SUPREME COURT OF QUEENSLAND

CITATION:	*R v LAU* [2022] QCA 37
PARTIES:	**R** **v** **LAU** (appellant/applicant)
FILE NO/S:	CA No 251 of 2020 CA No 29 of 2021 DC No 591 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 30 October 2020; Date of Sentence: 5 November 2020 (Lynham DCJ)
DELIVERED ON:	18 March 2022
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2021
JUDGES:	McMurdo JA and Boddice and Henry JJ
ORDERS:	**1. Leave to adduce further evidence be refused.** **2. The appeal against conviction be dismissed.** **3. Leave to appeal against sentence be refused.** 4. **The application for bail be dismissed**.
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted of three counts of rape and a contravention of a domestic violence order – where the appellant was found not guilty in respect of one count of rape and one count of contravention of a domestic violence order – where the appellant submits that a miscarriage of justice occurred when the trial Judge failed to discharge the jury upon the impermissible use of the domestic violence evidence in the address of the Crown prosecutor – where the Crown prosecutor and defence counsel agreed on the proposed direction to be given in respect of that evidence – where the Crown prosecutor's address was consistent with those directions and unexceptionally relied on what were clear inconsistencies in the appellant's account at trial – whether evidence as to past domestic violence in the course of the relationship between the appellant and the complainant was relevantly placed before the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant submits that a miscarriage of justice occurred as the jury's verdicts of guilty on Counts 3, 4, 5 and 7 were inconsistent with their verdicts of not guilty on Counts 1, 2 and 6 – where the appellant submits each count relied on the credibility and reliability of the complainant and the jury's rejections of her account of rape, in respect of Counts 1 and 6, support a conclusion that the complainant lacked such credibility and reliability as to warrant findings of not guilty in respect of each count – where the respondent submits there is no inconsistency in the jury's verdicts of not guilty of Counts 1, 2 and 6 to their verdicts of guilty of the remaining counts – where the respondent submits a jury may well have accepted the complainant's account as credible, but not have been satisfied beyond reasonable doubt that the Crown could exclude that the appellant had a mistaken belief that the complainant was consenting to that act – whether a consideration of those verdicts supports a conclusion that there was no proper basis in logic or reason to reconcile those different verdicts, such that the inconsistency represents an unacceptable affront to common sense and logic

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – AVAILABILITY AT TRIAL, MATERIALITY AND COGENCY – MATERIALITY AND COGENCY – EVIDENCE DIRECTED TO CREDIT – where the appellant made application to adduce fresh or new evidence, being the CCTV footage and the text messages – where the appellant submitted that each of these pieces of evidence had strong probative value and materially affected the jury's conclusions as to his guilt of the offences – where the respondent submits that nothing in the new or fresh evidence materially affected the reliability of the complainant's account – where the respondent submits the CCTV footage was consistent with the complainant's account that she had breakfast with the appellant at The Coffee Club that morning and that nothing in the complainant's account suggested that she was obviously distressed at that time – where the respondent submits a consideration of the relevant text messages does not give rise to any message inconsistent with the complainant's account – whether there was a miscarriage of justice by reason of that evidence not being available before the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where a miscarriage of justice was said to arise from the appellant having received a revised

or incomplete version of the original trial transcripts; from multiple breaches of the *Human Rights Act* to the conduct of the trial; from verdicts not supported by the evidence; from incompetence of counsel; and from the wrongful admission of evidence – where the respondent submits that errors in the transcript were typographical in nature and had no consequence – whether particular circumstances amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant submits that a sentence of five and a half years' imprisonment cumulative on his existing sentence was manifestly excessive – whether the appellant's sentence was manifestly excessive

CRIMINAL LAW – PROCEDURE – BAIL – AFTER CONVICTION – GENERALLY – where the appellant makes application for bail, pending his appeal – where that application was adjourned at the conclusion of the hearing of the appeals – whether the application ought to be dismissed

Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, followed
R v Anderson [2014] QCA 134, followed

COUNSEL: The appellant/applicant appeared on his own behalf
C M Cook for the respondent

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

[1] **McMURDO JA:** I agree with Boddice J.

[2] **BODDICE J:** On 30 October 2020, a jury found the appellant guilty of three counts of rape (Counts 3, 4 and 5) and one count of contravention of a domestic violence order (Count 7) all committed on 2 May 2019.

[3] On the same date, the jury found the appellant not guilty of one count of rape (Count 1) and one count of contravention of a domestic violence order with a circumstance of aggravation (Count 2), both alleged to have been committed on 21 April 2019, and a further count of rape (Count 6), alleged to have been committed on 2 May 2019.

[4] After the jury's verdict, the appellant pleaded guilty to a circumstance of aggravation in relation to Count 7.

[5] On 5 November 2020, the appellant was sentenced to five years and six months' imprisonment in respect of each of Counts 4 and 5, and a concurrent three years' imprisonment in respect of Count 3. A conviction was recorded in respect of Count 7, but the appellant was not further punished.

[6] The sentences of imprisonment, whilst concurrent with each other, were ordered to be served cumulatively on an existing sentence of 18 months' imprisonment being served by the appellant. After a declaration of 26 days of pre-sentence custody being time already served, a parole eligibility date was fixed for 12 January 2023, being two years and three months after the end of the applicant's existing sentence.

[7] The appellant appeals his convictions. The Notice of Appeal relies on two grounds. First, that a miscarriage of justice occurred when the trial Judge failed to discharge the jury upon the impermissible use of the domestic violence evidence in the address of the Crown prosecutor. Second, that a miscarriage of justice occurred as the jury's verdicts of guilty on Counts 3, 4, 5 and 7 were inconsistent with their verdicts of not guilty on Counts 1, 2 and 6.

[8] In written submissions, the appellant expanded on these grounds to assert a miscarriage of justice for a variety of other reasons, including that the verdicts of guilty were contrary to and not supported by the evidence.

[9] The appellant seeks leave to adduce further evidence in respect of his convictions. That evidence is CCTV footage, depicting the complainant and the appellant on the morning of 2 May 2019 and text messages between the complainant and the appellant and between the complainant and other persons on multiple days both prior to, and subsequent to, the commission of the offences on 2 May 2019.

[10] The appellant also seeks leave to appeal his sentences. The sole ground, should leave be granted, is that the sentences are manifestly excessive in all the circumstances.

[11] Finally, the appellant makes application for bail, pending his appeal. That application was adjourned at the conclusion of the hearing of the appeals.

Background

[12] The appellant was born on 21 December 1987. He was aged 31 at the time of the offences and 32 at sentence.

[13] The complainant in each of the counts was married to the appellant but they were separated at the time of the offences. They had been in a relationship for approximately eight years. There was one child from that relationship. The complainant had a child from an earlier relationship. The appellant had two children from an earlier relationship.

[14] At trial, formal admissions were made as to the making of a temporary protection order on 17 August 2018 and of a protection order on 1 May 2019, naming the appellant as respondent and the complainant as the aggrieved.

Counts

[15] Count 1 was particularised as penetration of the complainant's vagina, by the appellant's penis, without consent. Count 2 alleged contravention of a domestic violence order, being the commission of the rape in contravention of that protection order. Both alleged offences were said to have been committed at a motel in Cairns.

[16] Counts 3 to 7 were all alleged to have been committed on 2 May 2019, at the complainant's residence. Count 3 was particularised as penetration of the complainant's mouth, by the appellant's penis, in the shower, without consent. Count 4 was particularised as penetration of the complainant's vagina, by the appellant's penis, in the shower, without consent. Count 5 was particularised as penetration of the complainant's vagina, by the appellant's penis, in the shower, without consent. Count 6 was particularised as penetration of the complainant's vagina, by the appellant's penis, in the bedroom, without consent. Count 7 alleged contravention of a domestic violence order by each offence of rape, in contravention of that order.

[17] The appellant did not dispute the acts of penetration alleged in Counts 1, 3, 4 and 5 occurred but contended each act was consensual, or he believed was with the complainant's consent. The act of penetration alleged in Count 6 was said not to have occurred, although mistake as to consent was also left in relation to this count.

Evidence

[18] The complainant commenced a relationship with the appellant at the end of 2012. She was aged 17, whilst the appellant was 25 years of age. They married approximately three years later.

[19] The complainant said they had arguments in relation to the appellant's children. In early 2013, there was an incident when the complainant hid in the garage. The appellant grabbed her by the throat, choked her and "smacked" the back of her head against the garage wall, whilst yelling at the complainant.[1] The complainant suffered bruising to her face and lumps to her head.

[20] On another occasion in 2013, when the appellant had his arm in a sling from shoulder surgery, the complainant said the appellant kicked her in the head during an argument. On a further occasion, when the appellant was tickling her on the bed and she pushed him away, the appellant put her in a choke hold saying he was not going to let go until she calmed down. The complainant said there were other general incidents following arguments. The appellant would get angry over the complainant giving him attitude. On her evidence, he was quick to throw things or to push the complainant.

[21] In 2014, the appellant and the complainant moved from their army house as the appellant was leaving the army. They had a child together not long after that move. The complainant said the relationship went back to the same dynamic of arguments, where the appellant would get violent. In June or July 2016, after they argued over the telephone, the appellant returned home, obtained a knife from the kitchen, and cornered the complainant in the laundry. He pointed the knife towards her, saying repeatedly "Don't you understand this is what it makes me do when you give me attitude? It makes me want to kill you".[2] Once the complainant told the appellant she understood what she had done, the appellant walked away with the knife.

[22] The complainant said as the children were getting older, the appellant started to tell her to talk to him in the bedroom rather than have an argument in front of the children. The appellant would lock the bedroom door. He would tell the

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1 AB125/40-45.
2 AB131/11-12.

complainant what she had done wrong. If she did not agree, he would break things. On one occasion he picked up and dropped the bedframe, snapping its end.

[23] The complainant said the appellant would say the only way their relationship was going to end was if the complainant was dead or he was in jail, or both. The appellant would also say he was going to kill himself. On one occasion, the appellant took the car keys and said he was going to drive the car into a pole. The complainant tried to take the keys from the appellant. The appellant ended up punching the complainant repeatedly in the back of the head. The complainant recalled feeling dizzy. The appellant started crying, saying he was angry and upset because "You have to go to the hospital, and it's going to be all my fault because they're going to blame me, and the system is biased against men and it's going to – you know, it's going to [be] my fault and you have to go to hospital".[3] The complainant said she did not go to hospital on that occasion.

[24] The complainant said she tried to leave the relationship in 2017, after they had an argument, during which the appellant had forced his way into their ensuite, pushed her to the ground and lifted his foot back, saying "…I'm going to kick your fucking head in".[4] The complainant took the children and stayed with a friend, but ended up going back to the appellant after a week or two. During this time the appellant sent her messages. One day she noticed money had been spent from their joint bank account at a chemist and bottle shop. The complainant found the appellant had drunk "a whole heap" of scotch and had taken a bunch of pain medication. The appellant was not responding and she called an ambulance. As she told the ambulance she thought her husband was trying to kill himself, the appellant "started laughing at me and he said that's, like, typically me always trying to play the victim."[5]

[25] The complainant said, after an incident when the appellant strangled her,[6] Court proceedings were commenced and she left the appellant. The complainant said they resumed their relationship after they recommenced speaking to each other as part of contact between the appellant and his children. They decided to try and work the relationship out. The appellant then moved back into the house with the complainant. He did so prior to the making of the temporary protection order in April 2019.

[26] The complainant said there was continued tension. The appellant was not happy with the outcome of the Court proceeding. He was going to a program for domestic violence. Every time he returned from that program he was angry about what he had been told in the program.

[27] The complainant said they planned to go away to Cairns as a family for the Easter holiday weekend. This was not long after the finalisation of those Court proceedings. They drove there, arriving late Saturday. They took the children to various venues on the morning of Easter Sunday. When they returned, the complainant said the children were tired and she wanted them to have a sleep. The complainant also wanted to sleep.

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3 AB132/12-13.
4 AB132/26.
5 AB132/40.
6 It was formally admitted at trial that this incident occurred on 5 April 2018 and that the appellant has squeezed the complainant's neck causing her to lose consciousness.

[28] The complainant and the appellant lay down on the bed in a room separate from the children. The appellant locked the bedroom door and commenced kissing her, trying to initiate sex. The complainant told him she could not because she had her period. The appellant took all his clothes off and got on top of the complainant, pinning her arms down. The complainant kept saying "No, we can't".[7] The appellant leant forward, placing all his body weight on her chest. With his other hand, he pushed up her skirt, moved her underwear to the side and put his penis inside her vagina. The complainant said she stopped saying anything and "…just waited".[8] After the appellant finished having sex, he went to sleep.

[29] The complainant said they did not talk about the incident until they returned to Townsville. The complainant told the appellant she was angry with him because he did not "respect any of my boundaries".[9] She told the appellant she did not want to have sex and he did it anyway. The appellant got really angry and said, "Oh you calling me a rapist?". The complainant replied "No" because she did not want him to be angry. She wanted him to understand he had caused her pain; that she did not want it to happen again; and wanted him to acknowledge that what he did was wrong.

[30] The complainant said she ended up telling the appellant that she was not happy and did not want to be in the relationship anymore. The appellant agreed. They wrote down on a piece of paper the plan for the children. The appellant then removed his possessions and went back to a unit he had been renting since their earlier separation. The appellant left not long after they had returned to Townsville from Cairns. It was towards the end of April.

[31] The complainant said after they broke up, she started talking to someone at work named HAJ. One morning she had him come over to her house. It was in the early hours. He was in bed with her when the complainant heard keys hit the bench in the kitchen. Before the complainant could open the bedroom door, the appellant opened it and said "Oh, wow, that was fast". The complainant told the appellant he was not supposed to be there. She dressed and told HAJ to leave the house.

[32] The complainant said she kept asking the appellant what he was doing there and saying he was not supposed to be at the house. The appellant said he had come around to make a coffee and talk. The complainant described it as "just so bizarre" as it was between 5.00 am and 6.00 am. The appellant kept saying he came around to talk to her and that she was "sick" and that this was proof of how sick she was and that she needed to be in a relationship with him.

[33] The complainant said the appellant pointed to a samurai sword above the kitchen cabinets and said, "You see that there. Do you know how easy it would've been to kill you both? But I let him walk out of the house, and I could easily kill him, and I could easily kill you. See that sword? I could easily kill you with it, but I'm not; I'm sitting here and I'm talking to you, and that's proof that I am not crazy, you are."[10] The complainant described the appellant as really upset and shaken.

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7 AB134/30.
8 AB134/35.
9 AB135/13.
10 AB137/32-35.

[34] The complainant told the appellant the children had to go to school and she had to go to work. The appellant told her she had to call in sick and that she was not allowed to go to work. The complainant replied, "No, we're doing a lot. I really need to go" to which the appellant said, "You're not fucking going to work".[11]

[35] The complainant described the appellant as angry. She called in sick for work. When the children asked what was wrong, the appellant told them the complainant was crying because she was feeling sick. The appellant said they were going out to have breakfast together and talk. The complainant went with the appellant to take the children to school. They then went to breakfast at The Coffee Club. The complainant described it as a balance to try and not have him "go off".

[36] After breakfast, they returned back to the complainant's home. The appellant went into the shower in the ensuite. He took off all his clothes and turned the shower on. He then called the complainant into the ensuite. He was telling her to have a shower with him. The complainant said she kept saying no. The complainant said her back was up against the sink. The appellant was standing in front of her, between her and the shower. The appellant started kissing her and trying to take off her clothes. The complainant said she was saying no and that she did not want to. She also said, "I'm so tired. I've been crying all morning. Like I don't want to". The appellant replied, "You don't fucking say no to HAJ".[12]

[37] The complainant described the appellant as being "so angry", his face was just the way it was on all the other times that he was angry with her and had been violent towards her. The complainant said she was scared of him and let him take her clothes off. The appellant led her into the shower. He pushed her down onto her knees by the shoulders. The appellant grabbed a fistful of the back of her hair and put his penis in her mouth. He thrust his penis in and out of her mouth "Just really rough".

[38] The complainant said the appellant then stood her up. He tried to kiss her before putting his penis into her vagina. The appellant was thrusting his penis into her vagina. The appellant then turned her around so that she was facing into the corner of the shower. He again put his penis inside her vagina. The appellant was having sex with her roughly. The appellant kept saying "You're never going to have sex with anyone else again – again, are you?" and "You're never going to bring another man into this house again, are you?" until the complainant said, "No, I'm not".[13]

[39] The complainant said she was bending over and the appellant was standing behind her whilst he had his penis in her vagina. He kept going until he finished, after which she sat on the floor of the shower. The appellant said, "Do you feel better now?" She said, "Do you?" The appellant replied yes.[14]

[40] The complainant said she lay down on the bed but the appellant said they were going out. The complainant dressed and they went to JB Hi-Fi before having lunch. The complainant was trying to pretend that everything was normal to keep the appellant happy so that he would not get angry again. They remained out until they picked the children up from school.

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11 AB137/35.
12 AB141/22.
13 AB142/25-28.
14 AB142/46 – AB143/2.

[41] The complainant said the appellant stayed at the house that night. He offered to sleep on the couch but did not do so. The complainant said whilst she was having a bath, the appellant hopped in and started touching her. She said no. The complainant said, at one point she stopped saying no. She next remembered being on the bed. The appellant put his penis in her vagina whilst on top of her. The complainant could not remember anything else until the next morning.

[42] The complainant said the appellant was working a "graveyard shift". He left the house in the early hours of the morning. He had not left for long before he returned, crying, and saying he had a breakdown at work. The appellant said he could not believe the complainant cheated on him. The complainant kept saying "I didn't cheat on you because we weren't together".[15] The appellant told the complainant she needed to take another day off work. The complainant said she was scared and wanted to get out of the house. She told the appellant she could not take another day off work. She got dressed and left the house.

[43] The complainant said, whilst she was at work that day, the appellant kept sending her messages. He said if she did not come home he was going to come to her work to get her and was going to call her boss. The appellant said he had told the children he was going to jail, and they were upset. The complainant said she did not want to go back home. She stayed at work for a work barbecue before having HAJ drive her home. The appellant was calling her boss when she was at the work barbecue. He also called her father. The appellant was "running me down to people I knew"[16].

[44] The complainant said when she arrived at the house, she asked HAJ to wait close by as she was going to call the police. She wanted someone to wait until the police had arrived at the house. When she walked into the house, the appellant was really angry. He had thrown clothes everywhere in her room. The complainant told the appellant he needed to leave as she was calling the police. The appellant threw himself to the ground "like a child". He was saying "I don't know what's wrong with you. You're sick." When the complainant started calling the police, the appellant jumped straight back up. She called HAJ and asked him to stay in the house until the police arrived, which he did; he stood in the kitchen. The appellant put his keys, phone and wallet on the bench in the kitchen and said he was going to turn himself into the police. The appellant left before the police arrived at the house.

[45] The complainant said she called the police for a second time that night. The appellant forced entry back into the house. She immediately called the police. The appellant said, "If you ever loved me, you won't call the police".[17] The appellant left. When police arrived, the complainant noticed the appellant's keys, wallet and phone had gone. The police spoke to the appellant on the phone before leaving the house.

[46] In cross-examination, the complainant accepted her relationship with the appellant was "pretty messed up". The complainant said it was "clear who was in control at

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15 AB143/42.
16 AB144/27.
17 AB145/8.

the time of the relationship".[18] She did not think she was thinking clearly and agreed that the appellant "pretty well messed"[19] with her head.

[47] The complainant accepted that, when police first attended her house on 3 May 2019, she had an opportunity to complain to police about rape but did not do so. The complainant said she felt embarrassed. The police officer told her she could not have a domestic violence order and have the appellant come to her address and then complain. The complainant said she apologised to the police as she felt they were annoyed with her. She did not feel she could disclose anything further to those police officers.

[48] The complainant accepted that, when she first met the appellant, she had a young child. The appellant would be violent and then apologise and say he would not do it again. She accepted the apology but said there was a continuation of the cycle. The incident involving strangulation effectively brought the relationship to an end.

[49] The complainant accepted that, when the relationship ended, she became friends with "Garth" and the appellant became involved in a relationship with "Jamie". She denied she recommenced her relationship with the appellant by going to his home and telling him she was going to harm herself. At no stage during her relationship with the appellant did she threaten to harm herself. The complainant did not accept it was her idea for the appellant and the complainant to get back in a sexual relationship. The complainant felt "like it was mutual because [the appellant] was being flirtatious" with the complainant.[20] When they recommenced a sexual relationship, the appellant told the complainant he did not like her seeing Garth. They decided to become exclusive. The appellant told Jamie he had to spend time with the complainant because she was mentally unwell. The complainant argued with the appellant because that was not true.

[50] The complainant accepted that, in about March 2019, the appellant's lease was coming up for renewal. She tried to persuade him to not to renew the lease. The complainant said she was having a hard time with money and it made more sense to not have two rents. She denied it was because there was a concern the appellant might be being unfaithful. The appellant went against her wishes and renewed his lease. She denied that gave rise to a few arguments.

[51] The complainant accepted that, during their relationship, there were occasions when she became angry with the appellant. She denied physically assaulting the appellant. She denied punching the appellant in the face. The complainant accepted that, during their relationship, she self-harmed by cutting her legs. She denied doing so in front of the appellant or threatening to do so. The complainant would hide the cuts. She did not accept the appellant was telling her to get help about self-harming. The appellant would always tell her she was sick. That started before self-harm.

[52] The complainant accepted that, as the relationship progressed, she disclosed parts of her childhood to the appellant. She also accepted she did not have a relationship with her mother. The complainant said she argued with the appellant over her

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18 AB146/15.
19 AB146/7.
20 AB147/36.

relationship with her family. The appellant would tell her she should not speak to them.

[53] The complainant accepted that, as part of her sex life with the appellant, he had tied the complainant up. The complainant accepted she suggested she be tied up. She denied asking the appellant to hit her during sex. She never asked the appellant to be rough. She never wanted him to hurt her or to have sex if she said no. She accepted that, apart from the occasions the subject of the offences, there had been no other occasions when they had sex when she said no.

[54] The complainant denied asking the appellant to gag her during sex. They would banter about things like that. She denied she raised the issue of role play, where she would be a dog and the appellant would put a collar on her and lead around the bedroom. They made jokes but never did that role play.

[55] The complainant denied requesting the appellant to "fist" the complainant. The appellant had watched it in porn. They talked about it and the appellant did it, but she did not ask him to do so. The appellant would often watch porn and they would have discussions over it. The complainant accepted they had used toys during sex.

[56] The complainant accepted that, on 21 April 2019, the appellant initiated sexual contact. The complainant denied telling him "We need to put a towel down".[21] The complainant told the appellant she could not, because she had a menstrual cup inside her vagina. She denied ever having sex during the relationship when she had a menstrual cup in her vagina. The appellant continued to kiss her while she was trying to say no. The complainant denied grabbing the appellant's penis and pulling her underwear to one side to allow the appellant's penis to enter her vagina. She denied saying "Be gentle and don't go too deep, because I've got my DivaCup in".[22] She also denied that one of the children screamed out whilst they were having sex and the appellant left before returning to continue having sex with her. The complainant accepted that, after the children woke up, they went out for dinner.

[57] The complainant accepted that the next day they went to two different wildlife parks whilst travelling back to Townsville. She denied telling the appellant that day that she was sore from the sex. The complainant did tell the appellant it felt like he had torn her because it stung when she went to the toilet. It was in that discussion that they spoke about crossing boundaries and the appellant asked her if she was calling him a rapist.

[58] The complainant accepted that, when they returned to Townsville on Easter Monday, the appellant continued to stay at her house. She denied that, on the following evening, the appellant, after attending a mental DV program, returned home and said he could not keep going around in circles where they argued over nothing. The complainant said she initiated that they should break up. She denied the appellant said he needed a break and some space and that she said no. The complainant accepted that discussion was a civil discussion. The complainant denied that, after that discussion, she asked the appellant to sleep in the bed with her. The complainant also denied that the following evening she said the appellant did not need to go and could stay the night.

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21 AB152/35.

22 AB153/30.

[59] The complainant accepted the appellant retained a key to the house. He was going to still be involved with the children. The complainant said he was not supposed to enter her house without her permission. She accepted she did not ask for the keys to be returned at any stage before 2 May 2019.

[60] The complainant said when the appellant came to the house early on the morning of 2 May 2019, the appellant opened the bedroom door and said, "Wow, that was fast". She denied the appellant also said, "What the fuck, ELS. It's only been a day and a half". The complainant accepted the appellant kept saying, "What the fuck are you doing?" The appellant kept saying she was sick.[23] She denied the appellant was asking her about who was the stranger in her bed. The appellant was not calm. She denied the appellant, out of the blue, said, "I forgive you" and that she said, "What was wrong with me?"[24] She also denied the appellant said they should work it out together and be a family.

[61] The complainant denied the appellant asked her to take the day off so they could talk. The appellant said, "You're not fucking going to work"; and "You work with him, don't you?"; and "What the fuck ELS? You slept with someone who has a girlfriend. That's something your mother would do and you hate her".[25] The complainant said the appellant always used her mother to taunt her. The appellant kept saying she should be thankful he did not kill her. The complainant accepted that, when the appellant initially found her with HAJ, he did not yell or scream. That happened after HAJ left the house. The appellant never hurt her in front of other people.

[62] The complainant accepted that, after they finished speaking, they went to The Coffee Club. When they returned to the house, the appellant went straight to the shower. She denied the appellant said, "You can come and join me in the shower"[26] and she said "No". The appellant kept saying "Come into the shower"[27] and she kept saying she did not want to. She denied she started kissing the appellant before grabbing and stroking his penis. She denied she went down on her knees and performed oral sex. The appellant pushed her down. After a period of time, the appellant pulled her up. She denied moving her legs apart so that he could gain entry to her vagina.

[63] The complainant denied that after the bath was filled, the appellant penetrated her vagina with his fingers before she put his penis back into her vagina. She denied saying to the appellant, "Let's go to the bed".[28] She denied telling the appellant she wanted him to "fist" the complainant. She denied that after the appellant put his penis back into her vagina and started to thrust, she said "Harder". She denied she walked into the walk-in robe before returning with a collar and lead in her hand and saying to the appellant "Put it on my neck and walk me around the house"[29] and that he said no. The complainant said that did not happen.

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23 AB158/45.
24 AB159/12.
25 AB159/25 – AB160/27.
26 AB161/35.
27 AB161/38.
28 AB164/1.
29 AB164/39.

[64] The complainant accepted they later left the house together to go to JB Hi-Fi, before obtaining sushi. They then picked the children up together. The complainant said the appellant, that night, again raped her. She accepted that, when she gave a statement to police, she said she "started to say I didn't want to – to, like - I didn't feel like it and stuff, but I didn't keep saying "no" like I did before."[30] The complainant did not accept they had not had sex at all that night.

[65] The complainant accepted she telephoned the police the next day. She denied making two attempts to call the appellant. The complainant called him once, when she was at the police station, at the instructions of police. On another occasion, the appellant came to collect his things. That visit was facilitated by the complainant's father. The complainant accepted they were text messaging on 3 May 2019 in relation to the appellant collecting his things. She accepted it was part of the protection order that the appellant not remain at her house. The complainant accepted she went to police on 8 May 2019, after a conversation with DV Connect on 7 May 2019. That conversation was part of her decision to go to police.

[66] HAJ gave evidence that at about five one morning, after the Easter weekend, he was laying in the complainant's bed. He heard keys dropped on a bench and then the bedroom door was opened by the appellant. The appellant was really annoyed and said, "What are you doing in my – oh, my God. Kids are in the house" and "I can't believe you did this" and "We've been split up for like a day".[31] The complainant said he should go. HAJ said the complainant did not attend work that day. He next saw her the following day. There was a work barbecue. He drove the complainant home. The appellant was outside on the phone. He looked quite angry. HAJ parked a couple of houses away. He went back to the house when the complainant rang him. The appellant was "going off". He told the appellant he should leave. The appellant was yelling out to the children "Dad's going to jail".[32] The appellant left the house and the complainant called the police.

[67] In cross-examination, HAJ accepted the complainant invited him to her house that morning. He was splitting up with his partner as was the complainant. When the appellant opened the bedroom door, he said words to the effect "It's only been a day and you're already doing this".[33] HAJ said when police came to the house, the complainant was upset.

[68] Angelo Busetti, a police officer, attended the complainant's house on 3 May 2019, at about 10.05 pm, in response to a domestic violence incident. His enquiries revealed there was a domestic violence order in place, naming the complainant as the aggrieved and the appellant as the respondent. The conditions of that order prohibited the appellant from being at the address. When he arrived, the appellant was not at the address. Busetti spoke to the complainant and HAJ, before being handed some property which he returned to the appellant at a later time.

[69] After Busetti returned to the police station, there was another call for service to the same address. When he re-attended the appellant was not at the address. After discussions with the complainant, he attended a shopping centre where he found the appellant. It was about 11.40 pm. He placed the appellant under arrest for

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30 AB169/1.
31 AB174/14-16.
32 AB 175/16.
33 AB176/5.

breaching a domestic violence order on the basis he was not to be at the complainant's house. He accepted, in cross-examination, that the complainant, at that stage, made no allegations of rape or any violence.

[70] Jonathan Humphries, a police officer, spoke to the complainant at the police station on 8 May 2019. The complainant made a complaint of rape. As a consequence of that complaint, on the following day, he attended The Coffee Club at Stockland shopping centre and viewed CCTV footage from between 8.00 am and 10.00 am on 2 May 2019. It depicted both the complainant and the appellant walking out of The Coffee Club and through the shopping centre. Further enquiries revealed that the complainant had booked a room at a motel in Cairns for 20 and 21 April 2019.

[71] At the conclusion of the Crown case, the following formal admissions were made:[34]

> "***Temporary Protection Order***
>
> 1. On 17 August 2018 a Temporary Protection Order was made in the Townsville Magistrates Court naming the defendant as the Respondent and the ELS as the Aggrieved. The order was made in the presence of the defendant.
> 2. The Temporary Protection Order required the defendant to comply with the following conditions:-
>   a. The defendant to be of good behaviour towards the complainant and not to commit any domestic violence against her; and
>   b. The defendant was prohibited from remaining at and/or entering or attempting to enter the premises where the aggrieved lives.
>
> ***Protection Order***
>
> 3. On 1 May 2019 a Protection Order was made in the Townsville Magistrates Court naming the defendant as the Respondent and the ELS as the Aggrieved. The order was made in the presence of the defendant.
> 4. The Protection Order required the defendant to comply with the following conditions:-
>   a. The defendant to be of good behaviour towards the complainant and not to commit any domestic violence against her; and
>   b. The defendant was prohibited from remaining at and/or entering or attempting to enter the premises where the aggrieved lives.
>
> ***Relationship evidence***
>
> 5. On 5 April 2018 the defendant, complainant and their four (4) children were at the family home of [Redacted]. At approximately 7am, the complainant walked into the bedroom

[34] AB243 – 245.

and asked the defendant to help her clean the house and care for the children. The defendant continued to lay on the bed. The complainant became frustrated about the defendant's lack of assistance around the household. The complainant cried and told the defendant of her frustration. The defendant told the complainant she was being ridiculous.

6. There was a physical confrontation. The defendant pushed the complainant's head towards his legs. The complainant pushed away so she could stand. The defendant kicked the complainant in the stomach, though the kick was not hard as his leg was not fully extended. The defendant got up from the bed and walked towards the complainant. The complainant had her back towards the defendant and began cleaning the desk near her. The defendant walked towards her and said *"You need to stop"*. She responded she was not doing anything to the defendant.

7. The defendant grabbed the complainant from behind. The complainant's neck was in the crook of the defendant's arm, with his other arm around the back of her neck, forming a triangle. He squeezed the complainant's neck. The complainant felt dizzy and had difficulty breathing. She was not able to speak. The complainant unsuccessfully tried to put the defendant's arms away. Their son, EW (DOB [Redacted]), stood in the doorway watching. The complainant felt really dizzy and lost consciousness.

8. When the complainant awoke on the bedroom floor her vision was transient. Her body was shaking and rocking. She hyperventilated. EW stood beside the complainant, scared and hugged his mother while crying. The defendant stood at the end of the bed. The complainant attempted to stand and told the defendant *"I'm going to call the police"*. The defendant responded that she was not calling the police. She held onto her phone tightly to her chest to prevent the defendant obtaining it. The complainant dialled triple 0. As the complainant was on the phone to emergency services, he walked away saying *"You were attacking me and head butting me and I had to restrain you"*.

9. The complainant attended the Townsville Hospital later that afternoon complaining of laryngeal tenderness, discomfort swallowing and scratch marks to the left anterolateral neck. The complainant underwent a CT angiogram and was treated for a 4 cm superficial oblique scratch to the left anterolateral portion of the neck and two smaller faint scratches in parallel. Doctor Ian Mahoney opined the injuries were consistent with someone who had been rendered unconscious by strangulation, causing occlusion of the carotid arteries.

10. On 7 May 2018 the defendant entered into a bail undertaking that contained the condition he must not contact or approach,

nor have someone else contact or approach the complainant, except through a lawyer.

11. Between 7 May 2018 and 9 May 2018, the defendant sent a number of messages to a witness HUDSON. The essence of the messages were that the defendant was asking HUDSON to contact the complainant to ask for money and to obtain a few items from the house. The defendant was charged in relation to this offending on 23 October 2018.

12. In relation to the breach of bail on 17 June 2018 the defendant sent the complainant a text message. The message commenced with *"I know I'm not supposed [to] be sending this message"*. The essence of the message was that the defendant missed the complainant and their children and that he did not care if he went to prison. He told the complainant she should get some help with her mental health issues. The message concluded with *"Feel free to tell the police about this message"*. On the same day, the defendant contacted the complainant on a telephone call which was for 26 minutes and 7 seconds. The defendant was charged in relation to this offending on 23 October 2018.

13. In relation to the breach of bail on 27 October 2018, the complainant received a telephone call from the defendant as she pulled into a carpark in the Riverway area. The defendant stated he could see her car and proceeded to approach her and hand her a letter addressed to their children. The defendant engaged in conversation with the complainant about visiting their children, in breach of the no contact order. The defendant was charged in relation to this offending on 27 February 2019."

[72] The appellant elected to give evidence. He accepted that, during his relationship with the complainant, he had, on occasions, been violent towards her, including strangling her on one occasion. The appellant said he had taken steps to address some issues, including having weekly psychologist appointments and taking medication for a while. He stopped that medication about four to six weeks before the complainant's allegations. He also undertook a mentor program.

[73] The appellant said he ended the relationship with the complainant after the strangulation incident in 2018. The complainant revealed to him that she was seeing someone. He also was seeing someone. The appellant said three days later, the complainant turned up crying on his doorstep saying she could not stand the fact that he was happy with another woman. The complainant said she wanted to kill herself and the other woman could be the children's new mother. The appellant said that, after thinking about it for a couple of days, he ended the relationship with the other woman. About a week later he started working on a resumption of his relationship with the complainant. That relationship included a sexual relationship.

[74] The appellant said, at that stage, he had a lease on a unit that was about to expire. The complainant did not want him to renew the lease as she was worried he would recommence his relationship with that other woman. The appellant did renew his

lease. He should not have been staying at the complainant's house, which was part of the reason for renewing his lease. There was no violence but there were verbal arguments after they recommenced their relationship.

[75] After the strangulation matter had been dealt with in Court in April 2019, the complainant, the appellant and the children went on a family holiday to Cairns. It was a good weekend with no arguments. On the Sunday afternoon, after they returned from a visit to an aquarium with the children, he and the complainant went to bed and had sex. They then both had a sleep before the children woke them up. They went out to dinner with the children that evening.

[76] The appellant said it was not uncommon for them to have sex whilst the complainant was having her periods. He suggested they go into the shower, but the complainant preferred to put a towel down and stay on the bed. Whilst they were having sex, one of the children called out. He spoke to the children before returning back to the room and recommencing having sex. He estimated sexual activity lasted for about 10 minutes. At no stage did the complainant tell him to stop.

[77] The appellant said, on the occasion he found HAJ in bed with his wife, he swore and said "Fucking hell, ELS. That was fast".[35] The appellant said he was not in shock about catching her in bed with someone else, he was in shock about the fact she had brought a stranger into the house with the children. The appellant said after they had a discussion for a while, he said to the complainant "Listen, I forgive you for – like, it's a stupid mistake".[36] The appellant told the complainant he could not get over the fact she had brought a stranger into the house. The complainant replied he was not a stranger. She said she worked with him and he had a girlfriend himself.

[78] The appellant said they both helped the children to get ready for school that morning. After dropping them at school, he and the complainant went to breakfast at The Coffee Club. They returned back to the complainant's house at about 10.00 am. The appellant said he went to have a shower. The complainant walked into the ensuite and he asked her to join him in the shower. The complainant said, "What about what happened this morning?" The appellant replied, "I honestly just want to forget about it. I want to move on and do things right for our family. Like, you made a mistake. I've made a mistake, so, you know". The complainant replied "Okay", took her clothes off and hopped into the shower.[37]

[79] The appellant said that, after kissing for a short time, the complainant started performing oral sex on him in the shower. After a moment or two, he asked the complainant to stand up and kiss before they started to have sex normally. Initially, he had her back pressed up against the wall. After a while, he asked the complainant to turn around and they continued to have sex. At no stage during that sex did the complainant say no.

[80] The appellant said, after they talked for 10 or 15 minutes, they started having sex again in the bath. The appellant initiated the sex. He inserted his hand in her vagina. The complainant hopped on top of him, grabbed his penis and put it inside her vagina. They then left the bath, went to the bed and started to have sex again.

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35 AB189/33.
36 AB190/5.
37 AB190/34-38.

Not long after, the complainant told the appellant to put his fist inside of her. The complainant told him to keep going and after he took his fist out, he put her legs behind her head and continued to have sex until ejaculation.

[81] The appellant said they lay on the bed for a moment, before the complainant went into the walk-in wardrobe, pulled out a collar that had a dog lead on it, which the complainant had ordered off the internet, and told him to put it on her and walk her around. The appellant said no. The appellant said that had not happened in their relationship before but that the complainant had talked about it. He said fisting had not occurred in their sexual relationship until a couple of weeks after they had resumed their relationship after the strangulation incident.

[82] The appellant said when he refused to walk the complainant around the bedroom with the dog collar, the complainant begged him to do so. She asked why not, to which he replied, "Because that enables the domestic violence we had in our relationship".[38] He described the complainant as being disappointed. Later, after both showered, they went to lunch and JB Hi-Fi before picking up the children from school.

[83] The appellant said that evening, after dinner, he went to the mentor program, before returning back to the complainant's house. They did not have sex again that night. The last time he had sex with the complainant was that morning. At no stage did he ever force the complainant to have sex. On each occasion, he believed the complainant was consenting.

[84] In cross-examination, the appellant accepted that, as a member of the army, he had to obey his superiors. He denied holding an expectation that his wife was to do what he told her to. He accepted domestic violence was perpetrated by him on the complainant but said there were times when it was the other way around.

[85] The appellant accepted there was an occasion in which a dispute about how the complainant had asked him to do some housework ended in the appellant strangling the complainant to the point of unconsciousness. He denied that, during that incident, the complainant had started crying and he had pushed her head towards his legs and kicked her in the stomach. He denied walking towards her and telling her to stop. He accepted he squeezed her neck, such that she had difficulty breathing and that his three-year-old was inside the room at that time. He accepted the complainant lost consciousness somewhat, but said she was not completely unconscious. He agreed the complainant told him she was going to call the police and that he said, "You were attacking me and headbutting me and I had to restrain you".[39] The appellant said the complainant did headbutt him.

[86] The appellant accepted he committed domestic violence against the complainant but did not accept all of the details. He denied he was lying about everything at the trial. The appellant denied ever grabbing the complainant by her throat and "smacking" her head against the wall. On that occasion, he grabbed the complainant by the shoulders to stop her dragging their son because he had done something naughty. He denied kicking her on an occasion when he had his arm in a sling. He denied there was an occasion when he was tickling her and she told him

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38 AB192/30.
39 AB196/20.

to stop. On that occasion, the complainant hit him in the face straightaway with her fist. The appellant accepted he did have an issue with the complainant "having attitude".[40] He accepted he did throw things when he was angry.

[87] The appellant accepted there was an occasion when the complainant spoke to him in a way that he did not like and he had returned to the house, armed himself with a knife and said, "Don't you understand, this is what it makes me do when you give me attitude". He denied saying "It makes me want to kill you".[41] He denied ever saying that the only way the relationship was going to end was if the complainant was dead or he was in jail, or both. He denied ever telling her that he was going to kill himself or ever saying that he was going to drive a car into a pole. He accepted he had said previously that the system was biased against men. He agreed he accepted aspects of the document he had signed as admissions in the trial but did not accept all of it. There was only one occasion when he had choked or strangled the complainant in a domestic violence sense. He had broken objects but denied he ever broke the bed.

[88] The appellant said almost all of the sexual aspects of the relationship were at the complainant's suggestion. She asked him to choke her during sex; to hit her, to be rough and to gag her. He accepted that, during the trial, the complainant was asked by his counsel about explicit sexual acts. He wanted those matters to be put to the complainant, saying "I wanted the truth to be known".[42] When the appellant was asked if he wanted the complainant humiliated in Court, he replied "I thought it would be nice, but, no, I didn't – didn't get any enjoyment out of that at all. I almost started crying over there". The appellant added "After everything that she's put me through with a lie. I didn't enjoy it at all."[43]

[89] The appellant denied he raped the complainant in the Cairns motel. He denied the complainant told him no. He denied that a few days later, he told her "Are you saying I'm a rapist".[44] When they travelled together to Cairns, there was tension based on the Court case, but they had a great time in Cairns. The appellant suggested they have a break in their relationship, after they returned from Cairns.

[90] The appellant accepted he arrived at the complainant's house at about 5.00 am on 2 May 2019. The appellant had woken up at 4.30 am and "instead of laying in bed feeling depressed about the things that have been happening, arguments that had happened that week, or the argument that ELS tried to have with me that week, I thought I'd go around there and help her get the children ready for school once they've woken up. Thought I'd make her a coffee in bed and start the day that way."[45]

[91] The appellant denied catching the complainant in bed with another man made him angry. He was not jealous. He was only concerned about a stranger being in the house. He was also worried about the complainant "because the behaviour that she was conducting within the past few weeks that led up to that as well".[46] The complainant was cutting herself more frequently. The appellant accepted his first

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40 AB198/6.
41 AB199/17-20.
42 AB202/45.
43 AB203/30-45.
44 AB204/38.
45 AB205/25.
46 AB206/5.

words were "Wow, That was fast". It was obvious what HAJ and the complainant were doing in bed. He agreed it upset him a little bit, but his main concern was the children. He denied he pointed to a Samurai sword and said he could kill the complainant and HAJ.

[92] The appellant denied making the complainant take a day off work. The appellant said they spoke about many things that day. They talked about making a plan to see a marriage counsellor. There was talk about them getting back together. They had consensual sex that day. He did not rape her.

Appellant's submissions

[93] The appellant submits a miscarriage of justice occurred by reason of the impermissible use of domestic violence evidence in the Crown prosecutor's address. The appellant submits the Crown prosecutor used contradictory statements in the appellant's evidence at trial, to the contents of the agreed formal admissions as to the circumstances of previous domestic violence incidents, to undermine the appellant's credit.

[94] The appellant further submits that the jury's verdicts of not guilty of Counts 1, 2 and 6 were inconsistent with the verdicts of guilty of the remaining counts. There was no proper basis to reconcile those different verdicts. Each count relied on the credibility and reliability of the complainant and the jury's rejections of her account of rape, in respect of Counts 1 and 6, support a conclusion that the complainant lacked such credibility and reliability as to warrant findings of not guilty in respect of each count.

[95] The appellant's written outline of argument also relied on a number of other factors as supportive of a conclusion that there had been a miscarriage of justice. A miscarriage of justice was said to arise from the appellant having received a revised or incomplete version of the original trial transcripts; from the Crown having failed to adduce into evidence CCTV footage of the complainant and the appellant at The Coffee Club and of text messages between the complainant, the appellant and others in the days before and after the relevant events; from multiple breaches of the *Human Rights Act* to the conduct of the trial; from verdicts not supported by the evidence; from incompetence of counsel; and from the wrongful admission of evidence.

[96] In support of these additional submissions, the appellant made application to adduce fresh or new evidence, being the CCTV footage and the text messages. The appellant submitted that each of these pieces of evidence had strong probative value and materially affected the jury's conclusions as to his guilt of the offences. Accordingly, a refusal to receive that evidence would itself result in a miscarriage of justice.

Respondent's submissions

[97] The respondent submits there was no miscarriage of justice by reason of the Crown prosecutor's use of inconsistencies in the appellant's evidence to those matters the subject of formal admissions. The Crown prosecutor and defence counsel agreed on the proposed direction to be given in respect of that evidence. The Crown

prosecutor's address was consistent with those directions and unexceptionally relied on what were clear inconsistencies in the appellant's account at trial.

[98] The respondent further submits that there is no inconsistency in the jury's verdicts of not guilty of Counts 1, 2 and 6 to their verdicts of guilty of the remaining counts. Counts 1 and 2 related to an entirely discrete separate event. The complainant's evidence in respect of Count 1 included a statement to the effect that she stopped saying anything and just waited. A jury may well have accepted the complainant's account as credible, but not have been satisfied beyond reasonable doubt that the Crown could exclude that the appellant had a mistaken belief that the complainant was consenting to that act. That conclusion explains the verdicts of not guilty on Counts 1 and 2.

[99] Similarly, the respondent submits the verdict of not guilty of Count 6, involved a circumstance in which the complainant's evidence included an acceptance of lack of memory and limited protests to the appellant's advances. The verdict of not guilty of that count was consistent with the jury accepting the complainant's account as credible but not being satisfied beyond reasonable doubt that the Crown could exclude that the appellant mistakenly believed the complainant was consenting to that act.

[100] By contrast, the respondent submits the remaining counts concerned acts about which the complainant gave clear evidence of not consenting, evidence not shaken in cross-examination. The jury's acceptance of the appellant's guilt of those offences beyond reasonable doubt was reconcilable and did not represent an unacceptable affront to common sense and logic.

[101] In respect of the remaining matters advanced by the appellant in support of a submission that there was a miscarriage of justice, the respondent submits that errors in the transcript were typographical in nature and had no consequence; and a consideration of the evidence as a whole supports a conclusion that it was open to the jury to be satisfied of the appellant's guilt of each of the remaining counts beyond reasonable doubt. Accordingly, those verdicts were not unreasonable.

[102] The appellant's evidence was inconsistent with the specific formal admissions. That inconsistency was a matter properly taken into account by the jury. It provided a solid basis upon which to find the appellant's evidence neither reliable nor credible. Once the jury rejected the appellant's evidence as unreliable and lacking credibility, a consideration of the remaining evidence as a whole supported a conclusion that the complainant's account of each act of penetration the subject of Counts 3, 4 and 5 was reliable and credible. That evidence included overt expressions of non-consent to each act, thereby disallowing the appellant to believe that the complainant was consenting and supported a conclusion that the jury could be satisfied, on the whole of the evidence, that the appellant was guilty of each of those counts, beyond reasonable doubt. Once that finding was reached, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of Count 7.

[103] The respondent further submits that nothing in the new or fresh evidence materially affected the reliability of the complainant's account. The CCTV footage was consistent with the complainant's account that she had breakfast with the appellant at The Coffee Club that morning. Nothing in the complainant's account suggested that she was obviously distressed at that time. Similarly, a consideration of the

relevant text messages does not give rise to any message inconsistent with the complainant's account. Accordingly, there was no miscarriage of justice by reason of that evidence not being available before the jury.

Consideration

Ground one

[104] Evidence as to past domestic violence in the course of the relationship between the appellant and the complainant was relevantly placed before the jury to provide context to the jury's consideration of the evidence as to each of the alleged acts of rape and contravention of domestic violence orders. The terms of that evidence was the subject of specific agreement between the parties and the evidence was placed before the jury by way of agreed formal admissions.

[105] Against that background, inconsistencies in the appellant's evidence at trial with those agreed facts were properly matters for consideration by the jury. Nothing in the Crown prosecutor's address involved an impermissible use of those inconsistencies. No miscarriage of justice flows from the use of those inconsistencies. This ground fails.

Ground two

[106] Differing verdicts only give rise to an inconsistency warranting appellant intervention if a consideration of those verdicts supports a conclusion that there was no proper basis in logic or reason to reconcile those different verdicts, such that the inconsistency represents an unacceptable affront to common sense and logic.[47]

[107] No such inconsistency arises in the present case. Counts 1 and 2 arose out of a separate incident. The complainant's evidence in respect of that incident contained equivocal statements which, even if the jury accepted her evidence as reliable and credible, gave rise to a conclusion that, although the complainant was not consenting to that act of penetration, the Crown could not exclude beyond reasonable doubt that the appellant held a mistaken belief that the complainant was consenting to that act.

[108] Similarly, the rape alleged in Count 6 occurred on a separate occasion, albeit on the same day, as the rapes in Counts 3, 4 and 5. Again, the complainant's evidence in respect of that act of penetration contained equivocal statements which, even if the jury was satisfied that the complainant did not consent to that act, the jury could not be satisfied beyond reasonable doubt that the Crown had excluded that the appellant mistakenly believed the complainant was consenting to that act.

[109] By contrast, the complainant's evidence of each act of penetration in Counts 3, 4 and 5, contained clear, unequivocal statements of non-consent. Once the jury rejected the appellant's account of those events as being neither reliable nor credible, and the jury accepted the complainant's accounts of those events as reliable and credible, the jury would be satisfied beyond reasonable doubt that each of those acts of penetration occurred without the complainant's consent and that the Crown had excluded beyond reasonable doubt that the appellant had a mistaken belief as to the complainant's consent to those acts. Accordingly, the jury could be

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47 *R v Anderson* [2014] QCA 134 at 20.

satisfied each of the acts of penetration the subject of Counts 3, 4 and 5 constituted rape.

[110] There is a logical, rational explanation for the verdicts of guilty on Counts 3, 4, 5 and 7 and, not guilty of Counts 1, 2 and 6. Those verdicts are not inconsistent.

Other

[111] The appellant's remaining complaints, in large measure, constitute reasons for which the jury could not be satisfied beyond reasonable doubt of the appellant's guilt of each of Counts 3, 4, 5 and 7. In essence, they amount to a contention that the jury's verdicts of guilty of each of those counts were unreasonable.

[112] A consideration of such a ground requires this Court to undertake an independent assessment of the record as a whole to determine whether, notwithstanding the jury's acceptance of the complainant's evidence as credible and reliable, there are inconsistencies, discrepancies or other inadequacies in the evidence supporting a conclusion that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt of guilt.[48]

[113] A consideration of the record as a whole supports a conclusion that, whilst there were inconsistencies and inadequacies, they were not of a nature that support a conclusion that the jury, acting rationally, ought to have entertained a reasonable doubt as to the appellant's guilt of each of Counts 3, 4, 5 and 7.

[114] First, there was a sound basis upon which the jury could properly reject the appellant's evidence as being neither reliable nor credible. The appellant's evidence contained statements directly inconsistent with the agreed formal admissions. Further, his account of his response to having found the complainant in bed with another man, in the context of the history of a domestically violent relationship, was inherently inconsistent with his past behaviour, allowing a jury to reject his evidence as neither credible nor reliable.

[115] Once the jury rejected that evidence, the jury's task was to put that evidence aside and to consider the remaining evidence in its entirety to determine whether the jury was satisfied beyond reasonable doubt of the appellant's guilt of each of Counts 3, 4, 5 and 7.

[116] Second, a consideration of that remaining evidence amply supports a conclusion that it was open to the jury to accept the complainant's evidence in respect of each of those counts as being both credible and reliable. Nothing in her cross-examination gave rise to inconsistencies of a magnitude warranting a conclusion that the complainant's accounts were neither credible nor reliable.

[117] Once it was open to the jury to accept the complainant's accounts as reliable and credible, there was a sound basis for the jury to be satisfied that each of the acts of penetration in Counts 3, 4 and 5 occurred in circumstances where the complainant expressly indicated her non-consent to those acts. An acceptance of that express non-consent allowed the jury to exclude, beyond reasonable doubt, a contention that the appellant mistakenly believed the complainant was consenting to each of those acts of penetration.

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48 *Pell v The Queen* [2020] HCA 12 at [39].

[118] Each of those conclusions rendered it open to the jury to be satisfied beyond reasonable doubt that each act of penetration in Counts 3, 4 and 5 was non-consensual and that the appellant was guilty of each of those rapes. That conclusion, in the context of the admissions as to the existence of a protection order, allowed the jury to be satisfied beyond reasonable doubt of the appellant's guilt of Count 7.

[119] The verdicts of the jury were not unreasonable.

[120] A consideration of the further evidence sought to be adduced by leave does not support that there was a miscarriage of justice from its absence at the trial.

[121] Nothing in the CCTV footage materially called into question the complainant's evidence in respect of the events the subject of those counts. The visit to The Coffee Club occurred before the acts of penetration that day. Further, the complainant did not suggest there was obvious distress whilst at breakfast.

[122] Similarly, a consideration of the various text messages reveals no message so inconsistent with the complainant's account which could have given rise to a reasonable doubt as to the credibility and reliability of her account. Some are supportive of the complainant's evidence.

[123] The messages sent on 5 May 2019, between the complainant and an unknown contact, were sent days after the relevant acts of penetration and are not inconsistent with the complainant's account, nor are the text messages between the complainant, the appellant and Braithwaite on 1 May 2019.

[124] The messages between the complainant and the appellant on 3 May 2019 were consistent with the complainant's account that the appellant did not want her to go to work and that the appellant had told the children he was going to go to jail.

[125] The text and SMS message exchanges between the complainant and Jane on 5 May 2019 were also consistent with aspects of the complainant's account, including that, on 2 May 2019, the appellant was telling the complainant she was not going to work that day; that the appellant "HAD" to have sex with the complainant; and that the complainant had to call the police because the appellant would not leave the house and, when he did, he returned back to the house so that she had to call the police again.

[126] Finally, nothing in the messages sent on 13 November 2018, in respect of the dog collar, materially called into question the accuracy of the complainant's denial as to the conversations about that collar on 2 May 2019, particularly when the complainant accepted there had been discussions about the use of the dog collar at an earlier stage in their relationship.

[127] There is no real prospect that, had any or all of this evidence been led before the jury, it would have altered the jury's conclusion that the appellant was guilty of each of Counts 3, 4, 5 and 7 beyond reasonable doubt. The omission of that evidence at the appellant's trial did not give rise to a miscarriage of justice.

[128] The appellant's remaining complaints as to breaches of the *Human Rights Act* are without substance. The appellant was afforded a trial according to law. The trial was conducted fairly and the jury were properly directed as to the relevant matters of law to be considered in determining whether the Crown had established, beyond

reasonable doubt, the appellant's guilt of each of the offences. There was no breach of the *Human Rights Act* in the conduct of that trial.

[129] A consideration of all of the matters raised by the appellant supports a conclusion that none of those matters, either individually or collectively, could have materially impacted upon the jury's conclusion that the appellant was guilty of each of Counts 3, 4, 5 and 7, on a consideration of the whole of the evidence. There is no significant possibility that an innocent person has been convicted of those offences. There was no miscarriage of justice.

Sentence

[130] The appellant submits that a sentence of five and a half years' imprisonment cumulative on his existing sentence was manifestly excessive.

[131] However, a consideration of all of the factors, both aggravating and mitigating, supports a conclusion that the sentence imposed was not manifestly excessive. Whilst the consequence of that sentence was that the appellant was sentenced to a total period of imprisonment of nearly seven years, the sentences imposed for this offending properly reflected his criminality, after allowance for the fact that they were to be served cumulatively on his existing sentence.

[132] The appellant committed three acts of rape despite expressed resistance, in breach of a domestic violence order. He showed no remorse. To the contrary, the cross-examination of the complainant was belittling, a factor the appellant acknowledged in his evidence at trial "was nice".

[133] In sentencing the appellant, the trial Judge specifically found that the appellant's three offences of rape, in the context of a contravention of a domestic violence order, of themselves would support an effective head sentence of six and a half years' imprisonment. That head sentence was reduced, as was the parole eligibility period, to allow for the fact that the appellant was on parole in respect of an offence of strangulation of the complainant when he committed these offences.

[134] A consideration of comparable authorities[49] supports a conclusion that an effective head sentence of six and a half years' imprisonment fell well within a sound exercise of the sentencing discretion. A reduction of that effective head sentence, to five and a half years' imprisonment to reflect the fact that the sentence would be served cumulatively on the appellant's current sentence of imprisonment, amounted to a proper reflection of the consequences of a cumulative period of imprisonment.

[135] The setting of a parole eligibility date, at a period slightly less than the halfway period of that sentence of five and a half years also fell within a sound exercise of the sentencing discretion. There were no mitigating factors warranting further leniency.

[136] The appellant's sentence was not manifestly excessive.

Bail application

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[49] *R v Postchild* [2013] QCA 227; *R v TAQ* [2020] QCA 200; *R v Conway* [2012] QCA 142; *R v Burton* [2014] QCA 37.

[137] Once a conclusion is reached that the appellant's appeal against conviction is to be dismissed and that the application for leave to appeal against sentence is also to be dismissed, there is no basis upon which the appellant can advance release on bail. That application is properly to be dismissed.

Orders

[138] I would order:

1. Leave to adduce further evidence be refused.
2. The appeal against conviction be dismissed.
3. Leave to appeal against sentence be refused.
4. The application for bail be dismissed.

[139] **HENRY J:** Having assessed the record as a whole, I agree with the orders proposed by Boddice J for the reasons given by his Honour.