SUPREME COURT OF QUEENSLAND

CITATION:	*R v PBC* [2019] QCA 28
PARTIES:	**R** **v** **PBC** (appellant)
FILE NO/S:	CA No 316 of 2017 DC No 768 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 December 2017 (Durward DCJ)
DELIVERED ON:	26 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2018
JUDGES:	Fraser and Morrison and McMurdo JJA
ORDERS:	**1. Allow the appeal.** **2. Quash the appellant's conviction.** **3. The appellant be re-tried.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted of indecent treatment and rape – where the complainant had consensual sexual activity with a person other than the appellant – where the appellant at trial argued that the alleged conduct was fabricated because there were similarities between the complainant's description of the alleged conduct and the complainant's description of the consensual sexual activity – where the prosecutor in their closing address suggested that the similarities were the result of the sexualisation of the complainant by the appellant – where the appellant at trial was not permitted to ask the complainant about their sexual history other than the single instance of consensual sexual activity – where defence counsel at trial did not seek a direction about the prosecutor's argument – whether it was unfair that the appellant was not able to ask

the complainant about any other previous sexual activity – whether defence counsel made a forensic decision not to seek a direction – whether there was an unfairness as there were distinct risks to the appellant's case at trial if defence counsel chose to seek a direction or chose not to seek a direction

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – DISCHARGE OF JURY – where the appellant was convicted of indecent treatment and rape – where the complainant had consensual sexual activity with a person other than the appellant – where the appellant at trial argued that the alleged conduct was fabricated because there were similarities between the complainant's description of the alleged conduct and the complainant's description of the consensual sexual activity – where the prosecutor in their closing address suggested that the similarities were the result of the sexualisation of the complainant by the appellant – where the appellant at trial was not permitted to ask the complainant about their sexual history other than the single instance of consensual sexual activity – where the appellant at trial applied to discharge the jury – whether it was unfair that the appellant was not able to ask the complainant about any other previous sexual activity – whether the trial judge erred by failing to discharge the jury – whether defence counsel made a forensic decision not to seek a direction – whether there was an unfairness as there were distinct risks to the appellant's case at trial if defence counsel chose to seek a direction or chose not to seek a direction – whether the prosecutor's argument was an advocate's flourish – whether there was a real risk that the prosecutor's argument wrongly influenced the verdict, although it was not included in the trial judge's summing up

Nudd v The Queen (2006) 80 ALJR 614; (2006) 162 A Crim R 301; [2006] HCA 9, followed
R v MCT [2018] QCA 189, followed
R v Smith (2007) 179 A Crim R 453; [2007] QCA 447, followed

COUNSEL: P K O'Higgins, with S E Harburg, for the appellant (pro bono)
S J Farnden for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the orders his Honour proposes.

[3] **McMURDO JA:** After a five-day trial, the appellant was convicted by the jury of six offences of a sexual nature against the same complainant, who was the daughter of the appellant's then partner. The complainant was born in July 2002. Three of the offences were alleged to have occurred on the one occasion, sometime between 2009 and 2014. They involved one offence of indecent treatment and two offences of rape. There were three further offences of indecent treatment which were alleged to have occurred in early 2016.

[4] The convictions are challenged on the ground that there was a miscarriage of justice from what was said by the prosecutor in his closing address to the jury. Another ground of appeal, that the verdicts were unreasonable, was abandoned.

The evidence at the trial

[5] The only evidence of the offences was given by the complainant. Her evidence consisted of a statement under s 93A of the *Evidence Act* 1977 (Qld) (the Act) and pre-recorded testimony under s 21AK of the Act. There were in fact three separate s 21AK recordings.

[6] In the s 93A statement, which was given to police on 21 April 2016, the complainant described the occasion on which the two offences of rape were committed. One of those offences involved the appellant requiring the complainant to suck his penis. The other involved penile penetration and, in describing that offence, the complainant said that when she stopped sucking on the appellant's penis:

> "… [H]e grabbed me and pulled me onto his lap and then tried to insert his penis into me … and I think he did it and I started bleeding …"

She also said:

> "… once I finished sucking him, he grabbed me and then pulled me onto his lap and he had my pants down … and then he started fiddling with himself and trying to fit it in and then he eventually did …"

After a short time, she said she went to the bathroom and locked herself in.

[7] There was some evidence of uncharged sexual acts, described by the trial judge in his summing up as evidence that the appellant had touched the complainant and that it had been going on for a while.

[8] The appellant was permitted to cross-examine the complainant about an incident in which there was consensual sexual activity between her and a teenage boy, who was aged 14 and whom I will call E. The incident occurred on 3 October 2015 in a lavatory in a shopping centre. It appears that the incident became known at the complainant's school and the school reported the matter to police. A few days later the complainant was interviewed by police about the incident. The complainant described an incident in which E sat on the floor and grabbed her hands so that she would sit on his lap. She told police that "then he pulled his pants down a bit and then took his thing out and then tried inserting it into me". The police officer asked her "did it happen?" and she answered:

> "He sort of got it in, but he kept moving so it came out pretty much directly after …"

The police officer asked for more detail and the complainant then said:

> "He pulled me onto his lap and pulled his thing out … When I was on his lap, he tried to get his penis inside of me. … And then he kept moving around, so it wouldn't go in. And when he finally did get it in, he moved so it came back out."

[9] In pre-recorded testimony, the appellant's counsel suggested that the complainant's version of the penile rape, given in the s 93A statement in April 2016, was a fabrication in which the complainant was employing the details of the incident with E in order to describe an act of intercourse with the appellant. The complainant denied the suggestion.

[10] The appellant gave evidence. He testified that there had been no sexual conduct by him towards the complainant and that she was lying in order to be able to move to another address. When he was cross-examined, it was not suggested that he had engaged in any conduct other than the charged offences.

The address by defence counsel

[11] Defence counsel reminded the jury of the evidence of the incident with E, reading to the jury her description of it which I have set out above. Counsel then reminded the jury of the complainant's description of the act of penile intercourse with the appellant. Counsel argued that it was "inherently implausible that two males did that to her and raped her in that exact same way of pulling her down onto them …" (That was inaccurate, in that her evidence was that the sex with E was consensual.) It was argued that "[w]hat she's doing in that s 93A statement is merely recounting the physical things that she knows occurred with the incident with [E], and then repeating it and saying it was [the appellant] in an effort – quite successful effort to get [the appellant] into trouble." The address on this point continued:

> "[Y]ou might think, well, if she's a young person, what does she know about the precise mechanics of sex? And you'll probably think, well, nothing. … But if … she had this incident in the toilet with [E] and then she simply describes those mechanics again in the complaint she makes about [the appellant] … that gives a good explanation for why she's able to articulate details about sex which one would ordinarily think that a girl of her age might not be able to recount."

The address by the prosecutor

[12] The prosecutor told the jury that there were several reasons why that argument should be rejected. The first, he suggested, was that the incident with E was materially different from that described in the complainant's evidence of the penile rape. The other reasons were described by the prosecutor as follows:

> "Let me say this too: [the complainant] was 13 years old in October 2015 when she had consensual, peer-to-peer, teenager sex with a boy named [E]. Now, you might think 13 is quite young to have sex. Perhaps you think it isn't unusual, though, in today's world. It's a matter for you. If you do think it is unusual for a 13 year old to be heading into a disabled toilet with an older boy to have consensual intercourse, you might think there is a very plausible explanation for this, which also may go to the similarity of the two experiences.

> Over a period of years the Crown case is, [the complainant] when she was eight to 11 years old has engaged in sexual activity with her stepfather, the defendant, including an occasion when he had sex with her. You might think that in this instance the defendant has sexualised [the complainant] in doing this, that he has made her aware at a very young and tender age, eight to 11, what sexual activity is and, specifically, a single sexual position that she can use to have sex.
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> You might well think then, a matter for you, that is no coincidence that the one position that she has been – had sex in with her stepfather as a young girl is the same position she then later, as a teenager, chooses to engage in but with a boy she actually has feelings for."

The Application to discharge the jury

[13] After the prosecutor's address, defence counsel applied to the trial judge to discharge the jury, upon the basis that there was an unfairness from the prosecutor's suggestion that the complainant had been sexualised by the appellant, given that, apart from the specific incident with E, the appellant had been unable to ask the complainant about any previous sexual activity.[1]

[14] The trial judge refused the application, holding that there was no unfairness because the prosecutor's address was "responsive to the specific matter in the address that was raised by" the appellant's counsel. And his Honour said that there was no prejudice caused by the word "sexualisation".

[15] The trial judge then asked defence counsel whether he wanted anything said to the jury on the subject. At the same time, his Honour suggested that to do so "might draw matters to their attention and make things worse". The judge said that if a direction was required, counsel would need to formulate it. Defence counsel asked if he could consider the question overnight. Counsel said that he had another commitment on the following morning but that he would email any suggested direction to the prosecutor and to the judge's associate. When the case resumed the next day, the appellant's solicitor informed the judge that no direction on the argument was sought.

[16] At this point, it is necessary to say something about the course of proceedings before the commencement of this trial. In June 2017, another judge heard an application for permission to cross-examine the complainant about the incident with E. The application was made on the basis that the cross-examination was necessary to establish the factual foundation for an argument to the jury as was ultimately made. That application was refused.

[17] There was then an earlier trial on this indictment which commenced on 22 July 2017. The appellant gave evidence and the jury was addressed by both counsel, before defence counsel applied to re-open the ruling about the incident with E. The complaint made to that trial judge (who was not the judge in the present trial or the judge who had given the ruling) was that the prosecutor had argued to the jury that one of the reasons why the complainant's evidence should be accepted was that she had given a realistic and graphic description of, amongst other things, the penile

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1 s 4 of the *Criminal Law (Sexual Offences) Act* 1978 (Qld).

rape. That judge accepted the argument by defence counsel and his Honour re-opened the earlier ruling, granted permission to cross-examine on the incident with E and ordered a mistrial. It was after then that the evidence was given under s 21AK about the incident with E as I have described.

The submissions for the appellant

[18] For the appellant, it was submitted that for several reasons, the prosecutor's address and the trial judge's refusal to discharge the jury resulted in a substantial miscarriage of justice.

[19] The first of those reasons is that the appellant had no opportunity to answer the allegation, made by the prosecutor in his address, that "over a period of years … the defendant has sexualised [the complainant]". It is submitted that the appellant was not cross-examined to the effect that he had done so and that there was an unfairness under the rule in *Browne v Dunn*.[2]

[20] The second reason is that there was an unfairness because the appellant had been unable to explore the complainant's sexual history, other than the incident involving E, so that it was unknown whether there had been something else (apart from the alleged offending) which might have explained the complainant's preparedness to have sex with an older teenager.

[21] The third reason, which is really a variant of the second, is that if the prosecution had made it known that its submission would be made to the jury, consideration could have been given to seeking leave to cross-examine the complainant more broadly about her sexual history (if any).

[22] The fourth reason is that the unfairness could not be remedied by a direction to the jury, because that would only have drawn attention to the prosecutor's argument and invited the jury to speculate about things which were not in evidence.

[23] It is argued that this unfairness infected the entirety of the prosecution case, because of the importance of the complainant's credibility on the penile rape offence to her credibility on all counts. Consequently, it is submitted, all of the convictions should be quashed and a re-trial ordered.

The respondent's submissions

[24] For the respondent, it is argued that the prosecutor's address was simply in answer to a submission made by defence counsel by which the prosecutor was "effectively reversing the proposition that had been put by [defence] counsel to the jury."

[25] As to the first of the appellant's points, it is argued that the prosecutor made it clear that he was referring only to the charged acts as the conduct by which the complainant had become "sexualised". Further, it is submitted that whether the complainant had become sexualised was not a matter which was within the appellant's knowledge and he could not have been cross-examined about it.

[26] As to the appellant's second and third points, it is submitted that the prosecutor did not suggest to the jury that the incident with E had been the complainant's only sexual experience.

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2 (1893) 6 R 67.

[27] As to the appellant's fourth point, it is submitted that any suggested prejudice could have been overcome by a direction by the trial judge that the prosecutor was referring only to the charged conduct when speaking of the sexualisation of the complainant. It is submitted that there was no miscarriage of justice from the absence of any direction, given that a forensic decision was made by defence counsel not to seek it.

[28] There is no submission that the proviso under s 668E(1A) should be applied.

Consideration

[29] The argument by defence counsel to the jury was that there was such a similarity between what had happened with E in October 2015 and the complaint of the penile rape offence which she made to police in April 2016, that it should be inferred that this was a false complaint inspired by the incident which had occurred with E. The prosecutor's response, to the extent that there was not such a similarity, was relevant and fair, if not compelling.

[30] But the prosecutor went further by arguing, in effect, that the complainant's experience with the appellant might explain her conduct with E. He suggested that there was a "very plausible explanation" for the incident with E which was the conduct of the appellant of which she complained. The prosecutor said that if there was such a similarity between the intercourse with E and the alleged intercourse with the appellant, the jury might infer that she had applied her experience of sex with the appellant in choosing "the same position" with E. The effect of that argument was that the incident with E was something which was probative of the appellant's guilt.

[31] That was not an argument which defence counsel should have anticipated. It was an argument which was flawed in at least two ways. The first was that in describing the particular position in which the complainant and E had had sex, the prosecutor misrepresented the effect of her evidence. The complainant had not said that she had chosen that position for intercourse with E, yet this was part of his argument. The second was that the submission did not recognise the possibility that, if the incident with E was in any way attributable to a previous sexual experience of the complainant, the experience had been with someone other than the appellant.

[32] The submission had the potential to make the jury think that the complainant had had no other experience, an inference that might have been fortified by the fact that she had been cross-examined only about the incident with E.

[33] I do not accept the respondent's submission that the prosecutor had simply "reversed" the proposition which had been put by defence counsel to the jury. As I have said, he went further by suggesting that the incident with E was a piece of circumstantial evidence which assisted in the proof of the offence. Nor do I accept that the prosecutor made it clear that he was referring only to the charged acts as the conduct by which the complainant had become "sexualised", but in any case, it would be no answer to the flaws in the prosecutor's argument which I have described.

[34] Because the prosecutor's argument was at least potentially misleading, it warranted some intervention by the trial judge. It must be said that when the judge was asked to discharge the jury, the transcript of the prosecutor's address was not available

and, understandably, the full implications of the prosecutor's argument may not have been understood. Nevertheless, an appropriate response by the trial judge might have been to require the prosecutor to correct his misstatements to the jury. Another appropriate response might have been to direct the jury as to those flaws in the prosecutor's argument. In particular, the jury might have been directed that it was not the complainant's evidence that she had chosen the position in which she and E had intercourse and that there was no evidence that the complainant was without sexual experience prior to the event with E, apart from that which was alleged against the appellant.

[35] However no direction was sought by defence counsel. For the respondent, it is submitted that this is the end of the matter because counsel made a forensic decision not to seek a direction from the judge "no doubt because of the overall insignificance of the comment in the scheme of the entire address."[3] The precise reasoning of the appellant's trial counsel is unknown, but it is not unlikely that a direction was not sought because a judgment was made by counsel that it was preferable for the jury not to be reminded of the prosecutor's argument.

[36] As Gleeson CJ said in *Nudd v The Queen*:[4]

> "A criminal trial as conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what is used to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. … As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light."[5]

[37] However, the forensic decision in this case had to be made because of a predicament caused by an unfair argument to the jury by the prosecutor. Counsel's choice was between two alternatives: a direction or no direction, each of which involved risks for his client's case. That unfairness is not answered by a submission that counsel made a forensic choice.

[38] The respondent's submission that the prosecutor's "comment" was insignificant in the scheme of the entire address cannot be accepted. It is not unlikely that the jury considered and was persuaded by the argument, although it was not specifically mentioned in the trial judge's summary of the respective arguments in his summing up. The prosecutor's argument was more serious than an "advocate's flourish";[6] there was a real risk that this argument wrongly influenced the verdict, resulting in a miscarriage of justice.[7]

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3 Respondent's outline of submissions para 29.
4 [2006] HCA 9; (2006) 162 A Crim R 301 at 306-7 [9].
5 See also *Doggett v The Queen* [2001] HCA 46; (2001) 208 CLR 343 at 346 [1].
6 cf *R v Smith* [2007] QCA 447; (2007) 179 A Crim R 453 at 464 [38].
7 *R v MCT* [2018] QCA 189 [40].

Conclusion and orders

[39] Because of that risk, the conviction on each count should be set aside. The complainant's credibility about the particular count of penile rape was clearly relevant also to the jury's consideration of the case on the other counts.

[40] I would order that the appeal be allowed, that on each count the conviction be quashed, and there be a re-trial.