SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stanley* [2012] QCA 297
PARTIES:	**R** **v** **STANLEY, Paul John** (appellant)
FILE NO/S:	CA No 130 of 2012 DC No 1310 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2012
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant was convicted following a five day trial of nine offences – where those offences were constituted principally by acts of a sexual nature against one complainant including three counts of rape – where appellant contends the trial judge erred by unfairly emphasising the prosecution case during the summing up to the jury – whether the verdicts of the jury were unsafe and unsatisfactory *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited
COUNSEL:	The appellant appeared on his own behalf D L Meredith for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA**: After a five day trial in the District Court at Brisbane which concluded on 18 May 2012, the appellant, Paul John Stanley, was convicted by a jury of nine offences. Those offences were constituted principally by acts of a sexual nature committed by the appellant against one complainant on or about 2 October 2010. A Court directed verdict of not guilty on a tenth count of common assault was taken on the third day of the trial.

[3] The appellant was represented by competent counsel during the trial. His counsel was instructed by solicitors who filed a notice of appeal against conviction on his behalf on 31 May 2012. However, the appellant has represented himself in this appeal both in preparation of a written outline of argument and in presentation of oral submissions. A pre-sentence report which is to include a psychiatric report has been ordered. The appellant is currently remanded in custody pending sentence. He was 38 years old at the time of the offences.

Grounds of appeal

[4] The appellant relies upon two grounds of appeal, namely:

1. The verdicts of the jury were unsafe and unsatisfactory.
2. The trial judge erred by unfairly emphasising the prosecution case during her summing up to the jury.

[5] The first ground invokes s 668E(1) of the Code which requires the court to allow an appeal against conviction if it is of the opinion that the verdict should be set aside on the ground that it is unreasonable. In *SKA v The Queen*,[1] all members of the court reaffirmed[2] that the function to be performed by an intermediate court of appeal is as stated in *M v The Queen*,[3] by Mason CJ, Deane, Dawson and Toohey JJ:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[6] This test has been accepted as applicable to statutory formula which refers to the impugned verdict as "unreasonable".[4] In *M*, the joint judgment went on to say:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."[5]

In applying this test, the court is required to make an independent assessment of the evidence, both as to its sufficiency and quality.[6]

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1 (2011) 243 CLR 400; [2011] HCA 13.
2 French CJ, Gummow and Kiefel JJ at [11]; Heydon J at [45]; Crennan J at [77].
3 (1994) 181 CLR 487 at 493.
4 *SKA* at [12]; *MFA v The Queen* (2002) 213 CLR 606 at [58].
5 At 494.
6 *SKA* at 406 [14].

[7] I propose to undertake this exercise by outlining the complainant's account of events given at trial, referring to evidence, including the testimony of other Crown witnesses, which corroborated the complainant's account, and then addressing features of the evidence overall which, on the appellant's case, rendered the verdicts unsafe or unsatisfactory. I mention in this context that the appellant did not testify at the trial or adduce any evidence in his defence.

The complainant's account of the offending

[8] The complainant is a young adult male. He was sixteen years of age at the time of the offences. He gave evidence of the events that occurred. His account of them is summarised in the paragraphs which immediately follow.

[9] On the afternoon of Friday 1 October, 2010 the complainant went to Jacob Stanley's house at Petrie to stay the night. Jacob was a friend of his. The complainant was also friends with Jacob's older brother, Christopher. The two families were quite close. Jacob's mother, Margaret Geebung, had a long term association with the complainant's mother.

[10] Living at the Petrie house at the time were Ms Geebung, her partner Wilfred Stanley, two of her children, Jacob and Lutana, and the appellant. The appellant was the brother of Wilfred Stanley and occupied a room of his own within the residence.

[11] The complainant had been to the house once or twice before. He had never been in the room occupied by the appellant.

[12] There was a social gathering at the premises that day. A considerable number of people attended including Christopher Stanley and his partner, Crystal Reuben. Alcohol was consumed by the majority of the guests.

[13] Upon arriving at the home, the complainant was introduced to the appellant. He had never met the appellant previously. The complainant and Jacob began to play on an X-box. That continued until dinner time when the complainant again had contact with the appellant. After dinner, he resumed playing the X-box. Jacob eventually went to sleep in the loungeroom. The complainant went outside and played pool with the adults for an hour before returning to Jacob's room to play on the X-box. There were lights on in the room.

[14] At that point, the appellant came into the room and began rubbing his own penis. He pushed the complainant in the chest area and on to a beanbag. He then lent down with his other hand and started rubbing the complainant's penis on the outside of his clothing. He said, "Don't tell anyone or I'll hurt you". The appellant eventually left. (Count 1: *Criminal Code* ("Code") s 352(1)(a) – unlawful and indecent assault.)

[15] The complainant then went outside where the adults were playing pool. The appellant was not in the group. He played pool for about half an hour to an hour before going to the toilet inside the house. The toilet door could not be locked.

[16] The appellant barged into the toilet, pinned the complainant up against a wall and began playing with the complainant's penis. (Count 2: Code s 352(1)(a) – unlawful and indecent assault.) The complainant eventually got out and began running down

the hallway to get some help but was grabbed from behind and dragged into the appellant's room and thrown onto a mattress. The appellant shut the door and used an object to lock the door. (Count 3: Code s 355 – deprivation of liberty.) The object looked the same as Exhibit 5 (a butter knife).

[17] The complainant noticed that a pornographic movie with a male and a female having sexual intercourse was being played on a television screen in the room. During this period, the appellant threatened the complainant in order to prevent him from calling out. The complainant tried to get up. However, the appellant pushed the complainant back down and grabbed a knife. He pointed the knife about 10 to 15 centimetres from the complainant's throat. The knife was a kitchen knife similar to Exhibit 7. He threatened to stab the complainant if he did not remain silent. (Count 4: Code s 351 – assault with intent to commit rape.) The appellant put the knife back and then got on top of the complainant and started rubbing himself up and down on the complainant. (Count 5: Code s 352(1)(a), (3)(a) – unlawful and indecent assault armed with a dangerous weapon.)

[18] The appellant then got a brown container, took the lid off and ordered the complainant to sniff its contents. He threatened to stab him if he failed to comply. The complainant felt a little drowsy and dizzy. The appellant also took a sniff. The appellant then masturbated the complainant and sucked on his penis. (Count 6: Code ss 352(1)(a), 2, 3(a) – unlawful and indecent assault armed with a dangerous weapon and including bringing the complainant's penis in contact with the appellant's mouth), made the complainant perform oral sex upon him (Count 7: Code s 349 – rape), put his tongue in the complainant's anus (Count 8: Code s 349 – rape), and sodomised the complainant. (Count 9: Code s 349 – rape.) He then took his penis out of the complainant's anus, masturbated himself and ejaculated onto his own stomach. He again told the complainant not to tell anyone.

[19] The appellant left the room followed shortly thereafter by the complainant, who went to the toilet and cried. After leaving the toilet, the complainant lay on a mattress in the loungeroom. The appellant came up to him a short time later and tried unsuccessfully to get the complainant to return to the room with him.

[20] The complainant made a prompt complaint to Ms Geebung some hours later as soon as the appellant had left the premises.

[21] The complainant was cross-examined. The tenor of the cross-examination was to question the complainant on the accuracy of detail of his evidence. Ultimately, it was put to him that there was no sexual contact between him and the appellant that night. The complainant insisted that there was.[7] Next, it was put to him that the incidents simply did not happen. The complainant insisted that they did happen.[8] Then, it was put to him that if something had happened, it did not involve the appellant. Again, the complainant insisted that the appellant was involved.[9] Finally, it was suggested to the complainant that perhaps he had had sex with Christopher Stanley that night and that he was blaming the appellant to cover up for Christopher. This, the complainant denied.[10] A similar scenario was put to Christopher Stanley in cross-examination which he also denied.[11]

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7 AB 115 LL10-17.
8 AB 115 LL18-20.
9 AB 115 LL21-23.
10 AB 115 LL24-25.
11 AB 142 LL37-41.

Evidential corroboration of the complainant's account

[22] The respondent has identified a variety of factors sourced in the evidence adduced at trial which, it must be said, together provide strong corroboration of the complainant's account. These factors are outlined in the following six paragraphs.

[23] **Method of locking the appellant's door**: The unchallenged evidence from a number of Crown witnesses was that the door to the appellant's room was habitually locked by the method observed by the complainant.[12] There was no evidence that the complainant had ever previously seen the bedroom door locked in that fashion. During the search of the appellant's room later that morning, the police located a butter knife at the entrance to the room.[13]

[24] **Pornographic movie**: The police observed a television set and located a pornographic disc in the DVD player in the appellant's bedroom.[14]

[25] **Location of other knife**: A search of the appellant's vehicle by the police during the following morning located a black handled knife similar to that described by the complainant. It was amongst belongings of the appellant which had been packed into his vehicle.[15]

[26] **Drugs in brown bottle**: During their search of the appellant's room, the police also located a small brown bottle near the television set. An analysis of its contents revealed that the bottle contained the drug, Iosbutyl Nitrate.[16] Dr Robert Hoskins gave unchallenged evidence that the drug is used in the homosexual community. He also testified that when administered by inhalation, it takes effect very quickly – within several seconds to a few minutes at most; and that its effects include relaxing the anal sphincter and improving the quality of an erection.[17]

[27] **Injuries to complainant**: Dr Hoskins examined the complainant at the Sexual Assaults Suite at the Royal Brisbane and Women's Hospital on the afternoon of 2 October 2010. During the examination, he located a bruise between the two o'clock and three o'clock position on the complainant's anus which was very tender. The existence of the bruise was "strongly supportive" of either penetration, or attempted penetration, of the anus by a penis or other object.[18]

[28] **Complainant's distressed condition**: There was evidence from Christopher Stanley that the complainant's demeanour had become subdued and "a bit scared" by the early hours of the morning.[19] Ms Geebung, Ms Reuben and Ms Tapper, as well as the police subsequently observed the complainant crying and in a visibly distressed condition.[20]

Evidential features referred to by the appellant

[29] The appellant has raised a number of features of the evidence which he submits show that the complainant was "lying right through his statements". I have

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12 Ms Geebung AB 130 LL5-35; Christopher Stanley AB 137 LL19-32.
13 AB 174 LL1-10.
14 AB 174 L40; AB 175 LL15-30.
15 AB 172 L3-AB 173 L50.
16 AB 174 LL42-58.
17 AB 183 L45-AB 185 L20.
18 AB 183 LL30-45; AB 186 L50-AB 187 L10.
19 AB 138 L30-AB 139 L40.
20 Ms Geebung AB 122-AB 124; Ms Reuben AB 148 LL50-58; Ms Tapper AB 153 LL20-50; the police AB 171 LL30-50.

considered these features not only from the viewpoint of whether they demonstrate that the complainant deliberately told falsehoods in his testimony, but also from the viewpoint of whether they demonstrate that his testimony was unreliable to a point that a jury could not act upon it in order to be satisfied to the requisite standard of the appellant's guilt.

[30] The appellant submits that on the factual issue of whether the complainant had visited the Petrie house beforehand, there was a divergence between the complainant's evidence and that of Ms Geebung. That is not so. She said that he had been there twice.[21] He agreed that he had been there "once or twice".[22] The appellant also submitted that there was a divergence between the testimony of these two witnesses concerning whether the complainant had stayed overnight at the Petrie house before. He said that he had not.[23] She said that she could not remember him staying overnight.[24] Again, there was no divergence.

[31] There was inconclusiveness, if not divergence, in the evidence as to whether the complainant had consumed alcohol during the Friday evening. He said that he was not sure if he had had a drink with others that evening. He could not remember if he had drunk beer. He said that he had not drunk wine or spirits. He denied being "quite drunk" by the end of the night.[25] Christopher Stanley said that he had seen the complainant drink more than one can of bourbon or rum and that the complainant was drunk throughout the night.[26] Ms Geebung said that she had seen the complainant drinking rum or Jim Beam that evening.[27] Ms Tapper had seen the complainant taking a "sip of a drink here and there",[28] and Ms Reuben recalled seeing the complainant drinking during the night, but she said that he was "not overly intoxicated".[29]

[32] The appellant also referred to evidence concerning the complainant's drinking given by some of these witnesses during the course of a Basha inquiry conducted at the appellant's request, on the second day of the trial. The enquiry was conducted prior to empanelment of the jury and the evidence given on it was not provided to the jury. Thus it is irrelevant for assessment of the jury verdicts. I do note, however, that those witnesses did not give a "watered down" version of the complainant's drinking in their evidence before the jury.

[33] The appellant points to evidence by the complainant that the former was wearing football shorts at the time,[30] and by reference to Christopher Stanley's testimony, implies that there was competing evidence that he was not wearing football shorts. However, Christopher Stanley said that he could not recall what the appellant was wearing.[31] He did not contradict the complainant's evidence in this respect.

[34] With regard to DNA testing, a penis swab taken from the appellant revealed a mixed DNA profile to which there were two DNA contributors. The major profile was

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21 AB 118 L50.
22 AB 99 LL40-41.
23 AB 100 LL1-10.
24 AB 131 L40.
25 AB 101 LL30-50.
26 AB 141 LL15-31.
27 AB 132 LL12-22.
28 AB 154 LL10-12.
29 AB 151 LL38-40.
30 AB 72 L30.
31 AB 141 L59-AB 142 L1.

that of the appellant; however, the identity of the minor profile was undetermined.[32] Thus, the medical evidence did not conclude that the complainant was the minor contributor as the appellant claimed that it did. The evidence was neutral on that issue. I note also that Dr Hoskins gave evidence that with anal penetration by a penis, absent ejaculation, there was a possibility only that traces of the penetrator's DNA would be left.[33]

[35] The appellant also points to the absence of the complainant's DNA under his fingernails.[34] He does so in relation to evidence given by the complainant that his arms were scratched during the attacks upon him. Little can be drawn from that given that the complainant's evidence was merely that his "arms got scratched doing it somehow".[35] He did not say that the appellant scratched him.

[36] Whilst the bruising as described in these reasons was detected by Dr Hoskins, there was no evidence of tearing to the complainant's anus. The appellant relies upon this. Dr Hoskins' evidence was that tearing is the most common type of injury in non-consensual anal sex. He said that observable injury occurs in 30 to 40 per cent of instances, typically a tear.[36] He did not say that, more often than not, tearing occurs with such sex.

[37] The appellant also suggests that there was divergence in the evidence as to when Christopher Stanley arrived at the house on the Friday, whether it was at lunchtime as he said,[37] or in the early evening as Ms Geebung said.[38] The evidence of these two witnesses on this issue did not impact in any way upon the credibility of the complainant.

[38] Overall, the features in the evidence to which the appellant has referred involve instances of misunderstandings by him that evidence diverged when it did not; an instance of divergence on a factual issue of no significance; and one instance of divergence of potential significance. The last mentioned instance is that of the complainant's drinking that evening. The preponderance of the evidence would have suggested to the jury that the complainant had been rather less than frank in his evidence about what and how much he had had to drink. However, in the absence of evidence that the complainant was intoxicated to a degree that would have impaired his awareness or memory of what was being done to him, the jury were entitled to accept his testimony as reliable.

Ground 1 – conclusion

[39] For the foregoing reasons, the appellant has failed to demonstrate that the jury's verdicts were unsafe and unsatisfactory. This ground of appeal cannot succeed.

Ground 2

[40] I accept the respondent's submission that this ground of appeal is without merit. The summing up was balanced. It did not favour the prosecution. The learned judge reminded the jury of the appellant's arguments. It was not the fault of her

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32 AB 177 LL8-23.
33 AB 186 LL2-25.
34 AB 178 LL40-50.
35 AB 90 LL15-17.
36 AB 187 LL35-55.
37 AB 136 LL5-6.
38 AB 119 L50.

Honour that there was an abundance of evidence supporting the appellant's guilt. She was entitled to remind the jury of the prosecution evidence and arguments. No redirections were sought by the appellant's counsel at the conclusion of the summing up.

Disposition

[41] The two grounds of appeal are unavailing. The appeal against conviction must be dismissed.

Order

[42] The order I would propose is that the appeal be dismissed.

[43] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Gotterson JA and with the order he proposes.