SUPREME COURT OF QUEENSLAND

CITATION:	*R v Foster* [2014] QCA 226
PARTIES:	**R** **v** **FOSTER, Dane** (appellant)
FILE NO/S:	CA No 308 of 2013 DC No 1911 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2014
JUDGES:	Margaret McMurdo P and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant and complainant were in a relationship – where the appellant had become controlling and moody – where the appellant attacked the complainant at her home – where the appellant threw bleach and other chemicals onto the complainant, including around her vagina and in her ears – where the appellant penetrated the complainant's vagina with a hair brush, spray can and aluminium water bottle – where the complainant's work colleagues visited the complainant – where a colleague asked the complainant whether she had been raped by the appellant – where the complainant did not verbally respond but "looked very sad" – where the colleague "assumed that [the appellant] had raped" the complainant – where the trial judge directed the jury that the primary evidence of the colleague amounted to a preliminary complaint – where defence counsel sought a direction that the colleague's evidence did not amount to a complaint of rape – where the trial judge declined the request – whether the colleague's evidence was a complaint for the purposes of admission under s 4A *Criminal Law (Sexual Offences) Act* 1978 (Qld) – whether the colleague's evidence was sufficient as a complaint of any specific offence of rape

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUND OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the trial judge directed the jury to decide whether the instructions that the complainant had given to the prosecution and which formed Counts 9 and 10 were truthful or not – whether this was a misdirection – whether any substantial miscarriage of justice has occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where there were inconsistencies in the accounts given by the complainant – whether the inconsistencies undermined the reliability of the complainant's testimony – whether the testimony was unreliable to a point that the jury could not reasonably have acted upon it to convict

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was acquitted on Count 8 – whether those different verdicts are an affront to logic and inconsistent

Criminal Code 1899 (Qld), s 668E(1A)
Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v AW [2005] QCA 152, applied
R v CX [2006] QCA 409, applied
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied

COUNSEL: J McInnes for the appellant
G P Cash for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for dismissing this appeal against conviction.

[2] **GOTTERSON JA:** At the commencement of his trial on 11 November 2013, the appellant, Dane Foster, pleaded guilty to seven counts (Counts 1 to 5 inclusive and Counts 11 and 12) on a 12-count indictment. Count 1 was of assault occasioning bodily harm.[1] Count 2 was of common assault.[2] Count 3 was of torture.[3] Counts 4 and 5 were of committing acts intended to maim, disfigure or disable by unlawfully throwing a corrosive fluid.[4] Count 11 was of assault occasioning bodily harm while

1 *Criminal Code* (Qld) s 339(1).
2 *Criminal Code* (Qld) s 335.
3 *Criminal Code* (Qld) s 320A(1).
4 *Criminal Code* (Qld) s 317(a) and (k).

armed with an offensive instrument[5] and Count 12 was of unlawful deprivation of personal liberty.[6]

[3] In each case, the victim was the complainant, RL. The offending in Counts 1 and 2 occurred on 18 September 2011; that in Count 3, between 25 and 29 September 2011; and that in Counts 4 and 5, on a date unknown between 25 and 29 September 2011. For Count 11, the offending occurred on a date unknown between the same two dates; likewise for Count 12.

[4] The trial proceeded in respect of the other counts (Counts 6 to 10 inclusive) to which the appellant pleaded not guilty. Each of these was a count of rape[7] of the complainant at Yeerongpilly on a date unknown between 25 and 29 September 2011.

[5] On the afternoon of the second day of the trial and at the conclusion of the complainant's evidence, the prosecutor entered a *nolle prosequi* in respect of Counts 9 and 10. Those counts had alleged rape by penetration of the complainant's vagina with a fist and by penetration of the complainant's anus with a finger or fingers, respectively. The complainant had not testified that she had been penetrated in either of those ways.

[6] On the fifth day of the trial, the jury returned a verdict of guilty on each of Counts 6 and 7 and a verdict of not guilty on Count 8. Those counts had alleged rape by penetration of the complainant's vagina with a hairbrush, an aerosol can and a water bottle, respectively. On 5 December 2013, the appellant filed a notice of appeal against his conviction on each of Counts 6 and 7.

Circumstances of the offending

[7] The appellant and the complainant were in a relationship in September 2011. They had met through an online dating site. She was 22 years old at the time and he was about 10 years older. She lived in a unit at Yeerongpilly and he lived at Richlands.

[8] The complainant worked in a marketing role for the Brisbane Festival. The appellant was studying at a university. The Brisbane Festival began on 3 September 2011 and was to run for three weeks. The complainant was required to attend many events and to network during the festival. She stated that he was resentful of the time she gave to these activities. He became controlling and moody. He would check her emails and phone calls as if he suspected her of unfaithfulness. On one occasion, he was physically violent towards her, trying to choke her.

[9] In the last week of the festival the complainant did not go to work on the Monday, Tuesday, Wednesday or Thursday. On the preceding Sunday, the appellant had been physically violent. He had grabbed her hair, dragged her around the apartment, kicked her in the stomach and punched her in the chest and back. During the week she obtained a medical certificate for absence from work on account of her injuries. She did attend work on the Friday and a work function that evening.

[10] The festival had finished by Monday, 26 September. The complainant went to work that day. The appellant picked her up from work at 5 pm. He was "really angry".

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5 *Criminal Code* (Qld) s 339(1) and (3).
6 *Criminal Code* (Qld) s 355.
7 *Criminal Code* (Qld) s 349(1).

He accused her of cheating on him. They went walking at Kangaroo Point to calm down. He dropped her home; later, texted her to suggest they make up; and then called to pick her up to go for a snack. They returned to Kangaroo Point. He again accused her of cheating on him and of having an STD.

[11] The complainant testified that after a snack, they returned to her unit. The appellant started hitting her again and calling her a slut. He then threw bleach from the bathroom on her in the region of her stomach and vagina. She took her clothes off because they were sticking to her and the bleach on them was burning her skin. He grabbed a bottle of Glen 20 and began spraying her burns. He poured something, which she thought was toilet cleaner, in her ears. These events took place in the walk-in wardrobe.

[12] The complainant then gave the following evidence in chief concerning the Count 6 incident:

> "How long were you in your walk-in wardrobe for while these things were happening to you?---I can't remember. It felt like forever.
>
> And you gave evidence the defendant had not left the room. Were you able to see him at all times?---My vision was quite hazy at this stage from the chemicals in my eyes, but I did - I did see him. In some ways, it probably happened quite quickly between the different things being thrown on to the grabbing of the lighter. He also grabbed from my walk-in wardrobe a hairbrush, which he was hitting me with with (sic) the bristle end.
>
> Whereabouts was he hitting you with the brush?---On my face and on my vagina area. He also - he also crouched down and inserted the brush into my vagina, the bristle end, and again, he was saying that he wanted to ruin me so I wouldn't be able to have babies.
>
> Did you say anything to him while that was happening?---I was asking him to stop. I was screaming, it was hurting so much. He tried to shove towels down my throat so I would stop screaming.
>
> And are you able to say how many times he inserted the hairbrush into your vagina?---No. It was more than once.
>
> How did you know that that was what he was doing; that is, inserting the hairbrush into your vagina?---Because he told me, and I could feel it.
>
> All right. You say that he told you. Do you recall what he said to you at that stage?---No, but he told me as he was doing it that the whole point was to try and ruin me to stop me from having children."[8]

[13] Her evidence then moved to the Count 7 incident which she described as follows:

> "All right. After the incident that you described with the hairbrush, can you tell us what happened next?---He grabbed the hairspray can that he was using to spray on my face and he was hitting me with that. He also inserted the spray end of the can into my vagina.
>
> Again, how did you know that that's what it was he was doing?---I could see him.

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[8] AB67; Tr2-8 L21-AB68; Tr2-9 L3.

> And how could you see him?---I saw him grab it and that's what he was hitting me with - me with it first and then I could see (sic) shoving it in.
>
> In what position were you in when he was doing that?---I was still on my back.
>
> And in what position was him - he when you were doing that?---He was still crouched over me.
>
> Did he say anything to you when that happened?---I can't recall.
>
> And did you say anything to him?---I was still screaming. I kept telling him to stop and - please stop, and why are you doing this to me?
>
> Are you able to say how many times he inserted the can?---No.
>
> And how did you - you described the spray end, or the nozzle end. How did you know it was that end?---I could feel it.
>
> What could you feel?---I could feel the cold of the can. He didn't spray into me, not that I recall. All I just remember seeing was the spray end from how he was holding it.
>
> You gave evidence you could feel the cold of the can. Whereabouts on your body did you feel that?---Inside me. I just felt cold.
>
> And when you say inside you, can you be more specific about where inside you?---Inside my vagina.
>
> Where did the defendant get that hairspray can from?---My walk-in wardrobe."[9]

[14] A little later, the complainant gave the following evidence in chief relevant to the Count 8 incident:

> "And what happened when you got out onto the landing?---I was laying on the carpet again on my back and he had a water bottle - it was like an - an aluminium water bottle, one of those not recyclable but ones you reuse, and I was on my back and he was sitting against the wall and he had my ankles and he was bashing the water bottle on my ankles and he was telling me he was trying to break my ankle so I wouldn't be able to walk. He was calling me various names: Slut, whore. I can't remember exact sentences.
>
> How many times did he hit you with the water bottle?---I don't know. It was - it was a lot of times. It was on both ankles. He was also bending my toes backwards and forwards and said he was trying to break my toes.
>
> Did all of those things happen on the landing?---Yes.
>
> Can you have a look, please, at this photograph. It's marked 89 for identification. Do you recognise what's shown in that photograph, Ms RL?---This was one of the - his water bottles. He also had an army green one, but that's the type of water bottle that he used. I can't remember the colour of the one, but he had an orange/green one and - an orange one and an army green water bottle.

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[9] AB70; Tr2-11 L9-AB71 Tr2-12 L16.

You mentioned that he hit you in the ankles with a water bottle?---I can't remember if it was the orange one or an army green one.

Did anything else happen at the time that he was hitting you on the ankles?---He grabbed my legs at one point and pushed my head against the wall and then folded my legs over me and just put his weight on me. He said he was trying to hurt my neck. I can't remember what I said to him. I just remember noticing how bad my burns were on my tummy. He also - he also would spit on me and say - he called me an insect and he would hack up his spit and spit on me into my ears and on my face, and he also grabbed my jaw and opened it and spat in my mouth.

And in relation to hitting your ankles with a water bottle, when did those events happen?---When he dragged me out of the bathroom and I was just on the landing.

Did anything else happen on the landing?---No, I can't remember.

HIS HONOUR: Did he do anything else with the water bottle, I think you're being asked?---Yes, he did. Yeah, I can't remember the sequence, but he was using the water bottle and he was hitting me on my bottom with it, and he also inserted the drink bottle - like, the drinking end of the water bottle - into my vagina and then he would smack the end of the bottle so it would go in further.

MS DENNIS: And where were you when that happened?---On the landing.

And what position were you in when he inserted that into your vagina?---On my back. I can't remember where I was facing, if I was facing my room or the bathroom or - - -

And what about the defendant, where was he?---He was crouched over me.

Were any parts of his body touching you at that stage?---I can't remember. I don't think he was holding me down. By that stage, I was in so much pain, didn't need to hold me down.

You said he used the drinking end of the bottle. Again, how did you know that that's what he was using?---Because he was hitting the flat side to make it go in further.

And how many times did that happen?---I can't remember.

Are you able to say whether it was more than once?---More than once.

Did he remove the water bottle at any stage?---I can't remember. I remember him hitting it a number of times."[10]

[15] According to the complainant, after the events on the landing the appellant carried or helped her into the spare bedroom where she went to sleep. She awoke to find the appellant next to her. He renewed his accusations of cheating and then kicked her in the back and stomach many times. She managed to go back to sleep. The

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[10] AB74; Tr2-15 L38-AB76; Tr2-17 L9.

complainant's evidence indicates that she spent the Tuesday and Wednesday at home. The appellant was there. He was at times aggressive and abusive towards her. At some point on the Wednesday morning, he left. The complainant then telephoned her mother, CL, and her manager at work, HB.

[16] The complainant's evidence concerning each of the three incidents was not closely scrutinized. The cross-examination of the complainant was quite brief. It began with propositions put to her that at no time was her vagina penetrated by the appellant with a hairbrush, an aerosol can or a water bottle. Her response to each proposition was: "That's incorrect".[11] The cross-examiner then moved to another topic.

[17] Ms HB and other work colleagues, including CM, visited the complainant's unit that afternoon. Ms HB had alerted the police. An ambulance was also called. Constable Doria Pavic was one of the police officers who attended at the unit that afternoon. She took notes of the account that the complainant then gave her of what had happened over the preceding few days.

[18] At trial, the complainant's mother, Ms HB, Ms CM and Constable Pavic gave evidence in the prosecution case. The appellant neither called nor gave evidence.

Statements made by the complainant

[19] Each of the four witnesses to whom I have referred, gave evidence of statements made to her by the complainant at or from the unit that afternoon. Since most of the statements have relevance to more than one ground of appeal, I propose to detail them at this point.

[20] Ms HB said that upon her arrival, the complainant looked "sort of fragile and ragged". The complainant showed Ms HB her bruises and other injuries and said that the appellant had "held her against her will".

[21] Ms HB was asked in her evidence in chief if she had any conversation with the complainant about offences of a sexual nature. She then gave the following evidence:-

> "I did, but not at that stage when all the girls were there. After she had told me that, we had gone upstairs to get clothes for her, and I was worried about her going up the stairs because she looked like she was in extreme pain, but she wanted to show us where to go. Upstairs she told us that he hadn't let her eat or drink over that - those days. And so I ended up going back downstairs to the kitchen to get her something to eat. It was in the kitchen that I asked her if he raped her.
>
> Who was present when you asked RL that question?--- No one. Just myself.
>
> And RL presumably?---Sorry. And RL.
>
> You said you asked whether he raped her. Do you remember whether those were the - they were the words that you used when you spoke to RL that day?---I'm pretty sure I said did he rape you, or something along very similar lines.
>
> Did RL make any response to you when you asked her that question?--- She didn't make any verbal response. I just read the expression- - -

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[11] AB97; Tr2-38 LL16 – 24.

> MR BYRNE: I object your Honour.
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> HIS HONOUR: Well, did she give some facial or bodily gesture?--- Yes.
>
> What was it?--- She looked very sad, like – like, he did. I just assumed that he had raped her after seeing her facial expression, and I following up by saying it is rape, RL, even if you're – if he was your boyfriend. If you didn't want it to happen, it's rape. And then we were interrupted by the police arriving.
>
> Yes. Well, I don't think you described, really, what the facial expression was, to be blunt. What are you able to tell us about that, if you can?---Sorry. I'm just taking some time to really think about that.
>
> Yes. You go ahead?---She was – I guess looked like she was about to burst into tears again, and she had stopped crying by this point. She kind of slumped her shoulders. She just looked – I can't think of a different word, but beaten.
>
> Sorry? What was that?---Beaten."[12]

[22] Ms HB said that the conversation was then cut short by the arrival of the police. Her account of the conversation did not include a statement by the complainant that the appellant had used a hairbrush, an aerosol can or a water bottle in his conduct towards her.

[23] The complainant's mother was in Mackay at the time. She said that her daughter telephoned her on the Wednesday afternoon. Her daughter was crying and said that the appellant had bashed her and poured bleach on her.[13] She travelled to Brisbane and saw her daughter in hospital late that evening.

[24] Ms CM said that the complainant was visibly shaking, crying and pale when she spoke to her. She recounted that the complainant had said that the appellant had hit and hurt her and poured bleach on her. Ms CM continued:-

> "She indicated that she'd been inside for some time and that he - that he closed her in the room and moved - and locked her up and that she - you could see that he'd moved furniture around to restrain her. I know that - I remember HB asking - or me - I can't remember if it was me or HB, but we did ask her what else he had hit her with and she said a brush and a can of hairspray. That's it."[14]

Ms CM agreed in cross-examination that the complainant did not use the word "rape" to her.

[25] Constable Pavic spoke to the complainant at a time when she was lying on an ambulance stretcher at the unit. Her record of the complainant's account concluded with the following:-

> "I rang my mum and HB and I went upstairs to make sure all the doors were locked and sat on the stairs waiting for my friends, and then she also said after that he used the hairbrush in me and hit me with a can of hairspray to hit me and poured bleach in me.

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12 AB115; Tr2-56 L32-AB116; Tr2-57 L23.
13 AB108; Tr2-49 LL23-38.
14 AB133; Tr3-10 LL5-9.

> HIS HONOUR: Can you just repeat the last sentence. I've been trying to take notes. Just the last couple of sentences slowly, please?---He used a hairbrush in me and hit me with a can of hairspray to hit me and poured bleach in me.
>
> Yes. Just again "used a hairbrush in me"?---Yeah.
>
> Yes?--- - - - and poured bleach in me."[15]

The grounds of appeal

[26] At the hearing of the appeal, leave was given to the appellant to amend the grounds of appeal. Those grounds as amended are:-

> "1. The verdicts of the jury were inconsistent.
>
> 2. The verdicts of the jury were unreasonable.
>
> 3. The learned trial judge erred in directing the jury that the evidence of HB amounted to preliminary complaint.
>
> 4. The learned trial judge erred in directing the jury that counts 9 and 10 were on the indictment due to the complainant's "instructions" and "Whether they were truthful or not, I don't know. That's up to you."

[27] In oral submissions, counsel for the appellant concentrated on Grounds 3 and 4. It is convenient to consider them first.

Ground 3 – preliminary complaint

[28] In the course of summing up, the learned trial judge read to the jury extracts from the transcript passage of Ms HB's evidence set out above. He then directed the jury with respect to it:

> "Now members of the jury, first of all, it's a matter for you whether you accept that evidence from HB. Secondly, if you do accept it, does it amount to a complaint of rape?"[16]

A little later, he asked the jury to bear in mind:-

> "… that HB asked, "Had you been raped?" and asked if he raped her and she didn't respond in any positive way other than a verbal – other than a facial or bodily gesture which was described as being very sad. She looked very sad.
>
> And she just assumed that he raped her after seeing her facial expression. And then they were interrupted."[17]

Then he observed:-

> "I have said that in relation to what HB said that that was an allegation that – of rape, which could cover all three counts and you could apply it to either of those counts if you are prepared to do so and whether you think it bolsters HB – bolsters RL's credit."[18]

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15 AB140; Tr3-17 LL14-28. As noted, the complainant's account was that the bleach had been poured into her ears.

16 AB209; P8 LL24-26.

17 AB211; P10 LL6-12.

18 AB211; P10 LL33-37.

[29] Defence counsel requested a redirection which drew a distinction between the character of Ms HB's evidence as evidence of the complainant's distressed condition on the one hand, and as evidence of a preliminary complaint on the other. The request was put in the following terms:-

> "Your Honour directed the jury quite correctly, with respect, that they couldn't have regard to distressed state because of the overall circumstances of the case. But your Honour did direct the jury that the complaint of rape to HB could support the credibility of the complainant. I'd ask that your Honour direct the jury that there was no complaint of rape, and that as high as it got was that she looked sad. That is entirely consistent, as is a distressed state, with what has happened to her. I'm concerned that the jury's left with a view that not only was there a complaint of rape to HB, but that could somehow work in conjunction with the complaint of rape, if the jury found it, to the witness Pavic."[19]

His Honour declined the request.

[30] There are two limbs to this ground of appeal. The first limb reagitates the basis of the request for the redirection. It is that the evidence of Ms HB was not evidence of a complaint for the purposes of admissibility as a preliminary complaint under s 4A of the *Criminal Law (Sexual Offences) Act* 1978. Hence, it is submitted his Honour erred in directing the jury on the footing that the evidence was capable of being a complaint of rape. The second limb is that the evidence was not referrable to any specific act of penetration and was insufficient as a complaint of any specific offence of rape.

[31] As to the first limb, the scope of the meaning of the word "complaint", as defined for the purposes of s 4A, was considered by this Court in *R v AW*.[20] McMurdo P with whom Jerrard JA and Philippides J agreed, observed:-

> "The definition of 'complaint' in s 4A(6) of the Act 'includes a disclosure'. 'Disclosure' is not defined in the Act, but has the dictionary definition of 'the act of disclosing; exposure; revelation'. The [Macquarie Dictionary] definition of the verb 'disclose' includes 'to cause to appear; allow to be seen; make known; reveal: … uncover, lay open to view'. It follows that a 'disclosure' includes a revelation or disclosure after questioning, even questioning which might suggest a particular response. The legislature, in enacting s 4A, plainly intended that the jury have the full context of any preliminary complaint or disclosure so as to most accurately assess the credibility (or lack of credibility) of the complainant and the complaint."[21]

[32] I adopt these observations. It is not necessary that in order to respond meaningfully to a question which states a proposition of fact and invites acceptance or rejection of it, that the person so asked responds verbally. A meaningful response may be signalled by conduct other than speech. That conduct may include the absence of a verbal rejection of the proposition.

[33] Here, according to Ms HB, the conduct of the complainant when asked whether the appellant had raped her, was to slump her shoulders, to look as if she was about to

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19 AB217; P16 LL22-31. Compare direction as to distressed state at AB208; P7 L136 – AB209: P8 L13.

20 [2005] QCA 152.

21 At [26].

burst into tears and to look beaten. That demeanour together with the absence of any verbal rejection by her of the proposition that the appellant raped her, was capable of conveying acceptance of it. It is true that acceptance would have been clearer, arguably significantly clearer, had the complainant verbalised an affirmative response. Quite probably, the conduct here ought to be regarded as close to the bounds of what can constitute a disclosure and, on that account, ought to be regarded as a borderline example of a complaint.

[34] In my view, it was open to the learned trial judge to direct the jury on the footing that there had been disclosure sufficient to amount to a complaint. His Honour, of course, went on to remind the jury that it was a matter for them whether they accepted the evidence as evidence of a complaint or not.

[35] With regard to the second limb, I do not accept that because neither the proposition put by Ms HB in her question nor the response of the complainant to it was referable to any specific occasion or form of penetration, it follows that there was no complaint of rape. It is not necessary, in my view, that in order to complain of rape, a complainant make a separate complaint about each and every instance of penetration. In the case of multiple penetration of the one victim, a statement that "I was raped" is a sufficient complaint of rape by separate penetrations to found a preliminary complaint admissible under s 4A in respect of each penetration.

[36] For these reasons, this ground of appeal fails.

Ground 4 – Counts 9 and 10 directions

[37] This ground of appeal arises out of directions given by the learned trial judge to the jury concerning Counts 9 and 10. His Honour told the jury:-

> "An issue arises, therefore, for your consideration in evaluating her evidence in this case, because she gave no evidence as to counts 9 and 10. Clearly, you would think – and I direct you – that the complainant RL must have complained to someone in authority that what was alleged to have happened in relation to counts 9 and 10 happened, that is, the Director of Public Prosecutions, represented by Ms Dennis, does not think these things up themselves. They don't say, well, we'd better throw in counts 9 and 10 to this; they get instructions from RL.
>
> However, not having given the evidence before you about counts 9 and 10, but having given evidence of counts 6, 7 and 8, may depend on the view you take about the truthfulness and reliability or accuracy of RL that (a) you are satisfied she forgot what happened in relation to counts 9 and 10 and did not give that evidence before you and that, nevertheless, you are satisfied beyond reasonable doubt she's telling the truth and is reliable and accurate about counts 6, 7 and 8; or (b) she is not truthful and reliable about counts 6 or 7 or 8 and, therefore, you would find the defendant not guilty of each of those counts; or (c) you are left in a state of reasonable doubt on the whole of the evidence in this case and that, therefore, you are not satisfied beyond reasonable doubt that Dane Foster is guilty of either of counts 6, 7 or 8."[22]

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22 AB208; P7 LL16 – 34.

Later, he returned to the topic:-

> "Now, that significant issue is as I have told you, that she did not give any evidence to support counts 9 or 10. How you view that is a matter for you but you cannot just sweep it under the carpet. You have to ask, well, as I've explained to you, Ms Dennis doesn't dream this up. She doesn't at night – she's not given an indictment with counts 6, 7 and 8 and then she's, 'Look, we better add 9 and 10 in here for good measure'. As I said, it comes from instructions. So at some stage those were RL's instructions. Whether they were truthful or not, I don't know. That's up to you. But I've said to you that you have to bear it in mind, in this case, and not just sweep it under the carpet. It has significance and that significance is that she didn't give that evidence and what the defence says, 'Well, the reason for that is because it didn't happen'.
>
> The prosecution says of course, well, she may have forgotten it when giving evidence, or at least her credibility is supported by the evidence of HB and Doria Pavic. The prosecution says it mightn't be much, but it's there and you can act on it. But, members of the jury, I'm bringing to your attention that it is a serious issue. And because it is a serious issue, I am warning you that – not only because of that issue but because of the lack of corroboration, I am warning you that it would be dangerous to convict Dane Foster on any one of those three counts you are considering upon RL's evidence alone. Unless, after scrutinising her evidence with great care and considering the circumstances relevant to its evaluation and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy."[23]

[38] In oral argument, the objection underlying this ground of appeal was refined as one to the direction that it was a matter for the jury to decide whether or not the complainant was truthful when she gave "instructions" that the events the subject Counts 9 and 10 had occurred. It was submitted that it was not the function of this jury to decide the truthfulness of the instructions, the appellant having been discharged in relation to those counts. It was further submitted that in attending to that task, the jury may have formed an adverse view against the appellant which they took into account in deciding Counts 6, 7 and 8. The submission went so far as to suggest that such an adverse view could have been the source of a compromise verdict.[24]

[39] I readily accept that the learned trial judge erred in directing the jury that it was their function to decide whether the instructions that the complainant had given and which formed the basis of Counts 9 and 10, were truthful or not. Clearly, it was not their function to do so. It is fair to say that the error here was made within the context of a stern warning which, as counsel for the appellant conceded,[25] was otherwise favourable to his client. It is unsurprising then that experienced defence counsel did not seek a redirection in respect of it.

[40] Error having been established, the issue that next arises is whether this is a case for the application of the proviso in s 668E(1A) of the *Criminal Code*, that is to say,

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23 AB213; P12 L30 – AB214; P13 L5.

24 Tr1-5 LL16 – 24.

25 Tr1-5 L37.

whether no substantial miscarriage of justice has actually occurred by reason of the error. In speaking of the Victorian counterpart of s 668E(1A), the High Court in *Weiss v The Queen*[26] observed that there is no single universally applicable description of what constitutes "no *substantial* miscarriage of justice". Their Honours continued:

> "But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."[27]

[41] The application of this proposition requires the appellate court to review the whole of the record at trial.[28] The objective of such a review here is to determine whether on the evidence properly admitted, the prosecution had proved the appellant's guilt on Counts 6 and 7 beyond reasonable doubt. The evidence of the complainant with respect to those two counts, as set out above, proved the elements of each offence. The complainant made prompt reports of the offending to others. As explained, the evidence of the two witnesses to whom she recounted details of the relevant offending was generally supportive of the complainant's credibility. Although the appellant pleaded guilty to physically assaulting the complainant, her distressed condition and injuries were also consistent with her evidence. The cross-examination of the complainant did not dent her credibility or reliability with respect to this offending in any material way.

[42] Having regard to those matters and after scrutinizing the whole of the evidence with great care, I am persuaded that the prosecution did establish the appellant's guilt on Counts 6 and 7 beyond reasonable doubt. I am therefore satisfied that no miscarriage of justice actually occurred as a result of the error and that the proviso is to apply. It follows that this ground of appeal also fails.

Ground 2 – unreasonable verdicts

[43] The appellant submits that the convictions on Counts 6 and 7 are unreasonable. This submission is made notwithstanding that the complainant's testimony concerning these counts, as set out above, was a quite clear and cogent factual account which, of itself, was capable of sustaining a conviction on each of these counts.

[44] The burden of the appellant's submission on this ground is that this testimony was unreliable to a point that the jury could not reasonably have acted upon it to convict. The unreliability of the testimony, it was argued, was demonstrated by the complainant's failure to advert to the events alleged in the rape Counts 9 and 10 and by inconsistencies between her testimony and the accounts she gave to Ms HB, Ms CM and Constable Pavic on the Wednesday afternoon.

[45] In summing up, the learned trial judge referred to examples of inconsistency in the accounts given by the complainant. He mentioned that she had not told any of the witnesses that she had been penetrated by a water bottle or an aerosol can. (According to Ms CM and Constable Pavic, they were told that the appellant had hit and hurt the complainant with an aerosol can.) His Honour also referred to the absence of evidence on Counts 9 and 10.

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26 [2005] HCA 81; (2005) 224 CLR 300 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ at [44].

27 *Ibid.*

28 *Ibid* at [47].

[46] As noted, the jury was appropriately warned not to convict on the evidence of the complainant alone. They were told that it was a matter for them to determine, on all of the evidence, whether they were satisfied as to the truthfulness and reliability of the complainant's testimony at trial.

[47] In my view, it was not unreasonable for the jury to have been satisfied beyond reasonable doubt as to Counts 6 and 7. It was open to them to regard the omission to give evidence with respect to Counts 9 and 10 as attributable to forgetfulness on the complainant's part in the course of reliving in the witness box protracted violence towards her over several days. It was also open to the jury to regard the inconsistencies as not significantly undermining the truthfulness and reliability of the testimony. The inconsistencies did not exhibit the deficiency of mutual contradiction. They were of the nature of omission from one account given to one witness, detail which had been stated in an account given to another. That that might have occurred was quite unremarkable given the complainant's distressed state on the Wednesday afternoon.

[48] This ground of appeal is not made out.

Ground 1 – inconsistent verdicts

[49] The appellant argues that the convictions on Counts 6 and 7 are inconsistent with the acquittal on Count 8. These different verdicts, the appellant submits, are an affront to logic and commonsense which is unacceptable.

[50] In this context, the summary by Jerrard JA in *R v CX*[29] of matters of principle settled by appellate courts had immediate relevance. It is necessary to refer only to the second of them. It is this:-

> "Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts?"[30]

[51] The quality of the evidence concerning Count 8 was markedly different to, and less persuasive than, that concerning Counts 6 and 7. In recounting events on the landing, the complainant, at first, spoke only of being hit on the ankles with a water bottle. She was asked if anything else happened then and she said she could not remember. The learned trial judge intervened and focused the question on the water bottle. It was after the intervention that the evidence of rape with it was given. Secondly, the complainant did not mention the water bottle in the accounts she gave to any of the witnesses on the Wednesday afternoon whereas she did then mention both the hairbrush and the aerosol can to Ms CM and Constable Pavic.

[52] To my mind, this difference in quality of the evidence provided a sound platform for a difference in verdicts. That the jury entertained a reasonable doubt about the reliability of the complainant's testimony concerning Count 8 is logically explicable when this difference is taken into account.

Disposition

[53] As all grounds of appeal have failed, this appeal must be dismissed.

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29 [2006] QCA 409 at [33], Atkinson and Douglas JJ concurring.

30 *MacKenzie v The Queen* (1996) 190 CLR 348 per Gaudron, Gummow and Kirby JJ at 366.

Order

[54] I would propose the following:-

1. Appeal dismissed.

[55] **MORRISON JA:** I have had the advantage of reading the reasons of Gotterson JA and I agree with those reasons and the order his Honour proposes.