SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCP* [2013] QCA 383
PARTIES:	**R** **v** **BCP** (appellant/applicant)
FILE NO/S:	CA No 211 of 2012 DC No 8 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Charleville
DELIVERED ON:	Order delivered ex tempore on 21 August 2013 Further orders and reasons delivered on 17 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2013
JUDGES:	Margaret McMurdo P, Gotterson JA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 21 August 2013:** **Application for leave to appeal against sentence is refused.** **Further orders delivered on 17 December 2013:** **1. Application to adduce further evidence refused.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the appellant was convicted of one count of maintaining a sexual relationship with a child, three counts of rape, one count of indecent treatment of a child under 16 who is a lineal descendent under care, and one count of common assault – where the complainant for all counts was the appellant's biological daughter – where the appellant contended that inconsistencies in the complainant's account of what happened caused her to be an unreliable witness, that there was an "existing relationship" between the eldest daughter of the appellant and a member of the jury, that the s 93A interviews with complaint witnesses had not been video recorded, and that there was repetitive use of leading

questions and repeated questions in the s 93A interviews all amounting to a miscarriage of justice – whether or not any of these contentions amounted to a miscarriage of justice – whether the verdict was unsafe or unsatisfactory

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant contended that the complainant's testimonies were unreliable and uncorroborated – where evidence was given at trial by five complaint witnesses, the complainant's younger sister and a doctor, which was materially consistent with the complainant's account of events – whether the verdict was unsafe or unsatisfactory having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – AVAILABILITY AT TRIAL – MATERIALITY AND COGENCY – where the appellant sought to admit new evidence which was either irrelevant or evidence that was available at trial – where the test for non-fresh evidence requires that the verdict of guilty could not stand if the evidence was admitted – whether this evidence considered with both the evidence at trial raised such a doubt about guilt that the conviction could not be allowed to stand

Criminal Code 1899 (Qld), s 210(1)(4), s 229B, s 339(1), s 349, s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Katsidis; ex parte A-G (Qld) [2005] QCA 229, followed

COUNSEL: The appellant/applicant appeared on his own behalf
B J Power for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for refusing the application to adduce further evidence and dismissing this appeal against conviction.

[2] **GOTTERSON JA:** After a five day trial before a judge and jury in the District Court at Charleville which concluded on 27 July 2012, the appellant was convicted of one count of maintaining a sexual relationship with a child, three counts of rape, one count of indecent treatment of a child under 16 who is a lineal descendent under care, and one count of common assault. The appellant was then sentenced to a period of eight years imprisonment for the maintaining offence and shorter concurrent terms of imprisonment for the remaining offences.

[3] On 22 August 2012 the appellant filed a notice of appeal against the convictions and sentences. At the commencement of the appeal hearing on 21 August 2013, the appellant indicated he did not wish to continue his application for leave to appeal against sentence and it was refused. He also filed an application on 24 July 2013 seeking leave to adduce further evidence on his conviction appeal.

[4] The appellant had prepared both the notice of appeal and the application himself without the benefit of legal assistance.[1] The appellant's notice of appeal lists two grounds of appeal against conviction, namely, that the verdict is unreasonable or cannot be supported having regard to the evidence and that there has been a miscarriage of justice.

[5] I propose first to set out the circumstances of the offending and of the preliminary complaints and to summarize the prosecution and defence cases before undertaking an analysis of the application to adduce further evidence and the grounds of appeal.

Circumstances of the offending

[6] The complainant is the appellant's biological daughter. She was aged between 13 and 14 years during the period of offending. On the complainant's account[2], the offending spanned a period of approximately seven months, ceasing in mid-January 2009. The appellant was aged 45 and then 46 years during that period. He was the primary carer of the complainant at the time. The offending stopped when the complainant went to live with her mother shortly after the conduct which formed the basis of the common assault charge, occurred.

[7] The offending conduct was characterised by the learned trial judge as a gross breach of trust in which the appellant mistreated the complainant, following a separation from his wife, the complainant's biological mother. The mistreatment included regular sexual abuse by raping her and indecently dealing with her.[3] The appellant not only subjected the complainant to penile rape but also raped her by forcing her to engage in oral sex with him. Evidence was led at trial, and acted upon by the trial judge at sentence, that during the period charged, the appellant sexually abused the complainant as much as three times a week within the family home.[4] In his Honour's view, he used his status as her father to exercise his authority over her and intimidate her such that she felt she had no choice but to go along with the acts. The three charges of rape were offences alleged to have been committed by the appellant in the course of maintaining the sexual relationship with the complainant.

[8] The indecent treatment charge of which the appellant was convicted was based on his conduct by way of feeling her body from her genital area to her breasts with his hand. It also occurred during the maintaining period. The common assault charge related to an occasion when the appellant slapped the complainant in the face after accusing her of having sex with another man.[5] It was this offending that was first brought to the attention of police. It resulted in a charge of assault occasioning bodily harm, the fate of which is explained later in these reasons. Shortly thereafter in January 2009 the complainant went to live with her mother.

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1 The appellant was legally represented at his trial. He represented himself at the appeal.
2 AB67 LL20-25.
3 AB540; AB569.
4 AB541 LL11-12.
5 AB75 L8; AB489 LL49-57.

Summary of evidence in the Crown case

[9] In March 2009, the complainant told her mother what had happened to her at the appellant's house. Her mother contacted the police. Two recorded s 93A interviews were made.[6] It was during those interviews that the complainant disclosed to the investigating officers that the appellant had been having sexual intercourse with her on a regular basis which she said commenced about three months after her older sister left the home. The complainant remained there with the appellant and her younger sisters. She said that the appellant also made her masturbate him and perform fellatio on him usually prior to having intercourse.[7]

[10] The three counts of rape and one count of indecent treatment that were particularised arose out of circumstances which occurred within the period stated in Count 1, the maintaining count.

[11] Count 2 consisted of what the complainant in her s 93A interview described as the first occasion when sexual intercourse took place with the appellant.[8] The appellant was lying on the bed in his bedroom wearing only underpants. He had asked her to bring him some panadol. Then he told her to sit down and talk to him. She then started speaking to him about school and lay down on the bed. He then started rubbing her all over the front of her body, focussing on the area between her chest and her knees including her breasts and genitals.[9] He took off all her clothes and then took his clothes off. The complainant saw the appellant's penis which she described as shortish and hard. The appellant did not use a condom. He started having sexual intercourse with her. It lasted approximately five minutes. He then ejaculated and wiped his penis on a t-shirt which he picked up off the floor.

[12] Count 3 was an occasion during the day time. The complainant recalled it as unusual because the sexual intercourse routinely took place at night. The complainant was asleep on the appellant's bed following a dizzy spell that she had experienced on her way to the bathroom. It was caused by her epilepsy.[10] The appellant came home and woke her up for sex beginning with the same sequence of rubbing the complainant and then taking off her clothes. The complainant gave evidence that she was worried that her sisters might come in to the room. When she relayed this to the appellant, he told her that they had gone to the council pool with her friend.[11]

[13] Count 4 was the indecent treatment of a child charge.[12] On this occasion the complainant and her sisters were sleeping in the lounge room after they had watched a movie as was a usual weekend activity for them. The complainant gave evidence that she awoke during the night to find the appellant rubbing her underneath her clothing from her chest to her knees including her 'boobs' and 'vagina'.[13] The complainant told the appellant to go back to bed, which made the appellant angry. However he did leave.[14]

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6 AB554-585, AB585-596.
7 AB576-577.
8 AB561-566.
9 AB562.
10 AB594 LL33-54.
11 AB579-580.
12 AB587-589.
13 AB589 L8.
14 AB589 LL10-14.

[14] Count 5 occurred in the appellant's bedroom. The complainant went in to tell the appellant she was feeling sick because of her epilepsy and needed to take medication.[15] (She was required to tell the appellant when she was taking this particular medication.) Her evidence was the appellant was lying naked on his bed covered by a blanket. After the complainant had entered the room, the appellant took her clothes off and started touching her body. He then proceeded to have sexual intercourse with her. He withdrew and ejaculated into his hand which he wiped on a t-shirt. Afterwards, the complainant returned to her room and went to bed.

[15] Count 6 charged the appellant with assault occasioning bodily harm.[16] It was ultimately left to the jury in the form of a common assault charge because the element of bodily harm was insufficiently proven.[17] The circumstances of this offence arose about two days after the offence in count 5. The appellant accused the complainant of being a slut and sleeping with an older man known to the appellant. The complainant began to remonstrate with the appellant. He slapped her across the face which she said left a bruise.[18] The complainant then went to a friend T's house. T's mother called the police in relation to the slapping.[19] T gave evidence that the complainant had marks on her face when she arrived at the house.[20] T's mother also gave evidence that she saw a red mark on the complainant's face.[21] The police attended the following day in response to this call.

Preliminary complaints

[16] A preliminary complaint was made to the complainant's friend M. She gave pre-recorded evidence consistent with the complainant's version. Her evidence was tendered at trial.[22] M gave evidence that she and the complainant had known each other for approximately one year and two months when, at the end of 2008, the complainant told her what had been happening.[23] M said that she and the complainant were walking along the river bank to the complainant's house when the complainant started crying. M asked her what was wrong and the complainant said "Don't tell no-one, don't tell no-one" to which M responded "Okay". The complainant then said "When my father gets drunk, he comes home and he rapes me" and that it had "been going on for a long time".[24]

[17] The next complaints were made to two school friends, D and K, following the complainant's move to live with her mother. The evidence in chief of both these witnesses was by way of tendered s 93A statements. The cross-examination of them was pre-recorded. D gave evidence that the complainant told her during an English class at school that the appellant had raped her. She maintained this evidence under cross-examination.[25] K gave evidence that when K was staying at the complainant's house for the weekend, the complainant told her that she had been raped by her father. She also maintained her evidence under cross-examination.[26]

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15 AB572-574.
16 AB571.
17 AB390 LL57 – AB391 L20.
18 AB571 LL12-18.
19 AB253 LL33-34.
20 AB 611.
21 AB253 LL18 -24.
22 AB77-82.
23 AB78 L33 – AB79 L3.
24 AB77 L55 – AB78 L11.
25 AB626 LL29 – 50.
26 AB616 L18 – AB617 L20.

[18] The complainant then told her older sister that her father had raped her. The latter urged the former to tell their mother. As noted, the complainant ultimately told her mother of the offending conduct in March 2009. This happened during a shopping trip. Following these disclosures, the complainant was taken to police to make a complaint.[27] The complainant's mother testified that the complainant had given an account to her of having had sex with the appellant approximately three times a week during a seven or eight month period.[28]

[19] There was medical evidence at trial from Doctor Lesley Everard that the complainant had attended the Cairns Base Hospital on 25 March 2009 and that a general physical examination was undertaken which showed that there were only remnants of the hymen remaining.[29] The doctor said this was consistent with sexual activity having taken place prior to the time of examination without being specific as to when.[30] When cross-examined she conceded that the state of the complainant's hymen could have been caused by penetration of an object such as a dildo or the insertion of multiple fingers.[31]

[20] The complainant's younger sister, R, also gave evidence in chief by way of a tendered s 93A statement. R stated that after the complainant went to live with their mother, the appellant was drunk one night and asked her if she would have sex with him for one 100 dollars. R responded by saying no. He then told her that the complainant had had sex with him previously.[32] After he said this, R hid from the appellant for two days.[33] R said the conversation with the appellant took place a couple of weeks prior to the appellant's arrest. This account was maintained during pre-recorded cross-examination of this witness.

The defence case at trial

[21] The appellant did not give evidence at trial. He called one witness, S, in his defence. That witness was a friend of the appellant's. S gave evidence of a conversation she had with the complainant when the complainant came to her farm following the appellant's arrest. Her evidence was that she said to the complainant, "[W]hat's going on….You know your father can go to gaol if it's not true" and that the complainant replied by saying "I don't care. I'll do anything and I'll keep doing anything that I have to do to go and live with my mother."[34] Under cross-examination the complainant said she had spoken to S about wanting to live with her mother but could not specifically recall having that conversation. When prompted, she said she could not remember saying those words to S and then volunteered: "I don't really care if he does go to gaol because he shouldn't have done what he did."[35] It was put to the complainant in cross-examination that in speaking to S about "doing anything" she meant lying by way of false allegations made against the appellant, to which the complainant responded "I wouldn't lie about something like that."[36]

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27 AB168 L7 – AB171 L51.
28 AB177 L22 – AB178 L5.
29 AB298 LL1 – 51.
30 AB299 LL20 – 25.
31 AB302 LL47-58.
32 AB606 – 608.
33 AB605 L57 – AB606 L4.
34 AB347 LL39 – 45.
35 AB111 LL6-15.
36 AB112 LL8 – 12.

[22] On any reading of it, the evidence, given by S and the complainant on this topic, would not have compelled the jury to find that the intention of the complainant was to lie about her father in order to go and live with her mother. Even on a reading of the evidence of S alone, it was open for the jury to conclude that the complainant meant that she would do everything necessary to expose her father's conduct even if it resulted in his going to gaol; not that she did not care if he went to gaol as a consequence of false allegations on her part. When assessing the credit of S, the jury were entitled to take into account evidence both of her friendship with the appellant and of her prior conviction for assault causing bodily harm for breaking her own daughter's nose.

Application to adduce further evidence

[23] The appellant sought leave to adduce further evidence on the appeal being an unsworn written statement signed by his eldest daughter, KB, dated 5 June 2013[37]; a statutory declaration sworn by KB dated 6 June 2013[38]; and what appears to be a transcript of undated Facebook conversations between the complainant's mother (the appellant's now ex-wife) and KB.[39] KB was called as a witness in the prosecution case. On this application, the appellant claimed that these three documents supported his argument that there has been a miscarriage of justice.

[24] The unsworn statement is a single page typed document. It contains allegations of fact which underpin KB's "feeling" that the appellant is innocent and that her mother is spiteful towards him. Both the allegations of fact and the author's feeling are evidently irrelevant and inadmissible.

[25] The Facebook conversations reveal a fractious relationship between KB and her mother. The exchanges between them were often abusive as between themselves and accusatory of others. It is unnecessary to detail any of them. They do not contradict evidence given by KB or her mother at trial on any significant matter. They, too, are irrelevant and inadmissible.

[26] The statutory declaration is a half-page hand written document. It contains mere conjecture as to the perceived attitude towards the appellant of a member of the jury who was unknown to KB personally. Plainly its contents are irrelevant and inadmissible.

[27] The irrelevance of all of this documentary material precluded its admission. But even if it did have some relevance, the material does not satisfy the requirements for admission of it on appeal. It is properly characterised as "new evidence", not "fresh evidence". That is so because the appellant has quite failed to give any explanation of why the information in KB's statement and statutory declaration or the Facebook communications could not have been discovered by the exercise of reasonable diligence on his part prior to the trial. Turning to the test for admission of new evidence,[40] I am compelled to conclude that by no stretch of the imagination could this evidence combined with the evidence led at trial require that any of the convictions be set aside in order to avoid a miscarriage of justice. The application to adduce further evidence must be refused.

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37 Affidavit of RB sworn 3 July 2013; Exhibit C.

38 *Ibid*; Exhibit E.

39 *Ibid*; Exhibit D.

40 *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229 at [2]-[4] and [12]-[19].

Ground 1 - unsafe and unsatisfactory verdicts

[28] The appellant's first ground of appeal against conviction is that the convictions are unsafe and unsatisfactory. That is to say, in terms of s 668E(1) *Criminal Code* 1899 (Qld), they are "unreasonable or cannot be supported having regard to the evidence". The test that the Court must apply in determining whether it must allow an appeal under this limb of s 668E(1) 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 appellant was guilty.[41] In support of this ground of appeal the appellant contends that the complainant's testimonies were unreliable and influenced by her mother in an attempt to gain custody of the children.[42] The appellant also contends that the complainant's evidence was uncorroborated.[43]

[29] The first of these two points is undermined by the evidence of the preliminary complaint made to M. Her evidence established that in 2008 the complainant told her that she had been raped by the appellant. This was well prior to when the complainant told her mother about that. The second point quite overlooks the fact that the evidence given by each of the complainant's younger sister, R, by the five other complaint witnesses, and by Dr Everard, is materially consistent with her account of events.

[30] The complainant gave evidence that the appellant committed all the offences of which he was convicted. Her evidence was not contradicted by any sworn evidence. The complainant's evidence was supported by evidence of an admission by the appellant made to her younger sister R, when propositioning her for sex in exchange for money. It was consistent with complaints made by the complainant to her older sister KB, her three school friends, M, K and D, in whom she separately confided, and to her mother. Upon a review of the totality of the evidence as summarised in these reasons, I consider that it was open to a jury, properly instructed on the basis of the admissible evidence, to have been satisfied beyond reasonable doubt of the appellant's guilt. The jury had had the benefit of seeing and hearing the complainant and the other witnesses give evidence and of making an assessment of their credibility before coming to a unanimous guilty verdict on all of the counts.

[31] For these reasons I am of the view that the jury's verdict was neither unreasonable nor unsupported by the evidence. This ground of appeal must fail.

Ground 2 – miscarriage of justice

[32] The appellant's second ground of appeal is elaborated in his written outline by the following alleged circumstances:

- that inconsistencies in the complainant's account of what happened caused her to be an unreliable witness;
- an "existing relationship" between the eldest daughter KB and a member of the jury;
- the s 93A interviews not having been video recorded; and
- repetitive use of leading questions and repeated questions,

all of which, the appellant submitted, combined to cause a miscarriage of justice.

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41 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 215.

42 Page 6 of the appellant's outline.

43 Page 7 of the appellant's outline.

[33] This ground was developed in oral argument under the guise of a reply to the respondent's written outline to include additional circumstances, namely:

- a lack of relevant expertise on the part of the examining doctor;
- a failure on the part of the prosecution to adduce pretext phone call evidence of, and a written statement supplied by, the appellant's youngest daughter both of which, the appellant claimed, were in existence at the time of the trial.

[34] It is convenient to consider these circumstances under the following headings. I preface this with the observation that the suggestion by the appellant that the fairness of the trial was compromised by repetitive use of leading questions and repeated questions, is without substance.

Reliability of complainant's evidence

[35] In both his written outline and oral argument, the appellant pointed to a number of inconsistencies regarding money or mobile phones in the different accounts provided by the complainant on the one hand and other key witnesses on the other. The respondent conceded that they exist. The inconsistencies go to minor matters of detail. It is not uncommon in criminal trials of this nature for there to be inconsistencies at that level. Commonly that occurs benignly through the passage of time between the occurrence of the offences and the recording of evidence. Moreover, minor inconsistencies of this kind tend to give a confidence in the veracity of the testimony of the witnesses overall. The respondent submitted, and I accept, that these inconsistencies did not significantly impair the credibility of the complainant's evidence.

[36] The appellant also argued that the complainant's account was inherently unreliable as the offending was said to have occurred approximately three times a week over a seven month period – that is to say, about eighty-four times. He argued that it was improbable that the complainant would continue to go into his room if that was continuing to happen. I am unable to regard this argument as compellingly logical. The repetition was apt to be attributable, to a significant extent at least, to the authority exerted by the appellant over the complainant and to a lack of options on her part. In the end, this evidence was properly put before the jury and it was for them to come to a conclusion whether they, as the deciders of fact, could be satisfied that the complainant's testimony was credible.

Known relationship with juror

[37] The appellant put forward the argument that he was denied a fair trial because it was held in a small town where it was possible that members of the jury had prior knowledge of the appellant and the charges against him. He stated that following the trial, it became known to his eldest daughter, KB, that there was a juror who she knew, associated with a girl that she herself knew from school. It will be recalled that the appellant's application to adduce evidence to this effect from KB was refused.

[38] As occurs at the commencement of every criminal trial, all of the names of the witnesses were read out to the jury. The jury was then informed that it is essential that every jury member be completely impartial and be seen by all fair minded

people to be completely impartial. They were then called on to raise their hand if for any reason whatsoever any one of them felt that they could not be completely impartial and could not by all fair minded people be seen to be completely impartial. No juror came forward.[44] This solemnity was complemented by a direction that was given to the jury by the learned trial judge during the summing-up in the following terms:

> "Just reminding you that it's more important than ever, given that you're on the verge of being asked to retire to consider a verdict, that you don't discuss this case and any of the evidence or any of the personalities in it, with any person other than someone else on the jury panel, and of course you don't make your own inquiries and investigations into any aspect of the case."[45]

[39] I am satisfied that these events were adequate for any fair minded person to be satisfied that all members of the jury considered the verdict without external influences of partiality. Moreover, the appellant's argument is an unpersuasive one. He did not assert that this particular juror knew the witness, KB. All that KB knew was that the juror was familiar with someone with whom she went to school. The appellant has not established any irregularity relating to the constitution of the jury, let alone that there has been a resulting miscarriage of justice.

Expert evidence

[40] Doctor Everard conceded twice in her evidence in chief that she was not an expert in the field of performing perineum examinations.[46] However, after making these concessions, she stated that she undertakes these examinations as part of her duties as a general paediatrician and that she is experienced in doing so.[47] Her evidence was within the bounds of her experience. No objection was taken by defence counsel to the competency of Dr Everard to give the evidence she gave concerning her examination of the complainant. The learned trial judge quite correctly referred to this evidence in his summing up.[48]

Omitted evidence

[41] The appellant then made a complaint about a pretext phone call and a written statement of his youngest daughter, BS, which he claimed existed at the time of the trial. His complaint was that they were not tendered in the prosecution case. The appellant has failed to demonstrate why either would have been favourable to his defence.[49] In these circumstances, the complaint is unavailing.

The appellant's contentions regarding s 93A interviews

[42] The appellant contended that the complainant was asked leading questions by the police officer during her s 93A interview. He illustrated his contention with a reference to an instance where following a discussion with the complainant regarding "hand jobs", the police officer interviewing her said: "Okay and you said

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44 AB132 L36 – AB134 L2.
45 AB392 LL43 – 57.
46 AB299 LL35 – 40.
47 AB299 LL36 – 44.
48 AB479 L47 – AB81 L47.
49 Tr 1-6 LL17 – 21.

that sometimes um he'd get you to do, give you a head job tell me what you mean by head job" to which she responded "Like I had to put um his dick in my mouth."[50] The appellant argued that this was a leading question as the topic of "head jobs" had not been brought up prior to the officer's mention of it.

[43] It need be noted, however, that before the appearance of that question and answer in the transcript of the interview, there is a portion of the transcript which is recorded as 'indistinct'. Context strongly suggests that what was indistinct was a reference by the complainant to "head jobs". That may be seen from the following extract from the transcript:

> "[Officer]: Tell me did dad um get you to do anything else other than have sex like putting his dick inside your vagina?
>
> [Complainant]: Yeah sometimes he made me give him hand jobs.
>
> [Officer]: Hand jobs or head jobs?
>
> [Complainant]: Hand.
>
> [Officer]: Hand job.
>
> [Complainant]: And [INDISTINCT] sometimes.
>
> [Officer]: Tell me what you mean by hand jobs.
>
> [Complainant]: Like he made me touch his dick and stuff.
>
> [Officer]: Touch his dick with what?
>
> [Complainant]: My hand.
>
> [Officer]: And tell me what would happen then?
>
> [Complainant]: Um and then he would usually um, um have sex with me and then I'd go, I'd go back to bed and he'd.
>
> [Officer]: Okay so, so this would be before you had sex that he would make you touch his dick with your hand, tell me what um, what you'd do with your hand?
>
> [Complainant]: Just like move it up and down.
>
> [Officer]: Okay. And then you'd have sex?
>
> [Complainant]: Yeah.
>
> [Officer]: After, after that okay tell me how long would he get you to give you a hand job for?
>
> [Complainant]: Not long like two minutes, two three minutes.
>
> [Officer]: Okay and you said that sometimes um he'd get you to do, give you a head job tell me what you mean by head job.

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50 AB576 LL49-52.

[Complainant]: Like I had to put his dick in my mouth.

[Officer]: Tell me how many would that have happened?

[Complainant]: Um not very many."[51]

[44] The complainant went on to say that the appellant had explained to her how to 'give him a head job' because she didn't know how to do it and that it had happened 'like ten fifteen times'.[52] The matter of the indistinct portion was raised by defence counsel, and dealt with by the learned judge, at a pre-trial hearing on 28 August 2010. On that occasion, the prosecutor stated that he had listened to the recording and the complainant had said "and head sometimes" in the relevant part. It was accepted by defence counsel, and the learned judge agreed, that the indistinct portion included the word 'head'.[53]

[45] Next, in his outline of argument, the appellant questioned why both the mother and younger sister of R, BS, were present at R's s 93A interview. It would seem that this was done in order to insinuate such a degree of collusion between witnesses as would cause a miscarriage of justice. This point was not taken by the experienced defence counsel at trial. During the course of the hearing of the appeal, counsel for the respondent argued that although R's mother and younger sister were listed on the covering page of the interview transcript, and were present for the introductions, it was most unlikely that they remained during the s 93A interview proper.[54] This is evident, he submitted, from the transcript: an unidentified female person (presumed to be R's mother) is recorded as saying at the beginning of the interview: 'We'll be here waiting alright' to which R responded 'You better not go' and the unidentified female person is recorded as "INDISTINCT". The substantive interview then commenced.[55] The transcript does not contain any further references to anyone other than R, the police officer and the child care officer. The President has listened to the taped interview[56] and, after R said "You better not go", heard the unidentified female person, presumed to be R's mother, say, "Bye-dee-bye" and a sound as if a door was shutting. In my view, the argument advanced, and the observation made, by counsel for the respondent are soundly based. I accept them.

[46] The appellant also took issue with the fact that no video recordings of the s 93A interviews were adduced, and that only an audio recording of each was presented for the jury to hear. The appellant contended that this made it impossible for the jury to see how the witnesses appeared when questioned. The respondent responded to this complaint by observing that the jury had had the benefit of observing the demeanour of each of those witnesses during cross-examination at trial and was therefore in a position to assess their credit.[57] The jury did benefit in this way. The response is an entirely adequate one.

[47] For these reasons, I consider that the appellant has failed to show that there has been a miscarriage of justice. Accordingly, this ground of appeal also fails.

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51 AB576 LL8 – 56.
52 AB577 LL31 – 48.
53 AB18 LL19 - 47.
54 Tr 1-14 LL12 – 19.
55 AB598 LL1 – 10.
56 Marked for identification "I".
57 Tr 1-13 LL19-26.

Disposition

[48] The appellant has failed to demonstrate that the verdict was unsafe or unsatisfactory or that there was any miscarriage of justice. In consequence, his appeal against conviction must be dismissed.

Orders

[49] I would propose the following orders:

1. Application to adduce further evidence refused.
2. Appeal dismissed.

[50] **MARGARET WILSON J:** I agree with the orders proposed by Gotterson JA, and with his Honour's reasons for judgment.