SUPREME COURT OF QUEENSLAND

CITATION:	*R v TBJ* [2026] QCA 108
PARTIES:	**R** **v** **TBJ** (appellant)
FILE NO/S:	CA No 261 of 2022 DC No 4 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 14 October 2022 (Jackson KC DCJ)
DELIVERED ON:	12 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2025
JUDGES:	Bond JA, Bradley JA, Williams J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL COUNTS – where the appellant was convicted by a jury of 18 child sex offences and one assault offence – where the complainant was aged between 12 and 13 years of age – where the appellant was 35 years of age – where the appellant's case at trial was that the alleged sexual acts had not happened – whether the defence of honest and reasonable mistake was fairly raised and a miscarriage of justice was occasioned by the trial judge's failure to direct the jury on that defence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL COUNTS – where the Crown adduced preliminary complaint evidence in the form of statements made by the complainant to her school friends – where defence counsel cross-examined on alleged inconsistencies between the complainant's statements said to amount to preliminary complaint evidence and her testimony at trial – where neither counsel for the appellant nor the Crown sought to rely on any of the relevant prior statements as proof of the truth of their contents – where on appeal counsel for the appellant contended that the prior statements were admissible on that basis and contended that a miscarriage of justice was occasioned by the trial judge

failing so to direct the jury – whether counsel had complied with the conditions of s 18 of the *Evidence Act* in relation to the statements – whether the lack of a direction to the jury about the use of the evidence caused a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant's partner was called as a crown witness – where evidence was adduced from that witness's pre-recorded interview – where the evidence went to the appellant's discreditable conduct – where the evidence stated that the appellant was controlling and physically, verbally and emotionally abusive towards his partner – whether justice miscarried due to the evidence being allowed in the trial

Evidence Act 1977 (Qld), s 18, s 103CB

Bell v The King [2025] SASCA 97, cited
MDP v The King (2025) 99 ALJR 969; [2025] HCA 24, followed
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, cited
R v CAZ [2012] 1 Qd R 440; [2011] QCA 231, cited
R v DAT [2009] QCA 181, cited
R v Kalisa [2024] QCA 198, cited
R v Kehagias, Leone & Durkic [1985] VR 107; [1985] VicRp 10, cited
R v Kelleher [2024] QCA 99, followed
R v Sunderland (2020) 5 QR 261; [2020] QCA 156, cited

COUNSEL:	J R Jones, with J B Reeves, for the appellant (pro bono) M A Green for the respondent
SOLICITORS:	Jasper Fogerty Lawyers for the appellant (pro bono) Director of Public Prosecutions (Queensland) for the respondent

[1] **BOND JA:** On 14 October 2022, the appellant was convicted after a three day trial of 18 child sex offences and one assault offence.

[2] The offending was alleged to have occurred during a 9 month period commencing in July 2018. As at the commencement of the period the complainant was a female child aged 12 years and 5 months and the appellant was an adult male aged 35 years and 4 months.

[3] The counts of which the appellant was convicted comprised maintaining a sexual relationship with a child (count 1), rape (counts 5, 9, 10, 12, 16, 18, 19), indecent treatment of a child under 16, under care (counts 2, 3, 4, 6, 7, 8, 11, 13, 14, 17), and common assault (count 15).

[4] The appellant was sentenced to concurrent terms of imprisonment as follows:

(a) Count 1: 9 years and 6 months' imprisonment;

(b) Count 2: 6 months' imprisonment;

(c) Counts 3, 4, 6 to 8, 11, 13, 14, and 17: 3 years' imprisonment;

(d) Count 10: 6 years' imprisonment;

(e) Counts 5, 9, 12, 16, 18 and 19: 4 years' imprisonment;

(f) Count 15: 18 months' imprisonment.

[5] The sentencing judge declared 5 days pre-sentence custody as time already served under the sentences. The sentencing judge fixed the date that the appellant would be eligible for parole as 14 June 2028. Convictions were recorded for each count.

[6] The appellant appeals his convictions on the following grounds:

(a) a miscarriage of justice was occasioned by the learned trial judge's failure to direct the jury with respect to mistake of fact;

(b) a miscarriage of justice was occasioned by the learned trial judge's failure to direct the jury that the evidence of the complainant's friends was admissible as proof of the facts stated therein;

(c) a miscarriage of justice was occasioned by the learned trial judge's failure to adequately direct the jury in relation to consent;

(d) a miscarriage of justice was occasioned by the learned trial judge's failure to direct the jury with respect to the evidence of post-offence conduct;

(e) a miscarriage of justice was occasioned by the admission of inadmissible and prejudicial discreditable conduct evidence; and

(f) a miscarriage of justice was occasioned by the learned trial judge's failure to direct the jury not to engage in impermissible propensity reasoning.

[7] For reasons which follow, the appeal should be dismissed.

The relevant aspects of the evidence at trial

[8] The complainant's evidence was adduced in the form of –

(a) a recording of her interview with police on 9 May 2019 tendered pursuant to s 93A of the *Evidence Act*;

(b) a recording of a second interview with police on 29 September 2019 tendered pursuant to s 93A of the *Evidence Act*; and

(c) pre-recorded evidence taken on 10 March 2022 tendered pursuant to s 21AK of the *Evidence Act*.

[9] The complainant had known the appellant since she was a baby. The appellant was her father's friend from work. He knew her age because he had attended her birthday party. At the time of the alleged offending, she regularly stayed at the appellant's apartment on the Gold Coast with the appellant and his girlfriend AKM, whose two children often but not always also stayed at the apartment.

[10] The complainant's evidence was the appellant performed the alleged non-consensual sexual acts on her whenever she was under his care and that he slapped her on one occasion. She said that AKM licked her vagina on one occasion. The complainant's evidence supported the charged counts.

[11] The table below identifies the counts as particularised and briefly summarises the evidence which the complainant gave in support of each count. The bold print highlighting will become relevant to the first appeal ground.

Count(s)	**Particulars**	**Complainant's evidence**
1 Unlawfully maintaining a sexual relationship with a child	Particulars are contained in Counts 2 to 14 and 16 to 19	Refer to the summaries in relation to counts 2 to 14 and 16 to 19 below.
2 Indecent treatment of a child under 16, under care	The appellant squeezed the complainant's bottom when she was standing in the kitchen.	She could not remember the first time that well. But she did remember one time when the appellant started groping her bottom with both hands one time when she was talking with one of AKM's kids over the kitchen counter. She was standing on the other side of the kitchen counter, in the lounge room part.
3, 4, 6 and 7 Indecent treatment of a child under 16, under care	On an occasion when the complainant was staying at the appellant's apartment at the same time as AKM and her children, AKM came into the lounge room and told the complainant that the appellant wanted her to go into the bedroom. When the complainant entered the bedroom, the appellant made her wrap her hand around his penis and he then moved her hand on his penis (Count 3). The appellant then squeezed and touched the breasts of the complainant for some time (Count 4). The appellant told the complainant to undress and touched her vagina and clitoris (Count 6), while she stroked his penis (Count 7).	One of the first things she could remember was when they were at the apartment before they had dinner. AKM said that the appellant wanted the complainant in the bedroom. She went in because she was too nervous to say no. **The appellant sat the complainant on the bed and told her to sit in front of him facing the mirror, which she did.** **He started just talking to her. She could not remember exactly what he said but it was stuff like "if I didn't want it I could say no and if he was being either too rough or it was getting too much for me I could just say no." She did not say anything.** And then he made her hold her hand out to him and he grabbed her wrist and made her wrap her hand around his penis (count 3) and he

Count(s)	Particulars	Complainant's evidence
		started groping her chest by putting his hands up the bottom of her shirt and jumper and squeezing and playing with her breasts. Her bra was still on (count 4). Eventually he put his hand down her pants and underwear and started rubbing her clitoris and putting his finger in her vagina (count 6). He kept making her stroke his penis (count 7). She didn't think anything was said but after a while he made her get undressed and get onto the bed. He made it seem like she could not say no. His tone of voice was very demanding and she felt like if she said no he would hurt her physically.
5 Rape	The appellant inserted his finger in the complainant's vagina and moved his finger in and out (Count 5).	After the appellant made the complainant wrap her hand around his penis and rub it (count 3) and squeezed the complainant's breasts (count 4), the appellant put his hands down the complainant's pants, underneath her underwear, and he rubbed her vagina and clitoris and put one finger inside her vagina. The appellant was gently sliding his finger in and out of the complainant's vagina. The complainant felt like she couldn't say, "No" just mainly because of the appellant's tone of voice. It was very demanding and made her feel like if she said, "No", he would do something bad, like hurt her physically.
8 Indecent treatment of a child under 16, under care	The appellant encouraged AKM and the complainant to be more involved in "doing stuff". Following that, on an occasion during the school holidays the complainant was staying with them prior to a trip to Melbourne with them. One morning whilst the complainant was still in bed,	One night the complainant was at the appellant's house, the appellant and AKM invited her to sleep in their bed. He slept in the middle and AKM was on the left. He and AKM slept naked. The appellant asked the complainant to take her clothes off and she did. They let the complainant sleep in.

Count(s)	Particulars	Complainant's evidence
	AKM entered the room and licked the complainant's vagina for a few seconds. The appellant was said to be criminally responsible as a party pursuant to s 7 of the Criminal Code by virtue of his encouragement of the act.	When she woke up, the appellant was in the shower; AKM went out of the room and later came back in, spread the complainant's legs and licked her vagina for a few seconds. This occurred before the three of them went to Melbourne in the appellant's truck.
9 and 10 Rape	Counts 9, 10, 11, 12 and 13 arise out of the same occasion. The complainant was in the bedroom with the appellant playing a video game. The appellant then undressed her and himself and laid her on the bed. He then penetrated her vagina with his fingers (Count 9). The appellant then penetrated the complainant's vagina with his penis before stopping when the complainant told him it was hurting her (Count 10).	The complainant was staying at the Gold Coast apartment. AKM's two children were there. The complainant was in the bedroom with the appellant playing a video game called Call of Duty. He undressed himself and the complainant. **He did not say anything to her. She did not say anything to him.** The complainant lay on the bed on her back and the appellant penetrated her vagina with his fingers. He moved his fingers in and out of her vagina for a few minutes (count 9). Following that, he moved between the complainant's legs and started pushing his penis into her vagina (count 10). She thought he penetrated her halfway. **The complainant told him to stop because it was hurting her.**
11 Indecent treatment of a child under 16, under care	The appellant then removed his penis from the complainant's vagina and wrapped her hand around his penis while he thrusted his penis in her hand for several minutes (Count 11). AKM knocked at the door, entered whilst the offending was occurring and told the complainant and the appellant to get dressed and come out of the room as dinner was ready.	After she told him to stop, he then stopped and pulled out. He then made her touch his penis by placing her hand on it and thrusting into her hand. It ended when AKM knocked on the door, came in and said the complainant should go eat dinner.
12 Rape	After dinner, the appellant asked AKM to tell the complainant to return to the bedroom. When the complainant went back in the bedroom he penetrated her vagina with his finger as she was playing	After dinner, the appellant was back in the bedroom. He called AKM into the bedroom. AKM came back out to the living room area and told the complainant that the appellant wanted to play Call

Count(s)	Particulars	Complainant's evidence
	the video game. He then moved her onto the bed where he continued to penetrate her vagina with his fingers (Count 12).	of Duty again. The complainant went back into the room and started getting ready to play the game. The appellant put his hand underneath her pants and underwear and put his fingers inside the complainant's vagina. **She was attempting to ignore him and continued to play the video game. She felt really uncomfortable and nervous. She did not think she said anything to him.** After a time, the appellant removed the controller that she was playing the game with, from her, and put it on the bed and continued penetrating her vagina with his fingers.
13 Indecent treatment of a child under 16, under care	The appellant pulled the complainant closer to him and placed her hand on his penis over his shorts. He told then told the complainant to rub his penis which she did. As this was occurring, AKM entered the room and told the complainant it was time to go to sleep. When she entered the room the appellant was still penetrating the complainant's vagina with his fingers.	After he was moving his fingers inside her vagina he pulled her closer to him and made her touch his penis again over his shorts. He did so by placing her hand on his penis on top of his shorts. After that AKM entered the room and said the complainant should go sleep with the kids. When she came in, the appellant was still moving his fingers inside the complainant's vagina but the complainant had moved her hand away from his penis.
14 Indecent treatment of a child under 16, under care **15** Common assault	Following a walk to the beach, the appellant and the complainant returned to the apartment without AKM and her children. Whilst the complainant was washing her feet, the appellant entered the bathroom and grabbed her by the breasts (Count 14) and then slapped her to the face 5 or 6 times (Count 15).	AKM, the appellant, the complainant and AKM's kids had been to the beach. The appellant and the complainant had arrived home from the beach before AKM and the kids. The complainant was in the bathroom sitting on the edge of the bath washing her feet. The appellant grabbed her by her arm, pulled her up and aggressively touched her breasts on top of her clothes. (Count 14). He then slapped her once and then a few more times. (Count 15).

Count(s)	Particulars	Complainant's evidence
		She started crying and he told her that if she did not stop crying he would hit her again.
16 Rape **17** Indecent treatment of a child under 16, under care	The appellant made the complainant change into clothing that he brought out from the bedroom including a one-piece outfit that had clasps in the groin area. The complainant undressed and put on the outfit. The complainant's discarded underwear was on the floor. AKM complained to him that she did not want to see any of it. Whilst the complainant was wearing the outfit, the appellant told her to sit on his lap. Whilst the complainant was sitting on his lap, the appellant spoke to the complainant's father on the telephone and at the same time he inserted his fingers into the complainant's vagina and moved it in and out (Count 16). When the phone call ended the appellant made the complainant lay on a futon and he then touched her vagina (Count 17).	She and the appellant had been watching tv on the futon in the lounge room. AKM went into the bedroom. He brought out outfits and said he wanted the complainant to try stuff on. The one she remembered the most was a pink one piece that had clips at the bottom where the vagina is. He got her to undress and put the pink outfit on. He went outside for a smoke. Her underwear was on the floor. She put her shirt and pants back on while still wearing the pink outfit. AKM came out to get something, noticed the clothes on the ground. She had a conversation with the appellant which appeared to be bickering. She told the complainant to be more cautious and pick up after herself. Later on that same occasion, the appellant was on a phone call with the complainant's father. The appellant had the complainant sit on his lap with her legs either side of him, facing him. She was still wearing the pink outfit. Whilst he was on the phone call, the appellant undid the clasps in the groin area of the outfit and penetrated the complainant's vagina with his finger, and he moved his finger in and out of the complainant's vagina. **While doing that he told her to be quiet, so her parents didn't hear**. The complainant's parents were talking to her, and she could just barely reply.
18 and 19 Rape	Whilst on a walk along the beach, the appellant and the complainant	Counts 18 and 19 arise out of the same episode.

Count(s)	Particulars	Complainant's evidence
	stopped whilst AKM and her children walked on. The appellant then put his hand inside the complainant's underwear and penetrated her vagina with his fingers, moving them in and out for some minutes. He removed his hand when the others were returning (Count 18). He then told AKM that he and the complainant would remain on the beach for a bit longer. When they were alone again, he again penetrated the complainant's vagina with his fingers (Count 19).	The complainant was staying at the Gold Coast apartment. AKM's children were present. One evening while she was there, they all walked on the beach. The appellant pulled her back when they got to the beach and sat her down on the sand, and AKM and her children continued to walk on along the beach further down. The appellant told the complainant that she was going to start doing stuff with AKM's son soon. **He also said that she could not tell anyone about what was going on**. And she could not tell AKM's son what was going on even then. **She did not say anything back to him. She was quiet because she was anxious and embarrassed.** He then put his hand under the waistband of her pants and penetrated her vagina with his fingers. He fingered her for about 10 to 20 minutes. (Count 18) The appellant removed his hands from the complainant's pants when AKM and her kids were coming back towards them. The appellant told AKM that he and the complainant would stay at the beach for a little while longer, and AKM and the kids went back to the apartment. Once they'd gone, the appellant put his hand in the complainant's pants and penetrated her vagina with his fingers again. **She did not say anything to him while he was doing that. Nor did he say anything to her.** He continued to do that until she said that she wanted to go home because it was getting cold. (Count 19)

[12] AKM was called in the Crown case. She had initially been charged as a co-accused with respect to 11 of the counts on the indictment, but after negotiations with the Crown she pleaded guilty to count 8 only. She gave an induced statement and an undertaking to cooperate with police, and her sentence for count 8 was reduced because of her cooperation.

[13] Her evidence was as follows:

(a) She initially met the appellant when she started working for him in his trucking business. She ended up moving into a share house with him. Eventually their relationship became sexual. She said that ultimately their relationship "became very abusive, both physically and verbally".

(b) There came a time when she met the complainant. She believed the complainant was 12 years of age. The appellant was friends with the complainant's parents.

(c) She confirmed that the complainant would regularly stay with she and the appellant at the Gold Coast apartment. Often, but not always, she and the appellant would also pick up her two children (who lived with their father) and they would also stay at the Gold Coast apartment.

(d) The Gold Coast apartment was a one-bedroom unit. It had a combined kitchen and living area, one bathroom, one bedroom and a built-in cupboard, which served as the laundry.

(e) When the three children were there, the complainant and AKM's female child would sleep in a fold-out couch in the kitchen and living area and AKM's male child would sleep on cushions on the floor in that room. She and the appellant would sleep in the bedroom.

(f) She described an occasion two days before the Melbourne trip to which the complainant had referred in relation to count 8 where she said it was nighttime and she was in the bedroom getting ready for bed. The complainant and the appellant were in the lounge room on the fold-out couch. When she walked out they were both under the covers and she could see the complainant's legs were bent and spread apart and looked like his hand was draped over her leg in between her legs and she could see the blanket moving in the area of her vagina. The complainant was moaning quietly. She said she started freaking out and was telling the appellant to stop but he did not stop. She said that there were many arguments between them about what was going on between he and the complainant. He was drunk because he was drunk every night.

(g) She also described an occasion which was the night before they left for Melbourne where he wanted the complainant to come and hop in the bed with him. She said she did not want that. She was naked and he was naked. He told her to go out and get the complainant to come into the bedroom with the two of them. He started to get the same look he normally gets whenever he is about to "lose it" at her. She complied with his request. The complainant was dressed but when she came into the bedroom the appellant told her to take her clothes off. The complainant got into bed with them where the complainant was on one side of the bed, the appellant was in the middle and AKM was on the other side of the bed. She rolled over and turned her back and fell asleep.

(h) The next morning the appellant told the two of them that "we both needed to put more effort" or something to that effect. AKM took that as meaning he wanted her to make the complainant feel more comfortable in what he was doing. This conversation took place in the kitchen. AKM then went back into the bedroom, pulled the blanket back from the complainant and licked her vagina for a few seconds returning to the appellant and asking him "Are you fucking happy now".

(i) She described that the journey to Melbourne was in the appellant's truck. It was a prime mover which had bunks behind the driver and passenger's seats. She and the appellant slept in the bottom bunk and the complainant slept in the top bunk. AKM described that on one occasion before they were going to bed the complainant had to climb into the bottom bunk with the appellant; AKM was sitting on the passenger seat with her back towards them but she could hear them kissing. She tried to put a stop to it by telling them that they had to get up early in the morning.

(j) She said there were plenty of times when she told him that she wanted to go to the cops and that she wanted it to stop and that it needed to stop. His response was to tell her that if she went to the police she would lose her kids and never see them again because she would go to jail because she was involved. He made that comment more than once. She acknowledged that she just tried to turn a blind eye to what was going on.

(k) She described an occasion when the appellant and the complainant were in the bedroom and her children were staying at the unit with them. She was cooking dinner and the complainant stayed in the bedroom with the appellant. The door was shut. She and her kids ended up sleeping in the combined kitchen and living area. She woke up in the morning and found the complainant and the appellant were both in bed naked and asleep. She said she flipped out and started going off because she said "my kids were there and my whole thing was they could have walked in and seen that".

(l) The next day her male child (aged about 12) relayed a conversation that he had had with the complainant where the complainant had told him that she and the appellant "were trying to play hide the sausage in the bun". Counsel for the Crown referenced the contents of the conversation but the passage of evidence was used to introduce AKM saying that after she had spoken to her male child she spoke to the appellant and he told her that she needed to come up with a story to tell her child so that her child would think that the complainant was lying about what she had said to him. The appellant told AKM to come up with a story saying that the complainant was saying that AKM's son was touching her. AKM complied with the appellant's instruction, she said to take the spotlight off what the complainant had said to her son. The appellant was part of the conversation she had with her son as was the complainant. AKM described the conversation as the appellant "more or less putting [the complainant] on the spot, asking her why she was lying and making up stories". The complainant was quiet. She didn't try to deny what he was saying and may have started crying.

(m) AKM then described occasions when she and her children and the complainant were staying at an apartment and went for walks on the beach at night. She said that when that used to occur the complainant and the appellant used to

walk off by themselves. This used to happen every time the complainant was staying with them.

(n) AKM also gave evidence corroborating the fact that there was an occasion when the complainant wore a pink outfit provided to her by the appellant and AKM had noted that he had the outfit in the lounge room where he was with the complainant and that he had made AKM stay in the bedroom. At some point she left the bedroom and found there was underwear lying on the ground or on the couch. It was female underwear.

(o) AKM was present on an occasion when the complainant's father made a pretext call. She described that her part in the conversation was basically backing up what the appellant was saying and denying that there had been any wrongdoing with the complainant. She acknowledged that when she was doing that she was lying. She said that she was doing so because she was scared of the appellant and she was scared of the repercussions for herself like losing her kids, getting into trouble and going to jail.

(p) She acknowledged that ultimately she was charged with some matters and pleaded guilty in the courts concerning those matters.

(q) She was cross examined extensively on the latter subject matter to establish the advantage she had secured for herself by agreeing to co-operate with the Crown. It was established that she had been charged with multiple counts but ultimately pleaded to one count, obtaining a 12 month fully suspended sentence, instead of the 18 month sentence suspended after 4 months which she would otherwise have obtained. She accepted all of that. She insisted however that her ultimate decision to co-operate was that it was the right thing to do.

(r) She was cross-examined about her personal antecedents, it being established that she had been addicted to drugs and had mental health issues including borderline personality disorder and PTSD. She had made suicide attempts in the past and been the subject of involuntary hospitalisation.

(s) She conceded that if what she was saying was true she had been exposing her own children to a risk of harm. In the course of answering questions concerning her relationship with the appellant she suggested that she had a missing tooth and a scar on her eyebrow because of him. When asked why she did not simply leave the appellant she said that he had full control over her and the finances. She had neither a phone nor a bank account. He had control over everything.

(t) Ultimately it was suggested (and she rejected) that none of the sexual activity which she had described had ever occurred.

[14] Preliminary complaint evidence was led of statements made by the complainant to her mother, to AKM's son, and to three of the complainant's school friends TAB, MLB and GMH. The complaint made to the complainant's mother was the subject of an admission, so the mother was not called to give evidence at the trial. AKM's son and the school friends gave evidence and were cross-examined.

[15] The appellant did not give or call evidence at his trial.

Ground 1 – Failure to direct the jury with respect to mistake of fact

[16] At the time of the alleged offending, s 348 of the *Criminal Code* provided that:

> "(1) … ***consent*** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
>
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
>
> (a) by force; or
>
> (b) by threat or intimidation; or
>
> (c) by fear of bodily harm; or
>
> (d) by exercise of authority; or …"

[17] The trial judge directed the jury in an orthodox way and consistently with that definition that for each of the counts which alleged the offence of rape the Crown was required to prove beyond reasonable doubt that the alleged offending conduct occurred without the complainant's consent.

[18] In *R v Sunderland*[1] Sofronoff P explained the fact that the definition requires consent to be "given" is an aspect of the definition which must not be overlooked. His Honour went on to observe:

> "The giving of consent, in the context of a charge of a sexual offence, involves the making of a representation by one person to another, to the effect that the first person agrees to participate in the sexual act that would otherwise be an offence. Such a representation might be made by words or by actions or by a combination of both. Sometimes the words or actions cannot be understood apart from the surrounding circumstances. In cases where the complainant has communicated neither consent nor dissent by words or actions, the inaction cannot be considered in a vacuum. It too must be considered with all of the relevant circumstances surrounding the sexual act. The circumstances involve matters both past and present. So, inaction in the context of prior acts or words might mean that the complainant has previously given consent which remains operative until withdrawn. This might be established by evidence of relationship or previous interactions between the complainant and accused. So too, inaction, when taken with the other circumstances, may be a manifestation of unwilling submission rather than consent. Indeed, continued or sustained inaction for the duration of a sexual act may be a strong indicator of submission rather than consent. In *R v Day* Coleridge J said that every consent to an act "involves a submission; but it by no means follows, that a mere submission involves consent". In *R v Wollaston* Kelly CB said that "[m]ere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent"." (footnotes omitted) (emphasis in original)

[19] The complainant's evidence negated consent and no suggestion that she had in fact either subjectively consented or actually communicated consent to the appellant was ever put to her. At the commencement of her first interview with police she described the gamut of the appellant's behaviour in this way:

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1 *R v Sunderland* (2020) 5 QR 261, [44] (Morrison JA and Mullins JA agreeing).

“COMPLAINANT: Um.. I’ve been sexually assaulted by someone

POLICE CONSTABLE: Mm

COMPLAINANT: Who’s older than me

POLICE CONSTABLE: Yep ok so tell me everything about being sexually assaulted by this person who’s older than you and just start from the beginning

COMPLAINANT: Well um.. I don't remember the first time it started happening but

POLICE CONSTABLE: Mm

COMPLAINANT: One of the times um I was just at his house with his.. his girlfriend and myself

POLICE CONSTABLE: Mm

COMPLAINANT: And when we were alone he would pull me close to him and touch me

POLICE CONSTABLE: Yep

COMPLAINANT: And.. he would say that.. if I told anyone he would hurt me

POLICE CONSTABLE: Mm

COMPLAINANT: And he also said that at any time I could say I wanted it to stop but I was too scared to

POLICE CONSTABLE: Mm

COMPLAINANT: And sometime in the middle of all of it happening he got his girlfriend involved

POLICE CONSTABLE: Mm

COMPLAINANT: And they would both touch me and it made me feel really uncomfortable

POLICE CONSTABLE: Yep.. and then what happened

COMPLAINANT: Um.. he would put his hand under my shirt

POLICE CONSTABLE: Mm

COMPLAINANT: And.. touch my chest

POLICE CONSTABLE: Mm

COMPLAINANT: And.. he made me touch him

POLICE CONSTABLE: Mm

COMPLAINANT: And he would get really aggressive

POLICE CONSTABLE: Mm

COMPLAINANT: But it only really seemed to happen when he was drunk

POLICE CONSTABLE: Ui and then what happened

COMPLAINANT: He would make me get undressed and he would as well

POLICE CONSTABLE: Mm.. yep

COMPLAINANT: And one time he tried penetrating me

POLICE CONSTABLE: Mm.. ok then what happened

COMPLAINANT: He could tell I was in pain so he stopped

POLICE CONSTABLE: Ok.. then what happened

COMPLAINANT: Um.. ui he would put his fingers in me

POLICE CONSTABLE: Mm

COMPLAINANT: He started saying that ui doing stuff with his girlfriends kids

POLICE CONSTABLE: Mm

COMPLAINANT: And.. and.. then we used to go and ui on the beach and it was me him his girlfriend and her kids

POLICE CONSTABLE: Mm

COMPLAINANT: And he would normally pull me away from the rest

POLICE CONSTABLE: Mm

COMPLAINANT: And do stuff to me

POLICE CONSTABLE: Ok

COMPLAINANT: Um.. I think that's all I can remember"

[20] It is notable that the complainant referred to the appellant having told her that if she told anyone he would hurt her, but also that at any time she could say that she wanted it to stop. She said she was "too scared" to do that. Later in the interview she was asked to expand on what she had said.

"POLICE CONSTABLE: Ok.. alright so.. you said earlier that he said that if you told anyone that he would hurt you so tell me about when he told you ui

COMPLAINANT: Ui one time he said that if I told anyone

POLICE CONSTABLE: Mm

COMPLAINANT: And that it.. that if ui touching me and me touching him ui stopped he would find me and beat the shit out of me

POLICE CONSTABLE: Ok .. where were you when he said that

COMPLAINANT: At his unit

> POLICE CONSTABLE: Ok was anyone else around when he said that
>
> COMPLAINANT: Only [AKM]
>
> POLICE CONSTABLE: Ok and did she say anything or react in anyway when he said that
>
> COMPLAINANT: No
>
> POLICE CONSTABLE: Do you remember what.. what you guys were taking about before that that made him say that
>
> COMPLAINANT: Just.. that it needed to be kept a secret
>
> POLICE CONSTABLE: Mm
>
> COMPLAINANT: Or he could get sent to jail and stuff
>
> POLICE CONSTABLE: Ok.. ok.. and how did you feel when he told you that
>
> COMPLAINANT: Terrified
>
> POLICE CONSTABLE: Mm do you remember what like when about that.. he told you that
>
> COMPLAINANT: No"

[21] She was also asked to expand on her earlier reference that he said she could say she wanted it to stop:

> "POLICE CONSTABLE: No ok.. and you said that he also said something about.. you could say when you want it to stop but you were too scared so tell me more about that
>
> COMPLAINANT: I was too scared
>
> POLICE CONSTABLE: Mm
>
> COMPLAINANT: That if I said no
>
> POLICE CONSTABLE: Mm
>
> COMPLAINANT: He still try and f.. he would still try and force me into doing it
>
> POLICE CONSTABLE: Ok.. so when did he say the thing about if you wanted to stop you can tell me
>
> COMPLAINANT: Ui near the beginning"

[22] The trial judge made the following reference to this evidence in his summing up:

> "He told her that if she did not want to or was getting - or it was getting too much for her, she could say no."

but made no direction concerning the possible operation of s 24 of the *Criminal Code*. His Honour was not requested to do so by either trial counsel.

[23] The ground of appeal raises the question whether the jury should have been directed with respect to s 24(1) of the *Criminal Code*, which provides:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

[24] The appellant argued that there was evidence in the Crown case that raised the issue of mistake of fact. In particular, the appellant argued that the complainant gave evidence that there were occasions when she told the appellant to stop doing a sexual act, and the appellant stopped. And further, that on the complainant's own account, the appellant told her that if she didn't want it, she could say, no, and if the appellant was being either too rough or it was getting too much for the complainant, the complainant could say, no.

[25] Although the appellant's case at trial had been that none of the alleged sexual conduct had ever happened, the appellant argued before this Court that the effect of the complainant's evidence was that the appellant had been astute and careful to ensure that she was consenting. Accordingly, the appellant argued, the Crown's case included circumstantial evidence of the existence of a belief that the complainant was consenting. The jury was entitled to draw an inference that the appellant reasonably believed that the complainant was consenting. The excuse was available even though the defence case at trial was that the sexual activity simply had not occurred.

[26] It is well established that the fact that the defence case was that the sexual conduct had not occurred would not relieve the trial judge from his duty to put to the jury any defence fairly raised on the evidence.[2] In *R v Kelleher*[3], this Court observed:

> "It is settled law that if there was evidence which fairly raised any of the defences suggested by the ground of appeal, the legal or persuasive burden was on the Crown to exclude beyond reasonable doubt the proposition that the accused was acting in circumstances giving rise to the defence – that is, to exclude any reasonable possibility that that proposition was true.
>
> As to whether any of the suggested defences were fairly raised on the evidence such that they should have been left to the jury, the question for the trial judge was whether, on the version of events most favourable to the accused that was suggested by the evidence, a properly instructed jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting in circumstances giving rise to the defence. Or, to put it another way, the question for the trial judge was whether, on such a version of events such a jury could be left with a reasonable doubt as to whether the defence had been negatived.
>
> It should be emphasised that the question for the trial judge – and for the appellate court where it is suggested that the trial judge erred – is a question of law on which there can be only one correct answer. The question posed in the previous paragraph is not to be answered by a prediction of what the trial judge (or the appellate court) thinks that

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2 *Pemble v The Queen* (1971) 124 CLR 107, 117-118 and *R v Kalisa* [2024] QCA 198 at [3].

3 *R v Kelleher* [2024] QCA 99 at [8] to [12] per Bond JA, with whom Morrison JA and Crow J agreed.

> a properly instructed jury acting reasonably **would** do. The enquiry is as to what such a jury **could** do.
>
> That said, the proper analysis must necessarily act on the basis that a properly instructed jury acting reasonably will form logical conclusions by logical reasoning and not by mere speculation. Thus in *R v Clarke* when considering whether an innocent explanation posited for the first time on appeal should have been left to the jury, Hunt CJ at CL remarked that the jury could not act upon "some fanciful supposition or possibility not reasonably to be inferred from the facts proved".
>
> Finally, it is important to appreciate that where a posited defence has both subjective and objective elements, both elements must be considered. If, for example, a defence would exist if the accused relevantly acted while holding a particular belief on reasonable grounds, then the defence would not be fairly raised on the evidence unless there was evidence which fairly raised both the subjective aspect of the hypothesis (namely that the accused actually held the relevant belief when the accused relevantly acted) **and** the objective aspect of the hypothesis (namely that the belief, if held, could be regarded as held on reasonable grounds). If the evidence fairly raised the defence, the ultimate legal onus on the prosecution would be to prove beyond reasonable doubt either that the accused did not hold the belief **or** that any such belief was not held on reasonable grounds." (footnotes omitted) (emphasis in original)

[27] Similarly in *R v Kalisa*[4] Dalton JA expressed this view:

> "It is for the Crown to exclude a defence under s 24. When the jury should be instructed to consider whether or not the Crown has done so, depends upon the evidence in the case. The question must be asked whether the evidence raises for the jury's consideration the issue of whether, even though the complainant did not consent, there was a possibility that the defendant had an honest, reasonable but mistaken belief that the complainant had consented. It does not matter whether that evidence comes from the complainant, the defendant, from another source, or is open to the jury from a combination of sources. As recognised by Ryan J, the jury might accept and reject various parts of the evidence to arrive at factual findings not consistent with the entirety of any one witness's evidence.
>
> There will be some cases where, on the evidence, there could be no room for mistake as to whether or not there was consent. There will be others where the evidence does not support the idea that any mistake was reasonable." (footnotes omitted) (emphasis in original)"

[28] The posited defence in this case has both subjective and objective elements. The subjective element is that the appellant had the honest but mistaken belief that the complainant had consented to the conduct alleged to have amounted to the conduct charged as rape. The objective element is that the belief so held was a reasonable belief. The defence under s 24 would not be fairly raised on the evidence unless there

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4 *R v Kalisa* [2024] QCA 198 at [4] – [5].

was evidence which fairly raised both the subjective aspect of the hypothesis (namely that the appellant actually held the relevant belief when he relevantly acted as alleged in those counts) and the objective aspect of the hypothesis (namely that the belief, if held, could be regarded as a reasonable belief). If the evidence fairly raised the defence, the ultimate legal onus on the Crown would be to prove beyond reasonable doubt either that the accused did not hold the belief or that any such belief was not held on reasonable grounds.

[29] In my view this was a case where, even if the question whether the appellant honestly held the requisite belief could be regarded as fairly raised by the early indication that the complainant could say "no" if she didn't want it, when combined with her failure to do so, the proposition that the objective aspect of the defence was fairly raised is entirely fanciful. For the following reasons, even taken at its highest this was a case where the evidence could not be thought to support the idea that any mistaken subjective belief held by the appellant as to consent could have been regarded by the jury as a reasonable one.

[30] First, there was no evidence of any actual communication by the complainant which might be thought to communicate consent to him. Reference should be had to the highlighted portions of the final column in the table at [11] above.

[31] Second, at best the evidence raised the idea that the complainant submitted to the appellant's disordered sexual desires without explicit protest. But as Sofronoff P said in *R v Sunderland* any assessment of that submission would have to be performed having regard to all the contextual circumstances.

[32] Third, the appellant was a 35 year old man and the complainant was a 12 year old child. The appellant knew that. He had been to her birthday. The disparity in power and authority was both obvious and enormous. The complainant's submission to the appellant's sexual demands could not possibly be regarded as a reasonable foundation for any mistaken subjective belief that the appellant might have had as to consent. It would be fanciful to think that a properly instructed jury acting reasonably could be left with any doubt on that question.

[33] The defence was not fairly raised. The trial judge did not make the alleged error. Appeal ground 1 fails.

[34] For completeness I observe that if I had reached a different view I would have exercised power pursuant to s 668F of the *Criminal Code* to substitute verdicts of indecent treatment of a child under 16, under care for each of the rape verdicts which would have been affected by the success of appeal ground 1 (except count 10, for which, because it involved penile rape, the substitute verdict would be unlawful carnal knowledge). That course would be appropriate because, as the appellant accepted, the jury must have been satisfied of the elements of that offence for each of the rape counts. Of course, if those verdicts were substituted it would have been necessary to set aside the sentences for the rape counts and remit the matter to the District Court for resentencing. Given the view I have on the appeal ground it is not necessary to consider what orders would be made for that course.

Ground 2 – Failure to direct the jury regarding evidence admissible as proof of the facts stated therein

[35] Section 18 of the *Evidence Act* provides:

> "**18 Proof of previous inconsistent statement of witness**
>
> (1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.
>
> (2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement."

[36] "Statement" is defined in schedule 3 to the Act as including "any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise."

[37] In the event that a witness is cross-examined about a prior inconsistent statement and the procedure specified in s 18 is followed then pursuant to s 18(1) it becomes open to seek to prove that the witness in fact made the statement. Section 101 provides:

> "(1) Where in any proceeding—
>
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; …
>
> that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible."

[38] The appellant submitted that there were a number of prior inconsistent statements put to the complainant during cross-examination, which she denied, or at least did not distinctly admit, that she had made the statements. The appellant submitted that when the fact of the relevant statements were subsequently proved the statements were admissible as to the truth of their contents and that the trial judge erred by not so directing the jury. It is notable that at trial neither counsel for the Crown nor counsel for the appellant sought to rely on any of the statements as proof of the truth of their contents. Nor did counsel for the appellant seek a direction that the statements should be so regarded.

[39] The appellant argued before this Court that the evidence of the complainant's prior inconsistent statements was admissible for two reasons. First, they bore upon the complainant's credibility as to lack of consent. Second, they were proof that the sexual activity was consensual. The complainant's evidence was evidence that had to be proved beyond reasonable doubt. Furthermore, the appellant argued that one friend (MLB) gave evidence that at one stage, the complainant told her that sexual activity had not occurred. When this statement was put to the complainant, she did not distinctly admit that she made the statement. The appellant argued that this statement was, therefore, admissible as evidence of the truth of the fact asserted.

[40] In order to resolve the question whether there is merit in this ground of appeal it is necessary first to examine each of the alleged statements of which it is said that the consequences specified in s 101 applied with a view to considering the correctness of that proposition.

[41] The evidence concerning statements allegedly made to the complainant's friend MLB was as follows:

(a) During the complainant's second s 93A statement:

(i) The complainant described how the appellant and AKM used to go through her phone to make sure that the complainant was not saying anything to anyone about the offending. She said that she thought that she had told her friends about what was going on "because I didn't know how to deal with it" and she deleted the chat with her friends so the appellant and AKM didn't find out.

(ii) She said she had texted her friend TAB and told her the stuff the appellant did and that she felt so uncomfortable and did not want to be there anymore because of the arguing between the appellant and AKM. She said that she sent the text around the end of the previous year (2018) or the beginning of this year (2019).

(iii) Apart from TAB she said that she had also told her friends MLB and GMH. As to GMH she said that she had dropped hints here and there about her going to the appellant's place and eventually GMH just told her that if she wanted to talk about anything she could. The complainant said she thought that they were in Agriculture class. The complainant could not remember the words she used but said "I just told her everything.. well not everything but the few small details I was willing to tell her." As to MLB the recording of the complainant's second s 93A statement reveals that she said only that "I just told her that um I wasn't safe and that there was stuff going on that I didn't want to talk to her about because I didn't really trust her but then rumours went around the school about me so … couldn't trust her again".

(b) During her pre-recorded evidence the complainant was cross-examined about statements she may have made to her friend MLB:

(i) It was suggested to the complainant that she had a friend named [MLB] and that she had told MLB "about what had occurred". The complainant agreed.

(ii) This exchange then occurred:

> "And, initially, you told her that what occurred happened with consent – your consent, didn't you?---I don't remember.
>
> So is it possible you did say it?---I don't know.
>
> All right. And then, later, you told her about these – you started talking about these things, and you said that it, "never happened?"
>
> HER HONOUR: To whom did she say that?
>
> [DEFENCE COUNSEL]: To [MLB].
>
> HER HONOUR: Did you - - -
>
> [DEFENCE COUNSEL]: Thank you, your Honour.

> HER HONOUR: Did you tell [MLB], at any stage, that those – these things had not happened?---I don't remember."

(c) No part of this exchange amounted to compliance with the s 18 requirement that "the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness." No attempt was made by the Crown or the appellant's trial counsel to prove the fact of prior inconsistent statements by virtue of s 18 and the question of the sufficiency of compliance with s 18 was never tested at trial. That may be explicable having regard to an exchange which occurred shortly after between the judge and counsel in relation to cross examination on statements said to have been made to GMH. I will address that below.

(d) Evidence from MLB was adduced by the Crown as a preliminary complaint witness. In the first place that was done by tendering the recording of her interview with police as a s 93A statement. MLB told police:

(i) The complainant had told her on multiple occasions about a sexual assault. There was only one assault but the complainant's story about it changed a few times.

(ii) In the middle or start of 2019 was when the complainant first mentioned it to her. It was in class. The complainant had told her it had happened and she was scared to go to the house where it happened. She didn't tell MLB when the assault had happened.

(iii) In the last two terms of 2019 on the occasion of when MLB got her piercing done, the complainant told her that it gave her PTSD from the dude who sexually assaulted her. She went into detail about the sexual assault that happened at his house.

(iv) She said that she remembered that the time periods would change every time the complainant talked about it. She remembered one time that the complainant "told me that she had like done it on numerous occasions but not sexual assault like it was consensual... But then like the next time she talked about it she told me that never happened." This happened when they were in class at school.

(e) MLB was cross examined at trial. Her attention was drawn to the statement recorded in the previous paragraph and then the relevant exchange was as follows:

> "Do you remember saying that?---Yes.
>
> Okay. So she had told you whatever happened between her and the person that was doing these things, it was consensual?---At one time, yes. She did say that.
>
> Okay. And then there was another occasion when she spoke to you where she said it never happened?---Yes.
>
> And, no doubt, that was – you took good notice of that because that was different to what she had said on other occasions?---Yes.

> Okay. So there's an occasion when she says whatever happened, it was consensual; correct?---Yep.
>
> And then there's another occasion where she says to you, 'Well, look, those things just didn't happen'?---Yep."

[42] The evidence concerning the statement allegedly made to the complainant's friend GMH was as follows:

(a) As already mentioned, during her second s 93A statement, the complainant said that she had dropped hints here and there about her going to the appellant's place and eventually GMH just told her that if she wanted to talk about anything she could. The complainant said she thought that they were in Agriculture class. The complainant could not remember the words she used but said "I just told her everything.. well not everything but the few small details I was willing to tell her."

(b) During her pre-recorded evidence the complainant was cross-examined about statements she may have made to her friend GMH. In the first instance the exchange was as follows:

> "[DEFENCE COUNSEL]: Well, you spoke to – you'd agree that you spoke to [GMH] and [MLB] about these events, didn't you?---Yes.
>
> Which might suggest to someone that they were close to you. They're not the sort of things you'd just tell anybody, are they?---No.
>
> So I'd suggest to you they were people who were close to you – that you could confide in; correct? Do you - - -?---Yes.
>
> - - - know what, "confide in," means?---Yes.
>
> Tell them your inner-most secrets. You agree with that?---Yes.
>
> All right. And when you spoke to [GMH], you told her – and let me just find it if I could – that you were, 'sleeping with a person who was 30-something.' Do you remember telling her that?---No.
>
> Okay. And you told her in the sense that – you were boasting about it – that you were sleeping with this person who was 30-something? Can you make a comment about that?---I don't remember.
>
> Okay. All right. All right.
>
> HER HONOUR: And I take it these questions are going to credit because it's not
>
> - - -
>
> [DEFENCE COUNSEL]: Some of them are. Yes.
>
> HER HONOUR: - - - an issue – consent is not an issue in - - -
>
> [DEFENCE COUNSEL]: No, no - - -

> HER HONOUR: - - - the trial.
>
> [DEFENCE COUNSEL]: - - - I know, your Honour, but I think - - -
>
> HER HONOUR: I'm just trying - - -
>
> [DEFENCE COUNSEL]: - - - your Honour - - -
>
> HER HONOUR: - - - to see the relevance.
>
> [DEFENCE COUNSEL]: No, no. Your Honour's – I think your Honour's following the trail of my cross-examination while I'm doing it.
>
> HER HONOUR: It's about credit?
>
> [DEFENCE COUNSEL]: Indeed. You told [GMH], I'd suggest, that you loved him?
>
> HER HONOUR: Do you agree or disagree?--- I don't remember."

(c) No part of this exchange amounted to compliance with the s 18 requirement that "the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness." No attempt was made by the Crown or the appellant's trial counsel to prove the fact of prior inconsistent statements by virtue of s 18 and the question of the sufficiency of compliance with s 18 was never tested at trial. Indeed the exchange between counsel and the judge is explicable only on the basis that the purpose of the cross-examination was not to set up a basis subsequently to seek to prove prior inconsistent statements as proof of the truth of their contents, but was relevant only to credit. By this statement to the judge managing the cross-examination during the pre-recorded evidence of the complainant, trial counsel for the appellant was explaining the purpose of his cross-examination in a way which was not consistent with the purpose being that of satisfying the preconditions for subsequent reliance on s 101. In context I would take the indication as a general indication applicable to all of the cross-examination concerning statements made to the complainant's friends.

(d) GMH was called by the Crown as a preliminary complaint witness. In the first place that was done by tendering the recording of her interview with police as a s 93A statement. GMH told police:

(i) At the start of 2019 the complainant wasn't coming to school very often and then she stopped all together.

(ii) She just brought up this guy named [appellant's name]. GMH thought the complainant was telling white lies "because you know when your friend goes yeah I'm sleeping with a 30 something year old you don't really want to believe them cause that's.. that's really not you know normal for someone to say."

(iii) GMH wasn't sure whether it happened. But then the complainant started speaking more and GMH got more worried but didn't really say anything because the complainant did not seem hurt by it and seemed like she enjoyed it. That scared GHM because it was a 30 something year old and the complainant was "like 12".

(iv) GMH related that when the complainant started saying she had PTSD, GMH realised this was a real thing that actually happened. The complainant was "like yeah I love him."

(v) GMH thought the complainant first told her about it in March 2019 in maths class, but then corrected herself to say it was "Project Based Learning" where the study included cooking and agriculture.

(e) GHM was cross examined at trial. GMH conceded that she had told police that the complainant had told GMH that she was sleeping with a 30-something year old; that the way that she said it, she didn't seem hurt and that seemed like she enjoyed it. GMH thought it seemed like the complainant was excited to tell her.

[43] The evidence concerning the statement allegedly made to the complainant's friend TAB was as follows:

(a) As already mentioned, during her second s 93A statement, the complainant said that she said she had texted her friend TAB and told her the stuff the appellant did and that she felt so uncomfortable and did not want to be there anymore because of the arguing between the appellant and AKM. She said that she sent the text around the end of the previous year (2018) or the beginning of this year (2019).

(b) During her pre-recorded evidence the complainant was cross-examined about statements she may have made to her friend TAB. In the first instance the exchange was as follows:

> "Thank you. You told [TAB] some things as well, didn't you?---Yes.
>
> Okay. And do you remember what you told her in relation to [the appellant]?---Sort of.
>
> Okay. When you told her, you told her in a way that you were happy about it?---I don't remember."

(c) No part of this exchange amounted to compliance with the s 18 requirement that "the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness." No attempt was made by the Crown or the appellant's trial counsel to prove the fact of prior inconsistent statements by virtue of s 18 and the question of the sufficiency of compliance with s 18 was never tested at trial. I would also regard the indication of purpose of the equivalent cross-examination which had been made in relation to statements made to GHM as applicable to this line of cross-examination.

(d) Evidence from TAB was adduced by the Crown as a preliminary complaint witness. In the first place that was done by tendering the recording of her interview with police as a s 93A statement. TAB told police:

(i) She had come to talk to police about the complainant and a sexual assault situation.

(ii) She did not remember when the complainant told her, but thought it was "like mid last year" (2019).

(iii) The complainant said that she was "seeing" her dad's friend a lot and "did stuff". She didn't recall much else other than it was the complainant's dad's friend and she was seeing him.

(iv) The complainant had messaged TAB about it but TAB thought it was a day in school when the complainant told her that she was seeing him.

(v) TAB said when the complainant told her that the complainant seemed pretty happy about it.

(e) TAB was cross examined at trial:

(i) She agreed that she had received a text message from the complainant in which she had been told, in effect, that the complainant was seeing a person. The complainant used the words "seeing".

(ii) She said she had had a few conversations with the complainant about that. She accepted that she had told the police that when she had spoken to the complainant, the complainant had seemed happy about the situation.

(iii) She agreed that that was how the complainant had seemed to her when she spoke to her. She observed:

> "And she seemed happy about it?---Yep. There were a few times where she was – seemed distressed about certain situations relating to that but anytime we had spoken about a prior, it was just that they were seeing each other in a relationship.
>
> And there were occasions when she was happy about it?---Sometimes, yes."

[44] The trial judge gave the following direction to the jury regarding the use of the preliminary complaint evidence:

> "[I]n this case, there is evidence of the complainant's preliminary complaint to her mother. That's part of the admissions in exhibit 9, the substance of that, and some of her friends, [MLB], [TAB], and [GMH] as well as [AKM's son]. I will touch on what that evidence was in a moment.
>
> The evidence - what I'll talk about now is how you can use it. The evidence from these witnesses may only be used as it relates to the complainant's credibility. Consistency between the account of these witnesses of the complainant's complaint to them and the complainant's evidence before you is something that you may take into account as possibly enhancing the likelihood that her testimony is true. However, you cannot regard these things said in those out of court statements, hearsay statements, by the complainant as proof of what actually happened. In other words, evidence of what was said on those occasions may, depending on the view you take of it, bolster the complainant's credit because of consistency, but it does not independently prove anything.
>
> Likewise, any inconsistencies between the account of these witnesses of the complainant's complaint to them and the complainant's

> evidence may cause you to have doubts about the complainant's credibility or reliability. Whether consistencies or inconsistencies impact on the credibility or reliability of the complainant is a matter for you. Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable and the inconsistencies are a matter for you to consider in the course of your deliberations. But the mere existence of inconsistencies does not mean that of necessity, you must reject [the complainant's] evidence. Some inconsistency is to be expected because it's natural enough for people who are asked on a number of occasions to repeat what happened at an earlier time to tell a slightly different version each time."

[45] The appellant argued that while this was intended to direct the jury that the statements could not be used to prove the commission of the offence, instead, it was prone to lead to the incorrect reasoning that the evidence could not be treated as evidence of consent.

[46] The appellant argued that while the defence counsel and Crown prosecutor failed to seek a direction in this respect, this was an oversight rather than a forensic decision, and resulted in a substantial miscarriage of justice because it deprived the jury of essential instruction about the use of exculpatory evidence.

[47] This argument must be rejected.

[48] First, during his cross-examination of the complainant trial counsel for the appellant made no attempt to comply with the s 18 requirement that "the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness." The preconditions for admissibility pursuant to s 101 of the evidence elicited from MLB, TAB, and GMH about statements made to them by the complainant were not established.

[49] Second, neither counsel for the Crown nor counsel for the appellant sought to rely on any of the evidence elicited from MLB, TAB, and GMH as proof of the truth of its contents. Nor did counsel for the appellant seek a direction that the statements should be so regarded. It was unlikely that this was by oversight. Indeed, the exchange between counsel and the judge quoted at [42](b) above is explicable only on the basis that the purpose of the cross-examination concerning statements which the complainant made to her friends was not to set up a basis subsequently to seek to prove prior inconsistent statements as proof of the truth of their contents. If counsel has elicited evidence for a limited purpose, it does not lie in his mouth to change the purpose for which it was elicited, at least without doing so explicitly and then letting the judge and the opposing counsel consider how to respond.

[50] Third, there was a sound forensic basis for making the choice not to seek to establish s 101 admissibility. The difficulty for the appellant's trial counsel was that if he had sought to rely on the prior inconsistent statements sounding as to consent as proof of the truth of their contents, the statements would then be evidence of the fact that the offending sexual conduct had in fact occurred. That would be inconsistent with his whole trial strategy, which was to the effect that the alleged offending conduct never happened. And even if the appellant's trial counsel had sought to rely only on the alleged prior inconsistent statement of MLB that the events did not happen, the risk was that once a portion of a prior statement had been cross-examined upon, the whole

of the statement (namely the parts which were both consistent and inconsistent with the complainant's evidence) might be capable of being relied on by the Crown in the same way.[5]

[51] The judgment not to rely on the evidence in the way now posited was a rational forensic judgment. The appellant should be regarded as bound by his counsel's conduct of the trial. There was no miscarriage of justice in the way alleged.

[52] For completeness I also make the following observations:

(a) If I was wrong about the failure to satisfy the requirements of s 18, it would follow that the evidence the subject of this appeal ground was admissible as proof of the truth of its contents and that the trial judge erred in law when he gave the direction concerning the limited use which the jury could make of the evidence.

(b) It would be irrelevant that the conduct of counsel caused or contributed to the error of law. The appellant would have established there was a wrong decision on a question of law within the meaning of s 668E of the *Criminal Code*.[6]

(c) However, before that error would vindicate the ground of appeal, it would be necessary for the appellant to demonstrate the wrong decision could realistically have affected the reasoning of the jury to the verdict of guilty that was returned in the trial that occurred.[7]

(d) In the present case, the error could not be regarded as material in the relevant sense. In the trial which happened the materiality of the evidence was in its utility as a means of undermining the credibility of the complainant as a witness, not in its technical potential to be regarded as proof of the truth of the statements.

[53] Appeal ground 2 fails.

Ground 3 – Failure to adequately direct the jury in relation to consent

[54] The appellant argued that the evidence of the complainant's friends (discussed above in ground 2) was capable of proving (or at least raising a reasonable doubt) about whether the complainant had, in fact, consented to the alleged sexual activity.

[55] The appellant argued that detailed directions were needed to deal with the inconsistent statements about consent so that the jury could make a considered assessment of whether they were satisfied beyond reasonable doubt that the complainant had not consented on any given occasion. The appellant argued that this was exacerbated by the admission of highly prejudicial evidence about violence directed towards AKM (see grounds 5 and 6). The appellant argued that, having admitted the evidence regarding violence to AKM, the trial judge needed to remind the jury that there was no evidence that the complainant witnessed any of that violence.

[56] The appellant argued that the failure to give that direction caused a substantial miscarriage of justice, necessitating a retrial.

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5 That much is suggested in *R v Kehagias, Leone & Durkic* [1985] VR 107 at 119 per Starke and Hampel JJ and in *Forbes' Evidence Law in Queensland* at [101.4].

6 *MDP v The King* [2025] HCA 24 at [109] per Gleeson, Jagot and Beech-Jones JJ.

7 *MDP v The King* [2025] HCA 24 at [3] per Gageler CJ.

[57] The respondent argued that for each of the relevant charges the jury were clearly directed that they had to be satisfied beyond reasonable doubt that the complainant did not consent. The directions from the trial judge included the requirement for the jury to scrutinise her evidence with great care and included matters relevant to consent. They further included reminding the jury of the particular submissions made by the appellant's counsel on evidence inconsistent with the Crown case. Further, the respondent argued that trial counsel's failure to seek a direction supported a conclusion that in the context of the trial such further direction was not required.

[58] The respondent's submission must be accepted.

[59] By reference to a written handout which was left with the jury, the trial judge directed the jury on the elements of the offence of rape in an orthodox way, including by correctly explaining what consent meant at law. He explained that if the jury were not satisfied beyond reasonable doubt as to the absence of consent in relation to the rape counts, it would become necessary for them to consider the alternative verdicts of indecent treatment of a child under 16, under care (and unlawful carnal knowledge, in respect of count 10).

[60] His Honour later drew the attention of the jury to the evidence sounding on consent, including the complainant's evidence concerning what the appellant said to her concerning her ability to say no, and the one occasion in which she did tell him to stop because it was hurting her. He directed the jury on the importance of their considering whether they had any reasonable doubt as to the truthfulness or reliability of the complainant's evidence. He directed the jury in a proper way how to use the preliminary complaint evidence. He directed the jury as to the care they had to take in assessing the evidence of AKM and no complaint is directed at that direction.

[61] The judge went so far as to direct the jury that they needed to scrutinise the complainant's evidence with great care:

> "Now, I'll say something about the scrutiny that should be applied to the evidence of the complainant. You will need to scrutinise her evidence with great care before you could arrive at a conclusion of guilt. That's because of the following circumstances. The differences between the accounts that the complainant has given at different times, and you've heard what [the defence counsel] has highlighted in terms of those. And I'm not going to go through all of them, but I'll go through some when I deal with the facts in a moment and I'll indicate some now.
>
> So, for example, she told her mother that the defendant bit her breast, but that's not part of the Crown case. She told her mother that the [appellant] performed oral sex on her, but that conduct, which would amount to indecent treatment, is not part of the Crown case. [AKM] - she said that [AKM] did not perform oral sex on her, yet, as you know, [AKM] has pleaded guilty to that.
>
> She didn't mention to her mother being shown pornography, although you may recall in relation to this that she was cross-examined about pornography and whether she got into trouble from her parents for viewing it, which may be an explanation for her being less than forthcoming to her mother about that matter. You might also recall that [AKM's son] said that the complainant had got into trouble for

> viewing pornography. So again, that might be a relevant matter for you to consider.
>
> She did not tell her mother that she was slapped in the face and there were no observed injuries to her face, not that there necessarily would be, of course. That's a matter for you to think about, whether or not you think it's likely that there might've been and whether it's likely that somebody would have observed such injuries.
>
> She told [MLB] initially that it wasn't sexual assault, it happened with consent, and then later appears to have told her that it never happened. She told [TAB] via message that she was seeing her dad's friend and [TAB] said that she seemed very happy about it. She told [GMH] she was sleeping with a 30-something year old. She didn't seem to be hurt. She seemed to be excited to be telling her and she said she loved him. The final factor there is she kept returning to stay at the unit of the [appellant].
>
> Now, you should only act on her evidence if, after considering it with this warning in mind and all the other evidence in the case, you're convinced of its truth and accuracy."

[62] This passage must be considered with the earlier direction concerning preliminary complaint evidence. The consistencies and inconsistencies between the complainant's evidence in court and her previous statements to her friends were obvious and the way in which they might be legitimately used was adequately explained. Immediately after the directions just quoted, the trial judge continued on to remind the jury that they should only act on the complainant's evidence if they were convinced of its truth and accuracy bearing in mind the warning and all the other evidence in the case. The trial judge then went on to remind the jury of the need to separate consideration of each of the alleged offences and their duty to find the appellant not guilty if they had a reasonable doubt about an essential element of any one charge. There was no need for the trial judge to make any further or more detailed connection between the issue raised by the content of the complainant's statements to her friends and the specific element of absence of consent.

[63] Appeal ground 3 fails.

Ground 4 – Failure to direct the jury with respect to evidence of post-offence conduct

[64] The appellant pointed to the following evidence led at trial:

(a) The appellant induced AKM to tell her son, falsely, that the complainant had told AKM that the son had touched the complainant inappropriately. This was done to take the spotlight off what the complainant had said about the appellant;

(b) The appellant confronted the complainant at a family meeting and accused her of lying;

(c) The appellant and AKM went through the complainant's phone to make sure she was not telling anybody about what was happening; and

(d) The appellant and AKM sent messages on the complainant's phone (pretending to be the complainant) to her friends to make her seem more sexual than she was.

[65] There was no discussion between trial counsel and the trial judge about the use of the evidence and no suggestion that the evidence should be treated as post-offence conduct demonstrating consciousness of guilt. Nevertheless, the appellant argued before this Court that the trial judge was obliged to give direction about the use of the evidence to reveal consciousness of guilt or the limited use of the evidence. The appellant argued that the failure to do so left the jury with a body of prejudicial evidence the use of which was unclear.

[66] The appellant argued that the effect of this was exacerbated by the Crown's closing and the summing up with respect to the lie told to AKM's son. In closing submissions, the Crown prosecutor stated the following:

> "And that was it. He'd been sold on the lie. And interestingly, ladies and gentlemen… He's told to say nothing about what [the complainant] has said till [the appellant] has been spoken to. And after [the appellant] has been spoken to, at some point he's made aware - he says he wasn't there when it was said. And he says:
>
> > 'I wasn't there when she said it, but my mum had told me that [the complainant] said I was touching her genitals.'
>
> Well, isn't that convenient? So he is told there's been an allegation against him, which he knows is patently false, and then he becomes more susceptible to a group - to also accept that what [the complainant] has said about [the appellant] is false. Quite a clever, persuasive trick that's been pulled..."

[67] The appellant argued that as the evidence was therefore used to show a consciousness of guilt, there was a real risk that the jury would impermissibly reason that the conduct was evidence of guilt and an *Edwards*-type direction was required.

[68] In my view this argument must be rejected.

[69] As the trial judge directed the jury, proof of the maintaining element of count 1 required proof beyond reasonable doubt that there was an ongoing relationship of a sexual nature between the appellant and the complainant, which in turn required proof of sufficient continuity or habituality to justify that inference.[8] The impugned evidence does not refer to circumstances said to have occurred outside the date range within which the maintaining was alleged to have occurred. The impugned evidence was part of the proof of the facts from which the Crown sought to justify the requisite inferences. The trial judge gave the jury the orthodox direction that they might only draw an inference of guilt if it so overcame any other possible inferences as to leave no reasonable doubt in their minds.

[70] The issue which is determinative of whether a direction of the character suggested by the appellant is necessary is whether there is a risk of misunderstanding by the jury as to the significance of the evidence and, it would follow, a risk that they might reason towards guilt in an inappropriate way.[9] I do not consider the risk of misunderstanding and misuse existed. The impugned evidence did not directly point to guilt of count 1 but it was conduct which could properly be relied on by the jury in

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8 *R v DAT* [2009] QCA 181, [12], [22] and *R v CAZ* [2011] QCA 231, [46].

9 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [34], *McKey v The Queen* (2012) 219 A Crim R 227 at [28] following *R v Heyde* (1990) 20 NSWLR 234 and *R v WBS* [2022] QCA 180.

an inferential way. At the least, the impugned evidence demonstrated part of the course of conduct by which the appellant established and maintained the control over the complainant which enabled the sexual relationship to exist and to continue.

[71] Appeal ground 4 fails.

Ground 5 – Admission of discreditable conduct evidence

[72] The appellant argued that highly prejudicial evidence of discreditable conduct by the appellant to AKM was adduced from AKM during her evidence in chief, namely that the appellant was controlling and physically, verbally and emotionally abusive towards AKM. The evidence was led without objection, but the appellant argued that this was not a legitimate forensic decision as there was no possible benefit gained from allowing a critical Crown witness to pre-emptively explain her conduct in terms which were highly prejudicial to the appellant.

[73] The appellant argued that the evidence should not have been admitted, as its admission created a risk of impermissible bad character reasoning on the part of the jury, because the appellant's domestically violent conduct was not evidence on the question of guilt of the alleged offences. The appellant argued that the admission of the evidence was in error and had caused a substantial miscarriage of justice.

[74] The first two passages of evidence that the appellant argues should not have been admitted, were from the examination in chief of AKM.

[75] The first passage was:

> "All right. Did - in terms of your relationship, you told us that it was fine at the start. Did anything alter in that?--Sorry, could you repeat that.
>
> Yeah. You told us in regard to your relationship, it was fine at the start?---Yes.
>
> Did that continue?---No, it didn't continue like that. No.
>
> So in what way - what became of it, then? How did it change?---It became very abusive, both physically and verbally."

[76] The second passage was:

> "I believe - I think it was the night before we left or the night after that. I can't remember 100 per cent. He wanted her to come and hop in the bed with us, which I did not want. At the time, I did not want that. I was already naked because as far as he was concerned, if you slept in the bed with him you had to be naked. So it didn't matter what I wanted, but - and he - he quietly said to me to go out and tell her to come into the bedroom with us, which I resisted. I didn't – I didn't want to do that. And then he - he started to get pissed off, I think. Or sorry, excuse my language. He started to – he started to get that same look that he normally gets whenever he's about to lose it at me. And so I just - I just ended up complying and went to put on a dressing gown to go out there, and which he told me no, to go out there naked. And so I did. And I just said to her – I said something along the lines

> of, you know, why – why don't you come and lay in bed with us, or, you know, it's okay or something – something like that. I can't remember exactly."

[77] I would accept the respondent's argument that this evidence was clearly admissible by virtue of s 103CB of the *Evidence Act 1977*. It was relevant to the nature of the relationship between the appellant and AKM, as context for AKM's evidence and relevant to the circumstances surrounding the complainant in the context of a maintained relationship.

[78] The third passage that the appellant argues should not have been admitted was from the cross examination of AKM as follows:

> "When you gave this statement - I'll come back to the - look. You didn't wake up one morning, did you, before you were charged and go, 'Oh, my God. This is terrible. I need to clear my conscience. I'm going to see the police and - and give a statement.' That didn't happen, did it?---No. But what did happen - - -
>
> No, no?--- - - - is I was no longer under the spell of [the appellant]."

[79] I would accept the respondent's argument that this was during AKM's cross-examination where her honesty and reasons for giving evidence were being challenged. The answer was responsive to the question and was admissible.

[80] The fourth passage that the appellant argued should not have been admitted was as follows:

> "Right. Can I suggest he was - he was generous to a fault through the relationship?---I'm sorry, but no. Definitely not.
>
> He - - -?---I have a missing tooth because of him. I have a scar on my eyebrow because of him."

[81] This evidence was relevant and admissible for the same reasons as expressed in relation to the third passage.

[82] The fifth passage that the appellant argued should not have been admitted was as follows:

> "'All right. Well, when you said that that you wanted to go to the cops and you wanted it to stop, what was his response? What did he say when you say things like that?---He would basically use my kids and say that - you know, if I - if I go to the cops that I'll lose the kids and I'll never get to see them again and that I'll go to jail because I'm involved and just stuff like that and I believed him."

[83] I would accept the respondent's argument that this evidence was relevant and admissible as context for AKM's evidence and relevant to the circumstances surrounding the complainant in the context of a maintained relationship.

[84] There was no error in admission of any of the passages cited.

[85] Appeal ground 5 fails.

Ground 6 – Failure to direct the jury not to engage in impermissible propensity reasoning

[86] Further to ground 5, the appellant argued that, having been admitted, the judge ought to have directed the jury as to why the bad character evidence was admissible, how it could be used, and, most importantly, how it could not be used. No directions along those lines were given.

[87] While defence counsel failed to request a direction on the matter, the appellant argued that this did not relieve the trial judge of his duty to provide a direction. The appellant argued that the trial judge was in error not to direct the jury as to the use to which the evidence may be put and, importantly, the use to which it could not be put, and that this resulted in a substantial miscarriage of justice.

[88] The respondent argued that trial counsel's failure to seek a direction supports a conclusion that in the context of the trial such further direction was not required. Moreover, it should be seen as involving an entirely sensible forensic decision by the appellant's counsel as any directions of the type sought would have necessarily highlighted evidence which might not otherwise have held particular prominence for the jury in the context of the appellant's trial.

[89] In *Bell v The King*[10] S Doyle and David JJA explained the way in which the decisions and conduct of trial counsel can operate to inform an appellate court's assessment of relevant grounds of appeal:

> "Ordinarily, a defendant will be bound by the decisions and conduct of their counsel, including their attitude and submissions in relation to the directions given, or to be given, by the trial judge. That is particularly so where it may be inferred that this reflected a forensic choice, or an attempt to secure a forensic or tactical advantage for the defendant.
>
> As a corollary of this, the conduct of defence counsel may be significant in determining whether a ground of appeal has been made out. It may inform a determination of the real issues at trial, and hence the scope of the trial judge's obligation to give directions. Related to this, it may inform consideration of whether there has been a miscarriage of justice. It may do so in the direct sense that the Court will less readily accept that there was a miscarriage when the impugned direction (or failure to direct) was supported, or acquiesced in, by the defendant through his or her counsel. It may also do so in a less direct sense by reason that defence counsel's attitude to the directions given, or to be given, may be seen to reflect the contemporaneous view of an informed participant in the trial, with insight into the conduct and atmosphere of the trial, and a focus on the defendant's interests. Defence counsel's attitude may thus assist the appellate court's consideration of whether the impugned direction, or failure to direct, was material (that is, gave rise to a risk of impermissible reasoning that could realistically have affected the jury's reasoning towards their verdicts).

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10 *Bell v The King* [2025] SASCA 97 at [305] – [307] per S Doyle and David JJA.

> However, as is inherent in the above articulation of the principle and its operation, the idea that a defendant is bound by the conduct of his or her counsel is not an inflexible principle. The attitude of defence counsel to the impugned direction (or failure to direct) is not necessarily determinative of whether there has been a miscarriage of justice. The principle needs to be applied in the context of the judge retaining an overarching responsibility to ensure that the defendant receives a fair trial according to law, and to give such directions as may be required to ensure that outcome. The principle may be difficult to apply, or carry less weight, in circumstances where there was no discernible forensic choice or purpose (for example, where counsel's conduct may be explained by a mistake, oversight or inexperience), or where there appears to have been confusion about the evidence, its use or the directions to be given. It may not apply at all where counsel's conduct was the product of incompetence or a flagrant breach of duty." (footnotes omitted)

[90] In my view the respondent's argument must be accepted for the reasons expressed. In the present case it made perfect forensic sense not to highlight the evidence of the discreditable conduct of the appellant towards AKM. The impugned evidence was relatively confined in the context of fairly lengthy and detailed evidence regarding the full nature of the relationship with the complainant as maintained by the appellant. There is no reason not to regard the appellant as bound by the judgment of his trial counsel.

[91] Appeal ground 6 fails.

Conclusion

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

[93] **BRADLEY JA:** I agree with Bond JA.

[94] **WILLIAMS J:** I have read the reasons and proposed order of Bond JA and I agree with those reasons and the proposed order that the appeal be dismissed.