed sitting on the bed. The complainant described the appearance of the appellant's body, including an obvious tan mark. She said that after the events the appellant walked into the bathroom. She described lying on the bed, staring for a while, before she got up and put her pants on. She heard the appellant open the door to the bathroom but he did not come out, so she walked around. She saw

inside the bathroom. When she was asked whether there was a shower screen she said "...I think it was a curtain ... [b]ut um it was colourful". The complainant described in detail other things she observed in the bathroom, including a bottle of deodorant, a mirror and shelves. The complainant said that she stood there for a bit until the appellant said something about being nearly ready to go.

- [24] The appellant's attitude was as if nothing had happened. The complainant followed him back into the bedroom where the appellant put his shoes on. Then the appellant said they were going, and she followed him back down the stairs. The complainant was pretty sure that the appellant's mother was downstairs but she did not remember saying goodbye to her. The complainant said that they did not really talk until they got into the car. The appellant spoke about having to drop off money which he thought he had lost. The appellant stared at her: "He was like oi." The complainant said that as she was getting out of the car the appellant said, "if you tell anyone I'll make sure you never forget who I am." The complainant said that she made excuses to avoid going to work at the restaurant and she later resigned. The appellant communicated on the internet with her and always acted as if nothing had happened. The complainant told police that she told one of the owners of the restaurant that she could not continue to work there, giving as an excuse that she had basketball.
- [25] The complainant gave evidence at the trial. She said that the occasion about which she told the police officer was the only time that she had ever been to the unit occupied by the appellant, his sister and his mother. The complainant said that the appellant's mother was sitting on her couch watching TV when the complainant arrived in the lounge room of the unit. The complainant was shown various photographs and identified features of the unit, but she said that various things, such as colours, had changed since she was there. She identified the appellant's room where the appellant had assaulted her. She said that the bed shown in the photograph did not look the same. The complainant gave a detailed description of the appellant raping her which was consistent with her second police interview.
- [26] In cross-examination, the complainant said that the bed was different, the bathroom looked cleaner and newer than when she was there, and the wall on the left hand side of the stairs going from the ground floor up to the first floor was a different colour. Photographs shown to her depicted ripple glass sliding shower doors and a rectangular or square mirror in the bathroom. She said that was not what she had seen. She agreed there were differences between her description of the patio area downstairs from what was shown in the photographs. The complainant agreed that the photographs showed that at the top of the stairs there was what the complainant had called DC's room and then a big wooden ladder that went straight up to the loft. The complainant said that she had not seen the loft or the ladder. The complainant said that she did not recall telling the police officer in the first interview that she had walked upstairs to the appellant's room with him and that that was not what had happened. She agreed that she had not waited in the appellant's room for ten minutes while he was in the shower, as she had said in the first police interview. The complainant did not see Mrs DT hanging out washing.
- [27] The complainant's answers in cross-examination substantially agreed with the account in her second police interview. When it was put to the complainant in cross-examination that she did not see the appellant take his shoes off, she answered that "...I'd - I'd remembered seeing him taking his shoes off, but obviously I -

I must have said it wrong with – I don't know if I was nervous but, that's definitely not what happened, I didn't following [sic] him upstairs." After some further questioning the complainant said, "I can't really remember much of what happened before when I saw him taking his shoes off, but it's not really something that I've remembered but the whole incident, everything – I remember that, but this – I remember I – watching him take his shoes off, exactly, I remember." When asked whether this was downstairs or upstairs, she said it was downstairs. She agreed that this was inconsistent with what she had said in the first police interview. When asked to explain further she said that it was very long ago when she made the statement. The complainant said that the appellant's threat was made in the car and not upstairs. She could not remember if the threat was made as she was getting out of the car at her mother's house or when it was made. The complainant said that the threat had been made more than once. When the complainant's earlier account was put to her, in which she had spoken of a threat being made after the search for money in the car and at the end of the journey, the complainant agreed that the appellant had repeated himself.

[28] The complainant agreed that she had looked at social networking sites which included photographs of DC. She said that she had no idea whether they included photographs in DC's room. The complainant disagreed that the room which she had identified as the appellant's room was decorated in a feminine way using pinks. She said that there was nothing pink in the room she saw, and that this contrasted with photographs shown to her in cross-examination. She agreed that the bed shown in the photographs had a wooden frame and differed from the bed without a frame the complainant had described in her second police interview. The complainant disagreed with the suggestion that there were no surfing posters in the room. The complainant disagreed with the appellant's account when it was put to her in cross-examination. The complainant disagreed with the suggestion that she had told TE that the appellant had taken her home from the staff party and raped her at his place. The complainant agreed that after the alleged rape there had been some communication from the appellant to her over the internet after and that she had worked some shifts at the restaurant when the appellant was also working. The complainant agreed that after she spoke to her boyfriend GD she appreciated that she had to tell her brother or GD would tell him. She agreed that she took a long time to getting around to telling her brother.

[29] Mrs DT gave evidence that the appellant moved out of her unit in March when he went to live with a friend elsewhere. Before March the appellant came and went, treating the place like a hotel. She recalled one occasion when she was introduced to the complainant in the evening between 9.00 pm and 9.30 pm. Mrs DT said that she was at home relaxing. She may have had a glass of wine. She was quite tired. She was lying on the lounge. The appellant entered through the back door and introduced the complainant to her. He told her that they were going out and that he was going upstairs to have a shower. Disrupted by the conversations, she moved around the unit and made herself a cup of tea. She did not speak much to the complainant. At one point the complainant sat down on the lounge. At another point she sat at the table. Mrs DT thought that the complainant sat down with her and watched a bit of TV. The complainant did not go upstairs. Mrs DT said that the appellant was upstairs for 10 or 12 minutes. He came downstairs after having had a shower. The appellant asked how he looked. She said that he looked great. She enquired whether they were going to a wedding or something, as a bit of joke.

The appellant and the complainant then left. Both looked happy, “like they were two young kids just going out”.

- [30] In cross-examination, Mrs DT agreed that she had moved into the unit in November 2007. The unit had two bedrooms and a “bit of a loft”. By 1 March 2008 the appellant and a friend had their own unit elsewhere. The appellant hated the unit. He only stayed over briefly between November 2007 and 1 March 2008. Mrs DT said that he probably stayed one or two days a week. He spent more time at his girlfriend’s house. Mrs DT said that her daughter DC lived with her at the unit. The room which the complainant described as DC’s room was in fact Mrs DT’s room. The room which the complainant referred to as the appellant’s room was DC’s room. Photographs showed that, near the door of her room, there was a ladder leading up into a loft. Mrs DT said that in the loft area there was a thin mattress on the floor and a clothes rack, which is where the appellant had some things hanging up. Mrs DT said that the bed shown in the photographs was the bed DC had in her room when she stayed at the unit. It had a wooden frame. There was never any other bed in the bedroom.
- [31] Defence counsel took Mrs DT through the statements she had given to police on 23 December 2008. In that statement, Mrs DT told police that the complainant had stayed downstairs with her whilst the appellant had a shower. The appellant was upstairs for about eight minutes before he came back downstairs. The appellant then asked his mother if he looked nice. She replied that he did, and the appellant and the complainant left Mrs DT’s house. In that statement Mrs DT told police that at no time did she ever see the complainant leave the living room. She sat at the kitchen table. Mrs DT stated that she recalled making herself a cup of tea and that she also hung the washing on the line, which was next to the front entry sliding door. That took her only about two minutes. She agreed that while she was at the washing line she would have had her back to the unit for a couple of minutes. The complainant would then have been out of her sight. She was not aware that the complainant left the living room kitchen area of the unit. Mrs DT could not recall whether there was a time when the complainant was standing up near the patio.
- [32] Mrs DT said in cross-examination that the appellant was not allowed to store his shoes on the floor of DC’s room. DC decorated her side table with jewellery, perfume, and other things and she had a pink doona cover on her bed. She had no surfing posters in her room. DC would not let the appellant in her room. Mrs DT agreed that there had been some changes to the house between the time when the complainant visited and when the photographs were taken. Mrs DT said that there had been no change to the mirror in the bathroom from when she moved in. It was a big square or rectangular mirror. In the bathroom there was never a shelf between the mirror and the basin. She said that the sliding ripple glass doors of the bath were there when she moved into the unit, as shown in the police photographs in September 2009. Whilst there was now a curtain, in February and March of 2008 it was ripple glass. In re-examination Mrs DT said the ladder to the loft was permanently fixed in place.
- [33] TE gave evidence that in 2008 she and the complainant were best friends. When TE repeatedly asked the complainant if she wanted to come to her birthday party at the restaurant in August 2008 the complainant kept saying that she did not want to come. The complainant said that she did not want to come because she had been raped by the appellant at a work party. TE’s description of the party tallied with the

complainant's reference to the staff Christmas party in December 2007. TE said that the complainant told her that the appellant was dropping her home but they had gone back to his place first. In cross-examination TE agreed that at the preliminary hearing in the Magistrates Court in 2010 she gave evidence that the complainant had told her that the appellant had raped her at his house on the night of the staff party.

- [34] The complainant's brother CA gave evidence that after his return from overseas to Australia in February 2008 (he did not specify a date) the complainant told him of an occasion when she had needed a lift home from the restaurant and the appellant had offered to do that. Before the appellant took her home, he went to where he was living at the time to get ready to go to a party after he dropped her off. The complainant told CA that, whilst she was waiting in the appellant's room, the appellant entered the room, forced himself on her, and the complainant was unable to stop him raping her. CA told the complainant that she needed to tell the police as soon as possible, or as soon as she was ready to do so. The complainant responded that she was scared and nervous of anything involving the police. Whenever he spoke to her again, he encouraged her to report it to the police. In cross-examination CA agreed that he went to the restaurant staff party in December 2007. He recalled seeing the appellant leaving the party with a group of people which included the complainant, at roughly 9.00 – 10.00 pm. CA did not have any recollection of the appellant returning to the party. He agreed that the complainant was driven home with him later in the night. CA agreed that he first gave a statement to police on 12 January 2012. He agreed that he had taken the complainant to a police station in about May or June of 2008 and that it was closed.
- [35] The complainant's mother gave evidence about an occasion when the appellant agreed to her request to drop her daughter home after work. Later she received a text message from the complainant saying that the appellant had to go back home first to shower because he was going out somewhere afterwards. The complainant's mother rang her and had a conversation. When the complainant later arrived home the complainant went straight to her room and they did not have any conversation. The complainant's mother did not become aware that anything untoward had happened that night until much later. The complainant told her that when she was being taken home by the appellant he raped her. The complainant's mother took her straight to the police station.
- [36] The recording of the appellant's police interview on 23 December 2008 was tendered in the Crown case. When given the opportunity to tell the police officer everything he knew about a rape complained of by the complainant, the appellant responded that he did not know anything about it. He said that the complainant had worked with her older brother and the appellant at the restaurant. For the whole time the appellant knew the complainant he had a girlfriend and she had a boyfriend. They were just work mates. They had known each other for about a year or a year and a half. There was not much else the appellant could tell the police officer. After the police officer summarised the complainant's account in her first interview, the appellant commented that he did not have a bedroom at his mother's house but had a loft where his bed was. When asked to comment about the actual assault, the appellant responded that he had a girlfriend, the complainant had a boyfriend, the appellant was aware of her age, and that he would never think or act on doing something like that, especially to a friend of CA. The appellant said that it was clearly not what he would do. He referred to his mother's home as

a small unit. The appellant said that he recalled driving the complainant home from the restaurant. He had a shower and the complainant was downstairs with the appellant's mother the whole time. He said that he just went down and drove the complainant back to her mother. The appellant said that the complainant had never been upstairs. He said that his mother was watching TV downstairs.

- [37] The appellant gave evidence in his own defence. In the appellant's evidence-in-chief, he said that, whilst he did not live in his mother's townhouse during the relevant period, there were occasions when he stayed there in addition to visiting from time to time. At the townhouse he had a mattress, some clothing, and surfboards. When he stayed there, he stayed in the loft which looked down into his sister's room. The appellant gave evidence that on the occasion when he gave the complainant a lift he agreed to do so because he was friends with the family. When they arrived at his mother's townhouse, he said that he would not be long and invited her to come in. She came into the house, the appellant introduced her to his mother, and he went upstairs. He had a shower and changed. He came back down and asked how he looked, joked around, and they left. The appellant said that, to his knowledge, the complainant did not ever go upstairs. He denied that he raped the complainant. He denied that he threatened her. When they left his mother's house he took the complainant to her home, dropped the restaurant takings off at his employers' house, and then went out with friends. The appellant gave evidence that he attended the restaurant Christmas party around 11 December 2007. He denied that he walked along the boardwalk with the complainant and put a hand down her jeans onto her hip. He said that what he said in the rest of his police record of interview was true and correct.
- [38] In cross-examination the appellant said that he stayed overnight at his mother's townhouse in December 2007 but he rarely stayed there after the New Year. His memory was that he had not stayed overnight at the townhouse between January and March 2008, but that he would drop in. When he had stayed earlier he would either stay in the loft or sleep on a couch downstairs. The appellant said that his mother did all of his washing for him. The appellant agreed that this was the only time that the complainant had ever been to his mother's unit. He said that when he took his clothes off after the shower he would have dropped them in the laundry or left them in the bathroom on the floor, as he usually did. The prosecutor taxed the appellant with the fact that when the complainant's allegation that he had raped her was put to him in the police interview he had not expressly denied the allegation. He responded that it was the "shock value" and he had just put it into different words. The appellant was also taxed with the fact that in his responses of the police interview he had referred to the complainant's young age and to her having been a sister of his friend. He said that these were part of his way of denying the allegations. It would be wrong to think that this allegation will be true in relation to a good friend's sister. The appellant said that he and CA were good friends. The appellant said that he surfed all the time but he had no surfing posters. The appellant denied the complainant's version when it was put to him in cross-examination.
- [39] The appellant called evidence from his sister DC. She gave evidence that the appellant stayed a few times in her mother's house between when they moved in to the house in about November 2007 and the end of that year. She gave evidence that the appellant was not allowed in her bedroom and respected her privacy. She had brought her furniture across from the previous house. She had posted onto an

internet social networking site photographs taken all over the house. A lot of them were taken in her bedroom and in the hallway, and some in her mother's room and downstairs. She said that she had uploaded photographs showing background areas downstairs, in the hallway, the lounge room and dining area, the stairwell, and every room. DC gave evidence that the complainant was a "friend" on the networking site and had once commented on her photographs. She produced two such photographs of herself that showed the background in her room.

- [40] DC identified her room as the room next to the bathroom, which the complainant had identified as the appellant's room. With reference to one of the photographic exhibits, she identified her bed, bedside table, and items on the top of the bedside table including perfume, cards, photo frame and a lamp. Consistently with the photographs, she described the room as "very girly, very pink room, so always pink on the bed, pink on the bedside table, very girly." DC said that the bed was as shown in the photograph. She had never had an ensemble bed comprising one mattress on top of another. Her bed had come from the previous house in which the family had lived and had been put straight into her room. She never had a surfing poster on her wall or door. She had never let the appellant store his things in her room or put a collection of shoes on the floor. There was no occasion on which his items were in her room. She was in the room throughout 2008 and until the end of 2009 when she moved out. In cross-examination, DC adhered to her evidence. She agreed that she was the focus of the photographs taken inside the rooms in the house which she had uploaded to the internet site. She definitely remembered decorating her room when they moved in at the start of 2008. She had brought her things to decorate her room. She said that the appellant did not have any surfing posters. She described her bed as having four legs, a rectangular wooden frame, and a mattress above the frame. There was about 300 mm or a little less space between the bottom of the frame and the floor. She had added the array of items shown in the photograph on the bedside table at the start of 2008. The bedside table was not itself pink, but she threw a pink cover over it. The pink cover was always there. She had a pink bedspread, pink pillows, and the "girly touches" included an Audrey Hepburn poster.

### **Summing up**

- [41] In summing up to the jury, the trial judge observed that there had been a "spirited attack" on the complainant's reliability and credibility and upon the reliability of the appellant. The trial judge directed the jury that their assessment of the complainant's reliability and credibility was at the heart of their role. It was at the heart of the prosecution case. The jury had to acquit if they were not satisfied beyond a reasonable doubt that the complainant was both truthful and reliable in evidence that the appellant had sexual intercourse with her, in that room on the occasion when he drove her home via his mother's house, without her consent. The trial judge reminded the jury that the complainant gave two separate accounts to the police officers, and directed them that consistency or inconsistency between accounts was very important. The trial judge reminded the jury that the prosecutor acknowledged that the complainant admitted that she was wrong about a lot of things and that the evidence of the photographs and drawings, and of Mrs DT and DC, showed, if the jury accepted that evidence, that the complainant had made a lot of mistakes about her description of the upstairs area where she had said the attack took place.

- [42] The trial judge recorded that the prosecutor submitted that the complainant was not challenged about inconsistencies as between her account in relation to the sexual attack. The trial judge asked the jury to consider whether DC was asked many questions about the actual sexual attack during her second police interview. The trial judge reminded the jury that the prosecutor made the point that the complainant had got the layout upstairs right but had made many errors of detail. The trial judge reminded the jury that defence counsel had submitted that one of the critical things was whether the complainant went upstairs for enough time for the attack to have taken place. The trial judge recorded that the prosecutor conceded that if they accepted Mrs DT's evidence there was no opportunity for the complainant to go upstairs. The trial judge told the jury that if they accepted her evidence then that was probably the end of it, although it was a matter entirely for the jury. The trial judge noted that the prosecutor made a submission that "because she [Mrs DT] was maybe having a dream, getting tired after a long day at work, and she may have missed [the appellant] coming down with the laundry she may have not observed [the complainant] going upstairs."

### **Trial judge's report**

- [43] In the trial judge's report pursuant to r 94 of the *Criminal Practice Rules*, he observed that he had difficulty in reconciling the verdict with the evidence of Mrs DT. He observed that the prosecutor did not invite the jury to reject that evidence but made a submission, which the jury must have accepted, to the effect that the jury could find that the appellant had the opportunity to commit the offence "...while still accepting the mother as a reliable witness". The trial judge also observed that, since the jury must have rejected the appellant's evidence, the "other concerning evidence..." of TE might not be as significant, given that the jury must have accepted beyond reasonable doubt that the complainant was reliable and truthful in her evidence that the appellant raped her.

### **The arguments**

- [44] The appellant argued that the cumulative effect of many discrepancies and inconsistencies within the complainant's versions of events, including the "more fundamental" inconsistencies or irregularities indicating that the complainant was never in the bedroom where she alleged the offence occurred, should create a sense of "anxiety and discomfort"<sup>4</sup> about the complainant's evidence. Some discrepancies might be accounted for by the natural failings of memory, difficulties in articulation, and the passage of time, but the inconsistent versions about whether the complainant had waited upstairs whilst the appellant showered and demonstrable error in the complainant's description of the staircase, the bedroom which she wrongly described as the appellant's bedroom, the bed and other furnishings in that bedroom, the décor in the bedroom and bathroom, and the complainant's failure to refer to a loft, were problematic and telling. The inconsistency in the complainant's police interviews about when and how she came to be upstairs was submitted to be pivotal, the "battle line" at the trial being "drawn at the bottom of the stairs". The significance of the point was said to be enhanced by the absence of any suggestion or real possibility that the appellant might have colluded with his mother in giving their evidence that the complainant did not go upstairs. The appellant referred also to inconsistencies in the complainant's evidence about the number of threats made

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<sup>4</sup> *M v The Queen* (1994) 181 CLR 487 at [10].

by the appellant to the complainant and the place and circumstances on which they were made. The importance of this was said to be underscored by the fact that the complainant's evidence of the threat was relied upon as justifying her delay in making the complaint. The appellant relied upon the absence of any evidence by the complainant's former boyfriend GD. It was submitted that the absence of independent evidence of the time and circumstances in which that alleged first complaint was made meant that an assessment of the strength of the complaint could not be tempted.

- [45] The appellant also emphasised the contrasts between the complainant's evidence of a colourful shower curtain in the bathroom and a collection of the appellant's shoes, an ensemble style bed, and surfing posters in the appellant's bedroom and the very different evidence given by the appellant, his mother, and his sister that there was plain ripple glass in the bathroom, the bedroom adjacent to the bathroom was in fact CD's room, the décor in that room differed radically from that described by the complainant, and none of the appellant's things were in that room. It was submitted to be remarkable that the complainant did not refer to the loft and the permanent ladder up to the loft. It was also submitted that the small size of the unit and its cramped nature made it difficult to accept that the offence occurred without Mrs DT knowing of it. There was no explanation for why the complainant would have ventured upstairs and remained in the appellant's bedroom (as she identified it) when, on her account, she was aware of the appellant's "evil intentions" from the incident at the staff party in December 2007. The appellant argued that it was also unlikely that, having been the subject of the act of violence she alleged she would have left without Mrs DT having some hint of it and without saying anything about it.
- [46] Of even more significance, in the appellant's submission, was the evidence of Mrs DT. The appellant relied upon the trial judge's observations about the significance of this evidence. The appellant submitted that Mrs DT's evidence precluded satisfaction beyond reasonable doubt that the appellant had committed the offence because there was no basis in the record upon which that evidence could have been conclusively discredited. The matters relied upon by the prosecutor for the rejection of Mrs DT's evidence – that she might have been tired and had a dream – amounted to speculation unsupported by any evidence. It was submitted that the verdict could not be reconciled with the evidence by reference to the influence of the demeanour of the complainant and others in giving evidence. If demeanour was relevant, the evidence of the appellant demonstrated that the appellant could give apparently persuasive but different accounts of the same distressing event.
- [47] The appellant argued that it could be said of the appellant's account to police and his evidence that "...an innocent man could have done no more than the accused did in conducting himself as he did during his interview with the police or in giving evidence on oath at his trial."<sup>5</sup> The appellant submitted that, even making full allowance for the manner in which the critical witnesses gave their evidence, there remained a significant possibility that an innocent man had been convicted, so that the verdict should be set aside.
- [48] The respondent argued that the trial judge's report was wrong in so far as it suggested that the prosecution had not impugned the reliability of Mrs DT's evidence. The respondent argued that the two photographs which were tendered in

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<sup>5</sup> *M v The Queen* (1994) 181 CLR 487 at 500.

the defence case through DC did not show the layout of the upstairs floor, which the complainant had drawn accurately enough in her second police interview. It was submitted that the jury could reasonably conclude that TE had elided the complainant's separate complaints of the events at the staff Christmas party and the events in the alleged offence. The respondent argued that any doubts which otherwise might arise were capable of being reconciled with the verdict by the jury's advantage in seeing the complainant, the appellant, and Mrs DT give their evidence. Each of defence counsel, the prosecutor, and the trial judge conveyed to the jury that the critical issues concerned the credibility of the evidence given by the complainant and the appellant and the reliability of the evidence given by Mrs DT and DC. The prosecutor had submitted to the jury that the appellant was an unimpressive witness. The respondent submitted that it was reasonably open to the jury to reject the appellant's denials and be satisfied beyond reasonable doubt on the evidence of the complainant that the appellant was guilty of the offence. This was submitted to be primarily a question for the jury.

### **Consideration**

- [49] There is nothing inherently unlikely or implausible about the description of the alleged offence itself given by the complainant in the first police interview. Indeed, the jury might have found it persuasive because of an accumulation of details; the reference to the complainant thinking of the appellant like a big brother, her laughing at the appellant's conduct at the outset, her detailed description of how the appellant restrained her without needing to resort to violence, her crying without screaming, the appellant desisting apparently when persuaded of the appellant's rejection, and the appellant's subsequent behaviour in pretending that nothing had happened. That account, coupled with the evidence of friendship between the complainant and the appellant's sister and between the appellant and the complainant's brother, together with the evidence of a threat by the appellant could be regarded as explaining the complainant's very considerable delay in going to the police despite the urgings of her boyfriend and brother. Similarly, whilst the complainant's evidence that she complained of the alleged offence to her boyfriend GD did not accredit her own account, the jury were not necessarily bound to treat her account as significantly undermined by her evidence that GD said that he would tell her brother if she did not.
- [50] TE's evidence of the terms of the complaint to her was plainly inconsistent with the complainant's evidence of the offence. The jury were directed to take the inconsistency into account and it did not of itself require the jury to treat the complainant's evidence as unreliable. The jury could prefer the complainant's evidence and find that there had been a miscommunication or that TE had confused the two separate incidents spoken of by the complainant. TE's evidence was given a year or two after the conversation she reported. There was general consistency between CA's evidence of the complainant's complaint to him and the complainant's evidence of the offence. The jury could take that into account as supporting the credibility of the complainant's evidence. Furthermore, having regard to the jury's advantage in seeing and hearing the evidence unfold, the verdict should also not be regarded as necessarily unreasonable merely because the appellant gave sworn denials which were not manifestly implausible or inconsistent with evidence other than the evidence of the complainant.
- [51] In the complainant's first police interview, which took place about eight months after the alleged offence, she described the shower as being upstairs, the appellant's

bedroom as being next door to the shower, and the appellant's sister's room as being opposite either the shower or the appellant's bedroom. That broad description, which was later generally reflected in the complainant's rough sketches at her second police interview, accorded generally with the other evidence at the trial, but that was capable of being explained by reference to DC's evidence of the photographs she had taken of herself in all of the rooms in the unit which she had posted on the internet. That the complainant gave a generally accurate description of the layout upstairs therefore did not necessarily overshadow the significance of the inconsistencies within her evidence and between her evidence and other evidence.

- [52] Some of the inconsistencies between the complainant's evidence of the fixtures and fittings in the unit and the evidence of the appellant, his mother, and DC are not necessarily significant. There were, however, significant discrepancies between her description of the room in which the complainant said that she was raped and Mrs DT's and DC's evidence of the room. The jury were not necessarily bound to harbour a doubt about the complainant's account merely on the basis of evidence by the appellant's sister and mother given years after the event that the sister's bedroom had been decorated in such a way as to make it unlikely to have been mistaken for the appellant's bedroom. However, those inconsistencies become somewhat troubling when taken in conjunction with the complainant's failure to refer to the loft which (on the apparently reliable evidence in this respect of DC and Mrs DT) overlooked the bedroom in which the complainant said that she was raped. The photographs and a DVD in evidence convey the very strong impression that the loft and the ladder must have been starkly apparent to anybody ascending the stairs and entering the bedroom. On the evidence of Mrs DT and DC, the complainant also materially misdescribed the bed in that room.
- [53] Of even more concern is the cumulative impact of Mrs DC's evidence that the complainant did not go upstairs and the inconsistencies between the complainant's first police interview on the one hand, and her second police interview and her evidence on the other hand, about when she went upstairs. Reference to the trial judge's summing up reveals that the prosecutor invited the jury to discount Mrs DC's evidence on the ground that her tiredness and inattention might have caused her to overlook the complainant's movement upstairs. To that extent the jury were invited to find that Mrs DC's evidence was unreliable. The prosecutor disclaimed any challenge to Mrs DC's honesty, but the jury could take into account the natural partiality of a mother for a son as having some subconscious influence upon Mrs DC's evidence. The jury could also take into account that Mrs DC's evidence of how long her son was upstairs for and how long she took to hang out washing necessarily involved estimates made long after the event. Also relevant was Mrs DC's own evidence that she was relaxing with a glass of wine and subsequently a cup of tea and watching TV at the time. It might therefore be contended that there was nothing unreasonable in the jury accepting that the evidence was unreliable to the extent that it conflicted with the complainant's evidence of the offence.
- [54] It is necessary, however, to consider Mrs DC's evidence in the context of the evidence as a whole. There is no material inconsistency between the complainant's account of the sexual offence itself in her first police interview and her account of that offence in her second police interview some five months later but, in addition to the inconsistencies about the loft and the bed, there are substantial inconsistencies

between the two interviews concerning the complainant's movements within the unit prior to the alleged offence. The complainant was perfectly clear in the first police interview that she walked upstairs to the appellant's room with him. She said that she saw the appellant taking his shoes off and waited on his bed while he showered. There was a clear departure from this account in the complainant's second police interview and in her evidence, in which she described the appellant going upstairs to shower whilst she remained downstairs until the appellant called out after he had showered. In assessing this inconsistency within the complainant's accounts, the jury could take into account the substantial lapse of time between the alleged offence and the police interviews and the trial. The jury could also take into account that the inconsistency did not relate to the offence itself but to events prior to the alleged offence. But the inconsistency concerned circumstances which were closely related to the alleged offence and the complainant's unequivocal and apparently persuasive evidence on the point presents a rather stark contrast with her initial account to police, which was also apparently persuasive. And upon the complainant's first version to police, Mrs DC – whose honesty was not in issue – could not conceivably have failed to notice that the complainant went upstairs.

[55] I have not found it easy to decide whether these matters require the Court to take the strong step of setting aside a jury verdict. Any one of the weaknesses in the Crown case is capable of explanation for one or other of the reasons I have mentioned, but I have ultimately concluded that, on the whole of the evidence, the guilty verdict was not reasonably open. In particular, the cumulative effect of the substantial inconsistencies within the complainant's accounts, Mrs DC's evidence, the appellant's sworn denials, and the other matters to which I have adverted, creates a doubt about the appellant's guilt which cannot be explained away by the jury's advantage in seeing and hearing all of the evidence.

[56] The verdict should therefore be set aside and a verdict of acquittal entered. Accordingly, it is not necessary to consider the appellant's other grounds of appeal. That conclusion makes it unnecessary to deal with the application to adduce further evidence.

### **Proposed order**

[57] I would allow the appeal, set aside the verdict of guilty, and enter a verdict of acquittal. I would refuse the application to adduce further evidence.

[58] **DOUGLAS J:** The evidence from the appellant's mother that the complainant remained downstairs on her recollection at all times, where there was a period of about two minutes or less when the complainant was out of her sight, is difficult to ignore even if the accuracy of her time estimate several months after the event might have been questioned by the jury. Her credit was not in issue and the only reflection on her reliability in the Crown Prosecutor's address was that she was tired and may have missed some things. As Fraser JA has pointed out in his reasons, with which I agree, that evidence, coupled with the other inconsistencies in the complainant's evidence does make one anxious.

[59] I also agree with the President's reasons and the orders proposed by Fraser JA.