SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dighton* [2018] QCA 354
PARTIES:	**R** **v** **DIGHTON, John William** (appellant)
FILE NO/S:	CA No 46 of 2018 DC No 127 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 21 February 2018 (Lynham DCJ)
DELIVERED ON:	18 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2018
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted on two counts of rape – where the complainant suffered from an intellectual disability – where the appellant submitted that her evidence was unreliable given that disability – where it was further submitted that there were various inconsistencies and contradictions within the evidence of the complainant that should have led to her evidence being rejected – where it was also submitted that the complainant's statement was influenced by the way in which it was taken by the police and that her conduct in continuing to see the appellant was inconsistent with her account of being raped – where the appellant made particular admissions in a field interview – whether the verdicts were unreasonable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR – where the appellant advanced the contention that the prosecutor misled the jury with two statements, one that mischaracterised the complainant's disability, and one where she was characterised as an immature adult – whether the conduct of the prosecutor caused a miscarriage of justice *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited

R v Gathercole [2016] QCA 336, cited
R v PBA [2018] QCA 213, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
J A Geary 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 Morrison JA and the order his Honour proposes.

[2] **MORRISON JA:** After a three day trial the appellant was convicted on 21 February 2018, on two counts of rape. He challenges his convictions on the grounds that the verdicts were unreasonable and cannot be supported by the evidence.

[3] The appellant's outline identifies a number of matters, including detailed references to the transcript, which he contends are relevant to the appeal. The document is not as clear as it could be, though this is perhaps understandable given that the appellant is representing himself. Doing the best I can, the arguments seem to be identified as follows:

(a) the complainant's evidence was unreliable given her intellectual disability;

(b) there were various inconsistencies and contradictions within the evidence of the complainant that should have led to her evidence being rejected as unreliable;

(c) the complainant's evidence was contradicted in certain respects by the evidence of other witnesses, and that should have led to a rejection of the complainant's evidence;

(d) the complainant's evidence should have been rejected because it was improperly influenced by the way in which it was taken by the police officer, as well as her use of a statement prepared by her father;

(e) the fact that the complainant continued seeing the appellant over a period of some months was not addressed by anyone in the presence of the jury; that conduct is inconsistent with the complainant's account of being raped; and

(f) certain comments by the prosecutor in the opening and address would have prejudiced or distracted the jury, causing a miscarriage of justice.

Legal principles

[4] The principles governing how this appeal must be approached are not in doubt. In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[1] requires that this Court perform an independent examination of the whole of the evidence to determine whether it

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[1] (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63.

was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[5] In *M v The Queen* the High Court said:[2]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[6] *M v The Queen* also held that:[3]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

[7] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[4] As summarised by this Court recently in *R v Sun*,[5] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[6] in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[7]

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2 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen*.
3 *M v The Queen* at 494.
4 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.
5 [2018] QCA 24 at [31].
6 *Baden-Clay* at 329 [65]; citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.
7 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.

[8] Further, as was said by this court in *R v PBA*,[8] in the course of elucidating the applicable principles:

> "The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted."

Evidence at the trial

Evidence of the complainant

[9] The complainant's police statement was tendered as an exhibit. Its contents were affirmed by the complainant. Since that is her first official account of what happened it is appropriate to start with that document.

[10] The complainant was a 41 year old woman who has, since birth, suffered from a form of autism. She lived in a unit immediately next door to one occupied by her parents. Because of her condition, she was reliant on her parents in a variety of ways, including general assistance with living and transport.

[11] The complainant said she knew the appellant, having met him at a disability ten-pin bowling league. They formed a friendship which was initiated by the appellant giving her a gift of some Easter eggs. They exchanged mobile phone numbers and eventually friended each other on Facebook. The appellant commenced attending the bowling alley when the complainant was there for her sessions of bowling, and on one occasion he made her a bracelet. The complainant gave evidence that on an occasion before those the subject of the offences the appellant asked her to get into his car so they could have a chat. In the course of that meeting the complainant initiated a kiss following which they both walked back into the bowling alley. The appellant effectively set rules on how they were to behave in public, namely that they had to act like they were friends, they weren't allowed to hold hands, the complainant was not allowed to lean all over him, nor to kiss him.

[12] The complainant described the appellant as having three tones to his voice. The first one was "OK", the second one was a "mild one" and the third tone was "serious". She said the third tone made her feel scared when he used it, at which times he "would use the 'F' word and yell at me".[9] The complainant described how the friendship developed, and various aspects of the appellant's behaviour, including the carry bags that he had, and the contents of them.[10]

[13] The complainant described what happened on 31 January 2015, identified as being the night on which certain elections were held. Her father was working at the

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8 [2018] QCA 213 at [80]; citing *R v Clapham* [2017] QCA 99 at [4].

9 The evidence was contained in Appeal Book 2 (**AB**) 217. The openings, addresses and summing up are contained in Appeal Book 1 (**AB1**).

10 AB 218.

elections and her mother had gone out with a friend. The appellant came over after cricket. He brought some alcoholic drinks which he put in the fridge, and then went for a shower. He invited the complainant to join him in the shower, but she declined. Afterwards they went to buy some pizzas, returning to her unit where they ate them and watched TV. The complainant then described the appellant suggesting that they "muck around".[11] When she declined the appellant said "I am not taking no for an answer, we are going to do this".[12]

[14] The complainant said she took off her shorts and her underwear "because I didn't want to make him angry". The appellant also took off his underwear, which she identified as being "Spongebob square pants underwear". The appellant also had a light blue hand towel which he took out and placed on the lounge.

[15] The appellant then told her "go on your knees, now suck on my penis and have some of my apple juice".[13] The complainant declined and the appellant responded "I'm not asking you I'm telling you". The complainant then got on to the lounge, and went onto her knees with her face towards his penis. She said the appellant told her to move her hands on to his penis and suck it at the same time. Then followed this description:[14]

> "He started to massage the outside of my vagina with his left hand, I know this because he was holding his drink with his right hand. He would give me a drink if my mouth went dry and then tell me to keep going.
>
> I told him to stop after I came, I said, "I don't want to continue, I'm not felling (sic) well.
>
> He said, "I'm going to continue. Let's go to the bedroom and continue."
>
> I put my underwear back on and we went into my bedroom. We laid on my bed for about 5 minutes looking at the stars on my ceiling. I really like the stars on my ceiling, he put them on my bedroom ceiling one night when he came over for dinner.
>
> He then said, "Lets [sic] take our clothes off and muck around."
>
> We took our bottoms off and hugged whilst still looking at the stars on my ceiling.
>
> He then said, "I'm going to put an x rated movie into your tv. He then got up and put the DVD into the DVD player on the side of the TV.
>
> The movie started to play and was going for about 10 minutes. I thought it was disgusting because there were two ladies mucking around with each other and there were three people, a lady and two men, mucking around with each other. I turned my head away so I didn't have to see it.

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11 As her evidence developed it became apparent that the complainant used this phrase to refer to sexual interaction of one sort or another.

12 AB 219.

13 AB 219.

14 AB 220 – 222; paragraph numbers omitted.

> He said, "I want you to watch it, whatever the girl does to the man I want you to do to me. Take your clothes off".
>
> I said, "No, I'm not taking my clothes off".
>
> He said, "I'm not taking no for an answer."
>
> This is his favourite set of words, he would say this to me often when I said 'No' to him.
>
> I thought that because he wasn't going to take no for an answer and I didn't want to hear his serious tone, that I should just take my clothes off.
>
> He said, "Try to suck on my penis and try to do what that lady is doing on that DVD".
>
> He had the light blue hand towel with him. He said, "I want you to suck my penis and swallow the apple juice, nice and sweet."
>
> I went to grab the towel to put over the top of his penis.
>
> He said, "Leave the F'n towel alone."
>
> He said, "I want you to suck on my cock."
>
> I said, "No, I'm not going to."
>
> He said, "I'm not asking you, I'm telling you."
>
> He pushed the back of my head down towards his penis.
>
> I said, "I'm not swallowing this."
>
> He said, "You are going to swallow this."
>
> He said, "I want you to open your legs, I want to put one of my fingers inside you.
>
> He put the light blue towel underneath me and a finger inside my vagina, he told me that it was up to his knuckle.
>
> I said, "That's enough, Stop, that's hurting."
>
> He said, "You have to keep going. Ether (sic) you suck my penis or I'll put it inside you."
>
> I was feeling very scared because I didn't know what he was going to do. I continued to suck on his hard penis until he came, I swallowed his apple juice. It did not taste nice and sweet, it was bitter and it made me feel sick."

[16] The complainant gave a description of the appellant's anatomy, including the fact that he was circumcised, and had a tattoo on his stomach.

[17] The complainant also gave evidence of the appellant having sexual intercourse with her immediately following what is described above.[15]

[18] The complainant signed an addendum statement which was also admitted into evidence. It explained that when the appellant told her to move her hands on to his

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15 The digital penetration and the sexual intercourse formed the subject matter of counts 2 and 4, in respect of which the jury were unable to reach a verdict. Those counts are not the subject of this appeal.

penis and suck it at the same time, she did what he asked. The addendum statement added this description:

> "His penis was in my mouth. I had to get it hard in my mouth. He told me to do that. … He wouldn't take no for an answer. … It got hard … He came … I spat it on the towel. It was his towel. The one he brought with him and used every time. The light blue one."[16]

The complainant's trial evidence

[19] In her trial evidence[17] the complainant identified and affirmed her two statements. She also identified a number of photographs of her unit which showed, amongst other things, the lounge on which the events of count 1 were committed, and the bedroom where the events of count three were committed. She gave some further detail about the appellant, saying that he was a referee at an indoor cricket centre. She gave some additional evidence about the events the subject of counts 1 and 3, saying that during those events the appellant used what she described as the middle tone in his voice.[18]

[20] In cross-examination the complainant agreed that she and the appellant had become friends, swapping telephone numbers and befriending him on Facebook. She also agreed that after they swapped telephone numbers she and the appellant would send text messages to each other. Having been asked whether two other men (identified as Paul and Matthew) were her boyfriends, which she denied, she was asked whether she considered the appellant to be her boyfriend. She answered affirmatively, but it transpired as cross-examination continued that she did not mean "boyfriend" in the sense of being in a relationship, but merely friends.[19]

[21] The complainant gave very precise answers to most of the questions asked of her, but did not always agree with the propositions put to her. For example, she disagreed that she proposed that the appellant give her a kiss at Christmas time,[20] that the appellant said he had special needs himself,[21] that she had differences with her mother because her mother was controlling of her,[22] and that her mother would not allow her to go to bars.[23] She also denied suggestions that her father had a conversation with the appellant in which he told the appellant to stop being her boyfriend.[24]

[22] It was put to the complainant, and she denied, that she was in a boyfriend/girlfriend relationship with the appellant, that she would ask him to park his car at the back of the carpark so they could fool around together, and that the appellant took her to a Woolworths so that they could fool around in the disabled toilet.[25]

[23] The complainant was cross-examined about her relationship with the appellant, and agreed that she wanted to be affectionate and hug him, but disagreed that she also

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16 AB 227 – 228.
17 Pre-recorded under s 21AK of the *Penalties and Sentences Act* 1992 (Qld).
18 AB 35-36.
19 AB 38 ll 41-44, and AB 40 l 38 to AB 41 l 2.
20 AB 37 l 26.
21 AB 39 l 3.
22 AB 39 l 17.
23 AB 39 ll 19-37.
24 AB 40.
25 AB 41 ll 1-8.

wanted to kiss him.[26] She went on to explain that it was the appellant's idea to hug and kiss, but not in public.[27]

[24] As her evidence progressed it became apparent that the complainant had a good comprehension of the questions being asked, and an ability to dissect questions that had multiple parts.

[25] An example of that was when it was put to her that the appellant would have dinner with her almost every Sunday. She disagreed with that in the various ways it was put, but then explained that the appellant did come over to her house "but he came on a Saturday night".[28] The cross-examination continued and it was put to her that the appellant would come over to her house for dinner most Sundays, which she disagreed with. She immediately explained that he did come over "but never on a Sunday … It's always Saturdays. Fridays or Saturdays."[29]

[26] A further example of the precision with which the complainant answered questions in cross-examination came when it was put to her that it was she who had tried to have sex with the appellant. Her answer was "No, I didn't have sex with him. He – he made me".[30]

[27] A further example occurred when she was asked "When [the appellant] was your boyfriend, did you have a vibrator?" She answered, "Yes, but he wasn't my boyfriend".[31]

[28] The cross-examination turned to whether she had engaged in sexual encounters with the appellant prior to the election night events the subject of counts 1 and 3. The complainant agreed that there were two such occasions, but expressly disagreed with the proposition that she had asked if she could have sex with him.[32] She agreed that an attempt to have sex was unsuccessful because she had told him that it hurt and she wanted to stop. She continued, "Yes, I did say that it hurt. But he wouldn't – he wouldn't stop".[33] She also agreed that on that occasion she had sucked on his penis "but it was his idea", and she expressly rejected the proposition that it was her idea.[34]

[29] The complainant agreed there was a second occasion, prior to the events the subject of counts 1 and 3, when she and the appellant had tried to have sex together, but again said it was the appellant's idea, and expressly rejected the proposition that it was her idea.[35] It was put expressly to the complainant that those events were not the appellant's idea at all, a proposition with which she disagreed.[36]

[30] When asked why it was that she continued to see the appellant after the two occasions she had described as occurring before the night in question, the complainant explained that the appellant had "used his firm[37] tone, and told me if I

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26 AB 41 ll 17-22.
27 AB 41.
28 AB 42 ll 4-13; as per the video recording. This was transcribed as "… on the Saturday night".
29 AB 42 ll 28-34.
30 AB 44 l 26.
31 AB 45 l 23.
32 AB 43.
33 AB 43 l 24.
34 AB 43 ll 29-31.
35 AB 44.
36 AB 44 l 19.
37 The video recording has that word as "third".

don't do it, he'd go and hurt my family. … He said if I didn't let him back in or let him do stuff, he would go and hurt my family."[38] The following question and answer then followed:

> "Well, that's not true, is it? --- No, but I believed him."[39]

[31] That response is a good example of the complainant's precision of responses. She discerned that the question implied that the threat was not true, and she agreed, but she believed it to be true. The next question made it clear that it was being put that there had been no such threat, which the complainant denied, saying "Yes, he did."

[32] Turning to the events of count 1, in cross-examination it was put to her that she had told the appellant, when inviting him over that night, that she'd been having withdrawal symptoms from his "apple juice". She disagreed. However, the next question was whether, when the appellant arrived, she had asked him to have a shower with her, with which she agreed.[40] She disagreed with the proposition that she had asked the appellant if she could have some "apple juice", and reaffirmed her evidence that the appellant had told her that the appellant was not going to take no for an answer.[41] She also disagreed with the proposition that the appellant was not wearing Spongebob SquarePants underwear.[42]

[33] When cross-examination continued on the precise events of count 1, it was put to the complainant that she did suck on the appellant's penis. The complainant agreed, but said "He made me do it". She disagreed when it was put to her that she had wanted to do it, and had asked him if she could, asking whether she could have some of his "apple juice".[43]

[34] The following exchange occurred in cross-examination on count 1:

> "You certainly had never taken off your clothes in the lounge room? --- Yes, I did.
>
> You did? --- Yes.
>
> Well, tell me about that part? --- He asked me to take my underwear off so that he could do it, and I told him no but he said he wouldn't take no for an answer.
>
> Well, I'm suggesting that's not right … --- Well, it is.
>
> Do you remember telling the police officer … that you then went to the bedroom? --- Yes, I did.
>
> And what happened there …? ---He – he made me suck on his penis and have sex with him.
>
> Okay. So we'll start with that first thing that you say. You say he made you suck on his penis. Did ---? --- Yes.
>
> --- you suck on his penis? --- Yes, because he wouldn't take no for an answer.

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38 AB 45 ll 5-9.
39 AB 45 l 11.
40 AB 46 ll 36-39.
41 AB 47 ll 5-21.
42 AB 47 ll 44-47.
43 AB 48 ll 5-20.

> Is that what he said? --- Yes.
>
> I'm suggesting that that's not right. He didn't say that to you? --- Well, he did."[44]

[35] It was again put to the complainant that the true version of events was that the appellant had allowed her to suck on his penis, because that is what she wanted to do. Again she disagreed.[45] It was also put to her, and she agreed, that the appellant had performed oral sex on the complainant on that occasion. However, she said that the appellant's licking her on the vagina only happened in the bedroom and not the lounge room.[46]

[36] The complainant expressly disagreed with the proposition that the events of count 1 were consensual.[47]

[37] At that point of the cross-examination it became apparent that the cross-examiner had confused her instructions as to whether the licking of the complainant's vagina had happened on the same night as the events of count 1. That was corrected and it was put to the complainant that it had happened on one of the earlier two occasions. The complainant disagreed.[48]

[38] The complainant was questioned as to why she had not told the police officer about the episode where the appellant licked her on the vagina. Her answer was that she had forgotten.

[39] The complainant said that she told her mother about the events on election night.[49] She also told her mother about the earlier occasions.[50] When questioned about why it was that she kept seeing the appellant after the events of counts 1 and 3, the complainant explained that she stayed in contact because the appellant made her do so, including telling her to keep texting him.[51]

Evidence of the complainant's mother

[40] The complainant's mother identified in general terms the nature of the complainant's intellectual impairment. She described it as "Asperger's autism". In addition, she had a muscular disease named Charcot-Maree-Tooth Disorder which was a form of muscular atrophy. She also described the efforts to try and give the complainant a degree of independence and privacy as she got older, but also the need to prompt the complainant to carry out simple domestic tasks, such as washing her hair and cleaning her teeth. She said the complainant could sign simple legal documents, but not complicated ones. She could look after her own bank accounts and pay her own telephone and electricity accounts.

[41] The complainant's mother also gave evidence about the complainant's history including that she had had sexual education through a family medical centre, the

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44 AB 49 ll 6-28.
45 AB 50 l 45 to AB 51 l 1.
46 AB 51 ll 3-22.
47 AB 51 l 32 to AB 52 l 1.
48 AB 52 ll 23-28.
49 AB 54.
50 AB 55.
51 AB 55 ll 23-46.

difficulties encountered when she was entering her teens in terms of trying to control her periods, and the eventual need to have a hysterectomy at the age of 30.

[42] She described the complainant and the appellant meeting and the friendship forming, and the difficulties she and her husband encountered because they did not welcome the appellant's attention. However, she said that while she did not really accept the appellant, she had to accept him coming to the complainant's unit, because she "didn't have a choice".

[43] She said that on the day after the election night the complainant was "different", and "quite distressed".[52] However, she did not find out any of the details until some months later. The complainant eventually told her that she should have gone out that night with her mother because the appellant had come round saying that he had brought apple juice for her. She later explained what "apple juice" was, namely "Him to put his penis in her mouth and eject sperm and she was to swallow it and it would taste like apple juice". She said that the complainant told her about lying on the bed and watching the stars on the ceiling, the DVD being put on and then sexual intercourse.[53]

[44] The mother described the complainant "coming backwards and forwards through the day" with different pieces of her explanation. She described the complainant as being "quite distraught the majority of the day".[54] She said the complainant told her that she did "receive the apple juice" in her bedroom, and that she went to the bathroom and spat it out.[55]

[45] In cross-examination the nature of the complainant's autism, and her relationship with her parents, were explored. The mother explained the need to remind her of domestic duties such as washing hair and looking after her own health and wellbeing, and the narrow range of foods that she ate because of her autism.[56] She explained that she and her husband were close to the complainant, provided for her physically and were her primary emotional supports.[57]

[46] In cross-examination the mother reiterated that she did not have a favourable opinion of the appellant, describing him to the complainant as a "fruit loop", a view which did not change.[58] However, she did not accept that she had tried to supervise the complainant around the appellant, though she did make it clear that she disapproved of them having contact.

[47] Cross-examination established that the complainant had her own mobile phone and was fully capable of calling with it.[59] Because of her autism the complainant had a good memory for numbers and had committed various numbers to memory. She also agreed that the adjoining units were in such a configuration that if the complainant were to call out to her, she (the mother) was in a position to hear.[60]

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52 AB 93 ll 1-3.
53 AB 94-95.
54 AB 96 l 23.
55 AB 96 ll 26-37.
56 AB 100.
57 AB 102.
58 AB 106.
59 AB 107.
60 AB 107-108.

[48] When discussing the complainant, her mother described how one product of her autism was difficulties with communication, to the extent that she might skip words when speaking. However, she was able to deal with staff at the bank and the post office, and commune with the grocery lady. She said the complainant "communicates effectively because she gets around situations that if she leaves words out or she's not understood. … some of the sounds – she's hearing impaired as well so some of the sounds she doesn't hear so sometimes she leaves some sounds out … because she can't hear them, but most people that interact with her can understand her quite well".[61]

[49] It was put to her that after the election night the complainant wanted to continue to have contact with the appellant. The mother disagreed, saying that the appellant had contacted a couple of times, the complainant had told her, and she had said no.[62] There were also occasions when the appellant had phoned the complainant proposing to take her out, and the mother simply said no.

Evidence of Dr Scott

[50] Dr Scott was a clinical psychologist who had done an intellectual assessment of the complainant. Having explained the nature of the tests he used, Dr Scott identified the results in various areas:

(a) verbal comprehension: the complainant achieved a score in the extremely low range, putting her in the 0.05 percentile;

(b) in terms of perceptual reasoning (the ability to put blocks together, work out patterns and sequences), she achieved a score putting her in the one percentile range;

(c) for working memory the complainant achieved a score putting her in the fourth percentile rank, which was "borderline"; and

(d) in terms of processing speed (the ability to reply or put things together) she had a score putting her in the fourteenth percentile, which was low average.

[51] He assessed the complainant as having an intellectual impairment, an assessment borne out of the results which showed that she had functioning lower than almost all adults of the same age. The scores achieved by the complainant on a test that measured skill, languages, listening, conversation and non-verbal communication skills, was extremely low, at about two percent. The individual scores which were extremely low included functional academics (basic reading, writing and arithmetic skills), home living (being able to clean up and help adults with chores), health and safety, leisure, self-care, self-direction and social skills.[63]

[52] In cross-examination Dr Scott said that he did not assess the complainant's long and short term memory, but merely her level of intellectual ability. Dr Scott also expressed the view that given her results, the complainant would have a diminished capacity to interpret complex social situations.[64] Dr Scott was unable to advance an opinion on whether the complainant had the capacity to recall and accurately relate events that she had experienced.

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61 AB 112 ll 14-18.
62 AB 113 ll 40-47.
63 AB 131-132.
64 AB 135.

Evidence of Dr Hickey

[53] Dr Hickey had been the general practitioner attending to the complainant for over 30 years. He described the complainant as having been diagnosed with Asperger's Syndrome, under the spectrum of autism. He also recounted that she had Charcot-Marie-Tooth Syndrome, which was a broad spectrum title for a nerve disorder affecting mainly the arms and legs and interfering with muscle strength and co-ordination.[65] His opinion was that the complainant tended to follow authoritative figures, and was more inclined to follow direction from authoritative figures, rather than her peers.[66] He also expressed the view that the complainant had the ability to understand yes and no, and when to say that, but that she did not know what would happen with events that she decided to follow; that is, she may not know the repercussions of events she decided to go with.[67]

Evidence of the complainant's father

[54] The complainant's father gave evidence about his disapproval of the appellant's conduct towards the complainant when they first started to meet. He said he had a conversation with the appellant where he made him aware of her age, disabilities and her level of understanding, telling the appellant that he expected her to be treated with the utmost respect and dignity.[68] He said that he had cause to have a similar conversation on a second occasion, when he was concerned at the attention being paid to the complainant by the appellant. On that occasion he said that the appellant's response was: "Yes, he actually indicated that she was a good kid and that he would be looking to just treat her in a fashion that he saw fit. … He was going to make a whole woman of her."[69]

[55] The father gave evidence of the occasion when the complainant revealed what had happened to her on election night. She had raised it while they were out, and when they got home the father typed out some notes of what she was telling him. He said that he then asked the complainant to write it out in her own words, and in her own handwriting. He let her do that herself. That note was read into the record:[70]

> "On Saturday the 31st of January when dad was working (at the elections) and mum had gone out with her friend, [the appellant] came over after cricket. He always calls me when he is on her [sic] way over. He gets here at 7 pm (he puts drinks in my freezer and fridge on Friday night). Then he goes for a shower.
>
> When he comes out we got to get a pizza in his car. Then he comes back to have dinner and watch a DVD. At 8 pm he took me into my bedroom to lay down to look at the stars on my ceiling. We mucked around and then he put on an X-rated DVD.
>
> Then he put my head down on his penis to suck his apple juice. He wouldn't let me go until I swallowed it. Then he shoved his penis in my vagina and when I said no he said that he doesn't take no for an answer and he kept pushing it in and I was in tears. It was hurting and burning. He held my hands down. I told him I had to scratch

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65 AB 138.
66 AB 139.
67 AB 139-140.
68 AB 149.
69 AB 150 ll 23-27.
70 AB 152.

> my nose. He let one hand go and that's when I scratched him (his penis) and made it bleed."

[56] In cross-examination the father denied that he had told the appellant that if he did not treat the complainant with dignity and respect he would make life difficult for him. He agreed that he had not told the police that part of the conversation where the appellant said he would make a whole woman of the complainant, saying he had no direct answer to why he did not, except the fact that it was all pretty traumatic and upsetting for his daughter and himself. He thought it was an oversight.[71]

[57] The complainant's father confirmed that his daughter's police statement was taken over a number of days, but said that the interview was conducted in a separate room and he was not present.[72] He said he was pretty sure that his wife was with him, rather than present in the interview process.

[58] He said that he would not categorise the relationship between the complainant and the appellant as a close friendship, but rather an infatuation on the complainant's behalf.[73] He said the only time the complainant saw the appellant was down at the bowling alley but eventually he was made aware that the appellant was also visiting the complainant at her unit. He became aware of this and the events on election night because the complainant told him at a later time. He did not receive any calls from his daughter on election night, nor see her when he got home.

Evidence by the interviewing police officer

[59] The police officer who took the complainant's statement was called to give evidence as to the process undertaken in order to obtain that statement. He said it was different from other times, in that the complainant had some trouble in relation to her emotions and providing information, and it took a lot of time for her to gain trust in the police officer and tell her story. The process took a couple of days during which the complainant was only able to give him about two hours at a time, and then she would need a break.[74] He also gave evidence of having taken a recording of a field interview during a search of the appellant's house. During that search the police located an X-rated DVD, some bracelets, a diary, and a blue towel. In addition, police seized a number of SpongeBob underpants.

[60] The police officer said that when the statement was taken from the complainant, she was alone and the parents were not present.[75] He said that he was given a type-written note by the complainant's father, based on information she had provided to her father. He used that document to formulate the statement. As he put it, "she used that document to re-hash her memory as it was her document".[76]

[61] In cross-examination the police officer agreed that he had considerable difficulty eliciting information from the complainant and the whole process took in excess of six hours over multiple occasions. In re-examination the police officer said that he elicited the statement in a non-leading way, in accordance with his procedures.

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71 AB 153.
72 AB 154.
73 AB 154-155.
74 AB 158.
75 AB 164.
76 AB 166 l 2.

Evidence from the appellant

[62] The appellant neither called nor gave evidence at the trial. However, the field interview during the police search of his premises became part of the evidence.[77] In the course of that interview the appellant repeatedly asserted that it was the complainant who wanted to have sexual intercourse and he resisted. However, he admitted that the complainant had performed oral sex on him and he reciprocated. Salient passages of what the appellant said are as follows:[78]

> "She's got Asperger's, and her father's supposed to be some priest or somethin'. I met her at bowling and got to be good friends. I went and had dinner with her a couple of times at her place. She always wanted to have sex with me and I didn't want to. I said go and practice. Tried to make it as bad as possible 'cause her Dad was really freaky with me and then she'd talk about all this other stuff and it was like … 'cause I told her to go and practice. Told me her Mum bought her a vibrator and everything and I said oh. She goes, I want you to be my first, I want you to be my first. Just go and practice with your vibrator.[79]
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> …
>
> She asked me could she watch a porn movie, she's never seen one, so I go I don't care, you're forty-one years old …[80]
>
> …
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> She wanted me … to have sex with her all the time. She wanted me to be her first because her special friend Matthew couldn't get it into her and all this sorts o' things. … And I told her I couldn't and she said, well Mum's got me a vibrator and I practise with that. And I said well, great, practise with that. You know, practise with that. When you can get that, yeah, I'll think about it, we'll try it.[81]
>
> …
>
> So we would always be in there, and she kept wanting more and more. She kept getting more and more affectionate. Every time I used to like go there, she'd wanna kiss and cuddle and hold, no, no, sit there, sit there, sit there. … Even at bowling, she'd come up, she'd get her strike, we'd go high fives, high tens. She'd come up, she'd want hugs and kisses. [Complainant] we don't do that out, you know. We don't do that, we don't do that.[82]
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> …
>
> And then um she wanted to kiss and hug and everything outside. No [complainant], we don't do that. We're good friends. … We're

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77 Exhibit 7.

78 It will become apparent that in a number of these passages the appellant spoke as though the complainant asked something and he was responding to her in the first person. Questions by the interviewer are highlighted.

79 AB 252 ll 40-50.

80 AB 253 l 7.

81 AB 254 ll 10-24.

82 AB 255 ll 1-11.

special friends, 'cause like, she goes are we special fri-. Yeah, we're special friends, but we don't do that. Ok, yeah, I'll give you a hug for bowling whatever, but you don't kiss me, you don't …[83]

…

I got nothing. I did nothing. She wanted to have sex with me all the time and I kept saying no.[84]

…

Also, whilst in that car, … did you ever kiss [the complainant]? No. She wanted to kiss me, no [complainant]. Stipulated … No. … That's just, [to the complainant] … we're good friends, we're special friends, but no you don't kiss me.[85]

…

Never had penetrative sex with [the complainant] … She invited me to. And she said, and I stipulate now, no. She wanted me to be her first … and I told her to practise with her vibrator. That's it. Yeah, practise with, practise with Plastic Pete.[86]

…

Have you ever had oral sex performed on you by, from [the complainant]? … she wanted to experiment, and if, I said no, kept trying and I said well look, if you want to try, it's gotta be a two-way street. If you wanna do it on it, I will reciprocate and do it on you. But end of story, no penetrative sex. … **Did you ejaculate in [the complainant's] mouth?** Truthfully, yes and she spat it out and choked. … And did [the complainant] ejaculate in my mouth. Yes she did. … She came everywhere. … On her bed. And that was the end of the story. … I, I, no more of this, I've gotta go. I felt bad in, in a way of okay, it was consensual. She wanted to do it, I wanted to do it. It was mutually agreed. She did it to me, okay I'd do it back. And that was it. … So it was consensual, one-on-one, both climaxed and that was the end of the story, no penetrative sex.[87]

…

And it was like that she wanted me, I want you to be my first to have sex, … I'll do anything for you, I'll do anything you want, I'll do this, I'll do that, I'll do this. I'll move out, I'll tell … those bastards next door to go away, I don't want to be here anymore, they're stopping me from seeing you. I want to be with you, I want to move out with you, I want to. No, … I want you to be my first. I want you, you and only you. I don't care what anyone says, I don't care what anyone else does, I want you to be my first. I want you. I don't care what they, if they stop you from coming over, I'll run away, I'll come and

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83 AB 257 ll 9-18.
84 AB 258 l 49.
85 AB 262 ll 38-46.
86 AB 263 ll 37-47.
87 AB 263 l 53 to AB 264 l 33.

> see you. [to the complainant] No, you don't. You gotta stay here with Mum and Dad."[88]

[63] During the interview the appellant confirmed that on the night they had oral sex he was wearing Spongebob underpants.[89] The appellant said that the complainant at no time said no, but said "I'll do whatever it takes" and "I will do whatever it takes for you to be my first"[90] The appellant then confirmed that they had oral sex on two occasions, one in the bedroom and the other on the lounge.[91]

[64] Later the appellant said that it was the complainant who asked if she could watch a porn movie as she had never done so previously. However, he said that he did not watch the movie with her.[92] He described the complainant's response to having seen the movie:

> "Wow, I didn't know they could do that. Like okay. So is that what I gotta do. I was like I dunno … That's why I want you to be my first. I'll do anything you want. If you want me to be like the girls in the movie. [she] just wanted me to be her first, right or wrong. That's why I kept telling her to practice with the plastic tree, instead of me."[93]

[65] The appellant said that it was the complainant who gave the name "apple juice" to his ejaculate:

> "[the complainant] said it tasted like apple juice. … It tastes like apple juice. I said, well if that's what you wanna call it, apple juice. Fine, call it apple juice. … So can I have my juice, can I have my juice tonight."[94]

Discussion

[66] Most of the appellant's contentions centred around several core propositions, namely:

(a) there were such inconsistencies and contradictions in the complainant's evidence, both within the complainant's evidence and when it was compared with other evidence, that the jury should not have accepted her version of events as reliable;

(b) because of her intellectual disability the jury should not have accepted the complainant as a reliable witness;

(c) the police statement was taken over a number of interviews, none of which were electronically recorded; further, the note prepared by her father was given to her as a reference when giving the police interview; these two factors meant that the police statement was unreliable and should have been rejected; and

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88 AB 271 ll 33-45.
89 AB 275-276.
90 AB 276 l 34.
91 AB 276 ll 45-50 and AB 277 l 7.
92 AB 281.
93 AB 281 ll 31-37.
94 AB 281 ll 42-52.

(d) the fact that the complainant continued to see the appellant for some months after the events the subject of the convictions, was destructive of her credibility and reliability, and that fact was not given sufficient exposure during the addresses or summing up.

Inconsistencies and contradictions

[67] The appellant pointed to a number of pieces of evidence which, he contended, exhibited inconsistencies or contradictions between the complainant's version of events, or when that was compared to other evidence. A considerable list of transcript references was provided as part of the appellant's written outline, and some of them fell within this category. For example:

(a) when asked whether she considered the appellant her boyfriend the complainant said yes;

(b) she gave somewhat confused evidence as to how it was that she and the appellant were not to hug or kiss in public; she said it was the appellant's idea not to do so, but that she wanted to hug and not kiss;

(c) the complainant agreed that there had been two occasions of a sexual interaction between she and the appellant before the election night events, but she did not tell the police;

(d) following the events the subject of the convictions, the complainant continued to call or text the appellant, saying she wanted to see him;

(e) on the night of the offences, the complainant agreed that when the appellant arrived she asked the appellant to have a shower with her, but he declined; that was inconsistent with her statement which said that the appellant asked her to shower with him, and she declined;

(f) she gave contradictory evidence about whether she had her clothes on when in the lounge room, or whether she took them off there;

(g) she told a friend, Ms Ford, that she was sexually involved with the appellant;

(h) after the offences the complainant kept seeing the appellant, for a period of months, and at one point asked her parents if she could go to the beach with him; and

(i) at the time of the offences the appellant was using the medium tone in his voice, and not being aggressive.

[68] Some of the matters raised by the appellant are not true inconsistencies or contradictions at all. It is true that the complainant answered affirmatively to a question of whether she considered the appellant her boyfriend, but her later evidence explained that she used that phrase in a qualified way. The way in which she used that phrase did not signify anything that would involve a romantic connotation, let alone sexual. It is also true that the complainant did not tell the police, when she was interviewed, about the previous sexual encounters between her and the appellant. But that omission was explained as simply being that she forgot. In cross-examination when those encounters were put to her, the complainant openly agreed that they occurred.

[69] There was an inconsistency between her police statement and her evidence, as to who proposed to shower with whom on election night. However, there was no suggestion that the two of them did, in fact, shower together. The proposition put to her in cross-examination, then, might signify a changing memory, but in my respectful view, it is not significant. In circumstances where there were previous sexual encounters between them, the jury may have thought it not surprising that a joint shower might have been proposed by either of them. That piece of the complainant's evidence does not render her testimony so unreliable as to reject it.

[70] The jury could easily conclude that the complainant did not give confusing or contradictory evidence about whether her clothes were on, or not, when in the lounge room. Her evidence was fairly consistent that she only took her clothes off when she was told to do so by the appellant. Coupled with that was the fact that when the appellant told her to do the various things she did on that night, he said he was not going to take no for an answer. Even though the complainant said that the appellant was using a medium tone voice, and not being aggressive, nonetheless her evidence was quite clear that she felt she had to comply when he made those requests. That he was not using the third tone, which normally scared her, does not detract from the fact that he insisted, and she felt she had to comply, even though she did not agree.

[71] The fact that the complainant continued to contact the appellant, and see him for some months afterwards, does not raise such an inconsistency or contradiction with her account of what happened on election night that the jury would have been compelled to reject her evidence. The appellant's argument was that if he had done what was alleged then how could it possibly be that she would contact him or see him afterwards. The answer was the one given fairly clearly by the complainant in her evidence, namely that he insisted, telling her to continue to text. There was evidence, therefore, that the jury might accept, explaining away the further contact.

[72] One of the main difficulties confronting the appellant's case is that the inconsistencies and contradictions raised in evidence were addressed quite thoroughly before the jury. Specifically the fact that the complainant had continued to see the appellant was at the forefront of submissions.[95] Further, the delay in complaining was raised, as was her evidence that she asked him to have a shower with her when he arrived. Further, the fact that she said he had only used the mild tone or middle tone was emphasised by the defence address. These were some of various elements which were described by counsel for the appellant at the trial as being "elements of her evidence that jar one against the other and that jar against her evidence and other evidence".[96]

[73] In the summing up the jury were directed in conventional terms as to the difference between credibility and reliability of a witness, and the various factors that might impact upon their assessment of credibility and reliability. Those factors included the requirement to weigh inconsistencies or discrepancies.

[74] The jury were also directed that any inconsistencies between the complainant's account, and the account as related by those witnesses giving evidence of preliminary complaint

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95 AB1 32 in the case of the Crown and AB1 46-47 in the case of the defence.

96 AB1 45 l 9.

had to be weighed in their assessment of the complainant's credibility and reliability.[97]

[75] Having directed the jury in those terms the learned trial judge reminded the jury of the complainant's intellectual impairment. The jury were told that the prosecution case depended entirely upon the evidence of the complainant and therefore they should scrutinise her evidence with great care before they could arrive at a conclusion of guilt.[98]

[76] Finally, in the summing up, the difficulties that the defence relied upon in relation to the complainant's evidence, particularly as affecting her credibility and reliability, were recounted to the jury.[99]

[77] A further difficulty confronting the appellant's contentions is that when he was interviewed during the search of his premises, he made certain important admissions. The most significant one was in relation to count 1, where the appellant admitted that the complainant had performed oral sex upon him and that he had ejaculated in her mouth. That really only left the question of consent in respect of that count. That admission, and in particular the details of it, may well have been seen by the jury as corroborating the credibility and reliability of the complainant. After all, the complainant's version to the police had been given well in advance of the appellant being interviewed during the search of his premises. She had committed herself to the version of events concerning count 1 which, except as to consent, was then corroborated by the appellant himself.

[78] Further, the appellant admitted that he and the complainant had engaged in oral sex on two occasions, which he identified as being "one in the bedroom and one on the lounge". That also corroborated the version which had already been given by the complainant in her police statement. Once again, as a practical matter, that left the question of consent in respect of count 3.

[79] None of the inconsistencies or contradictions raised by the appellant, either individually or collectively, persuade me that they are of such moment that the jury should have rejected the complainant's evidence as unreliable.

Reliability generally

[80] The appellant's attacks on the complainant's reliability are, in my view, misplaced. His outline points to various aspects of the evidence, including (i) that of Dr Scott in relation to her capacity to recall events, (ii) answers given by the complainant as to whether she understood what "consensual" meant and (iii) her recall of the date of the events, to suggest that her intellectual impairment was such that the jury should have rejected her evidence as unreliable. There is nothing in this point. It is true that the complainant has an intellectual impairment, but none of the medical evidence suggested that she was incapable of recalling events with sufficient precision as to be relied upon. Dr Scott tested the complainant and found her general results to be in the extremely low range of functioning. However, he only went so far as expressing a view that she would have diminished capacity to interpret complex social situations, and expressly declined to express an opinion on whether her capacity to recall events accurately. Nothing in what Dr Hickey said would have provided a

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97 AB1 67.
98 AB1 55.
99 AB1 95-98.

basis for the jury to conclude that the complainant's intellectual impairment meant her evidence was unreliable.

[81] I have watched the complainant's pre-recorded evidence. Nothing in the complainant's giving of that evidence suggests that she was unable to recall events or to articulate those events in a clear manner. Nor was there anything in the way she answered questions which might have led the jury to conclude that she was generally unreliable. In fact the contrary is the case. Most of the answers which were given by the complainant were responsive and short. By and large the complainant answered yes or no, rarely adding qualifications unless the question called for them. On a number of occasions the complainant answered propositions in a way which, the jury could well have accepted, demonstrated that she was paying close attention to the precise terms of what she was being asked. Some examples are:

(a) when it was put to her that her mother did not want her to go to bars or clubs, she responded by dissecting the nominated venues, saying that her mother did not want her to go to nightclubs but she was allowed to go to bars;

(b) when it was put to her that she wanted to be affectionate or close with the appellant, she distinguished between wanting to hug him and wanting to kiss him, saying that she wanted the former to hug, but not kiss;

(c) in a similar context, she said that it was the appellant's idea not to hug and kiss in public;

(d) when it was put to her that the appellant and her would have dinner almost every Sunday she answered "no" repeatedly; she then made it clear that what she was saying was that he had come over, but on a Saturday, not a Sunday;

(e) when it was put to her that she had tried to have sex with the appellant, she answered "no" making the point that she did not have sex with him, but he made her do so;

(f) when a double-barrelled question was asked, to the effect that she had a vibrator when the appellant was her boyfriend, she said yes to the vibrator, pointing out that he was not her boyfriend; and

(g) when asked whether she knew what various words meant, such as "ejaculate" and "consensual", the complainant was able to explain them with clarity.

[82] The complainant's account was consistent and detailed. It largely matched what was in her handwritten notes, and her police statement, not to mention the preliminary complaint evidence. Ultimately it was corroborated, except as to consent, by the appellant's interview. The suggestion that her evidence was so unreliable that the jury should have rejected it, should not be accepted.

The complainant's police statement

[83] The appellant advanced various points about the way in which the police statement was taken. Because of the complainant's intellectual impairment, and the concern by the interviewing police officer that it might take some time to establish a sufficient rapport to extract an accurate account, the statement was taken over a number of occasions and was not made the subject of an audio or video recording.

[84] In my view there is nothing in the appellant's complaints. The police officer was mindful of the additional difficulties posed by the fact that he had to interview

a person with an intellectual impairment. It was those difficulties that dictated the way in which the statement proceeded. The police officer made it clear that the parents were not part of the process, other than to accompany the complainant to the police station and he spent some time establishing a rapport with the complainant because the parents were concerned that she was not going to react well to speaking to a male person. The previous note that had been taken by her father was used only to assist her memory, the police officer deeming that appropriate as it was her document in the first place. The interviewing officer had 15 years' experience in the police force and had spent 12 months' in the Child Protection Investigation Unit where he had been trained in the taking of statements for the purpose of s 93A of the *Penalties and Sentences Act*. He considered whether he would videotape the process but ultimately determined not to do so.[100] He said that he elicited the statement in a non-leading way, and the whole process took a long time because the complainant had trouble putting things into her own words.[101]

[85] In my view, the use of the previous note did not render the process of taking her statement improper, or unreliable. The complainant's father gave evidence that when she started to tell him what had happened he was typing up some of the details. He then asked her to sit down and write it out by hand herself. She did so, in her own words, and that was what was read into evidence.[102] There was no challenge in cross-examination to that evidence. Consequently, what the police officer had was a previous statement by the complainant herself, in her own words.

Other complaints

[86] The appellant made a number of other points in his written outline, and in oral address. There is no need to enumerate them as none of them have any substance. One example will suffice to demonstrate the point. In paragraph 3 of his outline the appellant contended:

> "The Oxford Dictionary has rape as:- forcing a person to preform [sic] a sexual act against their will [the complainant's father] threatens [the appellant] with if he doesn't do the honourable thing to his daughter he would make his life hard. Technical rape by forcing the [the appellant] to perform sex on his daughter."

[87] Another example is the appellant's identification of the complainant's evidence of what she had told Ms Ford. Having agreed that she told Ms Ford that she and the appellant were sexually involved, and that the appellant did not use condoms, the complainant then denied a series of propositions about matters supposedly told to Ms Ford.[103] Nothing further is made of that contention. There was no other evidence of those conversations, and Ms Ford did not give evidence. The fact that all of those propositions were denied goes nowhere in terms of establishing that those events happened, as the jury were carefully told in their directions.

Conclusion

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100 AB 167.
101 AB 168.
102 AB 151-152.
103 AB 54.

[88] The learned trial judge gave directions to the jury that they needed to scrutinise the complainant's evidence with great care before they could accept it or arrive at a conclusion of guilt. That was because of the complainant's intellectual impairment and the fact that the prosecution case depended entirely upon her evidence. Directions were also given regarding the requirement to consider each account separately, and that if they had a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or other count, that had to be taken into account in assessing the truthfulness or reliability of her evidence generally. They were directed that in such a case they were to consider why they had a reasonable doubt about that part of the evidence, and whether it affected the rest of the evidence.

[89] On the issue of consent, that being the main issue in respect of counts 1 and 3, the jury were directed that the fact that the complainant had an intellectual impairment did not mean that she lacked the capacity to either give consent or withhold consent. (That was supported by Dr Hickey's evidence.) They were directed that when they came to determine whether the prosecution had proved the lack of consent, they were to proceed on the basis that the complainant was a person who had the capability to give consent notwithstanding that she suffered from an intellectual impairment.

[90] The jury had the undoubted benefit, which this Court does not, of hearing the evidence from the appellant and the other witnesses and thus hearing that evidence in conjunction with that of the complainant. The complainant's evidence was substantially consistent from her police statement to her pre-recorded evidence and in cross-examination. It was also consistent with the complaint she had made to her parents some months after the event. Those factors gave the jury advantages which this Court does not enjoy, and which this Court must recognise in performing its role in this appeal. Having assessed the whole of the evidence I am unable to conclude that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[104] I am far from persuaded that an innocent person has been convicted.

Complaints about the Prosecutor's address

[91] In his written outline the appellant advanced a contention that the prosecutor had misled the jury in two respects, namely:

(a) it had been said that the complainant had autism and Charcot-Marie-Tooth Syndrome when in fact she had Asperger's Syndrome, a lesser form of impairment; and

(b) he referred to the complainant's age as a 12 year old, and not a 44 year old when the Crown's expert characterised her as an immature adult.

[92] I do not consider there is any substance to either of the complaints. The complainant's mother gave evidence that the complainant suffers from Asperger's autism, as well as having a muscular disease called Charcot-Marie-Tooth disorder.[105] Dr Hickey, the medical practitioner attending to the complainant for 30 years, gave evidence that she had Charcot-Marie-Tooth Syndrome, and Asperger's Syndrome which, when it was given, was under the spectrum of autism.[106] Dr

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104 *M v The Queen* (2011) 243 CLR 400; *SKA v The Queen* (2011) 243 CLR 400.
105 AB 76.
106 AB 138.

Hickey explained that recently Asperger's Syndrome had been taken away from the autism spectrum.[107]

[93] In those circumstances the fact that the Prosecutor, in the opening of the case, described the complainant as having a "diagnosed history of autism", and that she had Charcot-Marie-Tooth Syndrome, was unobjectionable.[108]

[94] In his address the prosecutor referred to the complainant as "a 44 year old woman with an intellectual impairment".[109] The comparison made was with a teenager:

> "… you don't simply write off what [the complainant] has to say as being unreliable because of the circumstances with which she confronts on a day to day basis, like you wouldn't write off a teenager who would say those things, a seven or an eight year old child who might say something or disclose similar type matters. … But you might consider what the detail is like in each individual story; is it such a bland account that lacks the type of detail you might think from someone who [was] simply [remembering] what happened to them. Is the story that somebody tells you so wildly outlandish, unbelievable, we simply register that it can't be right. Has the account of [the complainant] evolved over the course of time … has she been woefully inconsistent that would cause you some concern that you simply can't accept it?"[110]

[95] Having again referred to the complainant as a 44 year old woman with an intellectual impairment,[111] the Prosecutor made a comparison between the complainant and a 12 year old child, when discussing the issue of consent. The relevant part of the passage is as follows:

> "It is relevant to your consideration of her ability to rebuff someone's advances when there's a power imbalance, compute what is being asked of her, how persistent she can be in rebuffing those advances in the face of continuing conduct by [the appellant], how vulnerable she is, like a 12 year old child. Does 12 year old child have the mental fortitude to fight over and over again, or do they just do what the person who's doing these things to them says? Her mental impairment, her intellectual function, her autism or the characteristics of autism is the very reason that when she hears words such as:
>
> *I'm not taking no for an answer.*
>
> Or:
>
> *You don't want to hear my serious tone.*
>
> That she exceeds [sic] to the requests made of her."[112]

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107 AB 138 l 34 to AB 139 l 6.
108 AB1 23.
109 AB1 29 l 29.
110 AB1 29 ll 31-42.
111 AB1 30 l 21.
112 AB1 30 l 34 to AB1 31 l 1.

[96] Nothing in that conduct was objectionable. None of it departed from the principles summarised in *R v Gathercole*:[113]

> "It is well established that in conducting an Australian criminal trial, which is both accusatorial and adversarial, the prosecutor has a duty not to obtain a conviction at any cost but to act as a minister of justice. The prosecutor's role is to place before the jury the evidence the prosecution considers credible and to make firm and fair submissions consistent with that evidence but without any consideration for winning or losing. The central principle is that the prosecution case must be presented with fairness to the accused. Unfairness may arise from the manner in which the prosecutor addresses the jury. The fact that, as here, no objection was taken at trial to what is alleged on appeal to be unfair requires the appellate court to carefully examine what happened at trial to determine whether there has been unfairness. If so, the appellate court must determine whether, as a result of the unfairness, the appellant may have lost a chance which was fairly open of being acquitted. If so, there has been a miscarriage of justice."[114]

[97] In my view the comments made by the prosecutor were open and reasonable. There has been no loss of a chance to be acquitted.

[98] The final aspect of this complaint is that the prosecutor described the appellant as having "zeroed in" on the complainant. The appellant's point was that he was there to support another bowler, who also bowled in the disability league.

[99] The prosecutor's only reference to such a thing came in his opening:

> "Now, [the appellant] when he turned up to the disability league zeroed in on [the complainant]. He made her things. He gave her gifts like bracelets. He started spending time with her. He started spending time with her in the alley and outside the alley and sitting in their car. You'll hear that he gave her Easter eggs for Easter and hers was bigger than any of the other Easter eggs he gave to the bowlers … within the disability league."[115]

[100] That idea was taken up, not by the prosecutor in his address but by counsel for the appellant in his address. It was acknowledged as being a description used in the prosecutor's opening and the appellant's counsel made the point that it was not a case of the appellant zeroing in on the complaint, and there was not much evidence in the way of evidentiary foundation for it.[116]

[101] Counsel for the appellant made the point that the appellant was not there purely for the purpose of zeroing in on the complainant, but rather because he had a friend in the disabled league.[117] He then specifically turned, in some detail, to the lack of an evidentiary foundation for such a conclusion.[118]

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113 [2016] QCA 336.
114 *Gathercole* at [49]; internal citations omitted.
115 AB1 23 ll 41-46.
116 AB1 43 ll 33-38.
117 AB1 44.
118 AB1 44 ll 9-26.

[102] Once the context is understood, no legitimate complaint can be made about the prosecutor's reference in his opening.

Conclusion and disposition of the appeal

[103] There is no merit in the appellant's contentions. The appeal should be dismissed.

[104] **McMURDO JA:** Having considered the evidence, including the video recording of the complainant's testimony, I agree with the reasons of Morrison JA for concluding that it was open to the jury to convict the appellant of these charges and that the appeal should be dismissed.