SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCY* [2018] QCA 44
PARTIES:	**R** **v** **SCY** (appellant)
FILE NO/S:	CA No 205 of 2017 DC No 467 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 7 September 2017 (Dorney QC DCJ)
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2017
JUDGES:	Holmes CJ and Fraser and Gotterson JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of maintaining an unlawful relationship with a child under 16 and three offences of unlawful and indecent dealing with a child under his care – where there was a relatively long delay in complaint – where the trial judge referred to media reports concerning the Royal Commission into Institutional Responses to Child Sexual Abuse when commenting on delay – where the trial judge directed the jury to scrutinise the complainant's evidence because of the relatively long delay in complaint – whether the trial judge's reference to the content of media reports when commenting on delay occasioned a miscarriage of justice *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, applied
COUNSEL:	M J Copley QC for the appellant P J McCarthy for the respondent
SOLICITORS:	Groves & Clark Solicitors for the appellant Director of Public Prosecutions (Queensland) for the respondent

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

[2] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[3] **GOTTERSON JA:** At a trial over six days in the District Court at Townsville, the appellant, SCY, was found guilty on 4 September 2017 of an offence of maintaining an unlawful sexual relationship with the complainant, a child under 16 years[1] (Count 1) and three offences of unlawful and indecent dealing with the complainant who was under his care for the time being[2] (Counts 2, 4 and 5). The Count 1 offence was alleged to have occurred between 26 January 2010 and 3 November 2012. The Counts 2, 4 and 5 offences were each alleged to have occurred on a date unknown, in the case of Count 2, between the 26 January 2010 and 1 March 2010; in case of Count 4 between 1 January 2011 and 31 December 2011; and in the case of Count 5, between 1 June 2011 and 31 August 2011. All offending was alleged to have taken place at Clare.

[4] At the same time, the appellant was found not guilty of two counts of rape[3] (Counts 3 and 6), the latter with an additional statement that it was a domestic violence offence.[4] Those counts involved the same complainant. Count 3 was alleged to have taken place on a date unknown between 2 March 2010 and 31 July 2010, whereas Count 6 was alleged to have taken place on 20 September 2012. Again, this offending was alleged to have taken place at Clare.

[5] On 7 September 2017, the appellant was sentenced to three and half years' imprisonment for the Count 1 maintaining offence and to 18 months' imprisonment for each of the indecent treatment offences, all sentences to be served concurrently. The principal sentence was ordered to be suspended after 21 months for an operational period of four years. Two days pre-sentence custody were declared to be time served under the sentence.

[6] By a notice of appeal filed on 11 September 2017,[5] the appellant appealed initially against both his conviction and sentence. At the hearing of the appeal on 30 November 2017, the application for leave to appeal against sentence was abandoned.[6] The appeal against conviction was pursued.

Circumstances of the alleged offending

[7] The complainant was about 13 years and two months old when the alleged offending began and 15 years and 11 months old at the end of the period covered by the counts. The appellant was the complainant's stepfather from when she was two years old. He married the complainant's mother and they had two daughters, K and C, who were aged between nine and 12 years in the one case and eight and 11 years in the other, during the period in question. The offences were alleged to have occurred mostly at the family home at night when K and C were present but had gone to bed in their bedrooms, and the complainant's mother was absent either at voluntary group activities or her employment.

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1 *Criminal Code* s 229B(1).
2 Ibid ss 210(1)(a), (4).
3 Ibid s 349(1).
4 Ibid s 564(3A).
5 AB616-618.
6 Appeal Transcript ("AT") 1-2 ll22-23.

[8] According to the complainant's evidence, the Count 2 offending happened in about February 2010. The appellant told her to massage his shoulders. As he did so, he reached behind and touched and rubbed her vagina through her shorts. This went on for a couple of minutes. The complainant said she was scared and went to her bedroom.[7]

[9] The alleged offending in Count 3 occurred some months later, in June 2010. The complainant said it happened after a cricket carnival in May but was uncertain whether the carnival was in 2010 or 2011. The complainant testified that as she was massaging the appellant's shoulders, he touched her vagina for one or two minutes under her shorts and then put a finger in it, pushing the finger in and out for about five minutes.[8]

[10] As to the Count 4 alleged offending, the complainant said that on another occasion, the appellant asked her to massage his feet. She did so for five to 10 minutes. The appellant then asked her to hug him. As she was hugging him, he pulled her on top of him. She felt his penis. It was hard and pulsating. He then rubbed his hands up and down her back and touched her bottom under her clothing.[9]

[11] The Count 5 offending was alleged by the complainant to have occurred in July 2011. The appellant told her to massage his shoulders. After about 10 minutes, her hands were sore and she stopped. He took her hand and put it on to his penis which was inside his clothing. He held the hand there for several minutes and then moved it in a circular motion around and over his penis. The appellant then got up and went to the toilet.[10]

[12] With respect to the offending alleged in Count 6, the complainant said that on the evening of the local state school fancy dress ball in October 2012 which her mother and K and C attended, she was at home with the appellant. He called her over to his lounge chair and put his hands up under her shirt and fondled her breasts. He then put his hand inside her pants and touched the outside of her vagina. Next, he put his finger into it and moved the finger around.[11]

[13] The complainant gave evidence that she did not consent to any of the touchings of her by the appellant.[12]

[14] The maintaining count relied on the offending alleged in the other counts as well as other evidence of touching given by the complainant. She said that the appellant touched her breasts and vagina every couple of months when her mother was at volunteer group activities and K and C were in bed.[13]

Complaint to others

[15] The complainant testified that the appellant's sexualised behaviour continued beyond September 2012 until the end of 2013. She moved out of home in about April 2014. She did not mention the appellant's behaviour to any other person at the time that it occurred. It was her fiancé whom she told first in October 2014.

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7 AB468 Tr1-24 l37 – AB470 Tr1-26 l20.
8 AB470 Tr1-26 l35 – AB473 Tr1-29 l41.
9 AB475 Tr1-31 l44 – AB476 Tr1-32 l15.
10 AB475 Tr1-31 ll1-37.
11 AB476 Tr1-32 l40 – AB477 Tr1-33 l33.
12 AB479 Tr1-35 ll11-15.
13 AB474 Tr1-30 ll8-37.

She told him that the appellant had abused her. On a later occasion, she told him that the appellant had touched her breasts and vagina.[14]

[16] In her evidence in chief, the complainant was asked why she had not complained to anyone when the behaviour was occurring. She replied that she was scared; that she did not know what to do; and that she did not know whether she would be believed because the appellant was well liked in the district.[15] She did not tell her mother because they did not have a very good relationship.[16] The appellant had never threatened her to keep silent.[17]

[17] The complainant's fiancé gave evidence that one night in September 2014, the complainant became very upset. She told him that the appellant had "touched" her.[18] Later, in October 2015, again when she became very upset, she told him that her stepfather had "touched her boobs and vagina".[19]

[18] Other witnesses to whom the complainant also complained about the appellant's behaviour were two of her aunts. She spoke to them separately in October 2015. One aunt gave evidence that the complainant told her that the appellant had "sexually abused" her. She mentioned the word "fondle".[20] The other aunt testified that the complainant described the appellant's behaviour as going as far as "just touching".[21]

Directions given to the jury

[19] The appellant's sole ground of appeal relates to certain directions that were given by the learned trial judge to the jury. Those directions concerned delay in making complaint and were as follows:[22]

> "This matter took some time to be revealed to [the appellant], so I need to direct you in this respect to that particular issue. [The appellant] indicated that he was first informed of these allegations on the 26th of April 2016. Remember that, in the particular indictment, they go from early 2012 onwards. Now, this is a matter for you and, well, this is a comment and you can accept it or reject it as you see fit, but you may think that common experience and much public discussion indicates there are many cases of sexual abuse with children that do not result in a complaint being made for many years later. **For instance, you may be aware of this yourselves – and, again, you can accept or reject any comment I make of this kind, particularly from what has been published in the press about the Royal Commission into Institutional Responses to Child Sexual Abuse.**
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> You may also consider that consistent with your own common sense and your everyday experience, it is to be expected that different

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14 AB480 Tr1-36 l3 – AB481 Tr1-37 l12.
15 AB479 Tr1-35 ll24-28.
16 Ibid ll31-32.
17 AB489 Tr1-45 l38.
18 AB120 Tr2-68 ll37 – AB121 Tr2-69 ll41.
19 AB122 Tr2-70 l40 – AB123 Tr2-71 l39.
20 AB138 Tr2-86 ll8-25.
21 AB149 Tr3-7 ll30-32.
22 AB377 ll12-34.

> people will react in different ways to the same or similar situations: that is, there is no right or wrong way for people to react. Again, I comment to you: again, it is a matter for you. You might think there are no rules about how people who engage in sexual abuse of children behave and no rules about how a person who has been sexually abused may behave. So, although it is a matter for you, it is probably best to avoid acting on any preconceived notions of what someone in either position might or might not do. But the facts of this case are important and you must look at the facts of this case to determine the outcome - **but you may think that those kind of things that I have commented upon are useful in your evaluation**."

The words in bold type are specifically the subject of the ground of appeal to which I now turn.

The ground of appeal

[20] The appellant relies on the following ground of appeal:

The learned trial judge's comment concerning the delay in any complaint being made occasioned a miscarriage of justice.

[21] **Appellant's submissions:** Counsel for the appellant referred to s 4A(5) of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) which took effect from the beginning of 2004. It applied to this trial. Subject to one exception that is not relevant here, that provision permits a trial judge to make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice. Relying on observations in *Tully v The Queen*,[23] counsel submitted that the expression "in the interest of justice" is a qualification upon the provision that would preclude a comment that was apt to cause a miscarriage of justice. In oral argument, counsel for the appellant accepted that not every inappropriate comment would necessarily give rise to a miscarriage of justice.[24]

[22] The passages from the summing up highlighted in bold were in the nature of comment. They were, counsel submitted, neither appropriate nor proper. Further, they were conducive to a miscarriage of justice. They were inappropriate because they encouraged the jury to have regard to press reports and matters not in evidence in contradiction of the direction given to have regard only to the evidence.[25]

[23] As to miscarriage of justice, it was submitted that the jury would have known from press reports that the Royal Commission had found, or that it had been its experience, that delayed complaints were quite common where sexual abuse of a child was alleged. His Honour's comments implied that the experience of the Commission as reported was useful in evaluating the evidence of a complainant. The jury may have perceived that at some official level, it had been accepted or recognised that delayed complaints of sexual abuse were not at all inconsistent with the abuse having occurred, particularly since the jury were not directed that a royal commission is administrative in character; is not bound by the rules of evidence;

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23 (2006) 230 CLR 234; [2006] HCA 56 at [43], [89] and [180].
24 AT1-5 ll15-21.
25 AB295 ll15–19.

and does not make a determination whether sexual offending complained of by a witness before it, has been proved.

[24] In advancing the miscarriage of justice argument, counsel for the appellant referred to defence counsel's address to the jury, noting that delay in complaining was an important factor in arguments put for the appellant as to why they could not be satisfied of guilt beyond reasonable doubt. The complainant knew that she had been molested.[26] There must have been opportunities for her to have made a contemporaneous complaint. Arguably, the delay affected credit. It was of sufficient concern to the prosecutor for him to have examined the complainant about it in evidence-in-chief.

[25] **Respondent's submissions:** The respondent submitted that the impugned commentary should be considered in the context of the summing up as a whole. Comprehensive and careful directions warned the jury that scrutiny was required of the complainant's testimony before arriving at a conclusion of guilt. Specifically, a *Longman* direction[27] explained to the jury disadvantages for the appellant resulting from the delay in complaint within a context where the complainant's testimony was uncorroborated.

[26] The import of the impugned commentary was, it was submitted, to invite the jury to put aside preconceived notions of behavioural responses of either offenders or victims. In this respect, the directions were unremarkable and accorded with the disparagement by this Court of the "well-recognised fallacy" that a victim of sexual abuse will complain promptly.[28]

[27] Citing *Dhanhoa v The Queen*,[29] counsel for the respondent submitted that there was no reasonable possibility that the impugned comments, taken in context, may have affected the verdict. Thus there was no miscarriage of justice on account of their having been made.

[28] **Discussion:** I preface my discussion with the observation that it is undesirable that, in summing up to a jury, a trial judge allude to media reports for their content, when the reports themselves are not evidence in the trial. To do so is apt to detract from the general direction, as was given here, to decide the case in accordance with the testimony, the exhibits and admissions, and to disregard external influences. It may even confuse the jury.

[29] Whilst it is undesirable that these impugned comments were made, it does not at all follow that the making of them resulted in a miscarriage of justice. I agree with the submissions for the respondent that whether a miscarriage resulted or not is to be determined by the test enunciated in *Dhanhoa* and that in making such a determination, the comments ought to be considered in the context of the summing up overall.

[30] As to the press publications, their content to which the learned trial judge alluded, of course, concerned the Royal Commission into Institutional Responses to Child Sexual Abuse. The immediate context in which the allusion was made was the observation to the jury which directly preceded it, namely, that they may think that

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26 AB535 Tr2-35 ll1.

27 See *Longman v The Queen* (1989) 168 CLR 79. See also *Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42 at [20], [21].

28 *R v BBH* [2007] QCA 348 at [34], [35]; *R v MCJ* [2017] QCA 11 at [52], [53].

29 (2003) 217 CLR 1; [2003] HCA 40 at [38], [49] and [60].

common experience and public discussion indicate that there are many cases of sexual abuse with children where a complaint is not made until many years later.

[31] I accept that in that immediate context, the impugned comments implied that many individuals had complained to that Commission of historical child sexual abuse when they had not made a contemporaneous complaint about it and that it may also have implied that the complaints were regarded by the Commission as validly made, if not proved to a legal standard. I also accept that in that immediate context, those implications could have formed a basis for reasoning by one or more jurors to an initial conclusion that delay in complaint is a commonplace which is to be put to one side in considering the reliability and credibility of a complainant's testimony in a child sex abuse case.

[32] However, subsequent directions given by his Honour would have caused such a jury member or members to have disregarded any initial conclusion of that kind. Immediately following the impugned comments, the learned trial judge directed the jury as follows:[30]

> "As both barristers at the bar table have made clear, and I do, as well, this case depends on whether you accept [the complainant's] evidence as truthful and accurate. You can convict on her evidence, but you will need to scrutinise her evidence with great care before you can arrive at a conclusion of guilt. This is because of that delay, relatively long, although not as long as some, between the time of the alleged incidents and then when she first told anyone about them and then when she went to the police and then when [the appellant] first heard about them."

[33] Later, having referred to the complainant's evidence as to why she did not make a contemporaneous complaint, his Honour continued:[31]

> "So those are the reasons that, in general terms, she gave as to why she did not say anything. Now, [the complainant's] long delay in reporting the incidents that she says happened in that particular period has an important consequence; that is, that her evidence cannot be adequately tested or met after the passage of so many years, because [the appellant], as the defendant, loses, by reason of that delay, means of testing and meeting her allegations that would otherwise have been available. That is, if the allegations had been made immediately, he might have a better recollection of what happened on that occasion, and he might be able to call other particular witnesses.
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> The delay results in a lack of opportunity to him to prove or disprove the allegations, for example – and it is only a possibility – there may have been some medical examination to see whether there was any reddening of the vagina. It has also deprived [the appellant] of the opportunity to assemble, soon after the incidents were alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to [the complainant], these incidents happened.

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30 AB377 ll36-42.

31 AB381 ll1-23.

> If the complaints had been made at the time, the timeframe would have been more specific and if the complaints had been made known to (the appellant) soon after the alleged events, then it may have been possible to explore the pertinent circumstances in more detail and, perhaps, to gather before trial evidence throwing doubt on [the complainant's] story or confirming [the appellant's] denial. These are opportunities lost by the delay. So the fairness of the trial, that is, the proper way to prove or to challenge accusation, has necessarily been impaired by the long delay."

[34] There was, therefore, a clear direction to scrutinise the complainant's evidence because of the relatively long delay in complaint and there was a detailed explanation of the implications for the defence of it. The jury could not have been left with the impression that the delay was to be put to one side in considering the reliability and credibility of the complainant's testimony.

[35] It was for the appellant to establish that it is reasonably possible that the impugned comments may have affected the verdict. Having regard to the subsequent directions to which I have referred, I am quite unpersuaded that those comments might have affected the verdict.

[36] For these reasons, in my view, the ground of appeal has not been made out.

[37] **Disposition and order**

Since the sole ground of appeal has failed, this appeal must be dismissed. I would propose the following order:

1. Appeal dismissed.