SUPREME COURT OF QUEENSLAND

CITATION:	*R v Koranteng* [2016] QCA 299
PARTIES:	**R** **v** **KORANTENG, Kwaku** (appellant)
FILE NO/S:	CA No 187 of 2015 DC No 643 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 6 August 2016
DELIVERED ON:	18 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2016
JUDGES:	Morrison and Philippides JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO ALL THE EVIDENCE – where the appellant was convicted of one count of rape, one count of sexual assault and one count of depravation of liberty, all of which occurred on 3 August 2014 – where the jury failed to reach a verdict in respect of one count of rape and one count of sexual assault, both of which allegedly occurred on 27 July 2014 – where the appellant and the complainant worked together at an aged care facility – where the acts were alleged to have occurred on the evening of 3 August 2014, after the appellant and complainant finished a shift at the aged care facility – where the appellant offered the complainant a lift home – where the complainant initially declined the appellant's offer because she was concerned the appellant liked her and because of the incident on 27 July 2014 – where the complainant subsequently accepted the appellant's offer on the basis the appellant said he understood they could only be friends – where, upon the appellant and complainant entering the car, the appellant proceeded to kiss the complainant – where the appellant then sucked, kissed and bit the complainant's breasts (the sexual assault count) – where the appellant then put his finger into the complainant's vagina and licked her

vagina (the rape count) – where the complainant attempted to exit the vehicle but it was locked (the depravation of liberty count) – where there were inconsistencies in the complainant's evidence about the events of the evening and the accounts she gave to other people – where the appellant argues aspects of the complainant's evidence were implausible – whether the verdict is unreasonable or insupportable having regard to all of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO A MISCARRIAGE – MISDIRECTION AND NON-DIRECTION – NON-DIRECTION – where the trial judge did not direct the jury on mistake of fact – where the appellant's trial Counsel conceded mistake of fact did not arise on the evidence – where the complainant's evidence was that she repeatedly indicated her lack of consent to contact with her breast and vagina – where the defence case was conducted on the basis there was consensual sexual conduct which immediately ceased upon the complainant saying no to the appellant – whether there was an evidential basis upon which the jury could properly consider a mistake of fact – whether there was a miscarriage of justice in the trial judge's failure to direct the jury in relation to mistake of fact

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO A MISCARRIAGE – OTHER IRREGULARITIES – where the appellant raised with his legal representatives at trial the possibility of calling witnesses at trial – where the appellant's legal representatives did not advise the appellant of the availability of calling character evidence in his defence – where the proposed character evidence was to the effect that the appellant was a spiritual and loving husband and that none of the proposed witnesses had previously seen the appellant engage in the type of conduct he was convicted of – whether there has been a miscarriage of justice as a consequence of the failure to advise the appellant of the option to call character evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO A MISCARRIAGE – MISDIRECTION AND NON-DIRECTION – NON-DIRECTION – where the appellant alleged at trial the complainant had a motive to lie, namely that she may lose her job – where the trial judge directed the jury in respect of the complainant having a potential motive to lie, with specific reference to the motive alleged by the appellant – where the appellant argued on appeal the trial judge should have given a more general direction about motive to lie, with a reference

to other possible unknown motives to lie – whether the failure to give such a direction resulted in a miscarriage of justice

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Baden-Clay (2016) 90 ALJR 1013; (2016) 334 ALR 234; [2016] HCA 35, cited
R v SCH [2015] QCA 38, cited

COUNSEL:	K M Hillard for the appellant (pro bono) G P Cash QC for the respondent
SOLICITORS:	Wallace O'Hagan Lawyers for the appellant (pro bono) Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the order his Honour proposes.

[2] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Boddice J.

[3] **BODDICE J**: On 3 August 2015, the appellant pleaded not guilty to two counts of sexual assault, two counts of rape and one count of depravation of liberty. One count of sexual assault and one count of rape arose out of events on 27 July 2014. The remaining counts arose out of events on 3 August 2014. All offences related to the same female complainant.

[4] On 7 August 2015, a jury convicted the appellant of one count of depravation of liberty, one count of sexual assault and one count of rape. All three counts concerned events on 3 August 2014. The jury was unable to reach a verdict in respect of the counts of sexual assault and rape on 27 July 2014. The jury was discharged in respect of those counts. The Director of Public Prosecutions subsequently discontinued each of those counts.

[5] On 7 August 2015, the appellant was sentenced to concurrent terms of six months imprisonment in respect of the deprivation of liberty, nine months imprisonment in respect of the sexual assault and two years imprisonment in respect of the rape. The sentence of two years imprisonment was suspended after serving nine months, for an operational period of two years.

[6] The appellant appeals his convictions. The notice of appeal included only one ground, that the verdicts are unsafe and unsatisfactory in all the circumstances. At the hearing of the appeal, leave was given to amend the grounds of appeal as follows:

Ground 1: the jury verdict was unreasonable;

Ground 2: the learned trial judge erred in failing to leave to the jury the defence of mistake of fact;

Ground 3: the appellant's trial miscarried because the appellant was not advised of his right to call character witnesses;

Ground 4: the trial judge erred in failing to properly direct the jury on motive to lie.

[7] At the hearing, leave was also sought and given for both the appellant and respondent to rely on affidavit material in respect of ground 3.

Background

[8] The appellant was born in Ghana on 26 January 1986. His native language is Akan. English is his second language. He attended school in Ghana to Grade 12. He obtained a Higher Education Diploma in accountancy in 2007.

[9] In 2012, the appellant travelled to Australia with the intention of studying and working in nursing. He undertook further education and gained employment. In about July 2013, the appellant commenced employment with an aged care facility. He remained in that employment until he was spoken to by police about the events the subject of the counts on the indictment.

[10] The complainant was born on 3 August 1994. At the time of the offences she was a university student. She also worked with the appellant at the aged care facility. She turned 20 on the day of the offences.

Offences

[11] Counts 1 and 2 on the indictment were the counts of sexual assault and rape in respect of which the jury were unable to reach a verdict. Both were alleged to have occurred on the evening of 27 July 2014 in a room at the aged care facility. Count 1 concerned an allegation the appellant touched, licked, sucked and/or bit the complainant's breast without her consent. Count 2 concerned an allegation he inserted his finger into her vagina without her consent.

[12] Counts 3, 4 and 5 on the indictment were all alleged to have occurred on the evening of 3 August 2014 after the appellant and complainant had finished their shift at the aged care facility. Count 3, deprivation of liberty, concerned an allegation the appellant locked the door of his motor vehicle, preventing the complainant from leaving that vehicle. Count 4, sexual assault, concerned an allegation the appellant touched and/or licked and/or sucked and/or bit the complainant's breast without her consent. Count 5, rape, concerned an allegation the appellant licked the complainant's vagina and inserted his finger into her vagina without her consent.

Trial

[13] At trial, the Crown called the complainant and 10 other witnesses. The appellant elected not to give or call evidence at trial. The defence case was that the complainant was not a credible witness and that, to the extent there had been touching and kissing of the complainant by the appellant, that conduct was consensual.

[14] Having regard to the conduct of the case, it is relevant to detail the complainant's evidence as a whole, including in respect of counts 1 and 2. Even though the jury was unable to reach a verdict on those counts, that evidence is relevant to an assessment of whether it was reasonable for the jury to accept the complainant's evidence on Counts 3, 4 and 5 as reliable and credible.

Complainant's Evidence

[15] The complainant said on 27 July 2014, a Sunday, she was working at the facility as a personal carer. Her shift started at 1.45 pm and ended at 9.30 pm. The appellant was also working as a personal carer that day on the same shift. The complainant knew the appellant was a fellow personal carer, but did not know his name. She had not previously spoken to the appellant. At the time, there were a lot of personal carers working at the facility. The complainant often worked with different people every shift.

[16] The complainant said at around 2.30 pm that day, she and the appellant were involved in caring for a female resident who commented they looked like they were a couple. The resident said they looked "really good together".[1] The complainant thought it was funny at the time, noting the female resident had a bit of dementia. The complainant said she laughed at the comment and said, "Oh, he wishes". The appellant replied, "Oh, yes I do."

[17] The complainant said she thought it was a joke and throughout the shift she and the appellant were saying to residents they were together and that they were getting married and joking along those terms. The complainant accepted it was "a little bit of flirting".[2] At one point, the appellant was trying to hold the complainant's hand. The appellant also put his arms around her and kind of hugged her on the side. The complainant said it was not a big deal.[3]

[18] The complainant said after some time, she realised this behaviour was unprofessional and inappropriate and backed off. She estimated this was at the middle of the shift. When the shift finished, the appellant came in to where the complainant was helping a resident requiring very palliative care. The appellant told the complainant he was leaving and had his arms out ready for a hug. The complainant felt it was okay to give him a hug and hugged him back. The complainant said she hugs lots of people generally. As soon as the appellant hugged her, the complainant realised it was quite intense. It went on for longer than she expected, causing the complainant to back away a little bit.

[19] The complainant said the appellant put his hands to her face, holding it. The complainant knew he was going to kiss her. The complainant said, "We shouldn't be doing this". The appellant then kissed her "open mouth, tongue and very aggressive". The complainant did not stop him or say no. She did not pull away. The complainant let him tongue kiss her and she tongue kissed him back. She said it was purely a reaction.[4] The complainant said, "I'd actually never kissed with tongue before that, so it was my first experience, and that's when I started to say stop".[5] The kiss lasted a long time. The appellant had his hands on her face the whole time and had control of that situation.

[20] The complainant said after the kiss the appellant closed the door to the room and turned off the lights. The appellant kissed her again and started kissing the complainant's neck. The appellant then started to undo the buttons on her uniform. The complainant was trying to resist him as much as she could but the appellant was able to undo the buttons on her shirt. He did not tear any of her buttons off. They were both against the wall at this point. The appellant started to be more aggressive with his hands. The complainant said she knew he had crossed the line and told him to stop. The appellant did not say anything but put his hands through her shirt and started groping her breasts.

[21] The complainant said the incident happened very fast and the appellant was very forceful in his actions. The appellant "had control".[6] Whilst the appellant's hands were inside her top, the appellant was also kissing her. The complainant was trying

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1 AB 19/1.
2 AB 19/8.
3 AB 74/3.
4 AB 67/7.
5 AB 22/38 – 40.
6 AB 23/19.

to take the appellant's hands out of her shirt. There was not a lot of room between the two of them and she could not get his hands out. The appellant then started sucking and biting her nipple and breast. The complainant was telling him to stop. They were both standing up. The complainant was wearing a sports bra which the appellant pulled down. The appellant bit her nipples hard but it did not hurt that time.

[22] The complainant denied she consented to the appellant kissing her or touching or kissing her breast. The complainant was telling him to stop.[7] The complainant said when the appellant started to undo her top she struggled, pushed him away and told him to stop. He was still able to put his hand in her shirt and touch her breast. This occurred without her consent. She was objecting to it. She denied the appellant had never touched her on the nipple or bit her on the nipple that night.

[23] The complainant said the appellant then unzipped her pants and put his hands inside them and started to finger her. He did it quite fast. The appellant was still kissing her neck at this stage. The complainant said the appellant was able to put his hands down her pants inside her underwear because they just had a zip and button. He had to undo the zip and button. She did not undo them. Initially, her pants were just below her bottom but eventually he got them down to her knees.

[24] The complainant said she tried to pull up her pants whilst the appellant was trying to pull them lower.[8] The complainant was asking him to stop. The complainant said she had never experienced this previously. She recalled the appellant put his finger in her vagina and just went out and in quite aggressively. It did not last too long but it was "long enough".[9] It was just one finger. It had never happened to her before. It was "a different feeling".[10] It was forceful but did not hurt her. The appellant was moving his finger in and out for what seemed like about 30 seconds.

[25] The complainant said the appellant bent down and squatted, making it easier for him to put his weight to pull down her pants lower. Her pants were pulled down to about above her knees, as was her underwear. The appellant then licked the top of her vagina. The complainant was trying to push the appellant off, trying to lift him up. She was trying to lift him by his shoulders but it was no use. She was telling the appellant to stop. The appellant did not lick her vagina for very long. The complainant denied the appellant never took off her pants, puts his hands down her pants or put his finger in her vagina or licked her vagina on 27 July 2014. There was a lot more than a kiss and a fondle. All of these were first experiences for her. She agreed at the time it happened she was concerned somebody might walk in and she wanted the situation over as quickly as possible.[11]

[26] The complainant said the appellant put his finger in her vagina twice in the incident on 27 July. He was kissing the complainant on the neck while he put his fingers in for the first time. The second time he put his fingers in her vagina was when he squatted down. He licked her vagina at that time. She was trying to get him up throughout that part of the episode. The complainant was trying to pull her pants up and get him off her. The complainant did not try to turn on the light. The light was further down.

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7 AB 70/5.
8 AB 24/15.
9 AB 24/29.
10 AB 76/4.
11 AB 99/15.

[27] The complainant said she got the appellant up by bending down herself. She pulled her pants up. The appellant tried to kiss her again. The complainant said words to the effect of "I need to get out of here". The appellant backed himself towards the door. The complainant left the room. She estimated the whole episode took seven to eight minutes. She could not recall saying anything to the appellant other than "no" and "stop".

[28] The complainant said after she left the room she went into one of the resident's bathrooms. The complainant was shaking and felt dirty. Her belt was still undone. She did it up and fixed herself up. Her hair and makeup were a mess. She had a couple of deep breaths and stayed for a very short time before leaving the bathroom. The complainant continued the balance of her shift. The appellant saw her once before the shift ended. He came up behind her and wanted another kiss. He hugged her and grabbed her breasts again over her shirt. The appellant asked for another kiss before he left. The complainant said she had a lot of work to do and that his shift is finished. The appellant then left the building.

[29] The complainant said at one point that evening the appellant asked for her telephone number. He programmed it into his phone when she told him her number. He then telephoned her number but as she did not have the telephone she did not receive the call. After she finished her shift she saw she did have a missed call on her telephone.

[30] The complainant said the appellant never told her he would wait for her but she had a feeling he would be waiting outside. The complainant texted her room-mate, Carlos Alvarez, to ask him to pick her up. When she went outside into the street after her shift, Carlos was waiting outside. The appellant was also waiting for her a couple of doors down. The appellant had on a different shirt. The complainant put her bag down, told Carlos to wait a second and went and asked the appellant what he was doing. The appellant said he was going to drive her home.

[31] The complainant said she told the appellant her room-mate was picking her up. The appellant asked if her room-mate was her boyfriend or whether she had a boyfriend. The complainant replied no, she was just studying at the moment and not interested to get into anything. The appellant told her how much he liked her and was waiting to drop her home. The appellant said he would text her to meet up some time next week. The complainant said she was very busy and about to start her exams.

[32] The complainant recalled saying at one point on 27 July that she was not that type of girl.[12] She told police in her statement that on 27 July she had said to the appellant "look, this is not like me. I don't go around doing this stuff with guys especially when I'm interested in another guy." She said this because she "felt like a slut and really ashamed and guilty about the residents". The complainant said these words to the appellant at the car. It was a lie to try and get him off her back.[13]

[33] The complainant said she left with Carlos, who asked if she was okay. The complainant was openly upset and Carlos could see she was upset. She did not tell Carlos what had happened. The complainant called her brother the next day or that night. She told her brother a work colleague had kissed her at her job and that he had feelings for her and was very persistent. She did not tell him anything else. Her brother said if she was uncomfortable she needed to be blunt.

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12 AB 92/25.
13 AB 93/3.

[34] The complainant said when she spoke to her brother, she wanted some advice because this was her first experience at this sort of thing. She told her brother the appellant was coming on strongly. She could not recall saying to her brother "but I thought he was a nice guy".[14] She did recall saying "I think he only wants me for my body" and that the appellant had said "I want you so bad".[15] Her brother told her that if he was not the right guy she should tell him she just wanted to be friends. Her brother also gave her advice not to get into a car with him.[16]

[35] The complainant later had a conversation with her sister in which she told her a guy kissed her at work. She believed that conversation was in the week before 3 August 2014. She did not tell her sister about any other acts.

[36] The complainant said the appellant telephoned her on 28 July 2014. That call lasted nine seconds. She also received text messages from the appellant during that week. She sent him a text message. She had saved his phone number in her phone under "Tricare guy". She did not telephone the appellant. The complainant agreed she kept in contact with the appellant, despite what had occurred on 27 July 2014. She agreed the appellant texted her about meeting up. She agreed to catch up with him despite the things he had done to her which she didn't like on 27 July. She said at the time she sent those text messages she had had a really bad day at university and she wanted to get out of the house. After she sent the message she realised it was a dumb thing to do. She then made up a lie saying she could not meet with him.

[37] In the first text message on 28 July 2014, the appellant asked if the complainant was okay and said he was sorry if he had upset her in some way. He said it would be "great to hang out sometime this week, just let me know when you are ready". The appellant sent a further text message that same day asking what the complainant was up to that day. The complainant replied she was at university "till late". She asked the appellant if he was working that day. He replied he had been working in that same wing and it "kind of brought back memories of you. Made me miss you."

[38] The appellant later texted to ask if the complainant was having a good day. She replied, "Are you doing short shifting". The appellant responded "yes" and asked did she want to see him. The complainant responded she was finishing nearly in an hour so that maybe they could meet up after for a bit. The appellant replied, "Okay, cool, I'd like that."[17] Shortly later, the complainant texted the appellant saying she had to stay back at university to finish a group assignment and could they catch up another day. The appellant replied, "No worries". He sent a subsequent text saying he was looking forward to seeing her. The complainant replied she was not sure what time she would finish at university, that she would let him know later and she would meet him. The appellant replied "okay". The complainant responded "good night".

[39] On the following day, 29 July, the appellant texted the complainant saying he hoped she was having a great day and that there was a shift available and would she like it. The complainant responded she had university Monday, Tuesday and Wednesdays. The appellant asked when she started Uni. The complainant next received a text message from the appellant on Sunday, 3 August 2014 at about 7.46 pm. This was at the end of the complainant's shift, which was a short shift, 1.45 pm to 7.45 pm.

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14 AB 96/25.
15 AB 96/40 – 45.
16 AB 99/35 – 42.
17 AB 32/40.

[40] On 3 August 2014, the appellant was working the same shift as the complainant but in a different wing of the facility. The complainant saw the appellant thrice during this shift. They just said hi to each other on the first occasion. On the second occasion, the appellant saw her in a room with her work partner and asked if she was okay. She said she was fine, that she was working. The appellant replied okay and closed the door. The complainant also saw the appellant during her allocated break. He asked if she wanted to chill in the car with him. The complainant replied she had started her break early and was finishing, which was not the truth. The complainant did not want to be alone with the appellant.

[41] During her shift on 3 August 2014, at about 7.00 pm, the complainant sought the advice of a fellow employee, Darren Coss, about how to handle a situation of a staff member liking her and being persistent. She told Coss she did not like it. Coss told her to speak to her clinical manager. Coss said she needed to report it. She denied telling Coss that she had gotten a lift home with the person before. The complainant said she had never been taken home by the appellant. The complainant said at this point the appellant walked behind her and she stopped the conversation very quickly and tried to pretend they were not talking about the appellant.

[42] The complainant said when she completed her shift on 3 August 2014 she had a few duties still to do. She then said goodnight to some of the residents and walked into the locker room. When she picked up her telephone she saw she had some missed calls and a text from the appellant sent at 7.46 pm saying "wait for me".[18] The complainant did not respond to the text. As she was looking at her telephone, the appellant appeared at the door. He asked to drive her home. The complainant said she was taking the bus. At that point another colleague came in to ask about a shift change. The complainant spoke to the colleague. The appellant went towards the front of the building. The complainant thought he was going to his vehicle.

[43] The complainant said when she finished the conversation with her colleague and went outside the building to go towards the bus, she found the appellant waiting for her. She had a feeling he might wait for her.[19] The appellant told her he liked her, had been thinking about her in the past week and it had been hard for him. The complainant felt a little bit uncomfortable. The complainant said the appellant was moving around a lot, very agitated and said he had been wanting to kiss her all this time. The complainant said something about being not being able to date because they were work colleagues. The appellant replied "only if we get caught". The complainant replied they could only be friends. The complainant said she was focusing on her study at the moment.

[44] The complainant said the appellant replied "friends that can kiss, friends with benefits". The complainant said "no, friends don't kiss". The complainant was getting mad with the appellant. She was looking at her watch but had missed her bus. The complainant said at that point the appellant kind of gave up, his attitude changed and he said "okay fine, I respect that".[20] He said "friends it is" and offered to drive the complainant home as a friend. The complainant asked was he going to do this as a friend. The appellant replied "yes". They walked towards his car. The complainant said as the appellant had assured her he was taking her home as a friend, she accepted the lift. The complainant gave the appellant directions to her home, which was about four – five minutes away.

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18 AB 38/9.
19 AB 39/15.
20 AB 39/32.

[45] The complainant said when she hopped into the vehicle the appellant did not put the keys into the ignition. He lent towards her and took her hand and stroked it. The appellant said he liked her, and liked the way she had her hair. The complainant described it as "just a lot of flirting".[21] The appellant asked if he could kiss her, just one kiss. The appellant said "I know you just said friends but please".[22] The appellant was very persistent. The complainant took her hand away and said they could only be friends. The complainant tried to open the door but it was locked. She asked the appellant to unlock the vehicle. At that point, the appellant lent over and kissed her. It was a very forceful kiss. The complainant initially kissed him back. It was "just a reaction". She then pulled back.

[46] The complainant said the appellant started to touch her again. The appellant was positioned very much on her side but with his legs still on his side of the vehicle. His face was very close to her face. The appellant started to use his hands to unbutton her shirt. The complainant was telling him to stop. The complainant started to get very scared. The appellant definitely had control of the situation. The complainant was trying to take his hands away from her shirt as he was unbuttoning it but it was not effective. It was a small space and it was very difficult for the complainant to use force.

[47] The complainant told the appellant to stop or said no and tried to push him away. However, the appellant's whole body was on top of her so it was quite difficult. The appellant then started to suck and bite her breasts. It was more forceful than the first incident. It was beneath her bra. The complainant was telling him to stop. It did not go on for a very long time. The appellant then pulled the recliner chair back so that the complainant was lying down in the passenger seat. It appeared the appellant's whole body was on top of her body.

[48] The complainant said the appellant pulled her pants down and her underwear. He did not damage her pants or underwear.[23] The appellant undid her pants and zip. He was able to do so even though she was sitting. He started to touch the complainant "down there".[24] The complainant tried to get up twice. The first time was a big mistake because it made it easier for the appellant to pull her pants down even more. At this stage, the appellant put his finger into her vagina. It was one finger. He was moving it in and out. It hurt and was very uncomfortable and unpleasant. It was more forceful and quicker. In her statement to police, the complainant said the appellant put his fingers inside her vagina and started to move them in and out but a lot harder than the Sunday before. It was very forceful but not painful. That was a proper description.[25]

[49] The complainant again tried to get up. She was trying to pull her pants back up. She was telling the appellant to stop. The complainant said at one point the appellant pulled her back, kissed her again and told her to relax and not be scared. The complainant said she was very scared.[26] The appellant then put his head down and started licking her vagina. His head was between her legs. The complainant could not describe how that occurred but said "somehow he was able to do it".[27] The complainant said she "kind of stopped saying stop. I just – I just kind of let go in a way".[28] The appellant also licked his fingers. He then kissed her again.

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21 AB 40/14.
22 AB 40/15.
23 AB 89/12.
24 AB 42/25.
25 AB 124/10.
26 AB 42/45.
27 AB 122/32.
28 AB 43/18.

[50] The complainant remembered hearing an unzip noise and saw him trying to get his legs over the gear box. The appellant was trying to move himself over. The appellant never tried to get his penis out of his pants. At no stage, did his penis touch her at all.

[51] At that point, the complainant saw an opportunity. She stood up and pushed the appellant to his side. She said no very forcefully. She could not remember whether the words were either "get off me" or "stop it". The appellant stopped.

[52] The complainant said she then tried to unlock the door again. She told the appellant to unlock the door "now". The appellant said "no I will take you home". The complainant said either unlock the door now or take me home. The appellant turned on the ignition and they drove off in silence. The last thing the appellant said to her before driving off was "you should have just told me you were a virgin".[29] Nothing else was said. The appellant dropped her home. There was silence throughout that journey.

[53] The complainant said she asked the appellant to park a couple of doors down from her home. She then tried to unlock the door again. It was still locked. The complainant said "are you seriously going to keep me locked in this car?" The appellant said "look you're mad, let's talk". The complainant said "unlock this car now" in a very forceful tone. The appellant then unlocked the car with his keys. The complainant took her bag and walked out behind the car. The appellant followed her. They had a short conversation.

[54] The complainant said the appellant mostly spoke. He said he could see she was upset. He said he really liked her and they would be good together. He asked if he could come up and watch her study. The complainant said no. The appellant said at least can I have a kiss or a hug goodbye. The complainant just stood there. The appellant hugged her and kissed her. The complainant did not return the kiss or hug. She was very shaken and scared. She just stood there and let him do it.[30] The only thing on her mind was to get out of there. She remembers the appellant apologising to her. She made notes shortly after the incident, which recorded she had "pulled him away and said I have to go".[31] She made those notes on the night of the incident straight after she got home. Her brother told her to write down what had happened.

[55] The complainant agreed the appellant's car was an average car with a console between the driver's seat and the passenger's seat. The appellant was still able to straddle her at some stage. The appellant was very aggressive. At some point the appellant was on top of her. She did not know where his legs were at that time but the top half was on top of her. She agreed that in order to put down the back of her seat the appellant had to reach right across her to undo the button near the door. She also agreed that the appellant was able to take off her pants in small confines and put his mouth on her vagina in a very small space.

[56] The complainant denied that all that had happened on the evening of 3 August in the vehicle was that the appellant kissed her and she responded by kissing him back. She denied that he never put the seat down. She denied that she sat there while he put his hands inside her bra and fondled her breast. She told him to stop. She denied the appellant merely touched her in the vaginal area. The appellant put his hands down her pants and put his finger in her vagina. She denied that it was only at that point she said no. She said no "way before then".[32] She denied the appellant stopped when she said no.

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29 AB 43/40.
30 AB 65/1.
31 AB 65/30.
32 AB 52/22.

[57] The complainant denied that on 3 August 2014, while she was at the bus stop, she asked the appellant to drop her home in front of another co-worker. She agreed she told police that when she hopped in the vehicle she remembered a light on the dash and a song list. The vehicle looked new and the dash was black.[33]

[58] The complainant remained outside the house until she knew the appellant had gone. She then called her brother who did not answer the telephone. The complainant was crying at this stage. Carlos was watching television. He saw she was crying. A little bit later he asked if she was okay. She said "yes". She did not tell Carlos anything at that time.[34] The complainant went to her room. Her brother called her. The complainant spoke to her brother. She said "I nearly got raped tonight".[35] She told him it was the same guy she had been telling him about last week. Her brother told her she needed to tell the police and her manager as this "is not on".[36] The complainant's sister was in the room with her brother and overheard the conversation. During this conversation, the complainant did not tell her brother what had happened in the car. She did not tell her brother most of her clothes were off.

[59] The complainant said she received a text message from the appellant at 6.04 am the following morning, 4 August 2014. It read:

> "Hey. Hope you're having a great night. Don't stress today. Have fun at uni. Have an awesome day, okay? Text me where [sic] you can."[37]

[60] The complainant sent a text back asking if the appellant was working that afternoon. She wanted to know because she was going to tell her manager what had happened the previous evening. The appellant replied yes and queried if she was working.

[61] The complainant went to the facility that morning sometime after 8 am and before 9 am. She spoke to two managers. Her aim was to tell the first person, Elizabeth Roberts, that she did not want to work with the appellant. She told Elizabeth what had happened in the vehicle the previous evening. She did not tell her about the first incident. The complainant said she was crying a lot.

[62] The complainant told Elizabeth the appellant had locked her in the car. She had tried to get him off of her. He was kissing her, he was touching her, he was licking her. The complainant denied telling Roberts she did not think the appellant's penis went inside her. The complainant knew his penis did not go inside her.[38] She told Roberts his fingers went inside her and his tongue was licking her down there.[39] At that point Elizabeth went to Rene Huysamen's office. The complainant remained in Elizabeth's office. She then went into Rene's office. She said the whole thing again to Rene.

[63] The complainant was then spoken to by police. It was about 11 am. She gave police her whole uniform, including her underwear. She also gave police a DNA sample. She also showed police the text messages between her and the appellant. She agreed that in an addendum statement she told police the only boys she had previously kissed were boyfriends when in a relationship. The complainant has only had one boyfriend. If she told police boys that was a mistake.[40]

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33 AB 121/43.
34 AB 44/25.
35 AB 44/30.
36 AB 44/33.
37 AB 46/20.
38 AB 125/45.
39 AB 126/20.
40 AB 131/33.

[64] The complainant said she did not telephone the appellant after speaking to the managers and before going to police. While she was with the police, the appellant was calling her but she did not answer. The complainant said at some time that day, during a telephone conversation with the appellant, the appellant said he had been told not to go to work that day because there had been a complaint made. The complainant recalled Rene telephoned the appellant in front of her and told him he was dismissed from work that day. The complainant said that was when the appellant started to call her.

[65] The complainant agreed that whilst at the police station she telephoned the appellant. That conversation was recorded by police. During that conversation the appellant said he hoped the complainant was not upset with him. The complainant said she was. The appellant asked "what did I do?" The complainant replied "you know what you did". The appellant said "I kissed your lips. I don't think that you didn't want me to". The complainant replied "did you just say you just kissed me? … Are you serious? … Are you serious? You're just saying that you're just kissing me? You just kissed me last night? … I think you did a little bit more than that". The appellant replied "I thought it was just a kiss", to which the complainant said "… are you actually kidding me? Do you know what happened in your car? Do you remember?" The appellant replied "yes I do … It was just a kiss. I just didn't think that if it was, if it was something that would upset you". The complainant repeated "are you just saying to me that you'd just kissed me last night?", to which the appellant replied "just kissed you … that was it". The complainant said "are you kidding me? … I think we did a lot more than kissing last night". The appellant replied "It's alright … I apologise for that. Yeah. If it upset you". The appellant asked "did you went to report [indistinct] yesterday?", and said "oh I'm sorry. I'm joking. I'm just joking. I'm sorry".

[66] Later that afternoon, after the complainant had spoken to police, the complainant was examined by a clinical nurse, Kelly Flatley. At around this time, the appellant sent a text to the complainant asking whether she wanted to catch up. The appellant then sent a text at 2.58 pm:

> "Don't stress. .. just kidding. Where's your sense of humour? . Sorry okay."

The complainant replied:

> "My sense of humour! You hurt me last night, you used me and made me upset. Why didn't you stop when I said no!"

This text was sent by the complainant whilst she was either in police company or waiting for or after seeing a clinical nurse. She denied this was all about regrets on her part.[41] The appellant responded:

> "What? !!! No no Rich … you're getting this all wrong. What do you mean I used you? Oh no!! I think that's far fetched. Please don't think of me like that. It really hurts. You and I know that that's not what really happened. Am truly sorry if that's what you feel. Sincerely I didn't expect this reactions from you but I didn't mean to upset you in any way."

The complainant replied:

> "You used me and you know it! I said no several times and you locked the car on me! What does that say???"

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41 AB 55/41.

The appellant responded:

> "Please forgive me. Am sorry."

The appellant then sent another text message:

> "Please you're going too far Rich. You're really taking things out of context."

The complainant replied:

> "Really?? Am I? You knew I was upset last night!"

The complainant then sent another text message:

> "I cried all last night because of what happened. I wasn't comfortable and you knew that."

The appellant responded:

> "Not really Rich! I didn't know you're upset last night. You kissed and hugged me last night after I dropped you off. Am so confused and deeply concerned right now."

The complainant replied:

> "You should be! Because I know what happened and I'm very upset about it! I HAD to hug you back but you knew I was upset!"

The complainant then sent another text message:

> "And its Rachel not rich."

The appellant responded:

> "Sorry for the wrong spelling."

The appellant then sent another text message:

> "Rachel what are you saying?"

The last communication the complainant had with the appellant was this text from the appellant:

> "Hey Rachel … hope you had a great day at uni. Am very sorry about today. Please forgive me. It won't happen again. I promise."

[67] The complainant agreed police told her after the recorded telephone call not to have contact with the appellant. The complainant said she was very angry about the phone call. The complainant did not recall if the appellant laughed at her during the recorded conversation but remembers he was not taking it seriously and he was trying to justify himself all the time. It was in response to her anger that she sent these text messages following the telephone call recorded by police. She did not tell police about the text messages between her and the appellant until the end of her medical examination. She then gave police her telephone.

[68] The complainant said that after the first incident she did not know how she felt about the appellant. She knew he liked her and they were flirting the whole shift. The appellant took it too far. On the first incident, all of the kisses were full tongue kisses. The complainant had never kissed like that before so when he "went straight, very

aggressively and kissed me like that, I've never experienced that before, I didn't really know what to do".[42] When the appellant turned off the lights, she started to get worried. He had also closed the door.

[69] It was put to the complainant that after the events of 3 August 2014 the thought crossed her mind that if she had kissed him after all these things it would look bad for her. She said her only plan was to get out of there. She denied it was her thought that it would look bad for her if she had kissed him back. She agreed that in his text message at 3.31 pm on 4 August the appellant had said that she had kissed and hugged him last night and that in response she had said she had had to hug him back. The complainant said she had to just stand there.

[70] The complainant agreed that on the evening of 3 August she thought the appellant might be waiting to drive her home. She only received his text asking her to wait for him when she went down to her locker at the end of her shift. She considered calling her flatmate but he was working that night and her family lived half an hour away. She said whilst she had missed her bus, she had missed the bus heaps of times and had waited for half an hour.

[71] The complainant agreed that having felt dirty after the incident on 27 July 2014 there was no way she would put herself in that position again. However, on 3 August the appellant told her he was dropping her off as a friend. She did not know he was going to lock her in the car and do it again.[43] She denied that anything that happened in the car was with her consent. She denied it was only in the car when the appellant put his hands down on the top of her vagina that she said stop. She denied the appellant stopped at that time. She said "he did not stop".[44]

Other evidence

[72] Carlos Alvarez remembered picking the complainant up one evening from her employment in July 2014 after the complainant contacted him. When he arrived, he saw a tall black young male, in a corner using his mobile phone. That male then went towards a vehicle parked in front. When the complainant came out of the facility she said "thanks for coming, thanks for picking me up". The complainant then asked him to wait a bit. The complainant said there was a guy who was trying to hit on her. The complainant was stressed. The complainant went to the vehicle in front and said something to the male he had previously seen using the mobile phone. The complainant then came back to him and he took her home.

[73] Mr Alvarez said some nights later he was watching television when the complainant arrived home. She was very stressed, almost crying. He asked if she was okay. The complainant told him there was something about her work. She had a problem with some colleagues. She then left the living room and went into her bedroom.

[74] Ruth Forrest, the complainant's younger sister, recalled a short conversation with the complainant in July 2014 in her car on the way to the shops. They were discussing general matters, including the complainant's love life. The complainant mentioned a dark skinned person she was working with at the time. The complainant said it had been really confusing. The man said he wanted her. He had been giving her mixed

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42 AB 68/25 – 30.
43 AB 87/35.
44 AB 88/3.

messages. At the end of one shift, he had kissed the complainant on the lips. It was spontaneous and a surprise. The complainant did not know what to think. The complainant was concerned about the incident happening in the workplace. If other staff were to know she could be fired. She told the complainant to be careful and to not let him use her.

[75] Ms Forrest said a few nights later, when she was at home with her younger brother Jacob, she heard Jacob on the telephone to the complainant. There was urgency in his voice. She briefly spoke to the complainant. She asked if she was safe and okay. The complainant said it was "that guy from nursing".[45] She told the complainant to tell somebody. The complainant said she was going to the police. The complainant was crying. She could barely make out her words. She was "in a devastating way".[46] She spoke to her sister for maybe 15 seconds maximum before her brother grabbed the phone again.

[76] Jacob Forrest, the complainant's brother, recalled two conversations with the complainant. In the first conversation, towards the end of July 2014, the complainant sought his advice about a man at work she thought may like her. The complainant said he was coming on strongly but she thought he was a nice guy. The complainant didn't know what the man wanted from her. The complainant thought it was only for her body because he had said stuff like "I want you so bad".[47] The man had kissed the complainant outside the facility one day. The complainant was worried in case any of her work friends saw the kiss. Jacob told her to stay clear and just be friends.

[77] The second conversation was on 3 August 2014 at around 8.30 pm. Jacob had missed a fair few phone calls from the complainant. He telephoned her back. She was crying a lot. He asked her what happened. She said "Jake, I was nearly raped".[48] He asked if it was the same guy she had spoken about previously. The complainant said it was. The complainant told him she had just finished her shift and was waiting to catch the bus when the man had offered her a lift home. At first she had said no but he kept insisting so she went home with him. She told him she couldn't get out of the car. She was "almost trapped".

[78] The complainant said the man performed sexual acts on her. He asked the complainant about the sexual stuff. She mentioned he fingered her and licked her down there. She did not go into any other detail.[49] Jacob said he was in shock. He told the complainant to write down what had happened and to contact the police and her work. The complainant was crying throughout the whole conversation. During the course of this conversation, which lasted for maybe 15 to 20 minutes, his sister Ruth came into the room. He handed her the telephone. He heard her ask the complainant if she was okay. She then gave the telephone back to him and he kept speaking to the complainant. The complainant said it had happened outside home. The complainant said she was calling him from outside her home. He asked her if her clothes were off and she said "most of it was off".[50] He remembered the complainant said the man had ripped them off.[51]

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45 AB 134/5.
46 AB 134/9.
47 AB 137/1.
48 AB 137/20.
49 AB 137/40.
50 AB 138/19.
51 AB 138/45.

[79] Jacob agreed that in his statement to police he said the complainant told him there had been a conversation with the man about just being friends. The man said "I understand, but do you want me to take you home?" The complainant said yes because she had missed her bus. The complainant said when they hopped into the car the man lent over and kissed her. The complainant told the man "this can't happen. Please take me home." The man said "can't we just be friends that have a bit of fun?" The complainant said no. The complainant said the man drove to outside her house, locked the doors and did sexual stuff.[52]

[80] Darren Coss was working with the complainant and the appellant in July and August 2014. He was employed as a personal carer and physio aid. He had been in that role for over six years. He knew the appellant and the complainant as work colleagues. He did not know either of them outside of work. Coss recalled on Sunday, 3 August 2014 the complainant approached him and asked if he could give her some advice. The complainant was hesitant and nervous.

[81] The complainant said someone liked her in the facility and was being very persistent. The complainant said she had had a lift home with the person. Coss told her that was not a good idea. He advised her to report it if it was making her feel uncomfortable. Whilst they were standing in the corridor the appellant came around the corner. The complainant's facial expression became quite shocked and she asked him not to say anything to him. The complainant and the appellant then left. Coss spoke to his manager the next day.

[82] Elizabeth Roberts was employed as the Acting Clinical Manager at the facility where the complainant and the appellant were working in July and August 2014. She had responsibility over personal carers. Roberts recalled a conversation with the complainant on 4 August 2014. The conversation occurred after Coss has spoken to her. The complainant had telephoned her earlier to see if she could come in. The conversation was probably 8.20 or 8.30 in the morning. It continued for half an hour to 45 minutes.

[83] Roberts said the complainant was "in angst or conflict in her own brain".[53] She appeared a bit numb and looked like she had been crying and hadn't slept. Throughout the conversation she was crying. She was upset. The complainant said she would like to not work in the same wing as the appellant anymore if it was possible. Roberts told her she would need a reason. The complainant said he made her feel uncomfortable but she didn't want to get him in trouble.

[84] Roberts said the complainant told her the previous evening the appellant had offered her a lift home. The complainant had declined but when she walked outside the appellant was still continuing to offer her a lift. It made her feel uncomfortable. The complainant told him they just needed to be friends. By that time, she had missed her bus so the complainant accepted a lift home from the appellant. They walked to his car. The appellant asked if he could kiss her. The complainant said no, friends don't kiss.

[85] The complainant said once they were in the car the appellant hopped over the console, leant over and kissed her. The complainant tried to exit the car but found the doors were locked. The appellant at the same time pulled the seat back so she could not get up. The appellant was unbuttoning her shirt and undoing her trousers and pulled her pants down. The complainant said she tried to say no or said no and tried to push him off but she wasn't able to at that point.

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52 AB 141/25.
53 AB 153/21.

[86] Roberts asked the complainant if the appellant had had sex with her or penetrated her. The complainant said not with his penis but he had penetrated her with his fingers and that he was doing things down there with his tongue. The complainant said after a period of time she finally managed to push him off and he moved back to his seat. She again tried to get out of the car but the door was still locked. The complainant told him she wanted to get out and he said "no, I'll give you a lift home".

[87] The complainant said the appellant then gave her a lift home. The door was still locked and she said "are you joking, are you going to let me out?" The appellant offered to go inside her house. The complainant said he got out of the car and tried to give her a hug and kiss but she said no. The complainant said she stayed outside her house for a period of time before going inside. Roberts then contacted her Facility Manager, Rene Huysamen. Rene said she was about five minutes away from work. When she arrived Roberts and the complainant went into Rene's office. The complainant repeated her account of the night before.

[88] Roberts said she wrote notes at the time of the conversation but lost those notes before speaking to police. She spoke to police a week later. In her police statement, Roberts said she asked the complainant "did he penetrate you or have sex with you" and the complainant replied "I don't think that his penis went inside me, but he was doing other stuff. His fingers went inside me, and his tongue was licking down there". Roberts agreed her memory at that time would be more accurate.

[89] Thomas Madsen was the investigating officer in relation to the complainant's complaint. He took forensic samples from the complainant and the appellant. He also took samples from the complainant's underwear and top and from the appellant's vehicle. He obtained details of telephone calls to and from the complainant's telephone number. Madsen took a statement from the complainant when he spoke to her on 4 August 2014. He recorded that conversation. The complainant did not, in that conversation, mention the appellant had put his finger in her vagina or licked her vagina in the incident on 27 July 2014. The complainant gave the sequence of events for the 3 August 2014 incident as initially kissing, then the seat being pushed down, then touching of the breasts, pulling down of the pants, putting a hand down her pants and touching her vagina and fingering the vagina.

[90] Brendan Blyth was also an investigating police officer. He was involved in the complainant making a pretext call to the appellant on 4 August 2014 at about 2.50 pm. He also drove the complainant to a medical examination at around 3.30 pm that day. He later took photographs of the appellant's vehicle. He did not test its locking mechanism.

[91] Kelly Flatley undertook a forensic examination of the complainant on 4 August 2014. At the time, she was working for the clinical forensic medical unit as a nurse examiner. The complainant gave her the following history:

> "I got into the car with a friend who locked the door. He leant over and kissed me. He then undid my two top buttons. He slid my shirt down and grabbed my breast. He then bit and sucked my nipple. He then slid down – his hand down my pants and inserted more than one finger into my vagina. He then put his head down there and started licking and played with my breasts at the same time. He then inserted fingers again and I pushed him off. My seat was reclined back. He started undoing a zip and tried straddle me, and I pushed him off. When asked where – when asked where this happened, [the complainant] stated, at 8.30 last night on Annerley Road in a car."

[92] Flatley said her medical examination took an hour and 40 minutes to complete. That included taking a history and conducting a head to toe examination looking for injuries. She took some vaginal swabs. Her findings were consistent with the given history. She did not find any injuries. As the complainant was a young person, it was not unexpected to see no injuries. The complainant did not complain of being sore in the vagina. If there had been redness she would have documented that finding. You would not necessarily find redness if a person put a finger into the vagina. She saw no redness around the nipples.

[93] Rene Huysamen was Facility Manager at the complainant's place of employment in July and August 2014. She confirmed work records revealed both the complainant and the appellant had worked shifts together on 27 July 2014 and 3 August 2014. The records also confirmed Darren Coss had worked on the evening of 3 August 2014 on the same shift.

[94] Huysamen said on 4 August 2014 she spoke to the complainant with Roberts. It was about 9.30 in the morning. The complainant told her that during the shift the night before the appellant had asked her a few times if he could give her a lift home. The complainant told him she would take the bus. The complainant said she missed her bus and the appellant once again offered to take her home. The complainant said she told the appellant if he did give her a lift home he could only do so as a friend because she had an impression before that that he liked her. The complainant told him she could only be friends with him because she was concentrating on her studies and did not want to be involved in a romantic relationship. The appellant told her it would be okay if they didn't get caught. The complainant said no, she didn't want a relationship, she just wanted to be friends.

[95] Huysamen said the complainant told her the appellant agreed to be friends. The complainant then hopped into the appellant's vehicle so he could take her home. After she did so, the appellant started telling her again how much he liked her. The complainant felt uncomfortable and thought she should get out of the car. The appellant then lent over and locked the car door. He leaned over her body, unbuttoned her blouse, pulled her pants down to just above her knees and started caressing her body. The complainant asked him to stop on numerous occasions but he did not stop. The appellant also pushed her seat back and kept telling her to relax, that he wouldn't hurt her.

[96] Huysamen said the complainant told her every time she tried to sit up the appellant's hands went further down by her genitals. The complainant said she thought if she just stayed still he would stop. She said this carried on for a while. The appellant then climbed over the console of the car. She heard him unzip his trousers, at which stage she pushed him back hard to his own seat and said in a loud angry tone "no, stop it, stop it now". She then asked him to let her out of the car and he said "no, I'll drive you home". The complainant said she was quite angry and upset. The appellant drove her home.

[97] The complainant told Huysamen that when they arrived at the complainant's house the appellant asked her why she didn't tell him she was a virgin. Huysamen asked the complainant if she had mentioned she was a virgin and how the appellant knew she was a virgin. The complainant replied she did not know, "he must have found out". The complainant insisted he unlock the car door and let her out. The complainant said the appellant got out with her, apologised and attempted to hug her. The complainant said she waited for him to leave before going into her house.

[98] Huysamen said during the conversation she asked the complainant whether there was any penetration. The complainant said not with his penis but with his fingers. Huysamen described the complainant as very shocked. She was crying and shaking and really embarrassed. The complainant blamed herself for getting into the car. Huysamen made brief notes at the time. She agreed that in those notes she mentioned the appellant took his pants off but said that her memory was that the complainant said he was unzipping his pants. She clarified that in her notes. Huysamen then took the complainant to the police station.

[99] Huysamen said the complainant also told her about an incident on 27 July when she was working with the appellant. The complainant thought the appellant liked her. The appellant asked her if he could give her a lift home that day but the complainant declined. The appellant asked the complainant for her phone number which she gave to him. The complainant told her that on that day one of the residents had joked the two should be a couple. The appellant had joked with the resident they were getting married the next day. The complainant did not tell Huysamen that anything had happened on 27 July 2014 other than that he had offered her a lift home and that she suspected he liked her.

[100] Thomas Nurthen, a forensic scientist, examined the samples taken from the complainant and the appellant. The sample taken from the inside of the complainant's underwear produced a mixed DNA profile indicating the presence of DNA from two contributors, one being the complainant and the other being greater than 100 billion times more likely to have come from the appellant. A similar result was achieved from the sample taken from the top two buttons of the complainant's top. However, the sample from the top had a third contributor.

[101] Nurthen said a sample taken from fingerprint scrapings from the appellant also revealed a mixed DNA profile containing the presence of DNA from two contributors, one of whom could be the appellant. The complainant was excluded as a potential contributor to that mixture. A sample taken from a tissue pushed in the front passenger seat of the appellant's car revealed a DNA profile consistent with a single contributor that matched the reference DNA profile of the complainant. On a statistical analysis, it was greater than 100 billion times more likely to have occurred if the complainant had contributed DNA than if she had not done so. That result could have come from biological material, including shedding from skin and touching.

Appellant's submissions

[102] The appellant submits the verdicts of guilty were unreasonable because there were significant inconsistencies within the complainant's own evidence as to what had occurred and in the complainant's account to other witnesses, including as to what had been said by the complainant to those witnesses. The inconsistencies in the complainant's accounts included whether the appellant's penis went into the complainant's vagina and whether the complainant hugged and kissed the appellant after the incident on 3 August 2014. The inconsistencies in the complainant's account to other witnesses included that she considered the appellant a nice guy, that she liked the appellant, that she had hugged and kissed the appellant after the incident on 3 August 2014 and that her clothes had been ripped off by the appellant.

[103] The appellant submits the verdicts were also unreasonable because of the implausibility of the complainant's account. On the complainant's account, she agreed to travel in the

appellant's vehicle after she had been sexually assaulted and raped one week earlier. The complainant also contacted the appellant after the first incident by text and had kissed the appellant back at the commencement of the incident on 3 August 2014. There were other aspects of her account which were implausible such as that the appellant was able to remove her pants and lick her vagina whilst remaining in his own seat in the vehicle. The complainant also had a motive to lie, namely that she may lose her job, and denied telling others about that concern.

[104] The appellant submits the differences in the complainant's account, the conflicts in witnesses' evidence and the implausible aspects of the complainant's evidence ought to have caused the jury to have a reasonable doubt such that the verdicts of guilty are unreasonable and ought to be quashed.

[105] The appellant further submits the trial judge erred in failing to direct the jury as to mistake of fact. Whilst trial counsel did not seek any such direction and did not consider mistake of fact as to consent open, the evidence as a whole fairly raised mistake of fact. That evidence included the contact between the appellant and the complainant after the first incident, the discussion the complainant had with her brother about the appellant being a nice guy, the kissing back by the complainant in both the first and second incidents, the complainant's evidence that she let go and let it happen when the appellant was licking her vagina, the circumstances of the removal of the complainant's pants whilst seated in the motor vehicle, the fact the complainant went in the motor vehicle when there had been the earlier incident, the fact the complainant allowed the appellant to hug and kiss her after the conclusion of the second incident and the fact the appellant denied wrongdoing in the pretext call. The complainant's responses in cross-examination also supported mistake of fact being open. The complainant accepted she did not say no to the kiss and that the appellant was kissing her while he had his hands down her pants. Once a mistake of fact was fairly raised on the evidence, the failure to leave that issue to the jury gave rise to a miscarriage of justice as the appellant was deprived of a fair chance of acquittal.

[106] The appellant further submits the trial miscarried because the appellant was not advised by his legal representatives of the right to call character evidence. The new or fresh evidence on appeal supported the existence of relevant character evidence. Character evidence has long been recognised as valuable in cases involving these types of offences. The failure to advise the appellant of the right to call such witnesses gave rise to a miscarriage of justice as the appellant was deprived of the fair chance of acquittal, particularly where the complainant's evidence lacks credit and the character evidence was more than mere reputational evidence.

[107] Finally, the appellant submits the trial judge erred in failing to properly direct the jury on motive to lie. The complainant was cross-examined about a motive to lie. She conceded she had a fear of losing her job due to kissing a fellow colleague in the workplace. Whilst the trial judge provided a motive to lie direction, it did not refer to other possible unknown reasons for motive to lie. Accordingly, it was inadequate. A miscarried of justice occurred as the appellant was denied a fair chance of acquittal.

Respondent's submissions

[108] The respondent submits the verdicts of the jury were not unreasonable. The central issue at trial was not whether there had been any sexual contact between the appellant and the complainant. The issue was the extent of sexual contact and whether it was

consensual. The complainant's account was generally consistent and plausible. It included evidence of significant sexual contact. The pretext call was supportive of a conclusion that sexual contact was not consensual having regard to the appellant's apology and seeking of forgiveness in relation to the assertion he had locked the complainant in his vehicle.

[109] The respondent submits that all of the matters relied upon as a basis for a finding of an unreasonable verdict were matters properly within the province of the jury. The suggested inconsistencies in the complainant's account and in the accounts to other witnesses were not significant. None of them, either individually or collectively, compel a conclusion it was not open to the jury to be satisfied beyond reasonable doubt that the complainant was truthful and accurate concerning each of the offences. The evidence as a whole supported a finding the appellant was guilty of each of the counts. The verdicts were not unreasonable.

[110] The respondent submits there also had not been a miscarriage of justice due to the trial judge's failure to direct the jury concerning mistake of fact. The appellant's counsel at trial did not suggest mistake of fact was raised on the evidence. Section 24 does not operate unless there is some evidence of a mistaken belief actually held by the appellant. The evidence at trial revealed no such evidentiary basis. There was clear evidence from the complainant that the sexual conduct the subject of the counts the appellant was convicted of was all without consent.

[111] The complainant gave evidence she vocally and physically resisted the appellant in respect of each of those acts. In those circumstances, evidence the complainant kissed the appellant back at the commencement of the incident was insufficient to leave open a possibility the appellant mistakenly believed the complainant was consenting to the subsequent acts. Further, the case conducted at trial was that only limited sexual contact occurred which was consensual and that when the complainant asked the appellant to stop he did so. Once the jury concluded that further sexual contact, in accordance with the particularised counts had occurred, there was no basis upon which the jury could find that contact was consensual on the basis of an honest and reasonable mistaken belief as to the facts.

[112] The respondent submits there also had not been a miscarriage of justice because the appellant was not advised of the availability to call character evidence. Whilst evidence of good character may be relevant to a jury's determination of guilt, the proposed evidence could only be considered potentially relevant to whether the appellant was the kind of person who would commit the acts in question. The proposed evidence said little about the appellant's character. To the extent it did, namely, that he was a loving, spiritual husband, it was of no practical utility. On the case put a trial, the appellant had engaged in consensual sexual acts with a work colleague whilst married.

[113] The respondent submits there were also good forensic reasons not to call character evidence. The appellant himself did not propose to give evidence. There is no suggestion in the material the appellant wanted to give evidence. In those circumstances, calling character evidence would have changed the order of addresses to his detriment. Further, evidence from his wife, having regard to his admitted infidelity, would have been disadvantageous.

[114] Finally, the respondent submits the trial judge did not err in the directions concerning the complainant's motive to lie. The trial judge gave an orthodox direction in accordance with the Bench Book. That direction referred to the specific motive to lie. There was

no obligation to give a further direction to the effect that people might lie for unknown reasons. Such a direction would have been of no utility in circumstances where the jury, having assessed the complainant's evidence, must have rejected the suggestion she was telling lies for the specific reason of the potential impact on her employment. No miscarriage of justice resulted from the trial judge's direction on motive to lie.

Consideration

Ground 1

[115] In determining whether the jury's verdicts were unreasonable, it is necessary for this Court to undertake an independent review of the Appeal Record to determine whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt on each of the counts he was convicted on. Such a review should accord special respect and legitimacy for the jury's verdicts.[54] The primacy of a jury verdict in criminal trials was reiterated recently by the High Court in *R v Baden-Clay*.[55]

[116] The relevant principles in respect of a ground of appeal based on unreasonable verdicts were summarised in *R v SCH*:[56]

> "In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty. In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred. However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court 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." (Citations omitted)

[117] A consideration of the complainant's evidence, including her responses to a prolonged and detailed cross-examination, reveal the complainant gave evidence supportive of the findings of guilty for each of the offences that took place on 3 August 2014. Whilst there were inconsistencies in the complainant's accounts of the events of 3 August 2014, those differences were reconcilable having regard to the nature of the offences, the stress they had caused to the complainant and the difficulties experienced by witnesses in giving evidence at trial.

[118] In considering the inconsistencies in the complainant's account, the jury was properly entitled to have regard to whether variations in detail and sequence of events materially affected the core consistency in the complainant's accounts of the appellant having touched, sucked and bitten her breast, and of having licked and inserted his finger into her vagina whilst she was locked in his motor vehicle. It was open to the jury to find that any such inconsistencies did not affect the reliability of those core events.

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54 *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at 624 [59].

55 (2016) 334 ALR 234; [2016] HCA 35 at 246 [65]-[66].

56 [2015] QCA 38 at [7].

[119] Roberts gave evidence the complainant told her she was unsure whether the appellant had inserted his penis into her vagina. However, Huysamen gave evidence the complainant had told her she had not been penetrated by the appellant's penis, but had inserted his fingers into her vagina. It was open to the jury, having regard to those differences, to conclude that, notwithstanding those variations, the complainant had overall provided reliable and credible evidence as to the offences of sexual assault and rape.

[120] Similarly, differences in the complainant's evidence as to what she told other witnesses were properly matters for the jury to consider in the context of considering the consistency in the account the complainant had given to those witnesses as to the offences of sexual assault and rape. The account given by the complainant to her brother expressly included details consistent with the particularised acts of sexual assault and rape. It was open to the jury to discount the complainant's brother's recollection of the complainant saying her clothes were ripped off as being inaccurate. Any implausibility of aspects of the complainant's evidence was also properly a matter for the jury to consider, in the context of the overall consistency of the complainant's accounts of the acts of sexual assault and rape.

[121] This conclusion is also supported by a consideration of the evidence given by Roberts, Huysamen and Flatley as to the accounts given to each of them by the complainant the following day. Those accounts consistently asserted the appellant had locked the complainant in his vehicle before touching, sucking and biting her breast, and licking and inserting his finger in her vagina. That consistency was a significant factor for the jury to consider, when assessing suggestions of unreliability in the complainant's accounts of the incident on 3 August 2014.

[122] A consideration of the difference in accounts between the complainant's evidence and the accounts of the other witnesses does not give rise to inconsistencies of such a magnitude as to have required a reasonable jury to have a reasonable doubt as to the reliability and credibility of the complainant's account. The differences were in the nature of differences to be expected between honest witnesses seeking to give an account of events some time ago. Each was a matter well within the province of the jury, which was "well able to evaluate conflicts and imperfections of evidence".[57] There is no basis to conclude that those matters, either individually or collectively, were such as ought properly to have caused the jury to have a reasonable doubt as to the reliability and credibility of the complainant's account in respect of the events on the night of 3 August 2014.

[123] The jury's failure to reach a verdict in respect of counts 1 and 2 is consistent with a conclusion that the jury was not satisfied as to the reliability of the complainant's account in respect of those counts. However, that lack of satisfaction is not inconsistent with a conclusion it was open to the jury to be satisfied beyond reasonable doubt as to the reliability and credibility of the complainant's evidence in respect of the remaining counts. The evidence established the complainant did not make a complaint in respect of the first incident. That was in stark contrast to the events of the second incident.

[124] The events the subject of counts 3, 4 and 5 were in an entirely different category. Not only was there the complainant's own accounts of what occurred, there was evidence from her flatmate as to immediate distress, evidence of prompt complaint to members of her family and, early on the following day, to her employer and police. The

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57 *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at 634 [96].

contents of the text messages the following day and of the pretext call also supported a conclusion that events had occurred contrary to the complainant's consent, including detaining her in a locked vehicle.

[125] The evidence as a whole provided a consistent and compelling account of the complainant having been detained against her will and having been sexually assaulted and raped by the appellant on the evening of 3 August 2014. There is no basis to conclude that a reasonable jury ought properly to have had a reasonable doubt as to the appellant's guilt in respect of any of the counts the subject of the jury's guilty verdicts. The verdicts of the jury were not unreasonable. The appellant fails on this ground.

Ground 2

[126] A contention that mistake of fact was properly raised on the evidence depends upon a finding that the complainant's concession as to continuing contact between the first incident on 27 July 2014 and the incident on 3 August 2014, as well as her evidence as to the events of 3 August 2014, gave rise to an obligation on the trial judge to direct the jury on mistake of fact, notwithstanding the clear concession by counsel at trial that it did not arise on the evidence.

[127] A consideration of the complainant's evidence as a whole supports the conclusion that that concession was proper. The complainant's consistent account was that she repeatedly indicated her lack of consent to contact with her breast and vagina throughout the incident on 3 August 2014, both through statements and physical actions. The cross-examination of the complainant was premised on an assertion that the appellant desisted upon the complainant indicating an unwillingness to proceed with any sexual contact. In accordance with that assertion, it was put to the complainant that the biting of her breast and the insertion of a finger into the vagina did not occur at all.

[128] There was also a sound forensic reason for the appellant's legal representatives to not seek a direction on mistake of fact from the trial judge. The defence case was conducted on the basis there was consensual sexual conduct which immediately ceased upon the complainant saying no to the appellant. Such a case would have been significantly undermined by the seeking of a direction from the trial judge as to mistake of fact in respect of the counts of sexual assault and rape.

[129] Once the jury was satisfied that each of the acts relied upon to support count 4, sexual assault, and count 5, rape, had occurred, there was no basis upon which the jury could properly consider those acts had been undertaken by the appellant under the mistaken belief the complainant was consenting to each such act. There was no evidential basis upon which the jury could properly consider a mistake of fact.

[130] There was also no miscarriage of justice in the trial judge's failure to direct the jury in relation to mistake of fact. There is no basis to conclude the failure to direct the jury in respect of mistake of fact has given rise to a significant risk an innocent person has been wrongly convicted of the offences. The appellant fails on this ground.

Ground 3

[131] A consideration of the new and fresh evidence supports two conclusions. First, the appellant raised with his legal representatives the possibility of calling witnesses at trial. Second, his legal representatives did not advise the appellant of the availability of calling character evidence in his defence. Those conclusions do not, however, support a finding that there has been a miscarriage of justice.

[132] The proposed character evidence came from the appellant's wife, uncle and three friends. The appellant's wife proposed to give general evidence as to his character. She described the appellant as "a spiritual and loving husband who is caring and very humble. Who would not cause harm to anyone". She also proposed to give evidence that she was not aware of any previous issues relating to women or previous allegations of sexual assault, and that she had not seen or observed anything to suggest that her husband had behaved inappropriately in this regard to anyone.

[133] The appellant's uncle proposed to give evidence the appellant was a Christian who was respectful and listens to others and is an exceptionally humble person. The appellant's friends proposed to give evidence that the appellant had a very good relationship with his wife, that they were a happy couple, that he was very compassionate, loving and supportive of others, and that he had never acted inappropriately towards women in the past. One of the friends proposed to give specific evidence about his interactions with female staff at the facility. He described the appellant as popular with the younger staff, who found him attractive, and a "very self-confident young male". That friend had never had any concerns about the appellant's interaction with co-workers.

[134] Evidence of that nature can be powerful evidence in a trial involving allegations of sexual impropriety, where the allegations of any improper conduct are completely denied. However, such evidence has very limited value in a trial where the defendant is a married man who on his own case actively pursued a much younger female co-worker to engage in a sexual relationship. Evidence to the effect that those proposed witnesses had not seen the appellant engage in such conduct towards women in the past is unlikely to have assisted the jury in its assessment of the reliability and credibility of the complainant's evidence of the events on 3 August 2014. Those witnesses giving character evidence would have to concede that evidence the appellant was the instigator of an adulterous sexual relationship was totally contrary to their past dealings with the appellant. Once that concession was made, their evidence in respect of the appellant's reputation was worthless.

[135] In the context of the evidence as a whole and, in particular, the conduct of the defence case, there was a sound forensic basis for the appellant's legal representatives to not give consideration to the calling of character evidence. Their failure to advise the appellant of the availability of that option did not deny the appellant a fair chance of acquittal. There is no basis to conclude there has been a miscarriage of justice as a consequence of that failure to advise the appellant of that option. The appellant fails on this ground.

Ground 4

[136] In the summing up, the trial judge dealt with motive to lie in the following terms:

> "… In the cross-examination of the complainant, an issue was raised with her that she was concerned about the incident of kissing at the workplace and she was worried that she could be fired if other staff knew about it. There was also cross-examination on that subject of her brother and her sister.
>
> It is important that you bear in mind, members of jury, that if you reject the motive to lie put forward on behalf of the defence, that does not necessarily mean that the complainant is telling the truth. Please bear in mind that it is for the Crown to satisfy you that the complainant is telling the truth, because it is the Crown's burden to satisfy you beyond reasonable doubt that the defendant is guilty."[58]

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58 AB 220/7-17.

[137] His Honour later directed the jury:

> "[Defence Counsel] also referred to the possible motive on the part of the complainant to tell lies about what had happened. He asked you to consider whether she was worried about being fired from work and, whether in the circumstances, where she had just started a few months earlier and was a part-time employee, whether that might have been a reason why she did make up the allegations. [Defence Counsel] of course, pointed out, as I have already, members of the jury, that the defence have no onus of proving a motive to lie. He asked you to consider whether the allegations were, perhaps, all about the complainant having regrets and whether she was blaming the defendant for putting her in this position."[59]

[138] A consideration of these passages, in the context of the summing up as a whole, supports a conclusion that the jury were directed appropriately in relation to the issue of any motive to lie on the complainant's part. There was no obligation on the trial judge to give a further direction as to other possible unknown motives to lie. Such a direction would not have been likely to have caused a jury to have had a reasonable doubt as to the reliability and credibility of the complainant's account, if the specific motive to lie did not cause the jury to have such a doubt.

[139] There is no basis to conclude that the failure to give a more general direction as to motive to lie has deprived the appellant of a fair chance of acquittal or has resulted in there being a substantial risk that an innocent person has been wrongly convicted of the offences. There has been no miscarriage of justice. The appellant fails on this ground.

Conclusions

[140] The verdict of the jury in respect of counts 3, 4 and 5 on the indictment were not unreasonable or contrary to the evidence. They were amply supported by a consideration of the evidence as a whole. It was open to the jury, having considered that evidence as a whole, to find the complainant's evidence in respect of these counts reliable and credible.

[141] There was no obligation on the trial judge to direct the jury in respect of mistake of fact. No miscarriage of justice has resulted as a consequence of the failure to give such a direction. Similarly, no miscarriage of justice has arisen from the legal representatives' failure to advise the appellant of the option of calling character evidence and in the trial judge's failure to give a more general direction in respect of motive to lie.

Orders

[142] I would order that the appeal be dismissed.

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59 AB 230/19-27.