# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v MDE* [2019] QCA 262 |
| PARTIES: | **R**<br>**v**<br>**MDE**<br>(applicant) |
| FILE NO/S: | CA No 96 of 2018<br>DC No 71 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Extension (Conviction) |
| ORIGINATING COURT: | District Court at Townsville – Date of Conviction: 15 February 2018 (Lynham DCJ) |
| DELIVERED ON: | Date of Order: 15 October 2019<br>Date of Publication of Reasons: 22 November 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 October 2019 |
| JUDGES: | Sofronoff P and Buss AJA and Davis J |
| ORDER: | **Date of Order: 15 October 2019**<br><br>**The application for extension of time is refused.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicant was convicted on 15 February 2018 by jury of 21 counts, namely one count of maintaining a sexual relationship with a child, one count of indecent treatment of a child under 16 with circumstances of aggravation that she was under 12 years of age and in his care, two counts of common assault, 12 counts of indecent treatment of a child under the age of 16 years with a circumstance of aggravation that she was in his care, and five counts of rape – where the complainant in all instances of offending was the applicant's stepdaughter – where the applicant filed a notice of appeal on 19 April 2018 – where the applicant sought an extension of time within which to appeal those convictions – whether the application for an extension of time should be granted<br><br>CRIMINAL LAW – EVIDENCE – IDENTIFICATION EVIDENCE – MODES OF IDENTIFICATION – OTHER VISUAL IDENTIFICATION – where in an interview admissible by s 93A of the *Evidence Act* 1977, the complainant identified the applicant in a video file depicting one instance of the offending against her – where the complainant could specify characteristics of the applicant's |

penis that were significant, namely shaved pubic hair and red pimples – where the complainant's mother specified the same significant characteristics of the complainant's penis – where the applicant, at trial, did not object to the admission of that identification evidence – where the applicant contends on appeal that the identification evidence should have been excluded on discretionary grounds – where the applicant submits that the learned trial judge erred by failing to adequately direct the jury with regard to the identification evidence – whether the identification evidence was sufficiently weak or prejudicial to occasion its exclusion from the trial or require a warning to the jury

*Criminal Code* (Qld), s 229B, s 210, s 335, s 349
*Domestic and Violence Family Protection Act* 2012 (Qld), s 177
*Evidence Act* 1977 (Qld), s 93A, s 21AK, s 130

*Alexander v The Queen* (1981) 145 CLR 395; [1981] HCA 17, cited
*Davies & Cody v The King* (1937) 57 CLR 170; [1937] HCA 27, cited
*Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited
*Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13, cited
*Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, cited
*Kelleher v The Queen* (1974) 131 CLR 534; [1974] HCA 48, cited
*Pitkin v The Queen* (1995) 69 ALJR 612; [1995] HCA 30, cited
*R v Asaad* [2017] QCA 108, cited
*R v Bodnar* [2001] QCA 127, cited
*R v Carusi* (1997) 92 A Crim R 52, cited
*R v Christie* [1914] AC 545, cited
*R v Hasler; Ex parte Attorney-General (Qld)* [1987] 1 Qd R 239, cited
*R v Hawks* [2019] QCA 181, cited
*R v Marijancevic* (1993) 70 A Crim R 272, cited
*R v Murphy* [1996] 2 Qd R 523; [1995] QCA 568, cited
*R v Roughan & Jones* (2007) 179 A Crim R 389; [2007] QCA 443, cited
*R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited

COUNSEL: D Caruana for the applicant (pro bono)
C N Marco for the respondent

SOLICITORS: Townes and Associates for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Davis J.

[2] **BUSS AJA:** I agree with Davis J.

[3] **DAVIS J:** The applicant was charged on indictment with 22 counts, namely:

- One count of maintaining a sexual relationship with a child;[1]
- One count of indecent treatment of a child under 16 with circumstances of aggravation that she was under 12 years of age and in his care;[2]
- Three counts of common assault;[3]
- 12 counts of indecent treatment of a child under the age of 16 years with a circumstance of aggravation that she was in his care;[4]
- Five counts of rape.[5]

[4] The applicant pleaded guilty to count 17 on the indictment which was one charge of common assault. The jury convicted him of the other 21 counts and against those convictions he seeks to appeal.

[5] The applicant pleaded guilty to a second indictment charging him with one count of contravening a domestic violence order.[6] The plea was ultimately vacated and he was discharged. The applicant also pleaded guilty to a summary offence which is irrelevant to the present appeal.

[6] The Notice of Appeal was not lodged within time and the applicant seeks an extension of time within which to appeal.

[7] On 15 October 2019, I joined in an order of the court dismissing the application for an extension of time.

**Background**

[8] All the counts on the indictment allege offences against the stepdaughter of the applicant. The complainant was aged between 10 to 14 years over the period alleged in count 1 on the indictment, namely that the applicant maintained an unlawful sexual relationship with her. Apart from counts 3, 4 and 17, which allege common assault, all the other counts allege sexual offences committed against the complainant during the period defined by count 1.

[9] On 28 April 2014, the complainant told her mother that the applicant had "licked her private part". On that day, the complainant was taken to police and she participated in an interview which was admissible in proceedings against the applicant pursuant to s 93A of the *Evidence Act* 1977 (the first s 93A interview).

[10] In the first s 93A interview, the complainant told police that over the few months since Christmas 2013, the applicant had been offending against her sexually. The offending which was described was limited to activity which could broadly be described as indecent assaults. There was no mention of photographs being taken by the applicant of the complainant, nor videos being taken, and there was no allegation at that stage of any sexual acts involving penetration.

[11] Some months later, in January of 2015, a mobile telephone was located at a local rubbish dump. It contained a number of photographs and video files depicting indecent images of the complainant.

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1 *Criminal Code* s 229B(1).
2 *Criminal Code* s 210(1)(a)(3)(4).
3 *Criminal Code* s 335.
4 *Criminal Code* s 210(1)(f)(4).
5 *Criminal Code* s 349.
6 *Domestic and Violence Family Protection Act* 2012 s 177(2).

[12] Of particular significance was a video file which showed the complainant sucking the erect penis of an adult. The camera must have been positioned behind and above the male as what can be seen is the penis, back and arms of the adult and the face of the complainant who is looking towards the camera. She can clearly be seen placing her mouth over the adult's penis and then taking the penis in her hand and masturbating him.

[13] On 5 February 2015, the complainant was interviewed again (the second s 93A interview). In that interview, she was shown some of the photographs from the mobile telephone but was not shown the video file. She could identify herself in some of the photographs and recalled photographs being taken. She made further disclosure of offences, including three counts of anal penetration and two counts when the applicant inserted his penis into her mouth. All five of those incidents were charged as rape.[7]

[14] The face of the male in the video file cannot be seen. What can be seen is that the male has tattoos on his right arm, in what was described in the evidence as a "sleeve" of tattoos. His pubic area is shown and can be seen to be shaved. In the second s 93A interview, the complainant was asked to describe the applicant's penis. She described it as white and the genital region as hairless with pimples.

[15] Investigations showed that the mobile telephone bore a number that was connected to the applicant.

[16] On 26 July 2016, the complainant's evidence was pre-recorded pursuant to s 21AK of the *Evidence Act* (the first s 21AK evidence).

[17] On 31 January 2018, police showed the complainant the video file. That exercise was recorded and that recording was admitted into evidence pursuant to s 93A of the *Evidence Act* (the third s 93A interview).[8]

[18] When the video file appeared on the computer in front of the complainant, she became upset. She identified herself on the image and then said "that's me and that's [applicant's first name]". She then became more upset and the playing of the video file was stopped. After a time she said "that's me in the video and that's [applicant's first name]". When questioned yet further, she said "[applicant's first, middle and last names]". She then said that she did not wish to see the video file again. In fact, she had only viewed a few seconds of the video file. Perhaps curiously, she is then asked by the police officer how she knows that the male shown in the video file is the applicant. She then volunteered that she could recognise his penis, she had seen it before.

**The course of the trial**

[19] Counts 20 and 21 on the indictment were in these terms:

> "Count 20: that on a date unknown between the seventh day of January, 2011 and the twenty ninth day of April, 2014 at Hughenden in the State of Queensland, [the applicant] raped [the complainant].

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7 Counts 9, 10, 11, 12 and 20.

8 Exhibit 13.

> Count 21: that on a date unknown between the seventh day of January, 2011 and the twenty ninth day of April, 2014 at Hughenden in the State of Queensland, [the applicant] unlawfully permitted himself to be indecently dealt with by [the complainant], a child under 16 years.
>
> And [the applicant] had [the complainant] under his care."

[20] Particulars were given of counts 20 and 21 as follows:

> "20. The defendant inserted his penis into the complainant's mouth
>
> 21. The defendant permitted the complainant to masturbate his penis."

[21] Counts 20 and 21 reflected the offending shown in the video file.

[22] Given that the third s 93A interview post-dated the first s 21AK evidence, further pre-recorded evidence of the complainant was taken on 8 February 2018 (the second s 21AK evidence).

[23] During cross-examination in the second s 21AK evidence, the complainant was asked this:

> "… And you said to police that you knew it was [the applicant] because you recognised the penis as you'd seen it before, didn't you?---Yes."

[24] The question is barely fair. On my assessment of the third s 93A interview, the complainant initially identifies herself and the applicant on the video file and is clearly recalling an event which occurred between them. It is only when the police officer enquired further that the complainant volunteered that she recognised the applicant's penis. My impression of what the complainant was conveying in the third s 93A interview is fortified by the next exchange during the second s 21AK evidence:

> "What is it that you noticed on the penis in the video that you recognised from memory of seeing [the applicant's] penis before?---
>
> It's the most traumatic thing that's happened in my life. I don't think I'll ever forget that."

[25] The cross-examination continued:

> "What are the physical features, [complainant], that you saw that you recognised?---What do you mean, physical? Can you explain further, please?
>
> Well, you told police that you recognised the penis as something – as you had seen it before. I'm just trying to work out what it was that you recognised from what you'd seen before?---The penis. Like – sorry, I'm having trouble understanding, like - - -
>
> What was - - -?--- - - - a [indistinct]
>
> Sorry?---Continue, sorry.

What was it what you saw of the video that made it not just a penis though? What I'm asking you is why was it [the applicant's] penis as opposed to any other penis?---Because I know what it looks like. I – I – I – I don't know how to – any other way to explain it.

Okay?---But I – I know what it looks like. I've seen it before.

Well, I'd suggest that there was – that it was just a penis like any other penis?---What do you mean, like any – any – anyone else's penis?

That's right. The penis that was in the video. The part of the video that you saw, I'd suggest that there was nothing distinguishing in that that could distinguish it from any other – [the applicant's] penis from any other penis?---Sorry. I'm – I'm having trouble, like, understanding what you're saying. Like - - -

I'm trying – I'm asking you, [complainant], why you say that it was [the applicant's] penis and not another penis. There must – you've – said that you recognised it - - -?---Because I know what [the applicant's] penis looked like. Like, that's what I just said.

I know. And I want to find out what it is about [the applicant's] penis that's different and makes you recognise it as you know what it looks like?---Because I've seen it before.

[Complainant], I'd suggest that you haven't seen [the applicant's] penis very often, have you?---Yes, I did when I was quite younger.

Okay. You've told - - -?---I've not seen it in recent years.

Okay. Do you remember talking to police in February in 2015 – the 5th of February 2015, speaking to Officers Lanigan and McHugh?[9] And you were at [indistinct]?---Anne-Maree and Amanda? Yes.

Yes?---Yes.

And they asked you about [the applicant's] penis and asked, "Had you - - -" Officer Lanigan or Anne-Maree said to you – so you were talking about how [the applicant's] penis looked and you were asked, "Had you seen it on more than one occasion?" And you said - - -?---Yes.

- - - "No. I don't think so. I haven't. I didn't' see it, like, regularly, like, everyday." Do you recall saying that?---Yeah.

And you said as well, "I can mainly remember it once and then twice after that" so that you've qualified, "I can mainly remember it once, twice". Do you recall saying that?---Sorry, what year was this, 2015? Yes.

Yeah. That's right. Yep.

Now, what I'm suggesting to you, [complainant], is that there's nothing in the video that you've seen that could make you recognise that this was [the applicant's] penis as opposed to anyone else's

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9 The occasion of the second s 93A interview.

> penis?---Well, looking at the video, it had the – it was a shaved penis with red – like, ingrown hair pimples. And that was what [the applicant's] penis looked like.
>
> You saw red ingrown hair pimples on that video, did you?---Yes. I literally watched three seconds of it.
>
> That's right. You saw three seconds of it and it's not the clearest picture, is it?---No. But I've seen enough to identify. It was very traumatic to even watch that video - - -
>
> Yep?--- - - - for me.
>
> I'd suggest, [complainant], that you've presumed that because you were called back about this case about [the applicant], that it was [the applicant] in the video?---Sorry, can you re-word that?
>
> I'd suggest that you knew that because you came back to talk about something to do with [the applicant], that you've made the assumption that it was [the applicant] in the video?---I'll suggest that your suggestions are wrong." (emphasis added)

[26] The complainant was clearly confused by the cross-examination, or at least the purpose of it. That is understandable. From her point of view, she identified the video file as depicting an event of a type she described in the second s 93A interview occurring with the applicant. The cross-examination though is proceeding on the understanding that she has only identified the male in the video file by reference to characteristics of his penis.

[27] The complainant's mother gave this evidence:

> "MR CRANE:[10] I won't dwell on this. I just need to ask you these questions. [The applicant] – did [the applicant] shave his genitalia?---Yes.
>
> Did he do it – well, for how long did he do that for? For example, was it recent in 2014 or had he been doing it for some time?---No. He'd been doing it for some time."

[28] The police obtained a forensic procedure order and an examination of the applicant showed that his pubic area was shaved.

[29] The Crown Prosecutor opened his case on counts 20 and 21 as part of his opening on counts 19 to 22. He said:

> "Counts 19 to 22 on the indictment deal with occasions where there is some sexual conduct that is identified within images, and you'll see those images this afternoon. And they relate to what can be seen in those photographs. But certainly, I can state at this point in time, members of the jury, that they are predicated on the Crown having proven to you that it is, in fact, [the applicant] who was taking those photographs of her.
>
> So, count 19 – there is a photograph of [the complainant] as a young child licking a penis. Count 20, there is a movie. And the defendant,

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10 The Crown Prosecutor.

> you will see, inserts his penis into her mouth. And count 22, allows himself to be masturbated by [the complainant] – sorry – count 21, allows himself to be masturbated by her.
>
> Relevantly – and I'll make – I will point out this particular piece of evidence within the Crown case now, members of the jury – you will, or you might, observe within that video that the perpetrator has a sleeved right arm, or a right arm with a sleeve tattoo, which means tattoo from shoulder to wrist. You will see photographs taken by police of [the applicant]. He has a sleeve tattoo on the right arm.
>
> You'll observe within those videos, and perhaps in some of the photographs, a shaved pubic area, that being no hair. Police obtained a forensic procedure order and they will confirm that he had shaved genitals – pubic area, as will his partner, [the complainant's mother]. And it was routine for him to shave his pubic area."

[30] The Crown prosecutor, in his closing address, said the following:

> "So [the applicant], if he didn't do these crimes and didn't do these things to [the complainant], must be looking skyward and thinking, crikey, what have I done to deserve this? This girl made these – made up these lies about me and they found images of her naked, posing, and they're on my phone. And amongst those pictures, there is a video, and the video captures a sleeve tattoo – that's my word. I appreciate there might be different views of what a sleeve is, but tattoos on his arm down to the area on his wrist. And the unluckiest man in the world has tattoos on his right arm that go down to his wrist that correlate with what you can see – a blurred image, yes, but an image that demonstrates tattoos on his right arm."

[31] The Crown Prosecutor referred on several occasions to the sleeve of tattoos on the person shown in the photographs recovered from the mobile telephone, and that seemed also to be a reference to the video file. Nowhere did he suggest to the jury that the complainant was recognising the accused in the video file other than by identifying his penis.

[32] In his closing address, defence counsel dealt with the video file. He said:

> "In the video, I'd suggest – and you may watch it again later – but she's acting with care and gentleness for whoever is with her, something for her with – something that, from her evidence, she would not have done with [the applicant] if he had forced her to do this. Also, that anyone in that house could've had access to that phone from when it was bought until after it was finished with and after that. [The complainant] herself said that she believed she'd used the phone. And you've heard of the actions of [the applicant's son] with [the complainant] and also this semi-nude selfie that got onto the iCloud."

And later:

> "And what I'd suggest to you, ladies and gentlemen – you have a number of avenues for doubt to be present for you to be satisfied – or to be not satisfied to the standard of beyond a reasonable doubt, and one of the main reasons I said before is that [the complainant] has

> told vastly different stories about what happened between when she told her mother – the first interview with police, she told about four or five things, and then the second interview, and then in the pre-recorded hearing where she wavered and vacillated in her evidence about [the applicant] actually taking the photographs, and now you hear from her at 17, having said he'd never taken videos before that she remembers, and she – although she rarely saw his penis, saying that in the extremely short time that she watched that video, where you would think maybe it was a blurry picture, that she saw the minute details of ingrown hairs on his penis, and you might wonder how she could possibly say that."

And later:

> "And the video, whilst it is, of course, confronting, I ask you to at least remember it if you don't go back and watch it, but I would ask you to watch it and listen carefully to what [the complainant] says and you might hear her say what I've suggested before: "Is that all right?" And watch the interplay between [the complainant] and the person who is in the video. Asking those words, in my submission to you, is not – certainly not what [the complainant] would have done if this was [the applicant] forcing her to do that. Remember her evidence about him forcing her and gagging. That video, ladies and gentlemen, is gentle and caring. It's not [the complainant] who's crying or being forced to do anything there. And you might have great trouble accepting [the complainant's] evidence that that is [the applicant] in the video with her, especially when she expects you to believe that the reason she knows it's [the applicant] is that in the three seconds she watched that video, she could see his penis that she recognised and after going back and forth for quite some time about what physical features I was asking her about, she says she saw a shaved penis with red ingrown hair pimples on it. Ladies and gentlemen, watch the video of her watching it and you will see the point that she gets up to when she turns away. You might watch it and see the full video, that those things would be impossible to see at that time.

And later:

> "Even if you think that some things may have happened, which is not, obviously, [the applicant's] case in his pleas of not guilty, some things don't necessarily make a relationship. And you might have grave doubts about the truthfulness or reliability of [the complainant's] evidence and you find that you can come to the conclusion easily that there was no relationship if you accept any of her evidence that you might accept the first interview over the second one.
>
> So that the second – the first count, maintaining a relationship is not supported by that and you could be – you couldn't be satisfied beyond a reasonable doubt. You – I'm going to go through a little bit about the – not every single count, but a bit of the offences. The oral rapes.

> You have seen the video of the act of oral sex on a male by [the complainant]. And, again, you know what [the applicant's] case is, but if you do accept the Crown case, that this is [the applicant] in the video, then you might consider that the care and gentleness that I spoke about before that's shown in that video shows that her involvement in the act is with her consent.
>
> Now, if you consider that she was consenting in that video then you would not convict [the applicant] of rape. But you might consider an alternative verdict of indecent treatment for the oral count – oral rape counts of counts 20 and 21. Obviously, if you're not convinced its him then you would acquit.
>
> Now if you come to the conclusion that it's [the applicant] in the video and [the complainant] is consenting, then that determination of consent may have a strong baring on whether you believe [the complainant], firstly, about all of the other counts in relation to where consent is needed, being the rape counts, the anal rapes and the oral rapes that you'll see on your indictment document.
>
> So that you might consider that she told you in the way that she told her evidence that you could accept that she hasn't consented. But here is a count that you might think that she did consent. And you may not be able to accept her evidence on the rest of her story about consent because of that.
>
> That would include count number 12, which you might consider an acquittal or the alternative count of indecent treatment. And that's the other oral rape of putting his penis in her mouth. On that note, you've seen the photographs and I don't mean to put you through more trauma than you deserve in this case.
>
> Obviously it's nothing like [the complainant] has done, but you may need to go back to those photographs and analysis [sic] them as well. And you may remember, or see, that a good number of them is [the complainant] posing and smiling. She looks happy and involved in what is happening."

[33] Evidence was led of the applicant being violent in the household. The evidence was adduced for a limited purpose and attracted careful directions about which there is no complaint. Those directions are set out below.

[34] The applicant did not give evidence or call witnesses.

[35] In the summing up, his Honour was required to direct to the jury on the limited use they could make of the evidence of uncharged violence. His Honour did so in this way:

> "Now, members of the jury, that's the evidence from [the complainant's mother] relating to the directions that I'm now going to be giving you. You can only use that evidence – that is, this evidence of other allegations of violence or threats that I've just summarised for you – if you are satisfied beyond a reasonable doubt. If you do not accept the evidence then that finding will bear on whether or not you accept the complainant's evidence relating to the charges before you beyond reasonable doubt. If you do accept this

> evidence then it can only be used by you in relation to the charges before you in the specific way in which I now direct.
>
> The evidence may be used by you to understand why the complainant acquiesced to the offences, or why she did not make a complaint to anyone when the offences were being committed upon her. You should have regard to the evidence of the incidents of the other violence or threats not the subject of the charges only if you find it reliable. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offences with which he is charged. So it would be quite wrong for you to reason you are satisfied he did those acts on the other occasions. Therefore, it's likely that he committed the charged offence or offences."

[36] In relation to the video file, his Honour directed the jury that:

> "What the prosecution say to you, members of the jury, is that the grey phone – you have evidence that the grey phone had been subscribed in the name of the defendant. You have evidence of the photos that were found on the grey phone. There's the video clips, of course, and showing one of the babies – one of the children of the defendant and [the complainant's mother]. There was a clip on the – another clip found on the phone which, in fact, gives rise to each of counts 22 – sorry, 20 and 21 on the indictment, the movie clip. And the prosecution say that if you carefully look at that clip you can see whoever is filming that clip has got a tattoo on their arm. And you've got evidence of the tattoo that the defendant had, a sleeve tattoo on the right arm, and that you'd be satisfied that that was the defendant who was filming that sexual act. So they rely upon the photos for that.
>
> And, of course, in addition to that, you might recall that the complainant was asked by police – first of all, in relation to her second interview with police in 2015 – whether she identified – could identify any of the photos and she said that she could. Some of the photos she had no recollection as to how they came to be taken and some of the other photos she identified as having been taken by the defendant. And, finally, there is the movie clip that the complainant was shown in her interview with police earlier this year, 2018, in which she identifies the defendant's penis as being the penis that she could be seen having inserted in her mouth in that video clip. So that's the evidence that the prosecution rely upon. And, again, I'll summarise the competing submissions when I come to addresses of counsel.
>
> You'll appreciate Mr Stone's[11] submissions in response that the complainant is mistaken in terms of her identification of whose penis it is. In other words, there's nothing remarkable about it: that the tattoo is not remarkable either when you have a close look at that and you wouldn't be satisfied it was the defendant being depicted in that clip and that, in any event, the phone was one that seems to have

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11 Defence counsel at the trial.

> been passed around. Anyone could have taken the photos or the video clip that was found on it and, therefore, you would not be satisfied it was the defendant. The photos – if you're satisfied beyond a reasonable doubt that it was the defendant who took those photos of the complainant, that is an additional allegation not subject to any specific charge on the indictment. Leaving aside counts 20 and 21, which relate specifically to a movie clip. And count 19 and 21 that relate to a particular image."

And then, specifically in relation to counts 20 and 21:

> "So, in respect to count 20, the rape, if you are satisfied that it is the defendant whom the complainant is performing oral sex on, as depicted in that video, then you might think you'd have no difficulties being satisfied of element 1. And, then, the issue is, in relation to element 2, was the complainant doing that without consent. For the same reasons I've explained to you already in relation in relation to counts 9, 10, 11 and 12, if you are not satisfied, or you have reasonable doubt, as to any of those elements in respect to count 20, then you would need to then consider the alternative verdict of indecent treatment of a child under 16.
>
> The real issue in respect to count 20, members of the jury, given that it's captured on video – you can see very graphically what's occurring – is: are you satisfied beyond a reasonable doubt that that is the defendant whom the child is doing that act on. If you are not so satisfied, then your verdict would be one of not guilty. If you are so satisfied, but you are not satisfied that it was being done without the complainant's consent, for example, then you'd need to consider the alternative verdict. So that's the issue in relation to count 20.
>
> Count 21 is particularised as the defendant permitting the complainant to masturbate his penis, and I'll need to correct the elements in respect of that charge as well, members of the jury. So three of those that I've incorrectly set out there. But, again, members of the jury, the elements, you'll recall, are the same as what I've mentioned in respect of count 19, the defendant permitted the complainant to deal with him. Having a child stroke your penis would be, you might think – would fall within the definition of permitting the complainant to deal with you. Dealing, of course, includes doing any act which, if done without consent, would constitute an assault, and that would certainly be the case, as a matter of law. That such dealing was indecent, that the dealing was unlawful, that the complainant was under 16 and that she was under the defendant's care.
>
> So, members of the jury, in relation to that count, again, it's graphically captured on the video clip. You can see the complainant with her hand on a penis. The issue is: is that the defendant's penis. If you're not so satisfied, if the Prosecution haven't satisfied you beyond a reasonable doubt that what the complainant was engaged in was in respect to the defendant, then your verdict would be one of not guilty. That's in relation to count 21, members of the jury."

[37] There was no objection to the admission into evidence of the video file.

[38] There was no objection to the admission into evidence of the third s 93A interview.

[39] There was no application for specific directions or redirections in relation to the video file.

[40] There was no application for specific directions or redirections in relation to the third s 93A interview.

**The defence case at trial**

[41] The proposed grounds of appeal only concern the admission into evidence of the third s 93A interview although the applicant assumed that if that recording was excluded then the video file would necessarily also be excluded. It is therefore unnecessary to conduct any further analysis of the evidence or the defence. It is sufficient to say, for present purposes, that the applicant's defence at trial was, in general terms:

(i) the complainant did not like the applicant;

(ii) the complainant wished that the applicant would leave the household;

(iii) even if the mobile telephone could be linked to the applicant, there were explanations for the presence of the photographs and video file on the telephone other than that they were there with the applicant's knowledge;

(iv) there are other persons in the complainant's life who were tattooed who could have been the person in the video file;

(v) the complainant was close to the accused's son and there was a suggestion that he could have taken the photographs found on the mobile telephone, but obviously not the video file. The accused's son was between 12 and 14 years of age at relevant times and his arm was not tattooed.

**The appeal**

[42] The grounds upon which the applicant sought to appeal are:

> "Ground 1: The learned trial judge erred by admitting evidence of the complainant in which she purported to identify the defendant's penis in the video subject of Counts 20 and 21; and
>
> Ground 2: The learned trial judge erred by failing to adequately direct the jury with regard to complainant's evidence in which she purported to identify the defendant's penis in the video subject of Counts 20 and 21."

[43] The video file is particularly graphic. It shows serious offences of a sexual nature being committed against the complainant who is obviously under 16 years of age. The applicant rightly submits that if the jury concluded that the video file shows the applicant committing the offences against the complainant, then not only would the jury almost inevitably conclude guilt in relation to counts 20[12] and 21, but the

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12 Or the alternative verdict open; indecent treatment of a child, *Criminal Code*, s 210.

evidence would be highly damaging to the applicant's prospects on the other counts which have a sexual element.

[44] As already observed at trial, there was no objection to the admission of the evidence now challenged and no complaint about the directions which were given. It was not argued on appeal that the video file or the third s 93A interview were inadmissible but it was submitted that both ought to have been excluded in exercise of discretion. The applicant accepts that because there was no objection to the evidence taken at trial, he cannot succeed on an appeal against conviction unless he demonstrates that the admission into evidence of the video file or the third s 93A interview,[13] and/or any failure of the trial judge to give further directions about the use of the video file and/or the third s 93A interview has caused a miscarriage of justice.[14]

**The grounds of appeal**

***Ground 1: The third s 93A interview and the video file ought not to have been admitted into evidence***

[45] The submission was that the third s 93A interview ought to have been excluded in exercise of discretion. There is no proposed ground of appeal asserting that the video file should have been excluded. However, it was submitted that if the third s 93A interview was excluded then the video file would also be excluded as there was no, or no sufficient, evidence identifying the applicant as the male shown in the video file.

[46] In my view, it does not follow that the video file would be excluded if the third s 93A interview was excluded. Without the s 93A interview, the video file still has significant probative force. It shows a person of the general physical description as the applicant, with a sleeve of tattoos, offending against the complainant in a way described by her in the second s 93A interview. The video file was connected to the applicant as it was found on the mobile telephone which could be linked to him.

[47] The submission that the third s 93A interview and the video file ought to have been excluded in exercise of discretion immediately hits the hurdle that the learned trial judge was not asked to exclude the evidence on discretionary grounds. Nevertheless, it was submitted that the admission into evidence of the recordings has caused a miscarriage of justice.

[48] Section 130 of the *Evidence Act* provides as follows:

> "**130 Rejection of evidence in criminal proceedings**
>
> Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

[49] Section 130 does not create a discretionary basis upon which the court may exclude evidence.[15] The section simply preserves the recognised bases for discretionary

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13 That is the failure to exclude it on discretionary grounds.
14 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38].
15 *R v Roughan & Jones* (2007) 179 Crim R 389 at [75].

exclusion. What is relied upon here is the *Christie* discretion,[16] namely that a trial judge may exclude evidence where its probative value is outweighed by its prejudicial effect.

[50] The *Christie* discretion is often the basis for the exclusion of identification evidence.[17]

[51] In *Festa v The Queen*,[18] McHugh J said:

> "51 But the weakness of relevant evidence is not a ground for its exclusion. It is only when the probative value of evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task."

[52] The law concerning the approach to the exercise of the *Christie* discretion was authoritatively pronounced in *R v Hasler; Ex parte Attorney-General (Qld)*[19] as follows:

> "It is desirable that I attempt to summarise the conclusions I have reached from reviewing the relevant authorities on this question.
>
> (a) The exercise of the discretion is not a simple balancing function in which the judge decides whether the overall effect of the evidence is more prejudicial to the accused than it is beneficial to the Crown case. Sometimes the discretion is elliptically described in headnotes and elsewhere as a 'discretion to exclude where prejudicial value outweighs probative value'. Such abbreviations should not be permitted to modify or distort the true test, and should be recognised as mere shorthand references to it.
>
> (b) Exclusion should occur only when the evidence in question is of relatively slight probative value and the prejudicial effect of its admission would be substantial. Without dissenting from any of the five formulations quoted above, it is apparent that those stated by Barwick CJ and by Stephen and Aickin JJ in *Bunning v Cross* give proper recognition to these factors and that they may safely be used as concise working statements of the principle.
>
> (c) In performing the balancing exercise, the only evidence that should be thrown into the 'prejudice' scale is that which shows discreditable conduct other than those facts which directly tend to prove the offence itself. The 'prejudice' cannot refer to the damage to the accused's case through direct proof of the offence. To speak of a 'balancing' of prejudicial effect against probative value of such evidence is absurd, because the weight

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16 *R v Christie* [1914] AC 545.

17 *R v Carusi* (1997) 92 A Crim R 52 at 55-56; *R v Murphy* [1996] 2 Qd R 523 and *Pitkin v The Queen* (1995) 69 ALJR 612.

18 (2001) 208 CLR 593.

19 [1987] 1 Qd R 239 at 251.

> of each will be exactly the same. If prejudice arising from strict proof of the case were to go into the 'prejudice' scale, then the additional prejudicial effect would always tip the scales and the evidence would never be admissible." [20]

[53] The applicant submits that the relevant weaknesses in the identification which should attract a favourable exercise of discretion are:

> "a. the most recent time the complainant claimed to have seen the applicant's penis was in 2014. She viewed the video, for the first time, in 2018 and purported to make the identification;
>
> b. the complainant had previously participated in two s 93A recording regarding the applicant. She must have known, at the time of viewing that video, that she was giving an interview to be used in the applicant's trial;
>
> c. the video picture quality was not high;
>
> d. the complainant stated she only viewed the footage for three seconds before making the identification; and
>
> e. on the complainant's evidence, she had only seen the applicant's penis on a few occasions."

[54] The submission was, that given those alleged weaknesses, the third s 93A interview evidence was of such low probative value as to justify exclusion.

[55] In my view, the third s 93A interview did not record an act of identification of the applicant in the sense as understood in cases such as *Alexander v The Queen*[21] where this was said by Gibbs CJ:

> "Evidence given by a witness identifying an accused as the person who he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. The reasons for this were explained in *Davies and Cody v. The King*. In particular there is the danger that the witness will too readily come to believe, without any true recollection, that the man charged is the man whom he had previously seen, particularly if his own memory has become dim and there is some resemblance between the two men. The courts in England and Australia have long recognized the danger of acting upon evidence of identification made in those circumstances. It has accordingly become established practice for a witness to be asked to identify the accused at the earliest possible opportunity after the event, and for evidence to be given of that act of identification."[22]

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20 Page 251.
21 (1981) 145 CLR 395.
22 At 399.

[56] What the complainant actually did was to look at the video file and see a recording of what had happened to her. If this was not clear during the third s 93A interview, it was made very clear in the second s 21AK evidence when she described the event shown in the video file as "the most traumatic thing that has happened in my life". Consequently, the questions asked by the police officer about how the complainant knew that the male was the applicant (which led to the question of identifying features of his penis) were unnecessary. The complainant had, during the second s 93A interview, complained that her stepfather had sexually abused her for an extended period. The video file she was shown during the third s 93A interview was a recording of one of those episodes of abuse. The complainant did not have to "identify" the appellant. She knew it was him.

[57] However, both counsel and the trial judge dealt with the third s 93A interview on the basis that the complainant had "identified" the applicant in the video file by reference to characteristics of his penis.

[58] Even on that approach, there is no basis to exclude either the video file or the third s 93A interview. In particular:

(i) the complainant had told police in the second s 93A interview that the applicant had forced her to suck his erect penis. That is exactly what is shown in the video file;

(ii) the complainant is unquestionably the child shown in the video file;

(iii) no-one suggested any physical characteristics of the adult shown in the video file which were different to physical characteristics of the applicant;

(iv) the male depicted in the video file had a sleeve of tattoos on his right arm. The applicant, at all relevant times, bore a sleeve of tattoos on his right arm;

(v) the complainant was asked how she identified the applicant. She said she recognised his penis and later, in the second s 21AK evidence, nominated a characteristic which was then verified by other evidence;

(vi) in the second s 93A interview, almost three years before she was shown the video file, the complainant accurately stated that the applicant's pubic area was hairless.

(vii) There was no issue in the case that a second offender might have recorded himself abusing the complainant nor was any such case put to the complainant.

[59] Most telling is that when pressed to specify characteristics of the applicant's penis that were significant, the complainant could do so. She said under cross examination that the applicant's penis was shaved. That information that the applicant's pubic hair was shaved was confirmed by the complainant's mother, the applicant's sexual partner at the time. Therefore, the complainant, a girl of about 12 years of age at the time, was able to describe her stepfather's genitals, at least to the point of saying that his pubic area was shaved. The complainant's evidence was also supported by the forensic examination of the applicant which showed that, at least at the time of that examination, the applicant's genitals were shaved.

[60] The highly probative force of the evidence to which objection is now taken was not missed by defence counsel. I do not mean to be critical of him. Sometimes desperate situations call for desperate measures. After submitting that the jury

would have reasonable doubt as to the identity of the male in the video, he submitted as an alternative hypothesis that they could convict of counts 20 and 21 but then acquit of all the other counts because the video file showed the applicant as "kind and caring" which was inconsistent with the complainant's account of the applicant being aggressive and violent. That was said to contradict her account that the offending was forced on her.

[61] The third s 93A interview contained relevant evidence. Quite apart from her identification of the applicant's penis, the complainant identified herself as the child in the video file, a child against whom a male is seen to be offending sexually in a manner she described in the third s 93A interview.

[62] Both the third s 93A interview and the video file were highly relevant pieces of evidence which gave substantial support to the complainant's account of long-term sexual abuse at the hands of the applicant. No discretionary basis has been identified for their exclusion and therefore, no miscarriage of justice was occasioned by their admission.

***Ground 2: The failure to give a direction***

[63] It was submitted that the trial judge ought to have pointed out to the jury the weaknesses in the identification evidence that were identified on appeal. The submission is based primarily upon the High Court's decision in *Domican v The Queen*.[23] There, the court emphasised the need in an appropriate case for a trial judge to identify any weaknesses in the identification evidence and to draw those to the jury's attention with appropriate warnings.

[64] *Domican* and other cases which have considered the adequacy of a judge's warning against reliance upon evidence of an act of out of court identification concern circumstances far removed from the present. The cases concern witnesses who are attempting to identify an offender who they saw perhaps fleetingly during the commission of the offence.[24]

[65] The dangers arising in cases relying upon identification evidence were explained by Gibbs J (as his Honour then was) in *Kelleher v The Queen*[25] when his Honour said:

> "It is now well recognized that grave miscarriages of justice are liable to occur in criminal cases by reason of the fact that witnesses, however honest and careful, may make mistakes in identification, particularly where the person identified was unknown to the witness before the commission of the crime. Experience, including recent experience, has shown that such miscarriages can occur even when all the precautions provided by the law as safeguards against mistaken identification have been fully observed. <u>It is therefore obviously necessary that at a trial where the evidence implicating the accused is evidence that he was identified by a witness or witnesses who were not previously acquainted with him, both judge and jury should be constantly alert to guard against the possibility that the</u>

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23 (1992) 173 CLR 555.

24 *Kelleher v The Queen* (1974) 131 CLR 534 at 550; *Davies & Cody v The King* (1937) 57 CLR 170 at 182; *Domican v The Queen* (1991) 173 CLR 555 at 560.

25 (1974) 131 CLR 534.

> evidence may be mistaken and an innocent man convicted." (emphasis added)

And later, as the desirability of a warning:

> "However, it seems to me that although it is perfectly true that the adequacy of a summing up can only be decided in the light of the circumstances of the particular case, and that where a warning is necessary no particular form of words is required, it is in practice generally desirable that where the case for the prosecution includes evidence of visual identification by a person previously unfamiliar with the accused, an appropriate warning should be given to the jury, since jurors may not appreciate as fully as a judge may do, or even at all, the serious risk that always exists that evidence of that kind may be mistaken. The failure to give an adequate warning where one is required may have the result that the conviction must be quashed – a course that has been taken in a number of recent cases in Australia." (emphasis added)

[66] The dangers inherent in identification evidence do not exist here. The applicant was well known to the complainant and the video file shows offending which the complainant had described in the second s 93A interview.[26]

[67] It is not in every case of identification that a warning must be given.[27] Even if the third s 93A interview was an exercise of identification of the applicant rather than the identification of an event, there was no need for a warning. Indeed, it is difficult to imagine the form of any warning which would have been of assistance to the applicant.

[68] What is suggested is that the warning would have firstly drawn the jury's attention to the quality of the images in the recording. However, while the jury may not be able to discern the particular tattoos on the adult's right arm, they clearly enough could see the back of a person whose right arm is heavily tattooed and who no-one at the trial suggested had physical characteristics different to that of the applicant.

[69] It was then submitted that the jury should have been warned as to the fleeting opportunity of the complainant to view the footage before making the identification and also her limited opportunity during the alleged offending to have seen the applicant's penis. Whatever could be said about those two aspects becomes all but irrelevant given that the complainant accurately described the applicant's penis as being shaved.

[70] No miscarriage of justice was occasioned by any failure of the trial judge to draw the jury's attention to, and warn the jury about, any alleged shortcomings in the complainant's identification of the applicant as the adult in the video file.

[71] There is no substance in either of the grounds of appeal and so it was appropriate to dismiss the application for an extension of time in which to appeal.[28]

[72] For those reasons, I joined in the orders of the court refusing the application.

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26 See the discussion by Teague J in *R v Marijancevic* (1993) 70 A Crim R 272 at 275 – 279.
27 *R v Asaad* [2017] QCA 108 at [23]-[32].
28 *R v Tait* [1999] 2 Qd R 667, *R v Bodnar* [2001] QCA 127, *R v Hawks* [2019] QCA 181 at [4].