

SUPREME COURT OF QUEENSLAND

CITATION: *R v BCL* [2013] QCA 108

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

FILE NO/S: CA No 217 of 2012
DC No 97 of 2012

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: Orders delivered ex tempore 8 February 2013
Reasons and further order delivered 14 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 8 February 2013

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

ORDERS: **Delivered ex tempore 8 February 2013**

- 1. Appeal allowed.**
- 2. The verdicts of guilty in respect of counts 3 to 6 are set aside.**
- 3. The Court reserves its decision as to what further orders will be made and the reasons for those orders and any further orders.**

Delivered 14 May 2013

- 1. A retrial is ordered on counts 3 to 6.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was charged with five counts of rape and one count of sexual assault – where the appellant was convicted of three counts of rape and the sexual assault and acquitted on two counts of rape – where the complainant was declared a special witness under s 21A *Evidence Act* 1977 (Qld) and was consequently also an affected child witness – where the presiding judge at the pre-record hearing ordered under s 21A(2)(d) that a support

person sit with the complainant whilst she gave evidence – where the primary judge erred in failing to direct the jury in accordance with the mandatory requirements of s 21A(8) and s 21AW(2) about the presence of a support person – whether miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – where the Court ordered that the verdicts of guilty on counts 3 to 6 be set aside by reason of a miscarriage of justice arising from the primary judge's failure to direct the jury in accordance with s 21A(8) and s 21AW(2) about the presence of a support person – where the appellant contends that the verdicts of acquittal on counts 3 to 6 are unreasonable and cannot be supported having regard to the evidence – where the appellant contends that the verdicts of guilty on counts 3 to 6 are inconsistent with the verdicts of acquittal on counts 1 and 2 – where the resolution of this ground determines whether verdicts of acquittal will be entered or a re-trial ordered on counts 3 to 6 – whether verdicts unreasonable and cannot be supported by the evidence – whether verdicts inconsistent

CRIMINAL LAW – APPEAL AND NEW TRIAL – OTHER MATTERS – where the appellant contended that the primary judge erred in admitting evidence of the complainant's behavioural change – where the appellant contended that the primary judge erred in failing to warn the jury on the issue of delay and that it would be dangerous to convict on the uncorroborated testimony of the complainant alone – where the appellant contended that the primary judge erred in failing to identify matters affecting the reliability of the complainant's evidence and to warn the jury to scrutinise her evidence with great care – whether the primary judge erred on the above grounds

Evidence Act 1977 (Qld), s 21A, s 21AV, s 21AW, s 93A, s 668E

Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, considered

R v DM [2006] QCA 79, considered

R v Hellwig [2007] 1 Qd R 17; [2006] QCA 179, cited

R v Michael (2008) 181 A Crim R 490; [2008] QCA 33, considered

R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, cited

R v Williams [2010] 1 Qd R 276; [2008] QCA 411, considered

COUNSEL:

K Prskalo for the appellant

M R Byrne SC for the respondent

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

- [1] **MARGARET McMURDO P:** The appellant pleaded not guilty on 20 August 2012 in the Ipswich District Court to five counts of rape and one count of sexual assault. He was convicted after a four day jury trial of three counts of rape and the sexual assault (counts 3 to 6) and acquitted on two counts of rape (counts 1 and 2). On 8 February 2013, this Court allowed the appeal against conviction, set aside the guilty verdicts and reserved the delivery of its reasons for that order and its decision as to what further orders should be made. These are my reasons for allowing the appeal and setting aside the guilty verdicts and for now ordering a retrial.
- [2] The complainant was the appellant's step daughter. He has appealed against his convictions on five grounds:
1. The primary judge erred in law by failing to direct the jury in accordance with s 21A(8) and s 21AW *Evidence Act 1977* (Qld).
 2. There was a miscarriage of justice because of the reception of inadmissible evidence of the complainant's behavioural changes.
 3. There was a miscarriage because the primary judge failed to warn the jury that, by reason of delay, the appellant had lost the opportunity to test the evidence and to direct the jury that it would be dangerous to convict upon the uncorroborated testimony of the complainant alone.
 4. There was a miscarriage of justice because the primary judge failed to identify matters affecting the reliability of the complainant's evidence and failed to warn the jury to scrutinise that evidence with great care before arriving at a conclusion of guilt.
 5. The guilty verdicts are unreasonable and not supported by the evidence and are inconsistent with the verdicts of acquittal on counts 1 and 2.

Ground 1

- [3] The complainant, who was aged between 14 and 16 at the time of the alleged offences, was declared a special witness under s 21A and was consequently also an affected child witness under part 2 div 4A *Evidence Act*. Her interviews with police were admitted into evidence under s 93A *Evidence Act*. She also gave pre-recorded evidence, including cross-examination, on 25 May 2012. The presiding judge on 25 May (not the trial judge) ordered under s 21A(2)(d) that a support person sit with her whilst she gave her evidence. The support person was not visible when the pre-recorded evidence was played at trial on the main picture, but was distinctly visible to the jury on an inset.
- [4] Section 21A(8) provides:

"If evidence is given, or to be given, in a proceeding on indictment under an order or direction [concerning a special witness] mentioned in subsection (2)(a) to (e), the judge presiding at the proceeding *must* instruct the jury that—

- (a) they should not draw any inference as to the defendant's guilt from the order or direction; and
- (b) the probative value of the evidence is not increased or decreased because of the order or direction; and
- (c) the evidence is not to be given any greater or lesser weight because of the order or direction" (my emphasis).

[5] Section 21AV relevantly provides:

"Affected child entitled to support

- (1) An affected child, while he or she is giving evidence in a relevant proceeding, is entitled to have near to him or her a person who may provide the child with support (a *support person*).
- (2) A person may be the child's support person only if the person is approved by the court on application by the party proposing to call the child.
- (3) The support person must be permitted to be in close proximity to the child, and within the child's sight, while the child is giving evidence.

..."

[6] Section 21AW relevantly provides:

"Instructions to be given to jury

- (1) This section applies to a proceeding on indictment if any of the following measures is taken—
 - ...
 - (c) an affected child has a support person under section 21AV while the child gives evidence.
- (2) The judicial officer presiding at the proceeding *must* instruct the jury that—
 - (a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and
 - (b) the probative value of the evidence is not increased or decreased because of the measure; and
 - (c) the evidence is not to be given any greater or lesser weight because of the measure" (my emphasis).

[7] The trial judge warned the jury at the commencement of the trial in accordance with the requirements of s 21A(8) and s 21AW(2) insofar as they related to the s 93A

statements and the pre-recorded evidence, although her Honour did not repeat that warning in the summing-up. The judge at no stage warned the jury as required under s 21A(8) and s 21AW(2) about the presence of the support person.

- [8] This Court in *R v DM*¹ and *R v Michael*² discussed the failure to comply with a mandatory requirement for the giving of the directions set out in s 21AW and s 21A(8), respectively. Such an omission means that this Court can uphold any subsequent conviction only if convinced, notwithstanding the noncompliance and after viewing the whole of the record, that there has been no substantial miscarriage of justice in the terms of s 668E(1A) *Criminal Code* 1899 (Qld). The question is not whether the noncompliance could have had any adverse effect on the appellant's prospects of acquittal but whether, the trial being irregular, this Court is able to conclude for itself upon its review of the record that there has been no miscarriage of justice.³
- [9] It is true that, unlike in *DM* where there was contradicting evidence from both the complainant and appellant, the present appellant did not give evidence. But in *Michael* the appellant did not give evidence and that factor did not assist the respondent. The prosecution case against the present appellant turned solely on the complainant's evidence which contained some internal inconsistencies. Her testimony was in some ways inconsistent with parts of the evidence from the preliminary complaint witnesses, B and JC. She made no complaint to police until four to six weeks after the last alleged offence. Even then, she was a reluctant complainant and attempted to withdraw her police complaint. She gave as the reason for her reluctance to complain her anxiety that the family not be torn apart, but a jury may have considered her reluctance was inconsistent with truthfulness. She remained affectionate towards the appellant throughout the alleged offending period and they appeared to have a normal and loving familial relationship. The jury acquitted the appellant on two of the six counts. For all these reasons, this was a finely balanced case where a reasonable jury could have found the appellant not guilty. The mandatory warnings contained in s 21A(8) and s 21AW are concerned to ensure as fair a trial as possible for an accused person whilst also ensuring that special witnesses and affected child witnesses giving evidence have appropriate support and the opportunity to give their best evidence despite their youth or special needs. The omission to give the warning has resulted in the appellant's trial not being as fair as the legislature intended.
- [10] It is, of course, true that the judge gave a comparable warning as to other aspects of the way in which the court received the complainant's evidence under part 2 div 4A. But I do not consider this Court can resolve the quintessential jury question of whether the complainant's evidence proved beyond reasonable doubt that the appellant was guilty.⁴ It follows that I am unpersuaded that no miscarriage of justice has arisen from the omission to give the warning under either s 21A(8) or s 21AW as to the presence of the support person.
- [11] For this reason, on 8 February this Court allowed the appeal and quashed the convictions. Whether a new trial should be ordered on counts 3 to 6 or verdicts of acquittal entered will turn on the determination of ground 5.

¹ [2006] QCA 79, [26].

² [2008] QCA 33.

³ Above, [38].

⁴ See *R v Hellwig* [2006] QCA 179, [38].

Grounds 2 to 4

- [12] Although it is not strictly necessary to deal with grounds of appeal 2 to 4, as there may be a retrial I will briefly consider them in case this is of assistance to the court rehearing the case.
- [13] The second ground of appeal concerns the following evidence. A youthful male acquaintance of the complainant, JC, gave evidence that at a camp in September 2009⁵ run by a community organisation the complainant was distant and not her usual fun-loving self. When he questioned her about it, she said she was "just fine, just leave it alone."⁶ Her uncharacteristic behaviour continued over a few days.
- [14] There was no objection to the admissibility of this evidence from the experienced defence counsel at trial. He may have wanted the evidence led for a forensic purpose, although neither counsel in the appeal could identify what that purpose might be. Had there been an objection, the evidence should have been excluded. That is because evidence of distressed condition which is not related closely to the commission of an identified offence or to a preliminary complaint is inadmissible. As Fraser JA explained in *R v Williams*,⁷ evidence of a complainant's distressed condition may be left to the jury even if there are competing inferences but if the relationship between the distressed condition and the alleged offence is tenuous or remote, the trial judge should withdraw the evidence from the jury.
- [15] Absent a request from defence counsel, if this aspect of JC's evidence is no stronger than at this trial, it should not be led on any retrial.
- [16] The third ground of appeal concerns the judge's omission to warn the jury in terms of *Longman v The Queen*.⁸ The delay in making a complainant to police in the present case was not great. The last alleged offence occurred only four to six weeks beforehand. Although different judicial officers may have decided to give such a warning, the delay in this case was not of the kind to require a *Longman* warning.
- [17] The appellant's fourth ground of appeal is that the judge ought to have warned the jury to scrutinise the complainant's evidence with great care because of the following. Her evidence contained internal inconsistencies. Her complaint to others that the appellant had drugged her or got her drunk before committing some offences was inconsistent with her evidence. The appellant submitted that these and other matters of much lesser weight required the judge to warn the jury to scrutinise the complainant's evidence with great care before acting on it.
- [18] The judge carefully explained to the jury how these matters affected the complainant's credibility, which was central to the case, and fairly put the competing contentions. While some judges might have considered that a warning of this kind was prudent, the circumstances relied on by the appellant did not manifest a perceptible risk of miscarriage of justice so as to make such a warning essential: *R v Tichowitsch*.⁹

⁵ In cross-examination, JC said this happened in September 2010. The discrepancy was not clarified and it seems to have been accepted as a slip.

⁶ T 2-11.49 (AB 97).

⁷ [2008] QCA 411, [37]-[39].

⁸ (1989) 168 CLR 79.

⁹ [2007] 2 Qd R 462, [65].

Ground 5

- [19] I turn now to consider ground 5: whether the verdicts of guilty on counts 3 to 6 are unreasonable and not supported by the evidence, and are inconsistent with the verdicts of acquittal on counts 1 and 2. If this ground succeeds, this Court must order verdicts of acquittal. If it fails, the Court must order a retrial. Consideration of this ground requires a review of the evidence at trial.

The complainant's evidence

- [20] Police first spoke to the complainant at 8.00 pm on 8 August 2011 at the home of her friend B and B's mother. She told them that over the past couple of years the appellant had raped her once or twice and kissed, fondled or made sexual comments to her. This started when she was in year 9 aged 13. The first episode was when he fondled her through her shirt around the breast area. The raping had been happening since the end of 2009 when she was in year 9. She described an incident when her mother was not home; she was working in Sydney. The complainant was watching TV on the couch before she went to bed. He took off her clothes. She said "no"¹⁰ and tried to push him off but he overpowered her. She agreed with the police officer's suggestion that the appellant had full sexual intercourse with her by force (count 3).
- [21] On another night, he pulled her aside and asked whether she liked it. She said no and that she did not want it to happen again. It did not happen for a while, but he again began to fondle and grab her around the breast area. On one occasion, he picked her up, put her on the kitchen bench and kissed her on the lips. Sometimes when her mother was at work or asleep and the complainant was asleep, he would stand by the side of her loft bed, which was higher than normal beds, touch her breast area and try to pull off her blanket.
- [22] Police asked her to describe the next occasion on which he raped her. She recounted an episode in 2010 when she was in the shower. He got in the shower with her just after she turned off the water (count 1).
- [23] She then referred to another incident when he got her onto the floor of her bedroom and raped her (count 4). She thought "that was it."¹¹ When asked whether she recalled any other incidents of touching, trying to kiss her or anything else, she stated that she had blocked out most of it. She did not tell her mother because she "had a feeling that she might not believe me."¹² She understood the seriousness of her accusations and the importance of telling the truth. The last time he had fondled her was about four weeks ago. Those incidents happened "maybe once every two or three months",¹³ mainly after he had been drinking alcohol. The last rape was between October and December 2010.
- [24] The next day, 9 August 2011, police recorded a lengthy interview with the complainant at her school. Well into that interview, she discussed the occasion when she got out of the shower after turning off the water. The appellant was already in the bathroom, naked. He put one of her legs up on the side of the bath

¹⁰ Transcript of first s 93A interview, 3.41.

¹¹ Transcript of first s 93A interview, 6.16.

¹² Transcript of first s 93A interview, 6.31.

¹³ Transcript of first s 93A interview, 7.42.

and pulled her up so that she was hooked around his waist with one leg. He put his leg up on the bath as well and hooked her leg over the top of his. She added:

"I don't really remember but I – I'm guessing – I'm not one hundred percent sure but I'm guessing he had sex with me again. ... I remember ah, ah like a feeling I get in-inside like down here... kinda like it had been stretched and like I was open I guess you could say afterwards but um I don't remember the exacts of that time" (errors in original).¹⁴

[25] Her brother would have been either at basketball training or his game and her mother would have been picking him up. The incident would have occurred between 5.00 and 6.30 pm on a Tuesday or Thursday, probably in 2009, because her brother had not played basketball since 2009. She also said that it would have been in autumn or winter because it was starting to get dark early. She could not remember a lot about the incident (count 1).

[26] The police asked if there was anything else she remembered about the incident. She did not think so. The police asked her if she could remember what his penis looked like when he came over to her. She stated that it was erect but she only glanced at it and shut her eyes. The police again asked her if anything else happened. She responded, "I don't believe so."¹⁵ The police continued to ask her whether something else happened around this time, finally stating: "Because I've heard that um on this, this same time... in the bathroom um he's...made you do something else. Do you remember doing something else to him?" (errors in original).¹⁶ The complainant then stated:

"Um yes um he ah pushed me down onto my knees and made me give him head or oral sex... I kinda slipped off because I hadn't dried my body...I'd just gotten out of the shower and so I had been slipping while he what I'm assuming was he entered me and um he pushed down on my shoulders so that my – I was kneeling and um he grabbed the back of my head and pushed me onto his penis so that my mouth was over his penis and he would ah push my head back and forth so that I was essentially bobbing over his penis" (errors in original) (count 2).¹⁷

[27] She did not remember this incident when she first spoke to police because she had "lock[ed] some parts of it away"¹⁸ and

"when I talk about one thing sometimes the other thing gets pushed back into the back of my mind and um even last night when I was talking about it I didn't remember it until the um Police Officer asked me if he'd ever made me ah perform oral sex on him and that's when I remembered..." (errors in original).¹⁹

[28] When police asked her if she could remember another time, she described an incident on the couch when her mother was in Sydney for work in late 2009 and she

¹⁴ Transcript of second s 93A interview, 37.

¹⁵ Transcript of second s 93A interview, 45.

¹⁶ Transcript of second s 93A interview, 45.

¹⁷ Transcript of second s 93A interview, 45.

¹⁸ Transcript of second s 93A interview, 47.

¹⁹ Transcript of second s 93A interview, 47.

was in the last couple of weeks of the school term. It was between 9.00 and 10.00 pm and her brother was already asleep. She and the appellant were watching TV before bedtime. He leant over, pulled off her pants and entered her, thrusting inside her. She pushed him off slightly and he "kinda fell off the couch and had to stand up" (errors in original).²⁰ She put her pants back on, walked to her bedroom, shut the door and went to bed (count 3).

- [29] She recounted another occasion on the floor of her bedroom when the appellant came into her room, shut the door, pulled her onto the floor and took off her clothes. Her back was on the floor and he was on top of her. He spread her legs apart, put his hands on the ground above her shoulders, put his penis into her vagina and kept thrusting. She suffered minor carpet burn on her back; "it wasn't noticeable like there were bits of skin hanging off but it stung."²¹ She did not think he ejaculated. She did not think she tried to push him off as she was on the floor and there was not much she could do so she "just... let [it] play out".²² He got dressed and walked out. She was not sure when this happened: it might have been 2009 or 2010. The weather was mild so it might have been autumn or spring (count 4).
- [30] She told police about another incident when she was alone in her bed. The appellant came in and put his hands on her legs, holding her down so that she could not move. He ducked his head to avoid hitting some shelves. He took off her shirt and her underwear and shorts at the same time. He kissed her, forced her mouth open and put his tongue in. She unsuccessfully tried to push him off. He kissed her neck and one breast while he played with the other. He kissed her legs and thighs and entered her with his penis. He pulled her legs around his back and started thrusting. She again tried to push him off but after a while gave up and "just... let him do what he had to do."²³ He got up and dressed, kissed her and left. She waited a few minutes before going to the bathroom and dressing. She thought this incident happened between 12 midnight and 3.00 am as she normally went to bed at 11.30 pm and there was no morning light (count 5).
- [31] The interviewing police officer said, "I've heard um that some... other things have happened um not necessarily to the extent of what you've sort of just spoken to us about but um he's... done other things to you um like grabbed you. Is there a time that you can ... most remember?" (errors in original).²⁴ The complainant recounted an incident about five or six weeks earlier when she was in the kitchen and he grabbed her breasts. She hunched over, dropped to the floor to get him off and pushed him away. He picked up his drink and walked back to the lounge room (count 6).
- [32] She told police that he started grabbing her breasts or making sexual comments at the end of year 9. Over the next couple of years, his behaviour progressed to about four rapes from what she could remember. She did not remember "a lot of the other minor stuff that has happened"²⁵ because she blocked it out so that she did not get upset. Now she felt kind of numb and emotionless about it.
- [33] In her evidence at trial, she confirmed the accuracy of her police interviews which she had recently heard replayed.

²⁰ Transcript of second s 93A interview, 23.

²¹ Transcript of second s 93A interview, 55.

²² Transcript of second s 93A interview, 55.

²³ Transcript of second s 93A interview, 13.

²⁴ Transcript of second s 93A interview, 65.

²⁵ Transcript of second s 93A interview, 4.

- [34] In cross-examination, she agreed that the day after she complained to police she spoke to her mother and the appellant and decided not to pursue her complaint. She went to B's home to tell B and B's mother. B's mother and the complainant's mother had a heated argument. B's mother rang the police "kind of"²⁶ against the complainant's wishes. She agreed that she had had no contact with the appellant since his arrest and that, on a number of occasions, she had tried to withdraw her complaint as she did not wish the charges to proceed.
- [35] She agreed she did not give B any details of the appellant's conduct. She could not remember exactly what she told RM, a friend, and agreed that she did not give him any details about the appellant's conduct. Her complaint to JC, another friend, by way of the internet was also general in its terms. Apart from B, B's mother, RM and JC, she did not tell anyone else about the appellant's conduct before involving the police.
- [36] Her brother's bedroom was opposite hers and did not have a door. The house was fairly small with one bathroom which everyone used. She routinely went to bed at about 9.00 pm.
- [37] She considered that the appellant was strict. He disciplined her, for example, for not doing the dishes after dinner. He took her mobile phone from her when she exceeded her usage limit. He banned her from using the internet when she spent too long on it. B's boyfriend, RW, lived at B's house with her. This was a freedom which the appellant and the complainant's mother would not have allowed her. Her regular practice was to hug and kiss her parents at bedtime. She agreed that before she went to B's place on the weekend when she told B's mother about the appellant's actions, she asked for a hug from the appellant before she left.
- [38] She said the appellant made sexual comments and advances to her which progressed to rape. He commented about the large size of her breasts and progressed to feeling her breasts. She could not remember the first occasion he raped her. She did not give her statement to police in sequential order. She could remember additional occasions of improper conduct. The first incident she told the police about was when the appellant crawled up into her bed, kissed her on the lips and all over her body, and then raped her. When he noticed that she was not moving, he crawled off, dressed, kissed her goodnight and left (count 5). She thought this happened between November 2010 and January 2011.
- [39] The appellant's counsel asked if she remembered any other occasions. She recounted a time when she was having a shower. She got out, dried her hair and noticed that he was in the room. He picked her up, "shuttled"²⁷ her over his leg and "tried"²⁸ to have sex (count 1). He "pushed [her] onto the ground, made [her] give him oral sex and then when he tried to make [her] do it [herself she] got up and passed him his clothes and left" (count 2).²⁹ She agreed she was doing her best to remember what she told police about that incident. She thought this happened in about mid-2010.
- [40] She was asked if she could remember any other events. She recounted an occasion on the bedroom floor where the appellant crawled halfway up into her bed and

²⁶ T 1-11.13 (AB 27).

²⁷ T 1-22.15 (AB 38).

²⁸ T 1-22.16 (AB 38).

²⁹ T 1-22.16-18 (AB 38).

pulled her out of bed onto the floor. He took off her clothes and his clothes and had sex with her on the floor before dressing and leaving (count 4). She thought this happened between November 2010 and January 2011.

[41] She was asked if there were any other occasions she could remember. She recounted an occasion one night in the kitchen when she was doing the dishes. The appellant walked in, put his hands over the top of her from behind and squeezed her breasts. She hunched over, ducked and crawled to get away. This happened during the first six months of 2011 (count 6). She could not remember any other occasions.

[42] Whilst she was being cross-examined about the dates of various incidents, the court was adjourned for the complainant to go to the bathroom. When the court resumed, she continued to give evidence about the dates of various incidents. She maintained that her account of these incidents was true and that the appellant raped and sexually touched her as she described to police.

The evidence of the appellant's mother

[43] The complainant's mother gave the following evidence. She gave birth to the complainant in 1994 and to her son in 1997. She formed a relationship with the appellant and they married in 2001. The appellant also had a daughter born in 1991 or 1992. She had business trips to Sydney over two different periods from late August 2009 for nine weeks and for a further five weeks around November 2009. For about 18 months from mid-2008 to mid-2009, her son had basketball training on Tuesday nights and played on Thursday nights, from 6.00 pm to 7.00 pm both evenings. The appellant had soccer training from 6.30 pm until 9.00 pm on Tuesday evenings and played on Friday nights.

[44] On Friday 5 August 2011, the complainant went to her friend B's place for the weekend. B's mother brought the complainant home on the Sunday and spoke to the complainant's mother about the appellant. The complainant did not say anything. The complainant's mother asked the complainant if what B's mother had told her was true and she said yes. She was crying and said she wanted to stay at B's for the night. The complainant returned there with B's mother after the complainant's mother packed additional clothes for her. The next morning the complainant's mother picked up the complainant from school early. She asked her again whether it was true. The complainant said, "[m]aybe it wasn't how I've explained it properly".³⁰ The mother said, "[w]ell, either did it or didn't and you need to tell me the truth."³¹ The complainant said she did not want to talk about it; she wanted to speak to B's mother. The complainant's mother took her to a pre-arranged job interview then back to the family house. The complainant asked to return to B's house and her mother drove her there. The complainant went into B's house alone because she wanted to talk to B's mother in private. Later, the complainant's mother went into B's house where there was a "rather heated discussion".³² B's mother told the complainant's mother she had to take the complainant to the police. Whilst she was still at B's house the police arrived. She was locked out of B's house while the complainant spoke to them. After the police left, the complainant said to her, "I didn't want to make a statement."³³ The mother

³⁰ T 1-32.9-10 (AB 72).

³¹ T 1-32.10-11 (AB 72).

³² T 1-32.46 (AB 72).

³³ T 1-33.29 (AB 73).

said, "if it's the truth then you have to be true to yourself."³⁴ They hugged and the complainant went back inside and spent the night. The police interviewed the complainant at school the following day.

- [45] In cross-examination, she said that the door to the bedroom that she and the appellant shared was routinely kept open. She was a light sleeper; her son had suffered from asthma and she was always listening out for him. The house had timber floor boards which creaked when people moved around. This was especially audible in the dead of night. When she was awake in her bedroom, she could hear the complainant, whose room was close by, getting in and out of bed. She had a good relationship with her daughter. She noticed nothing unusual about her daughter's relationship with her husband or any changes in that relationship. They would hug and kiss each other good night each evening. Once the appellant was interviewed by police, he and the complainant had no further contact. She went with the complainant to the police station when the complainant told her she wanted to withdraw her complaint.
- [46] In re-examination, she stated that the complainant wanted to withdraw her complaint in late August or early September 2011. The complainant was under emotional stress and was concerned about her mother. They discussed the matter with the investigating police officer for about half to three-quarters of an hour and then left.

The preliminary complaint evidence

- [47] RW gave evidence that he met the complainant through a community organisation in which they were both involved. In about May 2011, the complainant told him that her step father had been "very abusive and that he had performed various sexual acts."³⁵ He could not remember exactly what she said. In cross-examination, he agreed she did not provide any detail.
- [48] RM gave evidence that in about May 2011 he noticed that the complainant, with whom he was a volunteer at the same community organisation, was upset. He asked her what was wrong. At first she said it was nothing, but he knew her well and continued to question her about it. She said that her step father had been abusing her. She was upset and uncomfortable. He could not remember any other conversation but he suggested she talk to police and that she definitely talk to her mother.
- [49] JC gave evidence that he too knew the complainant through the same community organisation. In July 2010, they were communicating through the internet using MSN. She wrote that she needed to tell him something, but he must swear secrecy. He responded that he could not promise this. Ultimately she told him that her step father had been sexually assaulting her for three years. He responded, "W-T-F"³⁶ and told her speak to an adult or to the police. She wrote that she did not want to split up the family. Her step father was the main source of family income and she did not want to destroy everything. He convinced her to tell another friend so that she had someone to talk to about it. The conversation, which commenced at about 8.00 pm, finished at about 2.00 am the next morning.

³⁴ T 1-33.30-31 (AB 73).

³⁵ T 2-6.52-53 (AB 92).

³⁶ T 2-12.28 (AB 98).

- [50] In cross-examination, he agreed he did not have a record of the original conversation and was relying on memory. He first spoke to police about this on 9 November 2011. He confirmed the conversation occurred in 2010. He was confused when he said in his earlier police statement that it was in 2011. He agreed that when he first spoke to police on 9 November 2011, his best memory was that the complainant wrote, "[m]y stepfather has been raping me for the past three years"³⁷ and that throughout their conversation she texted something like "[h]e gets me drunk or drugs me and then does it".³⁸ He asked her why she had not told him before and whether she had told anyone else. She said she had told one other friend. She said she did not want to split up her family and her step father provided the main family income.
- [51] B gave evidence that she was a good friend of the complainant; they attended the same school from year 11; they spent time at each other's homes and walked to and from school together. In August 2011 when they were walking to school, the complainant said that her dad had put drugs in her drinks before and that he had had sex with her. B asked if she knew what drugs and how she knew he had done this. The complainant changed the subject and then told B that the complainant's step father had had sex with the complainant. When they arrived at school, they stopped their conversation. On the way home after school, B asked her if the complainant's mum knew. The complainant said she had not told her mother. B told the complainant that she would need to go to the police to make it stop. She was concerned that if she did the family would fall apart and it would be all her fault. If the appellant was not there her mother would not have enough money and they would have to move away. B told her own mother because she was worried. The complainant came over to their house and talked to B's mother for about an hour. Later that night, they all went to the complainant's house to tell the complainant's mother. B and B's then boyfriend, RW, stayed in the car with the complainant while B's mother spoke to the complainant's mother. The complainant's mother came to the car and asked the complainant if it was true. The complainant was crying and seemed very nervous and afraid.
- [52] A few days later B spoke to the complainant on her mobile phone. The complainant was at home and sounded "very nervous and frantic".³⁹ B could hear background yelling. The complainant and her mother came to B's home. The complainant's mother told the complainant "you have to tell them".⁴⁰ The complainant's mother said that the complainant had been embellishing the story and it did not happen as much as she said it did. The complainant was very nervous, picking at her pants and she could not look at them. B's mother told the complainant's mother that she had to do something about it. The complainant's mother said she would take the complainant to the police station and she and the complainant left. A short time later, they returned to B's house because the complainant had asked her mother to take her back there. The complainant's mother was very distressed and wanted the complainant to return home with her, assuring B's mother that she had a plan to protect the complainant. B's mother asked for details of the plan and said that if the complainant's mother could not assure her as to how she would keep the complainant safe, B's mother would call the police. The complainant's mother tried

³⁷ T 2-15.53-54 (AB 101).

³⁸ T 2-16.42-43 (AB 102).

³⁹ T 3-10.20 (AB 114).

⁴⁰ T 3-10.49-50 (AB 114).

to pull the complainant out of the house. B held onto the complainant's other hand, telling her not to go. B's mother called the police and reported a rape.

The defence case

- [53] The appellant did not give or call evidence. The defence case was that the complainant's evidence could not be accepted beyond reasonable doubt. There were many inconsistencies and in cross-examination she was not remembering the actual incidents but her account of them to police. She could not even remember the first time she was raped. There were also inconsistencies between her evidence and some preliminary complaint witnesses. She gave inconsistent evidence as to when count 1 occurred. Her account of these incidents happening in the small family home without others being aware was implausible. At first, she told police she was raped once or twice, but the next day she claimed there were four rapes. The jury could not be satisfied she was not making up her allegations.

The competing contentions

- [54] The appellant contends that the acquittals on counts 1 and 2 cannot be reconciled as logical and reasonable with the guilty verdicts. These divergent verdicts compel a conclusion that the complainant's overall credibility was so diminished that the jury should have acquitted on all counts. There were inconsistencies in the complainant's account and between her account and some of the witnesses to whom she made preliminary complaint. She failed to seek assistance from her mother or brother. She failed to manifest dissent in respect of some of the alleged rapes. Her allegations that the offences were committed in a small house where there was a high risk of discovery were inherently implausible. This was especially so in light of the normal affection she displayed towards the appellant. Even making full allowance for the advantages enjoyed by the jury, there was a significant possibility that an innocent person had been convicted such that the verdicts should be set aside as either or both unreasonable and inconsistent.
- [55] The respondent emphasised the weakness of the complainant's evidence as to count 1 on which the appellant was acquitted. She did not give direct evidence that the appellant had sexual intercourse with her on this occasion. It is not surprising the jury were not satisfied beyond reasonable doubt of his guilt on count 1. That being so, they were likely to have a similar doubt in respect of count 2 which she claimed occurred immediately after count 1. In any case, her first recollection to police of count 2 followed leading questions. The judge gave the jury appropriate directions. The jury's doubts on counts 1 and 2 did not require them to have a doubt on the remaining counts. The jury were best placed to assess the critical matter of the complainant's credibility. She complained about the appellant's conduct in July 2010 and May 2011 whilst the offending was continuing and before she complained to police. Her account of the events was not inherently implausible. It was open to a jury considering the whole of the evidence to be satisfied of the appellant's guilt on counts 3 to 6, irrespective of their acquittal on counts 1 and 2.

Conclusion on count 5

- [56] The judge gave the jury appropriate directions to consider the complainant's evidence in respect of each charge in determining whether the elements of that particular offence had been proved beyond reasonable doubt. If they had a reasonable doubt as to her evidence about an element of an offence or about an

uncharged act, this did not mean they could not convict on another count. They must consider why they had a reasonable doubt about that part of her evidence and whether it affected the way they would assess the rest of her evidence. There is no reason to think that this jury did not conscientiously follow those directions.

- [57] It is true that the complainant's evidence contained the shortcomings noted by the appellant's counsel both at trial and in this appeal. Those shortcomings were especially obvious in her evidence on count 1 and, to a lesser extent, count 2. In count 1, the complainant did not unequivocally tell police that the appellant penetrated her vagina with his penis. In cross-examination on count 1, she said that he "tried to have sex". Alternative counts of indecent dealing were not left to the jury on any of the rape counts. She gave conflicting accounts as to whether the episode incorporating counts 1 and 2 occurred in mid-2009 or mid-2010. The indictment alleged that counts 1 and 2 occurred between 31 July 2008 and 1 October 2009. What is more, the complainant's evidence as to count 2 was extracted from her only after persistent and leading police questioning and was not the subject of a preliminary complaint. In these circumstances, it is not surprising that the jury, conscientiously following the judge's directions summarised in the preceding paragraph, gave the appellant the benefit of the doubt on these counts.
- [58] The complainant's uncontested evidence supporting counts 3 to 6 was not plagued with the same difficulties. Further, count 3 occurred when the complainant's mother was in Sydney attending to work commitments so that the appellant had an opportunity to offend in the mother's absence and count 6 was but a fleeting opportunistic incident when others were not present about six weeks before the complainant went to police. It is true that the complainant was reluctant to make these grave allegations against her step father and later sought to withdraw them. But that did not mean she was making a false complaint. Her evidence that she feared a complaint would break up her family and cause economic hardship to her mother was an entirely plausible explanation for her late complaint. She was aged between 14 and 16 at the time of the alleged offending and 16 when she made the complaint. She was clearly fond of the appellant. If he did sexually abuse her as she claimed, it is not surprising that she was a reluctant complainant.
- [59] I do not consider the acquittals on count 1 and 2 inevitably tainted the credibility or reliability of the complainant on counts 3 to 6. The guilty verdicts and the acquittals are logically explicable on the evidence in this case.
- [60] As the appellant points out, there were some inconsistencies in the complainant's evidence but they were relatively insignificant. It was certainly strange that she could not recall the first time she alleged the appellant raped her. It was also notable that she did not give evidence that the appellant had given her intoxicating substances prior to the commission of any of the offences whereas she gave this account to some preliminary complaint witnesses. But the issue of drugs and alcohol was not raised directly with her, either by the police or by counsel at trial. The jury would have been entitled to conclude that she did not tell the police about this in case it got her or the appellant into more trouble. Alternatively, they may have considered she falsely told the preliminary complaint witnesses that the appellant made her intoxicated before the abuse so as to minimise her feelings of guilt about and responsibility for the incidents. On neither scenario was it necessary for the jury to reject her evidence on the counts on which they convicted.

[61] After reviewing the whole of the evidence, I am satisfied that the matters relied on by the appellant neither individually nor collectively must prevent a reasonable jury properly instructed from being satisfied beyond reasonable doubt of the appellant's guilt on each count. It follows that the guilty verdicts are not unreasonable on the evidence.

[62] As the appellant has been unsuccessful on ground 5 and the jury verdicts were neither unreasonable nor inconsistent, a new trial must be ordered on those counts.

FURTHER ORDER:

A retrial is ordered on counts 3 to 6.

[63] **FRASER JA:** I agree with the reasons for judgment of the President and the order proposed by her Honour.

[64] **DALTON J:** I agree with the reasons of the President and the order proposed.