SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCF* [2014] QCA 95
PARTIES:	**R** **v** **SCF** (appellant/applicant)
FILE NO/S:	CA No 241 of 2013 CA No 315 of 2013 DC No 156 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	Orders delivered ex tempore on 31 March 2014 Reasons delivered 2 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2014
JUDGES:	Margaret McMurdo P and A Lyons and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 31 March 2014:** **1. The appeal against conviction is allowed.** **2. The verdict of guilty is set aside.** **3. A verdict of not guilty is substituted.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was found guilty after trial of two counts of rape and two counts of indecent treatment of a child under 16 – where the appellant was in a relationship with the mother of the complainant – where the complainant gave varying accounts as to where the incident occurred and the precise sequence of the allege offences – where the complainant's Facebook entries seriously undermined her credibility – whether it was open for the jury to conclude beyond reasonable doubt that the appellant was guilty of the offences – whether the verdict was unreasonable *Criminal Code* 1899 (Qld), s 668E *R v PAH* [2008] QCA 265, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL:	S R Lewis for the appellant/applicant B G Campbell for the respondent
SOLICITORS:	Fisher Dore for the appellant/applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Ann Lyons J's reasons for allowing the appeal, quashing the conviction and directing that a judgment and verdict of acquittal be entered.

ANN LYONS J: Grounds of appeal

[2] The appellant was convicted on 5 September 2013 after a three day trial in the Beenleigh District Court of two counts of rape and two counts of indecent treatment of a child under 16. On 13 November 2013 he was sentenced to three years imprisonment on the rape counts and 15 months imprisonment on the indecent treatment counts. All sentences were to be served concurrently and pre-sentence custody of 358 days was declared as time served.

[3] The appellant appeals against his conviction pursuant to s 668E of the *Criminal Code Act* 1899 (Qld) on the ground that the verdict was unsafe and unsatisfactory and against the weight of the evidence before the jury. Whilst an application for leave to appeal against sentence was filed that ground was not argued on the appeal.

[4] On 31 March 2014 the Court was satisfied that the jury could not be satisfied of the guilt of the appellant beyond reasonable doubt due to serious concerns the Court had in relation to the credibility and reliability of the complainant's evidence. Accordingly, on that date the Court made orders allowing the appeal, quashing the conviction and directed that a judgment and verdict of acquittal be entered. The Court indicated that reasons would be published at a later date. These are those reasons.

The counts on the indictment

[5] Counts 1 and 2 both charged rape and involved allegations that the appellant had licked the complainant's vagina and placed two fingers inside her vagina. Counts 3 and 4 both charged indecent treatment of a child under 16 and alleged that the appellant had touched the complainant's breast and squeezed her vagina.

[6] The question before this Court is whether it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the appellant which necessarily involves this Court examining the evidence that was before the jury at the trial. In order to fully understand that evidence it is necessary to briefly outline the relationship between the complainant and the appellant and the circumstances surrounding that relationship.

The relationships

[7] The complainant was 13 years old at the time of the alleged offences. The allegations were that all of the acts had occurred on one night at a time when the complainant's mother, SES, was away in Western Australia for about eight days caring for her mother after surgery. There were admissions by the parties pursuant to s 644 of the *Criminal Code* that SES had flown to Western Australia to visit her mother on 14 September 2011 and had returned on 22 September 2011.

[8] SES, who was then about 42 years of age, had commenced a sexual relationship with both the appellant and his girlfriend, FC, two or three weeks before leaving for Western Australia. The appellant was 33 at the time and FC was 20. The complainant later agreed with the description of the relationship as a "three-way love relationship".[1]

The evidence before the jury

[9] SES gave evidence at the trial and indicated that she met the appellant around August 2011 when she was managing a business in Jimboomba where both FC and the complainant also worked at times.[2] FC's evidence was that she was then living in a rented unit with the complainant, her son JS, and his girlfriend GS.[3] She stated that about six to eight weeks after meeting the appellant she moved into the unit he occupied in Jimboomba with FC and their 12 month old baby FJ.[4] Her evidence was that she did not 'move in' with them until after her return from Western Australia but that she had stayed overnight with the couple prior to going away.[5] She stated that the complainant would also have stayed overnight with her in at the appellant's unit as the complainant "was always with me".[6]

[10] SES stated that she had made arrangements for the complainant to reside at JS and GS's unit while she was in Western Australia so that she could walk to school. However, she had told her daughter that she could stay with FC on the weekend given that she got along well with FC but had some ongoing conflict with GS. SES stated that within a day or so of leaving, her daughter asked her if she could spend more time with FC and the appellant and that after checking with them she gave the complainant permission to do so.[7]

[11] She stated that it was not until two or three weeks after her return from Western Australia that she and the complainant moved into the unit with the couple.[8] SES confirmed that the relationship with both FC and the appellant had become sexual prior to her trip to Western Australia and that during their sexual relationship they used condoms and sex toys.[9] She did not remember precisely where they were kept but presumed it was in the bedroom they used. She stated that they all wore "ribbons" or "collars" around their necks as a way of showing affection between the three of them. She wore a ribbon while the appellant wore a collar. FC initially wore a collar, but later wore a ribbon.[10] She was clear that she had not worn such a ribbon until she returned from Western Australia stating, "It was certainly after, yes, yes."[11]

[12] SES gave evidence that that she had placed her daughter into the care of the Department of Communities, Child Safety and Disability Services in November 2011 two months after her return from Western Australia. She stated that she did

---

1 ARB 25 at ll 34 – 35.
2 ARB 89.
3 ARB 85.
4 ARB 86.
5 ARB 90.
6 ARB 90 at l 1.
7 ARB 86.
8 Ibid.
9 ARB 87.
10 ARB 90.
11 ARB 90 at ll 10 – 11.

not have any further contact with her for six months until May 2012.[12] She stated that whilst the complainant was subsequently placed into JS' care, she is under the guardianship of the Department of Child Safety until she is 18 years old.

[13] The complainant made her first complaint about the appellant's conduct in April 2012, some seven months after the incident is said to have occurred.

The circumstances of the first complaint

[14] On 20 April 2012 the complainant was taken to a doctor by her foster carer when she complained of vaginal discomfort. The doctor asked her if anyone ever touched her "down there" and she responded in the affirmative and named the appellant describing him as her "mother's boyfriend". The foster carer who was present in the room at the time but separated by a curtain overheard the conversation and informed police.

[15] The evidence of the foster carer at trial was that after the visit to the doctor:[13]

> "J had come to me later that afternoon and just started speaking to me about - just little things, when - because I have other children, she would just sort of sneak in and say, can I talk to you for a minute then she'd just tell me a little bit more, and if one of my other children came in, she'd stop and sort of go away, then come back again. … But she'd told me that her - that her mum's boyfriend wasn't supposed to be at the house, but her mother had gone away to Western Australia to help her mother - her - her - which would be her grandmother. … J and her little brother was staying with her mum's other girlfriend in their unit."

[16] She stated that the complainant had told her that: [14]

> "he had started fondling her and putting his hands down her pants and he had licked her - the girlfriend had come upstairs for something, I'm not sure what. He then took her downstairs. She'd asked not to. But she said that she was too scared to disagree with him and not do it."

The s 93A Statement

[17] The complainant was interviewed by police on 18 May 2012 in Townsville, a month after the initial complaint to the doctor. Her videotaped statement to police was tendered at the trial pursuant to s 93A of the *Evidence Act* 1977 (Qld). In that statement the complainant indicated that her mother was in a relationship with both the appellant and his girlfriend FC. She stated that when her mother went to Western Australia she was to stay with FC but her mother had told the appellant to stay with her brother.[15] The complainant indicated that whilst the appellant stayed with her brother for the first night he then came and stayed with FC and her for the rest of the time and slept on the couch.

[18] She then referred to one night "that they smoke weed"[16] and stated that FC went downstairs and started chopping up some weed. She continued:[17]

---

12 ARB 87 – 88.
13 ARB 61 – 62 at ll 47 – 11.
14 ARB 62 at ll 15 – 17.
15 ARB 154.
16 ARB 137.
17 Ibid.

> "well we were upstairs and then he went to the bathroom and I was sitting on the bed and then he came out and then he said um he said that what was going to happen wouldn't hurt and that it was that really it was ok for people to do it because that's for do stuff like that because what people do when their older and everything and then so I said to him what are you going to do and then he said ah we're going to have fun and then I said no."

[19] The complainant's evidence was that at that point the appellant said "its going to be ok every things going to be fine your allowed to I give you permission".[18] She states that at that point she asked to go back downstairs and he said "no'. She continued:[19]

> "he said to lie down on the bed and I did, cause I *was afraid because a few days before that mum said that like they had, mum had a big argument before she left with him* and he got scissors and cut [off] her collar. [T]hey had dog collars that they wear and um he cut it off and then he was getting quite angry and that and I saw it and then um it was like really scary and I didn't want him to yell at me like that an um so I said no and then he said lie on the bed and then I said nothing like I just like lied down and he pulled my shorts off and he said what do you want to do first and I said I don't understand um what's happening I don't want to do it like didn't I said to him I don't understand what's happening I don't want to do it like (indistinct). I said to him I don't understand what's happening I don't get what you're doing (indistinct). I don't think it's right and he said it's right, it's perfectly ok and then he said I'm [going to] start by going and getting his tongue piercing, he's got his tongue pierced and ah he went and got ah his tongue thing with the spikes on the end and he said it's [going] to feel great don't worry and then he went an got his tongue thing and he went into the bathroom an I didn't pull my shorts back up because I was afraid he'd shout at me and ah tell me off and he's really scary when he gets angry because his eyes literally do go red, his face goes red, he starts getting really super just grouchy really angry really quick. Um he came back into the room and he shut the door and then [FC] knocked on the door and said you guys have to go downstairs cause it's going to take me a while to get these pots and that ready and um well we moved downstairs like I didn't want to go, I told [FC] and she's just like mmm and um. I said I didn't want to go downstairs and he just grabbed my hand and pulled me down the staircase and um there's a bed down there and then there's the baby in the cot and um we're like I was lying on the bed and he lied down the end of the bed and said are you ready, I said no, he said oh well and then he said I don't remember what he said after that so I can't really say that but I don't remember that bit all I … he pushed my legs like out and then um he did these things with his tongue and then um he said that wasn't so bad it feels good, I said no I want to stop I don't want to do this, um stop it or I'll run away and um he's like no there's more things and um he you … like he like got his fingers and then he did things with

---

18 Ibid.

19 ARB 137 – 138.

> them as well and then um he told me to take my shirt [off] and then, take my bra off and then he took his tongue piercing out an held on to it and then he played with my boobs and then ah he pulled out a condom. It had um s written on it or something and I said no don't, I'll tell and you'll get in really big trouble and he said um don't tell and I said well I will tell if you go any further and then he's like ok and he put it, his tongue piercing back in, he put the condom away and got up and walked away and later on that night before I went to bed he said please don't tell mum um she's found someone happy don't tell her what happened otherwise you're going to make her depressed an sad for the rest of her life and then um I said I wouldn't tell her but what we did was wrong and he said ah no it's not - he was allowed to do it."

[20] The complaint's evidence was that she then went and "sat in the shower".[20]

[21] In her s 93A statement, the complainant also outlined the usual sleeping arrangements that were in place at the appellant's unit. She indicated that there was a king size bed downstairs and a king size bed upstairs.[21] She stated that the three adults all slept in the same bed upstairs. She told police that she came to know FC through her mother when the three of them worked shifts together at "Chicken Time" making chicken nuggets.[22]

[22] The complainant described the appellant as "really tall and like really scary."[23] She indicated that her mother, FC and the appellant all wore "dog collars."[24] She stated that FC's collar was black with pink. Her mother's was a black ribbon and the appellant's was just a black dog collar.[25] She stated "the dog collars were because they couldn't get married because it cost too much money. That was their symbol".[26]

[23] Later in that videotaped s 93A interview the complainant gave greater detail about the sexual incidents. She stated:[27]

> "he used the same thing with his tongue like his tongue was in my vagina and then he used his fingers in my vagina and um basically I don't know he put his finger in my vagina and then did some I don't know what (indistinct) it's hard to explain he moves it and then he moved it back out and then yeh just did the same thing over and over again."

[24] She explained that he also started feeling her breasts and feeling her vagina. She stated that it occurred on the bed that she normally slept in each night and that he also had "a blue bucket um he asked me if I wanted to use them um it was a blue bucket filled with dildos and vibrators and um tongue piercings and condoms and just everything."[28] She stated it was before 10 o'clock because she remembered

---

20 ARB 138.
21 ARB 142.
22 ARB 143.
23 ARB 145.
24 ARB 144 – 145.
25 ARB 145.
26 ARB 147.
27 ARB 156.
28 ARB 157.

looking as she ran upstairs. She stated it was nine something.[29] She stated that he had removed her underwear and her shorts and that whilst he had taken his shirt off, he had kept his jocks on.[30]

[25] The complainant confirmed that she did not say anything to her mother on her return from Western Australia because the appellant had said it would only make her sad and depressed.[31] She indicated that the first person she told about the incident was a doctor that her carer took her to see.[32]

[26] In both her statement to the carer and her statement of the police the complainant stated that the incident started upstairs and moved downstairs. The complainant's evidence to the carer was that the sequence of touching was that there was fondling, then the appellant put his hands in her pants and then the appellant licked her vagina. The sequence of events as detailed to police in the s 93A statement outlined a different sequence in that the appellant first licked her vagina, then inserted his fingers into her vagina before fondling her breasts and vagina. She also told police that FC knew about the incident.

[27] Pivotal to her account to both her carer and the police was her statement that she was afraid during the incident and in her s 93A statement she outlined in great detail an altercation that she had witnessed which made her afraid. She described a fight between the appellant and her mother when the appellant had been so angry that he cut off her mother's dog collar, breaking up the relationship.

The s 21 AK Recording

[28] On 15 August 2013 the complainant gave further evidence and was then cross-examined by defence counsel before Dearden DCJ in a pre-recording pursuant to s 21AK of the *Evidence Act*. That pre-recorded evidence and cross-examination was also before the jury.

[29] During that s 21AK pre-recording the complainant told the prosecutor a sequence of events which was different to that which she had outlined to either her carer or the police. She stated that the first thing that happened was that the appellant squeezed her vagina and breasts and licked her breasts.[33] She stated that it was after that occurred that he had then proceeded to pull her pants down and use his tongue on her vagina. She confirmed that the tongue went inside her vagina. Before he did that he got a tongue piercing. He had put in the tongue piercing "Before everything started happening."[34] She indicated that she was lying down at the time on the king size mattress on the floor which was positioned next to the cot.[35] Significantly, there was no mention of events commencing upstairs and then continuing downstairs. In her earlier statements she had stated that her pants had also been removed upstairs. She stated that the appellant was sitting on top of her legs and that he had unbuttoned her pants and pulled them down.[36] Her evidence was that after he used his tongue in her vagina he then used his fingers. She indicated he

---

29 ARB 157.
30 ARB 158.
31 ARB 158.
32 ARB 159.
33 ARB 20.
34 ARB 21 at ll 1 – 2.
35 ARB 19.
36 ARB 21.

used two fingers and put them inside her vagina and that he kept moving them in and out. She stated that through the whole process she was telling him to stop.[37]

[30] During this questioning the complainant indicated that throughout the incident the appellant was wearing a shirt with a pair of jocks whereas previously she had indicated he took his shirt off. She stated that after he finished doing what he was doing with his fingers he said "the next bit wasn't going to hurt and I told him to stop. That if he went any further, I would tell, because he - there was a *blue bucket there*, and he pulled out a condom."[38] It would also seem that that blue bucket was usually in the upstairs bedroom and not the room where the baby and the complainant slept.

[31] Under cross-examination the complainant indicated that she had met the appellant two or three weeks prior to her mother going to Western Australia and that at the time she was living with her mother, brother JS and his girlfriend GS. She agreed with the defence counsel that the relationship her mother had with the appellant and FC was a "three-way love relationship".[39] The complainant confirmed during cross-examination that she did not tell her brother or his girlfriend that she had been molested and that she, in fact, told them she was having a great time staying with them.[40]

[32] When questioned about the dog collars the complainant was adamant that her mother was wearing one before she went to Western Australia and refused to accept the proposition that her mother had started wearing such an item only after her return from Western Australia. The complainant had reiterated that she was scared of the appellant as she had seen him angrily remove her mother's dog collar. The exchange with defence counsel was as follows:[41]

> "And you knew that was a huge fight and he was very angry, because he cut the dog collar off your mother?---Yes.
>
> All right. Breaking up the relationship?---Yes.
>
> All right. And that would have happened, you're saying, before your mother went to Western Australia?---Yes.
>
> All right. Well, I'm saying that's incorrect. There was never any fight between SCF and your mother, where SCF ever got angry at that time?---Yes. There was a fight.
>
> And there was certainly no dog collar on your mother that got cut off?---Yes. There was. It was a black ribbon that she tied – she still wears one today.
>
> That's all right. She still wears one today, does she?---Yes."

[33] On the basis of that evidence it would seem unlikely that the complainant had witnessed such an incident in the first couple of weeks of her mother's relationship with the appellant given that her mother's relationship with the appellant was only in the early stages before she went to Western Australia and had accelerated after her return. Her mother also gave evidence that she was certain that she had not worn such a ribbon until her return from Western Australia. Any fear she had of the appellant is not likely to be based on that incident.

---

37 Ibid.
38 ARB 22 at ll 31 – 33.
39 ARB 24.
40 ARB 29.
41 ARB 27 at ll 4 – 19.

Cross-examination about the Facebook entries

[34] Counsel for the appellant during the pre-recorded cross-examination also took the complainant to a number of her Facebook entries. Those entries had been extracted and given to her in a bundle during the pre-recorded cross-examination. Whilst the complainant acknowledged the entries as being from her Facebook page, that bundle of entries was not tendered and was not in evidence at the trial except to the extent that the complainant had been referred to them in cross examination.

[35] The cross-examination in relation to the Facebook entries is significant and I will outline it in full as follows:[42]

> "All right. Well, I have some documents – Facebook records here and I just want to read out some things to you. Have you got a bundle of documents up there? ---Yes.
>
> All right. Have you got a bundle that has Facebook entries of yours in it? --- I'm not sure what you're talking about.
>
> Well. You know what Facebook is? --- Yes.
>
> Well just look at those documents and they should have been pulled out. I asked them to be pulled out? --- Yes.
>
> And it should have Facebook entries of yourself? --- Yes.
>
> Have you got those? --- Yes.
>
> All right. And just so I can get – so we're on the right path here, I've got a Facebook pager page with WV saying "stalker" at 1952. That's seven – ten to eight; have you got that? --- Is this on page 2?
>
> Page 2, yes? --- Yes.
>
> And you're reply was "SCF, remember mum's ex boyfriend. He raped me. I remember the night after I tried to call you but you lost your phone"; is that right? --- Yes.
>
> Okay. So that's your answer, isn't it, to the question; that's you on the Facebook? --- Yep.
>
> Okay. An then we proceed down, WV then says, "What is he doing after you? [indistinct] How do you know he's stalking you?" And then, your reply was. "He sends messages if different accounts like babe, come home. You left me. We were only having fun. Right sweetie? Kiss – kiss, circle, kiss, circle, kiss, circle, M-pie"; is that your answer – Yep.
>
> That's your answer? Well have you ever given any of those messages to the police? ---No.
>
> Do they exist? --- Yes. They're on FC's account but they're all deleted.
>
> Well, they're on – but they were sent to you? --- Yeah. Sent from FC's account to me.
>
> And what did you do with them? --- Deleted them.

---

42 ARB 32 – 35.

I'm suggesting they never existed and SCF never sent you any messages like that? --- Well, he did.

He did, did he? All right. Well we'll just go on. And WV replied to that, "Okay. What the fuck. That's disgusting." And this is [now] the next page, page 3, your follow on; can you see that? --- Yeah.

And you replied. "I know", that's at 1959; is that right? --- Yep.

And then you said, "It was happening for years B – ha, I remember calling you B – but all through grade 8 when you teased me every night I would get beaten up and raped. I told you he hit me with a brick but you called me an attention-seeking bitch to S and now [indistinct] still going and police are still looking for him."? --- Yep.

Is that about SCF? --- It was about SCF, but I didn't know that rape and molest were two different things ---

All right? --- --- so I used rape instead of molest.

All right. But you say every night you'll get beaten up. You didn't tell police that? – No.

Why didn't you tell police that? --- Because that was my mum.

Well, it doesn't – it says every night I would get beaten up and raped. So how many times were you beaten up and raped? --- I wasn't beaten up. I was talking about rape and molest. I didn't know at the time that they were two different ---

Well, why do you saw beaten up there? Were you just lying to make yourself more important? --- No. Because – no, because the night he held scissors to my mum's neck, where the collar was when he went to tie her up, afterwards I thought that he'd slapped her and beaten her up because she was crying and she was shaking and I could hear them upstairs.

All right. Well, I'm saying that didn't happen, but I suggest that – but you don't say that there. You talk about yourself being beaten up. You don't say anything about your mother being beaten up as you say now? --- Yep.

Got no more answers for that? --- No.

All right. If you turn over and let's go to – now, I don't – if you turn over a bit two or three pages, there should be an entry from – at the top of the page, from FJT and it says the 21st of March? --- What page is this?

Page 6? --- Yep.

And on that it says – and FJT says, "But my past, he asked me. I was physically abused and hit and hurt me, plus raped me, because I used to be skinny and tall but then he got me preggo and so, yeah, I never lost that weight. Sorry if you think I'm a slut, but don't worry, I didn't enjoy it. It hurt, and I hated that bastard. Is that in relation to SCF too? --- Yes.

Well, did he get you pregnant, did he? --- No. That wasn't from me.

> Pardon me? What ---? --- That was – well, me and WV were talking about she wrote a message like that, but this wasn't involving SCF. This is involving her dad.
>
> All right. But it's you that says "But then he got me pregnant". Where does it say WV got pregnant by someone? --- This was from what WV sent me, but she deleted it and I copied it before she deleted it and pasted it.
>
> Oh, and then you sent it to a TB? --- Yes.
>
> And so is that just to – why did you send it to TB. Is that to show that it was from you, but you don't say anything about, "Look what I've copied from WV's Facebook"? --- No. Because before that we were talking about if he knew anybody in Brisbane.
>
> Well, why don't you say in that – why don't you say in that Facebook anything to TB that it's not about you, it's about someone else? --- Pardon.
>
> Why don't you explain that it's copied from WV. Reading it ---? --- It was explained before that. It was explained but they were deleted.
>
> Well, who deleted them? --- Me.
>
> All right. So you – you've kept a lot of messages, but then you say you've deleted some messages? --- I've deleted the ones at the top because he was telling me stuff about his past.
>
> All right. And you certainly deleted all things about what SCF sent you and such like that, him stalking you. You've deleted those? --- From?
>
> From your Facebook? -- Some of them. Yes. Yeah. All of them actually.
>
> All of them actually. Yeah. And if you look on – page 7 and it's a paragraph from you that says. "Sure you have a lot of shit to deal with. My mum just died. I've got to go face my rapist in court. I'm failing school. I'm that stressed I can't sleep properly. My auntie has leukaemia and is dying", and you go on. When did you mother die? --- When we thought she'd ran away.
>
> But she's not dead, is she? --- No. We thought she was because she was driving."

[36] Of particular significance in those Facebook entries are entries which show that the complainant was untruthful or exaggerating. In some instances she accepted that what she said was untrue but with some other entries she confabulated or tried to explain away entries that were clearly untrue. In one Facebook entry the complainant refers to the appellant by name and alleges not only that he raped her but subsequently stalked her by sending messages which not only showed a sexual interest in her but which incriminated himself. She indicated that she had "destroyed" all such messages.

[37] Another Facebook entry alleges that "every night she would get beaten up and raped".[43] The complainant agreed that her complaint to police was about an incident on a single night and that she was never in fact beaten.

---

[43] ARB 33 at ll 24 – 25.

[38] The complainant was also taken to a Facebook entry on page six of the bundle where she had alleged that she became pregnant to the appellant. When challenged about it she tried to explain it away by saying it was something that she had copied from another person's Facebook and then forwarded on.[44]

[39] She was then taken to another entry on page seven of the bundle in the following terms:[45]

> "Sure you have a lot of shit to deal with. My mum just died. I've got to go to face my rapist in court. I'm failing school. I'm that stressed that I can't sleep properly. My [aunty] has leukaemia and is dying".

Defence counsel asked "When did [your] mother die?--- When we thought she'd ran away."[46] She confirmed that her mother was not dead.

[40] All of these entries raise serious questions about the complainant's truthfulness.

Did the complainant have a motive to lie?

[41] Under cross-examination the complainant had agreed that she was "quite jealous" of the relationship between the appellant, her mother and FC.[47] She also agreed that she considered that the affection given by her mother to the appellant was unfair. She stated "It was unfair, because it got to the point where she wouldn't talk to me."[48] She was then asked:[49]

> "And you, in part, blamed SCF because of the relationship that he had with your mother and FC for you being put into - being taken away and being put into care?--- Yes."

[42] She confirmed that she loved her mother and wanted to be back with her mother and that she considered her mother's affections were being taken away by the appellant. She confirmed that she ended up in care which was "not a nice place to be".[50]

[43] The complainant also agreed under cross examination that she was interviewed by a child safety officer on 15 November 2011 for about 20 minutes about eight weeks after the alleged offences. She confirmed that she did not mention the incident. She also agreed that at that point in time she had told the officer that it was "ok" living with the three adults and the baby and that whilst she wasn't "happy" about the relationship she could see the "bright side" of it.

[44] The complainant agreed that she was ultimately placed in the care of the Department of Child Safety later that year and then moved to Townsville with her brother and his girlfriend.

The other evidence

[45] The complainant's brother, JS, gave evidence and confirmed that his mother had gone to Western Australia in September 2011 and that whilst she was away the plan

---

44 ARB 34.
45 ARB 35 at ll 7 – 9.
46 ARB 35 at ll 9 – 10.
47 ARB 37.
48 ARB 37 at ll 42 – 43.
49 ARB 37 at ll 45 – 47.
50 ARB 38 at ll 16 – 17.

was that the appellant was to stay with him and his girlfriend, GS and that his sister was to have a couple of nights with FC for a sleepover.[51] He gave evidence that one or two weeks after his mother's return from Western Australia she moved into the unit with the appellant, FC and their son.[52] He confirmed that his mother was spending a lot of time with them and that at times the complainant would go to the unit and stay with her mother.[53] At other times, however, he stated that she would stay in the unit with him.[54] He stated that during the time his mother was in Western Australia his sister stayed the first two nights at the unit with FC and then returned home.[55] He confirmed that during the time that she was with them the complainant had gone with them to a number of theme parks such as Dreamworld and told him how much she had enjoyed her time with them.[56]

[46] His partner GS also gave evidence and stated that the complainant was supposed to be staying with her and JS while her mother was away in Western Australia but she was allowed to have a sleepover with FC and had stayed two nights. She stated that while the appellant was supposed to stay with them at that time he only stayed one night. She also confirmed that after the complainant's mother came back from Western Australia "she became involved in a love triangle with SCF and FC",[57] then moved in with them and that the complainant would go between the houses.

[47] The complainant's case manager from the Department of Child Safety also gave evidence indicating that the complainant was currently subject to a child protection order until she was 18. Her evidence was that on 26 April 2012 she attended a home visit during which time the complainant made some disclosures in relation to the appellant. She stated:[58]

> "[J] told me about going to the doctor's and then told – then had a conversation about being scared of SCF and SCF had licked her vagina in different rooms of the house and that FC was aware of that."

[48] The officer indicated that she did not pursue the allegations because the matter had been referred to police and their policy was not to discuss matters further.

The judge's summing up

[49] There is absolutely no complaint about the learned trial judge's summing up. Indeed, his Honour warned the jury in very strong terms of the importance of scrutinising the complainant's evidence with great care. After giving the usual warnings about what constitutes evidence the judge warned the jury that matters that would concern them related to the credibility and reliability of evidence. In particular, his Honour pointed out that credibility concerns honesty, and reliability is something different. He indicated that in this case the prosecution's case depended entirely on the jury's acceptance of the complainant child as a reliable witness and that because the circumstances of the four offences occurred at the one

---

51 ARB 71.
52 ARB 72.
53 Ibid.
54 Ibid.
55 ARB 71.
56 ARB 75.
57 ARB 80.
58 ARB 83 at ll 13 – 15.

place over a short period of time, it was unlikely that they would bring in different verdicts on the four counts but that ultimately that question was a matter for them.

[50] The learned trial judge indicated that if they had a reasonable doubt concerning the truthfulness or the reliability in relation to one or more of those counts, whether by reference to her demeanour or what she said about the particular circumstances of it or what she told other people, it might affect her credit and that that could be taken into account in assessing the truthfulness or reliability of her evidence. His Honour then outlined the elements of the offences and what the prosecution had to prove. His Honour indicated to the jury the question for them was whether they accepted beyond reasonable doubt the evidence of the complainant in relation to all the counts on the indictment.

[51] His Honour pointed out to the jury that the defence counsel had asked questions of the complainant about her motive to lie and that the complainant had indicated she resented the relationship between the appellant and her mother. He also referred to the fact that the complainant blamed the appellant because her mother had ignored her and for the fact that she was in care and not living with her mother.

[52] His Honour stressed the importance of the jury being satisfied that the complainant was telling the truth and that they could have regard to those issues about her motive to lie in assessing that question. His Honour also referred to the three witnesses who he described as preliminary complaint witnesses. He referred to the evidence of the carer and of the doctor and urged the jury to look at the complainant's evidence about what she said occurred and urged the jury to consider whether any inconsistencies between the accounts in the complainant's evidence might cause them to have doubts about the complainant's credibility or reliability.

[53] His Honour then referred to some of the inconsistencies in the accounts that she had given. In particular, his Honour referred to the evidence of the officer from the Department of Child Safety, who said that the complainant told her that the appellant had licked her vagina in "different rooms of the house" and that FC was aware of it. His Honour also referred to the fact that the complainant said that before her mother went to Western Australia, her mother and the appellant had a significant fight which had ended with the defendant losing his temper and cutting the ribbon which her mother wore around her neck.

[54] His Honour then continued:[59]

> "Next, you must also consider the Facebook communications. I won't go through them in as much detail as Mr Sloane. You heard the evidence yesterday. He's reminded you of it in some detail today, but I did want to say something about the communications she had, she said, with WV. There's no evidence when this occurred. In it, the Complainant said that the Defendant had raped her and that the next day she'd tried to ring WV, but that she, WV, had lost her phone. You must bear in mind that she didn't speak to, on her evidence, in fact, anybody for a period of about eight months, between September 2011 when this occurred and the 20th of April 2012 when she went to Dr Patane's. She also spoke of Facebook messages, in which she

---

59 ARB 117 at ll 1 – 45.

> asserted that the Defendant had sent to her puerile but importantly incriminating text messages, and she said that she'd deleted them.
>
> She also said that she'd told WV – and this is the words she used in the Facebook, "It was happening for years, B, but all through year 8, when you teased me every night, I would get beaten up and raped. I told you he hit me with a brick, but you called me an attention-seeking bitch to S." When she was asked, she thought beaten and raped meant the same thing as molested and raped. The important thing, I suppose, is whether you consider that her assertion that this happened all through year 12 – sorry, year 8, when she was being teased every night, and whether or not you think that reflects on her credit. The Complainant's explanation appears to be that she was referring to her mum being beaten up on the day of the ribbon being cut from her neck.
>
> But again, that doesn't explain the use of the term about whenever these events were occurring every night. The obvious difficulty is, of course, that what she describes, whether it was to her mother or to her, it was a one-off event and not regular, as her email suggests. Additionally, in another message, she talked to her friend about her mother having died, and it seems that that was clearly false. You might well conclude that the combination of those factors causes you to have grave concerns about the credit of the Complainant in this matter. Sexual abuse of young girls by stepfathers or mothers' boyfriends or by anyone is a grave crime. It's one that society has a natural abhorrence of. One is inclined to have feelings of sympathy and compassion for young people, and one obviously would for the victims of a crime if it had occurred.
>
> In this case, as I said to you earlier, it's necessary for you to be clinical and analytical. You must examine the evidence and determine for yourself whether you're convinced beyond reasonable doubt that the Crown has proved that the Defendant committed these offence (sic). There is, you might conclude, strong evidence of a motive to falsely implicate the Defendant in this alleged crime. Whether you do so is a matter for you. I said to you earlier that if you have a view of the facts significantly different from mine, you're entitled to come to your own conclusion. There is in the Facebook messages, you might also think, strong evidence that you might conclude of a history of histrionic fabrication of evidence. Again, they're matters for you to take into account."

[55] His Honour referred to the significance of the destruction of the incriminating messages that the complainant said she received. His Honour also stated that it was unfortunate they were destroyed because it might cause them to have some "misgivings about her truthfulness".[60] He also indicated that it would be appropriate for them to consider whether a man who had done the acts the complainant says he did would be likely to send such messages on Facebook evidencing such a strong sexual interest.[61]

---

60 ARB 118 at ll 5 – 6.

61 ARB 118.

[56] His Honour then gave the following warning:

> "The law requires you to give me a warning whenever it's necessary to avoid a perceptible risk of a miscarriage of justice. In the circumstances of this case, and bearing in mind those matters that I've just referred to, and having regard to the delay between these alleged events in September 2011 and the first complaint to Dr Patane on the 20th of April 2012, I warn that it'd be dangerous to convict upon the Complainant's testimony in this case unless, after scrutinising it with great care and considering all of those circumstances and those matters that I've referred to, and paying regard to this warning that I'm now giving you, you are satisfied beyond reasonable doubt of the truth and accuracy of the Complainant's account. And it is a particular feature that arises because of the circumstances of this case."[62]

[57] His Honour then referred to the fact that the complainant in her cross-examination by defence counsel had made a number of concessions in relation to the Facebook evidence and that the Crown had urged the jury to consider that it was teenage attention seeking behaviour. His Honour pointed out:[63]

> "The potential difficulty with that, of course, is that if it is teenage attention-seeking behaviour, it may account for the allegations she makes, in view of her concession that she had resentment towards the Defendant because of his relationship with her mother and with the effect that it had upon her care, that is, that she was in the care of the Department and the long-term order and really wished to be with her mother and family."

[58] His Honour noted that the prosecutor submitted that if she had been motivated by vindictiveness she might have complained earlier. His Honour stated, "That may or may not be right. It's a matter for you."[64] His Honour then indicated that there might be a number of reasons why a person does not complain immediately. Reference was specifically made to the weaknesses in the complainant's statement, including the lack of a complaint to her mother, brother, the Department, FC or anyone else at an earlier time. He also referred to the complainant's apparent happiness during the time her mother was in Western Australia.[65]

[59] His Honour warned in particular of the need to put prejudice out of their minds and not be influenced by what the jury might think are some of the unsavoury elements of the case, "for example, assuming it be true that a bucket with dildos and condoms and things was left around in the house where it was known that a young girl frequented."[66]

[60] His Honour referred specifically to the prosecutor's argument that had the complainant been motivated by vindictiveness she would have complained earlier. Furthermore, his Honour noted that her account always was that FC was there at the time she was molested which the prosecutor argued was unusual as a person in the complainant's position would not potentially arm a defendant with a witness who

---

62 ARB 118 at ll13 – 22.
63 ARB 118 at ll 36 – 41.
64 ARB page 118 at l 43.
65 ARB 119.
66 ARB 119.

might deny the truthfulness or otherwise of the account. His Honour also referred to the fact that the prosecution had indicated that her evidence about "sitting in the shower" had the ring of truth about it. His Honour urged the jury not to speculate as to why the witness FC had not been called to give evidence.

[61] In the course of its deliberations, the jury asked to have the s 21AK recording played in its entirety. They also asked for a copy of the Facebook entries but the entries had not been tendered into evidence.[67] Later that day the appellant was found guilty on all four counts.[68]

[62] On the day of his sentence the learned trial judge wrote a letter to the Registrar of the Court of Appeal. In a letter dated 13 November 2013, his Honour wrote:[69]

> "I am concerned about his conviction.
>
> The circumstances of the relationship between the defendant and his partner, and the complainant's mother were very likely to cause feelings of resentment in the complainant toward the defendant. She acknowledged this in her s21AK pre-recording when she said she felt left out of her mother's affection and that "was unfair, because it got to the point where she wouldn't talk to me" (Transcript 1-30ll 40/45)
>
> My concerns about the complainant's truthfulness were compounded by the revelations about her facebook messaging (see T1-25 l 12 to T1-26 l28). In particular, she alleged the appellant sent her messages from different accounts imploring her to come back to him (T1-25 l 45ff) but such messages were not able to be produced as she had deleted them. She also alleged to a friend of hers that the appellant's conduct had been happening for years and that in Grade 8 she was beaten up and raped nightly (T1-26 ll23-28). She had however only met the appellant shortly before the alleged offences and did not assert he had abused her other than on this one night. Her explanation for her extraordinary allegation (T1-26 ll35-50) is totally implausible.
>
> These matters caused me to have very great misgivings that the jury verdict was unsafe and unsatisfactory and that they found him guilty out of a feeling that the appellant, because of the nature of his relationship with the complainant's mother, aged about 42, was deserving of criminal censure."

The legal principles

[63] Section 668E of the *Criminal Code* provides:

> "(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

---

67 ARB 122 – 123.
68 ARB 125.
69 ARB 164.

(1A) However, 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.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law, and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

[64] The relevant principles governing an appeal under this section were examined in 2008 by Mackenzie AJA in *R v PAH* as follows:[70]

"**Applicable Legal Principles**

[29] The relevant principles of determining whether the conviction is unsafe and unsatisfactory, to use the former terminology, are set out in *M v R* and *MFA v R*. *M v R* establishes a number of propositions about the exercise by appellate courts of the powers conferred by s 668E of the *Criminal Code* 1899 (Qld) and like provisions. *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.* In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced. Where a jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by the appellate court, the court may conclude that no miscarriage of justice occurred. Where the evidence lacks credibility for reasons which are not explicable by the manner in which the evidence was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.

[30] If the evidence, on the record itself, contains discrepancies, inadequacies, is tainted or otherwise lacks probative force in such a way to lead the court to conclude that, even allowing for the advantage enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, the court is bound to act and set aside a verdict based on that evidence. In doing so, the court is not substituting trial by the Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty." (my emphasis)

---

70 [2008] QCA 265 at [29] – [31].

[65] There is no doubt therefore that the question for this Court is whether "*upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty*."[71] The significance of that question was reiterated by the High Court in *SKA v The Queen* as follows:[72]

> "*The task of the Court of Criminal Appeal*
>
> It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v The Queen* 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 if 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."

[66] It is also clear in determining this appeal the Court must make an independent assessment of the evidence which was before the jury not only as to its sufficiency but also as to its accuracy. As Mackenzie AJA stated by reference to the High Court decision in *M v The Queen*[73] "In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced."[74]

Is the evidence capable of satisfying a jury of the guilt of the appellant beyond a reasonable doubt?

[67] In my view there were a number of significant concerns about the state of the evidence before the jury. This is indeed a case where there are discrepancies, inconsistencies and inadequacies in the evidence. Some of those inconsistencies are of no real significance by themselves but overall they do contribute to a concern about the veracity of the complainant's account. Were her pants removed upstairs or downstairs? Did she actually tell FC as she alleged? What was the appellant wearing?

[68] Of particular significance, however, and the cause for the greatest concern are the varying accounts by the complainant as to where the incident occurred first and whether they occurred in the upstairs bedroom, "in every room in the house" or downstairs beside the cot where she usually slept as she later alleged. The complainant's evidence also clearly changed in relation to the precise sequence of alleged offences. The complainant's evidence about being afraid and her vivid account of why she was afraid of the appellant simply does not correspond with her mother's evidence and is not supported by the known evidence.

[69] Her failure to make any complaint for seven months until she saw the doctor who asked the leading question "has anyone touched you down there?" is also of concern. She had ample opportunity to tell her brother when she returned from the weekend but instead indicated how much she had enjoyed being with the appellant

---

71 [2008] QCA 265 at [29].
72 *SKA v The Queen* (2011) 243 CLR 400 at 405.
73 (1994) 181 CLR 487.
74 [2008] QCA 265 at [29].

and FC. She did not complain to the Child Safety Officer who was obviously concerned about her in November 2011 and interviewed her at some length. She did not mention the incident to her foster carer until after the visit to the doctor.

[70] In my view the Facebook entries seriously undermined the complainant's credibility. There were so many Facebook entries that were fanciful and attention seeking that her credibility is seriously cast into doubt. Those entries reveal that the complainant invented stories about being raped "every night", about being pregnant, about her mother being dead and that her aunt had leukaemia.

[71] I consider that in this case there are very real doubts about the credibility of the complainant. I do not consider that the jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by this Court given that the trial judge also saw and heard the evidence and expresses the same concerns that this Court raises. The complainant's evidence indeed lacks credibility for reasons which are not explicable by the manner in which the evidence was given.

[72] When one combines the inconsistencies in the complainant's evidence with the serious concerns about her credibility I consider that the combined effect is that it was not open to the jury to be satisfied of the guilt of the accused on any of the counts beyond reasonable doubt and it follows that the verdict of the jury was unreasonable and cannot be supported by the evidence that was before it.

[73] Accordingly, the appeal should be allowed, the conviction should be quashed and a verdict of acquittal be entered.

[74] **APPLEGARTH J:** I have had the advantage of reading the reasons of Lyons J, with which I agree. I also agree with the orders proposed by her Honour.