

SUPREME COURT OF QUEENSLAND

CITATION: *R v Gleeson* [2026] QCA 127

PARTIES: **R**
v
GLEESON, Stephen Paul
(appellant)

FILE NO/S: CA No 184 of 2025
DC No 157 of 2023

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Toowoomba – Date of Conviction: 4 August 2025 (Porter KC DCJ)

DELIVERED ON: 7 July 2026

DELIVERED AT: Brisbane

HEARING DATE: 13 April 2026

JUDGES: Brown JA, Bradley JA, Doyle JA

ORDERS: **1. The appeal is allowed.**
2. The appellant’s conviction on count 1 is set aside.
3. A verdict of not guilty be entered on count 1.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of one count of sexual assault and found not guilty of another count of sexual assault with a circumstance of aggravation – where the only evidence of the offence was given by the complainant – where evidence of preliminary complaints was given by the complainant’s ex-wife and a police officer – where the alleged offending occurred in late 2011 and the complainant made a formal complaint to police in 2022 – where the preliminary complaints were made to the police officer the morning after the offending and to the ex-wife eight months later – where the description of the sexual offending given by the complainant at trial, which accorded with the particulars of the charge and the case opened by the prosecution, was inconsistent with what the ex-wife and police officer recalled they were told by the complainant at the time – whether the verdict of guilty is unreasonable and unable to be supported having regard to the evidence as a whole

Criminal Code (Qld), s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Miller (2021) 8 QR 221; [\[2021\] QCA 126](#), cited
R v ZT (2025) 281 CLR 137; [2025] HCA 9, applied

COUNSEL: W R Prizeman for the appellant
 J T Aylward for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **BROWN JA:** The appellant was convicted of one count of sexual assault and found not guilty of one count of sexual assault with a circumstance of aggravation on 4 August 2025 after a five-day trial.
- [2] The appellant seeks to appeal the conviction on two grounds:
- (a) that the verdict of guilty in respect of count 1 is unreasonable and unable to be supported having regard to the evidence; and
 - (b) that the verdict of guilty in respect of count 1 is inconsistent with the acquittal in respect of count 2 and cannot be maintained.
- [3] The first ground requires this Court to carry out an independent assessment of the evidence and ask itself “whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty”.¹ The appellant has particularly identified the inconsistencies between the complainant’s evidence and the preliminary complaint as raising the possibility an innocent man may have been convicted.

The evidence

- [4] The only evidence given as to the offence was given by the complainant. Evidence was otherwise given by the complainant’s ex-wife, Officer Sanderson and Mr G, the complainant’s work’s supervisor, all of whom the complainant made or contended that he made a complaint to about the offending.
- [5] The events in question occurred in September 2011. The evidence of the complainant was that:
- (a) he had the appellant and two other friends over for a barbecue while his ex-wife and son were away. He consumed a lot of alcohol. After the two friends left and the appellant remained, he and the appellant watched a pornographic video in the lounge room;
 - (b) the appellant squeezed the complainant’s thigh while the two watched the pornographic video. The complainant wasn’t sure if it was intentional or not. He brushed the appellant’s hand away;
 - (c) he was dozing off on the couch and went to bed, maybe with the assistance of the appellant. He fell asleep on the bed fully clothed;

¹ *M v The Queen* (1994) 181 CLR 487 at 493.

- (d) at some point during the night the complainant went to the bathroom and threw up and went back to bed. He could hear the appellant moving around the house consistent with tidying up;
 - (e) he woke up to flashes from a camera and could hear a camera shutter style sound. The complainant's pants were off, but he couldn't recall if he still may have had boxer shorts on. The complainant was disoriented and frightened. The appellant started to perform oral sex on the complainant;
 - (f) after the appellant performed oral sex on the complainant for about a minute or so, he took another photo and then did something with what sounded like a plastic bag. The complainant said he didn't have any night vision and froze and pretended to be asleep. He said that he wanted to hit the appellant when he realised what was going on but the whole room was spinning, and he was very disoriented;
 - (g) the appellant then laid in bed beside the complainant and grabbed the complainant's hand and placed it on the appellant's penis. The appellant's penis was somewhat aroused, and the complainant noticed he was circumcised. The complainant rolled over away from the appellant and pretended he was asleep. The appellant stayed on the bed the rest of the night;
 - (h) no words were spoken throughout the incident;
 - (i) the next morning around 6 am the complainant and the appellant were in the kitchen. The complainant's clothes from the night before were at the foot of the bed. The appellant acted like nothing had happened;
 - (j) the appellant then left the house, followed shortly after by the complainant, who drove to the police station;
 - (k) the complainant gave a statement to a police officer, Officer Sanderson. He told the officer that he was sexually assaulted or raped. The complainant couldn't remember anything more about what was said: "basically the statement that we've already gone over about what had happened in the night. He asked me the questions and what instigated the whole situation and at that point then ... obviously happening the night before, was a lot more clearer to me at the time".² The complainant did not proceed with a formal criminal complaint at the time;
 - (l) after giving a statement, the complainant went to work and told his service manager Mr G that he had been sexually assaulted and couldn't work. The complainant stated he was distraught at the time.
 - (m) the complainant and the appellant did not have a conversation about the incident;
 - (n) some eight months later, the appellant told his ex-wife that he had been sexually assaulted or raped by the appellant after she asked why the complainant hadn't invited the appellant to anything for some time; and
 - (o) the appellant gave a written statement to police in 2022.
- [6] During extensive cross-examination of the complainant, the complainant gave evidence including that:

² AB 109/25-30.

- (a) prior to the incident in September 2011, he had invited the appellant to his son's second birthday party in October 2011. The appellant was then disinvited from his son's birthday party;
- (b) the morning after the incident, the complainant texted the appellant after receiving a message from the appellant that he had found an oil filter the complainant had been seeking. In that text message, the complainant said, "I know what you did". He did not receive a response;
- (c) the complainant continued to attend Repco after the incident, which was where the appellant worked, which he explained by the fact he was a mechanic and that they probably sold the cheapest oil in town. Although he agreed he could order online, he did not do online purchases;
- (d) the complainant agreed he was not physically intimidated by the appellant;
- (e) the complainant had his first drink on the day in question just prior to people arriving and when it had started to get dark. He was drinking home brew. He then started drinking bourbon from 6.30-7.00 pm until he fell asleep;
- (f) he agreed he was drunk when he went to bed but could walk and didn't need assistance, although the appellant put his arm around his back to steady him;
- (g) he had kept drinking with the appellant after the other two guests had left at about 9.30 pm although he wasn't sure of the time;
- (h) the complainant estimated he was watching the pornographic video, which the appellant had brought over, with the appellant for about 30-45 minutes;
- (i) the complainant described himself as feeling like he had been drugged and being extremely disoriented. He could not recall the gap in time from when he went to bed and the incident occurring;
- (j) he did not go to sleep under the covers because he had his work clothes on;
- (k) he saw a silhouette in the room when he saw the flash of a camera but couldn't clearly see their face. He heard the appellant get up in the morning and saw him in the kitchen after getting out of bed himself;
- (l) he rejected the suggestion that no photo was taken of him;
- (m) he stated that when the photos were taken the appellant was standing up but agreed he had told the police he couldn't remember if the appellant was standing up or in his bed at that time;
- (n) the complainant stated that at the time of the trial he had more or less remembered that the appellant was standing up, and explained that at times he had "brainstorming sessions" where he tried to recollect the moments and they would come to him, and he would recall bits and pieces;
- (o) he accepted that his memory of events was better the morning after the incident when he spoke to the police officer than in 2022 or at the trial;
- (p) he agreed the police officer wrote things down in his notebook while he spoke to him and from his recollection he didn't leave anything out as to what occurred;
- (q) he stated that he would have told the police officer about the appellant putting his mouth on his penis and rejected that he did not tell the policeman anything about the appellant putting the complainant's hand on his penis;

- (r) he stated that the whole incident took place over a couple of minutes with the appellant giving him oral sex for a minute or two and then when he placed the complainant's hand on the appellant's penis it took no time for the complainant to roll over onto his side;
 - (s) he could not recollect that he had said at any other time that the appellant laid behind him in a spooning position or that the appellant put his finger in his anus, although he could recall he farted. He could not recall whether the appellant put his finger in his anus or not;
 - (t) he rejected the suggestion that he had got very drunk, watched pornographic material and gone to sleep and dreamed about sexual interplay or was mistaken as to the events. He said he did not fall back to sleep after the incident in question;
 - (u) he agreed that he had said that the appellant had left nothing behind at the house and that he had not found a camera in his house;
 - (v) when he went to the kitchen, he did not see the appellant with a plastic bag or a camera and didn't see him carry anything to his ute;
 - (w) he rejected any suggestion that he had told anyone that the appellant stayed in bed ten minutes after his alarm went off, that he had a conversation with him in the kitchen or that he had offered to make him breakfast before he left for work;
 - (x) he stated there was no conversation between them about the night before as he was scared and in shock;
 - (y) he denied that he had said a number of the statements which were captured by Officer Sanderson in his statement, namely that:
 - (i) the appellant reached over to fondle the complainant's penis;
 - (ii) he was woken up at 4 am by the flash of a camera (as opposed to his estimated time which was considerably earlier); and
 - (iii) that the acts of the appellant fondling the complainant's penis or putting his finger in the complainant's anus occurred intermittently between 4 am and 6.30 am,
 - (z) he said that when he spoke to Mr G, he said he had been sexually assaulted. He spoke to him for a minute or two. Mr G did not ask him about the incident when he returned to work. He rejected the suggestion that he could have been mistaken about speaking with Mr G;
 - (aa) he rejected the suggestion that he did not proceed with the complaint on 21 September 2011 because he didn't know what had happened the night before; and
 - (bb) he stated that after fourteen years his memory was hazy, but he remembered the main details.
- [7] In re-examination the complainant stated that he had not told any of his friends where he worked what happened because he felt useless, belittled and ashamed and didn't want anyone to know. He did not proceed with a formal complaint in 2011 for the same reasons and also because he had just made the position of foreman at his work.

- [8] The complainant stated he was upset when he spoke to Officer Sanderson and his ex-wife about the events of that night.
- [9] Officer Sanderson was a plain clothes senior constable attached to the Toowoomba Criminal Investigation Branch. Not longer after his shift had started at 7.00 am, the complainant arrived at the station and he had a conversation with him. Officer Sanderson gave evidence that he received a complaint from the complainant the morning after the alleged offending. He stated that he took notes in his police notebook at the time. He also entered information in QPrime. He had no independent recollection of the discussion that occurred.
- [10] Officer Sanderson's evidence was he took contemporaneous notes with the conversation. By reference to his police notebook he stated that the complainant said to him as follows:
- “... he advised me that he had some friends to his house the previous night. Um, his wife and child had left the residence to go visit family, I believe, and during the night they had some drinks. Um, a couple of the friends who attended had left, leaving himself and another person, I believe. He named [the appellant] at the house. Ah, they went to bed. He went to his own bed. He woke approximately 3 or 4 o'clock in the morning. Ah, awoke to, ah, just only wearing a shirt and no pants, and he, [the appellant], um, coming to bed, he described it as, um, spooning. He then, ah, described it as, ah, [the appellant] then reached around and grabbed him on the penis, and then also stuck some fingers in his anus. Um, this went on for a period of time. They both got out of bed after his alarm went off and he went about his normal duties: go shower, got ready for work, and then attend the police station to report this.”
- [11] In cross-examination, Officer Sanderson agreed that he had entered the information he had received from the complainant into the police QPRIME system under narrative and stated:
- “Do you agree with me, Senior Constable, that the contents of the paragraphs in the occurrence report contain information that was told to you directly by [the complainant]?---I believe so, yes.
- All right. Do you agree with me that included in these paragraphs about four lines in are the words, ‘At approx. 0400 hours the victim was awoken’?---Yes.
- Okay. And can you see that there is then some further detail – there’s a sentence commencing with the word, ‘The suspects [sic] has laid behind the victim (spooning position)’; can you see that?---I can see that.
- All right. And the words that follow: ‘The suspect has then reached over and started to fondle the victim’s penis, and has also inserted possibly his finger into the victim’s anus’?---Yes.
- And then the words, ‘This has continued on and off until 0630 hours’, is that right?---Yep. That’s what’s written here, yes.”
- [12] The officer in cross-examination agreed that if he had been told something such as that the appellant had performed oral sex on the complainant, that would have been

something he would have written down. He stated that would similarly be the case if the complainant had said that the appellant put his hand on the appellant's penis:

"If he had said that [the appellant] put the complainant's hand onto [the appellant's] penis, is that something you would've put in your notebook?---I think so, yes, I would."

- [13] His evidence included other notes from his conversation with the complainant:³

"And that [the complainant] was woken at about 3 or 4 in the morning from a flash?---Yes.

Do you agree that he then said, 'I was only wearing my shirt'?---That's right.

And that he pretended to be asleep. '[The appellant] climbed into bed and was spooning. He then started to wank me off.' Is that what you were told?---Yes.

And were you also then told, 'He has also stuck his fingers into my ass'?---That's what I've got written there."

- [14] The following exchange occurred later in the officer's cross-examination:⁴

"All right. One moment, please. Now, you can refer to your police diary again if you need to, Senior, but is it also the case that you were told by [the complainant] that the [appellant] has gotten out of bed 10 minutes after the alarm went off?---That's what I have written here, yes.

All right. Do you recall being told that by [the complainant]?---I don't recall being told that. I don't recall that conversation. It was 14 years ago.

I appreciate it's certainly a long time ago, Senior, but would you presume that the fact that is – that's contained in your notebook, what I've just read to you, you agree with that?---Yes."

- [15] In re-examination, the officer clarified that he entered the information in the "occurrence report" a couple of hours after he saw the complainant. He couldn't explain the disparity between the notebook which referred to "and he also stuck his fingers into my ass" as opposed to "started to fondle the victim's penis and has also inserted, possibly, his finger into the victim's anus". Why he inserted the word "possibly" was something he could not explain.

- [16] Mr G was called. He could not recall having a conversation with the complainant about sexual offending against him. Mr G stated that if he had had a conversation of the nature with an employee about a sexual assault, he would have told his superior and could not recall having done so.⁵

- [17] The complainant's ex-wife gave evidence. She confirmed that they were married and living together at the time of the offending and had one child. She could recall

³ AB Vol 1 148.

⁴ AB Vol 1 149.

⁵ AB 174.

a conversation that she had had with the complainant in the kitchen. At the time they were experiencing marital issues. She said, “he didn’t tell me exactly when it happened, but I knew that it was towards the end of 2011, and when we had the conversation – um – we were planning a party for one of our children, so – for [the child], it would’ve been...”⁶

- [18] According to the complainant’s ex-wife, the complainant told her that the appellant had come over for a poker night at a time when she and her son were away. The complainant told her that “they’d had beers, and I – and played poker. Um – [the complainant] had said that ... he had woken up ... felt groggy and had woken up in our bed ... to a flash ... and he said that ... [the appellant] was holding his penis – [the complainant’s] penis.”⁷
- [19] She could not recall the exact words of the conversation and gave her statement to police in 2022.
- [20] Two other witnesses were called who had been present at the complainant’s barbecue but their evidence was not consequential in terms of the argument this Court has to consider.
- [21] The complainant went to the police and formally complained in 2022, at which time he gave a statement.

Legal Principles

- [22] The legal principles applicable to this appeal are generally uncontroversial. An appeal of this kind must be determined in the manner described by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*:⁸

“Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.” (footnotes omitted).

- [23] The Court must determine whether, notwithstanding the existence of evidence upon which a jury might convict, “none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand”.⁹
- [24] The majority of the High Court in *R v ZT*¹⁰ recently confirmed the principles as to whether a verdict is unreasonable or could not be supported having regard to the evidence as having been authoritatively stated in *M v The Queen*. In relation to the allowance that must be made in making such an assessment, the majority observed that was “not confined to witness testimony but may extend to all of the evidence adduced at trial. The advantages spoken of are the advantages the jury had, including by the application of the jurors’ collective wisdom and experience of ordinary affairs, from seeing and hearing the evidence as it unfolds when evaluating factual matters,

⁶ AB 179 – 1-5.

⁷ AB Vol 2 179/7-13.

⁸ (1994) 181 CLR 487 at 493.

⁹ (1994) 181 CLR 487 at 492-493, citing *Hayes v The Queen* (1973) 47 ALJR 603 at 604 (Barwick CJ).

¹⁰ (2025) 281 CLR 137 (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

especially witness credibility” (footnotes omitted).¹¹ As to the appellate court’s independent assessment of the sufficiency and quality of the “whole of the evidence” the majority observed that:¹²

“... that assessment is undertaken in a context in which an appeal is as much of an adversarial process as the criminal trial from which the appeal is brought and in which it is for the parties to identify the evidence that the appellate court must review and assess and the features of that evidence that support their respective cases on appeal. The appellate court does not determine the grounds of appeal by simply reconsidering the parties’ respective cases at the trial.”

- [25] Consistent with the statement of the High Court in *ZT*, this Court in *R v Miller*¹³ held that:¹⁴

“[a]n appellant who contends that the verdict of the jury was unreasonable or that it was unsupported by the evidence must identify the weaknesses in the evidence and *must then also* demonstrate that these weaknesses reduced the probative value of the evidence *in such a way* that the appellate court ought to conclude that *even making full allowance for the advantages enjoyed by the jury* there is a *significant possibility* that an innocent person has been convicted. The mere identification of weaknesses in the prosecution case is not enough to sustain the ground...” (emphasis in original)

- [26] The burden upon an appellant who relies upon this ground is a heavy one insofar as they seek to set aside the verdict of a jury.

Competing contentions

- [27] The chief contentions of the appellant and the most significant piece of evidence they identified as calling into question the reasonableness of the verdict was the preliminary complaint to Officer Sanderson and the inconsistencies between what the officer said the complainant told him about what occurred the morning after the incident and the evidence of the complainant at trial.
- [28] In the appellant’s submission, the officer’s notes had been taken contemporaneously and were not the subject of any real challenge other than raising a question as to the use of the word “possibly”. Further, the complainant had agreed that his recollection in 2011, when he made the complaint, would have been the product of a better recollection of events than it was during the trial and was made when the matter was fresh in his mind. There was, according to the appellant, no basis for the jury to reject the reliability of the officer’s evidence based on contemporaneous notes recorded soon after the alleged offending.
- [29] According to the appellant, therefore, in preferring the version of the complainant at trial, the jury would had had to set aside the “logic, common sense, and the express evidence of the complainant that his memory of the events would have been better in 2011 compared to 2025”.¹⁵

¹¹ (2025) 281 CLR 137 at 145 [9].

¹² (2025) 281 CLR 137 at 146 [11].

¹³ (2021) 8 QR 221.

¹⁴ (2021) 8 QR 221 at [18].

¹⁵ Appellant’s submissions at [34].

- [30] Further, the complainant's version of events was not supported by the complaints he made to his ex-wife, nor did Mr G give evidence supporting the complainant's contention that any complaint had been made to him at all.
- [31] Given the allegations of count 1 were not supported and in some key respects contradicted by the preliminary complaint evidence, the appellant contends that the court would conclude that even making allowance for the advantages of the jury, there is a significant possibility that the appellant was wrongfully convicted of count 1 as particularised.
- [32] The Crown however contends that the present case was one which involved the contested credibility and reliability of the complainant, where the advantage born of the collective wisdom of the jury was significant and could not be underestimated as was identified in *R v ZT*.
- [33] According to the Crown, the complainant in his evidence in chief and in cross-examination made appropriate concessions and acknowledged the limits of what he could and could not remember, but remained unshaken in his account of the allegations the subject of count 1. Further, there were some aspects of the complaints made to Officer Sanderson and to the complainant's ex-wife which were consistent with the evidence he gave. While he did not say he had his hand put on the appellant's penis, as opposed to the appellant's hand on his penis, sexual touching of a penis was a consistent theme raised in the complaints made to Officer Sanderson and to the complainant's ex-wife. Consistent with his evidence, he told both Officer Sanderson and his ex-wife that he awoke to a "flash" during the night.
- [34] He also stated that the appellant's penis was circumcised, a matter not contested in cross-examination, which objectively supported the fact that the appellant's penis had been exposed and the complainant saw it. The complainant's evidence, once accepted, could reasonably support the jury finding the offence in count 1 was proven beyond reasonable doubt.
- [35] As to the jury's verdict, the Crown observed that the jury had been directed as to how to consider the evidence of preliminary complaint in assessing the evidence of the complainant as evidence which may "bolster his credibility and reliability because of consistency, or damage it because of inconsistency, but it does not independently prove the offences occurred".¹⁶ The jury were addressed both by the defence and in the trial judge's summing up as to the complainant's cross-examination in which the inconsistencies in the complainant's evidence were highlighted and the evidence of the witnesses to whom he made preliminary complaint were also read or summarised in respect of count 1. The jury were also directed more generally as to the significance of inconsistencies of evidence and determining whether or not they were satisfied the inconsistencies in the complainant's account were material in assessing his credibility and reliability. No complaint is made as to the directions given.

Was the verdict unreasonable or unsupported by the evidence?

- [36] The only evidence of the alleged offending came from the complainant. Acceptance of his evidence would have been sufficient to support the verdict of guilty in respect of count 1. However, this ground of appeal is not premised on there being a lack of evidence to support the charge, but rather whether deficiencies, inconsistencies or inadequacies in the evidence when assessed by this Court raise a reasonable doubt.

¹⁶ AB Vol 1 57/30-35.

- [37] It is evident in this case that there were a number of inconsistencies between the substance of the preliminary complaints made and the complainant's evidence. However, the fact that there are inconsistencies in the evidence is not alone sufficient to set aside the jury's verdict. The question is whether those inconsistencies are such that, even acknowledging the advantages the jury held in hearing all of the evidence, particularly of the complainant, they lead this Court to conclude that there is a significant possibility that an innocent person has been convicted.¹⁷
- [38] In respect of count 1, the Court proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable.¹⁸ The complainant's evidence did not need to be corroborated to secure a conviction, nor, given the passing of time, would discrepancies and inconsistencies in the complainant's evidence be unexpected.
- [39] Preliminary complaint evidence is evidence which is admissible only for a limited purpose relevant to a complainant's credibility and reliability, as was directed by the primary judge, not as evidence of fact.
- [40] In *R v Miller* it was said by the Court that the inconsistencies between that complainant's accounts given by way of preliminary complaint had been correctly acknowledged by the appellant not to be sufficient, on their own, to raise a reasonable doubt as opposed to adding weight to other submissions.¹⁹ The Court observed that:²⁰

"Honest witnesses are frequently in error about the details of events. Also, it is to be expected that any complainant of a sexual assault would approach the task of confiding her story in different ways depending upon the nature of her relationship with the person to whom she is speaking, the circumstances surrounding that conversation, her age at the time of giving the account as well as many other possible factors. Further, a submission of this kind assumes that the witnesses to whom preliminary complaint was made all gave scrupulously accurate accounts while the complainant's recollection is to be regarded as suspect where it is in conflict with them. Such an assumption needs a firm foundation if it is to support this ground of appeal. There was no such foundation in this case."

- [41] In this case, the jury was specifically directed that:

"Now, as to [the complainant] in particular, as a complainant, experience does show that people may not remember all the details of a sexual offence and may not describe a sexual offence in the same way each time. It shows that trauma can affect people differently, including how they recall events. It is common for differences to arise in several accounts of an offence – such an offence, and truthful and untruthful accounts of a sexual offence can contain inconsistencies. However, bearing all that in mind, it is up to you to decide whether or not you consider there are inconsistencies in [the complainant's] account and whether they are material in assessing his credibility and reliability."

¹⁷ (2021) 8 QR 221 at [16].

¹⁸ *Pell v The Queen* (2020) 268 CLR 123 at [39].

¹⁹ (2021) 8 QR 221 at [24].

²⁰ (2021) 8 QR 221 at [24].

- [42] The complainant's evidence accorded with the particulars of the charge ultimately given and the case opened by the Crown.
- [43] The complainant's evidence was not however supported by any preliminary complaint in relation to count 2 and it deviated from the description of the offending in relation to count 1, if Officer Sanderson's evidence was accepted. The complainant did not accept that he had told Officer Sanderson a different version of events in relation to count 1 and that he had made no complaint at all as to count 2.
- [44] In referring to what he had told Officer Sanderson, the complainant referred to his statement which would appear to be a reference to his formal statement to police: "Do you remember if you told [Officer Sanderson] any more detail about what happened? ... basically the statement that we've already gone over about what happened in the night...". The formal statement given to police in 2022 presumably formed the basis of the particulars given and the Crown case.
- [45] Preliminary complaint evidence is not, as the jury was directed, proof of the fact of offending. Nor does it disprove the fact of the offending. It is relevant to the assessment of the credibility and reliability of the complainant insofar as it may, if the evidence of the preliminary complaint is accepted by the jury, serve to support or bolster the complainant's credibility where there is consistency between the complainant's evidence and potentially diminish the complainant's credibility where there is inconsistency.
- [46] In a case which turns on the credibility and reliability of the complainant's evidence, preliminary complaint can have particular importance. The jury are not compelled, however, to accept the accuracy of the evidence of preliminary complaint given by the witnesses.
- [47] In the case of Officer Sanderson, however, his evidence was supported by his entries in his police notebook made contemporaneously with what he was told, although neither the police notebook nor further entries made in the police computer system, QPrime, on the same day were in evidence. Both were only used by Officer Sanderson to refresh his memory. While there was no evidence that the complainant was shown the notebook or the entry in QPrime, Officer Sanderson's evidence was unchallenged by the Crown, save for an inconsistency in the records in respect of the complainant's description of fingers being placed in his anus raised by the Crown in re-examination, which was not a matter of any significance in terms of undermining his evidence. Officer Sanderson did not take verbatim notes, and I acknowledge the possibility that some matters which the complainant told Officer Sanderson may not have been accurately recorded. Those considerations notwithstanding, Officer Sanderson's evidence that he would have accurately recorded the complainant's description of the offending in his notes, and if told about the offending involving oral sex, that he would certainly have recorded that description, was unchallenged and compelling.
- [48] The complainant's ex-wife's evidence was also affected by the passing of time, although consistent with the version Officer Sanderson said he was told by the complainant as to what had occurred in terms of it being the appellant holding the complainant's penis and not vice-versa.
- [49] The complainant's evidence was that he was upset at the time of making the complaints to both Officer Sanderson and his ex-wife. The complainant's emotional

state when he made the complaints was not explored with Officer Sanderson or his ex-wife, however.

- [50] Accepting the evidence of Officer Sanderson and the complainant's ex-wife, there was no preliminary complaint evidence to support count 2.
- [51] In respect of count 1, there were some features of the preliminary complaints which were consistent with the Crown's case, insofar as the complainant said to both Officer Sanderson and his ex-wife that he was woken by a flash, and the fact the offending involved the touching of a penis. However, the description of the offence and how it occurred was quite different from the offence as particularised and the evidence of the complainant at trial in key respects. In particular, Officer Sanderson gave evidence that the complainant told him:
- (a) he woke up to the appellant lying behind him in a spooning position, whereas the complainant's evidence at the trial was that he woke up to the appellant giving him oral sex; and
 - (b) the appellant had then reached over and started to fondle the complainant's penis and possibly inserted his finger into the victim's anus, conduct which the complainant either denied or in the case of the latter could not recall occurring.
- [52] The Crown did not submit to the jury that the complainant's evidence should be preferred over Officer Sanderson's, but rather that conversation occurred within hours of him being sexually assaulted by his friend while drunk and disoriented and he "was either mistaken in what he told Officer Sanderson, or in the 11 years which has passed since he spoke with Officer Sanderson, you might think he's forgotten some details of what occurred".²¹
- [53] While the complainant had complained to the police the morning after the incident occurred, the complainant formally complained to police in 2022 some 11 years after. In his evidence at the trial, the complainant accepted his recollection had become hazy over time and he had spoken to Officer Sanderson the morning after the incident when events were fresh in his mind.
- [54] In terms of his recollection, the complainant had stated he would "sit and brainstorm, trying to recollect the moments, and then they come to me" since the incident.²²
- [55] The complainant did not however waiver in his evidence of what occurred when cross-examined. Nor was he cross-examined on the basis that his evidence departed from his 2022 statement to police in any significant way.
- [56] Accepting that the complainant's traumatised state may have caused him to be confused in some respects when describing what had occurred the night before to Officer Sanderson, it cannot account for the same misdescription of the offence the subject of count 1 made to his ex-wife some months later albeit the complainant said he was upset when he told her. The fact that there were differing accounts, given the passage of time, is to be expected. The complainant accepted that his recollection was impaired by the passing of time and, as the Crown points out, he readily made concessions that he may have said to Officer Sanderson that the appellant put his fingers in his anus, but he could not now recollect that to be the case. But the

²¹ AB 23/5-10.

²² AB 128/35-40.

discrepancies between the particulars of count 1 and what he told Officer Sanderson and his ex-wife are more fundamental, particularly given he considered that he had told Officer Sanderson the same version as he gave during his evidence at the trial.

- [57] The complainant did not provide an explanation for the absence of any complaint as to count 2 or the difference in description as to how the offending the subject of count 1 occurred between what he told Officer Sanderson and his evidence at trial, but rather gave evidence that he told Officer Sanderson of both counts as particularised. The difference in the description was marked, particularly in terms of the sequence of offending. In his description to Officer Sanderson, he said that woke up to the appellant being in a spooning position, following which the appellant touched his penis. In contrast, his evidence at trial was that he woke up to the appellant giving him oral sex before the appellant placed the complainant's hand on the appellant's penis.
- [58] The failure to make a complaint as to oral sex in that context brings the reliability of the complainant's evidence into question, not only in respect of count 2, but also count 1 given the differing sequence of events. Given the lack of challenge to Officer Sanderson's evidence, there was no rational basis for the jury to reject his evidence or prefer it over the evidence of the complainant, given he had accepted that his recollection had dissipated over time and his recent recollections were the product of brainstorming. This undermined the reliability of the complainant's evidence in court and raised the possibility of reconstruction. Similarly, the complainant could not recall whether he told Officer Sanderson or his ex-wife whether he was sexually assaulted or raped. The marked difference again undermines the reliability of the complainant's recollection.
- [59] Mr G's evidence, if accepted, similarly raised questions about the reliability of the complainant's recollection. It was open for the jury to prefer the complainant's evidence over that of Mr G if they considered it was Mr G's recollection which was impaired, rather than the complainant's. However, the fact that none of the preliminary complaint evidence supported the complainant's evidence in material respects undermined the complainant's evidence.
- [60] The complainant recalled that the appellant's penis was circumcised, an observation based on how the appellant's penis felt when the complainant's hand was placed on the appellant's penis. That was not challenged in cross-examination. That gives some objective evidence in support of the complainant's hand being placed on the appellant's penis rather than the appellant placing his hand on the complainant's penis. However, without that matter being further explored in evidence, that is not sufficient to overcome the discrepancies and inconsistencies discussed above.
- [61] The preliminary complaints to Officer Sanderson and his ex-wife had some similarities to the particulars of count 1, insofar as they involved the touching of a penis but, as discussed above, they described the converse of the charge as ultimately particularised. The evidence of preliminary complaint was in respect of a different offence. It was not enough for the jury to be satisfied that something had occurred. They had to be satisfied beyond reasonable doubt of count 1 as particularised.
- [62] Setting aside a jury's verdict is a "serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial".²³ In the absence of any reasonable explanation

²³ *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65].

for how they arose, the inconsistencies between the complainant's evidence and the preliminary complaints, together with his own evidence that the offence was fresh in his mind when he first spoke to the police and the absence of corroboration raises reasonable doubt. The discrepancies in the description of the offence cannot merely be attributed to peripheral inconsistencies from the passing of time, nor explained by the circumstances in which the complaint was made. In particular, the complainant's own evidence was not that his recollection had improved with time. The inconsistencies in the appellant's evidence "cast doubt upon the prosecution case" and "remain unanswered".²⁴

[63] The discrepancies and inconsistencies undermined the reliability of the complainant's recollection and his evidence and raise reasonable doubt as to count 1. The appellant has established that the Court should have a reasonable doubt of the appellant's guilt of the offence as charged, which cannot be explained by the advantage the jury had in hearing all of the evidence, particularly that of the complainant.

[64] I find the verdict was unreasonable and not supported by the evidence having reviewed the evidence as a whole.

Inconsistent Verdicts

[65] Given that finding, it is unnecessary to consider the second ground that the verdict was unreasonable on the ground of inconsistent verdicts.

Conclusion

[66] The verdict should be set aside, and an acquittal entered.

Orders

[67] The orders of the Court should be:

1. The appeal is allowed.
2. The appellant's conviction on count 1 is set aside.
3. A verdict of not guilty be entered on count 1.

[68] **BRADLEY JA:** In preparing these reasons, I have had the benefit of considering in draft the reasons of Justice Brown and Justice Doyle. This permits me to express my conclusions briefly, without extensive reference to the evidence and submissions recorded in their Honours' respective reasons.

Ground 1: unreasonable verdict

[69] As Justice Brown and Justice Doyle note, this Court must undertake an independent assessment to determine whether it was open to the jury, on the consideration of the evidence as a whole, to be satisfied beyond reasonable doubt of the appellant's guilt for the offence.

[70] In doing so, this Court must give full weight to the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and that the jury had the benefit of seeing and hearing the witnesses,²⁵ of observing "the

²⁴ (1994) 181 CLR 487 at 500.

²⁵ *R v ZT* (2025) 281 CLR 137, 144 at [7] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

tone and manner in which the witness or participants spoke or conducted themselves; their maturity; their emotional state and intelligence; and how they interact with others”.²⁶ The jurors apply their “collective wisdom and experience of ordinary affairs” to the oral testimony and all the other evidence adduced at trial.²⁷ In doing so, the jurors may have “a breadth of understanding of how different people speak and behave in such circumstances” that a judge may not have.²⁸ The benefit enjoyed by the jurors has particular importance in the jurors’ role of evaluating the credibility of a witness.²⁹

- [71] This Court should set aside a verdict as unreasonable, if this independent assessment reveals inadequacies or discrepancies or other reasons why, notwithstanding those advantages, the jury ought to have entertained a reasonable doubt as to the appellant’s guilt of the offence.³⁰
- [72] The real issue at the trial (with respect to each of the two counts) was whether the alleged act occurred. The appellant’s defence was that the act did not occur. As his Honour observed, if the jurors were satisfied beyond reasonable doubt that the act occurred, then it was open to the jury to be satisfied that it was an assault, it was unlawful and it was indecent.
- [73] Justice Brown and Justice Doyle have identified the features of the complainant’s evidence, and those arising from the evidence of the police officer and his wife about his earlier reports to each of them, which had the potential to bear upon the reliability and credibility of his testimony at the trial about the alleged offending.
- [74] The relevant differences were that:
- (a) the police officer said he made no entry about the conduct alleged in count 2, and the wife did not recall such a complaint; and
 - (b) the police officer said he made entries about an allegation of the appellant touching the complainant’s penis with his (the appellant’s) hand, and the wife recalled a similar complaint, rather than, as alleged in count 1, the appellant putting the complainant’s hand on the appellant’s penis.
- [75] These features were the subject of cross-examination at the trial. The complainant remained certain of his recollection of the appellant’s conduct. The primary judge directed the jury as to how they were to approach this evidence. No complaint was made about those directions.
- [76] The only evidence of the appellant’s offending was the complainant’s testimony at the trial. The complainant’s testimony of what he recalled was frank and, within its own limits, consistent and credible. No suggestion was put to this Court that the complainant did not seek to give a truthful account of the relevant events. The issue was whether the jury should have held a reasonable doubt about the reliability of his evidence. The jury can be taken to have been satisfied beyond reasonable doubt of the complainant’s testimony, notwithstanding the features that bore upon the reliability of his evidence.

²⁶ Ibid, 146 at [10].

²⁷ Ibid, 145 at [9].

²⁸ Ibid, 146 at [10].

²⁹ Ibid, 145 at [9].

³⁰ *Pell v The Queen* (2020) 268 CLR 123, 145 at [39].

- [77] The complainant gave unchallenged evidence that, from the touching alleged in count 1, he knew the appellant's penis was circumcised. This point, unique to count 1, may have factored in the jurors' consideration of the reliability of the complainant's evidence on count 1.
- [78] The complainant's verbal complaint to the police officer, made only a few hours after he alleged the offending had occurred, enhanced the credibility of the complainant's evidence that he had been sexually assaulted by the appellant. In his testimony, in what the police officer said he entered in his records, and in what his wife recalled of the complaint, the appellant was the alleged offender, and the date and circumstances in which the offences were alleged to have been committed were the same.
- [79] The police officer had no recollection of what the complainant had told him 14 years earlier. His evidence about entries he made at that earlier time was not evidence that what he recorded happened. Nor was it evidence that what he did not record did not happen.³¹ Like the jurors, this Court can only use the consistencies in the preliminary complaint evidence as something capable of enhancing the credibility of the complainant's account, and inconsistencies as something capable of damaging *both* the credibility and reliability of the complainant's testimony.³²
- [80] The complainant could not recall the words he used in either preliminary complaint, but only the basic effect of what he had said. He said he "broke down" speaking to his wife, as he had done with the police officer some months earlier.
- [81] In assessing the credibility and reliability of the complainant's evidence, like the jurors, this Court must be conscious of the need to mitigate the risk that the Court's decision on an appeal may be compromised by any preconceived expectation about how a complainant should react, behave, or be affected by what an accused person is alleged to have done. Relevantly:
- (a) Experience shows that people may not remember all the details of a sexual offence or they may not describe a sexual offence in the same way each time they speak about it.³³ As Justice Doyle has noted, the complainant had been drinking heavily, had fallen asleep, and woken to the alleged offending. He said he was "disoriented", not capable of standing up, could not see in the darkness, and could not make sense of what was going on. He did not confront the appellant. He reacted by pretending to be asleep.
 - (b) Experience also shows trauma may affect how a person recalls events.³⁴ The complainant remembered "being totally on edge and shaking" at the police station. He said he had not slept since the alleged offending, being "scared and on edge" and "in shock." He went to the police station to make a complaint. He saw a male plainclothes senior constable attached to the criminal investigation branch in a regional town. He said he "broke down". By the end of his interaction with the police officer, he had decided not to pursue a formal complaint. He said he did not proceed at that time because he "felt so belittled and ashamed" and "didn't want anyone to know." He made his report to police long before the police service adopted the aim of changing its culture about

³¹ Neither document was tendered as proof of the truth of its contents or as a prior inconsistent statement.

³² *R v RH* [2005] 1 Qd R 180, 186 (Williams JA, with whom Davies and Jerrard JJA agreed).

³³ Act, s 103ZY(2)(a)(i).

³⁴ Act, s 103ZY(2)(a)(ii).

sexual violence responses through victim-centred and trauma-informed practices.

- (c) It is common for there to be a gap or inconsistency in an account of a sexual offence, as well as a difference between one account and another account of the same offence.³⁵ The complainant told the jury some “obvious” things about his recollection of speaking to the police officer. Over the intervening 14 years, “a few things ... sort of are missing and so on”. He said, the events the night before were “fresh” in his mind and “a lot more clearer” to him at the time he spoke with the police officer, than when he gave evidence in court. In cross-examination, the complainant recalled some things about the alleged offending and his attendance at the police station, but not others. He said, “after 14 years my memory is getting hazy, but I remember the main details of that night.” It would be wrong to expect a complainant to have as good a memory of what he or she said to a police officer about offending, as the memory the person might have about the offending itself.

[82] The considerations noted at [81] above are relevant in assessing the clarity with which the complainant conveyed his complaint to the police officer and the diligence with which the police officer made the entries about his conversation with the complainant.³⁶ The complainant was scared, on edge, in shock, sleep-deprived, ashamed, embarrassed, not wanting anyone to know what happened, and breaking down. He could have inadequately or indistinctly described the count 1 conduct when speaking to the police officer. The police officer could have misunderstood what the complainant had described. He could have misremembered it when making the entries at a time when charges were not to be pressed. The complainant’s later disclosure to his wife was affected by the same trauma and break down. It occurred after about four months in which the complainant had been too embarrassed to share the information with his partner.

[83] Taking full account of their role, and the advantages which they enjoyed, in my view it cannot be concluded that it was not open to the jury, on the totality of the evidence, having applied the relevant considerations to their assessment of the evidence, including whether doubt on count 2 affected their acceptance of the complainant’s evidence on count 1, as the trial judge had directed them to do, to have accepted beyond reasonable doubt the complainant’s account of the indecent assault and found the appellant guilty of count 1.

Ground 2: inconsistent verdicts

[84] I agree with Justice Doyle’s formulation that the issue on ground 2 is whether no reasonable jury, applying their minds to the facts, could have reached the different verdicts returned by the jury at the appellant’s trial.

[85] The contrasting verdicts show that the jurors considered each count separately, as the trial judge directed them to do. His Honour directed the jury that their verdicts need not be the same for the two counts. His Honour also directed the jury that their general assessment of the complainant as a witness would be relevant to both counts, especially as the two were closely linked in time and circumstance. The trial judge

³⁵ Act, s 103ZY(2)(a)(iii), and (3).

³⁶ As is the police officer’s inability to explain differences between his notebook entry and the QPRIME entry.

explained that if they were “not sufficiently confident of the credibility and reliability of the evidence to convict” on one count, they might have some doubt, and find the appellant not guilty of that count. However, they were required to look at the evidence again on the other count and “consider where it leads”.

- [86] The inconsistencies between the complainant’s evidence on count 1, and the police officer’s evidence of the entries he made, were not of the same nature as for count 2. One might reasonably infer that the absence of any reference to oral sex in the police officer’s entries and the wife’s recollection, left the jury with a reasonable doubt that the act alleged in count 2 occurred.
- [87] The complainant’s description of the appellant’s penis as circumcised, based on having his hand placed on it, could explain, in part, the jury’s confidence that the complainant’s evidence on count 1 was reliable. There was no such additional factor for count 2.
- [88] In the circumstances, the jurors’ contrasting verdicts were not unreasonable or illogical. A reasonable jury, properly directed, and applying their minds to the whole of the evidence, could return these different verdicts, having no reasonable doubt about the complainant’s evidence on count 1, but entertaining a reasonable doubt about the reliability of his recollection on the act alleged in count 2.

Final disposition

- [89] For the above reasons, I would order that the appeal be dismissed.
- [90] **DOYLE JA:** This is an appeal against the appellant’s conviction, after a trial in the District Court at Toowoomba, of one count of sexual assault.

Grounds of Appeal

- [91] The appellant appeals on two grounds. They are:
 - (a) That the verdict of guilty in respect of Count 1 is unreasonable and unable to be supported having regard to the evidence; and
 - (b) That the verdict of guilty in respect of Count 1 is inconsistent with the acquittal in respect of Count 2 and cannot be maintained.
- [92] Both grounds of appeal invoke the power and obligation of this Court under section 668E(1) of the *Criminal Code* which provides that this Court “shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or can not be supported having regard to the evidence...”.
- [93] The ultimate question is, having regard to all of the evidence in the case and as discussed below, paying full regard to the role of and advantages enjoyed by the jury, whether there is a substantial risk that an innocent person has been convicted: *R v ZT* (2025) CLR 137 at 145; *M v The Queen* (1994) 181 CLR 487 at 494-495.

The Charged Counts

- [94] The appellant was charged with two counts.
 - (a) Count 1: The first is that the appellant sexually assaulted the complainant by the conduct of putting the complainant’s hand onto his, the appellant’s, penis.

- (b) Count 2: The second charge was also one of sexual assault but with a circumstance of aggravation in that it is contended the appellant sexually assaulted the complainant by putting the complainant's penis into his, the appellant's, mouth.

[95] The appellant was convicted on Count 1 but acquitted on Count 2.

The Complainant's Evidence

- [96] In broad terms, the complainant said that the appellant and others attended a barbeque at his home. His wife and child had gone elsewhere. Others who attended the barbeque left somewhere around 9.30 pm or 10.00 pm.³⁷ Then the appellant produced a pornographic DVD which he and the complainant sat to watch. In the course of watching that DVD, the complainant said that the appellant "put his hand over on my... thigh and gave my leg a squeeze. ... I wasn't sure if that was intentional or not, and I brushed his hand off."³⁸ Both before and after this, it would seem that the complainant and the appellant, had been drinking. At some point, the appellant told the complainant that he, the complainant, had had enough to drink and should go to bed.³⁹
- [97] The complainant accepted that he was "unsteady on [his] feet by the time that [he] went to bed."⁴⁰ The appellant "put his arm around [the complainant's] back to probably steady [him] and [the complainant] walked" to his bed.⁴¹ The complainant maintained that he did not require the appellant's assistance and could walk.⁴² At some point, the complainant woke up, got out of bed and vomited.⁴³
- [98] After some time, the complainant said that he woke up to flashes from a camera and that he was being photographed by the appellant. He said that he could not quite recall if "[he] still had boxer shorts on or not... but [he] no longer had pants on."⁴⁴ He then says that he remembered the appellant "starting to give [him] oral."⁴⁵ Then the following evidence was given (in evidence in chief):

"Now, you said that when [the appellant] was performing oral sex on you that that went for – I think you said about a minute?---From what I recollect. Yeah.

What's the next thing you can remember after that finishing?---Um – he'd taken a photo – um – like I said. Um – and then he'd laid in the bed beside me, and he grabbed my hand and put it on his penis. Um – and I rolled over. I rolled over, away from him, and just pretended I was asleep, and that's wh – that's where I stayed the rest of the night.

...

Are you able to describe what you felt, physically, when he did that?---Um – it – it felt like he was some – somewhat aroused, but not

³⁷ T1-34, lines 46 to 47.

³⁸ T1-36, lines 35 to 37.

³⁹ T1-37, line 4.

⁴⁰ T1-53, lines 34 to 35.

⁴¹ T1-56, lines 46 to 47.

⁴² T1-56, lines 43 to 44; T1-57 lines 1 to 16.

⁴³ T1-57, lines 6 to 8 and lines 18 to 20.

⁴⁴ T1-38, lines 10 to 12.

⁴⁵ T1-38, lines 14 to 16.

fully hard, and from my recollection – um – he wasn’t – uh – sorry, he was circumcised.”⁴⁶

- [99] The next morning when the appellant left the house, the complainant says that he followed him in his car, a journey of between six and seven kilometres.⁴⁷ After that he went to the police station and spoke to a police officer. In his evidence the complainant said he had told the police officer “[he’d] been sexually assaulted”, although he clarified that he could not remember if he had said that or that he had been “raped.”⁴⁸ He then continued:

“Do you remember if you told him any more detail about what happened?---Um – the – basically the statement that we’ve already gone over about what had happened in the night. He asked me the questions and what instigated the whole situation and at that point then – um – obviously happening the night before, was a lot more clearer to me at the time.”⁴⁹

- [100] In the course of his cross-examination the complainant rejected as “totally incorrect” the suggestion that the appellant had never put his hand on the complainant’s leg.⁵⁰

- [101] The complainant gave a statement to police in March 2022 (ten and a half years after the sexual assaults). He was cross-examined about it and accepted that the evidence as to whether or not the appellant was standing when he took the photos was a feature which he had recalled since giving that statement.⁵¹

- [102] The complainant accepted that when he first gave his statement to the police the morning after the sexual assaults he was reporting things that were, as he put it, “fresh in [his] mind.”⁵² The police officer appeared to be listening to him and writing down in his notebook things that he was told. As far as the complainant could recall he did not leave anything out in his complaint to the police that day and that everything important that had occurred he had told the police.⁵³

- [103] Importantly as to Count 2, he then stated:

“Right. Is it the case, [complainant], that you said nothing to the police officer about [the appellant] putting his mouth on your penis?---No. I would have said that to him.

Is it the case, [complainant], that you said nothing to the police officer when you spoke with him the day after this incident you say happened occurred, nothing about him putting your hand on his penis?---That is incorrect.

...

Well - - -?---When he placed my hand on his penis, it took no time at all for me to then roll over. And then a minute, maybe, of him giving me oral.

⁴⁶ T1-39, lines 9 to 16, and lines 32 to 34.

⁴⁷ T1-44, lines 18 to 33.

⁴⁸ T1-45, lines 15 to 23.

⁴⁹ T1-45, lines 25 to 29.

⁵⁰ T1-60, lines 23 to 26.

⁵¹ T1-62, line 37; T1-64, lines 36 to 38.

⁵² T1-65, lines 38 to 40.

⁵³ T1-65, line 45 to T1-66, line 6.

...

All right. Is it the case that you said on another occasion that [the appellant] has laid behind you in a spooning position on your bed, or words to that effect?---I don't recall. No.

No. Okay. Did you say on another occasion that [the appellant] has then reached over and started to fondle your penis?---No.

Or what about, wank you off?---No.

Did you say on another occasion that [the appellant] has inserted a finger into your anus?---I don't recall. But I remember something being brought to my attention that I'd farted, so – um – I cannot recall if this was during him giving me oral. I know it was – I was tense at the time, and I farted. I don't know if he – sorry. I don't know if he tried to touch my arsehole – yeah. So I'm going to s-

[Complainant], you've said nothing to the jury thus far about your anus being touched by [the appellant], have you?---I – sorry. I don't – I don't recall at this time.

Whether you said it, or whether it happened? What do you mean?---Whether I said it. I don't recall - - -

Okay?--- - - - it – well, sorry, I don't recall it happening or whether I said it. Like I said, it's 14 years ago.

All right. Well, do you remember saying on another occasion that fondling your penis, or inserting a finger into your anus, has continued on and off until 6.30 in the morning?---Absolutely not.”⁵⁴

- [104] There are other aspects of the complainant's evidence which it is more convenient to deal with below.

Preliminary Complaint Evidence

- [105] The complainant gave evidence of having told of his sexual assaults to three people.
- [106] The first was to Senior Constable Sanderson to whom the complainant made his complaint on 21 September 2011. Senior Constable Sanderson made notes at the time of the interview with the complainant and they recorded:

“So what was it that [the complainant] told you had happened?---Ah, he advised me that he had some friends to his house the previous night. Um, his wife and child had left the residence to go visit family, I believe, and during the night they had some drinks. Um, a couple of the friends who attended had left, leaving himself and another person, I believe. He named a [appellant's name] at the house. Ah, they went to bed. He went to his own bed. He woke approximately 3 or 4 o'clock in the morning. Ah, awoke to, ah, just only wearing a shirt and no pants, and he, [the appellant], um, coming to bed, he described it as, um, spooning. He then, ah, described it as, ah, [the appellant] then reached around and grabbed him on the penis, and then also stuck

⁵⁴ T1-66, line 8 to T1-67, line 27.

some fingers in his anus. Um, this went on for a period of time. They both got out of bed after his alarm went off and he went about his normal duties: go shower, got ready for work, and then attend the police station to report this.”⁵⁵

- [107] In addition to the notebook record, Senior Constable Sanderson entered details of the complaint in the police QPRIME system where he recorded matters similar to those recorded in the notebook. In cross-examination the constable was asked if, hypothetically, he had been told that the appellant had performed oral sex on the complainant, whether that is something he would write down in his notebook and he answered affirmatively. Similarly, if the complainant had said that the appellant put the complainant’s hand on the appellant’s penis, that is something he would have put in his notebook and he answered affirmatively.⁵⁶
- [108] After he went to the police station, the complainant went to work and spoke with his service manager, Mr G.⁵⁷ The complainant recalled speaking to him for a minute or two and that he told him that he had been “sexually assaulted.”⁵⁸ The complainant described Mr G’s reaction as his being shocked, but that no further questions were asked. The matter was not further discussed between the complainant and Mr G.
- [109] Mr G gave evidence at the trial but had no recollection of any conversation with the complainant about his having been sexually offended against.⁵⁹
- [110] The complainant also gave evidence that he told his wife of the sexual assaults. He said that he had a conversation with her some six to eight months later in which he told her that “[he] had been sexually assaulted”, again not recalling whether those were the exact words or if he said he had been raped.⁶⁰ The complainant’s wife could recall a conversation happening months after the incident. Her recollection was that the complainant did not tell her exactly when it happened. Her recollection was that the complainant told her:
- “[H]e had woken up – felt groggy and had woken up in our bed... to a flash ... and he said that... [the appellant] was holding his penis – [the complainant’s] penis.”⁶¹
- [111] In summary, the day after the sexual assaults, the complainant went to the police. It is evident that this evidence of the preliminary complaint does not refer at all to Count 2. It is of course consistent with some kind of sexual assault having taken place; it is of the appellant reaching around the complainant and touching the complainant’s penis, not as in Count 1 that the appellant put the complainant’s hand on the appellant’s penis.
- [112] Whilst he gave evidence of a complaint to Mr G and of Mr G’s shock reaction, it is something Mr G could not recall at trial. Views may reasonably differ as to whether a person is likely, after 14 years, to forget being told such an event. But this evidence is either neutral, or a factor not supportive of the complainant’s reliability.

⁵⁵ See T1-81, lines 13 to 25.

⁵⁶ T1-84, lines 32 to 39.

⁵⁷ T1-70, line 48 to T1-71, line 3.

⁵⁸ T1-71, lines 17 to 18.

⁵⁹ T2-14, lines 16 to 18.

⁶⁰ T1-46, lines 27 to 36.

⁶¹ T2-21, lines 11 to 16.

- [113] Some months after the assault, the complainant gave an explanation of what occurred to his wife. Again, this evidence of the preliminary complaint does not refer at all to Count 2. It is, again, consistent with some kind of sexual assault having taken place, but not that particularised for Count 1. The complaint, as recalled by his wife, was of the appellant touching the complainant's penis, and not of the appellant putting the complainant's hand on the appellant's penis.
- [114] There are other parts of the complainant's evidence that are pointed to by the respondent as supporting the conviction on Count 1.
- (a) First, the complainant gave evidence of his having, after 20 September 2011, withdrawn an invitation to the appellant, who until then had been a longtime friend, to attend the complainant's child's birthday party.
 - (b) Second, the complainant gave some statement to the police on 21 September 2011 and it was a complaint of sexual assault. He also made a like complaint to his wife some months later.
 - (c) Third, in evidence, the complainant was able to describe the appellant's penis as circumcised. There was no challenge to this in cross-examination. It is suggested this adds a degree of credence to the complainant's version on Count 1 as expressed in his oral evidence.
 - (d) Finally, the complainant gave a statement to police in 2022, and it is an admitted fact that that statement was given on 29 March 2022. The statement itself is not in evidence. I would infer that the statement formed the foundation for the charges and their particularisation in the way I have described above.

The Directions

- [115] The primary judge in his summing up gave a number of directions to the jury, none of which is challenged in the appeal. They included differentiating between credibility and reliability and the matters which might be thought to bear on each.
- [116] His Honour directed the jury that experience shows that people may not remember all of the details of a sexual offence and may not describe a sexual offence in the same way each time. Trauma can affect people differently, including how they recall events.⁶² There is, as the primary judge recorded, no rule book dictating how a person will be affected if they are offended against.⁶³
- [117] His Honour gave other directions as to the use of the preliminary complaint evidence, and as I have mentioned, there is no issue taken with those directions.⁶⁴
- [118] Finally, relevantly, it was made clear to the jury that they were arbiters of guilt or innocence, and that the verdicts need not be the same for both counts.

Appeal Ground 1

- [119] Both grounds of appeal in substance are concerned with the one question, whether the guilty verdict on Count 1 is unreasonable. But it is convenient to deal with them separately.

⁶² T1-7, lines 46 to 49.

⁶³ T1-8, lines 13 to 14.

⁶⁴ T1-13, line 5 to T1-17, line 40.

The Principles

- [120] In relation to what is ground 1, the High Court recently elucidated the applicable principles, drawn from *M v The Queen* (1994) 181 CLR 487, in *R v ZT* (2025) 281 CLR 137.
- [121] The task of an appellate court in determining, as a question of fact, whether the verdict of the jury is unreasonable, is to independently assess the sufficiency and quality of the whole of the evidence adduced at trial.⁶⁵ Having done that, if there are aspects of the evidence that cause the court to have doubts as to the verdict, it must nonetheless not interfere if the advantages of the jury, including those of hearing and seeing the evidence given and considering it in their collective wisdom and experience, are capable of resolving that doubt. The advantages of the jury and their central role as arbiters of fact and that it is the body entrusted with the primary responsibility of determining guilt or innocence was re-emphasised in *R v ZT*.
- [122] The advantages of the jury vary depending on the case, the form of the evidence and the nature of the issues at trial, but broadly inhere in their “seeing and hearing the evidence as it unfolds when evaluating factual matters, especially witness credibility”,⁶⁶ applying as part of this assessment their “collective wisdom and experience of ordinary affairs.”⁶⁷
- [123] The jury’s advantages in assessing the evidence extend to all evidence, including witness testimony, recorded conversations and recorded interviews⁶⁸ about which the jury “possessing a breadth of understanding of how different people speak and behave in such circumstances that a judge may not have”, considers a range of matters such as the witness’s tone and manner when speaking and conducting themselves, maturity, emotional state and intelligence, and manner of interaction with others.⁶⁹
- [124] The relevant question for this Court is whether “the nature of the reasonable doubt that the appellate court holds is one that is capable of being resolved by the appellate court making full allowance for the jury’s advantages in seeing and hearing the evidence”: *R v ZT* at [53]. But if, having undertaken that exercise, and making full allowance for the advantages the jury enjoys, the Court concludes “there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence”: *M v The Queen* (1994) 181 CLR 487 at 494-495.

Discussion

- [125] Having reviewed the evidence, it is apparent that there was reason to question the complainant’s credibility and reliability in respect of both counts. He had been drinking the night of the sexual assaults, at least sufficiently to cause him to wake up and be sick. In respect of Count 2, despite his having been to the police and saying that he told Senior Constable Sanderson in substance what had occurred (that the appellant put his mouth on the complainant’s penis) there is no record of his telling Senior Constable Sanderson of the acts the subject of this count. As one would expect

⁶⁵ *R v ZT* (2025) 281 CLR 137 at [11]-[12]; *M v The Queen* (1994) 181 CLR 487 at 494-95.

⁶⁶ *R v ZT* (2025) 281 CLR 137 at [9]; *M v The Queen* (1994) 181 CLR 487 at 495.

⁶⁷ *R v ZT* (2025) 281 CLR 137 at [9]; *Doney v The Queen* (1990) 171 CLR 207 at 214.

⁶⁸ *R v ZT* (2025) 281 CLR 137 at [10].

⁶⁹ *R v ZT* (2025) 281 CLR 137 at [10].

the Senior Constable said had such a thing been said he would have made a note of it. The complainant also did not tell this to Mr G or to his wife, though in each case that is explicable by reason of perhaps it being enough to refer to a sexual assault or rape.

- [126] As to Count 1, there is no independent proof of any preliminary complaint consistent with the appellant taking the complainant's hand and putting it on the appellant's penis. That is not what Senior Constable Sanderson noted he was told nor what the complainant's wife recalls being told. It must be accepted that either, or even both, of them could have confused what was said to them.
- [127] Senior Constable Sanderson's note of the discussion is not a formal interview. It should not be assumed to be a comprehensive or verbatim record of what the complainant told him. Nonetheless it is a contemporaneous note of the discussion and the complainant said matters were then fresh in his mind and that he told the police all matters of substance which had occurred. The police note is not consistent with the complainant's evidence in a number of important respects: the want of any reference to the acts the subject of Count 2; the reference to the appellant inserting his finger in the complainant's anus, which is absent from his oral evidence; it recorded that the appellant touched the complainant's penis and not, as in Count 1, the reverse.
- [128] The jury did not convict on Count 2. As discussed in relation to ground 2 of the appeal, that does not mean the jury necessarily rejected his evidence as credible; but simply that as to that count the jury was not satisfied to the required standard. Nonetheless he was convicted on Count 1. The jury it can be taken, were satisfied of the appellant's guilt beyond reasonable doubt and this necessarily required the jury to have accepted the complainant as a credible and reliable witness of the act charged in that count.
- [129] It is not possible, in my view, to assess the complainant's evidence as to these two counts entirely separately. His evidence is that the act of oral sex (Count 2) took about a minute and was then followed by the acts the subject of Count 1. It was after the oral sex that he said in his oral evidence that the appellant grabbed his (the complainant's) hand and placed it on the appellant's penis, but the complainant's evidence was that he was able to roll over to prevent this continuing. Any reservations held as to his reliability in recalling Count 2 would at least to some extent impact on his reliability with respect to another sexual assault said to follow immediately after it.
- [130] And as already explored above, while preliminary complaint evidence was led by the Crown, none of it supported the complainant's oral testimony as to either count.
- [131] The jury saw and heard the complainant give evidence, in chief and under cross-examination. They also saw and heard the witnesses called to give the preliminary complaint evidence. It was their task to assess the complainant's credibility and his reliability in light of their observations of him and taking account for that preliminary complaint evidence. As also already mentioned, they could take into account his version of the state of the appellant's penis (being circumcised) and the conduct of withdrawing his invitation to the appellant to attend his daughter's birthday function. They can be assumed to bring to bear their mutual experience and collective wisdom in assessing all of this.
- [132] Despite taking full account of the advantages of the jury and their unique role, in my view there remained a reasonable doubt as to the appellant's guilt on Count 1. The

evidence against him was exclusively that of the complainant. The complainant had been drinking to some significant extent that night and that might have influenced his perception or memory of events. The next day, while motivated to make a police complaint on 21 September 2011, when matters were fresh in his mind, the complainant, on one view of the evidence, omitted any reference to the more serious conduct and reported the other sexual assault in a way not consistent with the conduct charged. Similarly when he told his wife some months later, there was no explicit reference to the more serious conduct and he referred to the other sexual assault in a way not consistent with the conduct charged. Over a decade passed before a statement was given to the police reflecting the counts charged. The complainant's evidence of the occurrence of events the subject of Counts 1 and 2 were closely connected and do not readily admit of acceptance of his evidence as to Count 1 if the occurrence of detail of count 2 were subject to reasonable doubt.

- [133] Despite those advantages, I remain of the view that there is a significant possibility that an innocent person has been convicted. The reasons for that are those I have outlined above.

Ground 2

- [134] The approach in determining whether a guilty verdict is unreasonable by reason of that guilty verdict being inconsistent with an acquittal on other charges by the jury was canvassed by the High Court in *MacKenzie v The Queen* (1996) 190 CLR 348 at 365 and approved in *MFA v The Queen* (2002) 213 CLR 606.
- [135] The test is founded upon logic and reasonableness,⁷⁰ determined in light of the facts and circumstances of the case.⁷¹ The question is whether no reasonable jury, applying their minds to the facts, could have reached the different verdicts that were returned in the trial.⁷²
- [136] Differences in verdicts do not perforce demonstrate factual inconsistencies.⁷³ If there is evidence to support the guilty verdict, which is materially different from the evidence in respect of the acquittal, such that the mix of verdicts was logically open to the jury, the impugned verdicts should stand.⁷⁴
- [137] In *MFA v The Queen* (2002) 213 CLR 606 Gleeson CJ, Hayne and Callinan JJ stated (citations omitted):

“[34] Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that system. A number of features of that context were emphasised in *MacKenzie*. They include the following. ... In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting

⁷⁰ *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

⁷¹ *MFA v The Queen* (2002) 213 CLR 606 at 617.

⁷² *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

⁷³ *MFA v The Queen* (2002) 213 CLR 606 at 616.

⁷⁴ *R v Green* [2025] QCA 148 at [76]; *MFA v The Queen* (2002) 213 CLR 606 at 616-617.

evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others. ..."

- [138] To intervene, the Court must therefore be satisfied that the verdicts constitute an unacceptable affront to logic or demonstrate that the jury confronted some misunderstanding as to their function or uncertainty about the applicable law, among other things.⁷⁵ This ensures that "the respect for the function which the law assigns to juries" is not compromised.⁷⁶

Discussion

- [139] Given the view I have reached as to ground 1 it is unnecessary to fully consider ground 2. Moreover, the reason why in my view ground 1 ought to succeed is in part because the conduct which gives rise to both counts, and the preliminary complaints after them, were so closely interrelated that there is a manifest tension between the jury not being satisfied as to the complainant's reliability on Count 2 while being satisfied on Count 1.

Conclusion

- [140] In my view the appropriate orders are:
1. The appeal is allowed;
 2. The appellant's conviction on count 1 is set aside;
 3. A verdict of not guilty be entered on count 1.

⁷⁵ *R v Fanning* [2017] QCA 244 at [21].

⁷⁶ *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.