SUPREME COURT OF QUEENSLAND

CITATION:	*R v BDI* [2020] QCA 22
PARTIES:	**R** **v** **BDI** (appellant)
FILE NO/S:	CA No 303 of 2018 DC No 654 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 5 November 2018 (Porter QC DCJ)
DELIVERED ON:	18 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2019
JUDGES:	Boddice and Jackson and Brown JJ
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was convicted of seven counts of sexual offences following trial –where the complainant provided details of the complaint which was then recorded and transposed into a report – where that report was provided to detectives in order to investigate – where a formal witness statement was obtained from the complainant at a later date – whether the details of the complaint contained in the report were admissible as preliminary complaint evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was convicted of seven counts of sexual offences following trial – where the prosecution lead psychiatric evidence at trial of the complainant's mental state – where the psychiatrist did not treat the complainant – where the psychiatrist gave evidence from medical notes – whether the evidence of the psychiatrist was inadmissible – whether the directions given to the jury were wrong in law CRIMINAL LAW – APPEAL AND NEW TRIAL –

APPEAL AGAINST CONVICTION – CONDUCT OF PROSECUTOR OR PROSECUTION – where the appellant was convicted of seven counts of sexual offences following trial – where the prosecution had referred to the complainant as "victim" in closing – where the prosecution had criticised the defence counsel in closing – whether the prosecution's closing address wrongly influenced the jury causing an unfair trial

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4A

Flori v Winter & Ors [2019] QCA 281, considered
R v AW [2005] QCA 152, considered
R v BCZ [2016] QCA 232, considered
R v CAU [2010] QCA 46, considered
R v DBA (2012) 219 A Crim R 408; [2012] QCA 49, considered
R v Mahony [2019] QCA 131, considered
R v MCO [2018] QCA 140, considered
R v MCT [2018] QCA 189, considered
R v NM [2013] 1 Qd R 374; [2012] QCA 173, considered
R v Riera [2011] QCA 77, considered
R v SBV [2011] QCA 330, considered
Suresh v The Queen (1998) 72 ALJR 769; (1998) 153 ALR 145; [1998] HCA 23, considered

COUNSEL: S G Bain for the appellant
D Balic for the respondent

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

[1] **BODDICE J:** I agree with Brown J.

[2] **JACKSON J:** I agree with Brown J.

[3] **BROWN J:** The appellant was convicted of seven offences following a trial, namely:

(1) Three counts of rape (domestic violence offence), for which the appellant was sentenced to eight years' imprisonment on each count;[1]

(2) One count of common assault (domestic violence offence), for which the appellant was sentenced to six months' imprisonment;

(3) One count of assault with intent to commit rape (domestic violence offence), for which the appellant was sentenced to two years' imprisonment; and

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[1] The appellant was found not guilty of an additional count of rape, charged as count 7 on the indictment.

(4) Two counts of indecent treatment of a child under 16 who is a lineal descendent (domestic violence offence), for which the appellant was sentenced to two years' imprisonment on each count.[2]

[4] The appellant appeals against his conviction on the following bases:

(1) The ruling by the trial judge that the evidence of the complainant given in a recording with Officer Weibel was admissible as evidence of preliminary complaint constituted a wrong decision on a question of law; (**Ground 1**)

(2) The evidence of Dr Tracey was inadmissible and, further, the trial judge failed to direct the jury properly as to how they could use the doctor's evidence; (**Ground 2**) and

(3) The closing address of the Crown prosecutor was inappropriate and intemperate. (**Ground 3**)

Background

[5] The appellant was convicted of sexual offending against his biological daughter, which was charged as having occurred between 2000 and 2005. She was aged between 14 and 19 during the time period alleged in the indictment. Her initial complaint to the police occurred on 5 May 2013 and was the subject of a recording by a police officer, namely Officer Weibel. The recording was led at trial as evidence of preliminary complaint and is the subject of Ground 1 of the appeal.

[6] Between October 2014 and December 2014, the complainant was diagnosed as suffering from drug-induced psychotic episodes. She was cross-examined about those episodes. During the trial, the Crown called Dr Tracey, a psychiatrist, to give evidence. He had not personally treated the complainant, but was a consultant psychiatrist for the acute care team at the Princess Alexandra Hospital ("**PA Hospital**") at the time the complainant was treated there. He provided a summation of what had occurred while the complainant had been an inpatient based upon her medical records, which he had reviewed. He also provided his medical opinion as to the meaning of drug-induced psychosis and its symptoms, as well as the general duration of, and appropriate treatment for the condition. In that regard, he commented specifically on the effectiveness of the treatment given to the complainant. His evidence was not objected to, nor were his opinions challenged. He was cross-examined by the defence to draw admissions favourable to the defendant, particularly as to the effects of drug-induced psychosis. Dr Tracey's evidence and the direction given in respect of his evidence are the subject of Ground 2.

[7] During closing addresses, the Crown prosecutor referred to the complainant as being a victim of sexual abuse. The appellant claims that by doing so the Crown prosecutor effectively reversed the onus of proof. Further, in her closing address, the Crown prosecutor was critical of the defence counsel for his cross-examination of the complainant, asserting that counsel had failed to cross-examine with the necessary "certain level of respect and a certain level of care" for the complainant.[3] The closing address of the Crown prosecutor is the subject of Ground 3. The appellant's counsel conceded that it might not of itself be enough to substantiate a

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2 All sentences of imprisonment were ordered to be served concurrently.

3 AB I 19/40.

ground of appeal, but contended it should be looked at in combination with the other grounds of appeal.

Ground 1 - Preliminary complaint

[8] The complainant attended the Ipswich Police Station on 5 May 2013 without a prior appointment. She told the officer on counter duties, Officer Weibel, that she wanted to make a rape complaint.[4] Officer Weibel responded that she would make enquiries to see whether an officer from the Criminal Investigations Branch was available.[5] As no such officer was available, she gave evidence that she was advised by the Branch to obtain details and furnish a report to then be forwarded to the detectives to investigate.[6]

[9] Officer Weibel subsequently took the complainant to a private room inside the Ipswich Police Station and recorded a conversation with the complainant in which the complainant was asked questions. Officer Weibel took notes during the conversation. The complainant identified some five incidents in which the appellant was said to have sexually assaulted her. Officer Weibel asked for further details from the appellant, although it was not suggested she sought to lead the complainant or asked any impermissible questions. Officer Weibel advised the complainant that she would provide a report to the Criminal Investigation Brach and they would be in touch.[7] The recording was approximately ten minutes long.

[10] Defence counsel objected at the trial to the admission of the recording on the basis that the conversation was not a "preliminary complaint" within the meaning of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) (**"CLA"**), but a "formal witness statement" given to a police officer.

[11] Section 4A of the CLA provides for evidence of preliminary complaint to be admissible, irrespective of when it was made.

[12] Section 4A provides as follows:

> "(1) This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.
>
> (2) Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.
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> (3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
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> (4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable

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4 AB II 269/45-46.
5 AB II 270/1-5.
6 AB II 270/7-8.
7 AB II 271/24-26.

only because of the length of time before the complainant made a preliminary or other complaint.

(5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

(6) In this section—

complaint includes a disclosure.

preliminary complaint means any complaint other than—

(a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or

(b) a complaint made after the complaint mentioned in paragraph (a).

Example—

Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent (***complaint 1***). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer (***complaints 2 and 3***). The complainant visits the local police station and makes a complaint to the police officer at the front desk (***complaint 4***). The complainant subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence (***complaint 5***). After a criminal proceeding is begun, the complainant gives a further formal witness statement (***complaint 6***)."

Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints.

[13] The learned trial judge found that, on the facts, the recording was not a formal witness statement and was admissible as a preliminary complaint. As it was not in contention that the complaint was given to a police officer and given in anticipation of a criminal proceeding in relation to the alleged offences, his Honour stated that the issue for determination was whether the complaint to Officer Weibel was a "formal witness statement". His Honour stated:[8]

> "In my view, the phrase "*formal witness statement*" must be seen to distinguish between the statement intended to be referred to and other statements or complaints. The use of the adjective "formal" indicates that it is not just anything which can be characterised as a witness statement which is caught by the provision. The ordinary meaning of "formal" is an act done in accordance with the convention or etiquette, or officially sanctioned or recognised. It is to be contrasted with a witness statement which is informal in

8 AB II 322/25-47.

> character. Unfortunately, no authority of assistance was found by counsel despite efforts, and the lack of internet resources meant that at this important stage in this trial I was…
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> …[u]ninstructed by authority, therefore, I consider that the complaint to Constable Weibel was not a formal witness statement. That is because the statement was taken without particular formality. It was recorded on a device put on the table. It was made the subject of notes. There was no suggestion in evidence before me, at least, that it was going to be typed up, or that any provision for an opportunity for it to be read or confirmed as accurate. Further, while there was no evidence [the complainant] was told to return to give a more fulsome statement, the fact is this is what occurred later, presumably after an appointment was made for that to occur, consistent with the one helpful proposition contained in the example relating to the posited complaint 5. Further, it's relevant, in my view, to some degree that Constable Weibel was the officer who met [the complainant] at the desk and took her details in a room and didn't appear to be held out as an investigating officer who was going to be responsible for conducting the matter."

[14] While his Honour considered the matter was finely balanced, he concluded, having adopted an objective approach in all the circumstances, that the recording was not sufficiently formal to constitute a formal witness statement. He found that the evidence in the tape recording comprised evidence of preliminary complaint, and admitted it into evidence. However, to avoid any unfairness being caused to the defendant by excessive weight being given to that piece of evidence, his Honour ordered that it not be available in the jury room.[9]

[15] His Honour gave the appropriate direction in his summing up about the limited use to which the jury could put evidence of preliminary complaint.

[16] The issue for this Court is therefore the same as was considered by the learned trial judge, namely, whether the recording constituted a formal witness statement for the purposes of s 4A of the CLA, rather than being evidence of a preliminary complaint.

[17] The appellant's counsel contends that the recording was not a preliminary complaint because the police officer asked questions in order to obtain further details. That exchange, counsel contends, was "at the very least quite a comprehensive summary of the offences alleged against the appellant".[10] According to the appellant, it is the level of detail contained in the exchange that causes it to be a formal witness statement, rather than the mere fact that it was recorded.[11]

[18] The respondent, however, contends that it was a preliminary complaint, being in the nature of a "disclosure" contemplated by s 4A(6) of the CLA, particularly having regard to the decision of McMurdo P in *R v AW*.[12] The mere fact that it was recorded and that the disclosure was made to a police officer does not exclude it from being a preliminary complaint, given the wording of the section. As to the meaning of formal witness statement under s 4A, the respondent contends that the

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9 AB II 323/1-16.
10 Outline of Submissions for the Appellant, p 3.
11 T8-1/30 – T1-9/15.
12 [2005] QCA 152.

reference to the term "formal", in conjunction with the words "given in, or in anticipation of, a criminal proceeding", must mean that in context, such a statement is one that can be formally proven as a statement in court proceedings. The complaint to Officer Weibel was not, according to the Crown, in that category.

Consideration

[19] Although of common parlance, "Formal witness statement" is a term clothed in ambiguity. Whether or not a statement constitutes a preliminary complaint or formal witness statement depends on the factual circumstances in which it occurred. The legislation seeks to provide some guidance as to the distinction between a "preliminary complaint" and a "formal witness statement" by providing different factual examples. They contrast the situation in which a complainant makes a complaint to a police officer at the front desk of a local police station, which it is said would be a preliminary complaint, with the situation in which a complainant subsequently attends an appointment with the police officer and gives a formal witness statement in anticipation of a criminal proceeding in relation to the alleged offence, which is said not to be a preliminary complaint.

[20] The appellant's counsel accepts that the statement made by the complainant to Officer Weibel when she first went to the counter and was asked why she was at the station, to which she responded, "I'm here on a sexual charge on me, brought up on my father…[i]t's time to speak up out about what happened"[13] was a preliminary complaint, but submitted that the subsequent recording of the conversation that took place in a private room was not.

[21] I agree with the learned trial judge that the question is a finely balanced one in this case but that the recording is a preliminary complaint.

[22] The question of what "formal witness statement" means has not been addressed in the case law. However, the following propositions can be derived from the authorities:

(1) The definition of "complaint" in s 4A(6) of the CLA includes a "disclosure". According to McMurdo P in *R v AW*,[14] adopting the ordinary meaning of the term, disclosure "includes a revelation or disclosure after questioning, even questioning which might suggest a particular response". Her Honour considered that in enacting s 4A, the legislature "plainly intended that the jury have the full context of any preliminary complaint or disclosure so as to most accurately assess the credibility (or lack of credibility) of the complainant and the complaint".[15]

(2) In *R v Riera*,[16] Chesterman JA considered that "the 'how and when' of a preliminary complaint about the alleged commission of the offence includes matters beyond the bare account of the offence".

(3) To be admissible, the preliminary complaint evidence must be "unambiguously about conduct which was either constituted by or which at least included the incidents which were the subject of charges".[17]

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13 AB II 389.
14 [2005] QCA 152 at [26].
15 *R v AW* [2005] QCA 152 at [26]; followed in *R v NM* [2013] 1 Qd R 374 at [23], per Fryberg J.
16 [2011] QCA 77 at [7]; followed in *R v NM* [2013] 1 Qd R 374 at [24], per Fryberg J.
17 *R v BCZ* [2016] QCA 232 at [37]-[38], per McMurdo JA; referring to *R v NM* [2013] 1 Qd R 374 at 381.

(4) According to Fraser JA in *R v DBA*,[18] "the only formal witness statement by the complainant to police which excludes evidence of a subsequent complaint is a statement given 'in' or 'in anticipation of' a criminal proceeding in relation to the same alleged offence which is the subject of the subsequent complaint". In that case, Fraser JA found that statements relating to two uncharged counts were admissible as preliminary complaint evidence, despite the fact that the complainant had made a formal witness statement to the police in relation to other offences which were the subject of charges. There were no proceedings on foot in relation to the uncharged counts at the time the statements were given, and the statement of the complaint was not given in anticipation of such a proceeding since there was no evidence available to the authorities which suggested even a possibility of a criminal proceeding against the appellant relating to those counts. The evidence about the complainant's disclosures was therefore admissible in relation to those counts. In his reasons, his Honour noted that neither of the previous decisions of *R v RH*[19] or *R v Riera*[20] were authority for the view that a narrow meaning of the section should generally be adopted in preference to its natural and literal meaning.

[23] The present case involves the statutory interpretation of "formal witness statement" in s 4A of the CLA.

[24] In *Flori v Winter & Ors*,[21] Fraser JA[22] recently summarised the approach to statutory interpretation by reference to the High Court decision in *R v A2*[23] as follows:

> "The method of construing a statute was recently restated by Kiefel CJ and Keane J, with whose reasons Nettle and Gordon JJ agreed, in *R v A2*. The task is to ascertain the intended meaning of the statutory text. The construction exercise must focus upon a consideration of the statutory words in their context. The context includes surrounding statutory provisions, other aspects of the statute and the statute as a whole, any mischief in the pre-existing state of law the statute was designed to address, and an evident purpose of the statute. Under the *Acts Interpretation Act* 1954 (Qld) an interpretation of a provision of an Act that will best achieve its purpose is to be preferred to any other interpretation, and consideration may be given to extrinsic material, including a report of a Royal Commission, Law Reform Commission or similar body that was laid before the Legislative Assembly, an explanatory note or memorandum relating to the Bill, and the speech made to the Legislative Assembly by the member when introducing the Bill. The extrinsic material may be considered to provide an interpretation of an ambiguous or obscure provision, to provide an interpretation that avoids a manifestly absurd or unreasonable result of the ordinary meaning of the provision, or in any other case to confirm the

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18 (2012) 219 A Crim R 408 at [20], Daubney and Applegarth JJ agreeing.
19 [2005] 1 Qd R 180.
20 [2011] QCA 77.
21 [2019] QCA 281 at [22].
22 With whom Buss AJA and Henry J agreed.
23 (2019) 373 ALR 214.

> interpretation conveyed by the ordinary meaning of the provision." (footnotes omitted)

[25] The Explanatory Notes to the *Evidence (Protection of Children) Amendment Bill* 2003 (Qld), by which the *Criminal Law (Sexual Offences) Act* 1978 (Qld) was amended, do not clarify what is meant by "first formal witness statement". However, according to the Explanatory Notes, the stated purpose of s 4A of the CLA was to reflect the following comments of Thomas JA in *R v LSS*:[24]

> "In my view it would assist any jury in a case involving a sexual complaint to know how and when any complaint about the conduct of the accused person first emerged. Evidence of this kind is pivotal to explaining how the complainant comes to be in the witness box and the accused in the dock. An assessment of the truth of the complaint can hardly be attempted without some knowledge of how it first saw the light of day. It is my view that evidence of first complaint should always be receivable in cases involving sexual misconduct, as evidence which permits a better understanding of the story, irrespective of when it was made. To say that an early complaint is merely a bolster, or a later complaint a drawback to the complainant's credibility is an oversimplification. The circumstances of first emergence of the complaint may enable the story to be seen in a different light. To take just one of the factors involved in relation to such a complaint, the identity of the person chosen by the complainant may give an insight into the complainant's motivation. For example if it is made to a member of a peer group or a person from whom a complainant arguably might try to gain attention, some circumspection might be called for. This if added to other features might in the circumstances of a particular case raise reasonable doubt that the complaint may have been an irresponsible one and that the complainant became locked into it, or unwilling to withdraw it when further steps were taken in consequence of it. Conversely, in a family with a dominant father or step-father, and an apparently selfish or weak mother who is dependent upon the financial support of the male in the household, it might be easy to accept that a molested child sees no point in sharing her misery with her mother. Such factors in my view are often far more telling than the single circumstance of recency or lateness."

[26] The stated purpose does not support the adoption of a narrow meaning of "preliminary complaint", which is further supported by the examples given in the section.[25]

[27] The appellant contends that the fact that the recording came about as a result of questions being asked by a police officer in the course of the complainant outlining her complaints about the alleged conduct means that it went beyond a "preliminary complaint" under s 4A of the CLA. However, that is unsupported by authority. Nor with respect can it be the basis of distinction between a preliminary complaint and formal witness statement.

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24 (1998) 103 A Crim R 101 at 105.

25 An example in an Act of the operation of a provision of the Act is part of the Act: s 14(3) *Acts Interpretation Act* 1954 (Qld).

[28] Consistent with the fact that under s 4A of the CLA, a complaint includes a disclosure and disclosure is a term with a broad meaning, this Court recognised in *R v AW* that a disclosure includes a revelation or disclosure after questioning, even questioning which might have suggested a particular response.[26] Thus, in the present case, Officer Weibel's questioning, which the defence accepts was not of a leading nature, does not of itself transform the exchange between Officer Weibel and the complainant into a formal witness statement. Nor does the fact that the exchange was recorded. The use of body-worn cameras and other methods of recording, rather than simply relying on notes recorded in a police notebook, is now a common procedure adopted by police to ensure transparency in police questioning in many situations. Recording the asking of questions and answers cannot, of itself, transform the statements made by a complainant into a "formal" witness statement. Similarly, a statement would not be excluded from being a preliminary complaint by the mere fact that it is made to a police officer, as is evident from the examples given in the section.

[29] Although witness statements are a standard feature of legal practice, the term is not one which has an accepted meaning.

[30] Some assistance can be derived from the ordinary meaning of the words used in the legislation. The ordinary meaning of "formal" in this context would be "valid or correctly so called because of its form; explicit and definite" or "in accordance with recognised forms or rules".[27] "Statement" is defined to relevantly be "a formal account of facts, especially to the police or in a court of law".[28] There are not necessarily any formal requirements for such a statement.[29] In the present context, a "formal witness statement" would be a record of a witness' evidence in the accepted form of a written statement or a record of interview of a person's evidence taken by a police officer and prepared for the purpose of court proceedings, which would generally represent the person's evidence in chief in relation to the alleged offences. That is supported by s 4A(6)(a), which identifies the first formal witness statement being "given in, or in anticipation of, a criminal proceeding in relation to the alleged offence". The fact it is a witness statement prepared as evidence in chief for the purposes of a criminal proceeding in relation to particular offences is given some support by the decision of *R v DBA*.[30] In that case, the fact that the complainant had already given a formal witness statement to police in relation to particular offences did not prevent a subsequent disclosure in relation to other, previously uncharged offences from constituting a preliminary complaint.

[31] Although the CLA does not make any reference to the *Justices Act* 1886 (Qld), it is pre-existing legislation containing provisions to relevant committals. Certain provisions in the *Justices Act* give some support for the above meaning of "formal witness statement". Section 110A of the *Justices Act* provides for written witness statements to be tendered in lieu of oral testimony in committal proceedings. Section 110A provides that the contents of the statement must be admissible to the same extent as they would be if the contents of the statement had been given by the oral evidence of the person who made the written statement. The provision further requires the statement to be signed by the person making it, with either a declaration

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26 [2005] QCA 152 at [26].
27 Australian Oxford Dictionary online, 2nd Edition, Oxford University Press, 2004.
28 Australian Oxford Dictionary Online, 2nd Edition, Oxford University Press, 2004.
29 As opposed to being formally sworn like an affidavit.
30 (2012) 219 A Crim R 408.

under the *Oaths Act* 1867 (Qld) or with a written acknowledgement that the statement is true to the best of his or her knowledge and belief and that the person is aware that he or she is liable to prosecution for stating anything known to be false.[31]

[32] While a statement would not necessarily have to comply with the requirements of the *Justices Act* before it would constitute a "first formal witness statement" under the CLA, the provisions of that Act do support the interpretation that such a statement is one which contains admissible evidence of the witness relevant to the charged offences which, is acknowledged in some way as representing their evidence and is prepared for the purposes of legal proceedings.

[33] In my view, the trial judge's ruling that, although it was the subject of a recording where Officer Weibel also took notes, the disclosure made in this case was a preliminary complaint and not a formal witness statement, was correct in the circumstances. Those circumstances include that the complainant had walked into the station to make a complaint without any advance warning of her intent. The details of the complaint were taken by the front-of-counter officer, following her being requested to take some details and pass them on to investigating officers when an investigating officer was not available. Officer Weibel did not suggest to the complainant that she was doing anything other than asking her details of why the complainant was at the station. While the police officer asked some questions, those questions sought to clarify matters being raised by the complainant, and the process only took some 10 minutes. The officer concerned gave evidence that she did not intend it to be a formal statement.[32] She did not state to the complainant that the discussion was intended to be a formal record of her evidence or to be reduced to a statement for her to review, but rather stated that it would be used for a report to be provided to the Criminal Investigation Branch, which would be in contact with the complainant.

[34] The circumstances bear some similarity to the example given under s 4A described as "complaint 4",[33] save that the officer took the complainant into a private room to record their exchange, rather than asking questions and recording the exchange at the front counter. The fact that questions were asked of the complainant does not exclude it from being a disclosure about the alleged sexual offences that constituted a preliminary complaint.[34] The complainant subsequently provided a more fulsome statement.[35]

[35] I do not find that the document was improperly admitted as a preliminary complaint. This ground of appeal is not established.

Ground 2 – Evidence from Psychiatrist and Directions Given

Evidence from psychiatrist

[36] Prior to the trial, the defence had made the complainant's drug use and psychiatric state a live issue in terms of her reliability as a witness. In the pre-trial recording, the complainant was cross-examined about her use of cannabis and

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31 *Justices Act* 1886 (Qld), ss 110A(6A) and 110A(6C).
32 AB II 387.
33 "The complainant visits the local police station and makes a complaint to the police officer at the front desk."
34 *R v AW* [2005] QCA 152.
35 AB II 322/40-44.

methylamphetamine and her having been the subject of an emergency examination order in October or November of 2014, at which time she was hearing voices which she struggled to distinguish from reality and was complaining about "thought insertion".[36] It was put to her that at that time, she was slipping into a drug-induced psychosis,[37] and that the allegations against her father were the result of thought insertion, in which she received thoughts from an "external source" that then became her own.[38] It was further put to the complainant that she was diagnosed with a substance-induced psychotic disorder when she was admitted to the hospital from October to November 2014, that she was told by doctors that her thoughts were disorganised and that she told doctors at the time that she had been abusing methylamphetamine for 18 months. It was also put to her that she had presented with a substance-induced psychotic disorder in the context of methylamphetamine and cannabis use and had reported auditory hallucinations. She was asked about reporting bizarre delusions.[39] It was further put to the complainant that it was only after she had begun using methylamphetamine that she "developed these delusional thoughts" in her mind, which she denied.[40] The complainant did not agree with the aforementioned matters put to her in cross-examination, save in a couple of respects. For example, she agreed that when she was taken to hospital she had reported having auditory hallucinations, which she believed were of her brother.[41]

[37] Subsequently, at the trial, the Crown led evidence from Dr Tracey, who was a consultant psychiatrist at the hospital unit where the complainant was treated and had reviewed her medical records, although he had not treated her personally. Those were matters of which the defence was aware and to which counsel stated there was no objection.[42]

[38] Prior to the leading of the evidence of Dr Tracey, the defence raised an objection to potential evidence of Dr Tracey about the relationship between sexual abuse victims and the suffering of auditory hallucinations, which was not the subject of a report and had been foreshadowed in notes from a conference between the Crown and Dr Tracey. The defence contended that matter went to the reliability and credibility of the complainant.[43] There was an extensive argument before the learned trial judge as to the evidence that was proposed to be called from Dr Tracey that was additional to his report and given on the basis of medical records.[44] His Honour ordered the delivery of a further report as to the further evidence proposed to be led before he would finally consider the matter. That report was not delivered. The Crown did not lead the additional evidence from Dr Tracey that had been foreshadowed and limited his evidence to what was contained in his report and the hospital records relied upon in that regard.[45] The defence did not object to that course, consistent with his position on the previous day.

[39] The appellant now complains that the evidence of Dr Tracey was irrelevant and inadmissible. However, in oral submissions, counsel for the appellant ultimately

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36 See, for example: AB II 146/25-44.
37 AB II 146/26-27.
38 AB II 146/40-50 - AB II 147/1-10.
39 AB II 148/1-23.
40 AB II 150/40-46 – AB II 151/1.
41 AB II 147/42-46.
42 AB II 279/35-50.
43 AB II 280/15- AB II 282/9.
44 AB II 280 – AB II 291.
45 AB II 326/40-45 – AB II 327/1-5.

conceded that evidence concerning the complainant's psychosis was relevant, given that it was squarely raised in the cross-examination of the complainant. The appellant's counsel also accepted that at the trial, the defence counsel appeared to have regarded the evidence of Dr Tracey as providing some forensic advantage in its own case. That accords with the fact that the complainant was cross-examined in relation to the psychosis she experienced from October to November of 2014, her diagnosis and what she had told the doctors. It also accords with the cross-examination of Dr Tracey, which sought to and did obtain evidence that was helpful to the defence. In closing address, the defence counsel referred to Dr Tracey in the following terms:[46]

> "I'd suggest to you about Mr Manders, he's probably the most impressive witness I'll – and I – I don't say that in deference to Dr. Tracey, because he's impressive; he's a highly skilled and intelligent man."

[40] At the hearing of this appeal, the appellant's complaint ultimately appeared to be that Dr Tracey, who was a non-treating doctor, read slabs of medical reports, some of which were said to be clearly inadmissible, and that the learned trial judge did not give the full direction to the jury in relation to expert evidence. His Honour had not been requested to give any redirection in that respect.

[41] While the appellant concedes that the defence had perceived it could obtain a tactical advantage through the evidence of Dr Tracey by using his evidence of the complainant's numerous drug-induced psychotic episodes as a means of discrediting the complainant, the appellant contends that the doctor's evidence may well have acted to boost the credibility of the complainant. Counsel submits the evidence may have suggested that her mental health disorders were the result of the culmination of stress and substance abuse related to the sexual abuse alleged against the defendant.

[42] The Crown contends that the evidence must be evaluated in the context of the fact that the complainant was heavily cross-examined in relation to her mental health in the pre-trial recording. She was questioned about what she had told the mental health nurses; what drugs she had taken; her experiences of hallucinations, particularly auditory hallucinations she believed were of her brother; and her experiences of thought insertion. It was put to her that her complaints of sexual abuse were explicable as the development of her delusional thoughts. In cross-examining the complainant's boyfriend, defence counsel put to him that the complainant had an erratic nature. There was then cross-examination of Dr Tracey by the defence, particularly directed to the complainant's inability to distinguish between delusions and reality, the effect of her drug use, the fact that she could have had psychotic symptoms prior to 2014, the fact that she was experiencing significant psychotic symptoms when admitted to hospital for 23 days and the fact that she was readmitted two days after those symptoms appeared to have eased. Dr Tracey agreed in cross-examination that there was evidence that the complainant suffered persecutory delusions. He agreed that there can be residual damage after suffering from psychosis, such that the person cannot completely distinguish between what, on the one hand, was reality and, on the other, delusion.

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46 AB II 28/1-3.

[43] The complainant's mental health also featured significantly in the defence's summing up, which emphasised the fact that she suffered serious mental health issues and reminded the jury of the evidence of Dr Tracey.[47] The defence also submitted to the jury that they should have reasonable doubt, not only due to the delay in bringing criminal proceedings, but also as a result of the complainant's serious psychiatric illness and drug use.[48] The complainant's evidence was directly challenged by the fact that she had suffered a drug-induced psychosis in which she experienced delusions and hallucinations in 2014, in circumstances where the defence sought to suggest that her drug-taking and delusions had begun earlier and were the cause of her allegations of sexual offending.

[44] No objection was made to the evidence of Dr Tracey and no redirection was sought of directions given by the trial judge. That clearly arose out of an understandable tactical decision of defence counsel.[49]

Consideration

[45] It is well-established that when defence counsel deliberately conducts a trial in a particular way, a court will be reluctant to intervene on appeal. As was stated by McHugh J in *Suresh v The Queen*:[50]

> "It would undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics had failed to bring about the accused's acquittal."

[46] As was identified by Sofronoff P in *R v Mahony*,[51] as no objection was ultimately made to the admission of Dr Tracey's evidence or redirection sought in respect of it, it must be shown not only that the evidence is actually inadmissible and the direction complained of was wrong in law, but also that the errors may have affected the verdict of the jury.[52] However, of course, the lack of objection does not preclude the Court from intervening to prevent a miscarriage of justice, if there was any prospect that the evidence would have prejudiced the appellant's prospects of acquittal. Such a prospect has not been established in this case.

[47] Turning to the question of whether the evidence of Dr Tracey was inadmissible, it is difficult to determine the scope of the appellant's complaint as to the doctor's evidence. It is not clear whether that complaint includes a complaint about Dr Tracey reading from the complainant's medical records or is ultimately only put on the basis that there was a lack of proper direction to the jury as to the use of the evidence. It appeared to be the latter case in argument but was unclear.[53] Out of caution, I will briefly address the admissibility of the medical records referred to by Dr Tracey.

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47 AB II 27.
48 AB II 33.
49 AB II 72.
50 (1998) 153 ALR 145 at [23].
51 *R v Mahony* [2019] QCA 131, [84] referring to *Dhanhoa v The Queen* (2003) 217 CLR 1 at 49 per McHugh and Gummow JJ.
52 At [84] and [107].
53 T1-22/6-47 - T1-23/1-32.

[48] The appellant accepts that the medical records formed the underlying basis of Dr Tracey's opinion. The appellant also concedes that they were clearly used by the defence in cross-examining the complainant. While the records themselves were not admitted into evidence, no objection was taken to Dr Tracey reading from the records. To the extent that Dr Tracey's report relied upon those records as the underlying factual basis for his opinion, they should have been formally proven.[54] However, it is clear that the defence had considered the matter and chosen not to raise any objection. Indeed, based on the exchange before the Court, the defence implicitly consented to the evidence of the medical records being given which were the basis of Dr Tracey's opinion.

[49] If the Crown had sought to admit the records they would likely have been admissible, at least in part, under s 93 of the *Evidence Act* 1977 (Qld) (**"EA**"). Hospital records have been recognised as being "business" records for the purpose of s 93.[55] The appellant does not point to anything specific in relation to the records which did not otherwise meet the requirements of s 93 of the EA. The appellant's counsel concedes that some of the comments relating to sexual abuse may have been admissible in relation to preliminary complaint, but contends there was no attempt to confine the evidence in that way. However, the majority of the evidence as to the content of the medical records was of the complainant's medical and psychiatric presentation. It was clearly relevant. While Dr Tracey's evidence of the medical records was secondary evidence and strictly inadmissible, reading from excerpts of the records rather than requiring the full record to be admitted was objected to by the defence. The appellant has not established the evidence of the medical records was inadmissible.

[50] Even if it is assumed that some of the evidence admitted through the hospital records read by Dr Tracey was inadmissible, the appellant has not established how the admission of that evidence could have affected the jury's verdict. The defence used that evidence to attack the reliability of the complainant's evidence, which had been the subject of significant cross-examination. The records relate to the complainant's condition between October 2014 and January 2015, after the complainant had made a complaint to the police in May of 2013. The records, as relayed by Dr Tracey, did refer to distress arising from the court process regarding her allegations of childhood sexual abuse by her father.[56] The records also made reference to a diagnosis of cluster B personality traits on the background of childhood sexual abuse and a history of polysubstance abuse.[57] However, these excerpts were not further referred to by either the Crown or defence at trial, nor by the Court in its summing up. Doctor Tracey's opinion evidence was confined to evidence about the nature of a drug-induced psychosis. He did not provide any opinion as to any relationship between sexual abuse and the symptoms suffered by the complainant or her diagnosis. The reference to the allegations of childhood sexual abuse in the medical records post-dated the making of the complaint and referred to the stress of the criminal proceedings resulting from the allegations. Those matters were already the subject of evidence properly before the jury.

[51] The expert evidence given by Dr Tracey as to the nature of substance-induced psychosis and its resolution was relevant and a matter well within his expertise. The

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54 *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.
55 *R v TJW* [1989] 1 Qd R 108 at 112.
56 AB II 334/17-23; AB II 336/11-14.
57 AB II 334/28-31.

question of the complainant's psychosis and its effect on the reliability of her evidence had squarely been put in issue by the defence in its cross-examination. In cross-examining the complainant, the defence suggested that the allegations of sexual abuse were linked to the delusions and hallucinations she had suffered and, indeed, were the result of the symptoms suffered when she was in a drug-induced psychotic state.

[52] Dr Tracey's evidence did not extend to any opinion on the credibility or reliability of the allegations made by the complainant. Indeed, the pre-emptive objection made by the defence prior to Dr Tracey giving evidence ensured that no such evidence was given. Unlike the expert evidence that was found to be inadmissible in *R v CAU*,[58] relied upon by the defence, Dr Tracey's evidence spoke to matters that were properly the subject of expert evidence. The nature of drug-induced psychosis and its symptoms and effects was specialised information likely to be outside the experience and knowledge of a judge or jury[59] and was properly the subject of admissible expert opinion. Dr Tracey's opinion evidence was properly admissible, as was ultimately conceded by counsel for the appellant in argument.[60]

[53] In its closing address, the Crown sought to marginalise the relevance of the complainant's admission to hospital in October 2014 on the basis it occurred both well after the period of the offending conduct and the time that complaints about the conduct were made.[61] Similarly, the Crown sought to distance Dr Tracey's evidence concerning the complainant's drug-induced psychosis from the events in question for the very reason that it was damaging to the complainant's reliability as a witness:[62]

> "Of course, the doctor gave further evidence in respect of the fact that she was treated in respect of those drug-induced psychoses, which he said was caused by her use of drugs. He said she was treated when she was in the hospital and they were relatively brief, and the treatment was successful. In my submission there is no reason, despite that – like I said, it happened well after the offending, well after she reported it to police. There is no reason to doubt at all her honesty or her reliability, and it's my submission to you all, members of the jury, as she has provided a powerful and compelling account of what happened to her during that period."

[54] In its closing, the defence stated:[63]

> "We know, and I'm not being critical of it in one sense, but it is something you're entitled to take into account here. She suffered from some serious mental health issues. She's been mentally health - her mental health was bad over a period. Three admissions. We know that she had a drug-induced psychosis. I'm not going to remind you of the evidence of Dr. Tracey. It'd be pretty fresh in your mind as to what occurred this morning and I won't insult your intelligence

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58 [2010] QCA 46 at [102]-[103].
59 *Farrell v The Queen* (1998) 194 CLR 286 at 292.
60 T1-19/10-37.
61 AB I 22/15-20.
62 AB I 22/25-32.
63 AB 27/15-27.

> by rehashing it. But it's pretty clear she was a sick girl. She was treated for it. She was hospitalised for it. She, herself, describes herself as having schizophrenia, bipolar, split personality. We know – we know from the fact that it's a drug-induced psychosis, that she was a significant user of drugs; of cannabis; of methylamphetamine. Dangerous drugs. They're categorised for a – a very good purpose as dangerous drugs, because they have dangerous side effects, and they can cause damage. In some cases, lasting damage."

[55] In his summing up, having addressed aspects of Dr Tracey's evidence and contentions of the Crown, his Honour stated:[64]

> "[The prosecutor's] submission, as I apprehend it, is that the offending described doesn't have the flavour of psychotic delusions. I comment that, with the exception of count 7, which seems, I comment only, to have some unusual elements, you might think the other accounts lack the inherent improbability or exaggeration you might see in a delusional belief. But this is entirely a matter for you. That's just a comment by me and I am certainly not an expert on psychoses, hallucinations or delusions."

[56] In addressing matters raised by the defence as to the evidence, his Honour also stated:[65]

> "Third, [the defence counsel] emphasised that you would harbour doubts about the reliability of her accounts, given her mental health issues, including, in particular, her drug-induced psychosis and the possibility of it affecting her ability to tell between fact and fiction. And I comment, having taken you to the passage, that you might think that what was said by Dr Tracey leaves that possibility open."

[57] It is apparent that Dr Tracy's evidence did not favour or bolster the position of the complainant. The reality was quite to the contrary. The Crown sought to marginalise the relevance of the evidence to the complainant's reliability and the defence relied upon it to attack the complainant's reliability. Given the use the defence made of the medical records and the opinion of Dr Tracey, there is no reason to consider that the appellant was in any way prejudiced by that evidence, such that it may have denied the appellant a fair chance or even possibility of obtaining an acquittal. Even if it had been established that the evidence relied upon was not properly admissible, there was no miscarriage of justice.

Directions given

[58] The appellant originally contended that the trial judge ought to have given a direction that the jury was not to "reason backwards" from the evidence of Dr Tracey, such that the existence of a mental health condition on the complainant's part would support her allegations of sexual abuse. In making that submission, the appellant particularly relied on cases of *R v SBV*[66] and *R v MCO*.[67] However, in both of those cases, the expert purported to give evidence about the reliability of the

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64 AB I 66/30-36.
65 AB I 67/32-36.
66 [2011] QCA 330.
67 [2018] QCA 140.

complainant which was inadmissible as expert evidence.[68] Unlike *SBV* and *MCO*, the opinion evidence provided by Dr Tracey was admissible. Nor did Dr Tracey give any opinion that the complainant's psychiatric condition was causally linked to or increased the likelihood that the evidence given by the complainant was credible. There was no cause for the jury to reason backwards from the expert opinion in the manner originally contended for by the appellant, as that evidence has not been given.

[59] Ultimately, the appellant made the further complaint that the directions given by his Honour were not in accordance with the Practice Direction for expert evidence and did not direct the jury that it was a matter for them to accept or reject the facts underlying the opinion.[69] On that basis, the appellant contends that there was a miscarriage of justice arising from the risk that the jury might have improperly reasoned that, as Dr Tracey was an expert, they should accept his opinions.

[60] As to the direction given by his Honour, it was not in the same form as provided in No. 58 of the Bench Book. The Bench Book relevantly provides that:

> "Certain witnesses whom you've heard referred to as expert witnesses have been called to give evidence. The ordinary rule is that witnesses may speak only as to facts and not express their opinions. An exception to the general rule is that persons duly qualified to express some opinion in a particular area of expertise are permitted to do so on relevant matters within the field of their expertise.
>
> However the fact that we refer to such witnesses as expert does not mean that their evidence has automatically to be accepted. You are the sole judges of the facts and you are entitled to assess and accept and reject any such opinion evidence as you see fit. It is up to you to give such weight to the opinions of the expert witnesses as you think they should be given, having regard in each case to the qualifications of the witness and whether you thought them impartial or partial to either side and the extent to which their opinion accords with whatever other facts you find proved. This is a trial by jury, not a trial by expert; so it is up to you to decide what weight or importance you give to their opinions or indeed whether you accept their opinion at all.
>
> It is also important to remember that an expert's opinion is based on what the expert witness has been told of the facts. If those facts have not been established to your satisfaction the expert's opinion may be of little value."

[61] The above direction as to expert evidence was not given by his Honour in its entirety.

[62] While the jury are the arbiters of fact, that role must be seen in the context of the matters put in issue in a trial, notwithstanding the onus remains on the Crown. Although they were not the subject of formal admission, the matters contained in the underlying medical records referred to by Dr Tracey were not challenged by the defence at the trial. Nor were the opinions that Dr Tracey provided on the basis of

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68 *R v SBV* [2011] QCA 330 at [12]; *R v MCO* [2018] QCA 140 at [69]; *R v CAU* [2010] QCA 46 at [103].

69 T1-20/12-20.

those records. Indeed, the facts contained in the medical records referred to were generally embraced by the defence for what appeared to be sound forensic reasons.

[63] His Honour noted that "[t]he evidence of Dr Tracey, whose expertise and opinions were not challenged, was that the psychotic events were drug induced psychoses".[70] That was clearly correct. The issue for the jury was whether the complainant's psychiatric state post-dating when the complaint was made would have affected the reliability of complaints made against her father.

[64] His Honour in summing up described the evidence with respect to drug-induced psychosis. His Honour specifically referred to the evidence extracted through questioning by the defence that a drug-induced psychosis could leave residual damage after it had resolved, such that the afflicted person could not completely distinguish between reality and delusion.[71] His Honour's summing up dealt with the competing contentions of the Crown and defence as to the relevance of Dr Tracey's evidence, making it clear that it was entirely a matter for the jury whether they considered the complainant's mental health did or did not affect the reliability of her evidence. The summing up also made clear that a critical issue for the jury to determine was whether or not they believed the complainant. His Honour further directed the jury to the fact that "[w]hat has to be resolved by you in the context of those facts is whether, and to what extent you consider those considerations inform your assessment of the reliability and truthfulness of [the complainant's] evidence at this trial".[72] His Honour pointed out factors which would cause the jury to scrutinise the complainant's evidence with great care, stating that:[73]

> "So to summarise, these are the inconsistencies and improbabilities in her accounts, particularly in relation to count 7 and her omission of count 8 in the first complaint to the police. The mental health issues that manifest in 2014, and their possible effect on her reliability, and the apparently good relationship between [the complainant] and [the defendant] observed by Mr Manders who, you might think, seemed to be an honest and truthful witness – and reliable witness at around the time of this offending.
>
> Taken together with delay and the lack of any direct corroboration of any of the individual offences, it is necessary for me to warn you, and I direct you, you should not convict upon [the complainant's] testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth, reliability and accuracy in respect of each charge on which you are to return a verdict of guilty."

[65] The appellant submits that his Honour's comments about the meaning of psychosis, hallucinations and psychotic episodes indirectly bolstered the evidence of Dr Tracey, without being balanced by a general direction reminding the jury that, ultimately, all of it was still a matter for their determination. However, that submission does not accurately summarise his Honour's summing up. His Honour stated:

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70 AB I 65/28-29.
71 AB I 65 – AB I 66.
72 AB I 66/9-11.
73 AB I 68/31-47.

> "I am now going to turn to another topic, the mental health issue. Now, the evidence included the following matters. It's a matter for you whether to accept any evidence but I comment that you might think that the things I'm about to describe didn't appear to be contentious as between counsel in the case."[74]

Consideration

[66] When a comparison is made between the form of the Practice Direction in relation to expert evidence and the direction given by his Honour, his Honour did make plain to the jury that it was a matter for them to decide whether the medical evidence as to the complainant's mental health was or was not relevant. However, his Honour also made clear that any relevance the evidence did possess would be in terms of whether the jury considered it undermined the reliability of the complainant's evidence, not as evidence which could support the reliability or credibility of her allegations of sexual abuse by the defendant. Further, as was the case in *R v MCO*,[75] his Honour's directions made it clear that the truth and reliability of the complainant's account of the allegations was a matter for the jury. Accordingly, there was no risk that the jury would have reasoned impermissibly from the evidence of Dr Tracey that his evidence bolstered the complainant's evidence or could be used to negate any doubt they had about her evidence. In the context of the directions given, the jury could in fact have only reasoned from Dr Tracey's evidence in a way that damaged the complainant's evidence if they considered the psychiatric evidence was relevant to the veracity of the complaint made by the complainant.[76]

[67] In the present case the failure to give the full direction as to expert evidence did not deny the appellant a fair trial, nor was there a possibility that it may have affected the verdict so as to deny the appellant of a chance of an acquittal.

[68] This ground of appeal is not made out.

Ground 3- Closing Address of the Crown

[69] The appellant complains that in her closing address, the prosecutor made reference to the complainant as the "victim", effectively reversing the onus of proof. The complainant also contends the prosecutor further descended into inappropriate criticisms of the defence counsel. In her closing, the prosecutor relevantly stated:[77]

> "The job of a defence barrister is to cross-examine her. He is there to do his job and to challenge a victim, but in doing so, one needs to do it with a certain level of respect and a certain level of care, especially when the victim is someone who is a victim of serious sexual offences. A victim who has come to court to tell what happened and to relive what happened to her, and tell people that she's never met before. In my submission, that level of care and level of respect was not shown. Instead, for an hour and a half, [the complainant] was badgered. She was interrupted. She was spoken over, and the defence barrister repeatedly asked the same question despite her answering

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74 AB I 65/18-22.
75 [2018] QCA 140.
76 Cf *R v MCO* [2018] QCA 140 at [71] and [73] per Mullins J.
77 AB I 19/38- 47.

> that. That cross-examination should have taken half an hour, not over an hour and a half."

[70] The appellant submits that while the comments of the prosecutor may not be enough to substantiate a ground of appeal they could, in combination with the other matters raised, substantiate a finding of a miscarriage of justice. While I have not found either of the grounds are established, it is appropriate to still address the matters raised in argument.

[71] The respondent submits that the offending comments were made in the context of the prosecutor discussing the complainant's demeanour, in light of the fact she had appeared at times rude and unco-operative in giving her evidence. The complainant's demeanour was according to the respondent a matter for the jury to rightly take into account.

[72] As to the criticism that the comments reversed the onus of proof, the respondent submits that, given the extensive directions as to the burden of proof, the jury could have been left in no doubt that they had to be satisfied beyond a reasonable doubt by the Crown's case. His Honour gave clear and appropriate directions as to the fact that the Crown bore the burden of proof.

[73] In *R v MCT*,[78] Morrison JA[79] summarised the relevant law as follows:

> "Intemperate and improper addresses by a Crown Prosecutor can undoubtedly result in a miscarriage of justice and lead to the setting aside of a conviction. So much was recognised in *R v Freer and Weekes*. The issue is usually whether there has been a real risk that the remarks wrongly influenced the verdict, thus resulting in an unfair trial. As put in *R v Freer and Weekes* the issue is whether the trial process was unfair, or the appellant was denied a chance of an acquittal otherwise open, taking into account both the Prosecutor's remarks and the later directions by the judge.
>
> As was observed in *R v Day* considerable care is necessary to ensure that jury verdicts are not based upon prejudice, sympathy, fear or irrelevant emotion, and numerous statements may be found in the cases about the undesirability of emotion." (footnotes omitted)

[74] The comments made by the prosecutor were on any view inappropriate. They did not merely seek to contextualise the complainant's demeanour. The comments were disparaging of the defence for its approach to cross-examination, which may have aroused feelings of sympathy for the complainant. Viewed in isolation, they were potentially prejudicial to the appellant. However, the defence counsel in his closing address immediately answered the prosecutor's criticisms, stating:[80]

> "As part of the submissions made by my learned friend, she was somewhat – you might think, critical. She made submissions that were critical of Mr Kissick, who was the then defence barrister who carried out the cross-examination. It's clear it wasn't me. Now just be very, very careful about all of that. Because it was said to you that as [the complainant] was a victim, and I – again I'm just reading from my notes, it's not verbatim, but the flow of it was; well look,

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78 *R v MCT* [2018] QCA 189 at [40]-[41].
79 With whom Sofronoff P and Philippides JA agreed.
80 AB I 24/15-39.

> she's a victim of serious sexual abuse and she deserved respect and care and it wasn't shown to her. Now the problem with all of that is it puts the cart before the horse. That assumes that my client is guilty. And the law, members of the jury, works the other way. It presumes that he is not guilty. Now you mightn't like it, some of you might think that our system's broken down, but you came in here two days ago and said; well, we'll – we'll try this case, we'll be the judges of the facts and we will determine this case on the evidence according to law. And the starting point in this case, and I suggest to you, the finishing point in this case is that my client is presumed to be innocent. So please bear that in mind. It's quite wrong to say that, quite wrong, because it has the tendency, as I say, to reverse the onus of proof. It's said that Mr Kissick badgered [the complainant] and that his cross-examination should have taken 30 minutes. Again, I'd suggest to you that's a wrong-headed approach. Every person who unfortunately finds themself [sic] sitting where my client is, is entitled to a defence. Because he's presumed to be innocent. All of us are. And in fact, he's entitled to a vigorous defence if that's necessary. And if you will, just close your eyes for a minute and just think, "Well, hell. Imagine if I was there. Would I want somebody in there trying as hard as they could for me?" I think the answer's pretty obvious, isn't it? Pretty obvious. There's nothing wrong with a defence counsel pursuing the interests of his client."

[75] The defence counsel then went on to give examples of points at which the complainant was unco-operative, including where her conduct required intervention by the judge presiding over the pre-recording of evidence.[81]

[76] Further, the appellant's contention that there was a lack of direction by his Honour fails to take into account the full extent of what his Honour said, which was as follows:[82]

> "[The prosecutor] went a little bit further, though, and you recall that she submitted to you that while defence counsel is required to challenge a complainant, in this case the cross-examination crossed the line to be disrespectful of [the complainant], as a victim of sexual offences, and submitted that the cross-examination should have only taken 30 minutes, and she made some other criticisms. As to those submissions, those particular submissions, I direct you as follows.
>
> Those submissions might be thought to assume that [the complainant] was, in fact, a victim, and that Mr Kissick, [the complainant's] barrister, should have cross-examined her on the assumption she was a victim. Now, if you thought that was the assumption that underpinned that submission, that assumption is wrong. [The defendant] has pleaded not guilty. Those were Mr Kissick's instructions. He was required to cross-examine on that basis, and to do so to the best of his ability, according to law. I point out to you something that mightn't immediately occur to you, that the Crown prosecutor was present in court. He could have objected, if he chose to do so, and he didn't. But that's only in respect of that

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81 AB I 24/43 – AB I 25/44.

82 AB I 57/20-36.

> specific submission, and I've separated that from Ms Farnsworth's other submissions to you about what you should take from the hostility."

[77] No further direction or redirection was sought by the defence counsel after the summing up.

[78] Both the comments of the Defence Counsel and the directions of his Honour pointed out to the jury the misconceived nature and inappropriateness of the Crown prosecutor's comments.

[79] Similarly, the reference to the complainant being a victim suggested that the alleged offences did occur. The use of that term by the Crown was inappropriate. However, the jury were very clearly directed by his Honour that the onus was on the Crown and the Crown alone was to prove all of the elements of each of the offences beyond reasonable doubt.[83] That direction reinforced the comments made by the defence counsel referred to above. His Honour's summing up emphasised that the jury's assessment of the complainant's evidence and whether they considered it to be true and reliable was a fundamental feature of the case.

[80] The fact that the jury returned a verdict of not guilty in relation to count 7 supports the view that the jury did undertake a proper assessment of the evidence, which was dispassionate and unaffected by the Crown's disparaging remarks concerning the conduct of the defence.

[81] Having regard to the response of the defence counsel to the Crown's closing in his own closing address and the learned trial judge's summing up as whole, I do not find that there was a real risk that the Crown's reference to the complainant as a victim or the disparaging remarks made by the prosecutor wrongly influenced the verdict and resulted in an unfair trial.[84] Ground 3 is not made out.

[82] That said, the remarks by the prosecutor were inappropriate and should not be repeated.

Conclusion

[83] None of the grounds of appeal have been established by the appellant. The appeal should therefore be dismissed.

Orders

[84] I order that the appeal be dismissed.

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83 AB I 36 - AB I 40/1-10.

84 *R v Parker* [1993] QCA 444 at 20-21.