SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wells* [2015] QCA 230
PARTIES:	**R** **v** **WELLS, Brian Eric Reginald** (appellant)
FILE NO/S:	CA No 68 of 2014 DC No 33 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Unreported, 12 March 2014
DELIVERED ON:	17 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2015
JUDGES:	Holmes CJ and Morrison JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**That the appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of raping the complainant – where the complainant and her friend, who were both under the influence of alcohol and marijuana, gave partly inconsistent versions of the events leading up to and following the rape – where a family friend of the complainant, who was under the influence of alcohol and painkillers, gave evidence which partly supported the complainant's version – where the complainant's mother, who consistently admitted to having a poor recollection, gave evidence which partly supported the complainant's version – where the complainant, her mother and her friend all gave evidence that the complainant had said that during the offence she was pinned down to a trampoline and that following the offence the complainant was visibly upset – where the jury was in a position to assess the evidence of each of the witnesses in light of their relevant inhibitions at the time – whether the verdict was unreasonable or insupportable having regard to the evidence APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED –

where the rape was alleged to have occurred on the night when the appellant and her friend were at the appellant's house – where no other possible occasion was raised on the evidence as to when the rape would have occurred – where it was not suggested to the complainant that she may have confused the occasion on which the rape occurred – whether the trial judge erred in failing to direct the jury that they had to be satisfied that the rape occurred on the night that the complainant and her friend were at the appellant's house

Evidence Act 1977 (Qld), s 21AK, s 93A

Johnson v Miller (1937) 59 CLR 467; [1937] HCA 77, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Frederick [2004] SASC 404, considered
R v Hobson [2013] 1 WLR 3733; [2013] 2 Cr App R 27; [2013] EWCA Crim 819, considered
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
WGC v The Queen (2007) 233 CLR 66; [2007] HCA 58, cited

COUNSEL: C Chowdhury for the appellant
B J Power for the respondent

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

[1] **HOLMES CJ:** I agree with the reasons of Morrison JA and the order he proposes.

[2] **MORRISON JA:** On 12 March 2014 Mr Wells was convicted of rape. The indictment alleged that it had taken place on an unknown date between 31 December 2007 and 1 January 2009.

[3] The Crown case was that the complainant (**M**) and her friend (**P**) were staying at Mr Wells' house to look after his children, when he asked M to go downstairs for a smoke. While downstairs M was sitting on a trampoline at the side of the house. Mr Wells pushed her backwards on the trampoline, and raped her, while holding his hand over her nose and mouth. M rang a family friend (**S**) to come and collect her, and they went back to S's house. Later that day S took M home to her mother.

[4] Mr Wells appeals against his conviction. Two grounds of appeal are advanced:

1. the learned trial judge erred in not directing the jury that, should the jury find, on the facts, that M, S and M's mother were giving evidence about a night other than the night P stayed at Mr Wells' house, the jury could not convict; and

2. the verdict was unsafe, unsatisfactory and unreasonable or cannot be supported having regard to the whole of the evidence.

M's evidence

[5] M's evidence was given in the form of DVDs which recorded her interview taken under s 93A of the *Evidence Act* 1977 (Qld), and her pre-recorded evidence under s 21AK of that Act.

The s 93A statement

[6] The essential parts of M's evidence in the s 93A statement are set out below.

[7] Mr Wells was a friend of her father, before her father died in August 2007. She had known him for about seven years, and knew his children well. The events occurred about a year after her father died, or about a year before her police interview which took place on 26 October 2009.

[8] Mr Wells' house was a highset house near a BMX track. M and P had gone to his house, and were staying over to look after his two children, and M's younger sister stayed too. Mr Wells had a couple of friends over. M, P and Mr Wells' children watched a couple of movies, then P went to bed, and M put the children to bed.

[9] Mr Wells' friends went home, then his partner also went to bed. They had been having an argument and Mr Wells had said he was not going to sleep in the same bed as his partner anymore. Mr Wells asked M to go downstairs for a smoke, and she went downstairs with him. There was a trampoline was at the side of the house and she was sitting on a trampoline, her feet were hanging off the ground. Mr Wells was leaning against a pole having a smoke. M and Mr Wells were talking. He was wearing a pair of board shorts, but no shirt.

[10] Mr Wells asked M "if anyone had ever gone down on [her]", to which she responded "no". He suddenly pushed her back on the trampoline. He did that by using his hands on her shoulders, and he was on his knees on the trampoline. He put his hand over her nose and mouth, squeezing her face. She could breathe through her nose but could not speak. He ripped down her shorts, and her shorts and underpants ended up on the ground. He then pushed her further up, and pulled down his own shorts. She tried to push him away with her hands, but he just pushed harder on her face. She tried to grab his hands off her face, but he just pushed harder on her chin. He inserted his penis in her vagina and then had sex with her. During that time his hand was over mouth and his fingers were pushing down on her jaw or chin.

[11] M was scared through all of it. She did not know if he ejaculated or not, but thought he did not. Mr Wells just stopped, fixed up his shorts and left. M did not go back upstairs, but got her mobile phone out of a bag near the steps. She rang S to come and pick her up. She waited "down at the very end of the driveway for him to come … come really fast". She went to S's house and fixed herself up, having a shower. She then told S what had happened. She told her mother later, and her boyfriend Z who went with her to the police station.

M's pre-recorded evidence

[12] M's account in her pre-recorded evidence was largely similar to that recorded above, but there were additions and changes, which I have set out below.

[13] As to when it happened, M said that she could not be more precise than probably a year after her father died, and agreed she was guessing at the time frame. She could not recall if she was 13 or 14 at the time. M could not remember what day of the week it occurred. M and P were taken over to Mr Wells' house by her mother. Her younger sister was in the car but went back with her mother, so that the younger sister did not stay at Mr Wells' house.

[14] When it was put to her in cross-examination, M could remember a previous visit where Mr Wells got upset over the use of a trail bike and put it back under the house, but she did not think that P was present when that incident occurred. There was only one occasion when she and P stayed over at Mr Wells' house, and on that one occasion M's younger sister did not stay over. She said that if she told the police that her sister stayed as well, that was a mistake.

[15] P went to bed "close to midnight", and whilst M was not paying attention she did not think it could have been around 3.00 am (as was put to her). M recalled Mr Wells and his friends drinking bourbon and coke, but she and P did not have any. The only thing she had was a puff of marijuana through a bong.

[16] When P went to bed it was in the room usually occupied by Mr Wells children. The children fell asleep in the lounge room while watching the movie. It was not long after P went to bed that M and Mr Wells went downstairs to have a smoke, around midnight.

[17] When Mr Wells and his partner were arguing M, P and Mr Wells' children were in the lounge room. After Mr Wells' partner had gone to bed, M and P had contact with Mr Wells when he offered them marijuana in the dining room. Mr Wells was smoking it from a bottle. M tried it only once, and so did P, and this occurred "pretty late in the evening", when Mr Wells' friends were still there.

[18] The cannabis had not been mentioned in the police interview, however, M had become aware that P had mentioned cannabis in her own police interview, so M thought it would be a good idea to tell about it.

[19] In the conversation M had with Mr Wells downstairs near the trampoline, Mr Wells said that he did not want to sleep with his partner anymore.

[20] After she had a shower back at S's house she told S about the rape, and where and how it happened. That would have been about lunchtime on the same day it happened. She told S not to tell her mother. M told her mother about the rape quite a while later, but she thought it was still in the same year, some months later.

[21] Apart from telling her that he did not want to sleep with his partner anymore, she could not remember what Mr Wells spoke about during the 20 minute conversation downstairs, however there was nothing he said that made her feel nervous.

[22] M was not mistaken that it was his penis that penetrated her, but she could not tell if he had ejaculated. In the five or 10 minutes that he had his penis in M, Mr Wells did not say anything to her; he did not threaten M or tell her not to tell anyone; he did not tell her that she could not leave the house. However, during the incident on the trampoline she was frightened that he might hurt her, so she stopped resisting.

[23] After Mr Wells left her, she retrieved her phone from a bag under the house and called S, "probably as soon as he [Mr Wells] left". She did not tell S why she wanted to be picked up, and when S asked why, she told him that she would tell him back at his house. S came straight round to pick her up, and she agreed that was no later than 1.00 am; it was dark when he came round, and it was dark when she arrived at S's place.

[24] M agreed that she had told the police that she had a shower at S's place, then told him, and that she also told him that she did not want to tell her mother just yet.

However, she said that after her shower she had a sleep then told S around lunchtime. All she told S was that Mr Wells had raped her.

[25] Responding to matters put to her, she said she did not call S from a phone booth the next morning, nor tell S that her phone battery was flat, nor did she text him for some time to come and get her, nor did she say to S: "He won't let me leave. Come and get me". She maintained she was taken home by S, after lunch.

[26] It was some months later that she told her mother. They were in the dining room at home when she did, and that was prompted by S telling her mother that there had been an incident with Mr Wells. All she told her mother was that Mr Wells had raped her.

[27] M did not contact P, who was still at Mr Wells' house when M left with S, until the next day, at the time when P was leaving Mr Wells' house. M said it bothered her that she left P there and it crossed her mind to be concerned about her welfare, but she did nothing about it. After she told S that she had been raped, she also told S that P was still at the house.

[28] M was clear in her mind that the night she was raped was the night that P stayed over at Mr Wells' house. She told Z (her boyfriend) that "Brian had pushed me onto the trampoline and had sex with me", and "Had raped me".

P's evidence

P's s 93A statement

[29] P was interviewed on 12 February 2010, and that interview was admitted in evidence under s 93A of the *Evidence Act* 1977 (Qld). Relevant parts of her evidence are below.

[30] P stayed at M's house one night. They were going to Mr Wells' house and he picked them up. M's younger sister came too. They both stayed at Mr Wells' house just the once. She was not sure why they stayed: "I think [M] wanted to stay there, I'm not sure". P thought the stay over was on a weekend. M's younger sister was there. P met Mr Wells just the once.

[31] P was playing a video game and M and Mr Wells were in the dining room, talking. M's sister and Mr Wells' children were with her. P was not sure if Mr Wells' partner was there: "She might've been there earlier on, but I don't remember seeing her any other time"; "I met her earlier than that night".

[32] M and Mr Wells were smoking marijuana through a bong. P smoked some as well. M smoked twice. Mr Wells gave them both some alcohol. All the drinks were done by Mr Wells. P thought it was rum and cola out of a can, and they drank it out of a cup. P had three cups. P had a drink before she came back out from the video game. It was the first time she had alcohol.

[33] Mr Wells left to pick up someone else; he was gone a long time, maybe a couple of hours. While he was out P and M smoked some marijuana. During that time P smoked once, and so did M. P said it made her feel "very like not with it" and "after a while I felt tired". At one point after Mr Wells and the others came back, one of the men got a text message and asked if P could read it; she could not do so, as she "couldn't really see it".

[34] M showed P where to sleep and she went to bed, but M stayed up. P went to sleep early in the morning, about 3.00 am which she could tell as she saw the clock, and she fell asleep straight away. When P woke the next day, M was still there, sleeping on a mattress in the next room. P was able to describe the mattress and sheets. P woke M up. M was not very talkative most of that day, and she seemed really tired. They stayed for a while (about an hour) and Mr Wells' children were playing on a quad motorbike. Mr Wells or his partner dropped them off at M's house around lunchtime. P thought that M's mother knew they had been smoking marijuana. M's mother and M were walking to Woolworths.

[35] P said she knew that M had been raped because M told her, a few months after it happened, that Mr Wells had "pinned her down on the trampoline". M said "I got pinned down on a trampoline". M did not tell her at the time who raped her, and when P asked further M said she did not want to talk about it. When they spoke about this M was upset, not herself, quiet and whispering. P thought it happened in 2007 because that was when they started high school; but she was "not really sure about the years and stuff".

P's pre-recorded evidence

[36] P's pre-recorded evidence was mostly in line with her s 93A statement. Her evidence-in-chief was confined to verifying that what she had said in that interview was correct. There were clarifications and changes that were the subject of attention on the appeal. Below are the relevant parts of that evidence.

[37] P had met Mr Wells only once, when she stayed the one time at Mr Wells' house. Mr Wells picked them up and drove them out to his house, and M's younger sister went too. At the house they were drinking rum and cola, and she had two or three cups. P denied suggestions that Mr Wells did not offer alcohol, and denied that there was no alcohol there. P was offered cannabis by M, not by Mr Wells, after Mr Wells left to pick someone up. They smoked some while he was gone. P said M had some cannabis with Mr Wells, but whilst P said she did not see that, she could smell it. Mr Wells did offer cannabis to M and P saw that.

[38] P did not see any argument between Mr Wells and his partner. In the morning it was sunny when she woke up. M was in an adjoining room, asleep on a mattress. P said she would have remembered if she had woken up and found M not there. Either Mr Wells or his partner drove them back. M's younger sister was in the car. Once back at M's house P, M and M's mother walked to Woolworths.

[39] When M told P what had happened M did not use the word "raped", but said that Mr Wells had pinned her down on a trampoline.

The mother's evidence

[40] The mother's evidence differed from M's in some respects, which were the subject of submissions on the appeal, and to the jury. However, aspects of the mother's evidence supported that of M. She said a number of times that the passage of time meant her recall was not as good as it might be. Essential features of her evidence are below.

[41] Her two daughters used to play with the Wells children at their house. On one occasion M and P went to babysit there, and that was after her husband had died in

April 2007. M and P were picked up by Mr Wells' partner. The mother was "pretty sure [M's sister] was there as well… [p]retty sure they all left together".

[42] Later that night M rang up to say she wanted to come home. M said that Mr Wells and his partner had an argument and there were still people there drinking. As the mother did not have a car she suggested that M ring S. The call may have been about 11.30 or 12.00 midnight. M arrived home at lunchtime the next day. The mother said: "I'm pretty sure - from memory, I'm pretty sure that [Mr Wells' partner] dropped her back home".

[43] Later M was having panic attacks, was upset and kept crying. When she asked what was wrong M started to cry and said Mr Wells "pushed her back on the trampoline, and I said did he go all the way, and she said yes". M was crying "pretty hard". That was the first time M had said anything about Mr Wells doing anything sexual to her.

[44] The mother gave more detail on the conversation when M told her:[1]

> " … it's really hard to remember; it was so long ago. But all I really remember is I had to keep saying to her and, like, to get her to tell me. I said pushed her back on the – pushed her back and, and she just kept crying harder and trying to tell me. But, yeah, she just said he pushed her back and, like, pulled her pants down and that and I said did he go all the way, and she just put her head down and started crying. And she said she felt disgusting; this is why she didn't want to tell anybody about it."

[45] When asked whether M had said that he pulled her pants down, the mother said: "No. I can't remember the wording exactly, but I know I asked her did he go all the way, and she said yes". When they spoke about what happened M initially said "I don't want to go to the police. I don't want to talk to anyone about it".

[46] As to when M told her, there were varying times, "close to 12 months or a good few months" later, and "a few months afterwards". She then said:[2]

> "Probably 2008, I'm pretty sure, 9. Sorry, my memory's really crappy….
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> I think she didn't really tell me until, like, I think it was 2009 that we actually found out about it. But 2008 was the sleepover. Just real foggy with everything, sorry; it's just hard to remember."

[47] She then agreed that she was guessing at the time frame, because it was so long ago. As to whether the night in question was the only occasion when her daughters had stayed there, the mother said; "No, it probably isn't. I just can't remember exactly any other time", and "They could have done. I just can't recall exactly." As to who was dropped home the next day, the mother said "from memory" it was M and her sister, but she could not remember if P was there too.

S's evidence

[48] S explained how he was a friend of M's family, having met the mother in 2007. He assisted by driving the mother to work and looking after the children while she

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1 AB 52, 62.
2 AB 53.

was at work. He spent a lot of time with the daughters, with whom he had a father/daughter relationship. Essential features of his evidence are below.

[49] On the night in question he had gone to sleep at about 11.00 pm; he had had three or four beers, and was in pain from a car accident, so he had taken painkillers; he was very tired. At about 1.30 am, about March or April 2008, he received a text from M "wanting to be picked up from where she'd been". He later said he was not quite sure of the month, but "sometime around there", and earlier than the middle of the year because that is when his daughter had come over from Perth.

[50] He described the contact this way:[3]

> "But you said you got some telephone calls and texts from her. Can you recall what was your first communication from [M] on this night?---It was mainly text calls because when she'd ring she wouldn't – instead of using credit she just sort of ring me, and it'd ring around three or four times and then I'd either ring her back or text her and - - -
>
> All right. So on this night?---Yes."

[51] He then qualified that to say the first contact that night was by a phone call, when she asked to be picked up, and that was followed by some texts from him because he had run out of credit. In the first calls M gave him "an approximate estimation" of where she was, saying Griffith Street, and he asked where that was. M texted back a few times saying please come and pick me up. He then said there were a couple of phone calls where he and M first spoke. In the first one she said that she was babysitting with P, who was asleep. M did not say anything about her younger sister being there. The calls were not long.

[52] S said he told M that he had "had about three or four drinks and I would've been over the limit and I couldn't drive, and plus I was very tired". His evidence was that he did not want to be caught drink driving, which is why he said that.

[53] The next communication was from M saying: "… please, please, come and get me. He won't let me leave. Pick me up, please". He responded saying that he would "try and get some sleep and I'll come and pick you up as soon as I can, if you still need to be picked up". He said in cross-examination that he thought she could be in trouble, but teenagers were "always talking [like] that", and because Mr Wells was a good friend of M's father he "thought she was safe there, not being allowed to leave in the middle hours of the morning".

[54] Later in the morning he heard his phone still beeping and there were "at least a dozen or so" text messages saying to come and pick her up, then a couple saying "my phone's going flat". He tried to ring her but her phone was not available. He got the last of the text messages at "4.30 or 5 or so in the morning, because it was for a few hours". The next he heard from M was when she called him from a phone box, about 7.30 or 8.00 am asking to be picked up. That was a reverse charge 1800Dad call that went to his mobile phone, so they did not speak for long.

[55] M said where she was: "She was at the phone box on the corner of Farm Street and Alexandra, extended. There's a little snack food shop, there, with a phone box out

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[3] AB 64.

the front of it". S drove over and picked her up at the phone box. M looked tired and "was probably a bit upset", and withdrawn. M asked to go back to his place as she needed to have a shower. He asked where P was but M "didn't really say anything about it", and he did not ask any further. M did not say anything about her sister. He said "she hardly spoke at all", whereas she was normally bubbly and talkative.

[56] They went back to S's house, and while she was having a shower he fell asleep again. When he woke up it was about 11.00 to 11.30 am. M was still in his house. She was withdrawn and did not want to talk much. M did not say that day that she had been raped. He could not recall how M got home, but neither Mr Wells nor his partner came round to pick M up.

Evidence of Z

[57] At the time of the trial Z was M's boyfriend. The relationship started towards the end of 2008. His evidence was as to her complaint of being raped.

[58] He said that several months into their relationship M became angry when, during looking at the funeral book from her father's funeral, she saw Mr Wells' name. She swore, calling Mr Wells a "fucking cunt" and a "dickhead", saying he "shouldn't be in there", and making hand gestures towards his name in the book.[4]

[59] When he tried to find out what happened M said to "just leave it" and walked away angry and upset. He said she would "change her nature and personality".[5] He pressed the issue and M said she felt disgusting about what happened. Eventually she said that "he'd throw her down and … she got raped by him", and "pushed her down and raped".[6]

[60] In chief his evidence was that:[7]

> "All right. Did she give you any other details about this incident on that day?---I asked her what had happened, and she said that he threw her down. She – he called her out for a cigarette, offered her a cigarette, and she went with him on – outside into the – to on the trampoline, and that's when all of a sudden she had been thrown back and, yeah, she said she felt thrown back and that's when he did it. She – that's when he raped her."

[61] That conversation was several months after the incident with the funeral book. When M told him that, she was really negative, upset, angry and crying.[8]

Other evidence

[62] The remaining witness was a police constable. On 26 October 2009 she was called to a disturbance. She found M walking into the bushland. M said "can you help me". She was crying and very upset. She said that "something bad had happened to her and she wanted to get it sorted out". When asked for details, M said she had been raped about a year and a half earlier.[9] That led to M speaking to other police officers.

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4 AB 80-81, 87-88.
5 AB 82-83.
6 AB 82-83, 85, 90-91.
7 AB 85. See also AB 90-91.
8 AB 85-86.
9 AB 93, 95-96.

Cross-examination based on instructions

[63] There were a number of times during the cross-examination of M that questions were asked and counsel emphasised that they were his instructions. This was explained to M at AB 185 in these terms: "this is one of the parts where I'm putting something to you, I'm putting my instructions to you, what I'm being told, and if you don't agree you tell me." In every case M disagreed. Those matters were:

(a) no cannabis was ever offered to M by anyone;[10]

(b) P was not offered, nor did she use, cannabis;[11]

(c) Mr Wells and his partner did not have any argument that night;[12]

(d) Mr Wells and M did not go down to the trampoline at any time that night;[13]

(e) there was no rape;[14]

(f) M's younger sister stayed over at Mr Wells' house that night;[15]

(g) M slept there that night, in a room near where P was sleeping; P woke her up the next morning;[16] and

(h) M remained there till around lunchtime; they were all playing on the trail bike or quad bike; around lunchtime they were driven home.[17]

Unsafe, unsatisfactory or unreasonable verdict

[64] Where the ground of appeal is that the verdict was unsafe and unsatisfactory, the question for this Court is that which has been expressed in *M v The Queen*:[18]

> "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. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."[19]

[65] This consideration has to proceed at all times on the basis that 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. In considering that question the court is performing a function "within a legal system

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10 AB 185. This was also denied by P; AB 256-257, 263.
11 AB 185. This was also denied by P; AB 256-257, 263.
12 AB 187.
13 AB 203.
14 AB 203.
15 AB 203. P gave evidence that this was so.
16 AB 203. P gave evidence that this was so.
17 AB 203. P gave evidence that this was so.
18 *M v The Queen* (1994) 181 CLR 487 at 493.
19 Internal citations omitted.

that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials".[20]

[66] Counsel for Mr Wells submitted that there were a number of serious inconsistencies in M's evidence such that a jury should have had a reasonable doubt as to guilt. They included:

(1) M said that her sister was not there that night, whereas P and M's mother said she was;

(2) M said she called S who picked her up straight away, whereas: (i) S said he did not do so, but told her to wait, and picked her up from a different spot in the morning; (ii) P said that M was still at Mr Wells' house, asleep, in the morning; and (iii) M's mother said they were both dropped back in the morning;

(3) M said that Mr Wells offered P marijuana, whereas P denied that, saying that it was offered to her by M while Mr Wells was out;

(4) M said she told S about what happened the next morning, whereas he denied that;

(5) M denied sending numerous texts to S that night, whereas his evidence was that she texted up to a dozen times;

(6) M said there were at least two other men at the house, whereas P said there was definitely only one;

(7) M said that when she told her mother about the rape S was present, whereas he denied that; and

(8) M said there was an argument between Mr Wells and his partner whereas P said that she didn't hear any.

[67] Because of the delay in the complaint there was no medical evidence to call in support of the evidence of M. Further, there was no evidence of telephone records, which might have assisted the jury, particularly as S gave evidence that there were numerous texts between himself and M on the night in question. However, no evidence was given about whether the texts had been deleted, or that the telephones had been examined to see if any data was retrievable.

[68] P's evidence of what M told her about the events, namely that she was pinned down on the trampoline without using the word "raped", does not take the matter very far. On P's evidence M was upset and reluctant to speak, and P pressed her for more details. As such it is not difficult to understand that M, giving an account of a painful, frightening and embarrassing event, which she was reluctant to reveal, might have only given part of the full explanation. It does not seem to me to amount to a significant inconsistency at all.

[69] In my view the most significant inconsistency comes from the difference in evidence as to whether M left the house that night or early morning, as both M and S said, or whether she stayed at the house with P and they were both taken home by someone other than S.

[70] On that issue, putting M's account to one side for the moment, P's evidence and that of S were largely irreconcilable. According to P, M was still there at the house, asleep

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[20] *MFA v The Queen* (2002) 213 CLR 606, at 623-624; see also *SKA v The Queen* (2011) 243 CLR 400.

until P woke her, and she remained in M's company until they were taken home together, by Mr Wells or his partner but certainly not by S. According to S, early in the morning he picked up M only, from a spot near a phone booth, and took her back to his house, then dropped her off at her own house around lunchtime.

[71] It was, in my view, open to the jury to reject P's account of the events in the morning, but still accept her corroboration of events during the evening. For example, P supported M in relation to: the fact that this was the one time P and M stayed at that house together, the use of alcohol by Mr Wells, the smoking of marijuana, the presence of a friend of Mr Wells, and P going to bed ahead of M.

[72] True it is that there were areas where P and M differed, but the jury could take the view that the recollection of each of them might have been adversely affected by the alcohol and marijuana smoking. P gave evidence of the disorientating effect the alcohol and marijuana had on her, feeling "very like not with it", to the point where she could not even read a text message on a phone. The fact that P did not hear any argument between Mr Wells and his partner could hardly be elevated into evidence that conflicted with M, when it may be explained by the fact that she went to bed before the others (except the children), affected by alcohol and marijuana.

[73] Thus it was, in my view, open to the jury to accept that M did, in fact, leave that night or early morning, with S.

[74] Taking that approach, it was open to the jury to have accepted S's evidence on other matters that corroborated M's evidence. For example, S said: M did contact him during the night, seeking to be picked up; M said she and P were babysitting at Mr Wells' house; M said that there had been an argument between Mr Wells and his partner; they went to S's home where M had a shower; S then took her home, by herself.

[75] However, there were features about S's evidence which might have led the jury to reject parts of it, while still accepting others. S said he had a poor memory about some details; on the night in question he had taken painkillers and drank a number of beers, which made him very tired; there was no record of the texts he said he sent and received; and his explanation for not going to assist M, who he regarded as being in a father/daughter relationship with him, when he thought she was in trouble, may have been seen as insufficiently persuasive.

[76] Counsel for Mr Wells placed emphasis on the difference between the evidence of S and that of M, as to how and when S picked her up. S said it was early in the morning, and from a shop near the phone booth she called him from. M said that she called from the house, then was picked up straight away at the end of the driveway, and it was still dark. In my view it was open to the jury to accept S on that aspect, but still accept M as to the circumstances of the offence.[21] S was a person to whom M went for assistance when she was unhappy or had difficulties with her mother, and she often stayed with him. S said that M had called or texted him before at night, to be picked up. It may well be that M had confused the occasions of contacting S and being picked up.

[77] Further, the jury may well have considered the evidence from M's mother to be not so compelling that it would lead to a rejection of M's evidence. For example; the

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[21] Counsel for Mr Wells conceded that this was possible: Appeal transcript T 1-7, lines 37-39.

mother was not definite that the younger sister went with M; her memory was avowedly poor because of the lapse of time; on her account it was not S who brought M home; she could not recall if P was with M when she arrived home.

[78] Moreover, there were parts of the mother's evidence that supported M's account, such as the fact that M called during the night seeking to be picked up and she told M to contact S in that regard, M said there were people drinking at the Wells' house, and the account given by M to her about what happened. That account was also consistent with what M told Z.

[79] Examination of M's evidence reveals that there was a consistent core, notwithstanding other inconsistencies, that could have been accepted by the jury. Thus, M consistently said: M and P were babysitting at Mr Wells' house; it was the only time that M and P were at that house; there was an argument between Mr Wells and his partner; P went to bed before the offence; she went downstairs with Mr Wells; Mr Wells smoked a cigarette while they were talking; the offence took place on the trampoline; he placed his hand over her mouth; she did not know if he ejaculated; she called S; S picked her up; they went to S's house, where she had a shower; later S took her home.

[80] If the jury accepted the account of S and M's mother, M was trying to leave the house in the early hours of the morning, which was consistent with an event causing M to be upset. The nature of the contact, and what M said, led S to think that M might be in trouble. When he picked her up she was upset and withdrawn, contrary to her normal nature.

[81] In my view it was open to the jury to accept M as a reliable witness as to the events that constituted the offence, and the jury could be satisfied, beyond reasonable doubt, that Mr Wells was guilty. Accordingly this ground of appeal fails.

Failure to direct the jury that they had to be satisfied that the rape occurred on the night that M and P stayed at Mr Wells' house.

[82] At the trial counsel for Mr Wells sought a specific direction that the jury had to be satisfied that the rape occurred on the night that both M and P stayed at Mr Wells' house.[22] The learned trial judge declined to do so, saying it was purely a matter for the jury.

[83] The learned trial judge gave this direction during his summing up:[23]

> "The critical issue here is are you satisfied beyond reasonable doubt as to the truth and accuracy of [M's] evidence? Now, members of the jury, in addition you cannot convict of this offence unless you are satisfied that it occurred in the timeframe alleged by the Prosecution."

[84] The contention here is that there was a risk that the jury may have thought that M had confused the occasion when she was raped, and may have thought she was raped on another occasion when she sent numerous texts to S, that is, a night when P was not present.

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22 AB 122 line 30.
23 AB 119.

[85] It was urged that it is possible that all, or some, members of the jury may have been satisfied that beyond reasonable doubt that M was raped, but not on the night that M and P were at the house. Reliance was placed on *S v The Queen*,[24] where Dawson J referred to the need for unanimity as to the occasion when the offence occurred.

[86] There are three reasons why this contention cannot be accepted.

[87] First, it depends on the prospect that some or all of the jury may have reached the conclusion that M confused the occasion of the rape, ascribing it wrongly to the time when P was there, when it was another occasion when she stayed at Mr Wells' house. There was, in my view, no realistic chance of that happening. No other possible occasion was raised in evidence. M and P said this was the only time they were together at the house. S said that he got a call from M and she said that P was there and they were babysitting. M's mother said she received a call on the night that M and P were babysitting at the Wells' house.

[88] Counsel for Mr Wells suggested that the mother's evidence raised the probability of other times when M stayed at the Wells' house. But the evidence did not go that far. The mother said M and her younger sister would stay over at Mr Wells' house: "They'd stay over, like, with more during the day they'd hang out, and they mainly stayed that night just to help out babysitting". It was put that that night was not the only night M stayed there, and the mother responded: "No, it probably isn't. I just can't remember exactly any other time", and "They could have done. I just can't recall exactly".[25] That does not establish that there were other possible times.

[89] Secondly, it was not suggested to M that she may have confused the occasion to which she was referring. She was asked whether, on earlier occasions that she had gone to Mr Wells' house, she had stayed over, and M agreed.[26] Then it was put that she had "never had any problems with this man before", and M agreed.[27] However, that was not explored further.

[90] That no other possible occasion was being suggested was, in my view, made plain by this exchange in cross-examination, shortly following the answers in the previous paragraph above:[28]

> "I put it to you that you and Brian Wells did not go down by the side of his house near a trampoline at any time during the night that you're speaking about?-- Yes, we did.
>
> Okay. And when I say the night that we're speaking about, I'm not identifying a specific date, but I'm identifying the night that you and your friend, [P], were staying over there; okay?-- Yes.
>
> Right. Because it's clear in your mind, isn't it, that the night that you were raped is the night that [P] was there with you?-- Yes.
>
> You can't be mistaken about that?-- No."

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24 *S v The Queen* (1989) 168 CLR 266 at 276. Reliance was also placed on *WGC v The Queen* (2007) 233 CLR 66 (***WGC***) at 109 per Crennan J; *R v Frederick* [2004] SASC 404 (***Frederick***) at [26], [30]; *R v Hobson* [2013] 2 Cr App R 27; [2013] EWCA Crim 819 (***Hobson***).

25 AB 55.

26 AB 201.

27 AB 202.

28 AB 203.

[91] Thirdly, in my view *S v The Queen* does not support the contention advanced. It was a case where three counts of incest were alleged. The counts referred to three different twelve-month periods, in each of which one distinct act of incest was alleged to have occurred. Particulars of each of the three counts, on the basis that the problem which was likely to emerge, was that if the evidence called by the prosecution revealed more than one offence during each of the three years in question it would not be possible to say which of the offences was the one alleged. Subsequently the evidence disclosed a number of incest offences during each of the three periods, any one of which fell within the description of the count concerned. This gave rise to a latent ambiguity in each count.

[92] Dawson J dealt with the question of latent ambiguity in each of the counts and said:[29]

> "Not only was the applicant embarrassed in putting his defence, but as the prosecution was not put to its election, the trial proceeded in a manner which made it impossible to deal with questions of the admissibility of similar fact evidence: see *Johnson v. Miller*; *Parker v. Sutherland*. True it is that evidence of acts of intercourse other than those charged may have been admissible as similar facts of sufficient probative force to warrant their admission in evidence. I attempted to explain in *Harriman v. The Queen* that when such evidence is admitted in a case of this kind its relevance is said to lie in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance as to justify its admission. Cf. *R. v. Ball*. Obviously that high degree of relevance can only occur where the evidence of propensity is related to a specific offence upon an identified occasion. If no occasion is identified, the necessary relationship cannot exist. **In this case, where there was a failure to identify the occasions upon which the offences charged took place, the whole of the evidence was, in effect, evidence of propensity which could not be related to the offences charged because of the lack of identification of those offences. In other words, the prosecution case sought to go no further than to establish that an incestuous relationship existed between the applicant and his daughter - which is to do no more than establish a particular kind of propensity - and to assert the guilt of the applicant upon three unspecified occasions during the existence of, and upon the basis of, that relationship. Far from establishing the necessary high degree of relevance, to proceed in this way was to obtain the conviction of the applicant upon evidence of propensity unrelated to a specific offence upon an identified occasion. Such a course was clearly objectionable**.
>
> The case having proceeded as it did, it is theoretically possible that individual jurors identified different occasions as constituting the relevant offences so that there was no unanimity in relation to their verdict. That, of course, would be unacceptable, but it is more likely that the jury reached their verdict without identifying any particular

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[29] *S v The Queen*, at 275-276. Emphasis added. Internal footnotes omitted.

> occasions. Indeed, that is virtually inevitable because no means were afforded the jury whereby they could identify specific occasions. As I have indicated, such a result is tantamount to their having convicted the applicant, not in relation to identifiable offences, but only upon the basis of a general disposition on his part to commit offences of the kind charged."

[93] The highlighted part of that passage gives the true context for the last paragraph. That case is a far cry from the present case. In the present case there was only ever one count alleging one act on one specific occasion, which, although not identified by a specific date, was identified as being the one time that M and P stayed at Mr Wells' house. Further, there was only ever one alleged act of rape, namely rape on the trampoline.

[94] Just as *S v The Queen* was a case of multiple acts, so too were *Frederick* and *Hobson*. They are distinguishable from this case for that reason.

[95] In my view the jury are not likely to have reasoned as contended by Mr Wells. They had to be satisfied as to whether an offence of rape was committed on a specific occasion (the only night that M and P stayed at the house), and in a specific way (on the trampoline). To get to the point suggested by this ground the jury would have to have thought that there might be another night where M was raped **on the trampoline**.

[96] I do not consider that *WGC* is of assistance. It was a case where differing and conflicting evidence was led as to the same sexual incident. Here the evidence about the incident was consistent, it was the evidence about surrounding matters that was differing and conflicting.

[97] This ground fails.

Conclusion

[98] For the reasons expressed above I would dismiss the appeal.

[99] **DALTON J:** The facts of this matter and the evidence relied upon by the appellant are set out in the judgment of Morrison JA. There are three grounds of appeal. The first is:

> "That the learned trial judge erred in not directing the jury that, should the jury find, on the facts, that the complainant and the witnesses [S] and [G] were giving evidence about a night other than the night [P] stayed at the Defendant's house, the jury could not convict."

[100] Actually the direction sought by counsel who ran the trial was:

> "But, in this particular case, I'd submit, given that the Crown case is based on it occurring on a particular night, and that being the night that she slept over with her best friend – well, sorry, with her friend, [P] I'd submit that your Honour should just go that step further and say that they also need to be satisfied that it occurred on the night that they both slept over."

[101] The judge below did instruct the jury that they had to be satisfied that the rape happened in the timeframe alleged by the prosecution. He also directed them that the critical issue was whether they were satisfied beyond reasonable doubt as to the truth and accuracy of the complainant's evidence.

[102] In my view the learned primary judge was correct to refuse the direction sought. Nor was there any necessity for the direction proposed in the notice of appeal. The Crown case was confined to one occasion. It was an occasion on which the complainant, her mother (G), and her friend P, all said that she and P went to stay the night at the defendant's house. P's evidence was that she had never stayed at that house on any other occasion, and there was no evidence that she had. Indeed there was no evidence that the complainant had stayed at the defendant's house on any other occasion. Her mother allowed for the possibility that she had, but could not bring any such occasion to mind. The Crown case was that there was one occasion when the offence was committed. All the witnesses gave evidence about that night. It is true that there are discrepancies between the accounts of different witnesses, but none of the accounts were to the effect that the rape might have happened on another occasion – they were all discrepancies about what happened on that occasion.

[103] This case is quite different from the case relied upon by the appellant, *S v The Queen*.[30] There the evidence was that there had been many acts of intercourse between a father and daughter occurring frequently over many years. The complainant could not recall the details of each individual act. The indictment alleged several counts of intercourse which were indistinguishable from one another, except by date. The appeal point was that the trial was allowed to go ahead without the Crown being required to particularise each individual occasion. On the facts in *S*, the High Court found:

> "… a latent ambiguity which was not removed by particulars, nor by an election by the prosecution to proceed on a particular act falling within the period specified in the count … To allow the trial to proceed without confining each count to a single act of intercourse was an error of law …" – per Brennan J, p 269.

Gaudron and McHugh JJ thought that the latency infringed the basic rule of fairness that the accused should know what case he had to meet – p 285.

[104] This case contrasts. The Crown case was confined to one occasion and the accused man knew well what it was. The discrepancies in various witnesses' accounts did not produce any ambiguity as to the occasion relied upon by the Crown.

[105] Nor is this case like *R v Wilson*.[31] In that case the indictment alleged that the rape had taken place somewhere between 1 July 2009 and 6 February 2011. The complainant in that case was very young. She gave a version of events which involved her travelling from the country town in which she lived, to Toowoomba for a shopping trip. Further, the complainant said her mother was pregnant at the time of the shopping trip. The offence was said to have occurred on the day of this shopping trip.

[106] There was a body of reliable evidence from several sources, and documented by reference to shopping transactions in bank statements, that put the likely date of this shopping

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30 (1989) 168 CLR 266.
31 [2014] QCA 350.

trip as 20 January 2010. There was evidence from the director of a child care centre in the complainant's home town that she had been left at the child care centre on that day. There was evidence from a friend of the complainant's mother that she shopped with the complainant's mother on 20 January 2010 in Toowoomba and that the complainant was not present. On appeal it was said that that evidence must properly have raised a reasonable doubt as to the appellant's guilt – [35].

[107] No doubt because of the strength of the evidence about 20 January 2010, there was some discussion between the trial judge and counsel at the end of the defence case as to when the Crown said the offence was committed. The prosecutor said it was the Crown case that the offence occurred when the complainant's mother went on a shopping trip with her friend to Toowoomba and that the shopping trip had taken place before the date of the complainant's younger sister's birth. That meant that the Crown case was limited to a shopping trip before 15 January 2010 because that was the date of the birth. The prosecutor then addressed the jury on the basis that the shopping trip must have taken place before 15 January 2010 and was therefore not the shopping trip on 20 January. However, the prosecutor had not suggested to the mother's friend that she was mistaken about shopping with the complainant's mother on 20 January 2010 nor had it been put to her that there was an earlier shopping trip. It had not been suggested that any aspect of the friend's evidence was incorrect.

[108] There was no point about what direction the jury ought to have received in the case of *Wilson*. The successful appeal point was simply that the verdict was unreasonable on the basis of the body of evidence which made it likely that the only relevant shopping trip was on 20 January. The case does not assist the appellant here.

[109] The remaining two grounds of appeal are that the verdict was unsafe, unsatisfactory and unreasonable, or was against the weight of the evidence.[32]

[110] There were significant differences between the evidence of the complainant and the evidence of other witnesses called by the Crown as to the circumstances of the complainant's leaving the defendant's premises after the rape, and as to complaints which the complainant says she made of rape.

- The complainant said that she and her friend P went to stay with the defendant overnight. Both the complainant's mother and P gave evidence to this effect.
- Both the complainant's mother and P said that the complainant's younger sister accompanied the two older girls and also stayed the night at the defendant's house. The complainant denied this.
- The complainant said that she was collected by a friend, S, during the night or early morning, after the rape, at her request. She said that S took her to his house; she had a shower there; slept at his house until around lunch-time the next day, and then told him that she had been raped. She said she did not see her friend P on the day following the rape.
- The complainant's mother said that during the night the complainant rang her and asked if she would come and get her. She expressed various unhappinesses (but not a complaint of rape). The complainant's mother said she had no car and advised her daughter to ring S.

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[32] The ground of appeal that the "verdicts [sic] are inconsistent" was abandoned in the appellant's written outline.

- S said that the complainant contacted him several times by telephone or by text message on the night or early morning when she was staying at the defendant's house, asking for him to come and get her. She was upset, but he did not feel able to respond to her requests. His reasons for not driving out to get her immediately were that he felt sleepy and intoxicated by both alcohol and painkillers, which he said made him unfit to drive. S said that the complainant rang from a public phone booth the next morning, about 8 o'clock or so, and asked him to come and collect her from a location nearby the defendant's premises. He said he did that. S could not remember how the complainant got home after this. He said that she never complained to him that the defendant had raped her.
- P said that she woke up in the morning at the defendant's house and went into a separate bedroom where she woke the complainant. She said that they stayed at the defendant's house for some time watching his children ride a quad bike and that then the defendant's wife drove them to the complainant's home.
- P said that a few months after they spent the night at the defendant's house the defendant told her that she (the complainant) had been pinned down on a trampoline. She said that at the time of that conversation she did not understand the import of what the complainant was saying to her.
- The complainant's mother said that the defendant's wife dropped her children home on the morning after they stayed at the defendant's house; she could not remember if P was with them.
- The complainant said she told her mother of the rape at a time when S was present.
- The complainant's mother said she told her of the rape about 12 months later; she did not say S was present.

[111] At the time of the rape the complainant was 13 or 14 years old. There was certainly some delay before she gave any version of events to the police. Thus by the time she did, she was recounting traumatic events which had happened some time ago. Further, while she had reason to particularly remember those traumatic events, others, such as her mother, P and S, did not have the same reason to particularly remember the events as significant at the time.

[112] In addition, S was sleepy and affected by drugs and alcohol during the events about which he gave evidence. Further, the versions of S and the complainant as to her contact with him and his eventually coming to get her span a period during late night/early morning, which is a further factor likely to make their versions seem more disparate than they were.

[113] As to the complaints the complainant said she made to S and in his presence, consideration would have to be given to the possibility of a misunderstanding between them, based on the likelihood that the complainant said something imprecise by way of complaint. The complaints which she made both to her mother and to her friend P left much to be inferred by them. They were not explicit or precise, and on both occasions the complainant seemed upset. P expressly said she did not understand the import of what the complainant was saying to her. Her mother did understand, but only after she undertook questioning of her as to what she meant. It was a matter for the jury whether or not they considered that miscommunication might have happened between the complainant and S in these circumstances. When asked for details about the

complaint she made to S at lunch-time after the rape, she said that she "told him where it happened and how it happened". In her evidence, P said that all she took from the complaint the complainant made to her was that the complainant had been pinned down on a trampoline. She did not understand what the complainant meant by that. When the complainant told her mother of the rape, she started to cry and her mother said, "… I had to keep, sort of, asking her. And, you know, and what happened, and she's like, just said he pushed her back on the trampoline, and I said did he go all the way, and she said yes." It is possible that being pinned down on the trampoline is all she told S – it is consistent with the general description of telling him where it happened and how it happened. It is consistent with what she told P and her mother.

[114] The complainant's evidence was consistent across various versions – her police interview; the pre-recording of evidence, and her cross-examination. Criticisms were made of it by the appellant. In effect, they were criticisms that it was inherently unlikely in various respects. Whether or not the evidence was likely or credible was a matter for the jury.

[115] Significantly there were not great contradictions between the complainant's version of the events leading up to the rape and the version of P as to that period of time. Further, while there were obvious differences between the versions of the complainant, her mother and S as to how and when she got home, the evidence of both her mother and S supported her version that she had become upset during the night she stayed at the defendant's house and that she turned to S to take her home. P's version of how she and the complainant came back from the defendant's house is inconsistent with the complainant's evidence. But, in this respect, it is also inconsistent with S's evidence. The jury was entitled to prefer the version given by both the complainant and S – ie., that he took her home at her request – to that given by P. P had drunk alcohol (rum) for the first time in her life the night she stayed at the defendant's house, and she gave evidence that she was unable to read a text message after having done so because she felt "out of it". The complainant said, but P denied, that P had also taken marijuana from a bong.

[116] In summing-up the trial judge remarked upon the fact that there was some imprecision as to when the rape had occurred, and that the statements made by the complainant and her friend P were made quite some time later, and that there were a number of discrepancies between the witnesses. The jury was warned that the inconsistencies between other witnesses and the complainant might cause them to have doubts about the complainant's credibility or reliability. The trial judge spoke to the jury about the fact that the complainant said she told S she had been raped about lunch-time the day after the rape, but that S denied this. The inconsistencies about whether the younger sister accompanied the two older girls to the defendant's house was raised with the jury. The difference between the complainant's version of contacting S after the rape, and his version of it, was highlighted to the jury, and extracts from the transcript were read to the jury by the trial judge about this. How the jury might deal with those inconsistencies was discussed by the trial judge for some time in the summing-up. Further, the discrepancies between the complainant's evidence and P's evidence as to how and when they left the defendant's house was explored by the trial judge with the jury at some length. He read parts of the transcript to them and pointed out various inconsistencies. Lastly, the differences between the complainant's evidence and the mother's evidence were pointed out to the jury by the trial judge.

[117] The well-known test from *M v The Queen*[33] is referred to by Morrison JA in his reasons. In this case, my view is that there was sufficient evidence before the jury that it could properly bring in a verdict of guilty on the whole of the evidence. Very much would depend upon the jury's assessment of the witnesses in this case. Looked at just from the point of view of logic, the major inconsistencies between the evidence of the complainant and the evidence of other witnesses were as to matters after the rape. Bearing in mind those matters which I have discussed at [111], [112] and [115] above, the jury might well have discounted versions of events given by P, S and the complainant's mother in favour of the complainant's evidence. In any event, the jury may have accepted the complainant's evidence about what transpired while she was at the defendant's house, including the circumstances of the rape, notwithstanding they had doubts about her version of some of the matters which followed.

[118] I agree with the order proposed by Morrison JA.

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[33] (1994) 181 CLR 487.