SUPREME COURT OF QUEENSLAND

CITATION:	*R v Knight* [2017] QCA 98
PARTIES:	**R** **v** **KNIGHT, Nathan Geoffrey** (appellant)
FILE NO/S:	CA No 176 of 2016 DC No 1150 of 2016 DC No 2125 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 8 June 2016
DELIVERED ON:	23 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2017
JUDGES:	Gotterson and McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The convictions on all counts of which the appellant was convicted on 8 June 2016 are set aside.** **3. The appellant is to be retried on all such counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted by a jury of five counts of indecently dealing with a child under 16 years of age – where, in the closing address at trial, the prosecutor remarked to the jury that there was no apparent motive for the complainant to make false allegations against the appellant – where the trial judge directed the jury that it was for the prosecution to prove that the complainant was telling the truth and that any failure or inability on the part of the appellant to prove a motive to lie did not mean the complainant was telling the truth – where the trial judge did not otherwise direct the jury that a motive may still exist, that the defendant may not know of it, and that there may be many reasons why a person makes a false complaint – where no further or other direction was sought by defence counsel at trial – whether the direction cured the prejudice to the appellant arising from the prosecutor's remarks – whether there was a

miscarriage of justice

Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, applied
R v Coss [2016] QCA 44, followed
R v Geary [2003] 1 Qd R 64; [2002] QCA 33, distinguished
R v Kostaras (2002) 133 A Crim R 399; [2002] SASC 326, cited
R v Muniz [2016] QCA 210, distinguished
R v Van Der Zyden [2012] 2 Qd R 568; [2012] QCA 89, followed

COUNSEL: B J Power for the appellant
J A Wooldridge for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA**: The appellant, Nathan Geoffrey Knight, was tried in the District Court at Brisbane on five counts of indecently dealing with a female child under 16 years of age. On 8 June 2016, and at the conclusion of the three day trial, the appellant was found guilty on all five counts.

[2] The counts each alleged that the appellant offended against s 210(1)(a) of the *Criminal Code* (Qld) on a date unknown between 31 December 2013 and 1 August 2014 at Underwood. The counts all concerned the same female child.

[3] On 9 June 2016, the appellant was sentenced on each of Counts 1, 2 and 3 to 12 months' imprisonment suspended after three months with an operational period of 18 months. The sentence for each of Counts 4 and 5 was six months' imprisonment suspended after three months for an operational period of 18 months. All sentences are to be served concurrently. One day of pre-sentence custody was declared to be time served under the sentence.

[4] The appellant filed a Form 26 notice of appeal in this Court on 30 June 2016[1] in which he appealed against the convictions and applied for leave to appeal against his sentence. On the day preceding the hearing of this appeal, the appellant filed a Form 30 notice of abandonment of his application. The appeal against the convictions was heard on 22 March 2017.

The circumstances of the alleged offending as opened by the prosecutor

[5] The appellant was 21 years old at the time of the alleged offending. Since the beginning of 2014, he had been living at Underwood with the family of the complainant who was then an 11 year old girl. Although he was not a blood relative of her immediate family, he was distantly related to them and was regarded by them as a cousin by extension.

[6] The appellant occupied the garage of the four bedroom house. A double bed was placed in the garage together with a table with drawers to accommodate his TV and Xbox.

[7] The appellant and the complainant began watching movies and TV together in the garage. According to the complainant's mother, initially the complainant would lie

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1 AB317-319.

at the end of the bed. After a while, she noticed that the appellant and the complainant would be under the doona, side by side. One night she went to the garage to tell the complainant to go to bed. She noticed that the door was locked. She knocked; the appellant opened the door; then he told her that he had locked it because they were watching a scary movie that he did not wish the other children to see. She told the appellant not to lock the door again while the complainant was in the garage and to keep it open.

[8] The five counts were based on the complainant's recorded account of conduct engaged in by the appellant in the garage when she and he were there together alone. The account was given at an interview with police on 14 March 2015 by which time the complainant was almost 13 years old. The recording was tendered pursuant to s 93A of the *Evidence Act* 1977 (Qld) when the complainant's testimony was pre-recorded on 8 April 2016.[2]

[9] The counts were not particularised in a formal document.[3] The prosecutor stated that he would particularise them in his opening address so that they would be "quite distinguishable".[4]

[10] In opening, the prosecutor described the events on which each count was based. He used characteristics of each to distinguish it from the others. Some only of the conduct which the complainant attributed to the appellant was linked to the counts. That is sufficiently illustrated by reference to the complainant's statement in her interview that the appellant would put his hands under her pants "every single night".[5]

[11] Count 1 was based on an incident which the complainant told the police happened about midnight on a night when she and the appellant had been watching two movies, one called "The Conjuring" and one of the Paranormal Activity titled movies. She said good night to the appellant. As she walked away, he grabbed her hand, then hugged her tightly. The more she moved, the tighter he would hug her. He moved her dressing gown back and slowly put his hand under her shirt and onto her stomach. He rubbed it. Then he held her breasts and stroked them. He moved his hand down under her underwear and stroked her vagina, skin on skin. He alternated between rubbing her on the breasts and on the vagina. That was uncomfortable for her. When she was nearly asleep, he put his hand down her pants and stroked her vagina again. Ultimately, she fell asleep. She awoke. The appellant was not holding her so she got up, went to the toilet and then went to bed. The prosecutor identified this count as involving "the two movies late at night, and touching her on the breasts and vagina".

[12] According to the complainant's statement, the Count 2 offending occurred shortly after the appellant asked her to download a new movie which she thought was called, "The Haunted House". She asked if she could watch it in a week's time. He insisted that they watch it that night. The appellant grabbed the complainant, put her on the bed and told her to watch the movie with him. He put the movie on, went to lie down and held her for about an hour. There was no indecent touching. The complainant fell asleep before the movie finished. She awoke shortly afterwards to

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2 Exhibit 4; A transcript of the recorded interview, marked "MFIA", is at AB273-295.
3 AB55 Tr1-4 ll46-47. The prosecutor explained that he had been briefed at very late notice.
4 AB56 Tr1-5 ll16-17.
5 AB276 l41.

find the appellant's hand down her shirt and holding her breast. She pulled away and he removed his hand. The prosecutor described this as "the new movie incident".

[13] Counts 3 and 4 were based on the complainant's account to police of events in the lounge room of the house about a month after the appellant had moved in. He had taken his mattress there one night because it was air conditioned. About 9 pm the complainant was lying at the bottom of the mattress watching a Paranormal Activity movie. The appellant told her to lie at the top of the mattress. She did and they adopted a spooning position with the complainant's back to the appellant's front. He held her tightly, put his hand under her shirt and held her breasts. He then slid his hand down under her pants and onto her vagina, brushing his hand backwards and forwards on it. The touching of the breasts and the vagina constituted Count 3. Count 4 concerned the appellant's subsequent conduct in climbing on top of the complainant and kissing her. The prosecutor identified the former as "in the lounge and touching her breasts and vagina" and the latter as "in the lounge and kissing".

[14] The Count 5 offending occurred in the garage. In her statement to police, the complainant said that several nights after the lounge room events, she and the appellant were on his bed watching a Paranormal Activity movie. They were lying on their sides with her back to his front. She was wearing track suit pants. He was hugging her. He pulled her buttocks towards him and pressed his erect penis, which was inside his pants, against her buttocks area. He asked her if she could feel it. She said that she could and the appellant laughed. The prosecutor's description for this count was "the bum incident".

The trial

[15] Other pre-recorded evidence tendered at trial was given by two school friends of the complainant who were interviewed by police in March 2015.[6] Oral testimony was given by the complainant's mother, grandmother, aunt and great aunt, as well as by the investigating police officer. The appellant did not give or call evidence.

[16] It is unnecessary for the determination of this appeal to refer to the detail of the evidence given by the witnesses. For present purposes, it is sufficient to note, as the learned trial judge observed in his summing up, that there were "obvious inconsistencies" and other possible inconsistencies between the complainant's statement to police and her pre-recorded testimony and inconsistencies between the account given to police and the pre-recorded testimony of one of the child preliminary complaint witnesses.[7]

Grounds of appeal

[17] At the hearing of the appeal, counsel for the appellant, who had not been defence counsel at trial, applied for, and was granted, leave to amend the grounds of appeal to the following:

1. A miscarriage of justice was occasioned by the learned Crown Prosecutor stating that the complainant had no motive to lie and the direction to the jury by the learned trial judge on this subject constituted an error of law.

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6 Exhibits 5, 6. Transcripts of the recorded interviews marked "MFIB" and "MFIC", are at AB249-257 and AB259-264 respectively.

7 AB190 l38 – AB191 l6.

2. A miscarriage of justice was occasioned by the deficiencies in the particularisation of each of the counts in the indictment that resulted in latent ambiguity and duplicity.

[18] It is convenient to discuss each of these grounds separately.

Ground 1

[19] The circumstances from which this ground of appeal arises are these. During the complainant's pre-recorded evidence and towards the end of her cross-examination, defence counsel put to the complainant that she had made up the allegations against the appellant and that she was not telling the truth.[8] The complainant rejected both propositions.[9]

[20] Defence counsel then put to the complainant that she had played a game of truth and dare with the two school friends who were called as preliminary complaint witnesses. Counsel suggested that one of the friends said that "something had happened" to her; that, initially, the complainant said that nothing like that had happened to herself; but that, later, she said that it had happened. The complainant's response was that she did not remember.[10] I mention at this point that counsel for the respondent referred to this cross-examination in oral argument as support for a written submission that the complainant had been cross-examined "as to a possible motive".[11] Counsel for the respondent accepted that, in this cross-examination, no specific motive for lying was put to the complainant.[12]

[21] The focus in submissions on the appeal to motive arose out of the following remarks made by the prosecutor to the jury early in his closing address:[13]

> "The other possibility, which is the suggestion put by the accused, through his counsel, is that the whole thing is false. You heard just this morning, right at the end of the cross-examination, suggest to [the complainant] that all of these – these allegations are untrue; they've all been made up.
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> Now, in assessing [the complainant], I'd ask you to ask to think could she have made all of this up? At the time of the offending, she was 11 going on 12. At the time that she reported the matter and was interviewed by the police, she was nearly 13. One year had passed. The defendant had moved away. **There was no apparent motive for it**. Now, there can be motives which are unknown to anyone but, certainly, **there was no apparent motive for her to have done so**." (emphasis supplied)

[22] Defence counsel did not object to these remarks. In her closing address, she mentioned the prosecutor's reference to the absence of apparent motive and acknowledged that that was true.[14] Defence counsel told the jury that they did not have to decide why the complainant had made her complaint.[15] She then ventured a range of possible

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8 AB35 Tr1-24 ll39-43.
9 Ibid.
10 AB36 Tr1-25 ll9-17.
11 Respondent's Outline of Submissions, para 2.19.
12 Appeal Transcript 1-23 l42 – 1-24 l9. See also Respondent's Outline of Submissions, para 2.2.
13 Closing Addresses Transcript ("CAT") 1-2 ll27-37.
14 CAT1-10 ll35-36 and again at CAT1-21 ll40-41.
15 CAT1-10 ll36-37.

reasons why the complainant may have made a false complaint[16] and later observed that even if there was no motive, "people do lie".[17]

[23] The learned trial judge instructed the jury as to the onus of proof. That the appellant did not give or call evidence did not, he explained, change the fact that the prosecution retained responsibility for proving the appellant's guilt beyond reasonable doubt.[18] His Honour then observed:[19]

> "In her address Ms Wardle [defence counsel] spoke about motive. The prosecutor said, well, there was no apparent motive for the complainant to lie. Ms Wardle said, well, that may well be so but she did suggest a possible motive. She said, well, the complainant might've had a crush on him. If you reject the motive to lie that has been advanced on behalf of the defence that does not mean that the complainant is telling the truth. Remember, it's for the prosecution to satisfy you that the complainant is telling the truth for it is the prosecution's burden to satisfy you beyond a reasonable doubt of the guilt of the defendant and the defendant never has any obligation to prove anything."

[24] The learned trial judge returned to the topic of motive in his summary of the respective cases put by the prosecutor and defence counsel. As to the former, his Honour said:[20]

> "He reminds you that when she made this complaint, the defendant was no longer living at the house. A year had passed since the events, or thereabouts, and there's no apparent motive for her to lie or falsify about it. He said such a detailed story is hardly something she would have made up just to impress her mates in some game.
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> He made submissions to you about the plausibility of her account. He said that there's detail there that a girl of her age couldn't have made up, you know, her saying this man said he like (sic) flat-chested girls, or the – the threat that she said was made of how he said, well, he would get blamed and so, too, would she."

Turning to the latter, his Honour observed:[21]

> "Her direct submission to you is, well, the complainant has made all of this up. She said to you the defence can't say why that is so and as I said to you, it's no obligation on the defence to prove anything, and they're certainly not obligated to prove a motive on the part of the complainant, but counsel pointed to the fact that there was some evidence the girl had been bullied at school, that at some stage, the defendant had another girlfriend, that – that this first arose out of a game that she was playing with her school friends and it's submitted there might be reasons there, including her attitude to him, which might have caused a false complaint to be made.

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16 Ibid l37 - CAT1-11 l6.
17 CAT1-21 ll41-46.
18 AB172 l30 – AB173 l4.
19 AB173 ll6-14.
20 AB190 ll23-31.
21 AB191 ll27-39.

> Of course, ladies and gentlemen, as I said to you before, you're not to speculate. What you must do is act upon the evidence or upon reasonable inferences arising from evidence you accept. So before you draw conclusions about this, you must ask yourself whether those conclusions are reasonable inferences arising."

[25] No further or other direction as to motive was sought by defence counsel.

[26] **Appellant's submissions:** The appellant submitted that it was not appropriate for the prosecutor to have told the jury that the complainant had no motive to lie. Such a submission operated, in effect, to reverse the onus of proof. What was required was a strong direction from the learned trial judge to disregard what the prosecutor had said followed by a direction adapted from the suggested directions in *R v Van Der Zyden*[22] which themselves underlie Bench Book Direction 45.[23]

[27] The latter direction, it was submitted, would have instructed the jury effectively to put motive out of their minds. It would have reminded them that there could be many possible reasons why a person might make a false complaint and that, in any particular case, where there was a motive that had actuated the making of a false complaint, the accused may not know of it. A direction in those terms would have countered the effective reversal of the onus of proof.

[28] Neither direction was given. Moreover, counsel submitted, the directions that were given when his Honour returned to the topic of motive, risked inviting the jury to draw conclusions about motive by a process of inference.

[29] The appellant acknowledged that given that defence counsel had not sought redirections in these terms, it was necessary to show on appeal that the failure to give the directions had occasioned a miscarriage of justice. In a case such as this, that required the appellant to demonstrate that it is reasonably possible that the failure to give the directions may have affected the verdict.[24] That was such a possibility here, it was submitted, given that, on account of the inconsistencies in the complaint evidence, the case was finely balanced. The prosecutor's remarks may have caused the jury to have accepted more readily the complainant's evidence as truthful notwithstanding the inconsistencies, than they would have had the prosecutor not stressed the absence of an apparent motive to lie.

[30] Further, it was submitted that the failure to seek such directions could not be attributed to a rational forensic decision on the part of defence counsel. The prosecutor's remarks had placed defence counsel in a difficult position. She had attempted to deal with it by suggesting possible motives in her address. Quite probably the option of seeking redirections was overlooked.

[31] **Respondent's submissions:** The respondent noted that nothing was said by defence counsel at the time to indicate that her references to possible motives were made only to counter what the prosecutor had said about motive and were not made as part of the defence case theory.[25]

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22 [2012] QCA 89; [2012] 2 Qd R 568 at [32].

23 Formerly Bench Book Direction 43B.

24 *Van Der Zyden* [2012] QCA 89; [2012] 2 Qd R 568 at [35] per Muir JA citing *Dhanhoa v The Queen* [2003] HCA 40; (2003) 217 CLR 1 at [38] and *Simic v The Queen* [1980] HCA 25; (1980) 144 CLR 319 at 332.

25 Respondent's Outline of Submissions, para 2.9.

[32] It was submitted that the prosecutor's remarks did not rhetorically pose a question inviting the jury to consider why the complainant would make up the allegations. They did not reverse the onus of proof by implying that the Crown case was strengthened by the inability of the defence to adduce evidence of a motive for the complainant to have lied.[26]

[33] Counsel for the respondent contended that a *Van Der Zyden*-type direction was not required in every case where the prosecutor touched upon the absence of a motive for a complainant to lie. Here, the prosecutor's remarks had not gone as far as the impugned statements by the prosecutor in *Van Der Zyden*; nor did they have the significance or focus of those of the prosecutor in *R v Coss*.[27]

[34] It was submitted that the directions given by the learned trial judge canvassed each of the matters that would have been covered in the direction proposed by the appellant other than specifically stating "if such a motive existed, the defendant may not know if it"; and "there may be many reasons why a person may make a false complaint". However, in this case, such specific directions were not necessary "to balance out" any impermissible reasoning arising from the prosecutor's remarks.[28]

[35] It was further submitted that there was no basis to conclude that the failure to give further directions as to motive to lie had deprived the appellant of a fair chance of acquittal or had resulted in there being a substantial risk that an innocent person had been wrongly convicted. There was, therefore, no miscarriage of justice.[29]

[36] **Discussion:** In *Palmer v The Queen*,[30] the plurality, Brennan CJ, Gaudron and Gummow JJ, affirmed the principle that a complainant's account gains no legitimate credibility from the absence of evidence of motive to lie. The rationale for the principle was explained by their Honours in the following terms:[31]

> "If credibility which the jury would otherwise attribute to the complainant's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent is diminished."

The correct view, their Honours said, is "that absence of proof of motive is entirely neutral".[32]

[37] In that case, the accused was tried for sexual offences against a child aged 14. He was asked in cross-examination whether he could suggest any reason why the complainant would invent allegations against him. He was unable to suggest such a reason. The plurality held that the questioning conflicted with the principle and was impermissible.[33]

[38] Their Honours doubted that the directions given by the trial judge to scrutinise the complainant's evidence with upmost care and to be satisfied beyond reasonable doubt that her evidence was reliable before convicting, were capable of neutralising

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26 Ibid para 2.16.
27 [2016] QCA 44. Ibid paras 2.17, 2.19.
28 Respondent's Outline of Submissions, para 2.20.
29 Ibid para 2.22.
30 [1998] HCA 2; (1998) 193 CLR 1 at [9].
31 Ibid. See also per Kirby J at [102].
32 Ibid.
33 Ibid at [8].

the prejudicial effect of the questions. They were of the view that the asking of the questions in the circumstances of the case may have occasioned a miscarriage of justice.[34] Kirby J was of a similar view.[35]

[39] In the recent decision of *Coss*, this Court referred approvingly[36] to the approach taken in the Full Court of South Australia in *R v Kostaras*[37] towards the ambit of application of the principle affirmed in *Palmer*. In that case, Doyle CJ with whom Wicks and Besanko JJ agreed, stated that the observations in *Palmer* as to cross-examination of the accused with respect to motive applied with equal force to the prosecutor's address to the jury. His Honour said:[38]

> "It is impermissible for prosecuting counsel to address the jury on a basis that implies that a failure by the accused, or an inability of the accused, to identify a motive for the complainant or a supporting witness to lie, in some way buttresses the credit of the complainant or of the witness or strengthens the prosecution case. Any such suggestion in the address has the same unjust and unsound tendencies as does cross-examination to that effect."

[40] In my view, the remarks of the prosecutor in his closing address in this case impermissibly transgressed the principle. They were made in a context of the jury's assessment of the complainant. The prosecutor referred to cross-examination of the complainant suggesting that her allegations were untrue. The rhetorical question was then asked by him whether she could have made it all up. At that point, the prosecutor referred twice to the absence of an apparent motive for the complainant to have done so. There can be no doubt that those words conveyed to the jury that the absence of evidence of an apparent motive was relevant to their assessment of the credibility of the complainant's evidence. To my mind, they also conveyed that the complainant's evidence was the more credible on account of the absence of evidence of an apparent motive to lie. Consistently with the principle affirmed in *Palmer* what those remarks conveyed was incorrect. They were prejudicial to the appellant and their prejudice was heightened by the fine balance in the Crown case.

[41] The issue that next arises for consideration is whether the directions given by the learned trial judge were sufficient to correct the misconceptions conveyed by the prosecutor's remarks and neutralise their potential prejudicial effect. Given that they were made in the context of an assessment of the complainant's credibility, I consider that it was necessary that the jury have been directed expressly that the absence of evidence of a motive to lie on the complainant's part was irrelevant to the assessment of her credibility. It was both appropriate and necessary to direct them that that was entirely neutral.

[42] No such direction was given by learned trial judge to the jury in this case. The directions given were insufficient on that account. They did not adequately counter the misconceptions conveyed by the prosecutor's remarks. I accept also the appellant's submission that his Honour's direction to the jury about drawing certain conclusions did invite them to give consideration to what inferences they might reasonably draw

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34 Ibid at [13].
35 Ibid at [105].
36 [2016] QCA 44 per McMurdo P at [18] (Gotterson and Morrison JJA agreeing). See also *R v Muniz* [2016] QCA 210 per McMurdo JA at [19] (Holmes CJ and Gotterson JA agreeing).
37 [2002] SASC 326; (2002) 133 A Crim R 399.
38 Ibid at [87].

about motive, rather than directing them to put motive to one side in assessing the complainant's credibility.

[43] A similar flaw was detected by this Court in the impugned direction of the trial judge in *Van Der Zyden*. Muir JA offered the following criticism of it:[39]

> "The direction given by the trial judge was insufficient to address the risk arising from the prosecutor's approach that the jury might conclude that the absence of any proven reason for a false complaint strengthens the suggestion that the complainants must be telling the truth or might reason that unless each complainant could be shown to have a motive to lie his evidence should be accepted."

[44] The present case is distinguishable both from *R v Geary*[40] and *R v Muniz*[41] to which reference was made in argument of the appeal. In the former, defence counsel in his closing address forcibly attributed a specific motive to lie to indemnified witnesses in the Crown case. As he put it, the indemnities were a powerful inducement to implicate individuals such as the accused. They were the witnesses' "get out of jail free cards". This Court rejected a contention on appeal that it was not open to the prosecutor to respond in his address by questioning why, when the witnesses had implicated others in the offending, would they have falsely implicated the accused. Williams JA, with whom de Jersey CJ and McPherson JA agreed, regarded *Palmer* as clearly distinguishable.[42]

[45] In *Muniz*, this Court held that a *Van Der Zyden*-type direction would have been "inapt and confusing".[43] That was because the evidence and the accused's argument had raised a particular motive for a co-offender witness in the Crown case to lie. It was not a situation of an absence of evidence as to an identified particular motive.

[46] For these reasons, I am of the view that the directions given by the learned trial judge did not neutralise the prejudice to the appellant arising from the prosecutor's remarks. I accept the appellant's submission that it is reasonably possible that the failure to direct the jury sufficiently may have affected the verdicts for the reasons set out in the preceding summary of the appellant's submissions. There was therefore a miscarriage of justice arising from the prosecutor's impermissible remarks and the insufficiency of the directions to neutralise their impact.

[47] It was not suggested by the respondent that if a miscarriage of justice was established, this was a case for application of the proviso in s 668E(1)A of the *Code*. It was appropriate, in the circumstances of this case, that no such submission was made.

[48] This ground of appeal has been established. The appeal must be allowed and the convictions set aside. There should be a retrial on all counts.

Ground 2

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39 [2012] QCA 89; [2012] 2 Qd R 568 at [33] (footnotes omitted).
40 [2002] QCA 33; [2003] 1 Qd R 64.
41 [2016] QCA 210.
42 [2002] QCA 33; [2003] 1 Qd R 64 at [25].
43 [2016] QCA 210 per McMurdo JA at [21] (Holmes CJ and Gotterson JA agreeing).

[49] Were this ground of appeal to succeed, it would also be appropriate to order a retrial on all counts. No different order would be warranted in that event. In view of that, it is unnecessary to decide this ground.

Orders

[50] I would propose the following orders:

1. The appeal is allowed.
2. The convictions on all counts of which the appellant was convicted on 8 June 2016 are set aside.
3. The appellant is to be retried on all such counts.

[51] **McMURDO JA:** I agree with Gotterson JA.

[52] **MULLINS J:** I agree with Gotterson JA.