SUPREME COURT OF QUEENSLAND

CITATION:	*R v LQ* [2005] QCA 356
PARTIES:	**R** **v** **LQ** (appellant/applicant)
FILE NO/S:	CA No 139 of 2005 DC No 181 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2005
JUDGES:	McMurdo P, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, McMurdo P and Keane JA concurring as to the orders made, Jerrard JA dissenting in part
ORDER:	**1. Appeal against conviction on all counts dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – POWER TO DISMISS APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – PARTICULAR MATTERS – appellant convicted after a trial of three counts of indecent dealing with his 14 year old biological daughter – defence counsel objected to the prosecution's decision not to call as a witness a friend of the complainant to whom she had made relevant statements regarding the appellant's conduct – appellant contended that absence of this witness denied the appellant a possible advantage in proving the complainant had made a prior inconsistent statement regarding matters in issue at trial – complainant's statement to potential witness was not necessarily inconsistent with her evidence generally – whether the prosecution's failure to call complainant's friend as a witness resulted in a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE

OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – complainant gave consistent accounts of the conduct constituting the three counts of indecent dealing in both a police interview and the first cross-examination admitted as pre-recorded evidence – complainant was subsequently cross-examined a second time by new defence barrister – defence counsel used second cross-examination to put the appellant's case to the complainant – complainant agreed with some parts of appellant's case but denied other parts – defence counsel did not put to complainant directly the appellant's case regarding count 3 in the second cross-examination – this had been previously put to and denied by the complainant during the first cross-examination – re-examination of complainant after second cross-examination seemingly resulted in an inconsistency in complainant's evidence regarding count 3 – whether on the whole of the evidence it was open to the jury to find the appellant guilty of all three counts

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – appellant sentenced to a head sentence of two years and six months imprisonment with two concurrent terms of 12 months imprisonment – appellant's conduct involved breach of parental trust – no mitigation available by way of guilty plea or demonstrated remorse – appellant had impressive military record – whether sentence was manifestly excessive in the circumstances

M v The Queen (1994) 181 CLR 487, cited
MFA v The Queen [2002] HCA 53; (2002) 213 CLR 606, cited

COUNSEL: The appellant/applicant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of Jerrard JA so that I need only repeat those necessary to explain my reasons for reaching in part a different conclusion. I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

[2] I agree with Jerrard JA's reasons for concluding that the appellant's grounds of appeal against conviction on counts 1 and 2 should be dismissed and his application for leave to appeal against sentence on those counts should be refused. I also agree

with the reasons of Jerrard JA and Keane JA for rejecting the appellant's contention that the prosecution should have called the witness CJ.

[3] As Jerrard JA explains, the complainant child in her police interview on 2 April 2003 made a complaint, which was evidence at trial, that the appellant on 12 March 2003, immediately after committing count 2 in the bathroom, committed count 3 when he took her, naked from the waist, into his bedroom, pushed her onto the bed, got on top of her with his shorts removed and moved up and down. Later when her mother returned home she made a general complaint to her mother.

[4] On 31 March 2003 she gave an account to the doctor who examined her consistent with the appellant having committed count 3.

[5] During cross-examination in her pre-recorded evidence taken under Pt 2 Div 4A *Evidence Act* 1977 (Qld) on 23 August 2004 she maintained her account of the events relied on by the prosecution as constituting count 3. She specifically disavowed the suggestion put to her in cross-examination that the appellant did not commit count 3.

[6] It seems that some time after the complainant's evidence was video-recorded on 23 August 2004 before the first judge, the appellant came to be represented by a different barrister who also subsequently represented him at trial. The new barrister considered it prudent to put further matters to the complainant child in cross-examination. As a result, the complainant was further cross-examined by the new counsel, again by way of closed circuit television. This further evidence was pre-recorded on 14 February 2005 before a second judge. The prosecutor explained to the judge that, because there had been some earlier pre-recording of evidence, this further pre-recorded evidence was "on a limited basis". The questioning by the appellant's new barrister largely involved putting to the complainant the appellant's version of events given to police in his record of interview of 27 April 2003. The appellant's barrister suggested to her that the appellant was a strict disciplinarian as to cleanliness and personal hygiene and that on 12 March 2003 he wiped her genital area with a flannel in the bathroom and then threw her onto her parents' bed in the bedroom. The complainant denied this sequence of events. She agreed the episode with the flannel occurred but in the bedroom after she was thrown onto the bed, not earlier in the bathroom. The barrister did not directly put to her that the appellant did not lie on top of her with his pants and her skirt and underpants off and move up and down, probably because this had already been put to and denied by the complainant in the earlier pre-recorded evidence in August 2004.

[7] The re-examination confused rather than clarified matters. The prosecutor asked:

> "Where was your father when he was wiping you in the bedroom? --
> He was standing at the side of the bed.
> And was that the case for the entire time that you were in the bedroom? --
> Yes."

[8] Like Jerrard and Keane JJA, I have watched the relevant parts of the complainant's cross-examination and re-examination recorded on 14 February 2005. She was 16 years old at the time and was describing events which occurred almost two years earlier when she was 14 years old. She impressed as a quiet, shy young woman

who did not have a quick wit or sharp intellect. She appeared to listen to the questions asked and to conscientiously attempt to answer responsively.

[9] The appellant's trial commenced in May 2005 before a third judge. The potential inconsistency between her evidence recorded in February 2005, especially in the re-examination, and her earlier versions was an issue at trial. In his summing up to the jury his Honour quoted the passage in re-examination set out above and noted:

> "Now, it is unfortunate perhaps that that was not taken further to be clarified. On the face of it if you read that question and answer literally it is inconsistent with the complainant's evidence, that something happened in the course of which the accused got on top of her while she was on the bed. It is a question of whether that was what the complainant was really intending to say at that stage when she was asked [sic] question and gave that answer. That is a matter for you to make up your own mind, and also it is a matter for you to consider in determining just how reliable the evidence of the complainant really is."

[10] Later, while reminding the jury of the defence case, his Honour referred to counsel's submission that there were serious difficulties with the complainant's evidence so that the jury could not be satisfied of the complainant's guilt beyond reasonable doubt.

[11] Ultimately the resolution of the issue, as to whether in her re-examination in February 2005 the complainant was resiling from her allegations constituting count 3 or was merely intending to say that the appellant was standing beside the bed the entire time whilst he was wiping her with the flannel, was a question for the jury. The guilty verdict on count 3 indicates that the jury concluded that the complainant when further cross-examined in February 2005 was confused in her answers in re-examination and was not departing from her previous evidence, that the appellant had pushed her onto his bed and, with his shorts and her skirt and underpants removed, lay on top of her and moved up and down. That view was open on the evidence. Having reviewed the whole of the evidence, my assessment of the complainant's evidence coincides with that of the jury. It follows that, in my view, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the applicant indecently dealt with the complainant as particularised in count 3: *MFA v The Queen*.[1]

[12] The appellant's conduct towards the complainant was a brutish breach of parental trust towards a vulnerable adolescent. He did not have the mitigating factor which often exists in cases of this type of an early plea of guilty, co-operation with the administration of justice and demonstrated remorse. The victim impact statement suggests the offences have had a very detrimental effect on the complainant. Despite the appellant's impressive military record, and his lack of prior convictions for like offences, the sentence of two years and six months imprisonment was within a sound exercise of discretion.

[13] The appeal against conviction on all counts should be dismissed and the application for leave to appeal against sentence refused.

---

1 (2002) 213 CLR 606, [25].

[14] **JERRARD JA:** On 9 May 2005 LQ was convicted after a trial of three counts of having unlawfully and indecently dealt with AL, a child under the age of 16 years and who was his lineal descendant. On 10 May 2005 LQ was sentenced to 12 months imprisonment on the first two counts, and to two years and six months imprisonment on the third, all sentences to be served concurrently. The learned judge also ordered pursuant to Part 3A of the *Penalties and Sentences Act* 1992 (Qld) that LQ not have contact with AL for a period of two years after the day on which his term of imprisonment ended. LQ has appealed against his conviction, and seeks leave to appeal it, pursuant to s 668D(1)(a) and (b) of the *Criminal Code*; he also seeks leave pursuant to 668D(1)(c) to appeal against his sentence.

[15] LQ's grounds of appeal against conviction which he wanted to argue were:

- the prosecutor wrongly decided not to call the (potential) witness CJ;
- a miscarriage of justice resulted from the decision not to call CJ;
- the verdict is "unsafe and unsatisfactory", which should be understood as a complaint that the verdict is unreasonable or cannot be supported having regard to the evidence.[2]

The complaints of indecent dealing

[16] The three offences are alleged to have occurred, with respect to count 1, on 21 February 2003 in a provincial city, and with respect to counts 2 and 3, on 12 March 2003 in that city. The matter complained of came to light when LT, AL's mother who was then married to LQ, AL's father, returned from an evening walk on LT's birthday, 12 March 2003. She saw that LQ was in AL's room playing on a Playstation, and AL was in the shower. When AL emerged, LT noticed AL was very upset and in tears, and AL said words to the effect:

> "Daddy tried something. It's all my fault. I'm in trouble."

She then ran onto the veranda and cried. LT went into AL's room and spoke to LQ, asking him what he had done to AL. LQ said he had done nothing, and then said words to the effect "I smelt her yeast"; "I didn't do anything".

[17] LT attempted to sort the matter out, and called AL into the kitchen, where LT questioned LQ further about what had happened. LQ then said that he had smelt a yeast infection (apparently on AL), which he had smelt in the kitchen, and he had told AL to have a shower. He had then wiped her between the legs with a towel. LT said that it was wrong to do that, and he should not have done it, and LQ said that he was sorry and that he was wrong. LT then told AL to go and get changed, after having calmed her down. LT latter told LQ that if AL was hurt in any way, LT would tell the police. LQ's response demonstrated anger on his part, and LQ said to "leave it alone".

[18] LT did not suggest in her evidence that AL had corrected or challenged LQ's account of what had happened. A quite different picture emerged when AL was taken by her mother to see a doctor on 31 March 2003. The doctor's evidence was that AL described LQ taking AL into the bathroom, taking off his shorts and her skirt, and making AL take off her underpants; LQ then sat on the edge of the bath

---

[2] See s 668E(1) of the *Criminal Code,* and *MFA v R (*2002) 193 ALR 184 at [25] and [55] – [59]

and made AL sit on his lap. AL was unsure whether he touched her genital area or tried to insert his penis at that time, and a few minutes later he took AL into the bedroom and pushed her onto the bed, where he lay on top of her and attempted to have vaginal intercourse. AL asked him to stop and tried to wriggle out from underneath him. After some perhaps 10 minutes LQ stopped, and told AL to have a shower. AL, who had no sexual experience, was a little uncertain as to what had actually happened. A subsequent genital examination conducted on 2 June 2003 showed no abnormality, an intact hymen, and no obvious scarring. The doctor was not clear as to whether AL had described experiencing pain during the apparently attempted intercourse.

[19] LT was uncertain in her cross-examination when she had first heard those further and different details from AL as to what occurred on 12 March 2003, but they certainly were not revealed before 12 March 2003. LT agreed in cross-examination that she had sworn in April 2005 – apparently either the date of the committal proceedings or the date of an earlier trial – that until she had taken AL to see that doctor, AL had said nothing about any earlier incident occurring in February 2003, and LT then confirmed in cross-examination that she was not told any of the matters that constituted the three counts before the jury until after the visit to the doctor.

The complainant's account to the police

[20] AL was interviewed by police on 2 April 2003, and in that interview did provide details upon which the prosecution relied for the three counts. Regarding count 1, occurring on 21 February 2003, AL told the police that on a date on which there had been a science experiment conducted at her school, in which an eyeball was dissected – and it was admitted at the trial that that date was 21 February – LQ had taken her to a downstairs toilet in the home, locked her in it with the light off, pulled her skirt down and his shorts, and told her to sit on his lap. She wriggled, but he held her tighter, and she told him about the experiment with the eye ball and how cutting it up had made her feel sick. He then let her go.

[21] In response to questions, she gave further details. These were that he had taken her downstairs and told her that she had some clothes on the floor, and told her to pick them up. He then took her into the toilet area, told her she had to sweep it out, then pulled down her skirt and his shorts. He pulled her down onto his lap with her facing away from him, and she felt scared.

[22] Counts 2 and 3 happened on her mother's birthday. Her description of those to the police was that on that birthday, LQ took her into the bathroom, pulled her clothes off, sat on the edge of the bath and made her sit on his lap (count 2), then took her into the bedroom, pushed her onto the bed, and got on top of her (count 3). He then told her to have a shower, which she did, and then when her mother got home AL told her mother what had happened. Later, in the interview, when questioned further, she said that her father had sat on the railing of a screen in the bathroom, having removed his shorts when she was facing away from him (she knew he removed them because she heard them "go down"), and had taken off her school uniform. He made her sit on his lap and she felt uncomfortable. She said so, and he then took her into the bedroom, and got on top of her. She tried to wriggle out from underneath him but it was difficult. He was wearing only a T-shirt; on her description to the police she was probably naked. She lay on her back with him on top of her, and he moved up and down. She did not see her father's groin area

because she was looking at the ceiling. In answer to other questions, she said she had no idea what happened to a male's penis, and did not want to know; she gave the same answer when asked if she knew how people had sex. One police officer then explained to her how that happened, in the very basic terms that "sex is where a man's penis enters the woman's vagina"; and when asked whether anything like that happened between herself and LQ, AL said "I think so".

[23] She could not explain why she thought that, but did say that LQ had spread her legs, which she had wanted left closed. She thought he had touched her groin area with his hand, but described that belief as "just a wild guess". She neither touched nor saw his penis, and recalled that he had told her to have a shower, because he said that she smelt. When her mother came home she told her mother that "I copped what she copped before", a remark left unexplained.

[24] The description AL gave to the police of the incidents forming counts 2 and 3 on 12 March 2003 was consistent with the description given earlier to the doctor, which the doctor had paraphrased as AL saying that her father had attempted to have sexual intercourse with her. That is a reasonable construction of what AL said about count 3 to the police on 2 April 2003, three days after the visit to the doctor, although AL did not express it herself in those terms to those police officers. On her account she was rather innocently unaware of just what was happening.

The appellant's version to the police

[25] LQ was then interviewed by police on 27 April 2003. The description of the 12 March 2003 events was that that evening AL had come into the house with a strong body odour, and had disobeyed LQ's instructions to have a shower. LQ had told her to do that again, then grabbed her by the arm, and pushed her into the bathroom. She got undressed in it without shutting the door, and LQ could see from outside the bathroom that AL had a heat rash on her back, down her buttocks, and on her legs and thighs. He then went into the bathroom and sat on the edge of the bath, wiped AL's groin with a flannel towel, and showed "some white pussy stuff that you get from heat rash" to AL, remarking that "That's what you get for not washing". AL started to cry, and then walked out of the bathroom. LQ pursued her, demanding to know why she was not having a shower, and dragged her into the parents' bedroom and threw her on the bed. He then walked out. When his wife came home and subsequently asked him what happened, he told her what he had told the police. To them he added that:

> "Yeah, I screwed up. I admit it, I screwed up. I touched AL wrong – I shouldn't have."

[26] In answer to other questions, he said that he was angry with AL because when she came home "She stank", and that "The whole house stank, it hadn't been cleaned." He also said that what he smelt was a "yeasty type bacteria – you know those really yeasty smells?" He added that when he first entered the bathroom he told AL that she had a rash, and at that time she was wearing only a towel. The piece of flannel with which he had wiped AL between her legs had "yellow gunky stuff" on it after he had done that, which "smelt feral".

[27] He explained his dragging her into his bedroom and throwing her on the bed as being because he was "too angry, too annoyed, upset", and that he could not

remember "that part totally clearly". He agreed she may have been naked when thrown onto the bed.

[28] The police officers then put to him her account of what happened on 21 February 2003, and he conceded having taken her downstairs and having told her to "clean up the bloody laundry area" a "couple of times". He neither distinctly admitted nor distinctly denied her further description of that event. When the officers put to him her account of the 12 March 2003 incidents, his response (apparently restricted to the count 3 incident) was:

> "No, (indistinct) I was still wearing my shorts. I was wearing my shorts. I don't …didn't lay on her….never nothing like that".

[29] AL had been interviewed twice by the police, once on 2 April 2003 and once on 19 April 2003. The learned trial judge excluded the second video recording, also made pursuant to s 93A of the *Evidence Act* 1977 (Qld), because the judge considered that in substance it merely reproduced the allegations made on the earlier tape. Accepting that description of its contents, it is quite understandable that LQ was charged on the account AL had given in her interview on 2 April 2003, which was consistent as to the events of 12 March 2003 with her account to the doctor on 31 March 2003, and confirmed in its general outline by what LQ himself admitted, save that he either denied or did not admit any intentionally indecent conduct on any occasion.

The video-recorded evidence

[30] AL's next description of events was given in video recorded evidence taken on 28 August 2004 before a District Court judge, recorded pursuant to Part 2 Division 4A of the *Evidence Act* 1977 (Qld). That evidence consisted almost entirely of cross-examination in which AL said about the incident on 21 February 2003 that she had been wearing a skirt and top, and LQ had been wearing shorts and a T-shirt. LQ had told her that she had to go downstairs and pick up all the clothes that were on the floor and put them on a mattress which was downstairs, and he had then taken her into the toilet area and told her to sweep that out. Then he took her into it and locked the door. There was no light and he pulled down firstly her skirt when she was facing away from him, and then his shorts, which she heard fall down. He then sat on the toilet seat and pulled her by the waist onto his lap. When she said that she had an experiment due in, he let her go. She then ran back upstairs and went back to her laptop to work. That account was generally consistent in its details with what she had told the police well over a year earlier.

[31] Regarding 12 March 2003, she said in cross-examination had been working on her laptop when called to the bathroom, and had subsequently been dragged by her wrist to the bedroom and thrown on the bed. At that stage she had no clothes on, although her father still had his T-shirt on. Earlier, in the bathroom, he had sat on the edge of the bath and pulled her onto his lap, and it was after that that he threw her onto the bed and got on top of her. She said that she had wriggled, and he had stopped and told her to have a shower. That account too was consistent with what she told the police. She also said in cross-examination that "it" had happened to a friend of hers, apparently the potential witness CJ, and she had told that friend about the events at school. She had also told another friend, W.

[32] The cross-examiner put to her that the incident she described happening in the downstairs toilet on 21 February 2003 had not happened, and AL disagreed with that suggestion; the cross-examiner also put to her there had been no incident as she described which occurred on her mother's birthday, and AL disagreed with that too.

[33] That video recorded cross-examination presented an account consistent with AL's complaint to the police, and made a case appropriate for trial on the three counts charged. However on 14 February 2005 there was a second video recorded cross-examination of AL, conducted before a different District Court judge and by a different counsel, in which LQ's account to the police was specifically put to AL. In that cross-examination she agreed with a good deal of his version. She agreed her father had told her in March that she had a bad body odour, and told her to have a shower, that she had not done so immediately because she had some homework that she had to complete, and she had ignored what he said; he had become upset and very angry and grabbed her by the arm and pushed her into the bathroom, demanding she have a shower. She then undressed, and her father came into the bathroom, and was "going crook" at her about a heat rash which she did then have on her legs, back and bottom. She agreed her father seized a flannel or hand towel, and she said he sat down on the edge of the bath and pulled her onto his lap. She disagreed that he then wiped her with the hand towel, saying that "He did that in the bedroom"; and insisted that he sat down on the edge of the bath first, then pulled her onto his lap by her waist.

[34] She described his pulling her by the arm when she attempted to leave the bathroom without having had a shower, taking her to her parents' bedroom and throwing her on the bed, and on her evidence in that cross-examination he then wiped her between her legs with a hand towel. She agreed that at that time he was "going crook" at her about how she smelt.

[35] Regarding 21 February 2003, she agreed she had been asked to clean the downstairs toilet, and had not done as asked, and that her father had then got angry with her; she had been taken downstairs to the toilet area and LQ demanded she clean it. It was put that "That's what happened on the 21st of February 2003, isn't it?" and she replied "Yes, it was". No further questions were asked, although in re-examination the Crown established regarding count 3 that LQ was standing at the side of the bed when he wiped AL between the legs with the cloth, and that was the case for the entire time that she was in the bedroom.

[36] That account in February 2005 was quite inconsistent in significant ways with all that AL had said before. Certainly she still described being pulled onto her father's lap in the bathroom on 12 March 2003, but what she described happening in the bedroom did not include his even being on the bed, let alone lying on top of her; and she confirmed the description he had given on 12 March 2003 in the kitchen in her presence when he said he had wiped her between the legs, and which he had repeated to the police. Whether that happened as he said in the bathroom, or as she said in the bedroom, it was an intrusive, offensive, and a particularly stupid act; but in my opinion, applying the test from *M v R* (1994) 181 CLR 487 at 493, on the whole of the evidence it was not open to the jury to be satisfied beyond reasonable that that touching in the bedroom – count 3 – as described by AL in February 2005 constituted an occasion of his unlawfully and indecently dealing with AL. I am also satisfied it was not open to the jury to be satisfied any other touching had happened in the bedroom. AL's answers in re-examination in February 2005 excluded that

possibility. The video recording shows that the questions were not hurried, and there was often a small break between an answer and the next question; AL gave responsive answers and volunteered information when she disagreed with the question. Her answers meant her father had been standing beside the bed the whole time she was on it. There was no basis I can discern on which the jury could prefer beyond reasonable doubt AL's earlier, admittedly consistent, versions of the count 3 events over the February 2005 version of count 3, which was generally consistent with LQ's version to his wife and the police. I would allow the appeal against conviction on that count.

[37] Regarding count 1, the cross-examiner did not suggest in February 2005 that what AL had said on earlier occasions about being forced to sit upon her father's lap in the toilet, when her skirt and his shorts had both been removed, was untrue, and accordingly that allegation still remained for the jury's consideration, without any internal contradiction. Likewise AL insisted even on the occasion of 14 February 2005 that she had been made to sit on her father's lap in the bathroom on 12 March 2003, and by necessary inference she was unclothed at the time. I consider that it was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that LQ was guilty of having unlawfully and indecently dealing with AL on the occasions described which constituted each of counts 1 and 2, and that convictions on those counts are not necessarily inconsistent with an acquittal on count 3. That is because I am satisfied there was no sufficient evidence of indecent dealing in the bedroom, but sufficient of that having happened in the toilet downstairs and the bathroom upstairs on the occasions of counts 1 and 2 respectively.

[38] The fact that the potential witness CJ was not called did not deprive LQ of any chance, otherwise open, of an acquittal on any count. CJ's evidence, if called and if consistent with an earlier account, would have been that AL made a (preliminary)[3] complaint to CJ to the effect that LQ had "raped her", or that "Dad put his penis in my vagina" and it "hurt when it was inside me". The hoped-for benefit to LQ of this evidence from CJ was that AL did not say, either to the doctor or the police, or in either cross-examination, that that had happened; at least not in clear terms. But she suggested to both the doctor and the police that it may have, and was asked nothing about that by either cross-examiner; and was not asked by either what she told CJ, or whether it was true. Evidence from CJ of a complaint of penetration was more likely to harm LQ in his defence, by showing consistency in a belief there was penetration, than to help him by showing a false accusation.

[39] Accordingly, I would allow the appeal in respect of the conviction on count 3 and set that conviction aside, but dismiss it in respect of the convictions on counts 1 and 2. The sentences imposed for those counts were concurrent terms of 12 months imprisonment on each, and I was not persuaded by the argument that those terms were manifestly excessive after the trial. Accordingly, I would dismiss the application for leave to appeal against the two sentences on those counts.

[40] **KEANE JA:** I have had the advantage of reading the reasons of McMurdo P and Jerrard JA. I gratefully adopt the summary by Jerrard JA of the issues which arise on the appeal and of the evidence given at the trial. On that basis, I turn to address the arguments advanced by the appellant that there was a miscarriage of justice by

---

[3] The term appears in s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld)

reason of the failure of the Crown Prosecutor to call the complainant's friend CJ as a witness in the case or, alternatively, that the verdict of the jury was unreasonable.

[41] When the names of intended witnesses were read out by the learned Crown Prosecutor at the commencement of the trial, it became apparent that the Crown did not propose to call CJ.

[42] Counsel for the appellant immediately protested at the evident intention of the prosecution not to call CJ. It seems from what the appellant's counsel said that the only evidence which CJ might have given would have related to the terms of AL's complaint to CJ about the conduct of the appellant in relation to count 3. The appellant's counsel expected that CJ would give evidence that the terms of AL's complaint to her were that the appellant had "raped" her, that he "put his penis in [her] vagina" and that "it hurt when it was inside [her]".

[43] It is well established that a decision by a Crown Prosecutor not to adduce evidence available to the Crown will only constitute a ground for setting a conviction aside if, when viewed in the context of the trial, it gives rise to a miscarriage of justice.[4]

[44] In the present case, the absence of CJ as a witness meant that the appellant was denied the possible advantage of having the jury hear evidence of a prior inconsistent statement by AL as to matters in issue in the trial. In my view, the extent of any such advantage to the appellant is far from clear. AL claimed to be relatively ignorant about matters of sex; she had, after all, only just turned 14 years of age when the matters she complained of occurred. Further, AL's own evidence about what the appellant did to her while allegedly lying on top of her in his bedroom on 12 March 2003 was not so clear as to give rise to a stark inconsistency between her evidence and the terms of the complaint by her to CJ. Further, evidence of another prompt complaint by AL about the appellant's conduct may have been taken by the jury as supporting her credibility generally.

[45] In these circumstances, I am unable to conclude that the Crown's decision not to call CJ was apt to deprive the appellant of a fair chance of acquittal so as to give rise to a miscarriage of justice.

[46] As to the issue of whether the verdict of the jury was unreasonable, I agree with the reasons and conclusion of McMurdo P. I should explain why I have come to that view.

[47] The necessary starting point for my consideration of this issue is the decision of the High Court in *M v The Queen*.[5] In that case, Mason CJ, Deane, Dawson and Toohey JJ (with whom Gaudron J agreed on this point) said:[6]

> "Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as 'unjust or unsafe' (See *Davies and Cody v The King* (1937) 57 CLR 170 at p 180) or 'dangerous or unsafe' (See *Ratten v The*

---

4 See *Apostilides v The Queen* (1984) 154 CLR 563 at 575; *R v Cherry* [2004] QCA 328; CA No 380 of 2002, 10 September 2004 at [112].

5 (1994) 181 CLR 487.

6 (1994) 181 CLR 487 at 492 - 493 (citations footnoted in original).

Queen (1974) 131 CLR at p 515). In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict (See *Raspor v The Queen* (1958) 99 CLR 346 at pp 350 - 351; *Plomp v The Queen* (1963) 110 CLR 234 at pp 246, 250). Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence (*Morris v The Queen* (1987) 163 CLR 454) and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand' (See *Hayes v The Queen* (1973) 47 ALJR 603 at p 604). But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be 'unreasonable' or incapable of being 'supported having regard to the evidence'. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside. In speaking of the *Criminal Appeal Act* in *Hargan v The King*, Isaacs J said ((1919) 27 CLR 13 at p 23):

> 'If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.'

And as the Court observed in *Davies and Cody v The King* ((1937) 57 CLR at p 180), the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:

> 'not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.'

Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (See *Whitehorn v The Queen* (1983) 152 CLR at p 686; *Chamberlain v The Queen [No 2]* (1984) 153 CLR at p 532; *Knight v The Queen* (1992) 175 CLR 495 at pp 504 - 505, 511). **But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those**

> **considerations** (*Chamberlain v The Queen [No 2]* (1984) 153 CLR at p 621)." (emphasis added)

[48] Their Honours went on to say:[7]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, **where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced**. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (*Chamberlain v The Queen [No 2]* (1984) 153 CLR at pp 618 - 619; *Chidiac v The Queen* (1991) 171 CLR 432 at pp 443 - 444). In doing so, **the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty** (*Chidiac v The Queen* (1991) 171 CLR at pp 443, 451, 458, 461 - 462). Although the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above." (emphasis added)

[49] Like McMurdo P and Jerrard JA, I have watched the relevant parts of the cross-examination and re-examination of AL recorded on 14 February 2005. While the availability of the video-recording of the evidence diminishes the advantage of the jury in having seen and heard the complainant give evidence, it remains the case that this Court is not required to substitute its assessment of the credibility of the complainant for that of the jury. The decision to set aside a jury verdict is a "serious step".[8] The reasons of the majority of the members of the High Court in *M v The Queen* emphasize that this Court must "pay full regard" not only to the advantage enjoyed by the jury in seeing the witnesses, but also to "the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence".[9]

[50] In the light of the instruction derived from the passages from the reasons of the majority in *M v The Queen* cited above, the real issue is whether, bearing in mind that the jury is "the body entrusted with the primary responsibility of determining

---

7 (1994) 181 CLR 487 at 494 - 495 (citations footnoted in original).

8 *MFA v The Queen* [2002] HCA 53 at [49]; (2002) 213 CLR 606 at 621.

9 (1994) 181 CLR 487 at 493.

guilt or innocence", the apparent differences between AL's evidence given on 14 February 2005 and her earlier evidence are capable of reasonable explanation consistent with the jury's verdict by reason of "the manner in which it was given". The task for this Court is to determine whether "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".

[51] In my opinion, the jury may reasonably have regarded AL's evidence given in cross-examination on 14 February 2005 as not resiling from the gravamen of her earlier account of LQ's conduct in the bedroom. Importantly in this regard, it was not specifically put to her on 14 February 2005 that her father did not lie upon her in the bedroom. When AL had previously been cross-examined in August 2004, it was directly put to her that the appellant did not lie on top of her with his pants and her skirt and underpants off and move up and down. On that occasion, she denied what was put to her. Having regard to the way in which the complainant's evidence was elicited, and having regard particularly to the unfortunate circumstance that, at the appellant's request, the complainant was cross-examined "cold" after the lapse of six months since she had previously given evidence, the jury may reasonably have been quite reluctant to accept that the complainant was truly contradicting, even unintentionally, that version of events in her evidence of 14 February 2005.

[52] Further in this regard, it is to be noted that it was not suggested to the complainant at any stage that she had any motive to lie about the appellant's conduct. It was certainly not suggested to her on 14 February 2005 that her earlier evidence was fabricated or even unreliable. The innocent explanation of the appellant's conduct which was put to the complainant was itself suspicious, if not bizarre. Finally, of course, there was no evidence actually contradicting the version of events earlier sworn to by AL, save possibly the evidence elicited in re-examination on 14 February 2005.

[53] In relation to the complainant's evidence in re-examination in February 2005, the jury may reasonably have taken the view that the complainant's understanding of the unfocussed and potentially confusing question she was asked in re-examination was that it was directed to where the appellant was for the whole time he was wiping the complainant with the flannel. The complainant and the appellant's counsel had been at odds as to where the wiping incident occurred, the complainant being clear that it had occurred in the bedroom and not in the bathroom. The complainant's evidence in re-examination was specifically drawn to the jury's attention by the learned trial judge in the course of his summing up. The jury may reasonably not have been disposed to regard the complainant's answer in re-examination as conveying an unintended concession of the falsity of her earlier evidence. The jury may reasonably, in my view, have regarded the complainant's response to the Crown Prosecutor's question as focussed upon where the wiping incident occurred and the time when that incident occurred.

[54] In my respectful opinion, on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty on count 3. There was a reasonable explanation, consistent with the guilt of the accused, which the jury was entitled to accept, for each inconsistency to which the evidence gave rise.[10]

---

[10] Cf *R v MAL* [2005] QCA 238; CA No 36 of 2005, 28 June 2005 at [39].

Conclusion and orders

[55] For these reasons, I agree with McMurdo P that the appeal against conviction should be dismissed.

[56] For the reasons given by McMurdo P, I agree that the application for leave to appeal against sentence should also be dismissed.