SUPREME COURT OF QUEENSLAND

CITATION:	*R v CW* [2004] QCA 452
PARTIES:	**R** **v** **CW** (appellant)
FILE NO/S:	CA No 203 of 2004 DC No 17 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	26 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2004
JUDGES:	McMurdo P, McPherson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – appeal against conviction on two counts of attempted incest – where appellant charged with committing rape – where jury directed on alternative offence of attempted incest – whether compromise verdicts – whether there was evidence to support verdicts of guilty of attempted incest – whether jury reversed onus of proof – verdicts supportable on the evidence *Criminal Law (Sexual Offences) Act* 1978 (Qld), s4A *M v The Queen* (1994) 181 CLR 487, considered *R v Coureas* [1967] QWN 5, cited
COUNSEL:	S L Kissick for the appellant S G Bain for the respondent
SOLICITORS:	Norman & Kingston for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Mullins J's reasons for dismissing the appeal against conviction.

[2] **McPHERSON JA:** The appeal against conviction should be dismissed for the reasons, with which I agree, given by Mullins J.

[3] **MULLINS J:** The appellant was charged with two counts of rape, but convicted after trial of two counts of attempted incest. He appeals against the convictions.

Evidence

[4] The complainant was born in September 1983. The indictment identified the period of time during which the offences were committed as between 27 February 1999 and 22 January 2000. During this period the complainant was living in the home of the appellant and his wife in foster care.

[5] The complainant gave evidence that from about four months after she commenced living in the appellant's home, when the appellant used to drive another foster child (who was five years old) and her to school, he used to put his hand on her leg and rub her leg up and down. The complainant stated that that conduct occurred two to three times each week and that on occasions the appellant would buy her chocolates and lollies, but tell her that she had to keep that a secret. The complainant described how on one occasion when she was being driven home from school by the appellant, the appellant stopped the car at a place where there was no one else and he started to kiss her and touch her breasts, vagina and bottom through her clothing. The complainant said the appellant stopped when she told him that she was not feeling well and "didn't like it any more". The complainant stated that the appellant would come into her bedroom two or three times in a week and wake her up by shaking and touching her and would touch her breasts through the bedclothes.

[6] The complainant described the events the subject of the first count in terms of the appellant coming into her bedroom, waking her up, taking her out to the carport, telling her to close her eyes, then walking her out to the shed and laying her down on a mattress. The complainant said it was very late at night and everybody was asleep. The complainant's evidence in chief (at R21 line 14 to R22 line 33) provided the following details:

> "What happened then?-- He would lay me down on it and start to feel me up.
>
> Just how is he feeling you up?-- Touching my breasts and my vagina and my bottom.
>
> What happened next?-- Then he started to kiss me on my lips and my neck and then he – my legs were together and his legs were beside mine and then he ended up pushing them aside so he could be in the middle of both my legs.
>
> All right. And what were you wearing at this stage?-- My bedclothes.
>
> And you've told us you were cold-----?-- Yes.

-----at this time? Could you see much in the shed?-- No, it was pretty dark.

Okay. What happened next?-- And then inserted – inserted his penis inside me but it wasn't fully in.

Mmm. And what clothes were you wearing at that time?-- None.

Okay. So, how did your clothes come to be off?-- He took them off himself.

Okay. And he inserted his penis into your vagina and you were – sorry, you said it didn't go – what did – what did you say after that?-- It didn't go all the way in.

Okay. Now, if you could – perhaps if I – sorry to ask you this embarrassing question. The – what's called the outer lips of your vagina, did it go past there?-- Yes, it did.

And he's put his penis into your vagina, what's happened then?-- I ended telling him that I have to go to the toilet and he ended up pulling out and then I put my clothes back on and went back inside."

[7] The complainant's evidence-in-chief relating to the issue of consent in relation to this first occasion was (at R22, lines 52 to 57):

"You've told us about that first occasion. Can I ask you this: were you consenting to what he was doing?-- He never told me what he was doing.

Okay. When the penis was put into you, were you consenting to that?—No, he didn't tell me what was going on."

[8] The complainant's evidence-in-chief of the events the subject of the second charge was (at R23, lines 7 to 42):

"If you could please tell the Court what happened on that occasion?-- Well, he ended up taking me out to the shed-----

Mmm?-- -----and laid me down on the mattress again-----

Mmm?-- -----and he started to touch my breasts, my vagina and my butt and he ended up putting a couple of fingers inside and then he ended up putting his penis in.

And by "fingers inside", where are you referring to there?-- Putting them inside my vagina.

And then he ended up putting his-----?-- Penis inside.

Inside. What clothes were you wearing then?-- None.

Okay. And how did that come to be?-- He ended up taking them off.

> Now, when his penis was inside your vagina, how long – how long was he there for?-- Not very long.
>
> And what happened on that occasion?-- I ended up telling him that I wasn't feeling that well and he kept – he just laid on top of me and I said that I had to go to bed and, then, in his voice, he was getting very angry and I said that I have to get up in the morning to go to school so he ended up letting me go.
>
> Okay. Now, you've made mention of other things occurring to you in the shed on a couple of occasions?-- Yep.
>
> And we'll go to those shortly but before – if I can ask you this: were you consenting to what was happening-----?-- No, I wasn't."

[9] The complainant was cross-examined on the issue of penetration (at R56, lines 48 to 53):

> "You have told the learned Prosecutor that this man's penis was inside your vagina. For how long?-- Only – not very long, about two to three minutes.
>
> Two to three minutes?-- That is not long. That is a short period of time."

[10] The complainant was cross-examined on a statement she gave to Detective Hunter on 8 December 2002 when Detective Hunter wanted to clarify whether there had been any actual penetration. The following exchange took place at R57, lines 9 to 30:

> "In that addendum statement you wanted to assert, 'I want to make it clear.' You said, '[The appellant] did insert his penis into my vagina at that time but he only got in a very short distance before he pulled out.' This is the first allegation you make against [the appellant]?-- Yes.
>
> 'In all he probably only had his penis inside my vagina for a few seconds.' Remember that?-- Yes, I do.
>
> 'It was just the same the second time it happened as well. [The appellant] did put his penis inside my vagina but it wasn't inside a few seconds before I pushed him off and his penis came out.' Remember that?-- Yes.
>
> Now you say it is two to three minutes?-- It was varied.
>
> Varied. The only thing that varies, I suggest to you, is your statements, isn't it?-- No.
>
> So it varied, a few seconds, two to three minutes?-- That is how long it could last, a few seconds. That is how long it could last-----."

[11] The complainant was cross-examined on her evidence given at the committal hearing on 19 August 2003 as follows (at R58, line 45 to R59, line 47):

> "And you were asked: 'All right. Now, tell me about this sex act you say occurred. How long did the penile sex part go on for?' and you said, 'For about 20 minutes.' Do you remember giving that answer?-- No, I don't.
>
> Being asked that question and giving that answer?-- No, I don't.
>
> Do you accept it was in the transcript as what you gave that day?-- Yes, I do.
>
> On oath?-- Yes.
>
> ….
>
> All right. 'And he inserted his penis into you?' You said, 'Yes.' 'And how did he do that?' 'He got on top of me.' Do you remember that?-- Yes, I do.
>
> And question: 'Yes?' 'And he just put it in.' Question: 'How far in did it go?' and you said, 'Not very far.' All right. 'And how long did this go on for?' and you said, 'Not very long because I ended up telling him that I had to go to the toilet.' Question – well, do you remember being asked those questions and giving those answers?-- Yes, I do.
>
> 'Well, is it 20 minutes or not?'?-- No, it's not.
>
> Well, I'm sorry. Again, I don't – I'm reading from the transcript and I want to make that clear. You're unfamiliar with that. The question I asked you in the committal was: 'Well, is it 20 minutes or not?' and your answer was, 'It was 20 minutes all up.' Do you remember being asked that question and giving that answer?—No, I don't.
>
> Do you accept that, again, it was in the transcript?-- Yes, I do.
>
> Question: 'I see. Well, how long did the sex act I asked you about – the penile penetration go on for?' Answer: 'Probably about 10 minutes.' Do you remember giving that answer to that question on oath on the 19th of August 2003?-- No, I don't.
>
> Do you again accept it if it's in the transcript?-- Yes, I do."

[12] Whilst living in the appellant's household, the complainant had regular contact with her Family Services officer and did not make any complaint about being sexually abused by the appellant to her Family Services officer.

[13] The complainant gave evidence that the first complaint she made of the appellant's conduct was while she was still living in the appellant's household and she told the girlfriend ("the girlfriend") of the son of her previous foster parents. The girlfriend gave evidence that on one of the weekends that the complainant visited her former

foster family, which occurred while the complainant was still living at the appellant's house, the complainant told the girlfriend that she had been in bed one night and the appellant had come into her room, got her out of bed and took her down to the garden shed and that the appellant "used to cuddle her up" and rub his hand up and down her back. The girlfriend stated in evidence that she did not recall the complainant saying that she was raped by the appellant or that they had sexual intercourse.

[14] The complainant was cross-examined about the statement she made to police on 10 May 2002, in which she stated that the first person to whom she made a complaint about what the appellant had done to her was her Family Services officer during the period after she left the appellant's household. The complainant conceded that she had not told the police of the complaint which she described in evidence that she had made to the girlfriend.

[15] Ms Frainey was the Family Services officer who took over the complainant's file in April 2000. She gave evidence of the complaint that the complainant made to her on 14 July 2000 about the appellant's touching her in a sexual way when the appellant was with her at home and in the car and that the appellant would wake her up to touch her genitals and breasts. Ms Frainey took the complainant to the police on 21 July 2000 and remained with her when she was interviewed by Detective Hurd. Each of Ms Frainey and Detective Hurd stated in evidence that the complainant did not say anything to either of them about sexual intercourse having taken place between the appellant and her. The complainant in her evidence stated that she did tell Ms Frainey about sexual intercourse with the appellant and that she had told Detective Hurd that she was getting raped. A detailed statement was taken by Detective Hurd from the complainant on 21 August 2000 and there was no allegation of attempted or actual sexual intercourse made by the complainant against the appellant in that statement.

[16] It was not until Detective Hunter took the statement on 10 May 2002 from the complainant that the complainant's claim of non-consensual intercourse was recorded.

[17] The complainant was cross-examined extensively during the trial on inconsistencies between the evidence that she gave in chief about the events the subject of the charges and her evidence at the committal proceedings. The complainant was cross-examined extensively on when she first made a complaint about the appellant's conduct and inconsistencies between her evidence and that of the girlfriend and Ms Frainey as to the terms of the complaint which she made to each of them. The complainant was cross-examined on the fact that she gave evidence during the committal of one act of sexual intercourse only occurring with the appellant. The complainant conceded in cross-examination that she "forgot about the second one", when giving evidence at the committal, because she gave evidence on the day following that for which she had been prepared to give evidence.

[18] From May 1998 for about 18 months, a carer worked in the appellant's household to care for one of the foster children who was disabled. She worked between 7 am and 9 am each weekday. The carer gave evidence that the appellant showed the complainant more attention than the other children in the household including his own daughter. The carer gave evidence of a conversation she had with the appellant (at R106, lines 13 to 16):

> "Yeah, there was one morning that I got there and we were sat there having a cuppa and [the appellant] had said to me, 'Oh, have you heard? I am going to divorce [the appellant's wife] and marry [the complainant]'."

[19] The following evidence was also given by the carer in evidence-in-chief (at R106, lines 20 to 40):

> "Was there any conversation in relation to babies and [the complainant]?-- Yes, [the complainant] and I were having a conversation about babies and she told me that she didn't want to have any children and [the appellant] had said to her, 'So does this' – 'Does this mean you don't want me to give you one, [the complainant]?'
>
> Just so we are clear, who is present during this conversation?-- I am pretty sure everyone was present at the time. All the other foster children.
>
> Yourself?-- Yes.
>
> [The complainant]; is the accused there then?-- Yes.
>
> So this is a conversation and if we can just make that clear that the accused was present and made this comment to [the complainant] about babies?-- That is right.
>
> What was [the complainant's] response to that?-- She just kind of looked at me and, like, gave a really horrible face and she had said, 'No.', yeah."

[20] In cross-examination the carer conceded that she never saw the appellant touch the complainant.

[21] The appellant's daughter gave evidence for the prosecution. She stated that she noticed that her father would do more with the complainant than any of the other foster children and gave the example that he would do homework with the complainant in her bedroom behind closed doors. The appellant's daughter stated that the appellant made comments to her about the shape of the complainant's breasts and her bottom.

[22] The appellant's daughter stated she was present when the conversation took place about the appellant saying he would divorce his wife and marry the complainant. The appellant's daughter also gave evidence about a conversation that took place in her presence between the appellant and the complainant when the appellant asked the complainant whether she wanted to have a baby with him. It was suggested to the appellant's daughter in cross-examination that these conversations took place in a joking manner. The appellant's daughter disagreed with this suggestion in relation to the conversation about the divorce, but she conceded that, in relation to the conversation about the baby, she thought it was joking at the time of the conversation.

[23] The appellant's daughter stated that she observed an incident of physical contact between the appellant and the complainant (at R114, lines 12 to 39):

> "There was an incident in the kitchen. I was sitting out on the patio where he and [the complainant] were in the kitchen. Now, they were mucking around and so I looked in the kitchen 'cause at – and like on the patio you can see right into the kitchen and I looked in and they were playing round with a tea towel and then the next minute I see dad rubbing his right hand – back of the right hand – across her chest.
>
> Okay?-- And----
>
> Right. Can you just stop – stop you there? Can you just describe to us how that happened?-- He just rubbed like that…across her breasts.
>
> …
>
> And you've mentioned you were out on the patio?-- I was out on the patio and then just after that happened – after I saw what happened – I walked inside and [the complainant's] look on her face was, 'Oh, get away from me' – sort of thing. And everything just went quiet and dad just went into the fridge to get milk out."

[24] The appellant's daughter also gave evidence of another occasion when the appellant made comments to her about seeing the complainant in the bathroom when he was working with some electrical cord at the window to the bathroom. The appellant's daughter stated that the appellant described the complainant's "crack" as being "covered in red pubes".

[25] There was no evidence called on behalf of the appellant.

Grounds of appeal

[26] The appellant's grounds of appeal are:

1. The verdict of the jury is unreasonable or cannot be supported, having regard to the evidence;
2. The evidence did not establish the alternative verdicts of attempted incest and the verdicts represented a compromise by the jury;
3. The jury's request to re-hear evidence in regard to the circumstances in which the complainant spoke to the Department of Families, and their question in regard to the ability of the Crown to call the appellant as a witness, demonstrated a reversal of onus;
4. The learned trial judge should have directed the jury in respect of the absence of a timely complaint and as to the effects of delay; and
5. The evidence of guilty passion should not have been led in the trial, as it had limited probative force and its admission caused a miscarriage of justice.

Whether evidence of guilty passion should have been admitted

[27] It was made clear on the hearing of the appeal that the evidence which was the subject of the fifth ground of appeal was that of the carer and the appellant's

daughter. In fact, it was conceded on the hearing of the appeal that a decision was made not to object at the trial to the admission of this evidence.

[28] It is relevant that no objection was taken on behalf of the appellant at the trial to the leading of the evidence of the carer and the appellant's daughter.

[29] It is argued on the appeal that the evidence of each of the carer and the appellant's daughter was highly prejudicial and had limited probative force and therefore should not have been admitted by the learned trial judge. The evidence of each of these witnesses was relied upon by the prosecution to show there was an inappropriate relationship between the appellant and the complainant and it had the capacity to support the complainant's account of guilty passion or attraction by the appellant towards the complainant.

[30] Such evidence by its very nature is prejudicial, but in the circumstances it was probative and relevant on the issue of the nature of the relationship between the complainant and the appellant. There was no error in admitting the evidence.

Whether there was evidence to support verdicts of attempted incest

[31] The verdicts of guilty of attempted incest indicated that the jury found that neither lack of consent to sexual intercourse nor penetration was proved beyond reasonable doubt in respect of each count. This meant, in the circumstances of this case, that the jury was not satisfied to the requisite standard by the complainant's evidence on those matters.

[32] The complainant's evidence on the lack of consent to intercourse on each occasion was very brief. The complainant's evidence was merely to the effect that she did not consent. There was no suggestion in her evidence that she said or did anything on each relevant occasion to indicate to the appellant her lack of consent. In fact, the prosecution case on lack of consent was that as the appellant was the complainant's foster father and was exercising control over her by virtue of his position when she was either 15 or 16 years, there could not have been consent by the complainant. It is unremarkable that the jury was not satisfied beyond reasonable doubt on the lack of consent.

[33] On the issue of penetration, the complainant's evidence was to the effect that on each occasion there was penetration to some degree. The terms in which the complainant described what occurred resulted in the learned trial judge in the summing up referring to "partial penetration" and that on each occasion "it only went for a short period of time" (at R191). No objection was taken on behalf of the appellant at the trial to these terms in which the learned trial judge described to the jury the circumstances in which it was said the offences had occurred. After the learned trial judge had summed up on what the prosecution had to prove to establish the offences of rape or incest, the learned trial judge informed the jury on what was required for the prosecution to prove attempted rape (at R192):

> "Now, ladies and gentlemen, if you are satisfied that the accused did take the complainant out to the shed and that he did put his penis up against her genitalia, but you are not satisfied beyond reasonable doubt that there was penetration and therefore carnal knowledge, an alternative to the two charges I have just told you about is attempted rape."

[34] After explaining what was required for the prosecution to prove an attempt to commit an offence, the learned trial judge informed the jury (at R194):

> "To complicate matters further, if you are not satisfied that he penetrated her, but you are satisfied that he attempted to penetrate her and intended to penetrate her, but you are not satisfied beyond reasonable doubt that it was done without her consent then you would consider whether he is guilty or not guilty of attempted incest. So, it has that same definition of attempt. There has to be an observable act and an intention to commit the offence, that is an intention to have sexual intercourse or carnal knowledge with her, but you are not satisfied that there was penetration, and that he does some sort of act that is observable which shows that he is intending to carry out what his intention is."

[35] The appellant's counsel did not object to the course adopted by the learned trial judge of leaving to the jury the possibility of considering an alternative verdict on each count of guilty of attempted incest.

[36] The learned trial judge summarised the respective cases for the prosecution and the defence in the following terms (at R195):

> "The Crown case is that it is a rape, that there is penetration, slight penetration, or penetration to some degree and because of her age and position and because of the fact she didn't say she was happy for this to happen, that there was no consent and that that is what you would be satisfied of beyond reasonable doubt. The defence case is that you wouldn't be satisfied that any of these things happened beyond reasonable doubt because you couldn't rely on the complainant's evidence."

[37] In summarising the address of the prosecutor, the learned trial judge referred to what the prosecutor had said about the complainant's evidence on penetration (at R201):

> "She indicated that he had trouble penetrating her, that it was penetration to a slight degree, not full penetration and that really has the ring of truth. He says if she was really out to get him you would think that she would talk about it being full and painful penetration."

[38] In summarising the defence counsel's address, the learned trial judge emphasised that defence counsel had said that the real question for the jury was whether the complainant was reliable and whether her evidence was accurate and repeated the various points made by defence counsel that involved inconsistencies between what the complainant said at the trial and what she had said on other occasions and discrepancies between the complainant's evidence and that given by other witnesses.

[39] This is not a case where it was not disputed that penetration took place: cf *R v Coureas* [1967] QWN 5. The defence was that the complainant's evidence was so unreliable that the jury would not be satisfied beyond reasonable doubt in respect of any of the allegations (including penetration). Although the prosecution relied on the complainant's evidence that penetration did occur, there were discrepancies in the complainant's evidence as to the degree of penetration and the time for which it lasted on each occasion. In this context, it was appropriate for the learned trial

judge to direct the jury specifically on the alternative verdicts they could reach, if they were not satisfied beyond reasonable doubt that actual penetration did occur, but were satisfied beyond reasonable doubt that the appellant did put his penis up against the complainant's genitalia on each of the relevant occasions.

[40] It may be that the jury took a commonsense approach to the evidence of penetration, rather than relying on what they were told was technically sufficient to amount to proof of penetration. It did not follow that, because the jury was not satisfied beyond reasonable doubt on the issue of penetration, they were bound to reject the evidence of the complainant (for which there was support in the evidence of others including the carer and the appellant's daughter) that was capable of proving beyond reasonable doubt the offences of attempted incest. In the light of the summing up which clearly indicated to the jury what course should be adopted, if the jury had a reasonable doubt about penetration, the verdict of the jury cannot be described as a compromise verdict in the sense of being a verdict which was illogical or not supported by the evidence.

Whether verdicts were unreasonable

[41] The appellant relies on the test set out in *M v The Queen* (1994) 181 CLR 487, 493 to submit that, in the light of the inconsistencies in the complainant's evidence, it was not open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that the appellant was guilty of each of the offences of attempted incest. In support of this submission, the appellant's counsel also relied on the submissions made in an endeavour to show that there was no evidence to support the verdicts of guilty of attempted incest.

[42] The complainant's cross-examination was lengthy and her reliability and truthfulness were rigorously tested. It was apparent that there were inconsistencies and discrepancies arising from the complainant's evidence and the jury was directed to give them careful consideration. A pattern could be gleaned from the complainant's evidence, however, of gradual, but increasing, touching of her by the appellant, when he was with her in her bedroom and in the car. It is important in considering whether the verdicts were unreasonable that the evidence of the carer and the appellant's daughter provides support for the existence of an inappropriate relationship between the appellant and the complainant and that on one occasion the appellant's daughter saw the appellant touch the complainant's breasts. That gave a context for the complainant's evidence about the two occasions when the appellant took her to the shed and she said that sexual intercourse took place between them. The jury obviously accepted that evidence of the complainant to the extent that there was an attempt by the appellant to penetrate the complainant.

[43] This court on appeal is required to have regard to the advantage that the jury had in seeing and hearing the complainant give her evidence. As set out above in dealing with the second ground of appeal, it is explicable why the jury returned verdicts of guilty of attempted incest, when they were not satisfied beyond reasonable doubt on the issue of penetration. Having regard to the whole of the evidence, this is not a case which calls for the court on appeal to set aside the verdicts as unreasonable or not supported by the evidence.

Whether jury reversed the onus

[44] The appellant relied on two questions asked by the jury whilst deliberating as the basis for a submission that the jury reversed the onus of proof. The question which the jury asked about the timing of the complaint made by the complainant to her Family Services officer was "Please clarify the suggestion that the complainant did not have to return to the [appellant's] house at the end of her stay at Hannah's and what time did this occur in relation to her statement".

[45] Evidence was given by the complainant and Ms Frainey to the effect that after leaving the appellant's house, the complainant stayed at a place known as "Hannah's House" and that, after obtaining one extension of her stay there, other accommodation had to be found for the complainant. Both the complainant and Ms Frainey gave evidence to the effect that the complaint was made to Ms Frainey about the appellant's conduct towards the end of the complainant's stay at Hannah's House. The question that was asked by the jury was not surprising, in that the complainant had been cross-examined to the effect that she had made up her complaint about the appellant, to ensure that she was not returned to the appellant's household, after her stay at Hannah's House ended.

[46] The learned trial judge had given comprehensive and appropriate directions about the burden and onus of proof and the right of the appellant not to give or call evidence. The question that was asked by the jury was "Can the prosecution call the accused to give evidence?". The answer provided by the learned trial judge was concise and reinforced what the learned trial judge had conveyed to the jury during the summing-up:

> "Now, ladies and gentlemen, you also asked, 'Can the prosecution call the accused to give evidence?' and the answer to that is, the prosecution can't called [*sic*] the accused to give evidence because it's fundamental to our system of justice that an accused person is never required to give or call evidence in a criminal trial. He's perfectly entitled to sit back and say to the Crown, 'You prove the case against me.' You must not draw any adverse inference against the accused because he did not give evidence in this trial. It is his right and he's entitled to take that stand."

[47] In light of the directions given by the learned trial judge to the jury, it cannot be concluded from the two questions that are relied upon for the third ground of appeal that the jury reversed the onus of proof.

Whether there should have been a direction on absence of a timely complaint and delay

[48] The appellant relies on s 4A(5) of the *Criminal Law (Sexual Offences) Act* 1978 to submit that the learned trial judge should have made a comment to the jury on the complainant's evidence in respect of the absence of a timely complaint. Although the fourth ground of appeal also raised the question of whether the learned trial judge should have made a comment as to the effects of delay, the appellant's counsel on the hearing of the appeal did not press the matter of delay, as that was not an issue in the trial.

[49] No application for any direction about the absence of a timely complaint was made at the trial. The failure of the complainant to make a complaint at an earlier time

than the complaint that was made to Ms Frainey was canvassed extensively during cross-examination of the complainant and was covered in defence counsel's address in connection with the reliability and truthfulness of the complainant. When summing up, the learned trial judge referred to what defence counsel had said in the following terms (at R203):

> "He indicated or reminded you that she didn't tell the Department of Family Services anything when she was living at [the appellant's house]. Similarly, she didn't tell Frainey or Hurd or [the girlfriend] that she was raped. In fact, she said in evidence that she did but it's clear from those people's evidence that she didn't say that she was raped."

[50] The learned trial judge was constrained in what comment could be made in respect of the reliability of the complainant's evidence due to the absence of a timely complaint, by virtue of s 4A(4) of the *Criminal Law (Sexual Offences) Act* 1978. The learned trial judge made it clear to the jury that the reliability of the complainant's evidence was in issue, having regard to what was revealed by the course of the evidence. No further direction was required in the circumstances.

Order

[51] The appellant cannot successfully sustain any of the grounds of appeal. The appeal against conviction should therefore be dismissed.