SUPREME COURT OF QUEENSLAND

CITATION:	*R v SDG* [2018] QCA 362
PARTIES:	**R** **v** **SDG** (appellant)
FILE NO/S:	CA No 313 of 2017 DC No 463 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Charters Towers – Date of Conviction: 1 December 2017 (Lynham DCJ)
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2018
JUDGES:	Morrison and Philippides JJA and Flanagan J
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – COMMENT ON FAILURE TO GIVE EVIDENCE – BY PROSECUTION – where the appellant was convicted after trial of raping the child complainant on a night the appellant, complainant and E (the then boyfriend of the complainant's mother) went to a house together to look for the complainant's mother – where E was separately charged and convicted on his plea to two counts of attempted indecent treatment of a child and one count of indecent treatment of a child – where E provided a statement to police but was not called as a witness by the Crown – where E was called as a witness by the defence – whether the prosecutorial decision not to call E was based on a proper exercise of discretion – whether that decision should have been made prior to the s 21AK *Evidence Act* 1977 (Qld) recording of the cross examination of the complainant – whether the Crown's failure to call E as a witness resulted in a miscarriage of justice – whether there was improper cross examination of E by the Crown to cause a miscarriage of justice CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – PARTICULAR CASES – OTHER MATTERS – whether the jury inadvertently being played an unedited version of a recording resulted in a

miscarriage of justice

Dyers v The Queen (2002) 210 CLR 285; [2002] HCA 45, applied
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, applied
R v Apostilides (1984) 154 CLR 563; [1984] HCA 38, applied
R v Jensen (2009) 23 VR 591; [2009] VSCA 266, cited
R v Khaled [2014] QCA 349, cited
R v Manning [2017] QCA 23, applied
R v O'Brien (1996) 66 SASR 396; [1996] SASC 6172, cited
R v Peros [2018] 1 Qd R 1; [2017] QSC 97, considered
R v Susec [2013] QCA 77, cited
Richardson v The Queen (1974) 131 CLR 116; [1974] HCA 19, applied
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, applied
Whitehorn v The Queen (1983) 152 CLR 657; [1983] HCA 42, applied

COUNSEL: A W Collins for the appellant
C N Marco for the respondent

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

[1] **MORRISON JA:** I agree with the reasons of Philippides JA and the order her Honour proposes.

[2] **PHILIPPIDES JA:** The appellant was convicted by a jury on 1 December 2017 of raping the complainant on 1 January 2015. He was sentenced on 14 December 2017 to five years and six months imprisonment with a parole eligibility date on 30 August 2020 (13 days of presentence custody was declared as time already served). The offence charged against the appellant arose out of events alleged to have occurred against the complainant child, who was born on 12 December 2001, on New Year's Eve 2014.

[3] Another person also present on the occasion in question, E, the then boyfriend of the complainant's mother, was charged separately with distinct sexual offending in respect of conduct also occurring on the occasion in question. On 20 May 2016, E entered pleas of guilty to two counts of attempted indecent treatment of a child under 16 years and one count of indecent treatment of a child under 16 years. E was sentenced on 8 September 2016 for those offences. He subsequently provided a statement to police on 11 May 2017.

The grounds of appeal

[4] The appellant appeals against his conviction and seeks orders that the conviction be quashed and a retrial ordered on the following amended grounds of appeal:

1. A miscarriage of justice was occasioned by the Crown declining to call E as a witness, when he was a material witness and the decision not to call him was

made after the complainant had been cross examined and, as a result, the conduct of the trial as a whole miscarried.

2. Defence counsel failed to seek the discharge of the jury after evidence which had been excluded was inadvertently played to the jury.

3. The cross examination of E by the Crown was improper.

The evidence at the trial

Evidence of the complainant

[5] The complainant gave a statement pursuant to s 93A of the *Evidence Act* 1977 (Qld) (the s 93A statement).

[6] After the New Year's Eve fireworks at midnight in 2014, the complainant received a call from her mother. She was at E's house and crying. The complainant (and other family members) went to E's house to see if her mother was ok. However, when they arrived, she was not there, nor was E.

[7] E arrived a bit later with the appellant, his cousin. They suggested to the complainant that they all look for her mother at another house across the road, belonging to the complainant's uncle, which they did. The complainant's mother was not at that house either.[1] E and the appellant then asked the complainant if she wanted to go for a walk with them and that they would continue looking for her mother and the complainant agreed.[2] E, the appellant and the complainant then walked to the house where the appellant initially said he was living.[3]

[8] At that house, they all sat down on a couch. The complainant was sitting between them. E and the appellant told her that they wanted to have a "quick smoke" before they continued to look for her mother. While they were seated on the couch, E kissed the complainant with his tongue in her mouth and the complainant told him that that was wrong because he was with her mother and she was younger than he was.[4] The complainant said E apologised.[5]

[9] The complainant said that the appellant then grabbed her hand tightly and led her to a bedroom. The complainant went to the bedroom with the appellant because E and the appellant told her that her mother was at the house.[6] The appellant pushed her onto the bed, jumped on top of her, straddling her with his legs and held onto her hands.[7]

[10] E entered the room and the appellant got off the complainant. E sat on the bed, leaned his chest against the complainant's chest, and asked the complainant if she wanted to have a "threesome". The complainant said "no" and that they "should go home". E and the appellant started arguing about who was going to have sex with the complainant. The appellant "kicked" E out of the room and locked the door.[8] The

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1 AB at 331 and MFI A pp 2-3.
2 AB at 332 and MFI A pp 3-4.
3 AB at 344.
4 AB at 332; 346.
5 AB at 345-346 and MFI A pp 8-9 and 11-13.
6 AB at 33.36-34.10.
7 AB at 35.
8 AB at 33-36 and 347 and MFI A pp13-14.

complainant tried to get up to leave but the appellant prevented her from doing so. The appellant once again jumped on top of her and held her hands down. The appellant pulled down the complainant's shorts. The complainant tried to get away again but her attempts were overcome. The appellant forced the complainant to have sexual intercourse. The complainant was resisting by saying "no" and saying she wanted to "go". She also was crying and screaming for help but the appellant was covering her mouth and telling her to shut up. The appellant did not let her go until six o'clock in the morning. The appellant then walked the complainant home and told her not to tell anyone. The complainant felt pain to her vagina from the intercourse.[9] The complainant also said that she had a lump below her stomach that was hurting.[10]

[11] In cross examination, the complainant said that, when they entered the house, it was initially dark but the appellant turned the kitchen light on briefly.[11] The complainant did not go to the toilet at any point while she was at the house.[12] The complainant did not recall the appellant "feeling [her] leg up" while they were seated on the couch and she did not kiss him.[13] The complainant agreed that when she was on the couch E suggested that they have a threesome and she told him not to be silly.[14] The complainant maintained that E told her that her mother was in the bedroom.[15] The complainant said this occurred when she was on the couch.[16] The complainant agreed that the appellant held her hand and led her into the bedroom.[17]

[12] The complainant did not accept that she consented to have sex with the appellant and was having sex with him when E entered the room.[18] The complainant did not accept that E entered the room to look for some tobacco.[19] The complainant accepted that she did not tell the police that, when E entered the room, he sat down on the bed and leaned over her but disagreed that she did not tell police that E requested a threesome which was consistent with her police interview.[20] The complainant did not accept that she told another prosecutor that E jumped on top of her and held her hands down, but accepted that she said that the appellant had done those things to her.[21] The complainant did not attend the appointment arranged by the prosecutor at the police station because she did not have further evidence to give, rather, the complainant just wanted to review her video statement to the police.[22] The complainant said that she was scared of the appellant when she was in the bedroom.[23] An admission was made by the Crown that the handwritten note from an officer who attended the conference with the prosecutor stated that the complainant said, "[E] jumped on top of [her] and held [her] hands down".[24]

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9 AB at 332, 346-347 and 36-40 and MFI A pp 3-4, 12-14.
10 AB at 196 and 333 and MFI A pp 4-5.
11 AB at 44.
12 AB at 45.
13 AB at 45.
14 AB at 46.
15 AB at 47.
16 AB at 47.
17 AB at 48.
18 AB at 48-49.
19 AB at 49.
20 AB at 50-51, 53.
21 AB at 51.
22 AB at 52.
23 AB at 56.
24 AB at 202.

[13] In terms of the preliminary complaint evidence, in cross examination, the complainant said that she had a conversation with her sister when she woke up later that morning.[25] The complainant denied that she told her sister that E touched her leg or kissed her but accepted she said that he asked for a "threesome".[26] The complainant did not make a complaint of rape at that time because her sister would have told her mother and the complainant did not want her mother to know.[27] The complainant agreed that the first time she thought that she had been raped was when TDF told her that what had occurred was rape.[28]

Evidence of the complainant's sister

[14] MCE said that after the first attempt to find their mother at their uncle's house across the road, they returned to E's house. Later, the complainant, appellant and E went back to their uncle's house. When they did not return, MCE and the others in her company went looking for them. They could not find them so they returned to E's house. MCE stayed awake waiting for the complainant. E returned to the house and told her where the complainant was. The complainant returned and woke her up. The complainant told her that the appellant kissed her, was "checking her out" and told her that she had a "big ass and stuff". The complainant said that E was touching her on the leg and asked about "doing a threesome". The complainant said that the appellant told her to keep it a secret.[29]

[15] In cross examination, MCE said that she received a call from her mother and she was not sure if the complainant had a mobile telephone as well.[30] The complainant told her a few days later that the secret that she was told to keep was that she had been raped.[31] The complainant said that she went into a room and the appellant held her down on a bed and raped her.[32] In re-examination, MCE said that the complainant seemed sad when she told her that she had been raped.[33]

Evidence of the partner of the complainant's uncle - TDF

[16] TDF, the partner of the complainant's uncle, ZDF gave evidence,[34] that on 6 January 2015, the complainant told her that the appellant and E took her to an empty house by the train tracks on New Year's Eve. She said the appellant took her into a room and they did not come out until daybreak. The complainant agreed that she had sex with the appellant against her will. The complainant "was crying a lot" when making the complaint.[35]

[17] In cross examination, Ms TDF agreed that before the complainant made the complaint, ZDF was "growling" at the complainant for "wandering off" with the appellant and E. Ms TDF also agreed that she told the complainant that it was not her fault and that they should have known better because she was underage. The complainant expressed concern about a lump she had on her vagina.[36]

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25 AB at 57.
26 AB at 58.
27 AB at 65.
28 AB at 61.
29 AB at 313 and 324-325.
30 AB at 19.
31 AB at 24.
32 AB at 24.
33 AB at 27.
34 AB at 163.
35 AB at 165.
36 AB at 168.

Evidence of the complainant's uncle – ZDF

[18] The evidence of ZDF was that on 6 January 2015, when he asked the complainant, in a calm "sort of" growling manner, why she was walking around with the appellant and E, the complainant broke down crying.[37] On 12 January 2015, the complainant broke down again when speaking to him about the night in question but she did not tell him what occurred.[38]

Evidence of the complainant's uncle – IDF

[19] On 12 January 2015, the complainant told her uncle, IDF, that on New Year's Eve the appellant forced himself on her at a house. The complainant said that there was another man who was known to her mother at the house. The complainant was upset when she spoke to him.[39]

Evidence of Dr White

[20] On 15 January 2015, Dr White examined the complainant externally. The complainant declined an internal examination, which the doctor explained would involve using a colposcope and taking images. The doctor also said that, due to the passage of time, it was quite likely that they would not find anything. The complainant's demeanour was anxious and nervous.[40] The doctor examined the right lower part of the complainant's stomach where the complainant indicated that she felt a lump.[41] The complainant declined a genital examination indicating that she did not want to get through with that. Dr White said that, due to the passage of time (about two weeks) and genital examination would quite likely not reveal injury.[42]

Evidence of E

[21] The appellant did not give evidence but called E as a witness.

[22] Evidence was given by E that he returned to his brother's house around midnight after having a disagreement with the complainant's mother. He said that he was between "tipsy and intoxicated" but "not that drunk".[43] When he arrived, the complainant's mother was already at the house. There had been an argument and she left saying she was going across the road to her brother's place.[44] The appellant arrived. He also had been drinking and was in the same state as E. They were going to go and have a drink and party. The complainant and her sister and cousins arrived and they all went across the road to look for the complainant's mother but did not find her there.[45]

[23] The appellant told the girls to go their own way up the road to look for their mother but the complainant followed the appellant and E.[46] E said that they stopped in at the appellant's parents' house to find some more alcohol. He said he gave the

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37 AB at 170.
38 AB at 169-170.
39 AB at 183-184.
40 AB at 194-195.
41 AB at 196.
42 AB at 195-198.
43 AB at 205.
44 AB at 205.
45 AB at 206.
46 AB at 207.

complainant "just gave her a hug and a kiss" out the front of the house.[47] They continued on to the appellant's house. They went inside and sat on the couch in the lounge. E was sitting on the couch next to the complainant and leaned over and kissed the complainant again on the lips and she kissed him back. E was asked if he said anything to the complainant and responded that he "did ask her for a threesome" and the complainant said "don't be silly, with a giggle".[48]

[24] E said after that, while they were still on the couch, he saw the appellant kissing the complainant also "on the neck or the lips" and that the complainant "accepted" going into the bedroom with the appellant and that she followed him into the room. After a couple of minutes, E went into the room through the door, which was only "closed a bit." E said that when he got inside he saw the complainant "enjoying what she wanted" by which he explained he meant sexual activity.[49] He said that the complainant had her legs open and was "just having the time of her life". They were under a blanket. E said "I'm just going to grab my cigarette", which he did and then left. E gave evidence that he had got in trouble for kissing the complainant and trying to kiss her and asking for a threesome and had been dealt with by the courts.[50]

[25] In cross examination, E agreed that he had formed a close bond with the appellant, whom he met in 2012. E said that at the time of the events he thought that the complainant was 16 or 17 years old but accepted that he told police in his statement that she was 15 years old.[51] He did not accept that he knew that the complainant was 13 years old at the time. E said that he kissed the complainant because he was in the "wrong mind that night". E was asked about talking with the appellant about having a threesome and said that he whispered that suggestion to the complainant and that it was his idea not the appellant's.[52] E thought that he did not mention when he was sentenced that the complainant giggled when she told him "don't be silly" at his suggestion of a threesome. He accepted though that the version of events that he pleaded guilty to was that the complainant said "no" at the suggestion of a threesome and that she asked to be taken home but that was not what he remembered occurring.[53]

[26] E disagreed that he was heavily intoxicated but accepted that he pleaded guilty to a schedule of facts that stated he was intoxicated. E accepted that it was not mentioned at his sentence that, when he kissed the complainant on the couch, she kissed him back but he maintained that occurred.[54] E did not accept that the complainant told him, "That's wrong. You're going with my mum".[55] He accepted, however, that he was sentenced on that basis.[56]

[27] E accepted that after he kissed the complainant outside the appellant's parent's house, the complainant moved away from him and said, "Why did you do that".[57]

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47 AB at 207.
48 AB at 208.
49 AB at 209.
50 AB at 210.
51 AB at 211.
52 AB at 212.
53 AB at 214.
54 AB at 214-215.
55 AB at 218.
56 AB at 218-219.
57 AB at 226.

However, he did not recall the complainant saying that to him again when they were in the next house.[58]

[28] E accepted that he saw the appellant take the complainant's hand and lead her into the room.[59] E accepted that when he entered the room, there were no lights on in the room but there was a light shining in from the bathroom.[60] E disagreed that he had an argument with the appellant when he entered the room about who was going to have sex with the complainant.[61] E did not think that the complainant was a virgin.[62] E disagreed that he had no interest in finding the complainant's mother and just told the complainant that to get her to follow them.[63]

[29] In re-examination, E said he recalled the facts that his pleas of guilty were based on but he was not sure if he had seen the document he was shown, which was presumably the schedule of facts.[64]

Ground 1 – the Crown's failure to call E as a witness

[30] Ground 1 raises the issues of whether the prosecutorial decision not to call E was based on a proper exercise of discretion, whether that decision should have been made prior to the cross examination of the complainant on 21 July 2017 pursuant to s 21AK of the *Evidence Act* (Qld) 1977 (the s 21AK recording) and MCE and whether the decision, when considered against the conduct of the trial as a whole, resulted in a miscarriage of justice. Ground 1 thus concerns the first and sixth propositions set out in *R v Apostilides*[65] which were restated by this Court in *R v Manning*:[66]

> "The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness in the Crown case and a trial judge may not direct the prosecutor to call a particular witness. A decision of the prosecutor not to call a person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice." (footnotes omitted)

The appellant's submissions

[31] The appellant argued that there had been a miscarriage of justice occasioned by the prosecution's failure to call E, who was a material witness, and in failing to make that decision before the s 21AK recording of the cross examination of the complainant. It was submitted that when defence counsel cross examined the complainant, he was unaware that E would not be called as a witness in the prosecution case. During the s 21AK recording, counsel for the appellant put a version of events to the complainant[67] which was substantially similar to the version given to

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58 AB at 227.
59 AB at 227.
60 AB at 212.
61 AB at 213 and 227.
62 AB at 216.
63 AB at 218.
64 AB at 228.
65 (1984) 154 CLR 563 at 576.
66 [2017] QCA 23 at [15].
67 AB at 46.29-46.40.

police by E.[68] The prosecutor on the s 21AK hearings did not object to that part of the cross examination which was based upon E's version. The appellant complained that at no stage was his Honour informed that the cross examination had already occurred and that the version given by E was put to the complainant.

[32] The decision not to call E was put on the record by a different prosecutor on 29 August 2017 at a pre-trial hearing before Durward SC DCJ (the primary judge) when it was stated that E would not be called. It was submitted that no explanation was given as to why the discretion was not exercised prior to the cross examination of the complainant. The factors which were referred to on 29 August 2017 should all have been known to the prosecutor at the time she appeared on the s 21AK recording. The prosecution had possession of E's statement prior to the s 21AK recording and cannot be said to have been taken by surprise. Further, the decision was made without a prosecutor conferencing with E to determine whether he would give a version closer to that of the complainant. The decision was not made by the trial prosecutor, nor was the trial prosecutor requested to reconsider the decision prior to trial. Defence counsel did not make a request of Lynham DCJ (the trial judge) at the end of the prosecution case to call E.

[33] Reference was made to the primary judge's statement, after being referred to *Manning*, that "the judge doesn't have any power to oblige anyone to call – oblige the prosecution to call a particular witness".[69] It was said that his Honour was not referred, by either counsel, to the possibility of a judge calling a material witness, as held in *Apostilides* and applied by Henry J in *R v Peros*.[70] Complaint was made that *Peros* was not brought to the attention of either the primary or trial judges. It was contended that, at the end of the prosecution case, defence counsel should have applied to the trial judge, in accordance with the authority of *Apostilides* as recognised by Henry J in *Peros*, that his Honour to call E. It was submitted that it was in the above circumstances that E was called as a defence witness at trial.

[34] The appellant submitted that it was relevant to understand the reasoning of the prosecutor in deciding not to call E because, as stated in *Manning*, "in the great majority of cases of this kind an appellate tribunal which finds a miscarriage of justice to have occurred will trace that miscarriage to a wrong exercise of judgment by the prosecutor which led to the witness not being called".[71] It was submitted that the principal reason to not call E was so that he could be cross examined and his version challenged (rather than be placed before the jury on the Crown case contradicting the version given by the complainant). That is, so that the Crown could contradict the version put to the complainant in her cross examination.

[35] Reliance was placed on *Peros*, where Henry J recognised the unfairness to the defences and the disadvantage in conducting their case without knowing whether a witness would be called.[72] Such unfairness is even greater where the cross examination of the complainant has already taken place. Reliance was placed on the following passage of the Court of Appeal in *Manning*:[73]

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68 AB at 381 para 20.
69 AB at 83.
70 [2018] 1 Qd R 1.
71 [2017] QCA 23 at [16], quoting *Apostilides* at 577.
72 *R v Peros* [2018] 1 Qd R 1 at [7].
73 [2017] QCA 23 at [27].

> "Once it is seen that the evidence was material and not unreliable, the prosecution was obliged to lead that evidence because 'a basic requirement of the adversary system of criminal justice is that the prosecution, representing the State, must act "with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one".' This is part of prosecutor's function ultimately to assist in the attainment of justice between the Crown and the accused. A prosecutor is not relieved of that responsibility by the fact that the accused could elect to call that evidence. Rather, fairness requires the prosecution to produce all of the material evidence which is available to it before putting the defendant to his election as to whether to give or call evidence. Therefore, the fact that the defence was able to call the witness as a defence witness does not overcome the miscarriage of justice which occurs as a result of the Crown's refusal to call a material witness." (footnotes omitted)

[36] It was argued that, while a consideration of the whole of the evidence must be examined before it can be found that there was a miscarriage of justice, that was demonstrated in the present case.

Relevant principles

[37] The principles as to the prosecutor's responsibility in calling witnesses, the discretion not to call a witness and whether there is a basis on which a conviction should be set aside because of the failure to call a witness are well established and set out in *Apostilides* and the authorities therein.[74] The following propositions concerning the prosecutorial role and judicial role are relevant:

1. A prosecutor is required to call all material witnesses, and thus a witness who is able to give credible evidence about matters directly in issue should be called, even if the witness would give an account inconsistent with the Crown case.[75]

2. However, a prosecutor is not bound to call a witness whose evidence the prosecutor considers to be unreliable, untrustworthy or otherwise incapable of belief. Nevertheless, a refusal to call a witness due to unreliability requires "identifiable circumstances which clearly establish it".[76] A mere suspicion is not sufficient to overcome the duty of a prosecutor to call all material witnesses.[77]

3. A prosecutor, however, is not relieved of the responsibility to call all material witnesses by the fact that the accused could elect to call evidence. A miscarriage of justice will not be overcome by the accused calling the witness if the

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74 (1984) 154 CLR 563 at 576.

75 *Dyers v The Queen* (2002) 210 CLR 285 at 292 [11] and 326 [118]; *Whitehorn v The Queen* (1983) 152 CLR 657 at 674.

76 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674-675; *R v Apostilides* (1984) 154 CLR 563 at 576.

77 *R v Apostilides* (1984) 154 CLR 563 at 576.

Crown's refusal to call a material witness was not justified when viewed against the conduct of the trial as a whole.[78]

4. The Court has the power to call a witness but that power will only be exercised in "the most exceptional of circumstances".[79] More would be required to be demonstrated for such a rare course than that the trial judge considers the prosecutor's reasons for refusal to call a witness are insufficient. In *Apostilides*, the Court explained that the "extreme reluctance" attending such a course was, in part, to be understood by the role of a judge in the adversarial system. In that regard, Dawson J stated in *Whitehorn v The Queen*:[80]

> "It is no part of the function of the trial judge to prevent [a miscarriage of justice] by donning the mantle of prosecution or defence counsel. [The trial judge] is not equipped to do so, particularly in making a decision whether a witness should be called."

[38] Referring to *Richardson v The Queen*,[81] Dawson J, in a passage adopted by the Court in *Apostilides*,[82] observed:[83]

> "… [the trial judge] frequently lacks that knowledge and information about the witness or his relationship to the parties and to the evidence to be presented which is essential in making such a decision. If he calls a witness himself he will almost always have to do so in the dark, not knowing with any certainty what the witness is going to say or whether he can be relied upon …If the witness is unreliable (and if neither party has seen fit to call him, that is more likely than not), the fact that he is called by the judge may give his evidence an undesirable aspect of objectivity. There can be no assurance that his credit will be tested by either side but if it is, the judge has no means whereby he can ensure that any necessary steps to re-establish the witness's credit are taken. Because the judge does not know what a witness called by him may say, he may by calling him necessitate the calling of further evidence so that the trial takes a turn which was not intended and which further involves the judge in a function not appropriately his." (footnotes omitted)

[39] Ultimately, where a witness is not called by the prosecutor, the essential focus is on the consequences, objectively perceived, that the failure to call a witness has had on the course of the trial and its outcome; that is whether a miscarriage of justice has resulted, irrespective of whether there was an error of judgment in the prosecutor's failing to call a witness.[84]

Consideration

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78 *R v Manning* [2017] QCA 23 at [27]; *R v Jensen* (2009) 23 VR 591 at 604 [78].
79 *R v Apostilides* (1984) 154 CLR 563 at 576.
80 (1983) 152 CLR 657 at 682.
81 (1974) 131 CLR 116 at 122.
82 (1984) 154 CLR 563 at 576.
83 *Whitehorn v The Queen* (1983) 152 CLR 657 at 682-683.
84 *R v Apostilides* (1984) 154 CLR 563 at 577.

[40] At the pre-trial hearing on 29 August 2017, the prosecutor placed on the record her reasoning in determining not to call E as a witness in the Crown case, stating that inconsistencies between the factual basis of E's pleas of guilty and his sworn police statement, provided about eight months thereafter, were such that the prosecutor could not regard E as a credible witness.[85] The prosecutor pointed out that, by virtue of his guilty plea, E admitted conduct consistent with the complainant's s 93A statement, which was admissible against the appellant (there being only one statement made by the complainant).[86] As the respondent pointed out, in his police statement E did not provide evidence of his attempt to kiss the complainant at the appellant's parents' house, which was the evidence that formed the basis of an offence of an attempted indecent treatment of a child of which he was convicted on his plea of guilty.[87] Nor did E provide evidence of the kiss to the complainant on the mouth at the appellant's house while they were on the couch, which was the evidence that formed the basis of the offence of indecent treatment of a child to which he pleaded guilty.[88] While E did state that he asked the complainant for a threesome, he referred to it as "as a joke" which the complainant dismissed with the comment, "don't be silly". Further, he did not state that that took place in the bedroom she had been taken to, which was different to the evidence that formed the basis of an offence of attempted indecent treatment of a child he was convicted upon on his plea of guilty.[89]

[41] In addition, as the respondent argued and the prosecutor pointed out in her submissions on 29 August 2017, that in his police statement E swore to matters that were not part of the factual basis upon which he was sentenced. In that category were that when they were on the couch, E saw the appellant and complainant kissing and the appellant "feeling up" the complainant,[90] that E gave the complainant a little peck on the neck;[91] that, as mentioned, that the complainant responded "don't be silly" to his suggestion that they engage in a threesome[92] and that the complainant looked and sounded like she was enjoying the sexual activity in the bedroom with the appellant.[93]

[42] It is relevant to observe that, when asked by the primary judge whether she had conferenced with E, the prosecutor stated that she had not, but added:[94]

> "… this isn't an instance where there is simply a mere suspicion that the evidence will be unreliable, given the formal proceedings that [E] has already pleaded guilty to. I can't put him forward as a witness of credit, given the two distinctly different versions."

[43] The prosecutor thus identified the circumstances establishing the unreliability of E as emanating from his plea on an agreed basis and his police statement which was inconsistent in a manner that went to his reliability as a witness. The prosecutor went on to state, that if E were called and gave a version consistent with his police

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85 AB at 78.35-82.8.
86 AB at 80.13-80.14.
87 AB at 381 and Affidavit of Courtney Michelle Brown dated 9 August 2018 producing schedule of facts.
88 AB at 381 para [20].
89 AB at 381 para [20].
90 AB at 381 at [19].
91 AB at 381 at [20].
92 AB at 381 at [20].
93 AB at 382 at [21].
94 AB at 81.43-47.

statement and inconsistent with the plea, it would be an "an artificial version given to the jury".[95] The prosecutor also observed that if E were called she would not then be able to cross examine him on a prior inconsistent statement. As to that matter, the respondent submitted that the question of whether, in the interests of justice, the witness should be subject to cross examination by the Crown was relevant.[96] It was argued that there will be cases where it will be appropriate for the prosecutor neither to call a witness as part of the prosecution case, nor to call the witness so that the witness may be cross examined by defence.[97]

[44] It was in those circumstances, the primary judge, having referred to *Apostilides* and distinguishing *Manning*, accepted that the prosecutor's reasons for not calling E formed a proper basis for her decision.[98]

[45] As the respondent submitted, a prosecutor does not know the reason behind a defendant's plea of guilty and there was no indication on the record at the time of sentence for E that his plea was anything other than a full acceptance of the facts alleged against him. In my view, in the circumstances of this case, the differences between the factual basis of his pleas and the contents of his sworn statement amounted to identifiable circumstances that were capable of providing a sufficient basis of establishing that E was not a credible and reliable witness. It may also be observed that, where the prosecutor who ultimately conducted the trial differed from the prosecutor who conducted the pre-trial hearing, as the respondent submitted, it can be assumed that the trial prosecutor's opinion did not differ for the mere fact that E was not called by the Crown. In the circumstances of this case, it may be accepted that the prosecutor was not bound to call E as a witness.

[46] The respondent submitted that the same reasons would have justified the trial judge also not taking the exceptional step of calling the witness, although his Honour was not asked to. While that power was exercised in *Peros*, in that case, the trial judge clearly did not accept the prosecutor's reasons for not calling the witness as sufficient to discharge the obligation to call all material witnesses. In this case, however, the indication of the judge who heard the pre-trial hearing was that the reasons provided by the prosecutor for not calling the witness were sufficient and there was no ground to consider that the primary judge or indeed the trial judge ought to have taken a different course

[47] It may also be observed that defence counsel were well aware by the commencement of the trial that E was not being called by the prosecution. There was no attempt by the appellant's counsel to revisit the matter, despite application being made for various parts of the pre-recorded evidence to be edited.[99] There is weight in the argument that the appellant's counsel at trial may have considered the chances of conviction were greater if the appellant did not call E than if E was called to give evidence in the defence case. Moreover, E provided evidence at trial that contradicted the evidence of the complainant of lack of consent (and the only such evidence) which was favourable to the defence case.

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95 AB at 81.47-82.1.
96 *Richardson v The Queen* (1974) 131 CLR 116 at 119.
97 *R v O'Brien* (1996) 66 SASR 396 at 397.
98 AB at 83.6.
99 AB at 75 and 84-131.

[48] In my view, notwithstanding that the appellant may not have been informed until after the pre-recording that the prosecutor was refusing to call E, a consideration of the case as a whole results in the conclusion that that did not cause a miscarriage of justice or deprive the appellant of a real chance of acquittal.[100]

Ground 2 - admission of inadmissible evidence

Appellant's submissions

[49] The appellant's second ground concerned a passage of the s 21AK recording of the cross examination of the complainant which was to have been edited out but was played to the jury early in the trial.[101] The passage was the complainant's statement, "So I just went into a big trap set by [E] and [the appellant]".

[50] It was submitted that the leading of a statement by the complainant to the effect that E and the appellant "had set a trap" for her, was contrary to the Crown case and was likely, in the absence of any proper explanation, to mislead the jury. The appellant submitted that the prosecutor did not specifically put to E the offences to which he entered pleas of guilty, nor the sentence imposed. E and the appellant were not charged with the same offences, nor as parties to each other's offending.

[51] If the jury were misled inadvertently to the view that E and the appellant were working together, the manner in which the prosecutor's cross examination was conducted would, it was submitted, have added to such a perception. While the trial judge warned the jury that they should ignore what had been edited from the recordings,[102] it was submitted that defence counsel should have sought to have the jury discharged and there could be no appropriate forensic reason or advantage which would explain the failure to seek the discharge of the jury. It was argued that the words were highly prejudicial and in the context of the attack upon E's credit, represented prejudice which could not be overcome by judicial direction.

Consideration

[52] After the inadmissible evidence was received, defence counsel did raise the matter with the trial judge in the absence of the jury. The trial judge commented that "it was said very quickly" and he had "difficulties comprehending what she was saying".[103] The appellant's counsel agreed and when asked whether counsel sought the discharge of the jury, responded, "not at this stage … I do agree with your Honour … at this stage, it's something that could probably be glossed over".[104]

[53] The trial judge then repeated to defence counsel, "the child said that part that should have been removed very quickly" and that he doubted the jury would have apprehended what she said.[105] The judge asked whether a direction was sought to which the appellant's counsel responded:[106]

> "I think the way it is can be left as it is, and it's just something that if its drawn attention to, it will stick in their minds. But I don't make

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100 *TKWJ v The Queen* (2002) 212 CLR 124 at 135; *Gately v The Queen* (2007) 232 CLR 208 at 232-234.
101 AB at 147.15-28.
102 AB at 268.31-45.
103 AB at 148.4-5.
104 AB at 148.11-12.
105 AB at 149.25-29.
106 AB at 149.38-40.

a submission that your Honour should direct them in relation to it at this stage".

[54] It is to be observed, as the respondent submitted, that the recording that was first played was the unedited recording[107] and that the jury did not have the transcripts when the recording was played.[108] Further, there was no suggestion that when the complainant's evidence was replayed that the inadmissible portion was also replayed.[109]

[55] The inadmissible evidence inadvertently played to the jury was excluded on the basis that it was prejudicial for the complainant to be permitted to provide her opinion on the issue. However, as the trial judge indicated the complainant could give evidence of what had occurred and the jury could draw "an inference" from her evidence and "give it a particular characterisation".[110] In that regard, the respondent submitted that the complainant's evidence of the following facts was admitted:

(a) The appellant and E were "whispering something to each other" before they arrived at the location where the offence occurred.[111]

(b) The complainant went into the room that the appellant led her into because "they told me that Mum was in there", that is "[E] and [the appellant]" told her.[112]

(c) "[T]hey were just agreeing" to whatever the other said.[113]

(d) The whole time the complainant was in their company they were having conversations "on the side" and she did not know what they were talking about.[114]

(e) E told her that her mother was in the appellant's mother's house.[115]

(f) E told the complainant that her mother was in the bedroom.[116]

[56] There is merit in that submission and the submission that the evidence was an opinion the jury could have concluded for themselves from the surrounding circumstances but it was not necessary to obtain a conviction.[117] The inadmissible evidence did not suggest that the "big trap" was to lure her into the house or room for non-consensual sexual activity. The evidence upon which the opinion was based also more strongly suggested forethought on the part of E than the appellant. This was not a case where the Crown placed any reliance of a prior plan between them to lure the complainant into the room to prove its case. Further, while the prosecutor's cross examination of E on the inconsistencies between E's evidence and the factual basis of his pleas of guilty would have weighed against his credibility, it did not make it more likely that the jury would accept that the appellant was part of a plan to lure the complainant into the room for non-consensual sexual intercourse. E denied tricking the complainant or discussing what would occur with the appellant.[118]

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107 AB at 150.38-40.
108 AB at 146.13-15.
109 AB at 293-295.
110 AB at 123.4-124.47.
111 AB at 342 and MFI A pp 9.195.
112 AB at 33.36-37 and 33.45.
113 AB at 34.23.
114 AB at 34.26.
115 AB at 34.30-32.
116 AB at 47.1-5.
117 *TKWJ v The Queen* (2002) 212 CLR 124 at 135; *Gately v The Queen* (2007) 232 CLR 208 at 232-234; *R v Susec* [2013] QCA 77 at [50]-[60]; *R v Khaled* [2014] QCA 349 at [15]-[26].
118 AB at 212.19-20 and 218.20.

[57] The receipt of the inadmissible evidence did not cause a miscarriage of justice or deprive the appellant of a real chance of acquittal.

Ground 3 – The cross examination of E by the Crown prosecutor

The appellant's submissions

[58] It was submitted that the cross examination of E by the prosecutor was inappropriate and added to the miscarriage of justice occasioned by the inadvertent playing of the unedited pre-recorded cross examination. During cross examination, the prosecutor, in answer to an objection from defence counsel, stated in the presence of the jury, "I'm reading from the schedule of facts and the basis for which he was sentenced in 2016, the year prior".[119] The prosecutor went on to refer to "the agreed schedule of facts that [E] pleaded guilty to and was sentenced to on the 8th of September 2016".[120] The prosecutor went on to make further references to an "agreed" schedule of facts.[121]

[59] It was submitted that the prosecutor did not suggest to E that, prior to providing his statement to police, he was shown the schedule of facts and asked to affirm the facts, nor was it suggested that he had been shown the s 93A recording of the evidence of the complainant and asked by police to confirm the facts stated by the complainant. It was submitted that the trial judge recognised the difficulty with the prosecutor's approach by commenting that "there's potentially other difficulties relying on a schedule of facts for a whole number of reasons".[122] At that point, defence counsel interjected submitting that "it seems like he hasn't read it, and there are parts being put to him from that which aren't …".[123] His Honour then stated:[124]

> "Yes, schedule of facts isn't like a sworn statement, of course. They are a summary. But it's important that what's being put to a witness accurately accords with what's recorded in any event. So is there an issue there … in terms of putting the – what's being suggested to him in its full context, I suppose? I'm not sure what [defence counsel] is getting at because I don't … have that document."

[60] The prosecutor stated that E had pleaded guilty "to a certain set of facts" and then provided a statement that was different.[125] Defence counsel then asked for the jury to leave the court room.

[61] After the jury left the court room, defence counsel indicated that E did not recall ever reading the schedule of facts. His Honour remarked, "that's a different concept to saying he understood what factual bases he was being sentenced upon".[126] The trial judge summarised defence counsel's complaint as "simply this: that what's being put to him may not be, in fact, an accurate proposition as to … the bases upon which he pleaded guilty".[127]

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119 AB at 215.1-2.
120 AB at 215.30-31.
121 AB at 221.
122 AB at 220.16-17.
123 AB at 220.19-20.
124 AB at 220.22-30.
125 AB at 220.32-33.
126 AB at 221.31-32.
127 AB at 222.41-43.

Consideration

[62] The respondent argued that, while the prosecutor's cross examination of E as to the factual basis of the charges to which he entered pleas of guilty referred, on two occasions, to a "schedule of facts", she otherwise framed her questions by reference to the facts on which E entered pleas of guilty.[128]

[63] Although the record suggests that E did not recall reading the schedule of facts,[129] it remains, as the respondent argued, that E did have an understanding of the factual basis for his pleas of guilty and his understanding of the factual basis for which he entered the pleas of guilty was a proper matter for cross examination as it was relevant to the facts in issue. While, as the trial judge recognised, reference to the schedule of facts may have complicated the matter, it did not emerge that E did not recall reading such a schedule of facts until after cross examination had commenced. After objection was taken to reference being made to the schedule of facts, the prosecutor did not seek to further question the witness by reference to the "schedule of facts".[130]

[64] In the circumstances of the case, I agree with the respondent's submissions that it was not improper for the prosecutor to refer to the schedule of facts in cross examination of E. Moreover, as the respondent also submitted, the record from E's sentence shows that the prosecutor briefly summarised the facts in oral submissions in addition to fully outlining them in in the schedule of facts.[131] E's counsel at sentence did not challenge any of those facts.[132] Nor did E himself raise objection during the proceedings. There was nothing in the sentencing remarks to suggest that the sentencing judge sentenced E other than on the factual basis outlined in the schedule of facts.[133]

[65] There was no miscarriage of justice arising from the cross examination of E. This ground fails.

Issue of the manner of the Crown address

[66] The appellant argued that the manner in which the Crown addressed the jury resulted in a miscarriage of justice. It is to be noted, as the respondent pointed out, that although complaint was made in submissions with the "manner in which the Crown prosecutor addressed the jury", that did not form a ground of appeal.[134]

[67] In written submissions on behalf of the appellant complaint was made as to the prosecutor giving reasons in her address as to why the complainant would decline a genital examination. It was said that the explanation given by the prosecutor was not based upon any evidence given by either the complainant or Dr White. That is incorrect. The prosecutor's reference to the complainant saying, "I don't want to do it anymore"[135] was based on Dr White's evidence as to the circumstances in which the complainant declined the genital examination.[136]

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128 AB at 214.1 and 215.30-31.
129 AB at 216.1-11 and 220.19-20.
130 AB at 220-227.
131 AB at 391.
132 AB at 395-396.
133 AB at 400.
134 Appellant's outline at paragraphs 15(x), 47(iv), (v) and 55-58.
135 AB at 258.

[68] In oral submissions, counsel for the appellant stated that the complaint about the prosecutor's address in fact centred on that portion where the prosecutor questioned E's motivation for giving the account he gave.[137] In that portion, the prosecutor raised that E was no longer in a relationship with the complainant's mother, whether he was still angry with her. Also mentioned was whether E was concerned with his own involvement.

[69] What the prosecutor said must be put on the context of responding to defence counsel's address. Defence counsel, when dealing with the issue of whether the intercourse between the appellant and the complainant was consensual, referred to the evidence of E as the only person who could give evidence of what occurred, and where there was no supporting medical evidence of injury.[138] The prosecutor went on in her address to refer to E's acceptance that there was a request for a threesome and his distancing from non-consensual conduct.[139] The complaint that a miscarriage of justice resulted from what was said in the prosecutor's address is not made out.

Order

[70] The appeal against conviction should be dismissed.

[71] **FLANAGAN J:** I agree with the order proposed by Philippides JA and with her Honour's reasons.

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136 AB at 196.
137 AB at 258.
138 AB at 245.
139 AB at 258.39.