SUPREME COURT OF QUEENSLAND

CITATION:	*R v ABA* [2018] QCA 329
PARTIES:	**R** **v** **ABA** (appellant)
FILE NO/S:	CA No 235 of 2017 DC No 183 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 15 September 2017 (Lynham DCJ)
DELIVERED ON:	30 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2018
JUDGES:	Sofronoff P and Gotterson JA and Flanagan J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted of two counts of rape and four counts of indecent treatment of a child under 16 years – where the complainant wrote two notes, the first of which alleged improper conduct by the appellant, and the second of which indicated that she was lying in her first note – where one offence was alleged to have occurred when the complainant and the appellant were watching "Jaws" on free-to-air television at a time when the complainant's sister was in hospital – where the appellant contends that a miscarriage of justice was occasioned by defence counsel's failure to (a) cross-examine the complainant on the contents of the two notes; (b) object to re-examination of the complainant by the prosecutor; and (c) investigate whether "Jaws" was in fact shown on free-to-air television at a time when the complainant's sister was hospitalised – whether defence counsel's conduct resulted in an unfair trial occasioning a miscarriage of justice *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9, followed *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, cited
COUNSEL:	B Mumford for the appellant J A Geary for the respondent

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

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

[2] **GOTTERSON JA:** At a trial over four days in the District Court at Townsville, the appellant, ABA, was found guilty on 15 September 2017 of two counts of rape (Count 2 and 4) and three counts of indecent treatment of a child under 16 years (Counts 1, 3 and 6). On a further count (Count 7) he was found not guilty of rape but guilty of the alternative offence alleged of indecent treatment of a child under 16 years.[1]

[3] The appellant was sentenced on 18 September 2017. In respect of each rape count, convictions were recorded and he was sentenced to three and a half years imprisonment. For each indecent treatment count, convictions were also recorded and the appellant was sentenced to 18 months imprisonment. All sentences are to be served concurrently. A period of two days pre-sentence custody was declared to be time served under the sentence.

[4] On 16 October 2017, the appellant filed a notice of appeal against his convictions.[2] An amended notice of appeal was filed on 3 August 2018. He deleted the stated grounds of appeal and substituted a different ground of appeal. Leave to amend was not opposed and was given.

The circumstances of the alleged offending

[5] Each count concerned the same complainant. She was the appellant's stepdaughter. All offences were alleged to have occurred at residences in Townsville where the family lived. The complainant was aged between 10 and 12 years old when the Count 1 offence was alleged to have occurred. She was aged between nearly 13 years and almost 16 years when the other offending was alleged to have occurred.

[6] The other offending was alleged to have taken place on dates unknown between 1 July 2011 and 11 May 2014. On 17 May 2014, in direct response to questioning, the complainant told her aunt, S, that the appellant had been indecently dealing with her. By that time the complainant had moved to Rockhampton for schooling.

[7] The police were called. The complainant participated in an interview at Rockhampton police station on 18 May 2014. The interview was recorded, tendered in the prosecution case[3] and played to the jury.

[8] The complainant told police that the appellant sexually abused her. She wrote a note about it. The note explained how she had been "cutting herself" and that the appellant had touched her sexually.[4] Her sister gave the note to their mother who asked the complainant if she was making up the allegations in order to get the appellant out of the house. The complainant told her mother that that was the case. She did so because she did not wish the appellant's family to become involved.[5]

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1 The appellant had been acquitted on Count 5 at a previous trial.
2 AB317-320.
3 Exhibit 1. A transcript of the interview was also tendered: Exhibit 2: AB203-244.
4 AB204, 237.
5 AB205. The complainant explained that the appellant's family had helped her mother out: AB240.

[9] The evidence adduced disclosed that afterwards the complainant wrote a second note to her mother. The complainant did not refer to it in the police interview.

[10] The Count 1 offending, described by the complainant as "the first time", occurred at a residence at Rasmussen. She was in bed asleep. She was wakened by the feeling of movement. The appellant had placed her left hand on his penis which he was moving in a thrusting motion with his hands on his hips.[6] She thought his penis was hard.[7]

[11] The Counts 2, 3 and 4 offending occurred in the downstairs area of a residence in Kelso, a few months after Cyclone Yasi.[8] The complainant said that the appellant woke her up, lifted her up, and took her downstairs. He pulled down her panties. He licked her vagina with his tongue both "down the front and inside" (Count 2).[9] He made her suck his penis (Count 4).[10] Then he started licking her vaginal area again (Count 3).[11] The complainant told police that during the episode, the appellant ejaculated onto the bed.[12] The complainant said that she would tell her mother whereupon the appellant left the room and returned with a $50 note which he gave to her.[13]

[12] The offending which constituted Count 6 was described to police as having taken place on a Sunday night when the complainant's mother and sister were away from the house. Her sister was in hospital having a kidney operation.[14] She, the appellant and her younger brother were in bed together watching a movie, "Jaws", on free to air television.[15] The appellant was "feeling [her] boobs", and "rubbing his fingers over [her] nipples".[16] He put his hand under her shorts and moved it to the front of her vaginal area at the top.[17]

[13] The complainant also described an event which she said occurred after school one day in 2013. She asked the appellant if she could eat some leftover McDonald's food which he had put in the fridge. Initially, he said "no". She said "please". Then he knelt down while she was standing up. He pulled down her shorts and underwear and then put his mouth to her vagina. She said that he licked her at the front and inside her vagina for about 10 minutes. During that time, she was popping pimples on his bald head, which he asked her to keep doing.[18] This offending, which was charged as Count 7, was described by the complainant as the last instance of an indecent act.

The complainant's notes

[14] The two notes written by the complainant were shown to, and identified by, the complainant during a pre-recording of her evidence on 10 November 2016. They

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6 AB213, 217-218.
7 AB229.
8 AB219.
9 AB220, 233.
10 AB220.
11 Ibid.
12 AB225.
13 AB227-228.
14 AB229.
15 AB232.
16 AB229-230.
17 AB233-234.
18 AB206-207.

were admitted into evidence on the first day of the trial[19] and were read to the jury by the judge's associate.[20]

[15] In the first note, the complainant said:[21]

(a) one night she woke up, and the appellant had her hand on his private part;

(b) he was bribing her to have sex with him; he paid her; and "now it happens 24/7 but only small things like showing him my breasts";

(c) one time this year she asked if she could have his "McDonald's" but he told her to go downstairs … he started playing with her breasts then he licked her private part;

(d) today, she asked the appellant if she could have some chocolate and he said "show me some titty first";

(e) after fights between her mother and the appellant, he often tells the complainant "to suck him off";

(f) she has been telling him "no," but "it keeps going"; and

(g) she did not tell her mother because of the latter's money problems and she feared that if her mother got rid of the appellant, they would be homeless.

[16] The second note,[22] which was received by the complainant's mother after she had told the complainant that they would have to speak to the police, contained the following statements by the complainant:

(a) the complainant was sorry that she lied about telling her mother what the appellant did to her;

(b) she thought that if she told her mother a made-up story that she would not allow the appellant to come back;

(c) the truth is that she does not like the appellant and never did; he would constantly punish her and her sister;

(d) the appellant is "a selfish pig … when you try to do something good for the family he always spoils it";

(e) she got the idea from the books downstairs … she understands that her mother loves the appellant but she feels safe without him;

(f) the appellant says she cannot "spend time with friends" and her social life is "down the drain"; and

(g) the appellant treats the complainant's brother like a prince; that is why every now and then she asks if she can live in Rockhampton.

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19 Exhibits 4, 5: AB284, AB285.
20 AB39 Tr1-25 l25 – AB41 Tr1-27 l7.
21 Exhibit 4: AB284.
22 Exhibit 5: AB285.

[17] In written submissions,[23] the appellant has referred to the following aspects of the contents of the notes and differences between their contents and what the complainant told police in the interview. In the first note, the complainant set out details of the Count 1 offending. She complained that the appellant paid her money to show him her breasts, something that happened "24/7". She also referred to the Count 7 McDonald's food incident and said that the appellant played with her breasts on that occasion. As well, she said that the appellant often told her to "suck him off" after he and the complainant's mother had argued.

[18] In the police interview, the complainant told police that she wrote in the note that she had been "cutting" herself. However, she did not refer to that in either note. Also, she told police that the McDonald's food incident happened "last year", that is, in 2013.[24] Later in the interview, she said that she wrote the first note about a week after that incident.[25] She did not tell police that the appellant played with her breasts during that incident.

[19] Further, the complainant did not refer specifically in either note to the incident culminating in the appellant giving her $50 (Counts 2, 3 and 4). Nor did she mention an incident having occurred while her sister was hospitalised (Count 6).

[20] As well, in the police interview, the complainant did not say that she was showing the appellant her breasts – at all, or "24/7", as she said in the first note. Nor did she tell police that after arguments between her mother and the appellant, he "often" would tell her "to suck him off".

The evidence at trial

[21] The complainant's evidence was pre-recorded in two sessions; the first on 10 November 2016, and the second on 14 March 2017. The appellant was represented by counsel on the first day ("first counsel") and by different counsel on the second day ("second counsel"). Both counsel were instructed by the same solicitor ("instructing solicitor"). The DVD recordings were tendered in evidence and played to the jury.[26] It is convenient, at this point, to mention aspects of the complainant's evidence in chief and cross-examination to which the appellant has referred in submissions[27] and on which the first ground of appeal is based.

[22] When the complainant was cross-examined in November 2016, it was put to her that each one of the events, the subject of her complaint, did not happen. Defence counsel did not test the complainant on the contents of either of the notes. He elicited from her the following relevant matters:

(a) the incidents that occurred downstairs (which accumulated in the appellant giving her $50) happened at the house at Kelso when she was in year eight or nine, aged 13 or 14;[28]

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23 Appellant's Outline of Submissions ("AOS") at paras 22-25.
24 AB207.
25 AB237.
26 Exhibits 3A and 18A. Transcripts of the complainant's evidence were also tendered: Exhibit 3B: AB245-283 and Exhibit 18B: AB286-297.
27 AOS at paras 17-19.
28 Therefore, the appellant submits, they occurred from as early as 11 July 2011 until as late as December 2012, the end of the school year.

(b) she did not see the appellant ejaculate on the bed;[29]

(c) the event when the complainant's sister was hospitalised occurred when she was in year nine or 10, aged 14 or 15;[30] and

(d) the last occasion, the McDonald's food incident, occurred in 2013.

[23] In further cross-examination pre-recorded in March 2017, the complainant confirmed that the notes were written sometime in 2012. She also accepted that she did not tell her aunts, S and C, everything that the appellant had allegedly done. She accepted that she told her aunt, C, that nothing improper was happening with the appellant. The complainant also said that, when she complained to her grandmother, she did not tell her everything that the appellant had allegedly done.

[24] The complainant was not cross-examined on apparent inconsistencies between the notes, and her account given to police in the interview. Nor was she cross-examined on inconsistencies between the notes themselves. She was not tested as to the contents of the second note, nor was it suggested to her that the contents of that note were true, with the consequence that the contents of the first note were false.

[25] The complainant's mother testified. She described the layout of the residences at Rasmussen and Kelso. She also gave evidence that her younger daughter had been hospitalised "several times" for a kidney condition. She said that on one occasion in April 2012, she had accompanied that daughter to hospital for an operation, but that the daughter had not been hospitalised after the operation.[31]

[26] The complainant's mother also gave evidence that in October 2012 she was given a note written by the complainant. She spoke to the complainant about it. The complainant's mother told her that they would have to speak to the police.[32] The complainant was upset.[33] Later that night, the complainant gave her a second note and asked her to read it. They did not go to the police as had been arranged because the second note withdrew what had been said about the appellant in the first note.[34]

[27] Preliminary complaint evidence was given by a male friend of the complainant and her aunt, S. Another aunt, C, gave evidence of an occasion said to demonstrate that the appellant had a sexual interest in the complainant. The complainant's grandmother gave evidence of another occasion also said to demonstrate such an interest.

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

The grounds of appeal

[29] The appellant relies on the following grounds of appeal:

"1. A miscarriage of justice was occasioned, in that:

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29 AB266 Tr1-22 l7.

30 Therefore, as the appellant also submits, from as early as 11 July 2012 until as late as December 2013, the end of the school year.

31 AB62 Tr2-18 ll37-47.

32 AB63 Tr2-19 ll14-26.

33 Ibid l34.

34 Ibid l44 – AB64 Tr2-20 l9; AB66 Tr2-22 ll3-44.

(a) At a pre-recording of evidence held in the District Court at Townsville on 14 March 2017 (AR 286 – 297), the appellant's counsel:

(i) failed to adequately cross-examine the complainant on the contents of two notes written by the complainant;

(ii) failed to object to re-examination by the Crown Prosecutor (AR 295).

(b) In relation to count six on the indictment, the appellant's legal representatives failed to seek evidence establishing the date in 2012 when the complainant's sister and her mother stayed overnight at hospital. Nor did the appellant's legal representatives investigate whether the movie "Jaws" was playing on free-to-air television at the time the complainant's sister and her mother stayed overnight at hospital, or at any other time in 2012."

[30] Although there are, in effect, two grounds of appeal, Ground 1(a) and Ground 1(b), the former attributes incompetence to defence counsel in two separate respects. It is convenient to consider each respect as a separate ground.

Further evidence on appeal

[31] Before turning to these grounds, I note that each side sought, and was given, leave to adduce further evidence on appeal. For the appellant, this was by means of an affidavit of the appellant and an affidavit of an employee of Legal Aid Queensland, his solicitor. The respondent's evidence was an affidavit of the instructing solicitor, who also instructed at the trial, and the second counsel who was defence counsel at the trial. All deponents except the Legal Aid Queensland employee were cross-examined at the hearing of the appeal.

[32] It is unnecessary for present purposes to detail the evidence in chief or cross-examination of these witnesses. Reference will be made to aspects of that evidence as is appropriate for discussion of the grounds of appeal. Significantly, there is no disputed matter in the evidence on which this Court is required to make a finding of fact.[35]

Ground 1(a)(i)

[33] **Appellant's submissions:** The appellant has referred to the fact that at a hearing on 13 March 2017, the day before the second day on which the complainant's evidence was pre-recorded, the pre-record judge, who was not the trial judge, granted an application made by second counsel for leave to cross-examine the complainant about the two notes.[36] Second counsel indicated an intention to put to the complainant that she had made up the allegations in the first note because she did not

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35 It was put to the appellant that he had given certain written notes to his legal representatives prior to the commencement of closing addresses, to which he responded that he did not recall doing so: Appeal Transcript ("AT") 1-6 l26; AT1-7 l19. He had not filed an affidavit challenging the notes which had been exhibited to the instructing solicitor's affidavit, Exhibit 5 thereto.

36 Tr1-6 l41 – Tr1-7 l11; Tr1-29 ll4-7.

like the appellant.[37] Notwithstanding the leave obtained, second counsel did not cross-examine the complainant with respect to the contents of either note.

[34] The appellant submits that the credibility and reliability of the complainant's evidence ought to have been at the core of the cross-examination of her. As to the first note, she should have been cross-examined to establish that it was written at some time in 2012, thereby putting the McDonald's food incident as having occurred in 2012, and not 2013. She should have been asked what she meant when she wrote "he was bribing me to have sex with him" and "now it happens 24/7". It should have been put to her that she never mentioned actually having performed oral sex on him. Further, she should have been asked why she did not refer in the note to the facts comprising Counts 2, 3, 4 and 6.[38]

[35] With regard to the second note, topics which were not, but which the appellant submits should have been, the subject of cross-examination of the complainant are reasons alluded to in the note for why she would invent the allegations and what she meant when she said that she "got the idea from the books downstairs". Further, it was not put to the complainant that the contents of the second note were true and that the allegations in the first note were lies.[39] As well, the complainant should have been cross-examined as to differences between allegations made in the notes and those made by her in the police interview.[40]

[36] The appellant also submits that second counsel was clearly aware that the complainant should have been cross-examined on the notes and that it should have been put to her that she made up the allegations because of her animosity towards the appellant.[41]

[37] The failure to cross-examine on the notes, it is submitted, constituted "flagrant incompetence that must have deprived the appellant of a significant possibility of an acquittal". There was a miscarriage of justice on that account.[42]

[38] **Respondent's submissions:** The respondent refers to a ruling made by the pre-record judge on 23 June 2016. His Honour acceded to a request by first counsel to exclude certain evidence that the prosecution foreshadowed would be adduced at trial.

[39] This evidence was as to two specific incidents referred to by the complainant during her police interview. One of them was of violence of a non-sexual nature between the complainant and the appellant alleged to have occurred 15 to 18 months after the conclusion of the period over which the charged acts themselves were alleged to have occurred. The other involved violent conduct by the appellant within the household involving property alleged to have taken place "a long time ago". His Honour ruled against admissibility of this evidence for lack of temporal connection and hence of sufficient cogency.[43] (The complaint's accounts of these incidents were redacted from the recording of the interview tendered at trial pursuant to the ruling made on 23 June 2016.)

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37 Tr1-7 ll31-34.
38 AOS at para 28(a).
39 AOS at para 28(b).
40 AOS at para 28(c).
41 AOS at para 31.
42 AOS at para 32.
43 Tr1-10 l43 – Tr1-11 l31.

[40] At the hearing on 13 March 2017, second counsel explained that she wished to put to the complainant in cross-examination that she had made up the allegations against the appellant because she did not like him. His Honour asked second counsel if she was seeking to revisit the exclusion ruling. He put the proposition to second counsel that to cross-examine on that line would "reintroduce" the allegations of domestic violence which had been excluded. Ultimately, his Honour indicated that he would permit cross-examination that went no more than putting to the complainant that she did not like the appellant and did not venture into why she did not like him.[44]

[41] Second counsel said in evidence that after the hearing on 13 March 2017, she reflected upon the remarks of the pre-record judge. She realised that if she were to put to the complainant that she had made up the allegations and cross-examined her as to why she did so, then the admissibility of the evidence of prior domestic violence would be revived. She considered that it would be highly prejudicial to the appellant's case were the jury to hear evidence of violent behaviour on his part directed towards his family.

[42] Second counsel said further that she advised the appellant about the risks of such a cross-examination. He gave instructions to the instructing solicitor that he did not wish evidence of prior domestic violence to be admitted. She made a judgment call to adopt a conservative approach in cross-examination.[45] The instructing solicitor confirmed that such instructions were given.[46]

[43] **Discussion:** The principles applicable to an appeal on the basis of incompetence of counsel are now well established by the decisions of the High Court in *TKWJ v The Queen*[47] and *Nudd v The Queen.*[48] In *Nudd*, Gleeson CJ said:[49]

> "Sometimes, however, a decision as to whether something that happened at, or in connection with, a criminal trial involved a miscarriage of justice requires an understanding of the circumstances, and such an understanding might involve knowledge of why it happened. A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. Considerations of fairness often turn upon the choices made by counsel at a trial. In *TKWJ v The Queen*, the appellant complained that evidence of his good character was not led. This, it was said, was unfair. In rejecting that argument, this Court said that the failure to call the evidence was the

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44 Tr1-8 l5 – Tr1-10 l15; Tr1-29 ll3-7.
45 Affidavit at [15]-[19]; AT1-30 ll10-25.
46 Affidavit at [51], [52].
47 (2002) 212 CLR 124; [2002] HCA 46.
48 (2006) 80 ALJR 614; [2006] HCA 9.
49 At [9].

> result of a decision by counsel, and that, viewed objectively, it was a rational decision. That, in the circumstances of the case, was conclusive. It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct." (footnote omitted)

[44] Viewed objectively, the decision not to cross-examine the complainant about animosity she might have had towards the appellant was reasonable. As the transcript of the proceedings on 26 June 2016 and 13 March 2017 reveal, to have done so did seriously risk the admission into evidence in the prosecution case of highly prejudicial evidence of domestic violence on the appellant's part. Although counsel's subjective reasons for the course taken are not the frame of reference for present purposes, in this case, the reasons given by second counsel for the course taken are objectively sound.

[45] The other aspect to this ground is a failure to cross-examine the complainant with respect to the meaning of certain statements critical of the appellant's conduct that she used in the first note, differences between allegations in it and those in the second note, and differences between allegations made in the notes and those in the record of the police interview.

[46] In my view, cross-examination about the statements that criticised the appellant's conduct risked repetition of them in circumstances where there was no evidence, beyond a denial by the appellant, available to the defence to challenge them. It was therefore not unreasonable not to have cross-examined the complainant about those statements.

[47] As well, the inconsistencies spoke for themselves. To have cross-examined on them risked affording the complainant an opportunity to rationalise or diminish them. Furthermore, they were used by second counsel in her closing address. She observed that it was a "reliability case";[50] she referred to the retraction of the complaints by the second note;[51] and she also referred to the fact that the most serious offending was not mentioned in the first note.[52] Here, too, it was reasonable for second counsel to have approached the inconsistencies in this way.

[48] I am quite unpersuaded that the appellant has established that the conduct of second counsel in cross-examining the complainant was unfair to the appellant. Certainly, it had not been established that there was "flagrant incompetence" or "obvious shocking ineptitude" which gave rise to a substantial miscarriage of justice.

[49] For these reasons, I consider that Ground 1(a)(i) has not been established.

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50 AB153 Tr1-14 l32.
51 Ibid ll39-43.
52 AB154 Tr1-15 ll13-38, AB155 Tr1-16 ll42-47.

Ground 1(a)(ii)

[50] **Appellant's submissions:** This ground is based upon the following passage from the re-examination of the complainant on 14 March 2017:[53]

> "Okay. Now, you were asked questions about how your mum was going to take you to the police station – this is about the notes – the two notes that you wrote?---Yes.
>
> And you – the question was that your mum was going to take you to the police the following day and that you wrote the first note, the first note was discovered, that the police – your mum then said, "Well, we're going to go to the police" or arrangements were made for you to go to the police the following day - - -?---Yes.
>
> - - - and you then wrote another letter. **Was the other letter written because you were going to police the following day?---Yes, it was. I didn't want to go, and mum had called [the appellant] and spoken to him about it and he replied saying he wanted to kill himself. So I just got guilty and said that nothing happened.**" (emphasis supplied by the appellant)

[51] The appellant submits that this line of questioning did not arise out of cross-examination. Second counsel should have objected to it. The prosecutor placed reliance upon the highlighted passage from the re-examination in her closing address to the jury.[54] Significant prejudice to the appellant was thereby occasioned.[55]

[52] **Respondent's submissions:** The respondent submits that the questioning in re-examination did arise from the cross-examination and there was no basis for objection to it.[56] Reference was made in particular to the following passage in the cross-examination of the complainant on 14 March 2017:[57]

> "… Now, … after your mother saw [the first] note she came and spoke with you, didn't she?---Yes.
>
> And the two of you had a conversation?---Yes.
>
> And you became aware that your mother was going to take you to the police station the following day?---Yes.
>
> Before that happened, you wrote another note, didn't you?---Yes.
>
> …
>
> And you agree that that's the note there?---Yes.
>
> …
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> Now as a result of that second note you never did go to the police station the following day?---Nup, didn't."

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53 AB295 Tr1-10 ll15-26.
54 AB144 Tr1-5 ll19-35.
55 AOS at paras 34, 35.
56 Respondent's Outline of Submissions ("ROS") at paras 30, 31.
57 AB291 Tr1-6 l12 – AB292 Tr1-7 l2.

[53] **Discussion:** I accept the respondent's submission that the questioning in cross-examination and the answers to it were capable of giving rise to an inference that the complainant wrote the second note so that she would not have to lie to police by confirming that the allegations she made in the first note were true, and that that was her purpose in writing the second note. It was therefore open to the prosecutor to re-examine on the complainant's purpose in writing it.[58] Accordingly, there was no basis for objection to the questioning and no miscarriage of justice ensued from it. This ground of appeal, too, is not made out.

Ground 1(b)

[54] As to this ground of appeal, the instructing solicitor gave evidence that the medical records of the complainant's sister were part of the brief of evidence provided by the prosecution.[59] The records showed that the sister had had kidney surgery on 30 May 2012, a date within the period stated for the offending charged in Count 6, and that she was hospitalised for three days.[60]

[55] The instructing solicitor swore that at no stage during the preparation of the matter did the appellant put in issue the accuracy of dates in the medical records. Hence, no additional material about the hospitalisation dates was sought.[61] In my view, it was not unreasonable for the instructing solicitor not to have sought such material in the circumstances.

[56] With regard to the movie "Jaws", the appellant has not adduced any evidence to show that had enquiry been made, it would have revealed that that movie was not shown on free to air television at a time when the complainant's sister was hospitalised. No prejudice to the appellant has been demonstrated in not making such enquiry.

[57] In summary, the appellant has failed to establish that either matter raised in support of this ground of appeal has occasioned a miscarriage of justice. This ground of appeal also fails.

Disposition

[58] As none of the grounds of appeal has succeeded, this appeal must be dismissed.

Order

[59] I would propose the following order:

1. Appeal dismissed.

[60] **FLANAGAN J:** I agree with the order proposed by Gotterson JA and with his Honour's reasons.

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58 Further, second counsel in her closing address, submitted that the reason the complainant gave in re-examination for writing the second note did not accord with its contents nor with her mother's evidence: AB156 Tr1-17 ll1-29 – AB157 Tr1-18 l12.

59 Affidavit, Exhibit 4.

60 Affidavit at [62], [63], [66] and [67].

61 Affidavit at [64], [65].