SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCO* [2018] QCA 140
PARTIES:	**R** **v** **MCO** (appellant)
FILE NO/S:	CA No 233 of 2017 DC No 849 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 7 September 2017 (Butler SC DCJ)
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	10 April 2018
JUDGES:	Gotterson and McMurdo JJA and Mullins J
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant convicted after trial by jury of one count of incest of his stepdaughter – where the complainant had autism and intellectual impairment – where a neuropsychologist gave evidence – where the evidence of the neuropsychologist addressed the complainant's ability to recall and give an accurate account of events that had occurred in the past – where the neuropsychologist gave evidence that the complainant's evidence would "be brief and lack detail" by reason of her autism and intellectual impairment – whether this evidence was beyond the experience of ordinary persons – whether there was error in admitting this evidence as expert evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where a neuropsychologist gave expert evidence about the effects of the complainant's intellectual impairment and autism on the functioning of the complainant – where the evidence could explain inconsistencies in the complainant's evidence – whether the trial judge erred in

failing to direct the jury specifically about not using the expert evidence to bolster the complainant's evidence or negate any doubt they might have about the credibility or reliability of the complainant's evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the complainant's mother gave evidence at trial that she had seen blood on the toilet seat on the day the complainant alleged the offence was committed and on the next day saw a bruise on the complainant's tail bone at the back and the complainant told her on the same weekend she had a "sore bum" – where the evidence was relied on by the prosecution as capable of supporting the complainant's account of events – whether the trial judge erred in directing the jury they could find independent support for the complainant's evidence in respect of any of these facts, if satisfied of the fact beyond reasonable doubt – whether there was a miscarriage of justice

BRS v The Queen (1997) 191 CLR 275; [1997] HCA 47, considered
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, considered
Farrell v The Queen (1998) 194 CLR 286; [1998] HCA 50, considered
R v CAU [2010] QCA 46, considered

COUNSEL: J Robson 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 Mullins J and with the reasons given by her Honour.

[2] **McMURDO JA:** I agree with Mullins J that the appeal should be dismissed. I agree with her Honour's reasons, save for one matter which relates to the suggested misdirection to the jury about the use to be made of the evidence of Dr Keane.

[3] In a pre-trial ruling, the prosecution was permitted to lead evidence from Dr Keane which described the ways in which the complainant, as a witness, would be affected by her intellectual impairment and autism. Dr Keane explained that autism is an impairment of an ability to interact socially and to understand social communication. She said that combined with the complainant's intellectual impairment, the complainant's autism created "a significant barrier in her being able to express herself" and "understand questions". In addition to that difficulty with language, Dr Keane explained, the combination of her intellectual impairment and autism affected the complainant's demeanour. She said that the complainant had

"the stereotypical behaviours that you often see in the autism spectrum disorder… difficulty making eye contact, rubbing hands, rocking when … stressed."

[4] Dr Keane was taken to parts of the complainant's evidence to illustrate the complainant's difficulties with language which she had described. But at no point was Dr Keane asked to express an opinion as to whether the complainant's testimony should be accepted as credible and reliable. As the trial judge directed the jury, it was for them to determine whether they should accept the complainant's evidence and to convict the appellant upon the basis of it.

[5] The information from Dr Keane about the likely effects of the complainant's autism was likely to be outside the experience and knowledge of a judge or jury, and was thereby admissible expert evidence: *Farrell v The Queen*.[1] In that case, the defence called evidence from a psychiatrist who, having examined the complainant's medical records, expressed the opinion that the complainant suffered from alcohol dependence and polysubstance abuse, an anti-social personality disorder and a borderline personality disorder. The psychiatrist testified that alcohol dependence might in an extreme case cause memory impairment, although he could not say if the complainant had suffered from that impairment. He said that those suffering from polysubstance abuse frequently lied to obtain drugs and that persons with anti-social personality disorder were "often regarded as deceitful" and were "inherently less truthful than the average person", so that "information provided by [such persons]… should be regarded with caution". The evidence was uncontradicted. The judge directed the jury that it was to take extra care in assessing the complainant's evidence, because of the complainant's history, but that this was a judgment the jury could make without the assistance of the psychiatrist's evidence because he had not diagnosed an actual medical condition beyond the jury's experience. Because of those directions, the High Court quashed the convictions and ordered a new trial.

[6] Gaudron J said that the effect of an anti-social personality disorder was not within the ordinary experience of a jury so that the psychiatrist's evidence could be used to that extent in assessing the complainant's reliability.[2] Callinan J said that the psychiatrist's evidence was relevant, in that he suggested the "possible existence of a disability or disorder as it bore upon the complainant's capacity to give reliable evidence."[3]

[7] Kirby J explained that whilst expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility is admissible, provided three conditions were satisfied. The evidence was to be given by an expert within an established field of knowledge relevant to the witness's expertise, the testimony was to go beyond the ordinary experience of the trier of fact, and the trier of fact, if a jury, is to be provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine.[4]

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1 (1998) 194 CLR 286 at 292-293 [10]; [1998] HCA 50.
2 Ibid at 293 [11]-[13].
3 Ibid at 322-323 [95].
4 Ibid at 300 [29].

[8] Each of those three conditions, described by Kirby J, was satisfied in the present case. Dr Keane's evidence was relevant and admissible because it was capable of assisting the jury in assessing the credibility and reliability of the complainant, by providing them with information which was likely to be outside the ordinary experience of the jurors.

[9] By ground 2 of the appeal, it is contended that the trial judge should have directed the jury that they were not to use this evidence to bolster the complainant's evidence or to negate a doubt they might have about her evidence. But had the jury been directed in those terms, what use could they have made of Dr Keane's evidence? Such a direction would have precluded one of the possible uses of the evidence for which it was admitted.

[10] The appellant's argument is based upon what was said in *R v CAU*,[5] where evidence was given by a psychologist that the complainant was within the lowest four per cent of intelligence of members of the community, so that her credibility or reliability was affected. McMurdo P, with whom Fraser JA and Douglas J agreed, held that the psychologist's evidence was inadmissible, because it did not provide specialised information likely to be outside the experience and knowledge of a judge or jury.[6]

[11] At the end of the paragraph in her judgment which explained that conclusion, her Honour said:

> "There was a danger that the jury may have used [the psychologist's] evidence to fill gaps or satisfy doubts they may have had about the complainant's reliability."[7]

Her Honour continued:

> "[i]f the evidence was led in the prosecution case at the request of the defence for tactical reasons, the judge should have directed the jury as to the exceptional nature of expert evidence and warned them that they were not required to accept it; it was a matter for them what weight they gave it and that they should not use the evidence to bolster the complainant's evidence or to negate a doubt they might have about her evidence."[8]

[12] It is that last passage which is the suggested basis for this ground of appeal. But once it is seen that the statement was made in relation to evidence which was *inadmissible*, clearly it provides no support for the appellant's argument. In the present case, the evidence was admissible because it explained the possible effects of the complainant's autism, it was relevant to an assessment of the complainant's credibility or reliability. Dr Keane's evidence was able to be used to negate a doubt the jury might have had about the complainant's evidence. That reasoning was permissible and entirely consistent with the basis upon which the evidence was admitted. Therefore, there was no misdirection to the jury.

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5 [2010] QCA 46.
6 Ibid at [101]-[102].
7 Ibid at [102].
8 Ibid at [103].

[13] **MULLINS J:** The appellant was found guilty after trial in the District Court of one count of incest. The complainant was his stepdaughter. He appeals against his conviction on the following grounds:

(1) The learned judge hearing the pre-trial application erred by permitting the prosecution to lead expert evidence in relation to the complainant "that by reason of her intellectual impairment, an account of events that occurred in the past would be brief and lack detail".

(2) A miscarriage of justice was occasioned by the failure to direct the jury that they should not use the expert evidence to bolster the complainant's evidence or to negate a doubt they might have about her evidence.

(3) A miscarriage of justice was occasioned by the learned trial judge erroneously directing the jury that they could find independent support for the complainant's account in evidence provided by the complainant's mother that (a) she had seen blood on a toilet seat; (b) she had seen bruising on the complainant's back; and (c) the complainant had told her of having a sore bum.

The prosecution case at trial

[14] The offence was alleged to have occurred on 29 November 2014 (which was a couple of weeks before the complainant's 16th birthday) and particularised as the appellant "put his penis in the complainant's vagina".

[15] The complainant was diagnosed with autism and intellectual impairment. She and her younger brother attended a special school. The appellant had been employed at that school and met the complainant's mother. He moved in with the family in 2008 and married the complainant's mother in 2010.

[16] The complainant and her brother attended speech therapy sessions every second Saturday. The sessions followed each other, so one child would be at home while the other was at speech therapy a short distance away. The children also visited their father every second Saturday after the speech therapy sessions, staying with their father overnight and returning home on Sunday night.

[17] On 29 November 2014 the complainant was at home alone with the appellant, when her mother and brother were at speech therapy. The offending came to light two weeks later on 13 December 2014, when the complainant was about to attend her next speech therapy session. According to her mother who was driving the children to speech therapy, the complainant said to her "Mum, when you're at speech with [the brother], and [the appellant] looks after me, can you please tell him not to touch my private parts." Her mother then asked the complainant what the appellant did to her and the complainant responded "He put his penis into my bum and stuff squirted out." When the mother confronted the appellant, he denied any wrongdoing, but the mother then contacted the complainant's father who in turn notified the police.

[18] The police recorded their interview with the complainant on 13 December 2014 pursuant to s 93A of the *Evidence Act* 1977 (Qld) and that was played for the jury. The complainant described that the appellant told her to put her "pants down" and then "pushed" her vagina with his penis and she could feel pain in the appellant pushing. She said this happened on the couch and she was on her stomach on the couch and the appellant was lying on her. The pre-recording of the complainant's

evidence on 22 September 2016 that comprised mostly cross-examination was also played for the jury.

[19] Apart from the evidence of preliminary complaint, the complainant's mother gave evidence that was left to the jury as being capable of providing independent support to the complainant's account. The complainant's mother recalled arriving home from speech therapy on 29 November 2014 and observed the complainant to be "very distressed" and described:

> "She was rocking very slowly. She'd been crying and she had tears in her eyes."

[20] On the same day the mother noticed there was "blood on the toilet seat" in the children's bathroom, and explained the toilet in the children's bathroom was used "mainly" by the complainant. She knew the complainant had finished her period a week or more before, so she knew that the complainant was not on her period that day.

[21] After the complainant returned from her father's house on Sunday (the next day), her mother was helping her shower and noticed "a very big, black bruise on her … tailbone area at the back". When the complainant's mother asked the complainant how she got the bruise, she did not answer her. The complainant's mother also recalled that after speech therapy that weekend either on the Saturday or the Sunday, the complainant told her mother "that she had a sore bum". In cross-examination, the complainant's mother confirmed that the complainant knew the difference between her bum and her vagina and that she referred to her bottom as her "bum" and referred to her vagina and breasts as her "private parts".

[22] Clinical neuropsychologist Dr Keane explained the nature of the complainant's autistic spectrum disorder and intellectual impairment and its consequences for the complainant to assist the jury in understanding the difficulties under which the complainant functions.

[23] There were admissions of facts before the jury. It was an admitted fact that the complainant was examined by a doctor on 18 December 2014 and the following observations were made:

> "a. Her genitals, hymen and anal areas were normal and post-pubertal.
>
> b. There was no bruising or soft tissue injury on her thighs or bottom."

[24] It was also admitted that the normal genital, hymen and anal observations neither supported nor refuted the allegations of sexual intercourse and that, if significant trauma occurred to a vagina or anus 19 days prior to an examination, it may have healed completely by the time of the examination.

The defence contention at trial

[25] The appellant did not give or call evidence. By the cross-examination of the complainant, the appellant disputed the truth and accuracy of her account.

Dr Keane's evidence

[26] Dr Keane had assessed the complainant in July 2016 before the pre-recording of her evidence for the purpose of addressing a number of issues, including her diagnosis and the level of her intellectual impairment, her competency to give evidence and sworn evidence, whether she had cognitive capacity to consent to an act of sexual intercourse, and whether and how her impairments would affect her interaction with the stepfather, her communication and her giving evidence at trial.

[27] A pre-trial hearing took place on 27 March 2017 to determine whether Dr Keane should be permitted to give evidence at the trial. The prosecution sought to lead evidence from Dr Keane about the complainant's autistic spectrum disorder and intellectual impairment and the impact of those conditions on her demeanour, communication and evidence, in order to assist the jury assess the complainant's credibility and reliability. Ultimately, the only aspect of Dr Keane's evidence that was opposed by the appellant on the pre-trial application was her opinion that by reason of the complainant's intellectual impairment, "an account of events that occurred in the past would be brief and lack detail". The proposed evidence came from section 6.2 of Dr Keane's report dated 27 July 2016 which specifically dealt with the complainant's competency to give evidence and sworn evidence in accordance with s 9A and s 9B of the *Evidence Act* 1977. In respect of s 9A, Dr Keane expressed the opinion that the complainant was "able to give an intelligible account of the events". Dr Keane then stated:

> "By reason of her intellectual impairment, her account would be brief and lack detail."

[28] The pre-trial application judge ruled the prosecution was entitled to lead the impugned evidence from Dr Keane on the complainant's ability to give evidence about past events on the basis that it was related to the complainant's communication difficulty:

> "The objection is to one particular part of Dr Keane's evidence in relation to her opinion about an impact on the complainant's ability to give an account of events that have occurred in the past. Dr Keane would give the opinion that the evidence would be brief and lack detail. The objection is on the basis that that comes very close to swearing the issue in relation to what the jury needs to determine in relation to assessing the credibility of the complainant; however, it is plain that the doctor is entitled to give evidence about communication difficulties that the complainant suffers. Particularly, in her report she speaks on the conditions impairing the complainant's ability to communicate."

[29] Although Dr Keane had expressed her opinion in section 6.2 of the report that, by reason of the complainant's intellectual impairment, her account would be brief and lack detail, Dr Keane's evidence at the trial attributed the brevity and lack of detail of the complainant's account to both her disorder and her impairment.

[30] The first ground of appeal was expressed by reference to the evidence of Dr Keane from section 6.2 of her report that was anticipated at the pre-trial hearing. Mr Robson of counsel who appeared on behalf of the appellant properly conceded that this ground of appeal that challenged the pre-trial ruling had to be considered in the light of the actual evidence given by Dr Keane at the trial.

[31] In evidence-in-chief Dr Keane described the complainant as having an intellectual impairment where her IQ score falls in the extremely low range, with her word reading ability equivalent to 9 years of age and her reading comprehension equivalent to 6.8 years of age.

[32] When asked about the complainant's ability to answer questions, Dr Keane stated:

> "She struggled to express herself. [The complainant] is – is a young woman who has intellectual impairment and autism. Autism is a – an impairment of the ability to interact socially, to understand social communication, so she might have a deficit in communication skills. She – combined with the intellectual impairment – create a significant barrier in her being able to express herself and, also her ability to understand informa – understand questions. Often this is seen in sort of echolalia, so that means she repeats back what you say to her, and it could be that she misunderstood the question or that she is struggling to answer the question."

[33] When asked to comment on whether the complainant was "agreeable or not", Dr Keane stated:

> "It – it's not unusual for people with intellectual impairment to – to agree with statements. Again, it's – it's that struggle to communicate. Is it that they are – the person doesn't understand the question and they're not able to tell you that they don't understand the question or they're not able to give you an answer to the question? So 'yes' is an easy answer because it's – you're being agreeable, and it often doesn't – their experience is that it's not often followed up by further questioning."

[34] Dr Keane was then taken to some of the questions and answers in the recorded statements of evidence and Dr Keane commented on the complainant's comprehension of the questions. (These were not questions about the event the subject of the charge.) Dr Keane was also asked to explain about the complainant's making eye contact and other demeanour. Dr Keane then stated:

> "[The complainant] presented as a very child-like girl, younger than her years. She had the stereotypical behaviours that you often see in the autistic spectrum disorder, so that's difficulty making eye contact, rubbing hands, rocking when you become stressed – it's a form of soothing. She was embarrassed at times. She – when she was embarrassed she giggled, so it was that incongruent that – her affect was incongruent to the – to the conversation ---."

[35] Dr Keane related those behaviours she listed in that answer to the dual diagnosis of the autism spectrum disorder and the intellectual impairment.

[36] In context of what Dr Keane had recorded in paragraph 6.2 of her report, this exchange occurred with the prosecutor in evidence-in-chief:

> "By reason of her disorder and impairment, is she able to give an account that occurred in the past which has a lot of detail?---No.

> All right. So, in fact, her account would be brief and lack detail?---Yes, that's right."

[37] Dr Keane explained the complainant's difficulty in communicating:

> "[The complainant's] a young woman who is intellectually impaired and has autism, and even in just general communication – conversation with her, she find it – she struggled to – to – to give me much verbal information at all. Any information I got from her came from direct questioning. Her answers were brief and very concrete. Like, where you were born? In hospital. That – it's that sort of communication. So to get anything of any detail is – is – is – she – she just does not have the language to give any abstract or any detail or any temporal context to a lot of her information. How long have you been going to school? A long time. So it's that – that ability to give temporal detail, to say oh, it happened last year, or I've been at school for 10 years or answer a question that's not – that's – that may be just doing things like saying to her get ready is – is probably too complex a – a – an idea for her. It would be better to say put your coat on. It – her language skills are very basic and very literal and very concrete, so conversation with her has to be like that."

[38] During cross-examination, Dr Keane agreed with the proposition that when the complainant says "yes" in response to a question, the complainant may not mean "yes", and Dr Keane explained that it is important to check on the complainant's understanding of the question. The following exchange then took place:

> "If she gives a response like 'no', does that mean she understands the question?---It depends what you asked her.
>
> Okay?---It depends if you had 'no' in the question.
>
> Right. So if 'no' was in the question---?---It could be that she would say, yes.
>
> --- it could be but not necessarily?---Yeah."

[39] Dr Keane was referred in cross-examination to section 6.2 of her report where she recorded "In my opinion, I think that [the complainant] understood that she was not [to] lie in Court". The following exchange then took place with defence counsel:

> "And you used the word 'think' there?---Yep.
>
> That's because you can't be certain, can you, whether she understands ---?---That's correct.
>
> --- to lie or not to lie?---That's correct."

Arguments of counsel addressed to the jury

[40] In order to put the directions given by the trial judge in respect of Dr Keane's evidence into context and those relevant to the third ground of appeal, it is pertinent to refer to some of the arguments of counsel addressed to the jury on these matters.

[41] The prosecutor's submissions focused on why the jury would find that the complainant was a truthful and reliable witness in recounting the act perpetrated

upon her by her stepfather, rather than a 15 year old autistic girl who had seen too much television such as the show *Sex and the City* and was recounting something that was fantasy.

[42] In dealing with the inconsistencies in the complainant's evidence, the prosecutor noted:

> "Perhaps more importantly, you just should expect some inconsistencies due to the difficulties that [the complainant] faces in her everyday life, and that's why Dr Keane's evidence might be important."

[43] The prosecutor referred to the complainant's s 93A statement and observed:

> "You might think, when she spoke to the police on that day, that she provided a clear and simple version of events. Dr Keane told us yesterday that it's not unexpected that she would provide a simple version of events, lacking great detail."

[44] The prosecutor later addressed the jury about Dr Keane in these terms:

> "Now, you've heard from Dr Keane and, …, she's here to help you or try to help you understand [the complainant], as an expert, so she is a professional witness, different to everybody else, really. … She, of course, made the diagnosis that she told you about, and she told you about those testings that she performed placing her in a low IQ and a lower mental age. Importantly, she spoke about her communication generally, why she might not understand questions, why she might have movement different to you and I when she's answering questions, and you have seen that in the interview with the police and then here at court. So you can, as I say, use Dr Keane's evidence to assist you in understanding [the complainant].
>
> …
>
> Now, Dr Keane can't come along and say, 'Well, she's telling the truth.' That's not her job and, indeed, it's the tough job that you face, collectively, amongst yourselves. That's not a matter which I could have asked her about."

[45] The prosecutor referred to the evidence from Dr Keane, and also the complainant's father, about the trouble autistic children have in expressing themselves "screaming, shouting, hitting".

[46] In dealing with the bruise above the tail bone and the complainant's mother's evidence of her daughter's complaint on the weekend of the offending that she had a sore bottom, the prosecutor suggested to the jury that the bruise and the sore bottom might be consistent with the offence being committed in the way the complainant described in her evidence the appellant had sexual intercourse with her.

[47] The defence counsel summarised the appellant's position as "the complainant had been untruthful when she said these things happened". He emphasised the jury's task in relation to the complainant's evidence:

> "But you're going to have to assess her evidence and decide beyond reasonable doubt whether you can convict [the defendant] purely on what she said.
>
> Now, we need to consider whether the way in which she described these things is what you'd expect from someone who you can be completely confident in. That's what you've got to do. You've got to be completely confident that she's a reliable witness. I'd suggest the way in which she answered the questions and how she gave her evidence, watching the police interview and then watching the cross-examination, that's simply just impossible to do."

[48] The defence counsel placed significance on the fact that the complainant had used "bum" in her first disclosure of the appellant's conduct to her mother and then used "vagina" in her interview on the same day with the police:

> "She describes to her mother the fact he put his penis in her bum and stuff squirted out. That was the first thing she said. That was the first disclosure, and the charge you have to consider and what the Crown have charged is that the defendant is charged with putting his penis in her vagina. Not her anus, not her bum. In her vagina. Now, her mother was clear, giving evidence, that her daughter knew the difference between a bum and a vagina. She described her vagina as private parts and her bum as a bum. Yet the first thing her mother says – says she says is, 'Tell him not to touch my private parts,' and when the mum asks, 'What did he do?' she then replies, 'He put his penis in my bum'."

[49] In dealing with the bruise, defence counsel made this submission to the jury:

> "The bruise is seen by the mother, and she says she notices a very big black bruise on her tailbone area, and that's when she returns Sunday afternoon [indistinct] ladies and gentlemen, you can't be certain she didn't have that bruise before she went to her father's, the reason being she was never asked, during any questioning, whether she'd seen it before. Our learned friend didn't ask her if she had the bruise before she went to the father's, and the mother certainly didn't say if she'd seen it before she went to her father's. Who knows how long she's had the bruise for and how long – and how it was caused?."

[50] The defence counsel then referred to the suggestion by the prosecutor the bruise was caused during the sexual intercourse or by the appellant's hand and argued that, if that were the case, there would be more than one bruise. He also argued that the bruise could have been caused at school in the week or so before the relevant weekend or it could have been caused while the complainant was playing.

[51] In dealing with the mother's disclosure that on the relevant weekend the complainant had complained of a sore bum, defence counsel argued:

> "Now, in relation to the sore bum, the mother doesn't mention this at all to the police when they were ta – when they're taking her first statement. The daughter has apparently just been penetrated in her bum or in her vagina, and she doesn't mention to the police at all that

> she's saying she's got a – had a sore bum. It's only two months later she puts the comments in a second statement to the police. There's no evidence from the father, either, that she complained about a sore bum that weekend, and he also says there was nothing unusual, either, about her behaviour when she arrived there that weekend it was supposed to have happened, or even when she was going home. Nothing unusual at all."

[52] The defence counsel referred to Dr Keane's evidence in his address as follows:

> "From what the expert told us, you can't be sure when she says 'yes' she might mean yes, but she might not. You can't be sure she means no when she means no. She might do, she might not. The expert wasn't even sure whether she understood the concepts that she wasn't to lie in court and, again, that's very concerning in itself, and I'd suggest you could even acquit on that basis alone. All the expert said was that it was important to check the question with her so you can be sure if she understood the police questions or the defence questions … . The difficulty with that is … you can't be sure what she understands in relation to the police questions, and what she understands in relation to the cross-examination questions."

The summing up

[53] In the summing up, the trial judge gave the usual expert evidence direction in respect of Dr Keane's evidence:

> "Another area of evidence that is before you is the evidence of Dr Shelley Keane, the neuropsychologist. She is what is sometimes referred to as an expert witness. You see, the ordinary rule in our Courts is that witnesses may only speak as to facts. They are not permitted to give their opinions. But an exception to the general rule is made where the – a person is duly qualified to express some opinion in a particular area of expertise. Those people are permitted to give an opinion on relevant matters within the field of their expertise, and Dr Keane was asked to give you opinions within her expertise as a psychologist. Now, the fact that we refer to such a witness as an expert does not mean that their evidence has to automatically be accepted by you.
>
> As I have said before, you are the sole judges of the facts in this courtroom, and you are entitled to assess and accept and reject any opinion evidence as you see fit. It is up to you to give such weight to the opinions of the – of Dr Keane as you think should be given, having regard to her qualifications and whether you thought she was impartial or partial in the proceedings, and the extent to which her opinion accords with whatever other facts you find proved. It is a trial by jury and not a trial by experts, so it is up to you to decide what weight or importance you give to her opinions or, indeed, whether you accept her opinion at all. It is also important to remember that her opinion is based upon what she has been told about the facts, and if those facts have not been established to your satisfaction, well, then, of course, her opinion may be of little value.

> It seems here that her opinions were not really challenged, so you ought not reject her opinion unless the matters upon which she gave an opinion have not been proved to your satisfaction, or you consider there is other evidence casting doubt on her expert view."

[54] In dealing specifically with the complainant's evidence, the trial judge instructed the jury:

> "The only evidence of sexual offending comes from [the complainant]. You must accept her beyond reasonable doubt as a truthful and accurate witness on that crucial issue, that is, whether there was sexual penetration of her vagina. Before you can convict, you must accept her as being honest and reliable on that matter. In doing that, you will need to take account of her age, the fact that she has autism, the fact of her intellectual disability when you are assessing her evidence. Now, you had the psychologist's evidence to assist you in understanding her conditions. In assessing her testimony you need to look to whether you find support for her account elsewhere in the evidence."

[55] The trial judge then referred to the matters relied on by the prosecution to support the complainant's allegations:

> "The prosecution point to a number of matters, they say, support the complainant's allegations that she was sexually penetrated by the defendant on the 29th of November 2014. The prosecution point to evidence, they say, supports her account that she was sexually penetrated as being the blood.
>
> [The complainant's mother] has given evidence of seeing on the children's toilet seat on the weekend of the 29th of November and [the complainant's mother's] evidence that it wasn't when [the complainant] was having her period. The prosecution also rely upon the fact that [the complainant] complained, either on the Saturday or the Sunday, of having a sore bum and that she was seen as having this bruise in the area of her tailbone, and you have seen the photograph which photographs a bruise in that area.
>
> If you're to act on such facts in support of the credibility and reliability of [the complainant's] allegation, you must first be satisfied that the particular fact is correct and be satisfied of that beyond a reasonable doubt. In other words, you would have to be satisfied that there was blood on the toilet seat and that it wasn't the child's period time, that she did have, what she described as a sore bum, and you'd have to be satisfied beyond a reasonable doubt that she did have that bruise.
>
> If you are satisfied that one or more of those facts are proved you may use the fact or facts along with [the complainant's] testimony in considering whether you are satisfied beyond a reasonable doubt of the guilt of the defendant. If you are not satisfied of one or more those facts are proved, well then, put them aside and have no further regard to them, and return to the complainant's evidence and ask

> whether that evidence alone satisfies you beyond reasonable doubt of the guilt of the defendant.
>
> But let me emphasise that ultimately before you could convict, you must accept beyond reasonable doubt the complainant's evidence she was sexually penetrated and the defendant must be given the benefit of any reasonable doubt left in your mind at the end of your deliberations."

[56] The trial judge pointed out to the jury that in addition to those factual matters the prosecution relied on as providing some support to the complainant's account, the prosecution also pointed to the evidence of the complainant's mother of the complainant's distressed condition on the day the complainant alleged the offence occurred, when the complainant's mother returned to the house after the complainant's brother's therapy.

[57] In giving the *Robinson* direction, the trial judge directed the jury to consider the complainant's autism and intellectual impairment:

> "In this case, the only evidence of sexual offending is given by the complainant, … , so I need to direct you as follows: you must be satisfied beyond reasonable doubt by her evidence that the sexual act charged, that is the penile penetration, occurred before you can convict. Now, you'll need to scrutinise [the complainant's] evidence with great care before you could arrive at a conclusion of guilt. In evaluating her evidence you'll need to take into account certain circumstances. In particularly, you'd need to consider her age, her condition of autism, her intellectual impairment. In your ordinary lives you constantly assess whether what you've been told by others is true and reliable. You do that when you're dealing with your children, when you're dealing with people you do business with, it's a part of everyday interaction, but of course, due to her condition, obviously [the complainant's] responses and her facial responses, her verbal responses, differ from of that most people you usually deal with, so you must take particular care in assessing whether what she is telling you is credible and reliable."

[58] In summarising the prosecutor's arguments, the trial judge noted:

> "The prosecutor urged you to consider the evidence of Dr Keane to assist you in understanding [the complainant] and her answers."

[59] The trial judge referred to the prosecutor's submissions on supporting evidence in these terms:

> "The prosecutor said that when you're considering her evidence, you might find support in some other pieces of evidence. The evidence of the mother that, on the 29th, the girl was distressed, and crying and rocking slowly when she returned to the house. The prosecutor also relied upon the bruise saying, 'Well, that could well be consistent with the act she described and the blood on the toilet seat described by the mother.' He submitted to you that you would accept that the mother of a girl such as this would be acutely aware when her period was."

[60] In summarising defence counsel's arguments, the trial judge noted:

> "He said that it was impossible to know what the truth was from her answers and that you couldn't be sure that her evidence is reliable."

[61] The trial judge drew the jury's attention to the specific argument advanced by defence counsel in detailing inconsistencies in the complainant's evidence that:

> "He reminded you that her first disclosure said that the defendant put his penis in her bum, and not her vagina, and he emphasised that the charge required penetration of the vagina."

[62] In dealing with defence counsel's response to the prosecutor's submissions on supporting evidence, the trial judge said:

> "Counsel then turned to what the prosecutor said you could use as supporting evidence, that is, the bruise and other matters. In relation to the bruise, defence counsel said, 'well, there's just no evidence about how she got it, and she could've got it in a number of different ways', and that you wouldn't find that it arose from any sexual act. In respect of her saying she had a sore bum, blood on the toilet seat, and her being distressed or crying as described by the mother, he submitted to you that if these things had occurred, they would've been in the - [complainant's mother's] first statement to police. He suggested to you, as he put it, that the truth was embellished by her mother. He said you should dismiss this evidence about the bruise or the blood or the crying, and that'd be of no assistance to you."

Ground 1 – Was Dr Keane's opinion on the reasons for the brevity and lack of detail of the complainant's evidence admissible?

[63] Both counsel rely on the summary by Kirby J in *Farrell v The Queen* (1998) 194 CLR 286 at [29] as relevant to expert evidence in the nature of Dr Keane's impugned evidence:

> "Therefore, in principle, while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility, is admissible, provided that (1) it is given by an expert within an established field of knowledge relevant to the witness's expertise; (2) the testimony goes beyond the ordinary experience of the trier of fact; and (3) the trier of fact, if a jury, is provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine." (*footnote omitted*)

[64] This ground of appeal turns on the issue of whether the impugned evidence was within the jury's ordinary experience. The nub of the appellant's submission on this ground is that, on this aspect of the complainant's evidence, Dr Keane's evidence was "a common sense observation" that would have been readily apparent to the jury without expert opinion, so that Dr Keane's evidence usurped the jury's function in relation to the assessment of the complainant's credibility and reliability and should not have been adduced at the trial. The reference to "a common sense observation" is taken from *R v CAU* [2010] QCA 46 at [102].

[65] CAU was found guilty of sexual offences committed against his younger sister. One of his grounds of appeal was that the evidence of the clinical psychologist and the tender of the complainant's academic record were irrelevant and wrongly admitted and, if properly admitted, the trial judge failed to give appropriate directions on how the evidence should be used. The psychologist in that case had tested the complainant and found she had an IQ score of 74 and her intellectual functioning was in the bottom four percentile of the population. He described her as of very low intellect and as having a mild intellectual impairment which meant she had capacity to store and retrieve only smaller amounts of simple material with accuracy. The defence counsel did not object to the psychologist's evidence being adduced at the trial.

[66] McMurdo P (with whom the other members of the court agreed) concluded in *CAU* that the psychologist's evidence was not admissible in the trial, as it did not provide "specialised information outside the experience and knowledge of the jury", explaining at [102]:

> "Some witnesses are more or less intelligent than others. [The psychologist's] evidence as to the complainant's ability to remember seemed to be a common sense observation and not one outside the ordinary experience and knowledge of jurors. Jurors would have been well able to form an opinion about the complainant's intellectual functioning and memory skills unaided by expert evidence of the type given by [the psychologist]: her taped interviews with police ran for approximately eight hours and she was cross-examined over three days. I have viewed some of the tape recorded interviews between the complainant and police officer Jenkins. It was not difficult to form a general assessment from those tapes of the complainant's intellectual functioning and memory skills insofar as this was relevant to her credibility and reliability. She was clearly, as [the psychologist's] evidence suggested, a deal slower than the ordinary person, but she was able to give coherent evidence and was capable of remembering significant events in her life."

[67] The respondent submits that Dr Keane's evidence about how the complainant's dual conditions affected her capacity to express her memories and the way in which she expressed those memories was outside the ordinary experience of a jury and was therefore admissible.

[68] There was no issue about the qualifications of Dr Keane to express the opinion on this matter. Particularly as the opinion was based on the effect of the dual conditions on the complainant's ability to relate what happened to her, the submission of Ms Loury of Queen's Counsel for the respondent, that the experience of ordinary persons is not such that most would know how those dual conditions, (involving significant deficits in cognition and language use) impacted on the affected person's ability to record and recount a past event, must be correct. The nature and ambit of the aspect of Dr Keane's evidence that is the subject of this ground of appeal can be contrasted with the nature of the psychologist's evidence that was inadmissible in *CAU* that described the effect of the complainant's low intelligence that was otherwise obvious from the other evidence in that case. Dr Keane's opinion on the reasons for the brevity and lack of detail of the complainant's evidence was therefore admissible.

Ground 2 – Was there a failure to direct the jury adequately about the use to be made of Dr Keane's evidence?

[69] Even if the appellant were unsuccessful on the first ground, the appellant contends that the trial judge was required to give a direction in respect of the use to be made of Dr Keane's expert evidence (to the extent that it was relevant to the credibility and reliability of the complainant's evidence) in conformity with the third condition set out by Kirby J in *Farrell* at [29] and with the observation made by McMurdo P in *CAU* at [103]:

> "If the evidence was led in the prosecution case at the request of the defence for tactical reasons, the judge should have directed the jury as to the exceptional nature of expert evidence and warned them that they were not required to accept it; it was a matter for them what weight they gave it and that they should not use the evidence to bolster the complainant's evidence or to negate a doubt they might have about her evidence."

[70] The appellant acknowledges that no direction was sought by the defence counsel at trial in the terms of the direction which it is now contended should have been given in respect of Dr Keane's expert evidence. Although Mr Robson submits there was no apparent forensic explanation for such failure, that submission overlooks the fact referred to by the trial judge in the summing up that there was no challenge to Dr Keane's evidence given at the trial and, in fact, the defence relied specifically on Dr Keane's expression of opinion elicited in cross-examination that she was uncertain of whether the complainant understood that she was not to lie in court. What the appellant now asserts is a direction in the nature of a warning should have been given to the effect that Dr Keane's evidence did not displace the task the jury had to undertake of assessing the credibility and reliability of the complainant's evidence and they should not defer to the expert in that task. It is submitted that, as Dr Keane's evidence assumed prominence in the trial, there should have been a firm warning from the trial judge to the jury that they should not use the evidence of Dr Keane to bolster the complainant's credit or negate a doubt they might have about her evidence.

[71] The respondent submits that, unlike the case of *R v SBV* [2011] QCA 330 where the psychiatrist who was treating the complainant purported to give evidence about the credibility of the complainant's account, Dr Keane did not express any opinion as to the truthfulness or reliability of the complainant's account of the offending. The questioning by the prosecutor at trial of Dr Keane about specific questions asked of the complainant illustrated uncontroversial examples of the matters that Dr Keane spoke of in terms of the complainant's ability to understand questions and express herself. In the light of the directions of the trial judge that made it clear the issue for the jury was the truth and reliability of the complainant's account of the allegations, it is submitted there was no risk the jury would have reasoned impermissibly from the evidence of Dr Keane that her evidence bolstered the complainant's evidence or could be used to negate any doubt they had about it. That was reinforced by the evidence elicited from Dr Keane under cross-examination that Dr Keane could not be certain whether the complainant understood she was not to lie in court.

[72] I have concluded that, in the circumstances of the conduct of this case and the directions that were given by the trial judge as a result of the conduct of the case, it

was not essential for the direction to be given in the terms anticipated in the third condition set out in *Farrell* at [29] or by McMurdo P in *CAU* at [102].

[73] The whole focus of the trial, as emphasised in the summing up, was on the credibility and reliability of the complainant's evidence. The trial judge explained that Dr Keane's evidence was to assist the jury in understanding the complainant's conditions of autism and intellectual impairment. By the trial judge's explaining to the jury, first, their role in the trial in assessing the credibility and the reliability of the complainant's evidence and, second, the specific purpose of Dr Keane's evidence, there was no room left for the jury to follow an impermissible path of reasoning that the evidence of Dr Keane bolstered the complainant's credit or negated a doubt they might have about it.

[74] The purpose of Dr Keane's evidence can be contrasted with the psychiatric evidence that was the subject of the discussion in *Farrell* at [29] which was much more directly related to the credibility of the complainant in that case. The effect of the psychiatric evidence, noted at [127] in *Farrell*, was that the complainant suffered an anti-social personality disorder, one feature of which was that persons with that disability were "inherently less truthful than the average person". The suggested direction in *CAU* at [102] was proposed in circumstances where the expert evidence was strictly inadmissible, whereas the evidence of Dr Keane was admissible and the jury were directed specifically on its purpose that in no way suggested that Dr Keane's evidence displaced the jury's task of assessing the credibility and reliability of the complainant's evidence.

Ground 3 – Was there a misdirection by the trial judge on whether there was independent evidence supporting the complainant's account?

[75] In relation to the facts relied on by the prosecution as supportive of the complainant's allegations, the trial judge gave the jury a direction that was unduly favourable to the appellant, when he directed that they could only act on any of those facts, if they were first satisfied of the particular fact beyond reasonable doubt. The trial judge's direction was in response to a submission made by defence counsel at the trial that each of the three factual matters that are the subject of this ground of appeal should be proved beyond reasonable doubt before the fact could be relied on as supporting evidence, as each fact was relevant to proof of penetration as described in the complainant's evidence. The trial judge decided to adopt a cautious approach and directed the jury as requested by defence counsel. These factual matters were being considered by the jury in the context of a direction about supporting evidence and therefore none of these facts needed to be proved beyond reasonable doubt before the fact could be relied on as corroboration of the complainant's evidence.

[76] The appellant accepts that the direction was favourable, but submits that does not overcome the erroneous direction which was given that it was open to the jury to consider whether any of the three matters the subject of this ground of appeal supported the complainant's description of the offending. The essence of the appellant's argument is that the trial judge erred by leaving those three identified matters to the jury to consider as supporting evidence, to the extent they were satisfied of the matters beyond reasonable doubt.

[77] At the outset, it also should be noted that the third ground does not relate to all the matters relied on by the prosecution at the trial as supporting the complainant's account. The complainant's mother's evidence of the complainant's distressed condition on the day of the offending was properly left to the jury as a matter which, if they accepted, supported the evidence of the complainant.

[78] The respondent concedes that the evidence of the complainant's mother that the complainant told her that she had a "sore bum" was hearsay, but it was not objected to by defence counsel at the trial. The complainant herself had given evidence in her s 93A statement to the effect that she could feel "pain" in the vagina as the appellant was penetrating her with his penis. The respondent also concedes that the complaint of pain could not be characterised as evidence independent of the evidence of the complainant and therefore could not be supportive of the complainant's account.

[79] In relation to the blood on the toilet seat, the appellant argues that for that evidence to provide independent support of the complainant's account, the jury would also have to be satisfied that:

(a) the complainant was bleeding as a result of the offending;
(b) what the complainant's mother saw was, in fact, blood; and
(c) the source of the blood on the toilet seat was the complainant's injury.

[80] The appellant did concede in oral submissions it was open as a possibility that an inference could be drawn that the complainant was bleeding from the offending.

[81] The respondent submits that, in reliance on statements made in *BRS v The Queen* (1997) 191 CLR 275, 283-285, 290-291 and 324 applying *Doney v The Queen* (1990) 171 CLR 207, 211, the appellant's approach to the blood on the toilet seat overstates the requirements for supporting evidence and it is sufficient if the corroborative evidence strengthens the evidence to be corroborated. It does not need to prove the offence independently of the complainant's evidence.

[82] The respondent submits that the sighting of blood on the toilet seat used by the complainant on the same day the alleged offending occurred (and which was not explicable by her menstrual cycle) was capable of giving rise to an inference that she had an injury to her genitalia as a result of the offending.

[83] The appellant submits that it was not enough for the jury to be satisfied that the complainant had the bruise, unless the jury was satisfied that the complainant sustained the bruising as a result of the appellant's offending.

[84] The respondent relies on the approach of the trial judge in summarising the prosecutor's contentions by grouping the bruise to the tail bone with the complainant's complaint about pain to the "bum" and submits that, even though the mother's evidence of the complainant's complaint of pain was not evidence independent of the evidence of the complainant, it was referred to in the context of the bruise of which the evidence was independent of the complainant. It is submitted by the respondent that the evidence of the presence of a bruise to the tail bone and associated complaint of pain might be of no great supporting value, but it was not "intractably neutral", and can be contrasted with the greater strength as supporting evidence of the blood on the toilet seat and the distressed condition.

[85] On the basis that the bruise to the tail bone was not clearly connected to the offending, the respondent submits it should be concluded that it would not have affected the verdict when considered with the more compelling supporting evidence of genital injury and distressed condition. The ultimate submission of the respondent is that no miscarriage of justice arose from leaving the jury to consider the bruise and associated hearsay complaint of pain as supporting evidence, particularly when the jury had been instructed they had to be satisfied of these facts beyond reasonable doubt, before they could consider them as supporting evidence.

[86] The appellant's response is that the *Robinson* direction was impermissibly undermined by the erroneous direction in respect of these two factual matters which means that the court would be satisfied that a miscarriage of justice was caused.

[87] In order to deal with this ground of appeal, it is necessary to consider separately each of the three factual matters that are the subject of this ground. The respondent's submissions correctly outline the nature of supporting evidence for it to be corroborative of a complainant's evidence, as explained in the passages relied on from *BRS*. That means that the matter of blood on the toilet seat was capable of being corroborative of the complainant's evidence, if the jury accepted the complainant's mother's evidence that what she saw on the toilet seat was blood and inferred from the timing of when she saw the blood that it came from an injury to the complainant, as a result of the offending.

[88] The mere existence of a bruise was not compelling as corroborative evidence when there were many possibilities for the causation of a bruise other than the offending, but the complainant's mother did give evidence of noticing it for the first time on the next day after the offending. There was therefore no error in leaving the jury to consider whether they accepted the mother's evidence about what she saw and when she saw it and whether that supported the complainant's evidence.

[89] The evidence from the complainant's mother that, on the weekend after speech therapy when the event the subject of the charge occurred, the complainant had told her mother "that she had a sore bum" should not have been left to the jury as a matter that was capable of being supporting evidence of the complainant's evidence, as it was hearsay and it was not independent of the complainant.

[90] It is relevant that there had been no objection by defence counsel to the hearsay evidence of the complainant's mother that the complainant had told her "that she had a sore bum". In fact, the use by the complainant of "bum" and "vagina" at different times on the day she disclosed what the appellant had done to her was used by defence counsel at the trial in the arguments to the jury to undermine the credibility of the complainant. I therefore infer that it was a forensic decision by defence counsel not to object to the hearsay evidence about the earlier disclosure reported by the mother that the complainant said she had a sore "bum" and to rely on it.

[91] The erroneous direction was given in respect of evidence relied on by the prosecution as supporting evidence that was the least compelling of all matters relied on by the prosecution at the trial for this purpose. I am unpersuaded in the circumstances of the conduct of this trial where the defence endeavoured to make use of the hearsay evidence that any miscarriage of justice followed from the trial judge permitting this hearsay evidence that was not independent of the complainant

to be left to the jury to consider whether it was supporting evidence of the complainant's evidence. As submitted by the respondent, the mother's disclosure of the hearsay complaint by her daughter of having "a sore bum" was linked to the evidence that was properly relied on by the prosecution as supporting evidence of the bruise in the area of the complainant's tail bone, but in combination this evidence did not have the quality or strength as supporting evidence as the distressed condition and the blood on the toilet seat. I therefore could not conclude that it was reasonably possible that the misdirection affected the verdict: *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38].

[92] Even though there was a misdirection by the trial judge in respect of one of the factual matters relied on by the prosecution as supporting evidence, this ground of appeal cannot succeed as it did not result in a miscarriage of justice.

Order

[93] As the appellant has not succeeded in establishing any of the grounds of appeal, the appeal must be dismissed.