SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mentink* [2018] QCA 180
PARTIES:	**R** **v** **MENTINK, Wilfred Jan Reinier** (appellant)
FILE NO/S:	CA No 282 of 2017 DC No 2003 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 13 November 2017 (Farr SC DCJ)
DELIVERED ON:	3 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2018
JUDGES:	Sofronoff P and McMurdo JA and Boddice J
ORDERS:	**1. Refuse the application for leave to adduce further evidence.** **2. Dismiss the appeal against conviction.** **3. Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of two counts of indecent treatment of a child under the age of 16 years – where each count was committed against a different complainant – where the offences were committed in the course of a weekend camping trip in 1976, attended by a group of male high school students, to a campsite near Mount Barney – where the appellant was a teacher at the high school and the only adult who accompanied the group – where the complainants, J and A, were both students who attended the camping trip – where more than 40 years had passed between the time of the commission of the offences and the time of the trial – where the jury convicted the appellant on both counts – where counsel cross-examining the complainant J succeeded in obtaining evidence which provided arguments for why the jury should be left in doubt about J's complaint – where the complainant A admitted to having poor memory but was adamant that he did recall the acts which constituted the

offence against him – whether it was open to the jury to be satisfied of the appellant's guilt of the two counts beyond reasonable doubt

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where each of the complainants in this case was a "protected witness" under Part 2 of Division 6 of the *Evidence Act* 1977 (Qld) – where s 21O of the *Evidence Act* 1977 (Qld) requires the Court to order a person charged be given legal assistance for the purpose of conducting cross-examination of protected witnesses, unless the person charged arranges for legal representation or does not want the protected witness to be cross-examined – whether prohibiting the appellant from cross-examining the two complainants caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the appellant contended that the prosecution ought to have called several persons as witnesses and ought to have tendered a map of Mount Barney National Park, yearbooks for the school and photographs of the campsite – where the persons included former students at the school who were not present at the camp and an expert about the effects of fibromyalgia on memory – where none of these persons was said to have provided a statement to the prosecution – where complainant A gave evidence that he suffered from fibromyalgia – where the jury asked the question "what does fibromyalgia do to memory?" – where the prosecution did tender a map produced by Queensland Parks and Wildlife Service of the relevant area – where the yearbooks featured in the cross-examination of some of the witnesses – where it was open to the appellant to tender the yearbooks or an extract of them, or to request the prosecution to do so – where it was open to the appellant to tender photographs of the campsite but indicated that he did not wish to do so – whether the prosecution's failure to call these persons as witnesses and tender these documents caused the appellant's trial to be unfair

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant contended that previous written statements by the complainants were "highly damaging" to the credibility of each witness – where the prosecution was not able to impugn the credit of its own witnesses and the previous out of court statements were not admissible as part of the prosecution case – whether the failure by either the prosecution or appointed counsel for the appellant to tender previous written statements of the

complainants caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWERS OF COURT ON APPEAL – TO CONSIDER FRESH EVIDENCE – where the appellant contended that the scope and volume of the evidence not adduced at the trial was such that no verdict of guilty could have been reached by an unprejudiced jury – where the appellant sought to adduce further evidence consisting of documents including an affidavit sworn by the appellant in support of his application for appeal bail, notes of pre-trial conferences with the complainants and other witnesses and police records – whether to refuse to receive the evidence sought to be adduced by the appellant would result in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – IRREGULARITIES IN RELATION TO JURY – ATTEMPTS TO BRIBE OR INFLUENCE – where a jury note asked "To what extent should a jury or jurors attempt to convince another juror or jurors to change their vote to facilitate a unanimous verdict?" – where the judge told the jury that each juror had sworn or affirmed that he or she would conscientiously try the charges and decide them according to the evidence, and that each juror took his or her individual experience and wisdom into the jury room and was expected to judge the evidence fairly and impartially in that light – where the judge directed the jury that they should not join in a verdict if they did not honestly and genuinely think that it was the correct one – whether some jurors were prejudiced and sought to impose their views on other jurors

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – TAKING OBJECTION TO SUMMING UP – where the appellant contended that the judge misdirected the jury in summing up and giving a Robinson direction, a Longman direction, the preliminary complaint and distressed condition directions, discreditable conduct directions, similar fact directions and a Black direction – where more than 40 years had passed between the time of the commission of the offences and the time of the trial – where the judge ruled that the offences were sufficiently similar for a similar fact direction and directed the jury as to the similarities between the two offences charged – where there is no evidence that a juror was improperly pressured by the directions – whether there was an error in the judge's summing up that led to a miscarriage of justice

Evidence Act 1977 (Qld), s 21N, s 21O, s 21P

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60,

cited
R v Spina [2012] QCA 179, cited
R v WBF [2017] QCA 142, cited

COUNSEL: The appellant appeared on his own behalf
J A Wooldridge for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and the orders his Honour proposes.

[2] **McMURDO JA:** After a trial in November 2017, the appellant was convicted of two counts of the indecent treatment of a child under the age of 16 years. Each offence was found to have been committed in the course of a weekend camping trip in 1976. The appellant was sentenced on each count to a term of nine months imprisonment, suspended after four months with an operational period of two years.

[3] The appellant is without legal representation, as he was at the trial. He challenges his convictions on many grounds. He says that the verdicts were unreasonable and that in several ways, the trial was conducted by the judge, by the prosecutor and by counsel engaged to cross-examine the complainants as protected witnesses,[1] which resulted in a miscarriage of justice. At the hearing in this Court, he abandoned his challenge to his sentence.

The evidence at the trial

[4] The complainant on one of the counts was a 14 year old boy, whom I will call J, who then attended a State high school in Brisbane where the appellant was a teacher. The other complainant, whom I will call A, was another boy of the same age who also attended the school.

[5] J's evidence was that he and five other students (including A) went on a camping trip at a place called Yellow Pinch, near Mount Barney, over a weekend in the second half of 1976. The appellant was the only adult who accompanied the boys and, J said, the group travelled there in the appellant's Kombi van. The group arrived late on the Friday, setting up camp next to a river with three tents arranged around the fire. The site was not a designated camping ground, and there were no other campers there.

[6] On the Saturday, the boys and the appellant were swimming. J recalled that the appellant was walking around the site, for much of the morning, naked. He recalled that some of the students were wrestling each other and that one student was also wrestling with the appellant.

[7] J described the offence against him as occurring on the Saturday afternoon when he was outside but near to his tent. He was by himself and he had no recollection of seeing any other boys in the area at the time. He was wearing clothes, he thinks possibly shorts and a t-shirt. He described the appellant, who was naked,

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1 Under Part 2 Division 6 of the *Evidence Act* 1977 (Qld).

approaching him and then moving one of his hands over the complainant's pelvic area and the other "behind the top of [his] posterior". The appellant then clasped his hands on the other side of the complainant, so that the appellant's erect penis made contact with the boy's hip, outside of his clothing. J said that this continued for about 20 to 30 seconds until J pushed the appellant away. The appellant left without saying anything. J then went into his tent.

[8] J recalled seeing the appellant naked on the Saturday afternoon after this incident, as well as at times on the Sunday. He recalled the appellant being naked in a tyre tube on the river and having to be assisted out of the water by some of the boys when the tyre became stuck.

[9] J recalled the trip home in the appellant's van, when some of the boys in the back of the vehicle were exposing their bare backsides out of the windows. J said that he recalled that the appellant was looking in the rear vision mirror as this occurred and that his inattention to driving nearly caused the vehicle to run off the road.

[10] Counsel who was appointed to cross-examine the complainants obtained several answers from J which provided the basis for valid arguments to the jury. J had made a number of written statements about these events, the first of which was made to police in January 2014. In his evidence in chief, he had been able to name the five other boys who were in the group; in his original statement, he named only three boys, two of whom were not amongst the five who were named in his evidence as going on the camp. In his previous statements, he had made no mention of a hike which the group undertook on the Sunday morning, according to his evidence. In his statements, he had said that the pressure of the appellant's penis against him was "momentary", rather than lasting for as long as 30 seconds. Until his evidence, he had made no reference to one of the appellant's hands moving over his pelvic area. His original statement had made no reference to the appellant, whilst naked, wrestling one of the boys. And there were some differences in the detail of the incident in which the appellant had had to be assisted out of the river.

[11] Counsel also questioned whether J was correct in recalling that the boys were a fishing group at the school, which was part of his line of questioning as to whether in fact J had been on a camping trip which was supervised only by the appellant. J agreed that there had been no fishing over the weekend.

[12] Counsel asked J about his contacting Education Queensland, in April 2005, when J spoke to a Mr Meyers. J agreed that, at least prior to then, he had spoken to no one about this incident, including any of the other boys in the group. Counsel suggested to J that when he spoke to Mr Meyers, he had said that he was concerned that there may have been a sexual assault by the appellant on another boy in the group (and not A), based upon noises which J had heard from within the appellant's tent. J agreed that he did express that concern to Mr Meyers. In answer to the suggestion that J had made no mention to Mr Meyers of any abuse of him, J answered:

> "I can't recall that. My – my recollection is that I did, but I – I can't fully recall that. I know that there was another episode I was talking about."

In re-examination, J said that in that conversation in 2005, he was made to understand that the appellant was deceased, having committed suicide. He was asked about his first contact with police on this matter, which was in 2011, and

whether he believed at that time that the appellant was deceased. J said that his recollection was that he became aware that the appellant was not deceased in 2013.

[13] Counsel suggested to J that when he went to police in 2014, he was in financial difficulties and was motivated to pursue this complaint by an interest in obtaining criminal compensation. J rejected the suggestion, although it was revealed that in 2014, J made a complaint to Education Queensland in which he advised that he would be pursuing criminal compensation.

[14] In his evidence in chief, when asked whether he recalled in which month in 1976 it was that the trip occurred, J said that he "could probably pinpoint it to October/November", partly because "the school newspaper would have been published". In cross-examination, counsel showed J the 1976 yearbook for the school and directed his attention to a page where the students of one of the grade 9 classes had written that they were "looking forward to the camp to Mount Barney on which our form teacher [the appellant] is taking us". J agreed that he was not in that particular class. Counsel then suggested to J that the only camp which had occurred in 1976 for grade 9 students was one which the whole of that class had attended, involving about 19 students travelling in several vehicles, one being the appellant's Kombi van and others being driven by parents. J rejected that suggestion, saying that it was not his recollection. He also rejected the suggestion that he had not camped "at a spot near Yellow Pinch" and that instead, "the campsite was some five kilometres from Yellow Pinch". J also rejected a suggestion that the appellant had been "clothed throughout the entire camp".

[15] The other complainant, A, was in the same class in grade 9. He had some recollection of having been in a fishing club at the school. The complainant J was a friend of his at school and he assumed that he also was in the fishing club.

[16] A recalled going on a camp to Mount Barney with other boys and the appellant. He recalled the appellant's Kombi van, but he was unsure about whether he had travelled to the camp in the vehicle. His recollection of the camp, generally speaking, was less detailed than that of J and he could not remember the names of the other boys in the group or the year in which the camp occurred. He did recall that the boys and the appellant went swimming.

[17] A recalled being at one stage out of the water and walking away from the group, to go behind some trees in order to urinate. The appellant then came alongside him, saying to A that he also had to urinate. The appellant then said to A:

> "Yeah, well, I'll hold yours, you hold mine."

A said the appellant then moved A's hand onto the appellant's penis and the appellant put his own hand on the complainant's penis. He said this occurred for "maybe, five seconds". The appellant then walked away and A said nothing to anyone of what had happened for fear of ridicule.

[18] A was asked whether he recalled seeing the appellant naked at the camp. He could recall seeing the appellant's penis and buttocks, he thought, whilst the appellant was in his van, perhaps when the appellant was getting changed. A believed that he could recall one more time when he saw the appellant's penis, which was when the appellant was swimming in the waterhole. But A could not remember "the circumstances".

[19] Counsel cross-examining A suggested that A's memory was failing him and that he was wrong to think that the appellant had touched his penis. A was adamant that he did recall this happening. However, more generally, A accepted that his memory "around this incident" was "very poor". He agreed that he was unable to recall the trip to or from the campsite and that the only other thing which he could recall was a game of hide and seek, because he was then badly bitten by ants.

[20] The cross-examiner also asked A whether he suffered from memory problems. A agreed that he did, having a condition of fibromyalgia, which A said gave him a "fuzzy memory".

[21] At that point, the transcript records the judge asking the appellant to sit down and saying to counsel that the appellant wanted to give some instruction. The cross-examination then resumed with a question about the game of hide and seek.

[22] There were a number of witnesses who said that they had been amongst the group of boys on a camp with the appellant when they were at this school.

[23] The first of those witnesses recalled that the trip was in about August or September 1976. He said it was to have been a fishing trip, but became just a camping weekend. He recalled that there were about seven boys in the group, whom he was able to name as including J, A and his own brother. The witness said this was the only camping trip that he went on with the appellant, and the appellant was the only adult present.

[24] He recalled that the appellant picked the group up and drove them to the camp. He recalled that on the way, some of the boys in the van were "mooning" passing cars, and the appellant was encouraging them to do so by offering them loose change. He said that this activity went on possibly for more than half an hour. He recalled that the appellant was preoccupied by what was going on and caused the car to swerve. He rejected the suggestion by the appellant, in cross-examination, that it was the complainant J who was taking coins from the ashtray of the car and throwing them to the boys in the back.

[25] This witness recalled that when the appellant and the boys were swimming, the appellant was naked, as he was when he was walking around the camp. He had no recollection of seeing anyone wrestling.

[26] The witness said that he recalled a conversation with the complainant J, on the Sunday, when J came out of the bush or the tents, appearing to be upset and saying that the appellant had "brushed himself against me. He had no clothes on".

[27] The witness did not accept that as many as 19 or 20 boys had attended the camp and he was sure in his recollection as to which boys had been there.

[28] He recalled speaking to J in 2014, when he became aware that J had made a complaint to police. He told J that he would give a statement in support of his complaint.

[29] The next witness was the brother of that man. He recalled going on a camping trip with the appellant once in 1976 to Mount Barney. He recalled that no more than 10 people were on the trip. He recalled some of the others who were there, including J, A and his brother. He recalled travelling to the camp in the appellant's Kombi van and that the appellant was the only adult on the trip.

[30] He recalled seeing the appellant running around the camp naked; he said that the appellant was naked for an hour or two. He gave a statement to police in April 2014.

[31] A further witness recalled going on a camping trip near Mount Barney with the appellant and some other students, including J, A and the brothers who testified. He thought that the camp was in 1977 when he was in year 10. He recalled travelling to the camp in the back of a van. The camp was over two nights and the only adult he recalled as present was the appellant. He recalled the appellant being naked for effectively the whole weekend.

[32] The appellant saw fit to cross-examine this witness by asking him whether he could "recall something happening at night?" This prompted the witness to say that he had been with others in his tent, when J came to the opening of the tent, dropped to his knees and said "they're rooting us". The witness said that "immediately after, there was a man's hands that grabbed him [J] on his upper arms from behind and yanked him away. I did not see the face of the man who took it. I assume it was a man because of the size of the hands". The witness said that what then happened was that he "laid back and blacked out". He said that on the following morning, he discussed this incident with K, who said something to him which the witness did not understand.

[33] A further witness recalled being in a group of boys on a camp with the appellant "up Mount Barney way" in his year 9 or 10. There were six to eight students on the trip. He was "pretty sure" that they travelled together in a car or a Kombi van, which was driven by the appellant. He recalled that at the camp the group of boys were "mucking around as kids … play fighting … pushing each other and, sort of, wrestling". He could recall himself wrestling the appellant which was "not fighting, really" but "just sort of testing strength". He made no reference to the appellant being naked at any time and recalled that he enjoyed the camp.

[34] Another witness was a man who had been a boy at the school at the time and was one of those named by the complainant J in his original statement to police, as having been in the group on the trip. He was produced for cross-examination; he had no recollection of the appellant or of being on this trip.

[35] There was another boy identified by J in his first statement, as being on the trip, but not in J's testimony. This person was made available for cross-examination. Again his evidence was that he was not there. A further witness, who was made available for cross-examination, had been a boy at the school at the time but who had not been at this camp.

[36] The prosecution called Mr Meyers (the employee of Education Queensland referred to earlier) to be cross-examined by the appellant. Mr Meyers said he had very little memory of receiving a call from the complainant J. The appellant showed to him two documents which Mr Meyers had authored. One of them was a diary note of receiving a call from J, who had identified himself and referred to a fishing trip to Mount Barney with a teacher in 1977, whom he named as the appellant. The notes recorded J speaking about the appellant being "nude most of the time" and paying "the boys to chuck brown eyes out of the back of his Kombi van". Mr Meyers did not believe that J had told him that he, J, had been abused in any way. The note indicates that J was mainly concerned about another boy, whom J said that he had met at a recent school reunion and who had told J that he was uncomfortable talking

about the matter. (The boy whom J identified was the witness whose evidence I have discussed above at [33]). Mr Meyers' notes refer to someone having committed suicide, and said that J would have been the source of that information.

[37] Another witness produced for the appellant's cross-examination was a Mr Garland, an employee of the Department of Education and Training from April 2004. The appellant referred Mr Garland to a departmental record, which recorded a complaint by J on 27 April 2005. Mr Garland was not the author of the document, whom he understood to have been Mr Meyers.

[38] Mr Garland said that in April 2014, he received a call from a person identifying himself as J. This was his first encounter with a complaint by J and his understanding was that the file had been closed with no further action taken between August 2005 and when he received this call.

[39] Evidence was given by an investigating officer, Detective Senior Constable McConnell. In the course of her evidence, the prosecution tendered a map of Mount Barney, showing the location in the region of Yellow Pinch Reserve. She was then cross-examined by the appellant and asked to detail the steps which she took in identifying possible witnesses and taking of statements from them. She was cross-examined about a note in her diary, in August 2014, which indicated that the complainant A at that time did not wish to give a statement. She was asked about notes which she had made of a conversation with A at that time, in which J recalled going to the camp, travelling there in the Kombi van, swimming in the camp and the appellant being naked. A had also told her of his fibromyalgia, which he said affected his long-term memory. The officer was asked by the appellant about police records of the complaint by J that there had been sexual abuse by the appellant against the person to whom I have referred above at [33]. By that means, the appellant managed to adduce evidence that the police report of this complaint had commented that "[i]t is highly likely that [the appellant] did commit sexual offences against [that person]. Unable to identify [that person] at this time." The appellant's strategy in that instance appears to have been that the report was beneficial because it said nothing about J's complaining of an offence against himself.

[40] The appellant did not give or call evidence.

Were the verdicts unreasonable?

[41] By any measure, these were very old complaints. They concerned a weekend in 1976, when the complainants were aged 14 and the appellant was aged 29. He was 70 years of age at the time of the trial. That passage of more than 40 years would inevitably affect the extent to which any relevant witness might have a reliable memory of the events of the weekend. That delay had consequences for the appellant's ability to defend the case, as the judge explained to the jury, when giving a Longman direction.[2]

[42] Nevertheless, Courts now accept that the passage of such a long period of time need not, in every case, preclude a reliable recollection of the facts from which a jury might reasonably convict.

[43] As I have discussed, counsel cross-examining the complainant J succeeded in obtaining evidence which provided arguments for why the jury should be left in

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2 *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.

doubt about his complaint. But notwithstanding those matters, and the particular care with which the jury was instructed to assess his evidence because of the long delay, it was not unreasonable for the jury to accept the essential account by J, namely that the appellant had forced his erect penis against him, albeit for a short period of time. The cross-examiner's point that there was a discrepancy between this occurring "momentarily" and over "20 to 30 seconds" was not compelling. Nor was any of the other points made by the cross-examiner, either considered individually or with the others, something which *must* have left the jury with a reasonable doubt.

[44] The jury is likely to have been left in doubt about whether, when he rang Mr Meyers in 2005, J did refer to himself as being a victim of abuse by the appellant. But they may well have considered that J's motive in contacting the Department was to find out whether the appellant was still alive, without having to discuss what had happened to him. Ultimately the jury was asked to disbelieve J, upon the basis that his testimony was false and driven by his wish to obtain criminal compensation from a successful prosecution. Although that argument had some evidentiary basis, it was not so compelling that the jury was bound to accept it.

[45] Over the appellant's objection, the two complaints were the subject of the one trial and the jury was instructed as to the way in which they might use the evidence of one complaint in considering the other one. If the evidence of A could be used by the jury in considering the complaint by J, the prosecution case was somewhat stronger. But it was not dependent upon it. Quite apart from that evidence, it was open to the jury to conclude that the appellant had committed the offence against J with which the appellant was charged.

[46] In the case of A's evidence, there were not the inconsistencies which affected J's evidence. The matter of concern for the jury about A's evidence was his poor memory. He admitted that he had a "fuzzy memory", and this was, of course, in the context of relating events which had occurred more than 40 years earlier. However, he was adamant that he did recall the acts which constituted the offence. The evidence was that he had a condition which affected his memory, which was a relevant fact but not one which was fatal to the prosecution case. The acts constituting the offence were not the only things which he said he recalled from the weekend in question. And it was not inherently unlikely that he would have a specific recollection of the acts constituting the offence, but not of most of the other things which occurred over the weekend. It was open to the jury to accept his evidence of the offending against him and to thereby convict the appellant.

[47] I go then to the other grounds of appeal.

Part 2 Division 6 of the *Evidence Act* 1977 (Qld)

[48] Part 2 of Division 6 of the *Evidence Act* 1977 (Qld) provides for the giving of evidence by "protected witnesses", as each of the complainants was in this case.[3] Section 21N thereby precluded the cross-examination of the complainants by the appellant in person. He was given legal assistance for the conduct of that cross-examination, pursuant to s 21O, by which the Court in such a case will order that the person charged be given free legal assistance by Legal Aid for the cross-examination, unless the person charged arranges for his own representation for that

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[3] Each was the alleged victim of a "prescribed special offence" as defined in s 21M(3), so that he was deemed to be a protected witness, as defined in s 21M(1)(c).

purpose or does not want the protected witness to be cross-examined. Section 21O confers no discretion on the Court other than to proceed as occurred in this case. If the appellant wished the witness to be cross-examined and had not arranged for a legal representative to act for him for the proceeding, the Court was bound to order that he be given legal assistance for the purpose of the conduct of the cross-examination. By s 21P, the lawyer who cross-examines the protected witness for the person charged is the person's legal representative for the purposes only of the cross-examination.

[49] The ground of appeal here is that the operation of Part 2 Division 6 "prohibited the unrepresented appellant from cross-examining the 2 complainants, predisposing the trial to miscarry and the remedy that the State appoint a solicitor and counsel to cross-examine was insufficient to cure the defects".

[50] The appellant's argument is, in essence, a complaint about the performance of counsel who cross-examined the complainants. He appears to suggest that the provisions of Division 6 prevented what would have been, in his hands, a more capable cross-examination.

[51] He also seems to complain of something of a disconnect between his strategy for the conduct of the case and what he described, in his oral submissions in this Court, as the more "conventional" defence that was raised by the cross-examiner. This argument seems to focus upon the complainant J.

[52] Under this ground of appeal, it cannot be said that there was an error of law in any respect by the judge. As I have said, there was no discretion allowed to the Court in this respect. The argument is that the regime provided by Division 6 is unfair in this case, because it put the cross-examination into the hands of someone who was not really the defendant's lawyer. As the appellant put it in oral argument, "there is a question as to whether there was a proper lawyer/client relationship".

[53] These arguments cannot be accepted. A lawyer appointed to cross-examine under these provisions is the lawyer for the person who is charged, with all of the duties to the client, subject to the ethical constraints to which any advocate representing an accused person is subject. Although the appointed lawyer is the lawyer only for the course of the cross-examination, it is necessary for that lawyer to act upon the defendant's instructions (again subject to ethical constraints) and to try to make the cross-examination to the defendant's advantage in the way in which the defendant wishes to conduct his defence. In some cases, this will be a demanding task for the appointed lawyer. But it will not be an impossible task and the limited role of that lawyer in the trial need not be conducive to an unfair trial, and it was not in the present case. I will return to the appellant's complaints about the performance of the appointed lawyer in this trial, as those complaints arise in relation to other grounds of appeal. But this ground of appeal must be rejected.

Witnesses not called by the prosecution

[54] The appellant complains that the Crown failed to call several witnesses, with the result that his trial was unfair. None of these witnesses is said to have provided a statement to the prosecution. As I have discussed, there were some persons called by the prosecution so that they could be cross-examined by the appellant.

[55] Most of these persons appear to have been former students at the school, but no witness said that any of these persons was also at the camp. What, if anything, could have been said by any of these persons, which would have been relevant to the trial, is not apparent.

[56] The appellant complains that the prosecutor failed to call "[a] witness to give evidence about the location of the alleged camp Yellow Pinch". But there was evidence as to the location of the camp, from several witnesses. There was also the map which was tendered through the investigating officer.

[57] The appellant argues that the Crown should have called an expert about the effects of fibromyalgia on memory. After A's evidence had been given, the jury sent a note asking the question "what does fibromyalgia do to memory?" The judge told the jury that there was presently no evidence before them on the point, by which he appeared to mean that there was no expert evidence, as distinct from that given by A. The prosecutor said that the Crown would call a general practitioner to describe the condition. Subsequently, the prosecutor indicated that the Crown had been unable to procure a person to give evidence on the subject. Nevertheless, A's evidence enabled the appellant to rely upon the condition when addressing the jury. And in his summing-up, the judge told the jury that one reason why they needed to scrutinise A's evidence with "great care" was that A suffered from fibromyalgia which caused him to have a "fuzzy memory". The judge said to the jury:

> "Now, I know you asked a question earlier in the trial about fibromyalgia, but as I have indicated to you on a couple of occasions … you must act upon only the evidence before you, and the evidence before you, of course, in relation to this issue comes from [A] himself and that's what he said that is the impact of that complaint upon him."

[58] There is no evidence in this Court as to how the opinion of a medical practitioner would have advanced the point in favour of the appellant, who had the benefit of the complainant's own evidence about his memory difficulty. There is no evidence here that, according to what is known to medical science, the complainant understated that difficulty.

[59] This ground of appeal also complains of a failure to call a person who is said to have "acted as an intermediary between the complainants". Just what that role involved or how the evidence of this person might have been relevant is not demonstrated.

[60] For these reasons the ground of appeal which complains that the prosecution failed to call material witnesses must be rejected.

Documents not tendered by the prosecution

[61] The appellant says that the prosecution failed to tender "a legible map showing features of the Mount Barney National Park that were mentioned by Crown witnesses". As already noted, the prosecution did tender a map. It is a map produced by Queensland Parks and Wildlife Service of the area surrounding the Yellow Pinch Reserve. The map is legible. The appellant's argument does not explain how the interests of justice required the jury to have another map.

[62] Under this ground, the appellant complains that the prosecution did not tender the 1976 and 1977 yearbooks for the school. As I have discussed, these featured in the cross-examination of some of the witnesses. It was open to the appellant to tender the yearbooks or an extract of them. It was also open to him, at the trial, to request the prosecution to do so. In any event, the appellant seems to have obtained whatever benefit there was for him in these documents, by the evidence he was able to adduce by reference to them.

[63] Also under this ground, the appellant complains that the prosecution did not tender photographs of the campsite at Yellow Pinch, in order to show features mentioned in the evidence, such as a swimming area within a creek, rapids, tent sites and barb-wire fences. The appellant was aware that photographs had been taken by Ms McConnell. The appellant cross-examined her about those photographs, which she took in 2014. At least on her evidence, they had little, if any, probative value. At one point in his cross-examination, the appellant asked the jury to retire, after which he complained that the photographs had not been shown to the jury. The judge explained to the appellant that it was open to him to tender the photographs, although the consequence would be that the prosecutor would have a right to make a closing address. The appellant responded that he did not wish to tender the photographs. There was no further cross-examination of Ms McConnell. The appellant did not attempt to use the photographs in cross-examination, by asking the witness to look at them and suggesting that various features did or did not appear at the site when she saw it in 2014. Ultimately, the appellant has failed to establish how the prosecutor's decision not to tender these photographs affected his defence and caused a miscarriage of justice.

The prior statements of the complainants

[64] There are two grounds of appeal in respect of the previous written statements of the complainants. One is that there was a miscarriage of justice by the prosecutor's failure to tender them; the other is that there was the same consequence by the appointed counsel not tendering them and referring to only "a small part" of them when cross-examining the complainants. The appellant argues that, in each case, the complainant's prior statements were "highly damaging" to the credibility of the witness.

[65] As to the first ground, as is submitted for the respondent here, the prosecution was not able to impugn the credit of its own witness and the previous out of court statements were not admissible as part of the prosecution case. Further, and as to each of these grounds, the appellant's argument does not demonstrate, by reference to the content of any statement of either complainant, the way in which the disclosure of that content to the jury might have made a difference to the outcome. As I have discussed, the previous statements of the complainant J were used with some beneficial, although not decisive, effect by the appointed counsel. It is not explained how the previous statement or statements of the complainant A could and should have been used in the same way.

[66] Each ground should be rejected.

Scope and volume of the evidence not adduced at trial

[67] This ground of appeal is expressed as follows:

> "The scope and volume of the evidence not adduced at the trial was such that had it been put to the jury no verdict of guilty could have been reached by an unprejudiced jury."

This ground seems to be the suggested basis for the appellant's application to adduce further evidence. The application was opposed by the respondent. As is submitted for the respondent, the evidence is in no respect fresh evidence. It is further submitted that it is not new evidence, because, it is said, it was available to the appellant at the trial. However, it is that availability which takes this evidence outside the category of fresh evidence and makes it new evidence.

[68] Although this evidence was available at the trial, there remains a residual discretion in exceptional cases to receive it where to refuse to do so would result in a miscarriage of justice: *R v Spina.*[4] As was there said, in this context there are strictly two questions, the first being whether the Court should receive the evidence and the second being whether the evidence, if received and combined with the evidence at the trial, requires that the conviction be set aside to avoid a miscarriage of justice.[5]

[69] The first piece of evidence referred to within the appellant's application for leave to adduce further evidence[6] is the appellant's affidavit sworn on 3 January 2018, which was filed in the Trial Division in support of an application for appeal bail. That affidavit exhibited a large volume of material which is impossible to summarise shortly. The documents total some 165 pages. They include what the affidavit described as "a selection of documents disclosed by Bravehearts". That organisation was assisting the complainant J, including with his claim for compensation. None of the documents in this category was admissible at the trial. The appellant has not identified how the content of any of them might have assisted his defence. What he appears to have in mind is that it was evidence that the complainant had been seeking to obtain compensation for this offence, with the assistance of someone from Bravehearts. But that was acknowledged by the complainant when he was cross-examined. He accepted that his "case manager" at Bravehearts had made an application on his behalf under the *Victims of Crime Assistance Act* 2009 (Qld), before he was later advised that no further action would be taken in response to his application in the absence of a conviction of the offender. The Bravehearts material makes up about one half of that exhibited to his affidavit.

[70] The next category of documents within the affidavit consists of witness statements obtained by the investigating police. To some extent these have been discussed already. The appellant does not explain how the contents of any of them, insofar as it was not revealed to the jury in cross-examination of a witness, would have assisted his defence. The same may be said of the next category of documents within this compilation, which are extracts from the committal hearing transcript in this case.

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4 [2012] QCA 179 at [34] citing *Mallard v The Queen* (2005) 224 CLR 125, 131-132 [10]-[13]; [2005] HCA 68; *R v Young* (*No 2*) [1969] Qd R 566; *R v Condren; ex parte Attorney-General* [1991] 1 Qd R 574, 579; *R v Main* (1999) 105 A Crim R 412, 416-417 [16] [17], 417-418 [22]-[24]; [1999] QCA 148; *R v Daley; ex parte Attorney-General (Qld)* [2005] QCA 162; *R v Katsidis; ex parte Attorney-General (Qld)* [2005] QCA 229 [3], [19].

5 *R v Spina* [2012] QCA 179*;* as applied in *R v WBF* [2017] QCA 142 at [106]-[108].

6 Dated 9 February 2018.

[71] One of those witness statements requires some further discussion. It was a statement from the witness Mr Garland, who was called by the prosecutor so that he could be cross-examined by the appellant. In that statement, Mr Garland referred to a phone call he received in April 2014 from a man who identified himself as J and who stated that he had "historical information about a possible sexualised matter involving some students of a high school he attended". Mr Garland stated that J said that the appellant had taken a fellow student or students into his tent whilst they were on a fishing trip in the Mount Barney area. In the statement Mr Garland also recalled that J had said that he had not been a victim of the alleged conduct of the appellant, but rather that he had been contacted by a relative of one of the alleged victims. Mr Garland also stated that J had enquired whether the appellant was still a teacher with the Department. This statement was dated 7 November 2017 and it was provided by the prosecutor to the appellant only on the morning that the witness was called. At the commencement of that day of the trial, the prosecutor told the judge that Mr Garland's statement had been provided to the appellant who required "some further time to digest all the information that's contained in Mr Garland's statement". That was confirmed by the appellant who told the judge that "The information here … radically conflicts with the testimony from [J] and I would like to just digest that in order to work out how I'm going to approach the [evidence]." The judge adjourned for 10 minutes to enable the appellant to consider the statement, and no further time was requested by the appellant.

[72] Later that morning, Mr Garland was cross-examined by the appellant who began by showing him his statement. The appellant did not cross-examine on that part of the statement in which Mr Garland had said that J was calling about an offence against another person and not against himself. Mr Garland's witness statement is not a lengthy document and the appellant could not have overlooked that part of it. For whatever reason he chose not to ask Mr Garland about it. Had he done so, it is unlikely to have advanced the appellant's defence, because this conversation had occurred after J had complained to police about the offence against him and had made his January 2014 statement.

[73] Another of these documents is a record within Education Queensland of J's telephone call to, it would appear, Mr Meyers. This document would hardly have promoted the appellant's defence, because it contained remarks noting that the appellant had been dismissed in 1994 and was arrested in East Timor after a large amount of child pornography had been found on his boat. Ultimately the make-up of this documentation, exhibited to his bail application affidavit, gives the impression that the appellant is seeking to put before this Court any document, which might have been relevant to this case, in the hope that something will be identified which warrants a re-trial. Having looked at the material, it is my view that a document of that kind is not apparent.

[74] The next category of evidence within this application to adduce further evidence consists of "notes of pre-trial conference[s]" with the complainants and the other witnesses who were then boys at the camp. Apart from anything else, that is an entirely speculative application, revealing no basis for a conclusion that there has been a miscarriage of justice.

[75] Within this application, the appellant seeks an order that the Commissioner of Police produce documents, in an unedited form, corresponding with those at pages 771 and 772 of the Appeal Record. These are police records referring to this

investigation which the appellant says would be "fatally damaging to [J's] credibility". But versions within the Appeal Record demonstrate just how damaging the documents would have been to the appellant's case. They refer to his criminal history, having been imprisoned for "numerous sexual offences on children", and to his having been incarcerated in East Timor after being found with child pornography. The documents also refer to the appellant's criminal history for offences of stealing and assault.

[76] Next there is a large number of documents which the appellant says "were produced during the hearing of [his] stay application". These documents refer to his encounters with authorities in relation to possession of child pornography in East Timor. They could not have helped his case in this trial.

[77] Other documents are records of the police investigations of these offences. The appellant's submissions do not reveal anything about them which, if it was not the subject of evidence at his trial, would have been relevant and admissible.

[78] For these reasons the application to adduce further evidence should be refused.

Jury notes and prejudice

[79] The jury sent two notes to the judge before the evidence had closed, and 17 notes when they were considering the verdicts. The appellant says that these notes "raise an apprehension that some jurors were pre-empting the judge's directions, were prejudiced, and sought to impose their views on other jurors".

[80] The content of the jury notes appears from a table prepared by the appellant. There is no indication from those notes that any juror was prejudiced or was disregarding the judge's directions. Some of the notes indicate that there was a difference of views within the jury room. For example, the note marked "O" for identification asked "To what extent should a jury or jurors attempt to convince another juror or jurors to change their vote to facilitate a unanimous verdict?" That note does not indicate that any juror was being overborne, so that there is a risk that the verdicts were compromised. In response to that note, the judge told the jury that each juror had sworn or affirmed that he or she would conscientiously try the charges and decide them according to the evidence, and that each juror took his or her individual experience and wisdom into the jury room and was expected to judge the evidence fairly and impartially in that light. The judge said that the jury had a duty to listen carefully and objectively to the views of every juror. They were also told that they should not join in a verdict if they did not honestly and genuinely think that it was the correct one.

[81] This ground of appeal cannot be accepted.

The judge's summing up

[82] There is a ground of appeal which asserts that:

> "The trial judge misdirected the jury in summing up and giving a Robinson direction, a Longman direction, the preliminary complaint and distressed condition directions, discreditable conduct directions and similar fact directions."

[83] Save for the "similar fact directions", the appellant's argument seems not to be that directions of those kinds should not have been given, but that they were in some way flawed. In my view, there was no error in the summing up.

[84] The directions about the use of one complainant's evidence for the case involving the other complainant is criticised upon the basis that the two offences did not exhibit the necessary degree of similarity. As the judge directed the jury, there were these similarities: each of the complainants referred to events occurring at the same camp, they were school boys of the same age and each under the appellant's care at the time, both events occurred somewhat remotely from the other group of boys, and at a place to which the appellant had followed the boy, both events ended immediately after the boy resisted, both offences were opportunistic in character and brazen and both had occurred after the appellant had "been walking around naked in front of them for some period of time". Having identified those similarities, the judge fairly described the appellant's argument that the offences were not so similar, before leaving that for the jury's consideration.

[85] After the evidence had closed, the judge discussed with the parties the directions which should be given in certain respects. One which he identified was whether "a similar fact direction should be given to the jury in respect of each of the two complainants, and if not, how is the evidence of one admissible on the case [of] the other". The trial was then adjourned until the following morning, when the prosecutor made submissions to the effect that the offences had a sufficient similarity for the evidence of one complainant to be highly probative in the proof of the offence involving the other complainant, absent any collusion between the two witnesses. The appellant made submissions that the offences were dissimilar. The judge ruled that they had the sufficient degree of similarity. The judge referred to the similarities, which he subsequently described again in his summing up. The directions which the judge gave in that respect are criticised by the appellant, it would seem upon the basis that the jury ought to have been told that they were not to use the evidence of one offence in considering whether the other had been committed. In my conclusion the judge was correct in ruling as he did.

[86] The appellant has not demonstrated any misdirection of the jury.

The Black direction

[87] Under this ground, the appellant argues that the trial miscarried because a minority of jurors was wrongly pressured to agree with the verdicts, by a Black direction.[7]

[88] Late on the fifth day of the trial, the jury indicated that they had not yet reached a unanimous verdict. The jury was sent home with the judge indicating to the parties that he would give a Black direction on the next court day, which was the following Monday. That direction was given at 9.30 am on the Monday morning.

[89] After about an hour and a half, the jury asked for redirections on some aspects of the evidence and some aspects of the summing up. Those directions were concluded just after the luncheon adjournment. At 3.19 pm the jury sent a further note indicating they were then unable to reach a unanimous decision. The jury was then directed as to the possibility of taking a majority verdict before they again retired to consider the matters. At 4.08 pm, the jury asked for further evidence to be

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7 *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.

re-read, and this was completed at 4.40 pm. At 4.56 pm the jury returned their verdicts of guilty, with a majority of 11 to 1 jurors on each count.

[90] The appellant's argument has no substance. There was no error by the judge in the directions which were given, and in particular in the Black direction. There is no basis for thinking that any juror was improperly pressured by the directions or for that any other reason, that led to a miscarriage of justice.

Conclusion and orders

[91] None of the grounds of appeal can be accepted. I would order as follows:

1. Refuse the application for leave to adduce further evidence.
2. Dismiss the appeal against conviction.
3. Refuse the application for leave to appeal against sentence.

[92] **BODDICE J:** I agree with McMurdo JA.