SUPREME COURT OF QUEENSLAND

CITATION:	*R v Svensen* [2014] QCA 85
PARTIES:	**R** **v** **SVENSEN, Cheynne Troy** (appellant)
FILE NO/S:	CA No 278 of 2013 DC No 153 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	24 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2014
JUDGES:	Fraser and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
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 convicted after a trial of one count of maintaining a sexual relationship with a child under 16 years – where the defence introduced evidence of the complainant's conduct to cast doubt on the complainant's credibility – where the prosecutor in his address to the jury identified reasons why the jury would not doubt her credibility – where in summing up the learned primary judge summarised the rival contentions of the defence and prosecution – where there was no objection by defence counsel at trial to the way the learned primary judge summarised the parties' contentions – where the appellant contends that the reference in the learned primary judge's summing up to the evidence of "what [the complainant] did" involved an error of law that the learned primary judge ought to have corrected – whether the jury would have understood that the evidence of the complainant's conduct could only be used to determine the complainant's credibility and was not evidence of the appellant's conduct – whether the learned primary judge should have instructed the jury as to how the evidence of the complainant's conduct could be used

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE LIES – APPLICATION OF PROVISO TO PARTICULAR CASES – where s 668E(1A) of the *Criminal Code* provides that "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred" – where in addition to evidence of the complainant's conduct, there was the complainant's oral evidence, evidence of an admission by the appellant, and DNA evidence – where the DNA evidence corroborated the complainant's oral evidence – whether a substantial miscarriage of justice has occurred

Criminal Code 1899 (Qld), s 229B(1), s 668E(1A)

Baiada Poultry Pty Ltd v The Queen (2012) 246 CLR 92; [2012] HCA 14, cited
Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

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

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

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

[2] **MORRISON JA:** This is an appeal against the conviction of Cheynne Troy Svensen on a single count of maintaining a sexual relationship with a child under 16 years, contrary to s 229B(1) of the *Criminal Code*, between 31 December 2008 and 17 June 2010.

[3] The appellant was convicted on 1 October 2013, after a five day trial. An application was lodged for leave to appeal against the sentence, but as that was abandoned, it was dismissed on the hearing of the appeal.

Circumstances of the offence

[4] The complainant gave evidence in two ways, namely by two statements under s 93A of the *Evidence Act* 1977 (Qld),[1] and two occasions of pre-recorded evidence.[2] From her evidence the bulk of the background facts surrounding the evidence can be determined.

[5] The complainant was born on 2 April 1996. She and her mother were neighbours of the appellant, who lived in a granny flat on a neighbouring property.[3] The granny

1 See AB 292 and 315.
2 See AB 17 and 35.
3 AB 40-41.

flat was fairly small, consisting of a main bedroom, a small bedroom used for storage, bathroom and a combined kitchen/lounge/dining room.[4]

[6] Because of incidents of domestic violence in her own home the complainant began spending time at the main house of the neighbours, and then sleeping on the couch in the granny flat.[5] The complainant recalled moving into the granny flat on a permanent basis approximately "a week after my birthday",[6] which was pinpointed as being when she was 13.[7] According to the complainant it was the appellant who suggested she move in instead of staying with her family.[8]

[7] In her first interview the complainant explained that she had gone to the police "Because of the situation between me and [the appellant]", which she explained as "we're having sex together".[9]

[8] The complainant gave detailed evidence that she and the appellant were having sexual intercourse. She explained that she and the appellant started having sex when she had just turned 13[10] and she gave examples of the frequency as being "maybe every week maybe … Fortnight maybe … Whenever he ever feels like it … or I do."[11] Some occasions when sexual activity occurred were when she and the appellant "were sneaking around with each other, going up the high school and having sex …"[12] She gave evidence of the frequency of the activity at the high school, being "for about three weeks maybe", and involving about 15 or 20 times.[13] Her evidence included details of which gate they would use at the high school, and where the sexual activity took place.

[9] The complainant explained that once they commenced sexual activity in the granny flat, intercourse usually took place in the bedroom,[14] and she gave a description of what the bedroom contained. On one occasion sexual intercourse took place on the couch.[15]

[10] As to the frequency with which the complainant said she and the appellant had sexual intercourse, that was either once a week or once a fortnight, from the time they first started having sexual intercourse.[16]

[11] At her interview on 17 June 2010 the complainant said that she and the appellant last had sex "yesterday", "after I come home from school".[17] When pressed for details as to that incident she said:

> "I just got out of the shower and laid down on the bed and he's like, "Do you wanna have sex?" and I'm like "All right" and then we

---

4 AB 44.
5 AB 41-42, 43-44 and 294.
6 AB 309.
7 AB 42-43 and 178.
8 AB 294.
9 AB 293.
10 AB 296.
11 AB 298.
12 AB 308.
13 AB 309.
14 AB 304 and 306.
15 AB 51 and 306-307.
16 AB 300.
17 AB 307.

done it and then went for a shower again, got cleaned up and then jumped out and sat down and watched tele."[18]

[12] In cross-examination the complainant maintained her position that sexual intercourse had occurred with the appellant, in the granny flat, at the high school, and on the couch in the granny flat.[19]

Particular conduct by the complainant

[13] Defence counsel's cross-examination of the complainant elicited evidence in relation to particular events which are significant in terms of the grounds of appeal. They concern the complainant's reaction when the appellant proposed to go and see a girlfriend called Sarah.

[14] On the first occasion the appellant said that he was going to go and see Sarah and he had a few things to do. At that point the complainant was quite upset about that prospect and admitted the following conduct:

(a) she put her arm through the wheel of the appellant's pushbike to stop him from going;[20]

(b) she said to the appellant:

(i) "You shouldn't be going and seeing that slut";

(ii) "You should be staying home looking after me";

(iii) "I don't want you to have anything to do with that slut";[21]

(c) she went inside, got a knife, and tried to stab the tyres on the appellant's pushbike, which resulted in bursting the tyre;[22]

(d) she then said to the appellant: "If you go and see her, you're a dead mother-fucker".[23]

[15] On a different occasion the complainant again became upset at the prospect of the appellant and Sarah being friends. That was a time when the appellant was going to assist his mother to move into another house and the appellant became upset because she was worried the appellant was going to see Sarah. She agreed that she said:

(a) "All you want to do is leave me here and go and slut around down the beach";[24]

(b) in response to the appellant's suggestion that the complainant stay the weekend with her own sister, "You just want me out so you can move the slut in" (referring to Sarah);[25]

---

18 AB 307.
19 AB 50-51.
20 AB 49.
21 AB 50.
22 AB 50.
23 AB 50.
24 AB 52.
25 AB 52.

(c) the complainant became very angry, yelling, screaming and swearing and said to the appellant:

> "You know I could get you fucked up with the cops … You know I could tell the cops that you've touched me and you'd go to gaol and there'd be no sluts for you to go out with in gaol".[26]

[16] The third piece of conduct on the part of the complainant was referred to in the appellant's record of interview. It was that the complainant had confiscated "all my Picture books and put them up in the cupboard sort of thing 'cause she didn't want me looking at 'em. She reckons it's dirty but – yeah."[27] He then added:

> "I used to have them in the bathroom sort of thing and look at them, but [the complainant] sort of caught onto what I was doing sort of thing, 'cause they'd – she kept catch – like she come in, she must have arranged it on the [INDISTINCT] – she knew and if they had been moved and then she'd go off her head at me, saying that I'm looking at porno books and they're real girls and that's gross and - -"[28]

DNA evidence

[17] Numerous items of female underwear were found in the bedroom of the granny flat. That underwear belonged to the complainant, as well as the appellant's ex-girlfriend and his relative.[29] The clothing from the appellant's relative came from that person's mother, and had been given to the complainant by the appellant's father. The police seized, amongst other things, bed sheets and female underwear from the appellant's bedroom.[30]

[18] The clothing was subjected to DNA testing and compared to the DNA profile of both the appellant and the complainant. On three items[31] of underwear analysis detected that there was sperm, and the testing revealed a DNA match for the appellant. The analysis demonstrated that there was a very high degree of probability that it was not another person with similar DNA. The same items of underwear also exhibited biological material which matched the DNA profile of the complainant.[32] The appellant's sperm and the complainant's DNA (from skin cells) were found on the crotch of the three pieces of underwear.

[19] The bed sheet was analysed as well. It contained biological samples which DNA analysis revealed to be the appellant's semen and the complainant's epithelial (skin) cells.

[20] When the appellant was questioned as to how it could be that his sperm were found in the crotch of the underwear belonging to the complainant, he could offer no explanation. He said:

---

26 AB 53.
27 AB 397.
28 AB 398.
29 AB 350-351and 353.
30 AB 112.
31 See AB 199 in relation to Exhibit 9, AB 201 in relation to Exhibit 11, and AB 201 in relation to Exhibit 11.
32 AB 199-204.

> "Ah, that's just weird, why there'd even be semen on her clothes then. The only thing I can say is that I frigging – it might sound weird but I have masturbated in the bathroom but it's never been with any of her clothes or near her clothes or anything."[33]

[21] The appellant thereby ruled out the possibility that masturbation might have been the cause of his semen getting on to the complainant's underwear. That really left only one logical explanation, namely that sexual intercourse between the appellant and the complainant had taken place, and she had then put on the underwear.

Admissions by the appellant

[22] There was evidence before the jury of the appellant making personal admissions which could be construed as admissions of a sexual relationship. The first was in the complainant's initial pre-recorded interview. She said that the appellant:

> "sometimes … says, "I know I'm doing the wrong thing." He does admit that he knows it's wrong, and that he doesn't really wanna do it but he loves me that much."[34]

[23] The second came in the evidence given by the complainant's mother. She said that on one occasion, after the complainant had moved into the appellant's granny flat, she [the mother] asked the appellant, "Are you having sex with my daughter?", and the appellant "just nodded his head".[35] She then said that on a later occasion, a few days after, "it all came out",[36] she spoke to the appellant while he was leaning over the fence. She told him she was going to try and have him locked up and that she and her daughter, Jessica, were trying to think of ways to get him caught. The appellant said nothing about his relationship with the complaint, but did say "Well you won't find no DNA on her".[37]

[24] The third occasion occurred after the complainant had told her mother that the complainant and the appellant "were together".[38] The complainant's mother said that she, her daughter Jessica, and the complainant, all went to see the appellant at his granny flat. The complainant said to the appellant: "… we got to tell mum the truth, we can't keep lying to mum".[39] The appellant's response was to apologise for lying, saying "sorry Lisa, didn't – I was too scared to tell you – and he'd never hurt [the complainant], he'd look after her, that's what he said to me."[40] The appellant also told the complainant's mother that he loved the complainant.[41]

[25] In cross-examination the mother agreed that the appellant had never actually said that he had had sex with the complainant.[42] However, she affirmed that on the first occasion when the appellant nodded, "He nodded yes".[43]

---

33 AB 397.
34 AB 301.
35 AB 178.
36 AB 179.
37 AB 180 and 190 (in cross-examination).
38 AB 181.
39 AB 181.
40 AB 181.
41 AB 182.
42 AB 184.
43 AB 186 and 191.

The grounds of appeal

[26] At the hearing of the appeal the sole ground advanced concerned a passage in the learned primary judge's summing up to the jury, referring to the evidence of "what [the complainant] did".[44] The passage in the summing up, it was contended, involved an error of law and ought to have been corrected by the learned primary judge, and the failure to do so occasioned a miscarriage of justice, in that the appellant was deprived of the chance of an acquittal.

[27] The reference to "what she did" was to the conduct of the complainant referred to in paragraphs [14] to [16] above.

The summing up

[28] In the course of his summing up the learned primary judge came to a point where he summarised the rival contentions of the prosecutor and the defence counsel. The opening paragraph of that section of the summing up is as follows:

> "Now, that brings me to a summary of the rival contentions by both barristers, upon which it is my duty to remind you. Now, Mr Phillips addressed you first today, and he told you in the Crown's submission there were only three reasons to convict in this case. He said firstly there's [the complainant's] evidence. Secondly, there's the DNA evidence, and thirdly, there's what she did. He accepted on behalf of the Crown that in order to convict you must be satisfied that there is proof of more than one unlawful sexual act, and there was a maintaining of the sexual relationship. He pointed out to you though, the Crown doesn't need to prove every fact in the case, just the elements or the parts of the charge."[45]

[29] His Honour then commenced with the complainant's evidence, opening his comments by saying, "Turning to what she said …".[46] In the course of dealing with the prosecutor's submissions as to the complainant's evidence, he reminded the jury that the Crown "accepted it was important to examine her evidence carefully, and on her evidence alone, there might be a couple of weaknesses …".[47] What followed was an examination, as revealed by the Crown's submissions, of the weaknesses in the complainant's evidence, including threats to get the appellant in trouble, a statement to Sarah on the phone that the complainant had told lies to get the appellant in trouble, and an admission by the complainant about telling lies to the police. His Honour then finished that section of the summary by saying:

> "She accepted when she was cross-examined that she'd told lies to the police, but there was no evidence really about what she lied about and whether in fact she did lie to Sarah so the Crown submits that if it was [the complainant's] evidence alone, you might have some concerns."[48]

---

44 AB 254.
45 AB 254.
46 AB 254.
47 AB 254.
48 AB 255.

[30] I pause to observe that the jury were plainly being told by the primary judge, albeit in the course of summarising the competing contentions, that the Crown accepted that there were reasons whereby the jury might have some concerns about the complainant's evidence. Hence the comment that "if it was [the complainant's] evidence alone, you might have some concerns". In my view it is clear that the contention being summarised, as well as his Honour's comments, were directed at the credibility of the complainant.

[31] His Honour then went on to the next section of his summing up, saying: "But there are two other important pieces of evidence which erase reasonable doubt in this case. Firstly, there's the DNA evidence."[49]

[32] His Honour then went on to summarise the Crown's submission in relation to the DNA analysis, and the fact that three pairs of underwear were found to contain not only the appellant's sperm, but DNA from the complainant's skin. The summary included what the Crown contended as to the rational conclusions that followed from the DNA evidence, concluding with the reference to the appellant's sperm being discovered on the bed sheet, as well as the complainant's skin cells.

[33] I pause again to observe that in my view the opening words of that section of the summing up made it plain that this was being advanced as a section of evidence which would erase doubt as to the credibility of the complainant's evidence. The linking of the two sentences make that clear. Having immediately said that "if it was [the complainant's] evidence alone, you might have some concerns", then followed: "But there are two other important pieces of evidence which erase reasonable doubt in this case."

[34] Having dealt with the DNA, the primary judge then turned to the conduct of the complainant, and what the prosecutor said as to that. It appears in the following passage:

> "The third point the prosecutor relied upon was what she did. It was submitted to you that well, she confiscated the dirty magazines, she complained about him wanting to slut around down the beach with Sarah. She was angry at Sarah. She stabbed the tyre of the bike in anger. She'd threatened to go to the police when a new girl came on the scene. It was submitted to you that this is all consistent with a lover in a sexual relationship who was jilted. It's not the sort of conduct you'd expect from a 13 year old girl who was lying. He submitted to you this aspect of the case stands out, and there's no satisfactory answer to it. And you would put this into the mix – sorry – and in addition to that, you would put into the mix the confessional evidence to the mother, with whom you'd be impressed as to her evidence she was doing her best, and the admissions were made by [the appellant]."[50]

[35] When the learned primary judge turned to summarising the defence submissions, the conduct of the complainant was mentioned again. The defence contentions about that, as relayed to the jury by his Honour, included:

---

49 AB 255.

50 AB 255-256. The reference to the confessional evidence and admissions was to the matters set out in paragraphs [21] to [24] above.

(a) it was not unusual for young girls to become infatuated without having a sexual relationship, and the complainant's anger was because Sarah turned up and "what happened to her world"?, "It had finished";[51]

(b) there were many reasons to conclude that the complainant's evidence was a matter of exaggeration or given under duress, or simply lies; all of those matters would mean the jury had grave doubts about relying on her evidence;[52]

(c) the DNA evidence was equivocal; the appellant may well have been embarrassed to admit that he had masturbated on the underwear or used them to wipe up after masturbating, and the complainant's DNA on the bed sheet was explained by her simply sitting on the bed;[53]

(d) the defence argued that the reason for the complaint against the appellant:

> "was the fight over Sarah. She stabbed the bike. She was upset about him going out of her life. Bear in mind, the Defence argued that he called the police. So why would he do that if he'd had sex with her?"[54]

Appellant's submissions

[36] The appellant focussed on that part of the summing up where his Honour commenced to summarise the rival contentions. They pointed to the recitation of the prosecutor's submission namely, "there were only three reasons to convict in this case",[55] those three reasons as being:

(i) the complainant's evidence;

(ii) the DNA evidence; and

(iii) the complainant's conduct, specifically "what she did".[56]

[37] The contention was that the "what she did" category was raised as one of "two other important pieces of evidence which erase reasonable doubt in this case".[57] In that context "what she did" was identified as:

(a) "she confiscated the dirty magazines";

(b) "she complained about him wanting to slut around down the beach with Sarah";

(c) "She was angry at Sarah";

(d) "She stabbed the tyre of the bike in anger";

(e) "She'd threatened to go to the police when a new girl came on the scene".[58]

---

51 AB 256.
52 AB 256.
53 AB 257.
54 AB 257.
55 AB 254.
56 AB 254.
57 AB 255.
58 AB 255.

[38] As for the conduct identified above, the appellant's contention was that the primary judge elevated its status by giving the emphatic assertion that "this aspect of the case stands out, and there's no satisfactory answer to it".[59]

[39] The appellant contended that the conduct of the complainant as outlined above in paragraphs [14] to [16] could not be used in proof of acts performed by the appellant. Its probative value was limited to the question of the complainant's credibility. That conduct was not something which could be considered separately and apart from the complainant's evidence of what happened. The evidence should never have been identified as an aspect of proof that "stood out", and it ought not to have been implied that the appellant might be required to provide a "satisfactory answer to it".[60]

[40] The appellant contended that of the three points identified by the learned primary judge, only one related to the complainant's credibility. The other two were the DNA evidence and the evidence of the complainant's conduct or "what she did". The evidence of the complainant's conduct was not conduct by the appellant nor an admission by him. At the minimum there should have been a warning as to the use to which the jury could put the evidence of the conduct. Even if the evidence could be seen as evidence of distress on the complainant's part, said to corroborate the complainant's evidence, it could only be circumstantial evidence and in the circumstances a warning as to its use should have been given.

Respondent's submissions

[41] The respondent contended that the principal evidence in the case was that of the complainant herself, who said that she and the appellant had been in a sexual relationship. That was strongly supported by the DNA evidence, and also an admission by the appellant made to the complainant's mother. The evidence of the complainant's conduct was elicited by the defence counsel, evidently for the purpose of using it to attack the complainant's credibility, and to suggest that they were the actions of a jealous girl who wanted a relationship that did not exist. The evidence of the conduct was evidence which could be used by the jury on the question of whether the complainant's version was supported by other evidence. Because the conduct preceded the complaint, there was no need for a warning.

[42] Insofar as the learned primary judge referred to the evidence of conduct, that was in the course of summarising the competing contentions, which the judge was required to do, and he was required to go no further.

[43] Even if there was an error this was a case for the application of the proviso in s 668E(1A) of the *Criminal Code*. The evidence from the complainant about the sexual relationship was supported by the evidence of the admission made to her mother, and separately by the DNA evidence. The DNA evidence in particular was compelling, in that three separate pieces of underwear were shown to combine both the appellant's sperm and the complainant's DNA. That suggested three separate occasions of sexual intercourse, and there was no reasonable explanation for the presence of that DNA, apart from sexual intercourse having taken place. Thus, even if it was an error on the part of the primary judge to fail to give a warning, it was a case where the proviso would apply, there being no substantial miscarriage of justice.

---

59 AB 255; Appellant's Submissions, dated 7 March 2014, para 22.

60 Appellant's Submissions, dated 7 March 2014, paras 26-28.

Discussion

[44] The appellant's contention turns on characterising the primary judge's reference to the complainant's conduct as being a statement that it could be used as proof of acts performed by the appellant.

[45] I do not accept that submission. The learned primary judge made clear to the jury from the outset of his summing up that:

> "The lawyers' final addresses were not evidence. They were arguments which you may properly take into account when evaluating the evidence but the extent to which you do so is entirely a matter for you."[61]

[46] His Honour then took the jury through the elements of the charge.[62] Having done that he went on:

> "Now, in summary, the Crown case here is that [it] has proved the charge. What the Crown says it submits to you that you would accept the evidence of the complainant, … as credible and reliable. It submits there was a maintaining of an unlawful sexual relationship and it has proved more than one unlawful sexual offence or act. It submits that you'd be satisfied that at least two acts of unlawful carnal knowledge occurred here, then relies on the preliminary complaint evidence – and I'll come to that shortly – the DNA evidence and the admissions made by the defendant. That's the Crown case, in summary.
>
> The defence case, on the other hand, is that you would have reasonable doubt on the credibility and the reliability of … the complainant, and for that reason you'd find the defendant not guilty."[63]

[47] Shortly thereafter his Honour addressed the jury as to how they might use the complainant's evidence, in these terms:

> "If you don't accept the complainant's evidence relating to one or more of the alleged acts, take that into account when considering her evidence relating to this charge. If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to any one of the alleged acts, whether by reference to her demeanour or for any other reason, you should take that into account in assessing her truthfulness or [the] reliability of her evidence generally."[64]

[48] His Honour then dealt with the evidence of preliminary complaint, then the alleged admissions by the appellant. He then dealt with aspects of the appellant's recorded interview, dealing with various explanations or answers given in the course of that interview. That section of the summing up concluded with the reminder to the jury that the fact that the appellant had not given or called evidence, that was not to be used against the appellant.[65]

---

61 AB 246.
62 AB 249-250.
63 AB 250-251.
64 AB 251.
65 AB 254.

[49] The section which then followed was the summary of rival contentions, as is set out above in paragraphs [28], [29], [31], [32], [34] and [35]. In my view it was plain that what his Honour was doing was dealing with the submissions relating to the reliability and credibility of the complainant. It was the oral evidence of the complainant that was being referred to first, as demonstrated by his Honour's words: "Turning to what she said …".[66] What followed was a summary of the prosecutor's submissions about why the complainant would be accepted. However, that included reference to the weaknesses of her evidence and the admission that she told some lies to the police. It was in that context that the first of the three aspects of the Crown submission ended with his Honour saying: "… so the Crown submits that if it was [the complainant's] evidence alone, you might have some concerns".[67] To my mind there is little doubt that the jury would have understood that as being a reference to the oral evidence (whether in the pre-recorded interview or the pre-recorded evidence).

[50] His Honour then continued in the next paragraph saying: "But there are two other important pieces of evidence which erase reasonable doubt in this case. Firstly, there's the DNA evidence."[68] He then summarised the Crown's case on the DNA evidence principally in terms of whether it supported the truthfulness of the complainant's account, or whether there was some other rational conclusion that might be drawn from it. Once again this part of the summing up was plainly directed at dealing with an aspect of the evidence which would support a conclusion that the complainant's version of events was credible and reliable.

[51] His Honour then dealt with the third point: "The third point the prosecutor relied upon was what she did."[69] Then followed the passage set out at paragraph [34] above. In my view this was also directed at identifying evidence of conduct, not to prove an element of the charge, but to examine whether it supported a conclusion that the complainant's version of events was credible and reliable. The sentence which explains the way in which the submission was advanced, and the way in which it was likely that the jury understood it, is: "It's not the sort of conduct you'd expect from a 13 year old girl who was lying."[70]

[52] I do not interpret the next sentence, "He submitted to you this aspect of the case stands out, and there's no satisfactory answer to it", as indicating to the jury that it was an aspect of proof of an element in the charge, or that the appellant had to provide some satisfactory answer to it.[71] In my view all that was being submitted, and all the jury would have understood was being submitted, was that the conduct was very demonstrative, and therefore stood out. When one considers the conduct, that is not a surprising submission, nor is it surprising that it would be understood that way. The conduct included confiscating pornographic magazines, complaining about the appellant wanting to "slut around down the beach" with the other female, putting her arm through the bicycle wheel and stabbing the tyre of the bike. In context, the statement that "there's no satisfactory answer to it" is easily understood as meaning that the alternatives put forward by the defence to explain away that conduct were not, on the Crown's case, satisfactory to explain it away. The defence put forward that the complainant was simply an infatuated young girl

---

66 AB 254.
67 AB 255.
68 AB 255.
69 AB 255.
70 AB 255.
71 Appellant's Submissions, filed 7 March 2014, para 28.

who was not in a sexual relationship, but resented the fact that the appellant was paying attention to Sarah.[72] That was used as a basis for arguing that the whole complaint which led to the charge was really caused by "the fight over Sarah. She stabbed the bike. She was upset about him going out of her life. … he called the police. So why would he do that if he'd had sex with her?"[73]

[53] It must be noted that the evidence the subject of this contention was adduced in cross-examination by defence counsel. Clearly it was intended to use it to attack the complainant's credibility and reliability. Once that evidence was before the jury the Crown was entitled to submit that it, instead, enhanced the complainant's credibility.

[54] Properly understood, the passage to which the appellant objects was directed to exploring a Crown submission as to why the jury might accept the complainant's evidence as being credible and reliable. In my opinion it is plain that the jury would have understood it that way, and knowing that it was merely a Crown submission, would have treated it as the learned primary judge told them they could, namely that the final address was not evidence, but were arguments that may be taken into account when evaluating the evidence.

The proviso in s 668E(1A)

[55] Even if I had taken the view that the passage in the summing up could be characterised in the way the appellant contends, in my view this is a clear case where the proviso would operate. Section 668E(1A) provides that the Court may, notwithstanding that it is of the opinion that the point raised by the appeal might be decided in favour of the appellant, "dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

[56] The evidence of the complainant's conduct was but one aspect of the evidence that the jury had available to them. The other evidence was the oral evidence of the complainant herself, the evidence of an admission made to the complainant's mother by the appellant, and most importantly, the DNA evidence.

[57] In my opinion the DNA evidence provides a compelling basis for the conclusion of guilt. Put simply, three separate pieces of the complainant's underwear were tested and revealed that the appellant's sperm as well as the complainant's DNA, was present on the crotch of each piece of underwear. The appellant himself eliminated any possibility other than sexual intercourse to explain how that combination of DNA was possible. He proffered the suggestion of having masturbated, but said it was not near or in relation to the underwear. Though the defence raised, in summing up, the prospect that nonetheless the appellant might have masturbated to ejaculation, and then used the underwear to wipe himself, there was no evidentiary basis for that.

[58] Further, the fact that the combination of the appellant's sperm and the complainant's DNA were found on three separate underwear, was evidence which the jury could readily accept as indicating that there were separate acts of intercourse.

[59] In my view the DNA evidence was compelling in terms of what it revealed, and entirely supportive of the complainant's version of events. In those circumstances I do not consider that a miscarriage of justice has occurred.[74]

---

72 AB 256.

73 AB 257.

74 See: *Weiss v The Queen* (2005) 224 CLR 300, at [44]; *Darkan v The Queen* (2006) 227 CLR 373, at 379; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, at [27]-[29].

Disposition

[60] For the reasons given above I would dismiss the appeal.

[61] **APPLEGARTH J:** I agree with the reasons of Morrison JA and with the order proposed by his Honour.

[62] The evidence of "what the complainant did" was introduced by defence counsel to cast doubt on the credibility of the complainant. It was relied upon by defence counsel to suggest to the jury that she would make a false complaint because she was upset over Sarah and the idea of the appellant going out of her life.

[63] Anticipating this attack on the complainant's credibility, the prosecutor in his address to the jury identified reasons why the jury would not doubt her credibility. One was that the conduct was consistent with a jilted lover in a sexual relationship. That argument may not have been compelling but it was part of counsel's contentions as to why the complainant was a credible witness. The trial judge was obliged to summarise the rival contentions about the complainant's credibility.

[64] The jury would have understood the trial judge was summarising a prosecution contention about why the evidence about the complainant's conduct did not undermine her credibility. So understood, there was nothing improper in the jury being told to take the contentions of counsel into account when evaluating the evidence.

[65] There was no objection by defence counsel to the way in which the parties' contentions were summarised or a request for a redirection to clarify that the contention in issue went only to the complainant's credibility. Perhaps no redirection was sought because the contention and defence counsel's competing contention were understood as going to the credibility of the complainant.

[66] There were no improper remarks by the prosecutor which the trial judge was obliged to correct and no miscarriage of justice.

[67] In any case, for the reasons given by Morrison JA the proviso would apply.