SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collins* [2017] QCA 113
PARTIES:	**R** **v** **COLLINS, John** (appellant)
FILE NO/S:	CA No 314 of 2014 DC No 435 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 30 October 2016
DELIVERED ON:	2 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2016
JUDGES:	Gotterson and Morrison JJA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted by jury of one count of indecent assault, two counts of indecent assault with a circumstance of aggravation and one count of rape – where the complainant's mother was called as a witness at the appellant's committal hearing and later at his trial – where the account which the complainant's mother gave in evidence in chief at the trial regarding a telephone conversation with the complainant was different to the account which she gave on the same topic at the committal hearing –where the appellant contends that a miscarriage of justice occurred by reason of the way in which the trial judge directed the jury as to the use that could be made of the prior inconsistent statement – whether the trial judge misdirected the jury as to the use that could be made of the prior inconsistent statement – whether there was a miscarriage of justice in all of the circumstances CRIMINAL LAW – APPEAL AND NEW TRIAL – EVIDENCE – CREDIBILITY – PRIOR INCONSISTENT STATEMENTS – DIRECTIONS TO JURY – where the complainant's mother was called as a witness at the appellant's committal hearing and later at his trial – where the account which the complainant's mother gave in evidence in chief at

the trial regarding a telephone conversation with the complainant was different to the account which she gave on the same topic at the committal hearing – where the witness admitted the making of the prior inconsistent statement and the accuracy of the committal hearing transcript – whether the prior inconsistent statement was proved by virtue of either s 18 or s 19 of the *Evidence Act* 1977 (Qld) – whether the prior inconsistent statement was admissible as evidence of the facts stated therein – whether the prior inconsistent statement was available to the jury to assess the consistency of the complainant's preliminary complaint and, therefore, the complainant's credit – whether the trial judge misdirected the jury as to the use that could be made of the prior inconsistent statement

Criminal Code 1899 (Qld), s 668E(1A)
Evidence Act 1977 (Qld), s 18, s 19, s 101, s 102

Alchin v Commissioner for Railways (1935) 35 SR (NSW) 498; [1935] NSWStRp 23, cited
Birkett v AF Little Pty Ltd [1962] NSWR 492, cited
Bull v The Queen (2000) 201 CLR 443; [2000] HCA 24, followed
CB v Western Australia (2006) 175 A Crim R 304; [2006] WASCA 227, cited
Cotton v Commissioner for Road Transport and Tramways (1942) 43 SR (NSW) 66; [1942] NSWStRp 37, cited
Crowley v Page (1837) 7 Car & P 789 [173 ER 344]; [1837] EngR 574, cited
Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, cited
Driscoll v The Queen (1977) 137 CLR 517; [1977] HCA 43, cited
Jones v The Queen (1997) 191 CLR 439; [1997] HCA 56, cited
Kilby v The Queen (1973) 129 CLR 460; [1973] HCA 30, followed
Lee v the Queen (1998) 195 CLR 594; [1998] HCA 60, cited
Morgan v Kazandzis (2010) 206 A Crim R 235; [2010] WASC 377, cited
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
Nicholls v The Queen (2005) 219 CLR 196; [2005] HCA 1, cited
North Australian Territory Co v Goldsborough, Mort & Co [1893] 2 Ch 381, cited
Queen's Case (1820) 2 Brod & B 284 [129 ER 976]; [1820] EngR 563, cited
R v Anderson (1929) 21 Cr App Rep 178, cited
R v Baira [2009] QCA 332, cited
R v Baker [2014] QCA 5, cited
R v Billingham & Billingham [2009] 2 Cr App R 341; [2009] EWCA Crim 19, cited
R v Booth (1981) 74 Cr App Rep 123, cited
R v CBL and BCT [2014] 2 Qd R 331; [2014] QCA 93, cited
R v Chin (1985) 157 CLR 671; [1985] HCA 35, cited
R v Cox [1972] Qd R 366, cited

R v Drury [1984] CCA 095 (84/0009: Court of Criminal Appeal, Andrews SPJ, Macrossan and Williams JJ, 2 August 1984), cited
R v Foggo; Ex parte Attorney-General [1989] 2 Qd R 49, cited
R v Fox (No 2) [2000] 1 Qd R 640; [1999] QCA 140, cited
R v Franicevic [2010] QCA 36, cited
R v Ghion [1982] Qd R 781, cited
R v Hadlow [1992] 2 Qd R 440, cited
R v Hall [1986] 1 Qd R 462, cited
R v Hart (1957) 42 Cr App Rep 47, cited
R v Lawrie [1986] 2 Qd R 502, cited
R v Lillyman [1896] 2 QB 167, cited
R v Parkinson [1990] 1 Qd R 382, cited
R v Pearson [1964] Qd R 471, cited
R v Perera [1986] 2 Qd R 431, cited
R v RH [2005] 1 Qd R 180; [2004] QCA 225, cited
R v Roissetter [1984] 1 Qd R 477, cited
R v Sailor [1994] 2 Qd R 342; [1993] QCA 23, cited
R v Soma (2003) 212 CLR 299; [2003] HCA 13, followed
R v T, WA (2014) 118 SASR 382; [2014] SASCFC 3, cited
R v Thynne [1977] VR 98; [1977] VicRp 10, cited
R v Van Der Zyden [2012] 2 Qd R 568; [2012] QCA 89, cited
R v Walker (1993) 61 SASR 260, cited
R v Williams [2001] 2 Qd R 442; [2000] QCA 409, cited
R v Williams [2010] 1 Qd R 276; [2008] QCA 411, cited
Sainsbury v Allsopp (1899) 24 VLR 725; [1899] ArgusLawRp 29, followed
Savanoff v Re-Car Pty Ltd [1983] 2 Qd R 219, followed
Stateliner Pty Ltd v Legal & General Assurance Society Ltd (1981) 29 SASR 16, cited
Taylor v The King (1918) 25 CLR 573; [1918] HCA 68, cited

COUNSEL:	P Callaghan SC for the appellant G P Cash QC, with D Nardone, for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Burns J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have read the reasons of Burns J and agree with those reasons and the order his Honour proposes.

[3] **BURNS J:** The appellant was convicted after a trial of a number of sexual offences against a 19 year old woman, the most serious of which was rape.

[4] Some hours following the incident during which the offences were said to have been committed, the complainant telephoned her mother. In a brief conversation, she protested about what had taken place and was advised by her mother to go to the police.

[5] The complainant's mother was called as a witness at the appellant's committal hearing and later at his trial. On each occasion she was asked to give her account of this conversation and, in particular, to recall the words spoken by her daughter. However the account which she gave in evidence in chief at the trial was different to the account which she gave on the same topic at the committal hearing.

[6] The sole ground of appeal is that a "miscarriage of justice occurred by reason of the way in which the learned trial judge directed the jury as to the use that could be made" of the account which the complainant's mother gave at the committal hearing.[1]

[7] Before considering this ground in the context of the directions that were made, it is useful to provide an overview of the evidence. The appellant did not give or call evidence in his own defence and, as such, the evidence was confined to that which was adduced in the Crown case.

The evidence at trial

[8] The appellant faced an indictment alleging one count of indecent assault (**Count 1**), two counts of indecent assault with a circumstance of aggravation (**Counts 2 and 3**) and one count of rape (**Count 4**). The trial took place in the District Court at Brisbane over four days commencing on 27 October 2014. The jury retired to commence their deliberations shortly after 1.00 pm on the third day and, at about the same time on the fourth day, returned a guilty verdict with respect to each count. The sentence imposed with respect to Count 4 was imprisonment for nine years and four months coupled with a serious violent offence declaration. Lesser terms of imprisonment were imposed with respect to the other counts.[2]

[9] The offences were committed during a single episode on the evening of 11 January 2000 or in the early hours of the following day. The issue at trial was consent.[3]

[10] At the time, the appellant was aged 61 and living on a yacht moored at a marina in Southport. He had placed an advertisement in a newspaper for a nanny to accompany his partner, their child and him on a sailing trip to the Whitsundays. The complainant saw the advertisement and telephoned the appellant to register her interest. Arrangements were made for her to attend for an interview the following day. For this purpose the complainant travelled by train from Burpengary to Nerang and then by bus from Nerang to Surfers Paradise. She was accompanied by her friend, Alisha Johnson, as well as Ms Johnson's young son. After arriving at Surfers Paradise, they walked to Southport and met up with the appellant on his yacht. An interview of sorts took

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1 This ground of appeal first appeared in the Amended Notice of Appeal filed on 12 July 2016 and was said to be a "refashioned, particularised version" of two of the grounds that appeared in the original Notice of Appeal dated 1 December 2014: see Appellant's Outline of Argument filed on 15 June 2016 at par 4. The remaining grounds of appeal against conviction were struck through in the Amended Notice of Appeal.

2 The original Notice of Appeal included a ground to support an application for leave to appeal against sentence ("3. The sentence was manifestly excessive"), but it was not struck through in the Amended Notice of Appeal. This must have been an oversight because no submissions were advanced by either party, either in writing or orally, to support a challenge to the sentences that were imposed. If not, then it need only be said that no error of principle can be detected in those sentences and each accorded with a sound exercise of the sentencing discretion including, in the circumstances of this case, the making of a serious violent offence declaration.

3 The appellant formally admitted that the complainant and he had engaged in sexual intercourse, including penile penetration of the complainant's vagina, on the evening of 11 January 2000 or the morning of 12 January 2000: Exhibit 21 (AB 173).

place, following which the complainant, Ms Johnson and her son walked to Main Beach for a swim before returning to the yacht. The appellant then took them to a club at the marina for a further conversation over drinks before the complainant, Ms Johnson and her son caught a taxi to Nerang to board a train for the journey home.

[11] While they were still on the train, the complainant received a telephone call from the appellant. He asked her to return to the yacht to spend time with him in order to see whether "personality wise" they could live together at sea.[4] Although the complainant did not agree to do so at that time, she did return for that purpose about a week later, that is to say, on 11 January 2000.

[12] On that occasion, the complainant travelled alone. After arriving at the train station at Nerang, the complainant was collected by the appellant in his car. On the way to the marina, they stopped at a hotel and "had a couple of drinks",[5] after which they purchased a quantity of alcohol as well as some groceries. They then drove to the appellant's yacht. By the time they arrived, it was dark. They drank some more alcohol before leaving for dinner at a nearby restaurant. When they arrived at the restaurant it was fully booked so they returned to the yacht where the appellant cooked them a meal. They ate together, talked and, it appears, drank on into the evening.

[13] According to the complainant, by about 11.00 pm she was feeling a "bit drunk", a "bit tired" and "ready for bed".[6] She recalled that she "definitely knew [that she had] had enough to drink" and that it was "time to stop".[7] She asked the appellant whether she could shower and was directed to a bathroom adjoining his bedroom. After she had removed all of her clothes, the appellant entered the bathroom, took her by the arm and moved her into the bedroom. He pushed her onto the bed. He then announced that he wanted to shave the complainant's pubic hair and, using some electric clippers, proceeded to do so (**Count 1**).[8] The complainant recalled:

> "I told him I didn't want him to. … But he wouldn't listen to me. He forced me onto the bed, then he turned the clippers on and started shaving me, and when I'm telling him to stop he's telling me that if I move he would cut me, just to hold still, that he'd make me look good".[9]

[14] The complainant recalled when giving evidence that, after the appellant shaved her, she got up off the bed, walked into the bathroom and showered. She then dressed and returned to the area of the yacht where she and the appellant had eaten their meal. They had "a couple of drinks"[10] before the complainant told him that she would like to go to bed. With that, the appellant "grabbed" the complainant and "dragged" her to his bedroom.[11] She tried to stop the appellant, telling him that she did not want to go with him, but he persisted. When they reached the bedroom, the appellant removed the complainant's pants and pushed her onto his bed. He removed his trousers and, straddling the complainant, put his penis in her mouth (**Count 2**). The complainant said that she was trying "everything to stop" the appellant and that she was scared.[12]

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4 AB 21.
5 Ibid.
6 AB 23.
7 Ibid.
8 AB 23-24.
9 Ibid.
10 AB 34.
11 Ibid.
12 AB 36.

The appellant then pulled the complainant's legs apart and licked her vagina (**Count 3**). She continued to protest and tried to close her legs, but the appellant "kept pulling them apart".[13] He then penetrated her with his penis (**Count 4**). The complainant gave this account:

> "[The] next thing I remember was he was on top of me, and then he just was inside me. I couldn't breathe, and I kept squirming away, and he just kept pushing harder and harder. I kept saying stop. The more I squirmed, the more he just kept … [his penis] was in my vagina."[14]

[15] Afterwards, the appellant told the complainant to sleep at the other end of the yacht, so she gathered up her clothes and did as she had been told. When she awoke on 12 January 2000, the appellant was no longer aboard but there was a text message from him on her mobile telephone asking her to clean up the yacht. She did that and then went for a shower at the marina. Whilst there, she received a telephone call from Ms Johnson.[15] The complainant was asked when giving evidence to recall what she said:

> "I told her that [the appellant] raped me last night and that I'm scared and I don't know what I'm doing and I don't know where I am."[16]

[16] According to the complainant, Ms Johnson asked her to "help her organise to come down" to Southport,[17] so the complainant telephoned the appellant to ask him to collect Ms Johnson from the train station. After she arrived, Ms Johnson told the appellant that the complainant "needed to go home because [her] Nan needed [her] to come back and help her".[18] The pair eventually travelled back by train to Burpengary that afternoon and, from there, the complainant made her way home.

[17] After arriving home, the complainant telephoned her mother, whom I shall refer to as Ms M. The ensuing conversation is at the heart of this appeal. The complainant gave this account at the trial:

> "PROSECUTOR: Did you – you said you called your mum. As best as you can recall, could you tell us what you told your mum?---I said mum, he raped me.
>
> Do you recall if you gave her any more detail than that?---I'm pretty sure I told her I was silly and I shouldn't have gone down. Other than that – that's all I remember, I'm sorry."[19]

[18] The complainant was cross-examined by trial counsel for the appellant but, it is important to note, she was not challenged in any way about her account of the conversation with her mother.[20] Be that as it may, the approach of the appellant's trial counsel was to

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13 AB 37.

14 Ibid.

15 AB 38. Ms Johnson was also called to give evidence at the trial. She said that the complainant "sounded very upset" (AB 87) and "a bit disbelieving" (AB 88). Amongst other things, the complainant told her that the appellant "had raped her the previous night" (AB 88). When cross-examined, Ms Johnson confirmed that the complainant was "definitely upset. She cried when she admitted something had happened" (AB 98). She agreed that, so far as the rape was concerned, the complainant did not provide her with any details over the telephone. She did not agree that it was "possible that [the complainant] said 'I *think* I was raped'" when that proposition was put to her by trial counsel for the appellant (AB 99).

16 AB 38.

17 AB 38.

18 AB 39.

19 AB 41.

20 Unlike Ms Johnson, who was challenged; Ms Johnson did not agree that it was "possible that [the complainant] said 'I think I was raped'" (AB 99).

attack the complainant's credit and reliability. In the main, this was attempted by confronting the complainant with inconsistencies between her evidence in chief and the contents of her statement to police as well as the evidence she gave at the committal hearing in 2007. There were certainly a number of differences across the versions but, at the same time, they were largely with respect to matters of peripheral detail. The complainant otherwise appears to have given a relatively robust and unvarying account of the essential features of the conduct making up the offences in relation to which the appellant was convicted, and this was despite the passage of time between the relevant incident (2000) and when she gave evidence at the trial (2014).

[19] Ms M was called to give evidence at the trial. This is what she said about the telephone conversation with her daughter:

> "PROSECUTOR: After you were aware that she was having that interview, did you have any communication with her?---Not immediately. I was quite upset because I wanted to hear how she went.
>
> And what was the form of that communication?---She phoned me to tell me that she had been raped and that she was very upset and – yes.
>
> Okay. So you said that she phoned you - - - ?---Yes, she did.
>
> - - - and told you those things?--- Yes.
>
> Where were you at the time?---I was living – I was at home at [witness' address].
>
> Do you know – or did she let you know where she was at that time?--- I don't believe that came up in the conversation, I'm sorry.
>
> As – you've given us some detail as to what she told you?---Yes.
>
> Is that the extent of your recollection of that conversation?---Yes.
>
> After she told you those things, did you say anything to her?--- I advised her to go to the police, to which she said she wasn't going to. So I then – we – I think that was the extent of the conversation then."[21]

[20] Ms M was cross-examined. The questions and answers relevant to this appeal were these:

> "DEFENCE COUNSEL: [Ms M], I don't have too many questions for you. But, just to be clear, you spoke to [the complainant] when she first told you about this job?---Yes.
>
> And she was very excited about it?---Yes.
>
> And said she was going for an interview?---Yes.
>
> And it was the next day that you spoke to her?---Yes.
>
> So – all right. And you've indicated that you can't recall the exact terms of what she said?---Well, it was quite some time ago, as you can appreciate.
>
> Yes. Well, your memory was better back in 2007?---I would think so.
>
> And you gave evidence about what you recalled at that stage?---Yes.

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21 AB 102.

And I'd suggest you said, "I'm not even sure that the words were, 'I was raped'. I believe she said, 'I think I was raped', because she was – she was, "Mum, I think he's drugged me and I think he's raped me'. Do you recall you gave that evidence?---Well, if I gave it at that time, then that's how I would have remember [sic] it.

Well, it's just a legal process. Do you agree that that's the evidence you gave in 2007?---Well, if it's written there then it must be.

I can show you it if it's necessary. Page 448. I'll come to that.

…

If the witness could be handed those pages …

[Ms M], just looking at that first page, you'll see on the right-hand side of the page there's numbers 1, 10, 20, 30 and so forth down the page?---Yes.

If you could go to where about 45 would be, so that's just a little bit above 50, I'd suggest on a prior occasion in 2007 you said – gave evidence, "I'm not even sure that the words were, 'I was raped'. I believe she said, 'I think [sic] was raped', because she – she was – she said, 'Mum, I think he's drugged me and I think he's raped me.'" Do you agree you gave that evidence?---I'm just trying to find it because I've got two ---

It's the one with 448 down the bottom, it was at the top?---Yep.

The question starts with, "I appreciate that …", and then I was reading what I'm suggesting is your answer. Would you like me to mark it for you?---No, I've found it.

Do you agree you gave that evidence?---Well, it's written so I must have.

You accept that?---Yes.

All right. And I'd suggest you also gave evidence further – I don't need you to look at those yet – that she rang up, she was crying, she was hysterical and she said, "Mum, I think I've been raped. I had some wine and I felt funny and I don't remember every – anything after a certain time, and when I woke up'– I can't remember what she said after that. And I said, 'Well, you know, how did this happen?' And she said, 'Mum, I don't know. I – we had a glass of wine to celebrate.'" Do you agree you gave that evidence?---Yes.

And you went on to say, "No, she didn't say she was drunk". And, "Just that she couldn't understand why she doesn't remember anything because she didn't have that much to drink." You agree you gave that evidence?---Yes.

All right. And does that assist you that whilst you might have taken away from the conversation that she thought she'd been raped, what she actually told you was that she couldn't remember what had happened after a certain point?—I can appreciate what you're saying, but what you need to remember is that the phone call happened in 2000.

> All right?---We were then approached in 2007 to try to remember - - -
>
> That's all right?--- - - - and life goes on - - -
>
> That's okay?--- - - - 365 days a year.
>
> I appreciate that. I'm not being critical of you. You can't say anything further than, your memory, when you gave evidence back on the 21st of September 2007, was better than it is now?---Yes. I would say so, yes.
>
> And when you gave that evidence, that was the best recollection you could give to the court of what she said to you?---Yes. I would say so, yes.
>
> All right. Thank you. Those pages can be handed back?---Thank you."[22]

[21] In addition to the complaints made to Ms Johnson and her mother on 12 January 2000, the complainant also spoke to a journalist. That came about after Ms M contacted the newspaper where the advertisement to which the complainant had originally responded had been published.[23] A journalist from that newspaper, Ian Haberfield, subsequently interviewed the complainant at her parents' home. The complainant told him that the appellant had "attacked" and "raped" her.[24] A statement to police was made on 28 January 2000 and, on the same day, the appellant's yacht was searched.[25] Among the items located were electric clippers which were later submitted for scientific examination. The examination revealed the presence of the complainant's DNA on the inner and outer surfaces of the top and bottom cutting blades.[26]

Discussions in the absence of the jury

[22] After the last of the witnesses had given evidence but before the close of the Crown case, the appellant's counsel raised a number of matters with the trial judge in the absence of the jury. One of those matters concerned the evidence which Ms M had given about the telephone conversation with her daughter on 12 January 2000. The following exchange occurred:

> "DEFENCE COUNSEL: I was, unfortunately, unable to access the transcript last night, so I haven't been able to go through and check accurately what aspects she has distinctly accepted as opposed to not having distinctly accepted, so that may be a matter that could be sorted out through admissions.
>
> HIS HONOUR: Distinctly – I'm not sure – I'm just not following you.
>
> DEFENCE COUNSEL: Well, if she hasn't distinctly accepted saying those previous statements they need to be proved. I've spoken - - -
>
> HIS HONOUR: Well, this might raise another issue, throughout the course of – the course of your cross-examination you have put a number

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22 AB 103-106.

23 AB 102.

24 Ibid. Mr Haberfield gave evidence at the trial. He confirmed that he interviewed the complainant after the newspaper for which he was then working received an email from Ms M in which it was claimed that her daughter had been raped after responding to one of the newspaper's advertisements (AB 108). He later wrote an article that was published on 23 January 2000 (AB 111). During the interview, the complainant told Mr Haberfield that she had been "attacked" by the appellant and that he had "forced himself on" her (AB 108). She told him that the appellant "had sex with her" and that "the next morning he seemed to think that because he had raped [her they] were in some kind of relationship" (AB 111).

25 AB 41 and 113.

26 Exhibit 21 (AB 173).

of prior inconsistent statements to the witness. What was the purpose of the cross-examination, to prove the unreliability of the witness?

DEFENCE COUNSEL: Well, to prove the evidence of the fact of those matters.

HIS HONOUR: Well, how do you purport to have done that?

DEFENCE COUNSEL: Well, they have given evidence inconsistent to the prior statement - - -

HIS HONOUR: But in a criminal trial a prior inconsistent statement – there's many ample authority on it - is relevant to the credibility and reliability of the witness.

DEFENCE COUNSEL: But once it's proved either through the witness ultimately accepting it, or being otherwise proved it, becomes evidence of the fact.

HIS HONOUR: Only if you follow the appropriate procedures … and I don't see that those procedures have been followed. There's been authority on that just recently.[27]

DEFENCE COUNSEL: Well - - -

HIS HONOUR: You might wish to look at your cross-examination. I must say I was wondering where it was going. But at no stage have - do I recall you asking a witness, after they've identify [sic] a prior statement, that they now recall that, in fact, what they said then was correct and that was now their evidence. All you've done is identify the prior inconsistent statement.

DEFENCE COUNSEL: And established that they made that prior inconsistent statement.

HIS HONOUR: Well, what's the section that you rely upon?

DEFENCE COUNSEL: Section 101 of the *Evidence Act*.

HIS HONOUR: Of what, sorry?

DEFENCE COUNSEL: Section 101 of the *Evidence Act*.

HIS HONOUR: Yes. Well, that's if you prove it pursuant to section 17, 18 or 19. I would have thought section 18 would be the section you would be rely [sic] upon, but I'm having difficulty seeing how section 18 has been complied with.

DEFENCE COUNSEL: Well, in my submission - - -

HIS HONOUR: See, the admission of evidence under section 18 requires the application, the judicial discretion as to whether such evidence would be admitted.

DEFENCE COUNSEL: Well, that is - in my submission, the prior inconsistent statement can be proved either by the witness admitting

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27 It is possible that his Honour was here referring to a decision of this Court handed down on 7 February 2014 – *R v Baker* [2014] QCA 5 at [15]-[17] and [24] per Morrison JA.

> that it was made, and if it's not admitted that they made - they made that statement, then it can be proved subject to - - -
>
> HIS HONOUR: I think you've got to be quite specific. I will give you over the lunch break to look at the authorities, but my recollection is that counsel has to be quite specific before the provisions of section 18 are invoked such that section 101 has application, and I don't know that it has occurred. Traditionally prior inconsistent statements in criminal trials, juries receive the usual direction, that it goes to the credit and reliability of the witness. You may wish to have a look at that.
>
> DEFENCE COUNSEL: Well, that's a matter that I wish to check the transcript in relation to …:".[28]

[23] After the benefit of the luncheon adjournment, the topic was revisited. Again this occurred in the absence of the jury:[29]

> "DEFENCE COUNSEL: …. So, before the Crown case closes, I'd just like to clarify one aspect of your Honour's initial indication regarding prior statements of the witnesses. The only aspect that concerns me at this stage is the effect of … the mother's evidence as to what she was told by the complainant. Without going to the specifics, your Honour will recall that she gave evidence that in 2007 she recalled the complainant saying, effectively, that she didn't have any memory. In my submission, certainly, that can be used as part of the complaint evidence in assessing [the complainant's] credibility and reliability in the same way as any complaint evidence.
>
> HIS HONOUR: So just so I understand you correctly, you're saying that the mother's evidence that she was told by her daughter that her daughter had difficulty remembering that evening or whatever the exact terminology was - - -
>
> DEFENCE COUNSEL: Yes.
>
> HIS HONOUR: - - - forms part of the complaint that - - -
>
> DEFENCE COUNSEL: The complaint.
>
> HIS HONOUR: - - - was made to the mother that goes to the issues of the credibility of the complainant.
>
> DEFENCE COUNSEL: Yes.
>
> HIS HONOUR: Yeah. I can't see any difficulty with that. Mr [Prosecutor]?
>
> PROSECUTOR: No, I accept that, your Honour."

[24] The jury was then recalled, the Crown case closed and the appellant was called on.[30] After he elected not to go into evidence, the jury was sent home for the day. Then followed a discussion between the trial judge and counsel about an unrelated issue before the trial judge initiated this exchange:[31]

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28 AB 123-125.
29 AB 127-128.
30 AB 129-130.
31 AB 131-132.

> "HIS HONOUR: Now, the only other thing is, in relation to that issue that was discussed before lunch, regarding prior inconsistent statements – is that something you wanted to raise at this stage, Mr [Defence Counsel]?
>
> DEFENCE COUNSEL: No, your Honour.
>
> HIS HONOUR: Now, I would ordinarily simply direct the jury that it goes to the credit of the individual concerned. Which seems, to me, to be the real issue in this trial, in any event.
>
> DEFENCE COUNSEL: I'm not resiling from my earlier position, but the evidence has now closed. The only issue that really concerned me, was about [indistinct] complaint evidence and that's been resolved. If I anticipate saying something inconsistent with your Honour's indication, I'll raise it. But I don't expect to.
>
> HIS HONOUR: Hang on. What I'm minded to say to them, Mr [Defence Counsel], is that prior inconsistent – well, a prior statement or statements of the witness that may be inconsistent with something that's now being said in evidence, is not evidence of the truth of the contents of that prior statement. A prior inconsistency, if you find it to exist, merely, is relevant to the credibility of that particular witness when you're assessing that person's evidence. Whether the prior inconsistency, in fact, impacts upon that person's credibility and/or reliability is a matter for you to determine – or words to the effect.
>
> DEFENCE COUNSEL: Certainly.
>
> HIS HONOUR: So that'll give you some indication of the direction that I'm proposing.
>
> DEFENCE COUNSEL: I don't expect I'll be submitting otherwise - - -
>
> HIS HONOUR: All right.
>
> DEFENCE COUNSEL: - - - to the jury."[32]

[25] For completeness, in his address to the jury, trial counsel for the appellant submitted that if, when examining the "complaint evidence", there is no real consistency or indeed if it is completely inconsistent, such evidence "can detract from [the complainant's] credibility and reliability".[33] He reminded the jury that the complainant had said to her mother only that she "thought" she had been raped, and that she could not understand why she could not remember anything.[34] He submitted that the terms of this "complaint" were not consistent with what the complainant had said in evidence and, for that reason, it could not "bolster" her evidence. To the contrary, it was submitted that what the complainant told her mother was "nothing like what she said" in evidence at the trial.[35]

The summing up

[26] Following the addresses of counsel, the trial judge summed up the case to the jury. The relevant portions of the summing up commence with the following:

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32 AB 131-132.
33 Addresses; p 23.
34 Ibid 24.
35 Addresses; p 24.

> "If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to her demeanour or for any other reason, that must be taken into account in assessing the truthfulness or reliability of her evidence generally. Your general assessment of the complainant as a witness will be relevant to all counts but you will have to consider her evidence in respect of each count when considering that count.
>
> …
>
> You've also heard a lot of evidence and questioning in this trial about what has been referred to as prior inconsistent statements. Now, you should be aware, ladies and gentlemen, that a prior statement of a witness that may be inconsistent with something that's now being said in evidence by that witness is not evidence of the truth of what the person said at the earlier time. To give you an example and to use the same example that I used just a few moments ago, if, in a police statement, a witness said the sky was grey but in evidence that witness said the sky was blue, then the evidence from the witness is that the sky was blue. That's the evidence that was given. The prior inconsistency, if you find it to exist, merely is relevant to the credibility of that particular witness when you're assessing that person's evidence. Whether the prior inconsistency, in fact, impacts upon that person's credibility and/or reliability is a matter for you to determine. Now, I should make mention of this: that direction, of course, has relevance to the evidence of the complainant; you've just been listening to addresses about the alleged prior inconsistencies.
>
> You also, however, heard evidence from the complainant's mother about the complaint that she was given by her daughter the following day. What she told the committal proceeding court seven years ago and what she has said today was said to be different. That direction relates to that as well. That inconsistency between what the mother told the committal court seven years ago and what she told today, depending upon your view of it, impacts, potentially upon the mother's credibility and reliability. But what the mother said to the committal court seven years ago is not evidence of the fact that the complainant said those things to her. It's not evidence of the truth of the contents of the statement if you can follow that logic. It impacts upon the particular witness's credibility who's giving the evidence. I'll come to that evidence in just a moment."[36]

[27] The trial judge then discussed the evidence given by Ms Johnson regarding the "distressed condition of the complainant … [on] the following morning",[37] before moving to the preliminary complaint evidence. His Honour referred again to Ms Johnson's evidence as to what the complainant told her on 12 January 2000 before turning to the complainant's mother's evidence:

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36 AB 138.

37 AB 139. As to the relevance of independent evidence of a complainant's distressed condition, see *R v Roissetter* [1984] 1 Qd R 477 at 481-482; *R v Sailor* [1994] 2 Qd R 342 at 345-346 and *R v Williams* [2010] 1 Qd R 276 at 285-287.

> "There was also evidence from the complainant's mother, [Ms M], who gave this evidence, page 2-25:
>
> > *She said that she phoned me to tell me that she had been raped and that she was very upset and yes.*
>
> She said that she advised her to go to the police and she said she wasn't going to and she thought that was the extent of the conversation then. And you would recall that she was then reminded of what she – that is [Ms M] – had said on that prior occasion which I've already referred to and directed you in relation to."[38]

[28] His Honour then completed his summary of the preliminary complaint evidence by reminding the jury of what Mr Haberfield had said. There was then this direction:

> "Now, the evidence of what the complainant said to those people may only be used as it relates to the complainant's credibility. Consistency between each of those accounts and the complainant's evidence before you is something you may take into account as possibly enhancing the likelihood that her testimony is true. However, you cannot regard the things said in those out of court statements as proof of what actually happened. In other words evidence of what was said on those occasions may, depending on the view you take of it, bolster the complainant's credit because of consistency. But it does not independently prove anything.
>
> Likewise, any inconsistencies between any one of those accounts and the complainant's evidence may cause you to have doubts about the complainant's credibility [or] reliability. Whether consistencies or inconsistencies impact on the reliability of the complainant is a matter for you. Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable and the inconsistencies are a matter for you to consider in the course of your deliberations."[39]

[29] Lastly, after the jury retired to commence their deliberations, the appellant's trial counsel responded to the trial judge's enquiry about whether any redirections were sought:

> "DEFENCE COUNSEL: … [Can] I place on the record that in relation to the direction about [Ms M]'s evidence from 2007 your Honour gave them the direction which, in my submission, seemed to be inconsistent with the indication you gave yesterday.
>
> HIS HONOUR: Well, I gave the direction … because you seemed to be submitting to the jury that the evidence of what [Ms M] said in 2007 was truth of its contents. That is, that the complainant told her these things. That doesn't - - -
>
> DEFENCE COUNSEL: I accept - - -
>
> HIS HONOUR: That doesn't support that at all. That was the reason for that correction.
>
> DEFENCE COUNSEL: Certainly."[40]

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38 AB 140.
39 AB 141.
40 AB 146.

The appellant's contentions

[30] As stated at the outset, there was only one ground of appeal. It was formulated in these terms:

> "A miscarriage of justice occurred by reason of the way in which the learned trial judge directed the jury as to the use that could be made of evidence from the witness [Ms M] – specifically the prior inconsistent statement she had made about words spoken by the complainant." [41]

[31] In support of this ground, it was contended that the version which Ms M gave at the committal hearing of the telephone conversation with her daughter on 12 January 2000 – and, in particular, as to what her daughter said – was inconsistent with the version she gave in evidence in chief at the trial. Therefore, it was submitted, Ms M's committal hearing evidence was a "previous statement" within the meaning of s 19 of the *Evidence Act* 1977 (Qld) and had been "proved by virtue of" that section for the purposes, and within the meaning, of s 101 of the Act. Thus, it was contended that Ms M's committal hearing evidence did not merely go to her credit; it was admissible as evidence of the facts stated therein subject only to such considerations of weight as are set out in s 102 of the Act and are applicable to the circumstances of the case.[42] It was argued that, if this proposition was correct, then the evidence should have been available to the jury to assess the reliability of the evidence given by the complainant at trial.

[32] The appellant contended that Ms M's "previous statement" had been "proved by virtue of" s 19 because: (1) her evidence was recorded; (2) it was reduced to writing in the form of a transcript which formed part of the depositions; (3) it was relative to the subject matter of the proceeding; (4) Ms M's attention was called to those parts of the transcript that were to be used for the purpose of contradicting her; and (5) when she "accepted the accuracy of the transcript, her evidence in chief was contradicted".[43] Based on that series of propositions, the appellant argued that the jury had been misdirected as to the use to which the version which Ms M gave at the committal hearing of the telephone conversation with her daughter could be put and, further, that a substantial miscarriage of justice occurred by reason of that misdirection.

[33] For the Crown it was submitted that, where a witness admits the making of a previous inconsistent statement, proof of the statement is not permitted either by statute or at common law.[44] By reference to the terms of s 18 of the Act, it was submitted that proof of such a statement will only be permitted where the witness fails to "distinctly admit" that it was made. In that event, the prior statement, once proved, will, by operation of s 101 of the Act, be admissible as evidence of any fact stated therein of which direct oral evidence by the witness would be admissible. However where, as here, the making of the previous inconsistent statement is distinctly admitted by the witness, there is no room for the operation of that provision. For that reason, the Crown submitted, the statement was only relevant to an assessment of Ms M's credit and could not be used as proof that the complainant had in fact said the things recalled by her at the committal hearing.[45] In short, the Crown contended that neither s 18 nor s 19 was engaged in the circumstances of this case, let alone s 101 and s 102 of the Act.[46]

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41 Amended Notice of Appeal filed on 12 July 2016.
42 Appellant's Outline of Argument; par 41.
43 Ibid 40.
44 Submissions on behalf of the Respondent; par 9.
45 Ibid 15.
46 Submissions on behalf of the Respondent; par 15.

[34] Before turning to a consideration of the appellant's specific contentions, it is useful to make some observations about the operation of these provisions as well as the true nature of preliminary complaint evidence.

Cross-examination of a witness on a previous statement – ss 18 and 19 of the *Evidence Act* 1977 (Qld)

[35] Sections 18, 19, 101 and 102 of the Act provide as follows:

> "**18 Proof of previous inconsistent statement of witness**
>
> (1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.
>
> (2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement.
>
> **19 Witness may be cross-examined as to written statement without being shown it**
>
> (1) A witness may be cross-examined as to a previous statement made by the witness in writing or reduced into writing relative to the subject matter of the proceeding without such writing being shown to the witness.
>
> (1A) However, if it is intended to contradict the witness by the writing the attention of the witness must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting the witness.
>
> (2) A court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) be produced to the court and the court may make such use in the proceeding of the writing as the court thinks fit.
>
> **101 Witness's previous statement, if proved, to be evidence of facts stated**
>
> (1) Where in any proceeding—
>
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or
>
> (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated;
>
> that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.
>
> (2) Subsection (1) shall apply to any statement or information proved by virtue of section 94(1)(b) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in subsection (1)(a).
>
> (3) Nothing in this part shall affect any of the rules of law relating to the circumstances in which, where a person called as

> a witness in any proceeding is cross-examined on a document used by the person to refresh the person's memory, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh the person's memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.
>
> **102 Weight to be attached to evidence**
>
> In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[36] Unlike the section that precedes them,[47] ss 18 and 19 are concerned with cross-examination and, in particular, cross-examination on a "former"[48] or "previous"[49] statement made by the witness relative[50] to the subject matter of the proceeding.[51] The term, "statement", is defined to mean "any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise"[52] and because the expression, "former statement", is otherwise unqualified in s 18, that provision has application to both oral and written statements. However, the expression, "previous statement", is qualified in s 19; it can only apply to statements that are "in writing or reduced into writing".[53] As such, s 19 comprehends a previous statement relative to the subject matter of the proceeding that was either (1) made by the witness or (2) expressed by the witness and reduced to writing by another. As to (2):

(a) a transcript of the evidence given by the witness at a committal hearing in the

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47 Section 17 is concerned with evidence in chief. It forbids a party producing a witness from impeaching the credit of that witness by general evidence of bad character but allows the party: (1) to contradict the witness by other evidence (i.e., evidence other than evidence of bad character); or (2) in the case of a witness who is in the opinion of court adverse, to prove (with the court's leave) that the witness made a prior inconsistent statement. See *R v Lawrie* [1986] 2 Qd R 502; *R v Hadlow* [1992] 2 Qd R 440; *R v Franicevic* [2010] QCA 36 at [10] per Fraser JA.

48 Section 18(1).

49 Section 19(1).

50 The term, "relative", should be understood to mean, "relevant": *R v Hart* (1957) 42 Cr App Rep 47.

51 Section 19 would also apply to the "cross examination" of a witness who has been declared hostile: *R v Cox* [1972] Qd R 366 (a decision made with respect to the statutory predecessor of s 19, that is to say, s 18 of *The Evidence and Discovery Acts* 1867 to 1967 (Qld)); *R v Booth* (1981) 74 Cr App Rep 123 (referred to in *R v Baira* [2009] QCA 332 at [29]).

52 *Evidence Act* 1977 (Qld); Schedule 3 – Dictionary.

53 The term, "writing", is defined in the *Acts Interpretation Act* 1954 (Qld) to mean "any mode of representing or reproducing words in a visible form": Schedule 1 – Meaning of commonly used words and expressions.

proceeding and forming part of the depositions would qualify as a statement "reduced into writing" within the meaning of this provision;[54] and

(b) unless the authenticity of what was reduced into writing is not in issue,[55] there will need to be some evidence – either from the witness or another source[56] – to establish that the writing faithfully records what the witness actually said.[57]

[37] In a commentary to the United Kingdom provisions on which ss 18 and 19 were modelled,[58] the learned authors of *Phipson on Evidence* make the observation that "the wording of the two sections does not mesh completely" but then express the view that the relationship between the provisions is that s 19 "deals with cross-examination and with the laying of the ground for proving an earlier statement" and s 18 "deals with the proof of the earlier statement".[59] That may, with respect, not be entirely accurate because s 19 also facilitates the proof of an earlier statement to contradict the witness.[60] A more workable distinction might be that the *whole* focus of s 18 is on what must be established by the cross-examiner before a previous inconsistent statement of the witness may be proved in evidence and the *primary* focus of s 19 is on relieving the cross-examiner from the common law obligation of having to place the previous statement before the witness: s 19(1). It is only when the cross-examiner intends to contradict the witness by the previous statement that s 19(1A) goes on to lay down what must be done before such "contradictory proof can be given". In this sense, then, s 19 may be regarded as supplementary to s 18.[61]

[38] The application of one or both of ss 18 and 19 in a given case will not always be straightforward. Indeed, the drafting of the two provisions may only have antiquity to commend it. Nonetheless, they are intended to, and do, work together and each contemplates the receipt into evidence of a previous inconsistent (or contradictory) statement of the witness once certain preconditions are met.[62] The way in which that

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54 In this regard, it may be observed that the practice in Queensland of the cross-examiner calling for a certified copy of the depositions from the prosecutor has largely fallen into disuse. Instead, as happened in this case, the cross-examiner supplies the witness with a copy of the relevant part or parts of the depositions. Either practice is acceptable although the certified copy obviously prevails in the event of any dispute.

55 See the discussion in *R v Walker* (1993) 61 SASR 260 at 263-264 per Cox J and 266 per Duggan J.

56 That is to say, either by securing an admission from the witness that the statement was made or by calling another witness to attest to its making. As Macrossan J remarked in *R v Drury* [1984] CCA 095 (84/0009: Court of Criminal Appeal, Andrews SPJ, Macrossan and Williams JJ, 2 August 1984), "where the witness, not a party, admits the prior statement, but denies its truth, independent evidence of the making of the statement will not be required – the witness himself proves that matter": at p 25. This decision was later referred to by his Honour (when Chief Justice) in *R v Parkinson* [1990] 1 Qd R 382 at 383.

57 Cf *R v T, WA* (2014) 118 SASR 382 where it was held (at [69] per Kourakis CJ, with whom Vanstone and Anderson JJ agreed) that the phrase "reduced to writing" does not include "a written record made by someone other than the witness unless the witness has, in some way, adopted the record", citing *R v Walker* (1993) 61 SASR 260 at 263-264.

58 Sections 4 and 5 of the *Criminal Procedure Act* 1865 (UK) (Lord Denman's Act) which re-enacted ss 23 and 24 of the *Common Law Procedure Act* 1854 (UK) and applied the provisions to criminal as well as civil proceedings.

59 HM Malek QC, *Phipson on Evidence*, 18th ed., London, Sweet & Maxwell, 2015 at 12-39.

60 It should also be noted as a point of difference between the provisions that s 18 only applies to previous inconsistent statements whereas s 19 is not restricted in that way; it applies to previous written statements of the witness relative to the subject matter of the proceeding, and whether inconsistent or not with the witness' present testimony. Thus, s 19 contemplates cross-examination for the purpose of refreshing the witness' memory.

61 *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219 at 229 per McPherson J.

62 It has been held that, for testimony to be "inconsistent" with a previous statement of the witness, it is not necessary for the former to contradict the latter; a witness who by his or her testimony refuses to acknowledge even the making of a previous statement will have given evidence inconsistent with the statement for the purposes of s 101: *R v Williams* [2001] 2 Qd R 442 at 446 per Davies JA.

is achieved is through the giving of "proof" of the making of the previous statement; it will not be enough to introduce such a statement into evidence to merely establish that the witness failed to "distinctly admit" that the statement was made[63] or that it is needed to "contradict the witness".[64] Thus to the extent that s 18(1) provides that "proof may be given", it "amounts to no more than a statement that the evidence in question is admissible",[65] and the same observation may be made about the expression, "contradictory proof can be given" where it appears in s 19. It follows that something more is required, although in practice such proof is often not insisted on by the cross-examiner's opponent.

[39] Section 18 is "essentially declaratory of the common law".[66] By its terms, proof that a witness has made a prior inconsistent statement can only be given if the witness "does not distinctly admit that the witness has made such statement" *and* if the former statement is inconsistent with "the present testimony of the witness".[67] Inconsistency must be demonstrated.[68] Importantly, "before such proof can be given", the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness *and* the witness must be asked whether he or she made the statement. In the first-mentioned respect, the particular occasion on which the previous statement was made must be identified in sufficient detail to provide the witness with an opportunity to distinctly admit (or not) that he or she made the statement.[69] It is only if the witness fails to distinctly admit its making that the previous inconsistent statement will be receivable in evidence under s 18.

[40] At this point, where the previous inconsistent statement is in writing and its authenticity is either not in issue or has been satisfactorily established by other evidence, it (or, more precisely, the parts of it that are inconsistent with the witness' present testimony and relative to the subject matter of the proceeding)[70] may be tendered.[71] In the case of an oral previous inconsistent statement, evidence will need to be adduced as to its making.[72]

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63 Section 18(1).

64 Section 19(1A).

65 *R v Ghion* [1982] Qd R 781 at 784 per Connolly J.

66 *Nicholls v The Queen* (2005) 219 CLR 196 at [85] per McHugh J (with reference to a Western Australian provision similar in terms to s 18). And see Hayne and Heydon JJ (with whom Gleeson CJ concurred) at [280].

67 *R v Soma* (2003) 212 CLR 299 at [22]. And see *R v Hall* [1986] 1 Qd R 462 at 463-464 per McPherson J. The common law rule for admitting prior inconsistent statements was preserved in the United Kingdom by s 23 of the *Common Law Procedure Act* 1854 (UK) and its re-enactment as s 4 of the *Criminal Procedure Act* 1865 (UK). The language of s 18 of the *Evidence Act* 1977 (Qld) is taken from those provisions.

68 *R v Soma* (2003) 212 CLR 299 at [20] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

69 *Nicholls v The Queen* (2005) 219 CLR 196 at [85] per McHugh J; [275]-[277] per Hayne and Heydon JJ (Gleeson CJ agreeing). The designation of the occasion would require the cross-examiner to inform the witness of the place, time and speaker: at [272] per Hayne and Heydon JJ. And see *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219 at 225 per Campbell CJ.

70 *R v Baira* [2009] QCA 332 at [32] per Holmes JA.

71 *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219 at 224 and 226; *R v Chin* (1985) 157 CLR 671 at 689-691 per Dawson J. In a criminal trial, defence counsel will usually be reluctant to tender the statement because that may be construed as the defence having gone into evidence and, in consequence, losing the right of last say in the addresses to the jury. Such a consideration will not be of any moment where the accused person has instructed that he or she intends to give or call evidence – because the defence will be addressing the jury first in any event – but where instructions to that effect have not been provided or will not be sought until the close of the Crown case, the tender of a previous inconsistent statement can have that consequence. To avoid this, the Crown will usually agree in the interests of fairness to make the tender, and such a practice is to be encouraged.

72 Such as occurred in *R v Perera* [1986] 2 Qd R 431 where the making of the previous inconsistent statement in question was proved through the evidence of a solicitor (Wilson) who was present for the relevant conversation.

[41] That said, it is important to a proper consideration of this appeal to keep in mind that part of the rationale for the common law rule requiring the laying of a proper foundation before receiving a prior inconsistent statement into evidence is that, if the witness admits that the statement was made, proof of the statement becomes unnecessary. That was made clear in an answer to one of the questions proposed by the House of Lords for the judges of the King's Bench in the trial of *Queen Caroline* or, as it is more commonly known, the *Queen's Case*:[73]

> "The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved. *If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary*; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course."[74] [Emphasis added].

[42] More recently, in *R v Soma*,[75] McHugh J offered this further explanation:

> "A condition of the admissibility of an inconsistent statement under s 18 of the Act is that the witness 'does not distinctly admit' making the statement. A previous inconsistent statement cannot be proved where the witness admits making the statement: if the witness admits it, the purpose of discrediting the witness has been achieved.[76] In the interests of trial efficiency, '[i]f the witness, on the cross-examination, [unequivocally] admits the conversation imputed to him, there is no necessity for giving other evidence of it'.[77] In *North Australian Territory Co v Goldsborough, Mort & Co*[78] Lord Esher MR said:
>
> > 'When a witness is asked as to what he said on a previous occasion, he is bound to answer the question; he cannot insist on seeing what he previously said before he answers it; he must answer. If his answer does not contradict what he said before, *it is no use pursuing the topic further; he adopts his previous answer and it becomes part of his evidence*; if he does contradict it, he can be contradicted in turn by shewing him what he said before.'"[79] [Emphasis added]

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73 (1820) 2 Brod & B 284 at 311-312 [129 ER 976 at 988] per Abbott CJ.

74 (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

75 *R v Soma* (2003) 212 CLR 299.

76 Citing *North Australian Territory Co v Goldsborough, Mort & Co* [1893] 2 Ch 381 at 386; *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 509; *Cotton v Commissioner for Road Transport and Tramways* (1942) 43 SR (NSW) 66; *R v Thynne* [1977] VR 98 at 100.

77 Citing *Crowley v Page* (1837) 7 Car & P 789 at 792 [173 ER 344 at 345].

78 [1893] 2 Ch 381 at 386.

79 *R v Soma* (2003) 212 CLR 299 at [55]. And see *R v CBL and BCT* [2014] Qd R 331 at [146], a case where the witness did "distinctly admit" the making of a previous inconsistent statement. Muir JA (with whom Gotterson JA and Douglas J agreed) observed:

> "The operation of s 18(1) was not triggered and no proof was necessary that the witness made the statement."

[43] It follows that, where the making of the previous inconsistent statement is admitted by the witness – and regardless of whether the witness goes further to admit that its contents are true – the statement cannot be proved under s 18. Indeed, to the point of this appeal, it will only be where the prior statement was in writing or reduced to writing *and* it is intended to contradict the witness by that writing pursuant to s 19(1A) that it can be proved and then received into evidence. But, s 19(1A) aside, where the witness distinctly admits the making of the statement, it will not be admissible under s 18 or, indeed, at common law unless the witness is a party, in which event the statement may amount to an admission.[80]

[44] Where on the other hand a previous inconsistent statement is not distinctly admitted by the witness and is proved under s 18, its contents become part of the evidence at trial but, without s 101, those contents could have only gone to the credit of the maker of the statement; at common law the previous statement is not available to prove the truth of the facts in issue.[81] However s 101 makes such a statement admissible as evidence of any fact stated therein of which direct oral evidence by the maker would be admissible.[82] Section 102 goes on to provide that, in estimating the weight, if any, to be attached to such a statement, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including "its contemporaneity with the event and the existence of any incentive on the part of the maker of the statement to conceal or to misrepresent the facts".[83] Directions to the jury must be fashioned accordingly, it being a matter for them to determine what, if any, weight should be attached to the statement.[84] For this reason, a party seeking to rely on a proven prior inconsistent statement for its truth by operation of s 101 should make an application to the trial judge for appropriate directions to the jury in advance of the summing up.[85]

[45] In contrast to the declaratory effect of s 18, s 19 modifies the common law and, in particular, one of the rulings in the *Queen's Case* to the effect that a witness could not be cross-examined on a document without it being put before the witness. In *Savanoff v Re-Car Pty Ltd*,[86] McPherson J recounted the history and purpose of the provision:

> "Section 19 has its origin in s. 5 of the *Criminal Procedure Act* which was passed in England in 1865 to overcome a consequence of the ruling in the trial of *Queen Caroline* (1820) 2 Brod. & Bing. 286. The primary object of that ruling was to ensure that cross-examination was not used as a means of adducing the contents of a document in defiance of the best evidence rule. To that end, it was laid down that, before asking questions about the contents of a document, the cross-examiner

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80 *R v Soma* (2003) 212 CLR 299 at [55]; *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219 at 229 per McPherson J.

81 *Taylor v The King* (1918) 25 CLR 573 at 574-575; *R v Pearson* [1964] Qd R 471; *Driscoll v The Queen* (1977) 137 CLR 517 at 536 per Gibbs J; Lee v the Queen (1998) 195 CLR 594 at 603 per Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ; *Bull v The Queen* (2000) 201 CLR 443 at 466 per McHugh, Gummow and Hayne JJ.

82 A provision that is based on s 3(1)(a) of the *Civil Evidence Act* 1968 (UK) although its operation in Queensland was extended on the passing of the *Evidence Act* 1977 (Qld) to criminal proceedings, a position that was later adopted in the United Kingdom with the passing of the *Criminal Justice Act* 2003 (UK). See *R v Billingham & Billingham* [2009] EWCA Crim 19 at [58]-[60].

83 *R v Hall* [1986] 1 Qd R 462 at 464 per McPherson J.

84 Ibid at 463-464 per McPherson J (citing *R v Pearson* [1964] Qd R 471). And see *Morris v The Queen* (1987) 163 CLR 454 at 469 per Deane, Toohey and Gaudron JJ; *R v Soma* (2003) 212 CLR 299 at 334 per Callinan J; *R v CBL v BCT* [2014] Qd R 331 at [153] – [157].

85 *R v Fox (No 2)* [2000] 1 Qd R 640 at [33]-[34] per McMurdo P and [87]-[88] per Shepherdson J.

86 [1983] 2 Qd R 219.

> was required to lay it before the witness, and in due course to have it read in open court with a view to putting it in evidence in his own case: see *Allchin v. Commissioner* (1935) 35 S.R. (N.S.W.) 498, 508–509. By 1863, when the fourth edition of Starkie's *Practical Treatise of the Law of Evidence* was published, the ruling had been 'very recently' applied to the case where the cross-examiner wished only to use the document as a prior inconsistent statement in order to test the memory or credibility of the witness, and not for the purpose of establishing by secondary evidence the contents of a written document: see Starkie, *op. cit*., at pp. 221, 227. When two years later the rule was altered by the legislation, the first paragraph of what is now. s. 19(1) made it no longer necessary to show the statement to the witness before cross-examining him about it, although s. 19(2) enables the court to require that it be put in evidence: *R. v. Jack* (1894) 15 L.R. (N.S.W.) 196; and cf. *Burnell v. British Transport Commission* [1956] 1 Q.B. 187. The second paragraph of s. 19(1) appears to be directed primarily to the case where the witness denies that the statement is his, so that it becomes necessary to establish that fact by other evidence. It is to this that the expression 'before such contradictory proof can be given' refers in the second paragraph of s. 19(1)."[87]

[46] The reference by McPherson J to the "second paragraph of s 19(1)" may be taken for present purposes as a reference to s 19(1A); that subsection was originally included as a proviso to s 19(1).[88] As his Honour observed, the part of the provision that is now s 19(1A) appears to be directed primarily to the case where the witness denies that the previous statement is his "so that it becomes necessary to establish that fact by other evidence", but it will also have application where the witness admits the making of the statement but denies the truth (or accuracy) of the relevant part of its contents. In either circumstance, the witness may be contradicted "by the writing", that is, by the previous statement made by the witness in writing or reduced to writing relative to the subject matter of the proceeding.[89] In such an instance, "contradictory proof" in the form of that written statement can be given provided the attention of the witness is first directed to those parts of it that are to be used for that purpose, that is, to contradict the witness. Thus, s 19(1A) contemplates not only that the previous written statement be the *source* of the contradiction of the witness but also that it be the *means* by which the contradiction is to be proved. That is the "contradictory proof [that] can be given".

[47] The point earlier made can therefore be appreciated, at least so far as the admission of prior inconsistent statements is concerned – s 19(1A) supplements the operation of s 18. Thus, and assuming the other preconditions to proof in each case are met:

(a) a previous inconsistent *oral* statement may only be proved where the witness does not distinctly admit making it: s 18(1);

(b) a previous *written* statement (i.e., a statement "in writing or reduced into writing") may only be proved:

(i) where the witness does not distinctly admit making it: s 18(1);[90] or

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87 *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219 at 228-229.

88 The proviso to s 19(1) was renumbered s 19(1A) pursuant to s 43 of the *Reprints Act* 1992 (Qld).

89 Because under s 19(2) the court has power to require the written statement to be produced to the court and its tender might be required depending on the circumstances of the particular case, the statement must be available at court or readily obtainable in case the judge wishes to see it: *R v Anderson* (1929) 21 Cr App Rep 178.

90 The written statement must also qualify as a previous *inconsistent* statement to be admissible under s 18(1).

(ii) where the making of the statement is admitted but the witness disputes that its relevant contents are true: s 19(1A).[91]

[48] It follows that where, as here, the witness distinctly admits the making of a previous inconsistent statement and does not dispute the truth or accuracy of that earlier statement, it cannot be proved in evidence pursuant to either s 18 or s 19.[92] In particular, s 19(1A) can have no operation because there is nothing left to contradict "by the writing" and no other basis to advance it into evidence. That being the case, s 101 will not be engaged because no statement will have been "proved by virtue of" that provision (or, for that matter, by s 18).

[49] Such an outcome should not surprise. When a witness admits the making of a previous statement which is inconsistent with his or her earlier testimony at trial (in which case, s 18 cannot apply) and goes further to adopt or accept the truth of the relevant portions of that previous statement (in which case, there is no work for s 19(1A) to do), those portions become part of the witness' oral testimony at trial. In such a circumstance, as Abbott CJ in the *Queen's Case*[93] and McHugh J in *R v Soma*[94] observed in the passages extracted above (at [41] and [42]), proof of the earlier statement becomes unnecessary.[95] Hence, in *Morris v the Queen*,[96] the relevant witness "deposed to the truth of the various matters contained in his prior [inconsistent] statements which were orally put to him".[97] The prior inconsistent statement was not received into evidence pursuant to s 101, or at all, but, as Deane, Toohey and Gaudron JJ held, its "contents actually became part of the oral evidence of the witness and … fell for consideration in accordance with ordinary principles".[98]

[50] But what are those "ordinary principles" and, when applied, what can be concluded about the evidentiary value of the oral testimony by which the relevant parts of the previous inconsistent statement are adopted or accepted? Is it that, without the benefit of s 101, the witness' adoption of particular facts contained in his or her previous inconsistent statement could only go to that witness' credit or does what is adopted become evidence of those facts?

[51] Subject only to what I am about to say about the evidentiary value of hearsay evidence admitted at common law or under statute,[99] the answer is the latter of those two propositions. Once the witness, having had the relevant facts in the previous inconsistent statement drawn to his or her attention during the course of cross-examination, confirms in court that they are true, that confirmation is every bit as much evidence of those facts as the evidence the witness gave in evidence in chief on the same topic.[100] It

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91 It should be mentioned that none of this affects the court's power to accede to an application made by the party calling a witness for the documents which were cross-examined upon to be tendered by the cross-examiner. That "power is at large and exists to ensure that justice is done": *R v Foggo; Ex parte Attorney-General* [1989] 2 Qd R 49 at 51 per Thomas J.

92 Or at common law unless, as mentioned earlier, the witness is a party, in which event the statement may amount to an admission.

93 (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

94 (2003) 212 CLR 299 at [55].

95 And see *R v CBL v BCT* [2014] Qd R 331 at [146].

96 (1987) 163 CLR 454.

97 Ibid 468.

98 Ibid 469.

99 Below at [54]-[56].

100 See *Bull v The Queen* (2000) 201 CLR 443 at 466 per McHugh, Gummow and Hayne JJ (citing *Birkett v AF Little Pty Ltd* [1962] NSWR 492 and *R v Thynne* [1977] VR 98 at 100-101). And see *Stateliner Pty Ltd v Legal & General Assurance Society Ltd* (1981) 29 SASR 16 at 51; *R v Lawrie* [1986] 2 Qd R 502 at 511 per Williams J; *Morgan v Kazandzis* (2010) 206 A Crim R 235 at 249-250.

is therefore important to distinguish between a case where a witness, in cross-examination, does no more than admit that he or she has made a prior inconsistent statement and a case where the witness goes further to swear that the relevant facts in the prior inconsistent statement are true or, expressed another way, that they are accurate. As was said as long ago as 1899 in *Sainsbury v Allsopp*,[101] a case where a witness admitted having made a prior statement in writing inconsistent with his testimony and that it was true:

> "If the witness had sworn that the previous written statement was false it might be different. But the witness gave two versions, both on oath, because he swore that his written statement was true, and I take that as a repetition of the facts contained therein, and it was for the justices to say which version they believed."[102]

[52] Thus, if the maker of a prior inconsistent statement adopts as true (or accurate) the facts stated in it, the "witness, by doing so, will be giving evidence of those facts, which evidence can be relied on independently of the statement".[103] It will be for the jury to make their own assessment of the testimony in order to decide whether the version first advanced in evidence in chief or the version from the prior inconsistent statement which the witness adopted during cross-examination ought to be accepted.[104] As to this, the jury's task is no different to that which would confront them when assessing testimony that is internally inconsistent.

[53] Two final points should be addressed:

(a) It was submitted on behalf of the appellant that when Ms M "accepted the accuracy of the transcript [of her committal hearing evidence], her evidence in chief was contradicted".[105] Therefore, it was argued, because the other preconditions to proof under s 19(1A) were satisfied, her prior version must have been proved "by virtue of s 19". That submission cannot be accepted. *First*, acceptance by the witness of the "accuracy of the transcript" was not proof "by the writing" of her prior version; that would only be so if the committal evidence was tendered, and it was not. Contradictory proof will not have been advanced under s 19(1A) by means of a prior written statement merely because the witness accepts that he or she made that statement and that its contents are accurate. *Second*, before s 19(1A) can be called in aid, there must be an unresolved conflict between the testimony of the witness and his or her prior written version. Without that, the requisite intention – to contradict the witness by the writing – cannot be formed by the cross-examiner. In this case, as soon as Ms M "accepted the accuracy of the transcript", any conflict disappeared. There was no longer any need to contradict her testimony and, for that reason, no proper basis to advance "the writing" into evidence.[106] Put another way, her committal evidence could not have been tendered even had that been attempted;

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101 (1899) 24 VLR 725.

102 Ibid 728 per Hood J (which passage was referred to with approval in *R v Thynne* [1977] VR 98 at 100).

103 *R v CBL and BCT* [2014] Qd R 331 at [150] per Muir JA (with whom Gotterson JA and Douglas J agreed).

104 *CB v Western Australia* (2006) 175 A Crim R 304 at 316.

105 Appellant's Outline of Argument; par 40.

106 Similar reasoning was expressed by McHugh J in *R v Soma* (2003) 212 CLR 299 at 317 to exclude the operation of s 18 in that case. His Honour said:

> "Once a witness distinctly admits that he or she has made the inconsistent statement, the condition on which the admissibility of the statement rests disappears. It does not matter that the distinct admission was made reluctantly or as the result of a persistent cross-examination. Accordingly, once the accused distinctly admitted – even after a series of questions – that he made the statement put to him, the recording of that statement was not admissible under s 18."

(b) The submission was also made on behalf of the appellant that "cross-examination can be used as a means of adducing the contents of a document", that this is "what s 19 contemplates" and that "once that is done … the consequences specified in s 101 are triggered".[107] Although a cross-examiner will succeed in adducing evidence of the contents of a document if the witness adopts those contents, the document is not proved in that way; the contents so adopted become part of the witness' oral testimony. For the reasons just expressed, the previous statement is not proved under s 19(1A) merely because the witness accepts that he or she made the statement and that its contents are true. That is one way of authenticating the statement because it proves its making, but it cannot amount to "contradictory proof" within the meaning of s 19(1A).

Preliminary complaint evidence

[54] Evidence of preliminary complaint is admissible as an exception to the hearsay rule but, as Barwick CJ remarked in *Kilby v The Queen*,[108] "the admissibility of that evidence … can only be placed … upon the consistency of statement or conduct which it tends to show, the evidence having itself *no probative value* as to any fact in contest".[109] Since those remarks were made, s 4A was inserted in the *Criminal Law (Sexual Offences) Act* 1978 (Qld) with effect from 5 January 2004.[110] By s 4A(2), evidence of how and when any "preliminary complaint"[111] was made by a complainant about the alleged commission of a sexual offence by an accused is admissible in evidence, regardless of when such a complaint was made.[112]

[55] As such, evidence of the making of a complaint, either from the complainant or from the person or persons who received that complaint, will be admissible as an exception to the hearsay rule, but it is not received as evidence of the facts complained about.[113] Rather, the use to which such evidence can be put is limited to showing consistency of statement or conduct; it has no probative value and no capacity to prove the truth of what was said. Preliminary complaint evidence may serve to buttress the credit of the complainant, but that is all.[114] Section 4A does nothing to alter the correctness of the statement from *Kilby v The Queen* extracted above (at [54]).

[56] Of course, hearsay evidence once admitted becomes evidence in the case but, as McHugh, Gummow and Hayne JJ said in *Bull v The Queen*,[115] that does "not mean that, if a hearsay statement is admitted to prove a fact other than truth of its contents,

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107 Appeal Transcript; 1-5.

108 (1973) 129 CLR 460.

109 Ibid 472 (emphasis added). These remarks were quoted with approval in *Bull v The Queen* (2000) 201 CLR 443 at 466 per McHugh, Gummow and Hayne JJ.

110 *Evidence (Protection of Children) Amendment Act* 2003 (Qld); s 40.

111 The expression, "preliminary complaint" is defined to mean any complaint other than "the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence" or a complaint made after the complainant's first formal witness statement: s 4A(6)

112 Section 4A goes on to provide that nothing "in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence": s 4A(3).

113 *R v RH* [2005] 1 Qd R 180 at 185 per Williams J, citing *Jones v The Queen* (1997) 191 CLR 439 and *R v Lillyman* [1896] 2 QB 167.

114 *R v Van Der Zyden* [2012] 2 Qd R 568 at 586 per Muir JA (with whom de Jersey CJ and Margaret Wilson AJA agreed).

115 (2000) 201 CLR 443.

the contents, upon admission, also become evidence in the case".[116] To the contrary, it is "evidence only of [the] extraneous fact and not the contents of the statement".[117]

Analysis

[57] For the reasons just discussed, the account Ms M gave at the trial of the telephone conversation with her daughter was preliminary complaint evidence. If accepted by the jury, her evidence could not establish the truth of any of the underlying facts. At best it went to establish the *consistency* in the making of the complaint by her daughter and, if accepted by the jury, it may have supported her daughter's credit. In other words, although Ms M could give evidence of what she was told, her evidence was not capable of proving that what she was told was true.

[58] Two aspects of the account Ms M gave at the committal hearing were inconsistent with her testimony at trial. One was that her daughter told her that she could not remember events after a certain (unspecified) point whereas, at trial, there was no mention of that. The other was that her daughter had said to her, "I think I was raped" and "I think he's raped me" as opposed to the unqualified way in which she summarised the complaint at trial – "She phoned me to tell me that she had been raped".

[59] Clearly, the appellant's trial counsel wanted to use these inconsistencies to cast doubt on the account of this conversation which the complainant gave at trial – "I said mum, he raped me" [118] – in order to demonstrate *inconsistency* in the making of her complaint. Such an approach had the potential at least to bring into question the complainant's credibility. However, to do so, the appellant's counsel first needed to cast doubt on the reliability of the account of the conversation that Ms M had given in evidence in chief at the trial. Then he needed to establish that what she said in evidence at the committal hearing was her preferred account. As the passages from the cross-examination of Ms M extracted above (at [20]) demonstrate, in order to do this the appellant's counsel sought to have the witness: (1) distinctly admit that she had given evidence at the committal hearing relative to the subject matter of the proceeding; (2) agree that the parts the witness was taken to were more reliable than her trial testimony because her "memory was better back in 2007"; and (3) accept that those parts were true (or accurate), that is to say, that they "represented the best recollection [she] could give to the court". All three objectives were achieved.

[60] Because the giving of that evidence was distinctly admitted by Ms M, it could not be proved under s 18: s 18(2). Nor could it be advanced as "contradictory proof" under s 19(1A) because Ms M accepted the accuracy of her previous testimony. There was no longer any need to contradict her evidence in chief and no proper basis to advance it into evidence.

[61] Instead, Ms M's adoption of what she had said in evidence at the committal hearing became part of her oral testimony at the trial. The result was that there was before the jury two competing accounts from Ms M as to what her daughter had said on 12 January 2000 and, assuming Ms M was otherwise accepted as a witness of truth, it was for the jury to decide which account to accept. Of course, given the witness' concessions, it is more likely than not that the jury would have accepted that the account she gave at the committal hearing was more reliable than the one she gave in

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116 Ibid at 466.
117 Ibid.
118 AB 41.

evidence in chief, but that does not mean that this earlier account became evidence of the facts. To the contrary, if accepted by the jury, such evidence was still only available to the jury to assess the consistency (or not) of the making of her complaint. As such, the evidence went to the complainant's credit.

[62] It follows that it would be wrong to direct the jury that Ms M's evidence could only be used to assess her credit because that evidence was also available to assess the consistency of the complainant's complaint and, in that sense, to assess her credit.

Was there a misdirection?

[63] The discussions with counsel in advance of the summing up concerned the possible application of s 18 to the evidence Ms M gave at the committal hearing.[119] At no time was it submitted that s 19 was in play, or even potentially so. That argument was devised after trial and presented for the first time in this Court. As it turns out, this argument should be rejected for the reasons already given, but the exchanges between trial counsel for the appellant and the trial judge proceeded on that wrong footing, that is to say, that s 18 fell for consideration. It follows that it is difficult to derive much, if anything, of present relevance from those exchanges. All that should be said is that, despite requesting the appellant's trial counsel to assist with authorities on the point, none were advanced. It therefore fell to the trial judge to determine the question "on the run" as it were and without the benefit that reference to a number of the authorities canvassed in these reasons would no doubt have provided.

[64] That said, the parts of the summing up on which the appellant relied to contend in this Court that there had been a misdirection have already been reproduced (at [26] to [28]), but particular reliance was placed on these passages:

> "You've also heard a lot of evidence and questioning in this trial about what has been referred to as prior inconsistent statements. Now, you should be aware, ladies and gentlemen, that **a prior statement of a witness that may be inconsistent with something that's now being said in evidence by that witness is not evidence of the truth of what the person said at the earlier time**. To give you an example and to use the same example that I used just a few moments ago, if, in a police statement, a witness said the sky was grey but in evidence that witness said the sky was blue, then the evidence from the witness is that the sky was blue. That's the evidence that was given. **The prior inconsistency, if you find it to exist, merely is relevant to the credibility of that particular witness when you're assessing that person's evidence**. Whether the prior inconsistency, in fact, impacts upon that person's credibility and/or reliability is a matter for you to determine. Now, I should make mention of this: that direction, of course, has relevance to the evidence of the complainant; you've just been listening to addresses about the alleged prior inconsistencies.
>
> **You also, however, heard evidence from the complainant's mother about the complaint that she was given by her daughter the following day. What she told the committal proceeding court seven years ago and what she has said today was said to be different. That direction relates to that as well. That inconsistency**

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[119] Above at [22].

> **between what the mother told the committal court seven years ago and what she told today, depending upon your view of it, impacts, potentially upon the mother's credibility and reliability. But what the mother said to the committal court seven years ago is not evidence of the fact that the complainant said those things to her. It's not evidence of the truth of the contents of the statement if you can follow that logic. It impacts upon the particular witness's credibility who's giving the evidence.** I'll come to that evidence in just a moment."[120] [Emphasis added]

[65] His Honour's direction about the use to which a prior inconsistent statement of a witness could be put was entirely correct; in the absence of such a statement being proved by virtue of ss 17, 18 or 19 (with the consequence that s 101 is engaged), it cannot be evidence of the truth of what the witness said on that prior occasion. Instead, and again as his Honour correctly directed, the prior inconsistency is relevant to an assessment of the witness' credibility. So, too, was his Honour correct to direct the jury that the "inconsistency" between Ms M's evidence at the committal hearing and her evidence at trial (or, more precisely, her evidence in chief at trial) had a potential "impact" on Ms M's "credibility and reliability". However, in my view, his Honour erred when he instructed the jury that "what the mother said to the committal court seven years ago is not evidence of the fact that the complainant *said* those things to her". Although it was correct to direct the jury, as his Honour immediately did thereafter, that such evidence is "not evidence of the truth of the contents of the statement", Ms M's prior account had become part of her oral testimony at trial and was therefore available for use by the jury when considering what the complainant said by way of preliminary complaint to her mother. Thus, the use to which the evidence could be put extended beyond merely using it to assess Ms M's credit; if accepted, it was also available to determine the consistency or otherwise of the preliminary complaint and, therefore, the complainant's credit.

[66] Of course, these directions were not all that the trial judge said on the topic of Ms M's evidence. As earlier discussed,[121] his Honour turned to the preliminary complaint evidence a short time later. After referring to the evidence of Ms Johnson, his Honour said this:

> "There was also evidence from the complainant's mother, [Ms M], who gave this evidence, page 2-25:
>
> > *She said that she phoned me to tell me that she had been raped and that she was very upset and yes.*
>
> She said that she advised her to go to the police and she said she wasn't going to and she thought that was the extent of the conversation then. **And you would recall that she was then reminded of what she – that is [Ms M] – had said on that prior occasion which I've already referred to and directed you in relation to**."[122] [Emphasis added]

[67] Then, after dealing with the evidence of Mr Haberfield, the trial judge gave these directions:

> "**Now, the evidence of what the complainant said to those people may only be used as it relates to the complainant's credibility.**

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120 AB 138.
121 At [27].
122 AB 140.

> Consistency between each of those accounts and the complainant's evidence before you is something you may take into account as possibly enhancing the likelihood that her testimony is true. **However, you cannot regard the things said in those out of court statements as proof of what actually happened.** In other words evidence of what was said on those occasions may, depending on the view you take of it, bolster the complainant's credit because of consistency. But it does not independently prove anything.
>
> Likewise, **any inconsistencies between any one of those accounts and the complainant's evidence may cause you to have doubts about the complainant's credibility [or] reliability.** Whether consistencies or inconsistencies impact on the reliability of the complainant is a matter for you. Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable and the inconsistencies are a matter for you to consider in the course of your deliberations."[123] [Emphasis added]

[68] These further directions regarding the preliminary complaint evidence were unimpeachable. Indeed, it may be that when his Honour reminded the jury again of "what… [Ms M] … had said on that prior occasion" and then directed them that "any inconsistencies between *any one of those accounts* and the complainant's evidence may cause you to have doubts about the complainant's credibility of [sic] reliability", that was enough to cure what had been earlier said to the effect that Ms M's prior account could not be used for that purpose. However, when her prior account was referred to by the trial judge in this context, the reference was expressed to be subject to the directions already given and they were wrong.

[69] In my respectful view, there was a misdirection.

Application of the proviso

[70] Not every misdirection should result in a new trial. To the contrary, even if the Court is of the opinion that the point raised by the appellant might be decided in favour of the appellant, the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[124]

[71] For the appellant, it was submitted that it would be inappropriate to apply this proviso in any case "where the obligations of the trial judge to properly direct the jury are not observed, such that the jury is deprived of guidance on important matters" and that this was one such case.[125] Indeed, the Crown conceded on the hearing of the appeal that, if the appellant's argument was accepted, it could not be submitted that there had been no substantial miscarriage of justice.[126] I do not agree, and not merely because I have rejected the appellant's argument. Although the argument – that Ms M's prior account was "proved by virtue of" s 19 for the purposes, and within the meaning, of s 101 – cannot be accepted, the point – that the prior account was available to the jury to assess the credit of the complainant – was still good. Rather, I am of the opinion that, notwithstanding the misdirection, no substantial miscarriage of justice has actually occurred.

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123 AB 141.
124 *Criminal Code* 1899 (Qld); s 668E(1A).
125 Appellant's Outline of Argument; par 46 (citing *R v Baker* [2014] QCA 5 at [89]).
126 T. 1-11.

[72] In considering whether a substantial miscarriage of justice has occurred, the court must make its own independent assessment of the evidence and, after due allowance for the natural limitations that exist in the case of such a review, determine whether the accused was proved beyond reasonable doubt to be guilty of the offence in relation to which he or she was convicted by the jury.[127] Having undertaken such a review, it has to be said that the Crown case was strong. The complainant's account of what took place was comprehensively tested in cross-examination but she was unmoved regarding any of its essential detail. Physical evidence, although not going to the proof or otherwise of the issue of consent, nevertheless supported parts of her account. Preliminary complaints were not only made to her mother but also to Ms Johnson and Mr Haberfield. The guilt of the appellant on each of the offences for which he was convicted was proved beyond reasonable doubt.

[73] There is one other matter. The two aspects of Ms M's earlier evidence that were inconsistent with her evidence in chief at trial[128] were not put to the complainant when she was cross-examined. In fact, her account of the telephone conversation – "I said mum, he raped me"[129] – was not challenged at all. In the absence of such a challenge, the proposition that the jury were deprived of the chance to take into account what was earlier said by Ms M when assessing the complainant's credit is considerably weakened.

Disposition

[74] For these reasons, I am of the opinion that the appeal should be dismissed.

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127 *Darkan v The Queen* (2006) 227 CLR 373 at 399 per Gleeson CJ, Gummow, Heydon and Crennan JJ.
128 Identified at [58].
129 AB 41.