SUPREME COURT OF QUEENSLAND

CITATION:	*R v NV* [2018] QCA 310
PARTIES:	**R** **v** **NV** (appellant)
FILE NO/S:	CA No 299 of 2016 DC No 512 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 19 November 2015 (McGinness DCJ)
DELIVERED ON:	13 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2018
JUDGES:	Fraser and Gotterson JJA and Atkinson J
ORDERS:	**1. The applications for leave to adduce further evidence are granted.** **2. The application to amend the ground of appeal is granted.** **3. The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – where the appellant was convicted on his own plea of guilty of one count of indecent treatment of a child under 16, under 12, who is a lineal descendent – where the appellant had previously been acquitted of sexual offences in respect of the complainant's oldest sister – where the appellant seeks leave to adduce new evidence of the complainant and her oldest sister recanting their accounts – whether the evidence is "relevant, credible and cogent" – whether it would be a miscarriage of justice to allow the conviction to remain *Criminal Code* (Qld), s 671B(1)(c) *Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41, followed *R v Boag* (1994) 73 A Crim R 35, cited *R v DBI* [2016] 2 Qd R 151; [2015] QCA 83, applied *R v Gadaloff* [1999] QCA 286, cited *R v Maniadis* [1997] 1 Qd R 593; [1996] QCA 242, cited

R v McQuire (2000) 110 A Crim R 348; [2000] QCA 40, cited
R v Wade [2012] 2 Qd R 31; [2011] QCA 289, followed
R v Westphal [2009] QCA 223, cited
R v VI [2013] QCA 218, applied

COUNSEL: J J Allen QC, with J Lodziak, for the appellant
M Whitbread for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Atkinson J and the orders proposed by her Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Atkinson J and with the reasons given by her Honour.

[3] **ATKINSON J:** The appellant was convicted on his own plea of guilty on 19 November 2015 on one count of indecent treatment of a child under 16 years, under 12, who was his lineal descendant. He was sentenced on 4 March 2016.

[4] The sentence imposed upon the appellant was two months' imprisonment followed by two years' probation. By the time this matter came on for hearing on 6 June 2018, the appellant had completed both his period of imprisonment and the two years of probation.

[5] On 7 November 2016, the appellant filed an application for extension of time, an application for leave to appeal against sentence and a notice of appeal against conviction. The proposed notice of appeal set out that the grounds of his appeal were "I was informed of new evidence on 27 September 2016." The extension of time was granted.

[6] On 14 May 2018, the appellant filed a notice of intention to adduce new evidence[1] and, if the new evidence were admitted, an amended notice of appeal seeking only to appeal against his conviction on the ground that:

> "The evidence admitted by leave on the appeal demonstrates that a miscarriage of justice has occurred."

On the same date he formally abandoned his application for leave to appeal against sentence.

Background

[7] The offending to which the appellant pleaded guilty was said to have occurred between April 2010 and 17 November 2011 when the complainant was seven or eight years old.[2] The facts of the offending were agreed in a schedule of facts tendered at the sentencing hearing.

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1 *Criminal Code* s 671B(1)(c).

2 The charged period was between 31 December 2009 and 17 November 2011 but it was accepted at sentence that the alleged offending could not have taken place any earlier than April 2010: Appeal Record Book (**ARB**) 103.09-103.16; ARB 100.20-100.21; and ARB 12.28-13.31.

[8] The complainant is the appellant's biological daughter and was living with the appellant, her mother, who was then the appellant's partner, and her siblings, two sisters and two brothers.

[9] The offending was said to have occurred on an evening when the family were watching a horror movie in the lounge room and the complainant got up to take a shower in the bathroom. The complainant said that while she was naked and waiting for the shower water to heat up, the appellant entered the bathroom and touched her on the vagina. The complainant said that the appellant used both hands and moved them like he was "playing".

[10] The complainant said that she pushed the appellant away and told him to "get lost". The appellant then touched the complainant on her breasts and she punched him on the nose. The complainant said that the appellant had been drinking that night and that he was "really drunk" and "could hardly stand up".

[11] This offending occurred in the context of investigation of the appellant for similar acts of indecent treatment in respect of the complainant's two older sisters:

1. On 29 February 2012, the complainant's oldest sister was interviewed by police and disclosed that the appellant had touched her vagina after she told the appellant she had a rash.

2. On 3 May 2012, the oldest sister was again interviewed and reported that the appellant had inserted a finger into her vagina when observing the rash on her vagina.

3. On 28 September 2012, the complainant was interviewed by employees of the Department of Child Safety and denied that the appellant had touched her in her private parts.

4. On 1 October 2012, the complainant's oldest sister participated in a third interview with police. Her complaint remained essentially the same.

5. On 11 October 2012, the complainant participated in an interview with police. She spoke with police for the first time about the matter the subject of this appeal.

6. On 10 January 2013, the complainant's second oldest sister was interviewed by police. She disclosed an occasion she was having a shower and the appellant joined her. She did not complain of any sexual offending against her.

7. On 4 March 2013, police charged the appellant with offences against the complainant and her oldest sister.

[12] The prosecution of the appellant for alleged offences relating to the complainant's oldest sister resulted in an acquittal by a jury in the District Court. No charges were ever brought in respect of the complainant's second oldest sister.

Fresh evidence

[13] The fresh evidence sought to be adduced by the appellant is evidence of the complainant's recantation of the allegations and evidence that alleges that the complainant's mother induced the complainant and her sisters to make false claims against him. The affidavit evidence seeks to establish that the complainant's mother

forced her daughters to make false claims against the appellant to the police and coached them while they were giving pre-recorded evidence to reiterate the claims. Each of the three daughters now say that the accounts were entirely fabricated.

[14] In his application for leave to adduce evidence, the appellant applied for leave to adduce evidence from the complainant, who gave evidence in a pre-recording before his plea of guilty was entered, and four other witnesses who did not give evidence at the trial: the complainant's oldest sister, the complainant's second oldest sister, Megan Power and Samit Seth. Megan Power is the appellant's current lawyer on the appeal; Samit Seth was the appellant's lawyer at trial.

[15] The complainant has deposed that:

> "I made up the story to the police. My mother told me to make up what I told the police and to tell the police that my father touched me. I made up the story about this happening in the bathroom.
>
> …
>
> Before I gave evidence at Court my mother told me what to say in Court.
>
> When I was giving evidence to the Court I asked for a toilet break. During that break I told my mother and the support worker who was sitting in the room where I was giving evidence that I didn't want to give evidence any more. I told my mother and the support worker that I couldn't remember the lies I originally told the police.
>
> During the break my mother and the support worker re-read to me what I had said to the police in the police interview. My mother told me to tell the Court what I told the police."[3]

[16] The complainant's oldest sister has deposed that:

> "My mother took me to talk to the police on three occasions and I told the police that I had a medical issue and I told my father about it and he had checked me in the way I described to the police. My mother told me to say this before I spoke to the police each time. My father did not touch my vagina. He took me to see a doctor.
>
> It seemed like my mother was making a bigger thing out of it than I explained it was. I do not know why my mother did this.
>
> When I went to give evidence by videolink at the Caboolture Courthouse on 24 February 2015 I was in a room with my mother and a support person before giving evidence. This support person wasn't the same support person who was in the room when I was actually giving my evidence.
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> My mother and the support person were prompting me about what I should say.
>
> They read back to me what I had said to the police about my father checking my vagina before I gave evidence.

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3 Affidavit of [the complainant] affirmed 20 December 2017 at [10], [12]-[14].

> I believe my mother forced me to give false evidence in Court.
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> Before I gave evidence in Court I told her that I did not want to keep telling lies about what happened.
>
> She said that if I didn't then she would take my son [JNT] off me.
>
> Myself and [JNT] were living with my mother at the time.
>
> I told my mother that I wasn't listening to her any more. I got kicked out for two months and she kept [JNT].
>
> I ended up living at friend's houses.
>
> Eventually my mother let me visit [JNT]. She said I could keep [JNT] if I said in Court what I told the police. I agreed to do that."[4]

[17] The complainant's second oldest sister deposed that:

> "I told the police about a time when my father put me in the shower with him. I said this happened when my mother was at work.
>
> I told the police that my father didn't touch me sexually when I was in the shower.
>
> I didn't say this to the police but I had lice and my father put me in the shower to give me some treatment for the lice.
>
> I told my mother about having lice and my father putting me in the shower. A few weeks later my mother put me in the car one day and she said that we were going to go for icecream however ended up at the Logan Central Police Station.
>
> Before we went into the police station she told me to tell them about the shower but not the lice and to tell the police that my father had sexually assaulted me in the shower. She didn't ever tell me why I should say that to the police.
>
> I didn't tell the police that my father sexually assaulted me because he didn't."[5]

[18] The respondent also sought leave to adduce evidence on appeal, in the form of affidavits from the appellant's ex-partner, the mother of the complainant and her siblings; the PACT workers present during the pre-recording of the complainant's evidence and the pre-recording of the complainant's oldest sister's evidence; and Natalie Hogan, a lawyer employed at the Department of Public Prosecutions.

[19] Each of the PACT workers denied coaching the complainant or her oldest sister.

[20] The foster sister of the appellant's ex-partner, with whom the complainant was then living, deposed that:

> "After one of their weekend visits [the complainant] had a conversation with me at home. She said words to the effect of 'Aunty, dad was talking to me and wants me to drop the sexually [*sic*] assault charges

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4 Affidavit of [the complainant's oldest sister] affirmed 18 December 2017 at [11]-[22].

5 Affidavit of [the complainant's second oldest sister] affirmed 18 December 2017 at [8]-[13].

> against him so that he can clear his name. He told me that it didn't happen. I can't remember because I was only young. What do I do?
>
> I asked her if she wanted to speak to someone about it but she said that she might. I then got onto the Laidley DChS and told them what [the complainant] had said about [the appellant] wanting her to drop the charges against him. They told me that the charges were already finished in court and that [the appellant] would have to appeal if he wanted to change things. I never heard anything about that situation and [the complainant] never mentioned it to me again.
>
> In about May 2017 [the complainant and her second oldest sister] came back from a weekend visit with [the appellant]. They said that they need to talk with [me]. [The complainant's second oldest sister] said words to the effect of 'dad's been talking to us for a while now about wanting us to live with him and [redacted] and we've decided now that we want to. Can we do that?' [The complainant] added that she didn't really want to stop living with me but that she also wanted to be with [her second oldest sister]. I told the girls that I would have to speak with DChS again."[6]

[21] This evidence is particularly significant as it would seem to suggest that although the complainant has sworn in her affidavit to having "made up" the allegations and having direct memories of it being false, she told her aunt that she now simply could not remember what happened. It also provides a context for the recantation of her earlier evidence, that is that she and her sisters now wanted to go to live with their father.

Legal principles

[22] Before leave to go behind a plea of guilty so as to entertain an appeal against conviction will be granted, the Court must be satisfied that a miscarriage of justice has occurred.[7] In *Meissner v The Queen*,[8] Brennan, Toohey and McHugh JJ held:

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in the exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."[9]

[23] Similarly, as Dawson J observed in *Meissner v The Queen*, a person may plead guilty:

> "[For] all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the

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6 Affidavit of [the foster sister of the appellant's ex-partner] sworn 31 May 2018, Exhibit [XXX-1], [25]-[27].

7 *R v Wade* [2012] 2 Qd R 31 at [51] per Muir JA.

8 (1995) 184 CLR 132.

9 (1995) 184 CLR 132 at 141.

> elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside."[10]

[24] The appropriate test is whether letting the entered plea remain on the record would result in a miscarriage of justice.[11]

Application for leave to adduce fresh evidence

[25] In deciding whether to receive fresh evidence, the ultimate question is whether, if it were excluded, there would be a miscarriage of justice.[12] The evidence must be such that when viewed in combination with the evidence given at the trial it can be said that the jury would have been likely to entertain a reasonable doubt about the guilt of the accused person if all the evidence had been before it.[13]

[26] The test for whether fresh evidence will be adduced is whether it is 'relevant, credible and cogent.'[14]

[27] In this case, given that the evidence involved is recantation evidence, it poses a 'particular difficulty'[15] for the Court. It was said that 'such evidence after a trial should be approached with caution,'[16] which would be true *a fortiori* in cases involving guilty pleas. Applications of this nature are often approached by the Court with a good deal of caution given the obvious significance of a plea of guilty and the desirability of finalising proceedings.[17]

[28] The High Court in *Davies and Cody v The King*[18] said that recantation, in itself, is not a ground for setting aside a verdict.

[29] The test as to whether a recantation is a ground for setting aside a conviction was held by Fitzgerald P in *R v Bryer*[19] to be as follows:

> "A conviction is set aside on the basis of a recantation if (i) the witness's new version of events is sufficiently relevant, cogent and plausible to raise a doubt as to guilt in all the circumstances, including the original evidence and explanations given for the original evidence and the recantation, or (ii) the evidence of the recanting witness is so untrustworthy that it 'ought not to be allowed to enter into the reasons for any verdict of guilty'."

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10 (1995) 184 CLR 132 at 157.

11 *R v Boag* (1994) 73 A Crim R 35 at 37; *Meissner v The Queen* (1995) 184 CLR 132 at 157; *R v McQuire* (2000) 110 A Crim R 348 at 354 [32] and 360 [74]; *R v Gadaloff* [1999] QCA 286.

12 *R v Westphal* [2009] QCA 223 at [23]; *R v Maniadis* [1997] 1 Qd R 593 at 597.

13 *Mickelberg v The Queen* (1989) 167 CLR 259 at 301 (Toohey and Gaudron JJ).

14 *R v VI* [2013] QCA 218 at [64]; *R v DBI* [2016] 2 Qd R 151 at 156-158.

15 *R v DBI* [2016] 2 Qd R 151 at 156 [28].

16 *R v DBI* [2016] 2 Qd R 151 at 156 [28].

17 *R v Vella* (1984) 14 A Crim R 90 at 92; *R v Liberti* (1991) 5 A Crim R 120 at 122.

18 (1937) 57 CLR 170.

19 (1994) 75 A Crim 456 at 458; followed by the Full Court of the Supreme Court of Western Australia in *Bourne v Elliss* [2001] WASCA 290 at [50] and [73].

[30] Pincus JA in the same case observed that:

> "… the court will not ordinarily set aside the verdict unless it considers, having regard among other things to the reasons given for the recantation and for the original, allegedly false evidence, that there is reason to think that the later rather than the earlier version is genuine."[20]

Appellant's submissions

[31] The appellant submits that a miscarriage of justice has been demonstrated on the basis that:

1. The only evidence to support a conviction was that of the complainant;
2. The recantation of the evidence of the complainant should be accepted as credible and cogent; and
3. The appellant's plea of guilty did not demonstrate a consciousness of guilt "in the fullest sense" as he at no stage admitted to having a recollection of the offending, and it bears some similarities to a fraud inducing a plea of guilty.[21]

[32] The appellant submits that "the events never happened" and that he accepted his counsel's advice to plead guilty "as [he] was often drunk at the time of the alleged conduct and [his] legal representatives said that [he] would have difficulty challenging the allegation for that reason."[22] He says that he also does not recall reading the instructions he signed and does not recall being shown the schedule of facts referred to in the instructions.[23]

Respondent's submissions

[33] The respondent submits that the recantation evidence is not credible, cogent and plausible.

[34] The respondent notes that the complainant was subjected to extensive cross-examination at the pre-recording of her evidence when she was only 11 years of age. An examination of that evidence does not suggest that she was coached or lying.

Consideration

[35] The complainant's evidence was given in four sections:

1. first, from 10.20 am to 10.43 am, ending when the complainant asked for a break;[24]
2. second, from 11.00 am to 11.34 am, ending when the complainant asked for a bathroom break;[25]
3. third, from 11.54 am to 12.29 pm, ending when the Court adjourned to deal with counsel's submissions;[26] and

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20 *R v Bryer* (1994) 75 A Crim R 456 at 462 (Pincus JA).
21 Appellant's Outline of Submissions at [31] and [32].
22 Affidavit of [the appellant] sworn 9 June 2017 at [9].
23 Affidavit of [the appellant] sworn 11 May 2018 at [13] and [34].
24 ARB 20.36.
25 ARB 36.14.
26 ARB 50.07.

4. fourth, from 2.23 pm to 2.59 pm.[27]

[36] The complainant acknowledged at the beginning of her evidence that she watched a copy of the recording of her police interview two days earlier, on Monday 23 February 2015.[28] She specifically denied having access to the transcript of that recording.[29]

[37] Further, it is noted that the transcript of her evidence does not show any signs that, as the complainant now says in her affidavit, she could not recall "the lies" she was coached to say by her mother.

[38] After the appellant's counsel at trial asked the complainant to repeat what had occurred, she said that she did not want to say it but that she remembered "all of it" and "every single bit".[30]

[39] The complainant frequently acknowledged that she could not remember certain elements of her evidence, but these acknowledgements do not harm the complainant's credibility; rather, they strengthen the argument that she was telling a truthful story and had not been coached.

[40] In her cross-examination, the complainant acknowledged not remembering the following:

1. how old she was when she moved to the home in Eagleby;[31]
2. how long she had lived at the Eagleby home;[32]
3. whether she spoke to the police while they lived at Mudgee;[33]
4. speaking with officers from the Department of Child Safety in September 2012 prior to being interviewed by police;[34]
5. an incident in which she had described in her police interview as her father sleeping on the ground;[35]
6. whether the bathroom door at the house in Eagleby was lockable or not;[36]
7. an earlier incident with the police in which her brother had injured himself on a trailer;[37]
8. what she was doing before she went into the bathroom to take her shower, originally,[38] before later being able to summon more details after more specific questions;[39]
9. whether the evening of the incident was a weekday or weekend;[40]

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27 ARB 76.28.
28 ARB 11.14.
29 ARB 49.15-49.25.
30 ARB 48. 22.
31 ARB 12.34-12.35.
32 ARB 13.20-13.21.
33 ARB 14.14-14.20.
34 ARB 15.14-15.26.
35 ARB 29.19-29.43.
36 ARB 33.29.
37 ARB 41.21-41.22.
38 ARB 62.43-62.44.
39 ARB 64.08-64.22.
40 ARB 63.09-63.10.

10. specifics of where in the eighteen month period during which they lived in the house at Eagleby the incident occurred;[41]

11. whether she locked the bathroom door or not;[42]

12. whether she "shouted out" during the incident;[43]

13. whether, after the incident, she stayed in her bedroom or came out;[44] and

14. the specific timing of incidents, whereas in the police interview she was able to recall that she returned from her walk after the incident at 7.20 pm and able to infer that the incident occurred at around 6.50 pm.[45]

[41] Additionally, she made no reference to telling the appellant to get lost and punching the appellant in the nose in response to the incident, whereas this is recorded in the police interview.[46]

[42] This is particularly significant as during the cross-examination, counsel for the appellant put to the complainant prior inconsistent statements in the form of her police statement, which were inconsistent with the evidence she was giving at the pre-recording. This would seem to be inconsistent with the claim made by the appellant (and the evidence now sworn by the complainant) that she was coached by her mother and the support person repeating back to her that police statement before and during her giving evidence.

[43] Crucially, the complainant was not able to state with certainty what she was doing prior to the shower, a key detail of the incident, even in the fourth session in which she gave evidence (after three breaks). In the pre-recording of her evidence, she says multiple times that she was not sure and that she could have been in the lounge room with her family or in her bedroom:

> "[APPELLANT'S DEFENCE COUNSEL AT TRIAL]: Okay. So were you in the lounge room as – so were you in the lounge room as well then?
>
> [COMPLAINANT]: I think so. I'm pretty sure, unless I come from my bedroom. I'm not exactly sure.[47]
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> …
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> "[APPELLANT'S DEFENCE COUNSEL AT TRIAL]: Okay. So – anyway, were you watching that horror movie as well, or – what – the TV?
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> [COMPLAINANT]: "No. No. I don't know."[48]

[44] Similarly, in her police interview, she could remember with detail what she did after the incident. At the pre-recording, she not only could not remember what she did

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41 ARB 63.18-63.28.
42 ARB 65.01-65.10.
43 ARB 70.40-71.14.
44 ARB 72.18-72.31.
45 ARB 74.34-74.39.
46 Police Record of Interview dated 11 October 2012 with [the complainant] at 29.44-29.46; 35.42-35.44 ("**PRI**").
47 ARB 64.01-64.06.
48 ARB 64.21-64.22.

after the incident but when reminded of it, maintained that she could not remember doing that nor did she remember telling the police officer that.[49]

[45] Furthermore, the complainant in her evidence acknowledged things which were potentially prejudicial to her mother, including describing that she had not understood why she was going to the police and that her mother had explained to her why she was there[50] and acknowledging that her mother had been angry with her father in the past.[51]

[46] In the police interview, the complainant was able to recall:

1. that she was watching a movie with her family prior to the incident[52] and later, that the movie was *Scream*[53] and that she had been sitting on the floor of the living room with her mother while she was watching it;[54]
2. what she was wearing after the incident and what he was wearing during the incident;[55]
3. that the appellant was heavily drunk at the time;[56] and
4. what the complainant did after the incident in a large amount of detail.[57]

[47] None of these were mentioned in her pre-recording evidence.

[48] Of particular significance in assessing the credibility, cogency and plausibility of the recantation evidence is the evidence provided by the two PACT support workers and the appellant's ex-partner, in their affidavits denying that they coached the complainant or her oldest sister. Their accounts of the events are plausible, particularly given the inherent improbability of two PACT support workers being willing to, on separate occasions, conspire to manufacture untrue testimony of two separate complainants in two separate pre-recording sessions.

[49] There are compelling reasons which suggest that the recantation evidence, while relevant, is neither credible nor cogent. It is directly contradicted by two apparently independent PACT workers. The explanation given by the complainant to her aunt suggests a motive for her and her oldest sister giving recantation evidence, that is that they wanted to live with their father, rather than because they had been coached by their mother and the PACT workers and had accordingly lied to the Court. Further, the complainant's disclosure to her aunt that she could not now remember what had happened is entirely inconsistent with her recantation evidence that she was deliberately lying.

[50] I consider that on balance, taking into account all the evidence available, this makes the complainant's account in her recanting affidavit, and those supporting accounts of her sisters, neither credible nor cogent. I do not think that, given the reasons given by the complainant and her sisters in her recantation evidence, there is reason to think that the later rather than the earlier version is genuine. In those

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49 ARB 73.34-73.43.
50 ARB 16.04-16.13.
51 ARB 23.04-23.05.
52 PRI 32.13-32.14.
53 PRI 37.28.
54 PRI 37.28-37.29.
55 PRI 36.01-36.30.
56 PRI 37.02.
57 PRI 37.40-38.40.

circumstances, there is no miscarriage of justice and no reason to set aside the appellant's plea of guilty.

[51] In view of the relevance to the determination of this appeal of the new evidence filed by the applicant and the respondent, I would grant both applications for leave to adduce further evidence and grant the application to amend the ground of appeal. I would, however, refuse the appellant leave to withdraw his plea of guilty and dismiss the appeal.