SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chardon* [2015] QCA 186
PARTIES:	**R** **v** **CHARDON, John William** (appellant)
FILE NO/S:	CA No 211 of 2014 DC No 5 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Reopening (Criminal) Miscellaneous Applications – Criminal – Applications to adduce further evidence and to add a further ground of appeal
ORIGINATING COURT:	District Court at Southport – Unreported, 18 July 2014
DELIVERED ON:	6 October 2015
DELIVERED AT:	Brisbane
HEARING DATES:	17 February 2015; 14 April 2015 Further submissions and material filed on 21 April 2015 and 12 May 2015
JUDGES:	Margaret McMurdo P and Gotterson JA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to re-open the hearing of the appeal is granted.** **2. The applications to adduce further evidence and to add a further ground of appeal are refused.** **3. The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was charged with one count of indecent treatment of a child under 16, under care (count 1); four counts of indecent treatment of a child under 16 (counts 2, 3, 5 and 6); and three counts of rape (counts 4, 7 and 8) – where all counts concerned the same complainant and were charged as occurring between September 1998 and October 1999 – where the prosecution did not proceed on counts 3 and 5 – where the appellant was convicted on counts 1, 2, 6 and 7 – where the appellant was found not guilty on count 4 but was convicted on the

alternative charge of attempted rape – where the appellant was found not guilty on count 8 but was convicted on the alternative charge of unlawful carnal knowledge – where the complainant gave evidence to support all counts on which the appellant was convicted – where the complainant made preliminary complaints to a school friend, a school counsellor and a psychologist – where the complainant gave evidence that she told the appellant's two daughters, Angela and Candice that the appellant had abused her – where the complainant visited the appellant's house a few years later when she was over 16 – where the appellant offered her money if she would have sex with him – where the appellant offered the complainant $1,000 and told her that she could go on business trips with him and be his secret girlfriend – where the complainant agreed – where the complainant signed a piece of paper which she believed was a contract for $1,000 – where the appellant and the complainant then had a consensual, sexual paid relationship for approximately 18 months – where the appellant stated in a police interview that he had no sexual contact with the complainant until she was over 18 – where the appellant's daughters Angela and Candice both gave evidence denying that the complainant told them that the appellant had abused her – where the appellant contended that the verdicts were unreasonable or cannot be supported having regard to the evidence due to the conflict between the complainant's evidence and the evidence of Angela and Candice; the discrepancies between the complainant's evidence and that of preliminary complaint witnesses; and from the generally poor quality of the complainant's evidence – whether the verdicts were against the weight of the evidence – whether there has been a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where there were inconsistencies between the complainant's evidence and the evidence of other witnesses – where the appellant contended that the judge did not adequately put the defence case to the jury because the judge did not point out all these inconsistencies – where the judge referred to many inconsistences in the complainant's evidence and how this may detract from the complainant's credibility – where the judge referred to the evidence of the defence witnesses and twice directed the jury to read the appellant's police interview – whether the judge's summing up fairly placed the defence case before the jury – whether the appellant has been deprived of a chance of acquittal

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR

CASES – WHERE APPEAL DISMISSED – where the appellant was charged with three counts of rape (counts 4, 7 and 8) – where the appellant was found guilty on count 7 – where the appellant was found not guilty on count 4 but guilty on the alternative offence of attempted rape – where the appellant was found not guilty on count 8 but guilty on the alternative offence of unlawful carnal knowledge – where the judge left the defence of honest and reasonable mistake of fact as to consent under s 24 *Criminal Code* to the jury only in relation to count 8 – where the appellant contended that had the defence been left in respect of counts 4 and 7 the jury may have acquitted him of attempted rape on count 4 and rape on count 7 and convicted him of the lesser counts of attempted carnal knowledge of a girl under 16 and carnal knowledge of a girl under 16 – where the complainant gave evidence that immediately preceding the commission of count 4 she was "saying no" and "sobbing" – where the complainant gave evidence that during count 7 she was crying and saying "no" – where the appellant told police that he had no sexual contact with the complainant until she was 18 – where there was no evidence before the jury of the appellant holding an honest and reasonable mistake of fact as to consent in respect of counts 4 or 7 – whether the judge erred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant's police interview was tendered by the prosecution – where the appellant contended that the judge erred in not directing the jury as to why it was led by the prosecution, how they should use it and how the defence said it should be used – where the appellant contended that if the interview was entirely self-serving it was inadmissible – where the appellant contended that the jury may have reasoned that it was a false denial and treated it as a lie without the benefit of any directions as to lies – where the appellant did not object to the prosecution leading evidence of his police interview – where the police interview was admissible as during it, the appellant accepted the complainant's account that he had employed her to clean his house and therefore had the opportunity to commit the alleged offences – where the appellant's counsel did not seek any directions as to lies – where the judge twice directed the jury to read the appellant's police interview – whether there has been a miscarriage of justice

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the appeal was originally heard on 17 February 2015 – where on 25 March 2015, the appellant applied to re-open the appeal and adduce further evidence – where at the hearing of that application on 14

April 2015, counsel for the appellant stated that if leave to re-open were granted, the appellant would seek leave to amend the notice of appeal by adding a further ground of appeal – where the proposed fifth ground of appeal was that there has been a miscarriage of justice in that the appellant did not, at the trial, have the information contained in the affidavit of Steven John Pike, sworn 16 February 2015 – where Mr Pike's affidavit exhibited documents, including copies of notes and reports of psychiatrist, Dr John Chalk, and psychologist, Ms Wendy Mackay concerning their consultations with and treatment of the complainant – where the appellant also sought to lead evidence contained in statutory declarations from Matthew Webb and Renee Webb – where the respondent sought leave to adduce further evidence by way of affidavits from an officer in the Office of the Queensland Director of Public Prosecutions and from the complainant – where the appellant then sought to lead evidence from appellant's solicitor and from a paralegal employed by him – where the complainant deposed that there were two episodes of sexual intercourse with the appellant when she was a child, both at the appellant's home – where a report of Ms Mackay makes reference to a third episode of sexual intercourse in 1999 at the appellant's factory – where the complainant denied telling Ms Mackay that any of the appellant's offending in 1999 occurred at his factory – where the complainant gave evidence that when she was over 16, during her consensual, sexual paid relationship with the appellant, most of the sexual conduct occurred at the appellant's factory – where the appellant contended that Ms Mackay's report supported the appellant's case that the complainant had conflated evidence about aspects of their lawful, consensual paid relationship when she was over 16 into false testimony about fabricated sexual encounters when she was 14 or 15 – whether the application to re-open the hearing of the appeal should be granted – whether the applications to adduce further evidence and to add a further ground of appeal should be granted – whether the appeal should be allowed

Criminal Code (Qld), s 24, s 620

Burrell v The Queen (2008) 238 CLR 218; [2008] HCA 34, followed
Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, cited
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, considered
Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Maraache v R [2013] NSWCCA 199, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited

Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, cited
O'Rafferty v The Queen [2014] ACTCA 35, cited
R v Katsidis; Ex parte Attorney-General (Qld) [2005] QCA 229, cited
R v Main (1999) 105 A Crim R 412; [1999] QCA 148, cited
R v Meher [2004] NSWCCA 355, cited
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v VI [2013] QCA 218, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited

COUNSEL: At the appeal on 17 February 2015
A J Kimmins, for the appellant
B J Power for the respondent

At the application for reopening on 14 April 2015
W Sofronoff QC, with A J Kimmins, for the appellant
B J Power for the respondent

SOLICITORS: Toogoods Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, John Chardon, pleaded not guilty to one count of indecent treatment of a child under 16, under care (count 1); four counts of indecent treatment of a child under 16 (counts 2, 3, 5 and 6); and three counts of rape (counts 4, 7 and 8). All counts concerned the same complainant and were charged as occurring on an unknown date between 11 September 1998 and 27 October 1999. His jury trial commenced on 14 July 2014. The prosecution endorsed the indictment that it was not proceeding on counts 3 and 5 at the close of its case. On 18 July 2014, the jury convicted him on counts 1, 2, 6 and 7. They found him not guilty on count 4 (rape) but convicted him on the alternative charge of attempted rape. They also found him not guilty on count 8 (rape) but convicted him on the alternative charge of unlawful carnal knowledge. He was sentenced on 15 August 2014 to an effective term of six years imprisonment with parole eligibility fixed at 14 August 2017.

[2] The appellant appealed against his convictions on a number of grounds. The first was that there has been a miscarriage of justice in that the verdicts were against the weight of the evidence. The second was that the judge failed to adequately sum up the defence case to the jury and that failure deprived the appellant of a chance of acquittal. The third was that the judge erred in not directing the jury on s 24 *Criminal Code* 1899 (Qld) as to counts 4 and 7. The fourth was that the judge failed to adequately direct the jury regarding the appellant's police interview. Following the hearing of this appeal, the appellant applied on 14 April 2015 to re-open the appeal, adduce further evidence and, if successful, to add a fifth ground of appeal, that there has been a miscarriage of justice in that he did not have the information contained in the affidavit of Steven John Pike sworn on 16 February 2015. In response to those applications, the respondent has also applied to adduce further evidence.

[3] Before directly discussing these grounds of appeal and the applications to re-open the appeal and adduce further evidence, it is helpful to first review the evidence at trial.

The evidence at trial

The complainant's evidence

[4] The complainant was born on 12 September 1984 and the alleged offences occurred around the time of her 15th birthday. Her evidence concerned events 15 years prior to the trial, by which time she was almost 30 years old.

[5] She was a close friend of the appellant's daughter, Angela, with whom she had attended a Gold Coast primary school. One evening prior to Angela leaving to attend a Brisbane boarding school, the complainant went to a sleep-over at Angela's house. The appellant's elder daughter, Candice, was also present. The appellant had bought them a case of Lemon Ruskis, a pre-mixed vodka drink. The three girls sat at the kitchen table drinking them while the appellant was drinking bourbon. She described herself as "drunk" and said that all three girls were "tipsy and happy".[1] She went to the toilet. As she was coming out, the appellant walked in and "started feeling [her] boobs and below".[2] He rubbed her breast with one hand and then moved his hand down to her vagina area and was "just rubbing up and down with one hand"[3] on the outside of her clothes (count 1). She vaguely recalled him asking if she liked it; "does it feel good".[4] She was "getting all upset and … pushed him away".[5] She felt sick and vomited in the bathroom. The appellant was annoyed that she had vomited on the wall and he had to clean it up.[6] She told Angela what had happened in the toilet before they went to bed.

[6] She visited Angela on her first weekend home from boarding school. Candice was not there. On the Sunday afternoon, the appellant drove her and Angela to the station so that Angela could catch the train to return to Brisbane. As he was driving the complainant home at about 5.00 or 6.00 pm, he pulled over and asked her about her relationship with her boyfriend. He asked if she had had oral sex. She said "no". She was sitting directly behind him. He reached his arm around and felt her legs. He said "I'd like to go down on you"[7]… "show you how good it feels."[8] He asked her to move to the front seat but she refused. He eventually drove off. He offered to pay her to clean his house. When they arrived at her home she went straight to her bedroom. He made arrangements with her parents to collect her from school so that she could earn extra pocket money by cleaning his house.

[7] The following week he picked her up from school and took her to his home. She changed out of her uniform into a baggy t-shirt and board shorts. He gave her a cloth, spray and a broom. When she was cleaning the study he sat her down on a chair and said "I'd like to really try going down on you."[9] "I think you'll like it".[10]

---

1 T 1-9, lines 29 – 34.
2 T 1-10, line 3.
3 T 1-10, line 45.
4 T 1-11, line 5.
5 T 1-11, line 7.
6 T 1-11, line 18.
7 T 1-12, line 35.
8 T 1-12, line 35.
9 T 1-15, line 17.

She felt "very uncomfortable."[11] He hugged her and said he would give her more money. He took her hand and led her into the spare room, which contained only a single bed and a built-in wardrobe. He shut the door and asked her to take off her clothes but for her socks. She felt scared[12] and she complied. He asked her to lie on the bed. She lay on her back on the bed. He was naked from the waist down and said "I'm going to go down on you and you will like it".[13] She "was just saying no. No. … just sobbing."[14] He licked her vagina for a couple of minutes (count 2). He said words to the effect of "I love young pussy".[15]

[8] He moved up the bed, lay on top of her and tried to put his penis inside her. He placed his penis at the opening of her vagina but he had trouble maintaining an erection (count 4).[16] He stood up, told her to kneel on the floor and put his penis in her mouth. She performed fellatio on him (count 6). They got back on the bed. He licked her vagina again before lying on top of her and putting his penis inside her vagina. He was "rocking back and forth"[17] as they "were … having sex … in the normal missionary position".[18] She was "crying and saying no" (count 7).[19] He ejaculated, got up and told her she could have a shower before her dad arrived to collect her. He told her not to tell her parents and offered to give her money and buy her drinks and cigarettes. He said he would try to organise with her parents for her to come back in a fortnight. When her father arrived she did not tell him what happened as she was "embarrassed, ashamed, not sure what really had just happened, and scared."[20]

[9] The complainant did not give evidence in the terms particularised for counts 3 (inserting his finger in her vagina) and 5 (trying to get the complainant to put his penis in her mouth)[21] and the prosecution later withdrew those counts.

[10] The next time she came to the house to clean, the appellant told her she could use the spare room to have sex with her boyfriend. The appellant left the house for about an hour and her boyfriend came over. When the appellant returned, the complainant and her boyfriend were sitting outside near the pool. The appellant seemed annoyed and asked why they didn't use the spare room.[22]

[11] On the last occasion she cleaned the appellant's house, he again picked her up from school. When she was sweeping the hallway, he told her to go to the back room, a converted garage. Once they were there he told her to take off her clothes. She lay on her back on the bed and he "went down" on her.[23] He then got on top of her, put his penis in her vagina and started "rocking". They had sex but she could not recall whether he ejaculated (count 8).[24] After he left, she dressed and went into the

---

10 T 1-15, line 18.
11 T 1-15, line 28.
12 T 1-16, line 23.
13 T 1-17, line 19.
14 T 1-17, line 22.
15 T 1-17, line 46.
16 T 1-19, line 26.
17 T 1-20, line 36.
18 T 1-20, lines 36 – 37.
19 T 1-20, line 40.
20 T 1-22, line 1.
21 Exhibit 2, ARB 342.
22 T 1-22, lines 10 – 36.
23 T 1-23, line 30; T 1-24, line 18.
24 T 1-24, lines 8 – 11.

dining room to wait for her father. The appellant gave her money.[25] She felt "very scared",[26] "didn't know what to feel"[27] and felt that she could not tell her parents. She did not want any of the prior sexual conduct to happen.[28] She felt shaky, had tears in her eyes and was sobbing. The appellant hugged her and tried to calm her down, saying "no one has to know" and then he gave her money.[29]

[12] After this episode, she told her high school friend, CW, that the appellant had raped her. The following day the school counsellor spoke to the complainant. The complainant told her about the first occasion she went to the appellant's house to clean but could not remember what else she told her. She also remembered telling her boyfriend D, but could not recall what she told him, or when.

[13] A few days after speaking to the school counsellor, two female police officers came to her home. She told them she just went to the appellant's house to clean. She did not say what had happened because her mother was present and she did not want her to know.

[14] When Angela was at boarding school, she spoke to her by telephone and said that her parents would not allow her to see Angela anymore. She told Angela that the appellant had abused her. The complainant visited Angela the next weekend. While she was in Angela's room, she told Angela and Candice what had happened. They were both upset. The appellant came home unexpectedly and Candice approached him. Angela and Candice were crying and yelling and Candice yelled at him, calling him an "effing cunt".[30]

[15] In 2001 when the complainant was 17, she visited Angela at the appellant's home. As she was about to leave, the appellant came outside with her. He told her he would like to have sex with her for money. He offered her $1,000; they would have to keep it quiet and she could go on business trips with him and be his secret girlfriend. She agreed and later signed a piece of paper which she believed was a contract for $1,000. He would give her the money in $100 notes and would call her whenever he wanted sex. There were three or four agreements, each for $1,000. She last saw the appellant in February 2003.

[16] During a lengthy cross-examination extending over two days, she agreed that between 1999 and 2000 she was a person who would lie to protect herself and cheat to serve her own purposes.[31] She was unable to accurately recall incidents from this time or generally. The reliability of her memory was somewhat damaged by time. From the age of 13 she was "off the rails a bit".[32] She suffered depression,[33] engaged in self-harm[34] and used drugs and alcohol,[35] sometimes stealing alcohol from the appellant. She agreed that in her witness statement to police on 19 February 2013 she withheld the full extent of her paid, consensual relationship with the appellant.[36] She told the prosecution about these contracts only in the week prior to the trial. She told

---

25 T 1-24, line 33.
26 T 1-24, line 23.
27 T 1-24, lines 23 – 24.
28 T 1-24, lines 26 – 29.
29 T 1-25, lines 3 – 4.
30 T 1-29, line 47.
31 T 1-36, lines 28 – 34.
32 T 1-38, line 36.
33 T 1-38, line 30.
34 T 1-38, line 33.
35 T 1-40, lines 6 – 24.
36 T 2-11, line 45.

a psychologist on 17 February 2000 that she took "speed" and "pot"; liked "to do dangerous new things"; her parents were over-protective and did not really trust her; and she was "often sad and confused but happy when … away from home." When using drugs she sometimes saw "visions, like angels".[37] She agreed that the only time the appellant spoke to her parents about her cleaning his house was after the train station incident. The appellant asked her mother outside the kitchen in the complainant's house if she could clean his house and she agreed she might have begged to be allowed.

[17] In terms of her paid sexual relationship with the appellant, whenever he wanted sex, $200 would be deducted from the $1,000, and when he wanted anal intercourse $300 would be deducted.[38] Every time he gave her $1,000 she would sign a new contract. She thought they had consensual sex on 20 to 25 occasions, mostly at his factory. [39] She did not think he gave her as much as $12,000 during their 12 month consensual sexual relationship.[40]

[18] She agreed that there was only one occasion when the appellant bought a carton of Lemon Ruskis for Angela, Candice and her. She recalled another occasion when she vomited at his house, but only Angela was home. There was only one occasion when she vomited and he cleaned it up.[41] She later conceded that there was another time when she was with a boy at the appellant's home; she ran for the toilet but vomited all over the corridor. She denied that, during "the Lemon Ruski incident" (count 1), that it was Candice who vomited over the corridor walls. She confirmed that during that incident she vomited and the appellant cleaned it up. She denied that she had conflated two separate incidents into one and maintained that the appellant cleaned up her vomit on the night the three girls were drinking Lemon Ruskis, that is, when count 1 occurred. During the occasions they had sexual intercourse, she could not recall him having any physical problems or having to stop because of pain.[42] He was breathing heavily, however. He was a large man, much larger than her.

[19] She was sure that after count 2 he said something like, "I love pussy". He also used those words during their sexual relationship when she was over 16.

[20] She denied that she approached him and asked him to lend her money in return for sexual things.[43] She remembered him mentioning his lawyer and that if he had sex with her, he would get between three and five years jail.[44] She agreed that she forgot to tell police in her witness statements of 19 February and 13 September 2013 that after the Lemon Ruski incident (count 1) she spoke to Candice or Angela.[45]

[21] She agreed that CW's father spoke to her parents. Her mother asked what was going on and the complainant said nothing was going on. On two weekends in the December school holidays she worked with Angela at the appellant's factory to earn

---

37 T 1-42 – T 1-43.
38 T 2-14, line 30.
39 T 2-15, lines 38 – 40.
40 T 2-15, line 15; T 2-62, line 24.
41 T 2-16, line 25.
42 T 2 -40, lines 35 – 44; T 52, lines 1 – 4.
43 T 2-66, line 39.
44 T 2-67, lines 1 – 7.
45 T 2-31.

money for Christmas presents. She agreed she saw a psychologist, Ms Williams, in January 2000. She denied telling her that the appellant tried to have sex with her, she cried and he stopped. She remembered crying but he did not stop.[46] On the first occasion they had sex she remembered "sobbing and saying no".[47] After police interviewed the appellant about her complaint, they told her that he said she had paid sex with him many times. Until then she deliberately had told no one about the full extent of her paid sex with the appellant.

The preliminary complaint evidence

[22] CW gave evidence that when she was in year 9 at school, the complainant, who was also in year 9, was very upset and told her that the appellant had "done something sexually inappropriate to her the day before".[48] She said that she was cleaning the appellant's house and he pushed her onto the bed and was on top of her. He had told her he would give her money if she had sex with him. CW went with the complainant to see the school counsellor. In CW's presence, the complainant told the counsellor that something sexual happened, a gun was involved and she had to go to the appellant's house that afternoon.

[23] The complainant's former school counsellor[49] gave evidence that she worked at the complainant's school between 1996 and 2000. Between four and six weeks prior to 26 October 1999,[50] she spoke to CW and, later that day, to the complainant who told her that she was cleaning the house for the father of her friend, Angela. He was behaving inappropriately towards her and she felt threatened.[51] In cross-examination she agreed that her supervision notes recorded that the complainant was concerned that the appellant might advise her parents of her sexual history with her boyfriend.[52]

[24] Sally Williams, a psychologist,[53] gave evidence that on 17 January 2000 she spoke to the complainant and made contemporaneous clinical notes. These recorded: "Angela's father tried to have sex with her"[54]; "She cried and he stopped"[55] and "Has happened (molestation) approximately three times. But the third incident was the worst – almost sex".[56]

[25] The complainant's husband gave evidence that he and the complainant commenced a relationship in 2007 and they married in 2010. Early in the relationship she told him that she had been raped as a child. She said that she was at the house of her best friend, Angela, and that Angela's father raped her.[57] In cross-examination he agreed he told police that the complainant had told him that she had "gone to spend the night at her friend [A's] house and that she'd woken up with [his] hand on her face, sitting on the bed with her and that the man had raped her."[58]

---

46 T 2-41.
47 T 2-58, line 11.
48 T 2-77, line 18.
49 T 2-95, line 10.
50 T 2-96, lines 5 – 16.
51 T 2-95, lines 39 – 43.
52 T 2-97, lines 11 – 15.
53 T 2-85, line 8.
54 T 2-88, line 31.
55 T 2-88, line 35.
56 T 2-88, lines 42 – 46 to T 2-89, lines 1 – 26.
57 T 2-74, lines 3 – 8.
58 T 2-75, lines 34 – 43.

The police evidence

[26] Detective Sergeant Troy Quinn of the Gold Coast Child Protection Investigation Unit[59] was unable to obtain any records in relation to the complainant's discussions with the school counsellor as the records had been destroyed.[60] During cross-examination he agreed that the complainant in her initial witness statement to police on 19 February 2013, said that there was one occasion where she had sex with the appellant for money.[61] In her addendum statement to police on 13 September 2013, she provided further information relating to that one occasion.[62] She disclosed the full extent of her paid consensual sexual relationship with the appellant only a week before the trial.[63]

[27] The tendered video recording of the appellant's police interview on 20 May 2013[64] was largely inaudible and a transcript of it was tendered.[65] It included the following. He knew the complainant as she was a friend of his daughter, Angela. The complainant cleaned his house after school and he paid her $90.[66] She wanted to borrow about four or five hundred dollars and said "I'll let you fuck me."[67] He told her he would think about it. He asked his lawyer what would happen if he had sex with a girl who was 15 turning 16. His lawyer advised he would receive three to five years jail.[68] He told the complainant this, and said "in a few years … couple years time yeah".[69] He next saw her when she was 18 years old. She reminded him of her offer and asked if he was interested in having paid sex with her.[70] She became his paid mistress for the next 18 months. He gave her two to three hundred dollars a week. He paid for her car registration and bought her things for university. After about a year and a half, he discovered she was using drugs and he ended the relationship.[71] The first time he had paid sex with her she was over 18. He denied being confronted by Angela and Candice about allegations that he had underage sex with her.[72] He denied following the complainant to the toilet and rubbing his hand on her breast and on the outside of her clothing when she was a child.[73] He could not remember drafting and having her sign an agreement about having sex.[74] Towards the end of their relationship she became too demanding and "was hittin' the drugs like crazy … Speed, Marijuana".[75]

Documentary Evidence

[28] A letter from the boarding school Angela and Candice attended[76] stated that Candice commenced there on 10 May 1999 and Angela commenced there on 12 July 1999. The 1999 September school holidays were from 18 September to 3

---

59 T 3-4, line 6.
60 T 3-5, lines 27 – 33.
61 T 3-42, lines 12 – 14.
62 T 3-42, lines 7 – 10.
63 T 3-42, lines 40 – 47.
64 Exhibit 5.
65 Exhibit 6; T 3-10, lines 43 – 44 to T 3-11, lines 1 – 27.
66 ARB 352.
67 ARB 353, line 6.
68 ARB 353, line 13.
69 ARB 353, line 19.
70 ARB 353, line 35.
71 ARB 353, lines 36 – 42.
72 ARB 372, lines 39 – 57; ARB 374, lines 55 – 58.
73 ARB 375, lines 45 – 47.
74 ARB 379, lines 7 – 14.
75 ARB 385.
76 Exhibit 7.

October. Other documentary evidence established the appellant was in the USA from 15 August until 4 September 1999.

The defence case

[29] The appellant did not give evidence but his daughters, Angela and Candice, and a doctor gave evidence in the defence case.

[30] Angela's evidence was that she attended primary school with the complainant from years 1 to 7 and they were best friends. There was only one occasion when the appellant bought a carton of Lemon Ruskis for her, her sister, Candice, and the complainant. They each had about four drinks. She was in her bedroom with the complainant when she heard the appellant yelling because Candice had thrown up on the kitchen table.[77] She told the complainant to stay in her room. Angela went to the kitchen and saw vomit on the table. It was Candice, not the complainant, who vomited on the only occasion involving Lemon Ruskis. She recalled only one occasion when the complainant vomited at Angela's house. The complainant and her boyfriend, J, were in the spare bedroom and the appellant came home and caught them having sex. The complainant then ran from the spare bedroom towards the bathroom but did not make it, vomiting on the floor and the walls.[78]

[31] During the first three to six months of Angela attending boarding school, she would travel to and from school either by limousine or the appellant would drive her.[79] She could not recall a time in the first six months of boarding school when she came home for the weekend without Candice, or when she caught a train from Brisbane to the Gold Coast or from the Gold Coast to Brisbane.[80] She did not speak to the complainant on the telephone during her first six months at boarding school. The complainant never told her on the telephone that the appellant had interfered with her.[81] During the night they drank Lemon Ruskis, the complainant did not tell her that the appellant had sexually molested her.[82] There was never an occasion on a boarders' weekend when the complainant told her and Candice that the appellant had sexually molested her.[83] There was never an occasion when Angela and Candice remonstrated with the appellant in angry tones including swear words.[84]

[32] In cross-examination she agreed that when police came to her home they located an item and put it on the TV cabinet. She grabbed it and said "Oops, my fingerprints are [on] them now", laughed and rubbed the item clean.[85] Police hit her on the head with a torch and she was charged with obstructing police. She agreed that she was the type of person to do something just to get her own way.[86] She denied she had given untruthful evidence[87] or that she had tailored it to assist the appellant.[88]

[33] Candice gave evidence that she knew the complainant as her younger sister Angela's friend. There was only one occasion when the appellant purchased a

---

77 T 3-48, line 39.
78 T 3-49, lines 13 – 21.
79 T 3-53, lines 11 – 17.
80 T 3-53, lines 38 – 44.
81 T 3-54, lines 38 – 42.
82 T 3-54, line 44.
83 T 3-55, lines 1 – 3.
84 T 3-55, lines 5 – 6.
85 T 3-70, lines 24 – 36.
86 T 3-72, line 8.
87 T 3-72, line 11.
88 T 3-72, lines 24 – 31.

carton of Lemon Ruski pre-mixed drinks. She had about three or four drinks. Angela and the complainant had more to drink. She felt sick and vomited all over the kitchen table. The appellant was right next to her and became very angry.[89] He cleaned up while she remained at the table. Angela and the complainant were elsewhere in the house.[90] The one time the complainant vomited in the house was when she was in the spare room with J and the appellant came home. He went into the spare room and found them, either before or after sex. The complainant was on the bed and J was standing up without his shirt. The complainant left the room, went up the hall and threw up outside Candice's bedroom, in the bathroom and in the toilet. The appellant was angry. [91] There was never an occasion in Angela's room when the complainant outlined in some depth to Angela and Candice that the appellant had sexually abused the complainant.[92] Candice had never confronted the appellant about allegations concerning the complainant.[93] In 1999 Candice always travelled to and from boarding school with Angela, either by limousine or was driven by the appellant.[94] During cross-examination she denied that she had been told to say certain things. She also denied that she would lie to support the appellant's case.[95] She again denied that the complainant told her that the appellant had sexually assaulted the complainant.[96]

[34] Dr John Mullett gave evidence that on 4 September 1999 he treated the appellant for injuries sustained when he was caught in an escalator at a United States airport the previous day. He suffered mild linear abrasions in parallel rows down the right side of his back, shoulders and buttock and down the back of his right arm, forearm and wrist.[97] He had further scrapings on his right calf on the lateral side from his knee to his ankle.[98] Dr Mullett again saw the appellant about these injuries on 28 September and 8 and 13 October 1999. He prescribed medication for back pain and for gout relief.[99] The appellant next consulted him on 8 November 1999 when he prescribed Viagra for erectile dysfunction.[100] During cross-examination, he agreed that the appellant's September 1999 injuries could be summarised as "cuts and bruises"[101] and "a few scrapes".[102]

Was the jury verdict unreasonable?

[35] The appellant's first ground of appeal was that there has been a miscarriage of justice in that the verdicts were against the weight of the evidence, that is, in terms of s 668E(1) *Criminal Code*, the verdicts were "unreasonable or cannot be supported having regard to the evidence." He contended that this followed from the conflict between the complainant's evidence and that of Angela and Candice; the discrepancies between the complainant's evidence and that of the preliminary

---

89 T 3-81, lines 39 – 47.
90 T 3-82, line 6.
91 T 3-82, lines 17 – 29.
92 T 3-83, lines 41 – 43.
93 T 3-83, lines 45 – 47.
94 T 3-83, lines 17 – 20.
95 T 3-87, lines 1 – 3; T 3-89, lines 25 – 47.
96 T 3-90, line 7.
97 T 3-74, lines 45 – 47 to T 3-75, lines 1 – 6.
98 T 3-75, lines 8 – 12.
99 T 3-75, lines 14 – 34.
100 T 3-76, line 5.
101 T 3-76, line 45.
102 T 3-77, line 4.

complaint witnesses; and from the generally poor quality of the complainant's evidence.

[36] The appellant emphasised that the complainant had a consensual sexual relationship with him once she was lawfully allowed to have sex. This gravely affected her credibility. She made no preliminary complaint in respect of any act of cunnilingus (count 2) or of penetration of the vagina (counts 4 and 7). He also emphasised that she described the appellant's act of cunnilingus on her immediately preceding the act of sexual intercourse (count 8) for the first time in court. Both cunnilingus and penile penetration were aspects of her sexual relationship with him once she was over 16. It was likely that she was giving evidence about episodes of consensual sexual activity when she was over 16 which she falsely claimed occurred when she was 15. He also emphasised that many aspects of her evidence were not included in her original complaint to police and she raised them only shortly before or at trial. She was a troubled teenager and adult who had suffered depression, used speed, pot and alcohol, and was not trusted by her parents. She denied to her parents and police that anything was going on with the appellant.

[37] In considering this ground of appeal, this Court must review the whole of the evidence and determine whether it was open on that evidence for the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *M v The Queen*.[103] It is necessary to give proper respect to jury verdicts deciding contested factual questions of the kind arising in this trial concerning the credibility of the complainant and the appellant's guilt.[104]

[38] The complainant was cross-examined at length over two days by an experienced criminal law barrister. Although she omitted to give evidence on counts 3 and 5 so that these counts were withdrawn at the end of the prosecution case, she maintained that the remaining counts occurred as she described. She was giving evidence of events which occurred more than 15 years earlier when she was no older than 15, half her life ago. It is not surprising that her account of what she told other people at that time now differs from theirs. It is possible that she made a more general complaint to them, given her youth and the likelihood that she would have been too embarrassed to provide full and explicit details. It is also plausible that she did not tell her mother or the police in her mother's presence in 1999 about the alleged offending because she was embarrassed and did not want to get in trouble. The fact that she made complaints of sexual impropriety to CW, the school counsellor and Ms Williams fairly soon after the alleged offending tends to support her credibility.

[39] The judge gave strong directions to the jury about the care they must take in assessing the complainant's evidence, explaining it was the only evidence against the appellant and that they must scrutinise it very carefully. If they had a reasonable doubt concerning her truthfulness or reliability on one or more counts, they must take that into consideration when assessing her evidence generally. If the jury did not believe her or had a reasonable doubt about her evidence generally they must find him not guilty of every count. His Honour added:

> "…you must approach her evidence with great care and with the utmost caution. You should scrutinise her evidence carefully and you need to be satisfied of its accuracy and reliability beyond reasonable doubt before you can convict. Human experience in the

---

103 (1994) 181 CLR 487, 493 to 495.

104 *MFA v The Queen* (2002) 213 CLR 606, McHugh, Gummow and Kirby JJ, 623 to 624.

> court is that complainants in such matters for all sorts of reasons and sometimes for no reasons at all tell a false story which is very easy to fabricate and very difficult to refute.
>
> In cases such as this it is therefore important to consider whether there is evidence corroborating the complainant, evidence corroborating her evidence, that is, evidence which confirms or strengthens or supports her evidence in that it renders it more probable. It's evidence that confirms in some material particular that the offences took place and also that the accused was the person who committed them. Often sometimes in rape cases that corroborate evidence may be medical evidence of damage to the vagina or of a bruised and battered woman. There is here no corroboration at all and that's a factor that you should consider and is an added reason why you should approach the evidence of the complainant very carefully and with caution. You may convict on the uncorroborated evidence of the complainant but you should give careful consideration to her evidence and careful consideration to the warning I have just given you."

[40] His Honour then gave a direction consistent with *Longman v The Queen*[105] as to the consequence of the delay in this case and its detrimental impact on the defence. Another reason for caution, his Honour said, was that the complainant at the time of the alleged offending was 14 or had just turned 15, adding:

> "Children have a fertile and sometimes fanciful imaginations and have been known to invent accounts which bear no relationship to truth particularly where sexual matters are concerned."[106]

[41] The judge reminded the jury that the complainant told police when they came to her house in 1999, in the presence of her mother, that nothing happened to her when she was with the appellant.[107] His Honour told the jury that they could take into account inconsistencies between the complainant's evidence and that of other witnesses, particularly the preliminary complaint witnesses in assessing the credibility of the complainant, and that she had raised some aspects of her evidence only at a late stage.

[42] The jury must have understood from these directions the critical importance of the complainant's evidence, the need to scrutinise it with care, and the weaknesses in it. It certainly was a most unusual feature of the evidence at trial that after the alleged offending the complainant had a paid, consensual and lawful relationship with the appellant when she was a young adult. But that did not mean her evidence about these offences had to be doubted.

[43] The jury were entitled to reject the evidence of Angela and Candice as partial to the appellant, their father. Dr Mullett's evidence was that the appellant had some relatively minor, although no doubt uncomfortable, injuries which concerned him for some time at about the period of the alleged offending. But these injuries were not so serious as to have prevented him from committing the alleged offences. The prescription for Viagra did not throw doubt on the complainant's testimony. The

---

105 (1989) 168 CLR 79.
106 ARB 272.
107 ARB 273.

jury were entitled to reject the appellant's unsworn denial of the alleged offending to police.

[44] After carefully considering the whole of the evidence in this unusual case, together with the appellant's contentions, I consider it was open to the jury to accept the complainant's account of the alleged offending beyond reasonable doubt and to convict the appellant on each count. This ground of appeal is not made out.

The adequacy of the judge's directions on the defence case

[45] The appellant contended that the judge did not adequately put the defence case to the jury. Relying on *Maraache v R*,[108] he submitted that the judge was required but failed to ensure a fair trial by assisting the jury to identify relevant issues and relate them to the law, putting the defence case fairly, cogently and with clarity. The judge did not point out all the many inconsistencies between the complainant's evidence and other witnesses. The appellant added in his oral submissions that the following directions contained in the Queensland Supreme and District Court Benchbook should have been given:

> "Where, as here, there is defence evidence, usually one of three possible results would follow:
>
> (a) you may think the defence evidence is credible and reliable, and that it provides a satisfying answer to the prosecution's case. If so, your verdict would be not guilty; or
>
> (b) you may think that, although the defence evidence was not convincing, it leaves you in a state of reasonable doubt as to what the true position was. If so, your verdict would be not guilty; or
>
> (c) you may think that the defence evidence should not be accepted. However, if that is your view, be careful not to jump from that view to an automatic conclusion of guilt. If you find the defence evidence unconvincing, set it to one side, go back to the rest of the evidence, and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question." (Footnotes omitted)[109]

[46] It is true that the judge's specific directions as to the defence and prosecution case were brief:

> "[Defence counsel] addressed you thoroughly about the issues and the evidence you must consider. He addressed submissions to you about the complainant's credit and reasons why you should not accept her evidence, why you should not find her to be a truthful, honest, accurate, and reliable witness. He asked you to compare her evidence to what she said to the complainant witnesses – complaint witnesses – and asked you to conclude that what she said to them

---

108 [2013] NSWCCA 199, [68], [70] and [72].

109 Queensland Supreme and District Court Benchbook No. 27.1 – 27.2.

> was not consistent with her evidence, and he analysed each charge and the complainant's evidence about each."[110]

[47] His Honour's summation of the prosecution case which followed was even shorter:

> "[The prosecutor], on the other hand, urged you to accept the complainant's evidence, and he referred to certain matters about defence witnesses and to aspects of the police interview with the [appellant]. He asked you to accept the evidence of the complainant as an honest, accurate and reliable witness."[111]

[48] But that was not all the judge said about the defence case. The judge referred to the three defence witnesses, Angela, Candice and Dr Mullett; to the letter from the boarding school about term dates; and to the appellant's interview with police,[112] early in his jury directions. His Honour emphasised that the only evidence against the appellant was from the complainant and that they must scrutinise that evidence very carefully before acting on it.[113] Defence counsel, the judge explained, sought to persuade the jury that the complainant may be an untruthful, inaccurate, unreliable or dishonest witness so that they could not be satisfied of her evidence beyond reasonable doubt.[114] The judge again referred to the defence witnesses[115] and explained that the appellant's failure to give evidence did not strengthen the prosecution case and could not be used against him.

[49] His Honour then explained the elements of the offences and again highlighted for the jury the reasons why they must scrutinise her evidence with great care before acting on it. The judge reminded them that she told the police in the presence of her mother in 1999 that nothing happened to her when she was with the appellant. In giving directions about the preliminary complaint evidence, his Honour explained that they could use inconsistencies between the complainant's evidence and the preliminary complaint witnesses as showing that the complainant was untruthful and unreliable.[116] He pointed out the inconsistencies between the complainant's evidence and that of Angela and Candice.[117] He referred to the inconsistencies between the complainant's evidence and CW's evidence and that the jury may think this detracts from the complainant's credit.[118] It was up to the jury to determine whether the preliminary complaint evidence bolstered the complainant's credit or undermined it.[119] The judge reminded the jury that the complainant did not tell her father about the appellant's sexual abuse when he picked her up. She said this was because she was embarrassed and scared. She did not make a complaint to the two police officers who came to her house. She said this was because she was scared and felt she could not tell her parents.[120]

[50] In dealing with the train station incident, the judge reminded the jury to bear in mind the evidence of Angela and Candice that they did not travel to or from

---

110 ARB 289.
111 ARB 289.
112 ARB 266.
113 ARB 267.
114 ARB 267 – 268.
115 ARB 268.
116 ARB 275.
117 ARB 276.
118 ARB 276.
119 ARB 277.
120 ARB 277.

Brisbane by train in 1999.[121] The judge read out to the jury the complainant's evidence relating to the three episodes of uncharged acts and appropriately explained how they could use that evidence. His Honour again warned the jury that it would be dangerous to accept as reliable the complainant's evidence of those acts unless, after scrutinising it with great care and considering the circumstances relevant to its evaluation and paying heed to the warning, they were satisfied beyond reasonable doubt of its truth and accuracy.[122]

[51] The judge next read out the complainant's evidence to establish count 1, adding:

> "Whether it occurred is the issue here. The complainant said it did. [The appellant] said there was no – he had no involvement at all with this girl until she was 18, nearly 19."[123]

His Honour directed that if the jury were satisfied of the complainant's evidence on count 1 beyond reasonable doubt they would convict him. If they were not satisfied they would find him not guilty.

[52] The judge read out the complainant's evidence to establish count 2 and count 4 and her cross-examination about count 4. The judge explained that attempted rape, unlawful carnal knowledge and attempted unlawful carnal knowledge were all alternative verdicts.[124] His Honour then read out her evidence to establish counts 6 and 7, explaining that unlawful carnal knowledge was an alternative verdict to count 7.[125] The judge then read out the complainant's evidence to establish count 8, explaining that if they were satisfied of penetration they must consider the defence of honest and reasonable mistaken belief as to consent because there was no opposition or resistance from the complainant. The judge gave comprehensive directions as to s 24 *Criminal Code* in relation to count 8 about which no complaint is made.[126] If the jury were not satisfied beyond reasonable doubt that the prosecution had disproved s 24 in respect of count 8, they could then consider the alternative offence of unlawful carnal knowledge of a girl under 16.[127]

[53] After returning to count 4 and explaining what they had to consider in deciding whether there was an attempt,[128] his Honour reminded the jury that the appellant was interviewed by police. They had a copy of the transcript of that interview which set out his account of events and they should read it. The appellant, the judge explained, denied that any of the acts alleged by the complainant occurred at all. There was a consensual relationship between them when she was 18, almost 19. The judge read a relevant selection of questions and answers and again told the jury to read the interview. His Honour then gave the directions recorded at [39] and [40] of these reasons.

[54] When the jury retired to consider their verdicts, counsel asked for various redirections. As a result, the jury returned to the courtroom and the judge instructed them as follows. In respect of the uncharged act involving the appellant's alleged encouragement of the complainant to have underage sex with her boyfriend in the appellant's house, this was raised by her for the first time on 10 July 2014 when she

---

121 ARB 277.
122 ARB 280 – 281.
123 ARB 281.
124 ARB 282 – 284.
125 ARB 284 – 285.
126 ARB 285 – 288.
127 ARB 288.
128 ARB 288.

spoke to the prosecutor shortly before trial. As to her evidence about the act of oral sex immediately preceding count 8, she mentioned this for the first time in her evidence on the first day of the trial. These were relevant considerations in relation to her credit.[129]

[55] The judge reminded the jury of Dr Mullett's evidence and explained that it was led to suggest that the appellant was physically incapable of performing the acts alleged by the complainant at that time.[130]

[56] His Honour again discussed the preliminary complaint evidence. He read out the evidence of the complainant's husband and pointed out that it was inconsistent with the complainant's account and may adversely reflect on her credit.[131] He also read a portion of the evidence of the school counsellor and explained that defence counsel said this evidence was inconsistent with the complainant's evidence; it was not necessarily a complaint about sexual offences; and, if the jury thought it was, it may relate only to count 2 rather than to counts 2, 4, 6 and 7.

[57] The judge reminded the jury that the psychologist recorded that the complainant told her that the appellant, "Tried to have sex with me. I cried and he stopped." This was consistent with an attempt to have intercourse rather than having intercourse. It was also relevant to whether she consented as her evidence was that she was crying and said no but he continued. Defence counsel, the judge explained, submitted that was inconsistent with the complainant's account and reflected adversely on her credit.[132]

[58] Under s 620 *Criminal Code* the judge has the duty "to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make." As McHugh J observed in *Fingleton v The Queen*[133] this requires the court to identify the real issues in the case, the facts that are relevant to those issues and to explain how the law applies to those facts. It also requires the judge to put fairly before the jury the case which the accused person makes.[134] It is not necessary for a trial judge to put to the jury every argument put forward on behalf of the accused person.[135]

[59] The review I have undertaken of the judge's summing up makes clear that, when it is considered in its totality, it fairly placed the defence case before the jury, identified the central issue, namely the credibility of the complainant, and referred to the relevant facts and how the law applied to those facts. It was not necessary for the judge to repeat every inconsistency upon which the appellant relied. The summing up was fair and balanced. It highlighted the principal inconsistencies relied on by the appellant between the complainant's evidence and that of the preliminary complaint witnesses, together with her failure to complain to her parents or to the police when they attended her home shortly after the alleged commission of the offences. All specific directions as to inconsistencies which the appellant requested were given.

---

129 ARB 300.
130 ARB 300.
131 ARB 300 – 301.
132 ARB 302.
133 (2005) 227 CLR 166, 197.
134 (2005) 227 CLR 166, 197, [77] – [78]; *RPS v The Queen* (2000) 199 CLR 620, Gaudron ACJ, Gummow, Kirby and Hayne JJ; *R v Mogg* [2000] QCA 244; (2000) 112 A Crim R 417, [49] – [54]; *Maraache v R* [2013] NSWCCA 199, [68] – [72], *O'Rafferty v The Queen* [2014] ACTCA 35, [47] and [48].
135 *Maraache v R* [73]; *Domican v The Queen* [1992] HCA 13; (1992) 173 CLR 555, 560 – 561; *R v Meher* [2004] NSWCCA 355, [77]; *O'Rafferty v The Queen* [49].

The contention that the judge failed to adequately put the defence case is not made out.

[60] The appellant's contention that the Benchbook directions set out in [45] of these reasons should have been given is also not made out. The directions are contained in a heading in the Benchbook "Defendant giving Evidence." The appellant did not give evidence; he called evidence. The directions now sought could have been given but defence counsel at trial, who was also defence counsel in this appeal, did not seek those directions. When the judge's directions are considered as a whole, it is clear that the jury were clearly instructed that they could only convict the appellant if they were satisfied beyond reasonable doubt of the reliability of the complainant's evidence about each alleged offence. I am unpersuaded that in the circumstances of this case the failure to give those directions has resulted in a miscarriage of justice. It follows that this ground of appeal is not made out.

Should the judge have directed the jury as to s 24 *Criminal Code* in respect of counts 4 and 7?

[61] The appellant contended the judge erred in leaving honest and reasonable mistake of fact as to consent under s 24 *Criminal Code* to the jury only in relation to count 8; it should also have been left in respect of counts 4 and 7. Where the defence was left on count 8, the jury were left in doubt as to rape and convicted only of unlawful carnal knowledge of a girl under 16. Had the defence been left in respect of counts 4 and 7, the jury may well have acquitted the appellant of attempted rape on count 4 and rape on count 7 and convicted only on the lesser counts of attempted unlawful carnal knowledge of a girl under 16 and unlawful carnal knowledge of a girl under 16. The evidence that raised s 24 *Criminal Code* was psychologist, Sally Williams' evidence; the evidence that the complainant had worked at the appellant's factory over the Christmas holidays; and the evidence that she had a subsequent paid consensual sexual relationship with him after she turned 16.

[62] Ms Williams' evidence was that the complainant told her that Angela's father tried to have sex with her; she cried and he stopped. The preliminary complaint evidence was relevant only to credit; it was not evidence of the truth of the statement. The complainant's evidence was that she did not tell Ms Williams this and the appellant did not stop. This was not evidence of the appellant having an honest and reasonable belief that she was consenting. The fact that the complainant worked at the appellant's factory or that they had a consensual sexual relationship some years later was not evidence of a mistake on the appellant's part as to her consent to the acts charged as counts 4 and 7.

[63] The complainant's evidence was that while the appellant was committing count 2, which immediately preceded his commission of count 4, she "was just saying no. No. And…just sobbing."[136] The appellant told police that he had no sexual contact with the complainant until she was 18. There was therefore no evidence before the jury of the appellant holding an honest and reasonable mistake of fact as to consent in respect of count 4.

[64] As to count 7, the complainant's evidence was that she and the appellant were having sex in the normal missionary position while she was crying and saying no.

---

136 See [7] of these reasons.

On her evidence, there was no room for mistake as to consent. The appellant's account to police was that he had no sexual relationship with the complainant until she was 18. There was therefore no evidence before the jury to raise the issue of the appellant holding an honest and reasonable mistake of fact as to consent on count 7.

[65] It follows that the judge rightly held that s 24 was not raised in respect of counts 4 and 7. This ground of appeal is not made out.

The adequacy of the judge's directions regarding the appellant's interview with police

[66] The appellant contended that the trial judge erred in not directing the jury as to why the appellant's interview with police was led by the prosecution, how they should use it and how the defence said it should be used. If the interview was entirely self-serving it was inadmissible. The jury may have reasoned it was a false denial and treated it as a lie without the benefit of any directions as to lies.

[67] For obvious forensic reasons, the appellant did not object to the prosecution leading evidence of his interview with police. It was largely self-serving and undoubtedly helpful to the defence in that it placed the appellant's account before the jury without him having to give evidence on oath and be cross-examined. But it was admissible as the appellant accepted in it the complainant's account that he had employed her to clean his house when she was under 16 and that he therefore had the opportunity to commit the alleged offences. Other aspects of the interview were also admissible including the fact that he had asked his lawyer for advice as to whether he could have a sexual relationship with the complainant when she was under 16 and the fact that he later had a sexual relationship with her when she was 18. These matters tended to support the complainant's account in that they were capable of suggesting that he had an unhealthy sexual interest in her when she was under 16. It is true that the judge did not direct the jury that the interview could be used in this way but no such direction was sought and it would not have been a direction that favoured the appellant. Indeed, none of the directions the absence of which now constitute this ground of appeal were sought below by the appellant's experienced barrister, apparently for sound forensic reasons. The prosecution at trial did not suggest that the appellant's account to police was a lie from which the jury could infer his guilt. The appellant's counsel did not seek any direction about lies, apparently because he considered it would not assist his case. The judge twice directed the jury to read the transcript of the appellant's police interview. It is clear from the judge's directions that he encouraged the jury to read it so that they understood the appellant's very straightforward case, namely, that he did not have a sexual relationship with the complainant when she was under 16 and that her account was based on their consensual, paid, sexual relations after she had turned 18. The appellant has not demonstrated any miscarriage of justice arising from this ground of appeal.

The application to re-open the appeal, adduce further evidence and add a ground of appeal

[68] This appeal was originally heard on 17 February 2015 when the Court reserved its decision. On 25 March 2015, the appellant applied to re-open the appeal and adduce further evidence. At the hearing of that application on 14 April 2015, counsel for the appellant stated that if leave to re-open were granted, the appellant

would seek leave to amend the notice of appeal by adding a further ground of appeal, namely that there had been a miscarriage of justice in that he did not, at the trial, have the information contained in the affidavit of Steven John Pike, sworn 16 February 2015. Mr Pike's affidavit exhibited documents, including copies of notes and reports of psychiatrist, Dr John Chalk, and psychologist, Ms Wendy Mackay, concerning their consultations with and treatment of the complainant. Mr Pike's affidavit was exhibited to the affidavit of the appellant's solicitor, Craig Ian Newport, sworn 24 March 2015. The appellant also sought to lead evidence contained in statutory declarations from Matthew Webb[137] and Renee Webb.[138] The appellant contended that the material did not exist at the date of trial; it was relevant to the complainant's credibility; and there has been a miscarriage of justice by reason of his inability to lead that evidence at trial. The appellant tendered part of the complainant's police statement.[139] The respondent later provided the full statement.

[69] As the appellant's outline of argument and some of their further evidence was provided to the respondent only shortly before the hearing to re-open the appeal, the Court gave the respondent leave to file a written outline in response after the hearing. The respondent, in answer to the appellant's material, subsequently sought leave to adduce further evidence by way of affidavits from an officer in the Office of the Queensland Director of Public Prosecutions, Susan Therese Gillies, sworn 21 April 2015 and from the complainant, sworn 17 April 2015. The appellant then sought to lead evidence by way of a further affidavit from Mr Newport and an affidavit from a paralegal employed by the appellant's solicitor, Susan Mary Forrest, both sworn 11 May 2015. The most recent material in these applications is the appellant's reply submissions, filed on 12 May 2015.

Chronology

[70] On 25 August 2014, 10 days after the appellant was sentenced, the complainant's solicitors sent him, care of the Public Trustee, a copy of the complainant's Form 1, Notice of Claim Form for Damages under the *Personal Injuries Proceedings Act* 2002 (Qld). On 15 September this was personally served on him in prison and on 17 September 2014 his solicitor, Mr Newport, telephoned the complainant's solicitor advising that he had instructions to accept service.[140]

[71] On 4 February 2015, almost two weeks before the original appeal hearing, the complainant's solicitor sent a copy of reports from Dr Chalk and Ms Mackay and records relating to the complainant's counselling and assessment to the appellant's solicitors.[141] But Mr Newport did not become aware of Ms Mackay's report dated 12 November 2014 until 19 February 2015, two days after the appeal hearing.[142] Ms Webb signed her statutory declaration on 3 March 2015 and Mr Webb signed his statutory declaration on 11 March 2015. On 25 March 2015 the appellant filed his application to re-open the appeal, together with Mr Newport's affidavit sworn 24 March 2015.

The further evidence

---

137 Exhibit 1 in the application to reopen.
138 Exhibit 2 in the application to reopen.
139 Exhibit 3 in the application to reopen.
140 Affidavit of Steven John Pike sworn 16 February 2015, [13].
141 Above, [20].
142 Affidavit of Craig Ian Newport sworn 11 May 2015, [7].

[72] The parties emphasise the following aspects of the new evidence. Psychologist, Ms Mackay, interviewed the complainant over 11 sessions between 25 March and 11 November 2014. A file note dated 25 March 2014 recorded:

> "Last year or two. Alcohol: daily – bottle wine or 6 pack beer. Starting to think about when can I have a drink. Cut down last week to 2 – 3 days/ week. Weekends start at lunch. 1 doz beer full strength. Night wines or spirits. Starting to have blackouts. Craving alcohol. Family/friends noticed."[143]

[73] Her Australian Alcohol Screen (AUDIT) test achieved a score of 31. A scale of 20 or above indicates high risk from alcohol abuse. On a weekly basis over the last year she had been unable to remember what happened the night before because of her drinking. During the last year either she or someone else had been injured because of her drinking and others had been concerned about her drinking or suggested she cut down.[144] Ms Mackay determined that the complainant's alcohol use placed her at high risk of alcohol related problems and diagnosed her as having a mild alcohol use disorder.[145] The complainant reported to Ms Mackay when asked about risk-taking or harmful behaviour, that she consumed alcohol, "to point of blackouts".[146]

[74] In completing a clinician administered test[147] Scale for DSM-5 on 26 August 2014 in answer to the question "Do other people notice your behaviour? What do they say?" the complainant responded, "Yes others notice. They say 'come back to us [the complainant]'. Mainly husband." She also said that sometimes she missed a conversation and her memory seemed to be getting worse. In answer to the question "How long does it last?" she responded, "A few minutes in & out". She considered that she experienced pronounced disassociation.[148] In answer to a question as to whether she had taken risks or done things that might have caused her harm, she responded affirmatively. When asked for examples she said, "Alcohol consumption to point of blackouts. Usually self-harm by cutting, but not in past month." She described suffering "injuries – cuts, bruises found on self day after drinking. Lying to husband." She had taken those kinds of risks three times in the past month.[149]

[75] Ms Mackay did not discuss the complainant's account of the alleged sexual assaults until session 6 on 29 July 2014, after the jury had convicted the appellant. The only notes of Ms Mackay's dealing with the alleged offending before this Court are those relating to that session.[150] They recorded an occasion which was consistent with the complainant's evidence at trial.[151] They did not support the account of the offending recorded in Ms Mackay's report of 12 November 2014[152] which recorded Ms Mackay's summary of what the complainant told her about the offending. In a

---

143 Affidavit of Steven John Pike sworn 16 February 2015, Exhibit 7, 51; see also 57.
144 Above, 73.
145 Above, Exhibit 14, 191 – 192.
146 Affidavit of Steven John Pike, sworn 16 February 2015, 89.
147 Post-traumatic stress disorder.
148 Affidavit of Steven John Pike, sworn 16 February 2015, Exhibit 13, 94.
149 Above, 89.
150 Affidavit of Steven John Pike sworn 16 February 2015, Exhibit 7, 57 – 60.
151 Transcribed as Annexure A to the respondent's outline of argument in the application to re-open the appeal and adduce further evidence.
152 Affidavit of Steven John Pike sworn 16 February 2015, Exhibit 14, 185 – 186.

letter to the complainant's General Practitioner, Ms Mackay referred to "several years" of childhood sexual abuse.[153]

[76] Ms Mackay recorded in her report of 12 November 2014 that the complainant reported three assaults involving sexual intercourse during one month in 1999; two at the appellant's house in Nerang and one at his factory in Cleveland. The complainant reported that he gave her a vibrator when she was employed at his factory and he told her to "keep it and practise". The complainant told her that the appellant:

> "began grooming her when she was 13 years of age. For example, she reported that prior to the sexual assaults, [the appellant] told her he could buy her items and could help her buy her first car. He suggested that [the complainant] could be his secret girlfriend, and he could take her on business trips."[154]

The complainant reported that she struggled with intimacy[155] and had experienced other traumatic events in her life including:

> "Transportation accident (e.g. car accident, boat accident, train wreck, plane crash) … and assault with a weapon (e.g. being shot, stabbed, threatened with a knife, gun, bomb)."[156]

[77] Dr Chalk examined the complainant on 27 October 2014. In his report of 29 October 2014 he concluded that the complainant had complex post-traumatic stress disorder with associated significant features of borderline personality organisation but this was not his primary diagnosis.[157]

[78] On 6 November 2014 the complainant's lawyers asked him about her carbohydrate deficient transferrin level of three per cent which "indicates probable recent or ongoing excessive alcohol use despite the normal MCV and GGT results". Dr Chalk responded that the results were unremarkable and confirmed the history she gave and did not lead him to substantially alter his earlier report.[158]

[79] In the complainant's statement to police on 19 February 2013 she said that, when she was 14 or 15 (not 13), after the appellant had dropped Angela at the train station to return to boarding school, he drove the complainant to her home. On the way he offered to perform oral sex on her but she refused. He told her she could be his secret girlfriend, buy her a car and help her out with money. She could come on business trips with him and if she wanted extra money she could clean his house after school.

[80] Matthew Webb stated that he married Renee Webb in 2007 but they separated in February 2014. He first met the complainant in 2007. They commenced an 18 month intimate relationship in 2013. She told him that she would get damages from the appellant for some sexual assault he had committed against her. She said she wanted to remain in a longer term relationship with Mr Webb after he left his

---

153 Above, 105.
154 Affidavit of Steven John Pike, sworn 16 February 2015, Exhibit 14, 185.
155 Above, 195.
156 Affidavit of Steven John Pike, sworn 16 February 2015, Exhibit 14, 189.
157 Affidavit of Steven John Pike, sworn 16 February 2015, Exhibit 12, 177.
158 Affidavit of Steven John Pike, sworn 16 February 2015, Exhibit 13, 181.

wife. He did not consider the complainant was an alcoholic and had not seen any evidence of self-harming or scarring on her body.

[81] Renee Webb stated that she had known the complainant since 2007 and at that time regarded her as one of her closest female friends. In February 2015 she learnt that Matthew had been having a sexual relationship with the complainant since 2013. In March 2013 the complainant spoke about bringing charges against the appellant. She had previously had a paid relationship with him and was worried she might not be believed. She said when she received money from the court case against him she would like to go overseas and have plastic surgery.

[82] Ms Gillies' affidavit exhibited an email from the prosecutor at trial to the appellant's counsel attaching notes of a conference between the prosecutor and the complainant on 10 July 2014 shortly before the trial.[159] They included the statement that the complainant,

> "used to also work at the [appellant's] factory packing boxes 'for years' during school holidays."

[83] The complainant in her affidavit stated that she gave truthful evidence at the trial and believed that what she told Ms Mackay, about the appellant's sexual offending in 1999, was the same as her evidence at trial. She did not tell Ms Mackay that any of the appellant's offending in 1999 occurred at his factory. She understood that in 1999 the appellant's factory was at Nerang and only later moved to another location which she thought was at Loganholme. She only ever worked in the appellant's factory at Nerang, and did so over a number of school holidays, always with the appellant's daughter, Angela. The first time the appellant spoke to her about being his secret girlfriend and offering her a car, money and business trips was in 1999 when she was 14 years old. She did not think that she told Ms Mackay this conversation occurred when she was 13 years old.

[84] The appellant in reply sought leave to read two further affidavits. The first, from Susan Mary Forrest, a paralegal at the appellant's solicitor's firm sworn 11 May 2015, exhibited a covering letter from the complainant's solicitor's stating it attached five items relating to the complainant's personal injuries claim. The fifth item, Ms Mackay's report of 17 December 2014 was not included. Ms Forrest telephoned the complainant's solicitors and asked them to forward a copy. The complainant's solicitors forwarded a copy of Ms Mackay's report later that day. Ms Forrest placed that report on the electronic file for the appellant's personal injuries matter, not his criminal matter. She did not email it to the appellant's solicitor, Mr Newport. The second affidavit was from Mr Newport who stated that he did not become aware of Ms Mackay's report of 12 November 2014 until he received Mr Pike's affidavit on 19 February 2015. He has never seen a report from Ms Mackay dated 17 December 2014.

The appellant's contentions

[85] The appellant emphasised the complainant's account to Ms Mackay in her November 2014 report about an episode of sexual intercourse at the appellant's factory in Cleveland in 1999. No such episode was included in her statement to police or in her evidence at trial. Ms Mackay also recorded in her November 2014

---

159 Exhibit 3 in the hearing of the application to re-open the appeal on 14 April 2015.

report that the complainant began grooming her when she was 13 years old. In her statement to police and at trial, however, she was clear that this did not happen until she was 14 or 15 years old. The complainant's action for damages against the appellant was persuasive evidence of a motive for her to fabricate false evidence against him. The likelihood of her fabricating these allegations was strengthened by Mr Webb's evidence that during their intimate relationship she told him she would get damages from the appellant. The further evidence sought to be used strongly supported the defence case that the complainant had turned evidence about aspects of their lawful, consensual paid sexual relationship when she was over 16 into false testimony about fabricated sexual encounters when she was 14 or 15 years old.

[86] The appellant also emphasised the further evidence about the complainant's heavy consumption of alcohol. This has affected her memory and caused her to have blackouts. It was relevant to her reliability and credibility as a witness. Her credibility was also affected by her deception of her husband and her best friend in her affair with Mr Webb. This was inconsistent with her claim to Ms Mackay that she struggled with intimacy. Further, she told Ms Mackay she had experienced other traumatic events in her life, including some sort of accident and an assault with a weapon. These incidents may also have affected her ability to give credible and reliable evidence.

[87] The appellant argued that his case at trial was that he and the complainant had a lawful consensual paid sexual relationship after she turned 16. She has used those real experiences to fabricate false allegations against him about sexual conduct before she was 16. The case against him turned completely on the complainant's credibility. Although some material about the complainant's statements to Ms Mackay were obtained pre-trial, the full extent of it was unknown. The appellant's lawyers could not have obtained the fresh information with reasonable diligence prior to trial. Her claim to Ms Mackay of an entirely new episode of unlawful sexual offending at the Cleveland factory threw doubt on her account at trial. The new evidence was highly credible and primarily consisted of reports from health professionals. The jury were entitled to know, when considering the complainant's credit and reliability, that she was a heavy drinker to the point of blackouts; had experienced memory impairment; suffered from a mental disorder capable of being attributed to other traumatic incidents in her unhappy life; had lied to her husband and deceived her best friend; and had a financial motive to fabricate the allegations against the appellant.

[88] The appellant contended that the complainant's arguably false denial in her affidavit that she provided Ms Mackay with the information included in her report, was another matter which directly affected her credibility and supported the application to adduce further evidence, to set aside the convictions and to order a re-trial. Whether the jury found the complainant credible and reliable in light of the further evidence was a matter for a jury at a retrial. It was not relevant to the question of whether the Court should receive the fresh evidence, set aside the convictions and order a re-trial.

[89] Had this inconsistent evidence, together with the evidence about the complainant's character, behaviour, mental state and motive, been before the jury, when considered together with the other evidence at trial, including the inconsistencies with the preliminary complaint witnesses and the evidence of the defence witnesses, there was a significant possibility that a jury acting reasonably would have acquitted. It

followed, the appellant argued, that the appeal should be re-opened, the new evidence admitted, the appeal allowed, the convictions set aside and a new trial ordered.

Conclusion on the application to re-open the appeal, adduce further evidence and add a ground of appeal

[90] The community interests in the finality of litigation and the lawyers' duty to the court and to the administration of justice require parties to an appeal to do everything reasonably possible to ensure that all relevant issues and materials are presented to the appellate court before or at the hearing of the appeal. Appellate courts recognise, however, that circumstances may occasionally arise warranting the re-opening of an appeal. But this is only possible if the application to re-open is made and determined before the appellate court's final orders are pronounced and perfected and it is necessary to re-open it to prevent a miscarriage of justice: see *Burrell v The Queen*.[160] It is appropriate in this case to grant the application to re-open the appeal hearing so that the Court can consider the parties' further evidence and determine whether the applications to adduce it should be granted.

[91] The principle that litigants should be bound by the way they have conducted their litigation at trial and the public interest in the finality of litigation requires appellate courts to be cautious before receiving evidence not led at trial. An appellate court will receive evidence on appeal which was not led at trial where that evidence could not, with reasonable diligence have been produced by the appellant at trial; the evidence is credible or capable of belief; and there is a significant possibility, or it is likely, that a reasonable jury, considering the fresh evidence together with the evidence at trial, would have acquitted the appellant: *Gallagher v The Queen*;[161] *Mickelberg v The Queen*;[162] and *R v Main*.[163] Even where the further evidence was available at trial, an appellate court will receive it if, when combined with the evidence at trial, the court is satisfied that the conviction should be set aside to avoid a miscarriage of justice: *R v Katsidis; ex parte Attorney-General (Qld)*[164] and *R v VI*.[165]

[92] It is arguable that some aspects of the further evidence relied on by the appellant are not fresh in the legal sense. But for present purposes I am prepared to treat all the further evidence relied upon by the appellant as fresh evidence so that the more generous test for its admission applies to the appellant.

[93] The most concerning aspect of the fresh evidence is in Ms Mackay's report of 12 November 2014[166] where she stated that the complainant reported not just the two episodes of sexual assault in 1999 about which she told police and gave evidence at trial, but also a third episode of sexual assault at the appellant's factory in Cleveland in 1999. On the other hand, Ms Mackay's notes of 29 July 2014 recorded an account from the complainant which was broadly consistent with her statement to police and her evidence at trial. Similarly, the account recorded in Ms Mackay's notes when administering a post-traumatic stress disorder test were also broadly consistent with the complainant's evidence at trial.[167] The complainant has sworn that she did not tell Ms Mackay of a third episode at the Cleveland factory. The most plausible conclusion is that Ms Mackay erroneously summarised in her November

---

160 (2008) 238 CLR 218, Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ, 226 [27].
161 (1986) 160 CLR 392, 397, 399, 407.
162 (1989) 167 CLR 259, 273, 275, 292 and 301 – 302.
163 [1999] QCA 148.
164 [2005] QCA 229, [2] – [4], [11] – [19] and [36].
165 [2013] QCA 218, [66].
166 Affidavit of Steven John Pike, sworn 16 February 2015, Exhibit 14, 185.
167 Above, 81.

2014 report her recollection of the complainant's earlier account to her. Ms Mackay's notes are the better evidence.

[94] In her November 2014 report, Ms Mackay also recorded that the complainant said the appellant's grooming of her began when she was 13 whereas she told police this began when she was 14. The complainant has sworn that she did not tell Ms Mackay this. The most likely explanation is that Ms Mackay was mistaken on this issue.

[95] Ms Mackay's reference to "several years" of childhood sexual abuse was in a letter to the complainant's GP. In context, this is probably loose language intended to incorporate the whole sexual relationship between the complainant from when she was aged 14 or 15 until she was about 19 years old.

[96] The appellant also contended that Ms Mackay's November 2014 report recorded statements by the complainant about the appellant's factory which were inconsistent with her cross-examination at trial. The complainant gave evidence in chief at trial that she worked for the appellant in his factory with Angela in the school holidays. The cross-examination included:

> "You told us yesterday that there was – at some stage, you worked in [the appellant's] factory?---Yes.
>
> I'm going to suggest to you that you in fact worked at his factory on two occasions that's two weekends and they were two weekends in December of 1999?--- I believe so. I thought it was school holidays.
>
> School holidays in 1999?---Yes.
>
> And you and Angela worked there?---Yes.
>
> And effectively it was to earn some money to buy Christmas presents?--- Yes."[168]

[97] It was not clear from the cross-examination that the appellant's counsel was suggesting that these were the only occasions that the complainant worked at the appellant's factory. When this cross-examination is considered together with the complainant's evidence in chief and the prosecutor's notes of his conference with the complainant shortly before trial on 10 July 2014 (provided to the appellant before trial) this is not necessarily inconsistent with Ms Mackay's account that the complainant said the appellant had employed her from the age of 13.

[98] Whether the appellant's factory, after the alleged offending, was at Cleveland or Loganlea is irrelevant. The complainant swears she did not tell Ms Mackay the factory was at Cleveland. Ms Mackay's references to the appellant's factory being at Cleveland in 1999 seems likely to have arisen through some miscommunication.

[99] The evidence that the complainant was motivated to sue the appellant is of limited assistance to him. If her allegations are true, she was entitled to sue him. A reasonable jury would not be inclined to doubt her credit merely because she elected to pursue her legal rights. This did not add any significant weight to the appellant's contentions, thoroughly pursued at trial, that the complainant had fabricated the evidence of the appellant's childhood sexual abuse by reference to their later lawful, paid consensual sexual relationship. It is not unusual in cases of this kind for an accused

---

168 T2-56.

person's counsel to cross-examine a complainant about whether she intends to claim damages from the accused person and to raise this in the jury address as a possible motive for making false allegations. The appellant could have but did not explore that line of cross-examination at trial. This aspect of the fresh evidence does not significantly damage her credit and nor is it compelling evidence of a motive to give false testimony, especially when this issue could have been but was not explored at trial. Her statement to Mr Webb that she would get damages from the appellant for sexual assault is not evidence that she intended to fabricate allegations to obtain money from the appellant.

[100] The fresh evidence about the complainant's past heavy consumption of alcohol and its possible effect on her memory are also of limited weight. It does not directly suggest that the reliability of her testimony about the appellant's offending was diminished. The appellant had copies prior to trial of some of Ms Mackay's notes about her consultations with the complainant and cross-examined her about this. She agreed that she sometimes saw "visions, like angels … [during] pot and speed."[169] Further cross-examination based on the more extensive fresh material could prove harmful to the appellant's case if, as may be likely, the complainant contended her present excessive alcohol consumption was caused by the appellant's offending.

[101] The further evidence about the complainant's mental disorders leading her to engage in past self-harm and that she suffers from a severe post-traumatic stress disorder with some degree of borderline personality disorder, does not greatly assist the appellant. There is no evidence that these matters make her a person likely to give false evidence about the alleged offences. On the contrary, the fresh evidence suggests that her present mental issues are directly linked to the appellant's offending.

[102] The appellant emphasised that Ms Mackay's report recorded that the complainant struggled with intimacy with her husband, implicitly because of this offending. This, the appellant contended, was contradicted by the statutory declarations of Mr and Mrs Webb. But the fact that the complainant may have been intimate during an 18 month relationship with Mr Webb is not inconsistent with her struggling with intimacy with her husband. In any case, it seems unlikely that a trial judge would allow the evidence of the complainant's sexual relations with Mr Webb to be led at any retrial: see s 4 *Criminal Law(Sexual Offences) Act* 1978 (Qld). If it were, it is likely that a jury would conclude that her unstable relationship with her husband stemmed from the appellant's sexual offending against her when she was a child.

[103] Similarly, her statements to her psychologist about other traumatic events in her life have no particular relevance and the evidence before this Court does not suggest that they had a negative impact on her credibility as a witness.

[104] None of the evidence upon which the appellant seeks to rely, either individually or in combination, establishes that it is likely that the appellant gave false testimony at trial. At best for the appellant, the further evidence could be used as a tool in cross-examining her as to her credit. His counsel thoroughly undertook that course at trial. After carefully considering all the evidence upon which the appellant relies, individually and in combination, together with the evidence at trial, I am unpersuaded that there is a significant possibility, or it is likely, that a reasonable jury considering the further evidence together with the evidence at trial would have acquitted the appellant. The fresh evidence does not demonstrate there has been a

---

169 T1-41 – T1-44 and T2-143.

miscarriage of justice caused by the unavailability to the appellant of the material exhibited to Mr Pike's affidavit. It follows that the application to adduce further evidence should be refused and the proposed additional ground of appeal is not made out.

Summary

[105] The appellant has not made out any of his grounds of appeal against conviction. The application to re-open the hearing of the appeal should be granted but the applications to adduce further evidence and to add a further ground of appeal should be refused and the appeal against conviction dismissed.

[106] I would make the following orders:

1. The application to re-open the hearing of the appeal is granted.
2. The applications to adduce further evidence and to add a further ground of appeal are refused.
3. The appeal against conviction is dismissed.

[107] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

[108] **JACKSON J:** I have had the advantage of considering McMurdo P's comprehensive analysis of the appellant's many grounds of appeal. I agree with her Honour's reasons and the orders proposed.