SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBQ* [2017] QCA 134
PARTIES:	**R** **v** **HBQ** (appellant)
FILE NO/S:	CA No 289 of 2016 DC No 593 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 20 October 2016
DELIVERED ON:	16 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2017
JUDGES:	Gotterson and McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against each conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – SUMMING UP – where the appellant was convicted of four counts of rape and five counts of indecent dealing with his step-daughter – where the offending the subject of two of the rape counts occurred when the complainant was over the age of 16 years – where defence counsel expressly disavowed the defence in s 24 of the *Criminal Code* (Qld) of honest and reasonable mistake of fact as to the complainant's consent to those acts – where the trial judge, in summing up to the jury and over the objection of defence counsel, left the defence of honest and reasonable mistake of fact to the jury – where the evidence did not raise an issue under s 24 and the trial judge therefore made a wrong decision on a question of law – where, in the defence counsel's final address to the jury, the defence under s 24 was expressly disavowed – where the jury delivered two notes relating to the issue of consent – whether a substantial miscarriage of justice had occurred – whether the proviso in s 668E(1A) of the *Code* could be applied CRIMINAL LAW – PROCEDURE – COURSE OF EVIDENCE, STATEMENTS AND ADDRESSES – ADDRESSES – FINAL ADDRESS OF COUNSEL FOR CROWN – where the prosecutor submitted that the complainant's version of the acts was "graphic and detailed"

and therefore she was drawing on a real memory because she could not "surround her account with true details" – where the appellant contended that a possible answer to that argument was that the complainant may have had sexual experience with someone else, which was an impermissible line of argument without leave under s 4 of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) – where the prosecutor gave no notice of that line of argument and the defence had no opportunity to consider whether to apply for leave or to cross-examine on the subject – where the prosecutor's argument, in context, was merely that the complainant's version was more persuasive because it was detailed – where the appellant made a number of other complaints about the content of the prosecutor's address – whether the defects, alone or in combination, caused a miscarriage of justice

Criminal Code (Qld), s 24, s 668E(1A)

Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, cited
R v Trieu [2008] QCA 28, cited
R v Willett (2005) 156 A Crim R 214; [2005] QCA 339, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited
Viro v The Queen (1978) 141 CLR 88; [1978] HCA 9, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, considered

COUNSEL: J McInnes for the appellant
V A Loury QC 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 McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** After a trial in the District Court, the appellant was convicted of sexual offences against his step-daughter. There were four offences of rape and five offences of indecent dealing with the child, who was under the age of sixteen years.

[3] He appeals against each of those convictions upon two grounds. The first is that there was an error of law by the trial judge in directing the jury to consider, on the charges of rape, whether the prosecution had excluded the possibility that the appellant had honestly and reasonably believed that the complainant was consenting. It is argued that that this issue was not raised by the evidence and that the judge's directions to the jury, over the objection of the appellant's counsel, could have detracted from his defence, which was that the alleged incidents did not occur at all.

[4] The second ground of appeal is that, in several ways, the address to the jury by the prosecutor was improper and led to a miscarriage of justice.

The evidence at the trial

[5] The nine charges came from three alleged incidents, each occurring in the house where the appellant then lived. Her evidence in chief, for the most part, was in the form of a recording admitted under s 93A of the *Evidence Act* 1977 (Qld). She was also further examined and then re-examined in pre-recorded evidence.

[6] The first incident was said to have occurred when the complainant was in year 8 of school. The complainant's step-brother and step-sister were staying in the house over a holiday period. The complainant was sharing a bed with her step-brother. The complainant said that the appellant came into this bedroom and lay down on the bed between her and the step-brother before touching her vagina, kissing her cheek, inserting a finger in her vagina and placing her hand on his penis. She was asked by the prosecutor whether she did anything in response to his initial actions of lifting up her pants and her underwear and she said that she "just froze".[1] She said that she made no movement and said nothing to him and nor did he say anything to her.[2]

[7] The second incident, she said, occurred when she was in year 9. When her mother and sister were out shopping, she was in her room when the appellant came in and sat down on the bed beside her. He touched her vagina on the outside of her clothing and then under her clothing. He said "Do you like that?" and she did not reply. He told her not to tell anyone. Her evidence was that "he did it the same way he did it the first time".[3] She was asked what she did in response to his fingers being in her vagina and she said "I just froze again".[4] She said nothing and she did not move away but "just laid there." She said that she "didn't know what to do".[5]

[8] The complainant said she moved out of the house at the beginning of grade 10 and went to live with her father. In her s 93A interview, she explained the circumstances that led to her then moving back to the house where her mother and the appellant lived. She said that her mother had had a baby and had become pregnant again in 2014. And she said that at "the end of the year my step-dad [the appellant] had to go to court because he was really drunk one night and … he went to where a police officer's house [was] and he … tried to break in and stuff like that". She said that "because they knew he was like going to jail, my mum like needed support and myself, to help her … so I moved back in to help her … with my little brother and because she was pregnant as well …".[6]

[9] The third incident, the complainant said, occurred on the night before the appellant was to be sentenced for that offending. It occurred when the other family members were out shopping. The appellant was in the shower and called out to her that he needed a towel and soap. She took these in to the bathroom. He then grabbed her hand and placed his hand on her vagina outside her clothes. He kissed her neck and took off her clothing and her underwear whilst continuing to kiss her neck and cheek. She was pulled into the shower and pushed against the wall and he then placed a finger in her vagina and kissed her neck and breasts. He placed her hand on his penis. She told police that she "just stood there … waiting for it to stop."[7] She said that he then "turned me around so I was facing like where he walked into

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1 AR 26.
2 Ibid.
3 AR 28.
4 Ibid.
5 Ibid.
6 AR 317.
7 AR 320.

the shower … [a]nd then he bent me over and put his penis inside me."[8] He said that "he kept on moving and I like was crying and stuff and he kept on saying that he wasn't going to hurt me and told me not to tell anyone and then I tried to move away but he pulled me back and then he pulled away again and grabbed my shirt and my pants and walked out of the bathroom and put them on my bed …"[9] In this incident, she said that nothing was said.[10] She said all of this took neither "a really long time" nor "a really short time".[11] In her pre-recorded evidence in chief, she was asked how she was positioned after "he bent you over", and she answered "[m]y hands and feet were on the ground".[12] She tried to pull away at one stage, but he pulled her back and "kept on going", before she pulled away for a second time and left the shower.[13]

[10] The cross-examiner suggested that at the time of the alleged incident in the shower, the complainant must have been still living at her father's house, which she denied.[14] The cross-examination was not lengthy and it was all directed towards the defence case that none of this had occurred. There was no evidence from her cross-examination which raised or contributed to an issue of an honest and reasonable mistake about consent.

[11] There were several witnesses who gave preliminary complaint evidence. It is unnecessary to discuss their testimony, because it did not raise or contribute to that issue.

[12] The appellant did not give or call evidence. The prosecutor and the defence counsel addressed the jury on the third day of the trial. The judge summed up on that afternoon and the jury returned with their verdicts on the following day.

Mistake

[13] There are two questions raised by the first ground of appeal. Was it an error by the trial judge to direct the jury to consider the operation of s 24 of the *Criminal Code*? And if it was an error, did a substantial miscarriage of justice actually occur?

[14] After the conclusion of the evidence and before the addresses, the judge invited submissions as to whether certain directions should be given. He said that he intended to give directions on the operation of s 24 in respect of consent. The judge said that especially for the last counts of rape (those occurring in the shower), there was a question of whether the appellant could have thought that she was consenting, "because she didn't actually say no and …. she had him take all her clothes off and then perform very sexual acts in the shower, on her evidence." The judge remarked that it was established by authority that a jury should be directed on honest and reasonable mistake of fact, even in circumstances where a defendant has not given evidence and says that the incident did not occur.

[15] In response, the appellant's counsel objected to the direction, saying this:

> "I disavow the defence, I put that on the record. The matter has been litigated on the basis that the incidents did not occur. I would prefer

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8 Ibid.
9 AR 320-321.
10 AR 30.
11 AR 31.
12 Ibid.
13 Ibid.
14 AR 39-40.

> it if your Honour did not leave the defence, because I don't want the jury thinking that my client is having a bob each way. I understand what the authorities say that your Honour's reason is, but in this particular case, it's my submission that it is more likely to lead to a potential miscarriage than otherwise."

[16] Nevertheless, the judge said that he would direct the jury to consider the issue. In anticipation of those directions, each counsel addressed the jury on the issue. The prosecutor, addressing first, said this to the jury:

> "It was never even suggested to her that she was consenting. It would be absurd to think that this young girl has consented to having sex with her father or any [act] of that kind. So you might think she's not consenting to what he's doing. But take, for example, the second occasion. When he's touching her, he says something like, "Do you like that?" So you have to wonder in your mind, what you have to ask yourself is, "Well, does this mean he thought she wanted him to touch her?" And if he thought that she was consenting and that mistake, because she wasn't, was reasonable and honest, he would not be guilty of the rape offence.
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> In respect of the penetration of her vagina with his fingers, he would still be guilty of indecent treatment of a child under 16. So in Queensland, it doesn't matter if kids consent. So if a 15 year old girl chooses to have sex with a man, that is still a crime called unlawful carnal knowledge, which is just sex, just penetration of vagina. His Honour will give the detailed directions about this. I'm just giving an overview now. Now, what the Crown would say here is that he couldn't possibly be mistaken. He's her stepfather. He's much older than her. You can see from his age. She's a young, little, 12 year old girl at the first occasions, 13 at the second. He couldn't possibly think, in his mind, "Oh, she really wants me to do this. She's consenting."
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> But there's two parts to it. Even if in his deluded mind, he believes that she is consenting, that's not the end of the test. You'd still have to decide that his mistake was both honest, that he really thought it, and that it was reasonable. And the Crown would say you would, really, on this evidence, be sure beyond reasonable doubt that he couldn't have had a reasonable mistake, given her young age of 12 and 13 and 15. Take, for example, in the shower because when the first two occasions happened, she just froze. She didn't actually say no to him or stop or anything like that, but you would say, from the circumstances, he just couldn't have thought, reasonably, even if he deluded himself otherwise, he couldn't have thought she was consenting.
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> In respect of the shower, where he penilely raped her, the situation is even more clear. She is crying during this and he says, "Don't worry. I'm not going to hurt you." He knows that she is not into him having sex with her. That's while he's saying "I'm not going to hurt you." Effectively, "Just let me do what I want," is what he's saying. And she tries to pull away and he pulls her back and then she pulls away, successful the second time. There can be no ambiguity in his mind, if you're satisfied that that happened, that he is

> reasonably mistaken. He must have known that she wasn't consenting to any of these acts, particularly, in the shower where he's having sex with his 15 year old stepdaughter who's crying and try to pull away, where he's pulling her clothes off and bending her over."

[17] I have set out that part of the prosecutor's address in full for two reasons. One is that it was, in substance, correct in identifying the facts and circumstances by which the jury could exclude the operation of s 24. The other is because in this Court, it is said that it shows how this false issue enabled the prosecutor to denigrate the appellant as if he had raised the issue.

[18] In his address to the jury, the appellant's counsel disavowed any case about mistake, saying:

> "Now, the learned trial judge has a duty to give you directions about defences that may – that do arise on the evidence. Now, he's going to tell you, as my learned friend said, about this defence called honest and reasonable mistake of fact. Let me be completely upfront with you. The defence case is you cannot accept beyond a reasonable doubt that these things happened. The defence disavows any notion that my client is trying to say through me, "But if you think it did happen, she consented". We're not saying it at all. Listen to his Honour – you're bound to, and he's bound to give you directions. But that is not a defence upon which we are relying. I don't think I can be much clearer than that. If it happened, he's guilty. If you've got a reasonable doubt about that, he's not guilty. And this is not a trial about guilt or innocence. This is trial about whether he's guilty beyond a reasonable doubt."

[19] It is unnecessary to set out in full what the judge said to the jury about mistake of fact. If it were appropriate to direct the jury on this question, there could be no criticism of the content of his directions. He instructed the jury that they had to consider whether "the defendant in the circumstances honestly and reasonably believed that the complainant was consenting."[15] He directed that if they were left in doubt as to whether there was such a belief, they would return verdicts of guilty of indecent treatment of a child under 16 and under care for those counts. When discussing the rival contentions, the judge referred to the prosecutor's submission on the issue. When discussing the submissions for the appellant, the judge did not refer to what the counsel had said about it. There is no complaint about that however: the complaint is that the jury was instructed to consider the question.

[20] On the following day, the jury sent a note to the judge, which contained a question about whether they could "infer consent from the absence of resistance … during the removal of the clothing".[16] The jury returned and the judge directed them as to what was meant by consent, as well as reminding them of his directions about mistake.

[21] A little later, the jury sent a further note asking, in relation to "the element of consent in charges 7 and 9", whether "we require absolute unanimity in order to

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15 AR 176.

16 AR 191-192.

give the verdict of guilty on the charge as written, rather than a guilty verdict on the lesser charge?" The judge told them that the answer to their question was "yes". The jury then agreed upon their verdicts within half an hour.

[22] The arguments in this Court do not differ as to the principles. It is the role of a trial judge to decide what the real issues are in a case and to instruct the jury on so much of the law as they need to know in order to decide those issues.[17] The fact that the appellant's counsel disavowed any reliance upon the operation of s 24 did not exempt the judge from the duty to direct the jury on the question if the issue was raised by the evidence.[18] And if a trial judge is in any doubt as to whether there is sufficient material to raise an issue, in general the prudent course is for the issue to be left to the jury.[19]

[23] Some of the trial judge's remarks, during the course of submissions to him by the appellant's counsel on this question, could give the impression that the judge believed that directions about mistake as to consent should be routinely given in any trial of a charge of rape. If so, that would be a misunderstanding. There is a potential for a miscarriage of justice by unnecessary directions being given to juries, just as there is from the omission of directions which should be given. An unnecessary direction has the potential to distract the jury from the consideration of the true issues. And that distraction can be exacerbated by unnecessary and irrelevant arguments to the jury, by one or both sides, in the anticipation of that direction. It can also result, as the appellant argues occurred here, in a prejudice to a defendant's case by the jury having the impression that it is the defendant who is raising the point, because the defendant lacks any persuasive argument on the true issues. Whilst generally a trial judge should adopt the prudent approach to which I have referred, a judge should be alert to the possibility that, in the particular case, more harm than good could come to the fairness of the trial from requiring the jury to consider an issue not raised by evidence or relied upon by the defendant.

[24] Here there were four counts of rape, one in each of the first and second incidents and two counts (digital and penile rape) in the third incident. The evidence on the first and second counts raised no issue about mistake as to consent. The complainant was relatively young, had no demonstrated sexual experience and neither said nor did anything which could have indicated that she was consenting to what was being done to her.

[25] The trial judge did not appear to think otherwise, about those earlier counts. But he thought that the later counts were different, because the complainant was then older, the entire incident had taken longer and the removal of the complainant's clothing and the act of penile rape must have involved some physical cooperation which might have been interpreted as consent. However, the complainant's evidence was also that she was crying and that before managing to flee, she had made an unsuccessful attempt to do so. And nothing which had preceded this incident was said to have been relevant to a belief that she was consenting. The earlier incidents could not have done so: instead, they would have indicated that the complainant was not agreeable to this conduct.

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17 *R v Getachew* (2012) 248 CLR 22 at 34-35.

18 *Pemble v The Queen* (1971) 124 CLR 107; *Stevens v The Queen* (2005) 227 CLR 319.

19 *Viro v The Queen* (1978) 141 CLR 88 at 118 per Gibbs J; *R v Willett* (2005) 156 A Crim R 214 at [16] per McPherson JA; *R v Trieu* [2008] QCA 28 at [47] per McMurdo P.

[26] In my opinion, the evidence, considered together with the absence of any suggestion in cross-examination of consent, did not raise an issue under s 24. Although generally prudence requires a judge to direct on an issue where some doubt as to whether it is raised by the evidence, the present case should not have been considered as one of that kind.

[27] It follows that the directions as to s 24 were unnecessary. The judge's decision to give those directions was a wrong decision on a question of law.

[28] The second inquiry then is whether a substantial miscarriage of justice actually occurred.[20] It is the respondent's submission, in the alternative, that there was no substantial miscarriage of justice. This question must therefore be considered according to the High Court's judgment is *Weiss v The Queen*.[21] In this context, "[i]t cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."[22]

[29] The appellate court's task "must be undertaken on the *whole* of the record of the trial *including the fact that the jury returned a guilty verdict*."[23] In many cases, the error or irregularity, which calls for the consideration of the proviso, is one which makes the jury's verdict a consideration of little weight. For example, the wrongful admission of evidence which is prejudicial to the defence case may have affected that verdict. But there is another kind of case, described by the plurality in *Weiss,* as follows:[24]

> "[T]here are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. [In such cases] [t]he fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial."

[30] The respondent argues that this is such a case. The appellant argues that the directions about mistake were prejudicial because they distracted the jury from the true defence case and "allowed the prosecution to indulge in …. rhetorical flourishes, and gave rise to illusory talking points which would inevitably be resolved against the defence." The argument refers, in particular, to the prosecutor's comment that the appellant was "deluded" in the passage which I have set out above.

[31] But the prosecutor's "flourishes", on this point, were effectively countered by the defence counsel's address. His stated concern that the jury would consider that his client was having a "bob each way" should have been overcome by his own address. The appellant could not have been discredited, in the eyes of the jury, from the fact that the judge directed as he did.

[32] Nor, in my view, could the jury have been distracted from a proper consideration of the defence case. This was a relatively short trial and the evidence was not

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20 Under the proviso in *Criminal Code* s 668E(1A).
21 (2005) 224 CLR 300.
22 Ibid at 317 [44].
23 Ibid at 317 [43] (emphasis added).
24 Ibid.

complex. The addition of this issue could not have obscured the appellant's argument.

[33] Consequently, this is a case where it is possible to conclude that the giving of the unnecessary directions about mistake would, or at least should, have had no significance in the jury's determinations. Importantly, in this case, the fact of the guilty verdicts "cannot be discarded" from this Court's assessment of the whole record of the trial. By the verdicts, the jury has accepted that these incidents occurred and that the complainant did not consent. The verdicts are relevant because the directions could not have "materially influenced or affected the jury's assessment of the … evidence [on the appellant's] case at the trial," or "otherwise materially prejudiced [him]."[25]

[34] Having considered the evidence, and according due weight to the jury's verdicts, I consider that the evidence proved, beyond reasonable doubt, the accused's guilt. The first ground of appeal should be rejected.

The second ground of appeal

[35] There are many complaints made about the prosecutor's address to the jury and ultimately it is necessary to consider them not only individually, but for their effect in combination.

[36] I will begin with the only one of these complaints which was subject of an objection at the trial and which is said to be the most significant. The relevant passage was part of the prosecutor's argument about the third incident. He summarised the complainant's evidence and argued that the complainant was more believable because she had a detailed memory. The prosecutor said:

> "This is a graphic and detailed portrayal of the sexual descriptions she was in. So much so, she knows where her feet were and she knows where her hands were. Now, it's details like this the Crown suggests points to the fact that she's drawing on a real memory in recalling what the accused did to her. She actually remembers the position her body was in, bent over and where her hands and feet were. Now, my learned friend might well say of these details, well the mark of a good story is to surround it with truth. But here, either what [the complainant] is saying is all true or really none of it is true. It's not a case where she could surround this story with true details but it's otherwise a false account. All those details I've just been through are details that would have to be all false. None of them could be true …. So it's not a case where she can just surround her account with true details."

[37] The appellant's counsel applied for the jury to be discharged upon the basis of this part of the address. He argued that the prosecutor's submission was predicated on the premise that she was not a sexually active teenager, because the response to the argument was that, if she was sexually active, she would have been able to substitute alleged actions by her stepfather for things that had occurred to her with someone else. It is not permissible for the sexual history of a complainant, except in very rare circumstances, to be explored by the defence. It was (and is) said that

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25 *Papadimitriou v The Queen* [2011] WASCA 140 at [256]; (2011) 241 A Crim R 50 at 112 per Buss JA (as he then was).

the prosecutor's argument was therefore unfair and could not be responded to in the defence case, because it was not possible to say, "well, she could well do that … if she has had sexual experience."

[38] It is argued that this was an unfairness to the appellant because the prosecution had given no notice that, at the end of the case, there would be such an argument. As a result, it is said, there was a breach of the rule in *Browne v Dunn*.[26]

[39] Had that notice been given, the appellant could have considered whether to apply for the judge's leave to explore the sexual experience [if any] of the complainant.[27]

[40] The application to discharge the jury having failed, the appellant's counsel responded to this argument by suggesting to the jury that the details of what she described about the third incident could well have come from movies or television. But in my view, that argument to the jury, like counsel's argument to the judge, incorrectly characterised the prosecutor's argument. What was said by the prosecutor in the above passage needs to be understood in the context of his address. A little earlier, the prosecutor had said:

> "Another reason you might think she is describing real memories, she's drawing on a real memory in her mind, is the presence of the details of her account: both details that aren't relevant to a sexual offending account, that are only present because they occurred, and details that relate to sensations, to feelings, the type of things you might think a teenager reflecting on a time when she was younger would remember."

[41] The prosecutor's argument was that the complainant's version was more persuasive for the fact that it was a detailed, rather than a generalised, account. That was a legitimate argument. The prosecutor did not suggest that the detail of the complainant's account could not have been a fabrication, because the complainant could have had no source from which to compile her story. In particular, he did not suggest that the complainant could have had no source, because of her sexual inexperience, for her description of what had occurred. There was not the unfairness in that submission which was and is still suggested on behalf of the appellant.

[42] The next complaint is that the prosecutor told the jury that "if she was honest then he is guilty of the offences". It is said that the jury was misled because reliability was also "the critical factor". For at least two reasons, that submission could not have misled the jury. The first is that, in the usual way, the judge instructed the jury as to how they were to assess the evidence and not only the credibility, but also the reliability, of the witnesses.[28] The second is that in this case, it was correct to say that "the critical factor" was the credibility of the complainant. The defence case was not that she could have been innocently mistaken, it was that she was being untruthful and that she had made up these complaints as a means of getting the attention of her friends.

[43] The next complaint is of the prosecutor's statement that "juries can and do convict on the testimony of a single child witness." It is submitted that the words "and do"

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26 (1893) 6 R 67.

27 *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 4.

28 AR 172.

involve the prosecutor giving evidence. It is also criticised upon the basis that it was irrelevant: what other juries have done in other cases did not matter to the determination of the present one. In my view the submission by the prosecutor should not have been made in these terms. The prosecutor could have said simply that it was open to the jury to convict solely on the testimony of the complainant. Fortunately the prosecutor did not go further and suggest that, for example, it was commonplace for juries to do so. However the appellant's argument, that this statement contributed to a miscarriage of justice, cannot be accepted. The jury was given clear instructions by the judge as to the need to scrutinise the evidence of the complainant with great care and they were warned that they should only act on her evidence if, after doing so, they were convinced of its truth and accuracy.[29] In anticipation of that instruction by the judge, the prosecutor said this:

> "His Honour will indeed tell you to scrutinise her evidence with great care before convicting the defendant, particularly in circumstances where some time has gone by before she spoke about the first and second occasions of offending. Now, you might think that direction – and many of the directions like the ones you received – are matters of common sense: that in a rape trial based on the word of the complainant, you would of course carefully consider her evidence."[30]

For the appellant, it is said that this statement by the prosecutor "invited a misapprehension about the functions of the judge and jury and tendered to undermine the authority of the directions."[31]

[44] Again, it is my view that the prosecutor should not have made an argument in those terms. He was referring to the anticipated direction and warning about the effect of a delay between the times of the first and second incidents and when the appellant was told of these complaints. A warning by the judge in these terms was necessary because the nature of the prejudice to the accused person might not have been appreciated by a jury.[32] However, the jury heard last from the judge whose instructions in this respect were clear and it is usually assumed that a jury will act in accordance with such instructions.

[45] When addressing on the credibility of the complainant, the prosecutor said:

> "You might think that that [the complainant] isn't some master cool, calm, collected liar able to deceive police and then barristers and a judge."

It must be accepted that this was a statement which should not have been made. One of its difficulties was its vagueness and ambiguity: who were the barristers and who was the judge who had been deceived if the complainant was not truthful? More importantly, the submission suggested that her testimony should be more readily accepted because others, including a judge involved in this case, had done so. It appears that what the prosecutor was meaning to say was that it was unlikely that a teenager would be "cool, calm and collected" in the presence of police and then a court if she was telling lies. That is suggested by what the prosecutor said a little further on as follows:

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29 AR 174-175.
30 Transcript of Crown Closing Address, 19 October 2016, T1-2 ll 18-23.
31 Appellant's outline of submissions, paragraph 18.
32 *Longman v The Queen* (1989) 168 CLR 79, 91 per Brennan, Dawson and Toohey JJ.

> "So an initial reason the Crown would suggest you would believe [the complainant] is because of how she came across in her police interview and in testifying in court. Her fairly normal manner of speaking and occasional but overblown tears are not consistent with a teenager wilfully deceiving police and then a court."

That statement had the effect of clarifying the earlier statement and the jury could not have thought that the complainant's testimony had been the subject of some preliminary adjudication by a judge or others. They were instructed, of course, that they were the persons charged with the sole responsibility for deciding whether the defendant was guilty.

[46] The next complaint is that the prosecutor made an incomplete and consequently misleading submission that there was some significant consistency between the complainant's evidence in the s 93A recording and her pre-recorded oral evidence. It is said that this was misleading because it omitted the fact that, as the complainant said in her pre-recorded evidence, she had recently seen the s 93A recording. That fact affected the weight of the prosecutor's submission, but it did not make it misleading or unfair. It was, of course, open to the appellant's counsel, when he addressed after the prosecutor, to point out any incompleteness in what the prosecutor had said.

[47] The next complaint is about this statement by the prosecutor:

> "Now my learned friend may raise that … [the complainant] was not actually living with the defendant on [sic] the time of the third occasion, the night before he was to be sentenced *for threatening violence and burglary*".

The jury heard evidence that the appellant was to be sentenced for such an offence.[33] The appellant's counsel had made an apparently sound forensic decision that he would not object to that evidence: although evidence of the nature of the offence could be prejudicial, counsel was wanting to avoid a suspicion by the jury that he was to be sentenced for a sexual offence. The prosecutor's reference to the nature of this other offence, at this point in his address, was unfortunate and gives the impression that, as the appellant argues, he was wanting to gratuitously remind the jury that the defendant had some propensity to threaten violence. However the judge gave this direction: [34]

> "Evidence has been given that the defendant has convictions for threatening violence at night, attempted burglary in the night with property damage and trespass. That fact must not be used by you to say that because he has committed offences before, therefore, he must be guilty of the offences the subject of the counts before you, which are, furthermore, of an entirely different character. This evidence was placed before you solely for the purpose of ascertaining the date of the offending which allegedly occurred in the third incident."

That direction effectively negated what might have been the unfairly prejudicial impact of the prosecutor's statement.

[48] It follows that none of the complaints about the prosecutor's address can be

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33 See the passage set out at paragraphs 8-9 above.

34 AR 174.

accepted as causing, or in combination with others, contributing to a miscarriage of justice. That is my conclusion having considered each of these complaints in the light of the appellant's further submission that the prosecutor's statements were amplified by his frequent use of his expression "the Crown would suggest" or "the Crown suggests".

[49] The second ground of appeal must be rejected.

Conclusion and order

[50] I would order that the appeal against each conviction be dismissed.

[51] **MULLINS J:** I agree with McMurdo JA.