# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Wheatley* [2012] QCA 55 |
| PARTIES: | **R**<br>**v**<br>**WHEATLEY, Tony Shane**<br>(appellant) |
| FILE NO/S: | CA No 262 of 2011<br>SC No 688 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 20 March 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 5 March 2012 |
| JUDGE: | Muir JA and Margaret Wilson AJA and Applegarth J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The appeal against convictions be allowed.**<br>**2. The convictions in respect of all counts on the indictment be set aside.**<br>**3. There be a re-trial on those counts.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted after a trial of 10 counts of supplying a dangerous drug with a circumstance of aggravation, seven counts of indecent treatment of a child under 16 and four counts of rape – where the complainant was a 15 year old child entrusted to the care of the appellant – where the complainant alleged that the appellant would commit sexual acts against her whilst she was greatly under the influence of cannabis – where the prosecution abandoned cognitive capacity as a ground for lack of consent – where the trial judge did not direct the jury with respect to that abandonment – where the prosecutor personally attacked defence counsel in his closing address and drew the jury's attention to protecting the weak and vulnerable of society – where the trial judge did not specifically direct the jury with respect to these aspects of the prosecutor's address – whether the trial judge's directions |

with respect to the meaning of consent were inadequate – whether the prosecutor's closing address exceeded the bounds of proper comment and submission – whether the verdicts are unreasonable and unsupported by the evidence

*Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, cited
*Libke v The Queen* (2007) 230 CLR 559; [2007] HCA 30, followed
*R v Cannell* [2009] QCA 94, cited
*R v M* [1991] 2 Qd R 68, considered
*R v Winchester* [2011] QCA 374, considered
*Whitehorn v The Queen* (1983) 152 CLR 657; [1983] HCA 42, cited

COUNSEL: J J Allen for the appellant
M J Copley SC for the respondent

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

[1] **MUIR JA: Introduction** The appellant was convicted after a trial of 10 counts of supplying a dangerous drug with a circumstance of aggravation, seven counts of indecent treatment of a child under 16 years and four counts of rape. He appeals against his convictions. Before discussing the grounds of appeal, it is desirable to say something of the evidence before the jury.

**The evidence**

[2] The complainant female was aged 15 at the time of the offences. She was having behavioural problems and was in receipt of psychiatric treatment which included the taking of anti-depressant medication. The appellant, a friend of the complainant's parents, was aged either 49 or 50. He lived in Brisbane. The complainant and her family resided in Tamworth.

[3] The complainant was entrusted by her parents, who were separated, to the appellant's care and she resided with him on two occasions, firstly on an unknown date between late 2009 and early 2010 and subsequently in March 2010. The offences alleged in counts 1 to 4 were allegedly committed during the first such occasion and the offences in the subsequent counts were allegedly committed during the second.

[4] The following schedule, which was marked for identification at trial, sets out the particulars of each count by reference to statements made by the complainant in her three police interviews. Counts 2, 4, 9 and 19 allege offences of rape. Counts 3, 6, 7, 11, 13, 15 and 20 are counts of indecent treatment of a child under 16 and the remaining 10 counts are for supplying dangerous drugs with a circumstance of aggravation.

| | Counts | Particulars | Pages in Interview |
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| 1. | that on a date unknown between the twentieth day of December, 2009 and the first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | The complainant and defendant had sex once.<br><br>She described being "very, very stoned" on cannabis that the defendant had been giving her. The complainant lay on the defendant's bed and he pulled down her pants and said "you are going to love this". The defendant had sex with the complainant without a condom. She described being in pain. | **1**[1] – page 43<br><br>**2** – pages 46-47 |
| 2. | that on a date unknown between the twentieth day of December, 2009 and the first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY raped [the complainant]. | | **3** – pages 14-17 |
| 3. | that on a date unknown between the twentieth day of December, 2009 and the first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY unlawfully procured [the complainant] a child under 16 years to commit an indecent act.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | The next night following this intercourse the defendant requested oral sex from the complainant. The complainant refused and the defendant made her masturbate him.<br><br>The defendant put his tongue inside the complainant's vagina. | **3** – pages 27-28 |
| 4. | that on a date unknown between the twentieth day of December, 2009 and the first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY raped [the complainant]. | | |
| 5. | that on the twentieth day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | At some point on this Saturday after the drive from Tamworth, the defendant and complainant went to his room. He gave her three cones to smoke that included 'pot' and tobacco. | **1** – pages 20-27 |
| 6. | that on the twentieth day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY wilfully and unlawfully exposed [the complainant], a child under 16 years, to an indecent act by TONY SHANE WHEATLEY.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | The defendant questioned the complainant asking "when are you going to have sex with me?" The defendant asked the complainant if she wanted to "play with his cock" and said "Now I'm disappointed"<br><br>During this time the defendant was touching his penis and the complainant saw it start to become erect. She stated the defendant was naked. | |

[1] **1** – Interview on 4 April 2010; **2** – Interview on 5 April 2010; **3** – Interview on 7 April 2010.

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| 7. | that on the twenty-first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY unlawfully and indecently dealt with [the complainant] a child under the age of 16 years.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | On the Sunday 21st March, the complainant was using the defendant's computer in the kitchen. It was late afternoon and getting dark. The defendant came up behind the complainant and, using both hands, squeezed her breasts. The defendant used his right hand to try to get under the complainant's bra but was unsuccessful. The defendant said to the complainant "I hope you don't mind" and suggested she take off her bra. | **1** – pages 31-33 |
| 8. | that on the twenty-first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | That night the defendant again gave the complainant three cones which they smoked together before she went to sleep. | |
| 9. | that on or about the twenty first day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY raped [the complainant]. | The complainant went to sleep Sunday night and woke up to find the defendant had 1-2 fingers inside her vagina. She was able to recognise him from the light cast by her computer. She told the defendant to stop twice and he pushed his finger(s) in harder then stopped and left. | **1** – pages 36-41 |
| 10. | that on the twenty-second day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor | On the Monday after the complainant arrived, the defendant gave her cannabis. She stated he gave her cannabis on the first day (Saturday) and Monday as these were special occasions. The complainant was not completely sure why the Monday was a special occasion saying the defendant was talking to someone he hadn't spoken with for some time. | **1** – pages 44-45 |
| 11. | that on the twenty-fifth day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY unlawfully and indecently dealt with [the complainant] a child under the age of 16 years.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | On Thursday 25 March 2010 at around 5-5.30pm, the complainant was in the lounge room looking at fish and the defendant put both his hands on her breasts and felt them. The defendant told the complainant he needed to release the pressure and the complainant replied "nuh, I'm a bit frigid at the moment. | **1** – pages 54-57 |
| 12. | that on a date unknown between the nineteenth day of March, 2010 and the twenty-sixth day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | The complainant was in the defendant's bedroom smoking cannabis. The defendant told the complainant that she was so hot he has to masturbate whenever she was in the house. The defendant pulled down his pants and began to rub his penis with his hand. The complainant saw the defendant's penis becoming erect and he asked her if she wanted to excite him a little bit.<br><br>The defendant grabbed the complainant's hand and pulled it toward his penis. The complainant pulled away and left. | **1** – pages 58-60 |
| 13. | that on a date unknown between the nineteenth day of March, 2010 and the twenty-sixth day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY unlawfully and indecently dealt with [the complainant] a child under the age of 16 years.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | | |

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| 14.<br><br><br><br><br>15. | that on the twenty-sixth day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor.<br><br>that on the twenty sixth-day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY wilfully and unlawfully exposed [the complainant], a child under 16 years, to an indecent act by TONY SHANE WHEATLEY.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | On Friday 26 March the complainant recalled the defendant coming home angry from work. They ordered take away and she recalled going into the defendant's room and smoking 3 cones of cannabis. The defendant told her that smoking cannabis made him horny.<br><br>The defendant took off his pants and was naked in front of the complainant. He lay on his bed rubbing his penis with his hand and asked the complainant if she would help masturbate him. | **2** – pages 7-15 |
| 16.<br><br><br><br>17. | that on the twenty-seventh day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor.<br><br>that on the twenty-seventh day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | Before the complainant went to the shops with the defendant he gave her cannabis and she smoked it. That night he again gave her cannabis and they smoked it together. | **2** – pages 35-37 |
| 18 | that on the twenty-eight[h] day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | On Sunday 28 March the defendant gave the complainant cannabis to smoke | **2** – pages 47-50 |
| 19 | that on the twenty-eight[h] day of March, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY raped [the complainant]. | The complainant was going to bed when the defendant put his hand on the complainant's thigh and was rubbing it while she was in his bedroom sitting in a chair. He briefly took his hand off her thigh to help her up and while he was behind her put one hand down her pants and one hand on her breast. The defendant used his finger, on the outside of the complainant's undies, to rub her vagina. The complainant described his finger as inside her and painful. | **2** – pages 60-72 |
| 20. | that on the third day of April, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY unlawfully and indecently dealt with [the complainant] a child under the age of 16 years.<br><br>And TONY SHANE WHEATLEY had [the complainant] under his care. | The complainant stated the last incident was groping and occurred on the Saturday before her interview (3 April 2010). The complainant was in the kitchen and the defendant came past and touched her breasts with his fingers including her nipples with his thumb.<br><br>She said they later had cones. | **2** – page 90<br><br>**3** – pages 7-11 |
| 21. | that on the third day of April, 2010 at Brisbane in the State of Queensland, TONY SHANE WHEATLEY being an adult, unlawfully supplied the dangerous drug cannabis to [the complainant], a minor. | The complainant remembered that on the last night she stayed with the defendant, he gave her 2 cones of cannabis and not the usual 3. The defendant told her "if I'm not getting what I want, you're not getting what you want.' | **1** – page 46 |

[5] It was not suggested by counsel for the appellant that the Schedule materially misstated what the complainant had said in her police interviews.

[6] The complainant also gave pre-recorded evidence and was cross-examined in relation to: her psychiatric condition; her use of marijuana; her smoking of marijuana on her first trip from Tamworth to Brisbane with the appellant; whether she had a sexual relationship with a 24 or 25 year old male called Andrew; whether she had a pregnancy scare; whether the complainant continued having a nightly marijuana cigarette when she stayed with the appellant; being bullied at school and having learning difficulties.

[7] Counsel for the appellant put to the complainant that she had fabricated her story. He also put to her that on the night of the appellant's birthday the complainant had attempted to initiate sexual interaction, but had been rebuffed by the appellant. The complainant denied these allegations.

**Other prosecution evidence**

[8] A specialist paediatrician, Dr Skellern, gave evidence to the effect that her examination of the complainant on 5 April 2010 revealed two areas of mucosal abrasion just outside of the vagina which were painful to touch and consistent with the complainant's account concerning count 19. Dr Skellern conceded that her findings could also be consistent with an infection. She said that swabs taken at the time of examination subsequently indicated the presence of Candida. The complainant's hymen was intact and Dr Skellern's evidence was that this could be expected in 60 per cent of females at the complainant's stage of pubertal development who had verified sexual penetration of the vagina by a penis.

[9] A substance detected in the complainant's blood and urine samples was consistent with the complainant's account of having been supplied with cannabis by the appellant.

[10] A helpline operator, Ms Daley, gave evidence of receiving a telephone call on 4 April 2010 at about 2.06 pm. She said that the call was made by the complainant who asked her "Is it rape if you're under 16 and he is 50 years old, even though she said yes". Asked what her response was, she said, "My response was that it is rape and that it is illegal for an adult to have sex with a child". Asked what the complainant said, Ms Daley responded, "That she'd been raped a couple of months ago by a 50 year male, who is a friend of the family".

[11] Ms Daley said that on a subsequent occasion on which the complainant's mother participated in a discussion over the telephone, the complainant said that the appellant "took her virginity". The complainant had also made a preliminary complaint to a male acquaintance of the appellant in about Easter 2010. The complainant said, referring to the appellant, "Did he tell you that he had raped me?" He said that he was told by the complainant that she had been raped the first time that she had been at the appellant's residence.

[12] The complainant telephoned the appellant at the instigation of police officers. After a complaint by the appellant about the complainant having left his residence without informing him that she intended to do so or of her whereabouts the following exchange occurred:

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| "WHEATLEY: | You're not real considerate mate, are ya? |
| [THE COMPLAINANT]: | Oh and you are. |
| WHEATLEY: | What do you mean by that? |
| [THE COMPLAINANT]: | You've had sex with me, Stumpy. |
| WHEATLEY: | You asked me for it. |
| [THE COMPLAINANT]: | I was stoned off my head. |
| WHEATLEY: | Yeah right oh. Whatever darling. You still there? |
| [THE COMPLAINANT]: | Yeah. |
| WHEATLEY: | So, nuh this is not right [the complainant], mate, you could have asked me, I probably would have drove you there." |

[13] Later in the conversation, this exchange occurred:

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| "[THE COMPLAINANT]: | I've got to go. |
| WHEATLEY: | No you don't darling. You keep talking. Just listen mate, I am sorry. But you pushed me and you called me a blackmailer. |
| [THE COMPLAINANT]: | You are. |
| WHEATLEY: | I am not, mate. I'm the one paying." |

[14] I now turn to a consideration of the grounds of appeal.

**Ground 1 – the trial judge's directions as to the meaning of "consent" were inadequate, occasioning a miscarriage of justice – the appellant's contentions**

[15] This ground relates only to the offences of rape – counts 2, 4, 9 and 19. The count 2 offence was allegedly committed during the first occasion on which the complainant resided with the appellant. In her third interview with police on 7 April 2010, the complainant stated that she got "very, very stoned" and:

> "I had to lay down and I went onto, he said to lay down on his bed. And um, pulled my pants down and said you're going to love this. And um, he didn't have a condom on and … he was inside me for, it felt like forever. I was in pain. And um, afterwards I just pulled up my pants and went to my room. He was trying to get me to sleep in his bed with him."

[16] The complainant said that when she smoked enough 'pot' she hallucinated, she said "…I can't move my muscles totally relax. My eyes go blood shot… and I feel like I'm going to vomit sometimes". This exchange followed:

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| "[THE COMPLAINANT]: | I um, started wanting to throw up 'cause I have to lay down — |
| CON JENKINS: | Mm. |

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| [THE COMPLAINANT]: | When that happens, because I cannot sit up. |
| CON JENKINS: | Yep. |
| [THE COMPLAINANT]: | So he said just lay down on my bed so I'd, I moved over and laid on his bed and that is when that happened. |
| CON JENKINS: | So you said you moved over and laid on his bed. What do you mean you moved over? |
| [THE COMPLAINANT]: | I had to get up and I sort of fell on his water bed." |

[17] Asked by the interviewing police officer to describe how the appellant pulled her pants down, she said:

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| "[THE COMPLAINANT]: | Um, I, I had shorts on I think. And he grabbed each side of my pants and pulled them down to my ankles. |
| CON JENKINS: | Yep. |
| [THE COMPLAINANT]: | And then he um, raped me. Said you're going to love it." |

[18] She said that she had been lying on her back on the bed looking up at the ceiling "Cause I couldn't move. And he was getting onto the bed, but I thought he was just climbing over me… And he pulled them down… He took his pants off".

[19] The incident was further discussed as follows:

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| "CON JENKINS: | When you say his pants, what do you, um, what did his, tell me everything about his pants. |
| [THE COMPLAINANT]: | He just um, shorts on and just pulled them down. |
| | … |
| [THE COMPLAINANT]: | He um, he, he used his penis and um, put it in me. |
| | … |
| CON JENKINS: | Yep. And what's the next thing that happened? |
| [THE COMPLAINANT]: | Huh? |
| CON JENKINS: | What, he's put his penis in your vagina. |
| [THE COMPLAINANT]: | He started pushing really hard. Saying he was being gentle and um, I just remember it feeling like it was ripping. And um, I was in so much pain. |
| CON JENKINS: | Yep. |

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| [THE COMPLAINANT]: | Um, he, he stopped after a while I think and I pulled my pants and ran to the room, Stacey's room. |
| CON JENKINS: | Yeah. |
| [THE COMPLAINANT]: | And I um, shut the door hoping he wouldn't come back in. |
| CON JENKINS: | Mm. And what happened then? |
| [THE COMPLAINANT]: | He didn't. But I stayed up all night. |
| CON JENKINS: | You said he was pushing really hard, when you say he's pushing really hard, what do you mean by that? |
| [THE COMPLAINANT]: | It felt like he was just like going really hard inside me, but it felt like he was inserting it all. |
| CON JENKINS: | Inserting what all? |
| [THE COMPLAINANT]: | All his um, penis." |

[20] The complainant described the pain she was feeling in her vagina as the result of the insertion of the appellant's penis. She said the appellant was making "sort of like a grunting noise" and that "…it sounded like he was talking, but [she] had zoned out" and "was trying not to feel anything". Asked what she did when the appellant pulled his penis out, she said, "He just laid next to me and I got up, pulled my pants up and ran". The complainant said that this had happened prior to ejaculation.

[21] In cross-examination, the complainant stated that she could not recall saying to the Kids Helpline operator "Is it rape if you are under 16 and he is over 50, even though you said yes?" A little later in the cross-examination this exchange took place:

> "MR GUNN: Did you say yes to Mr Wheatley? – No.
>
> Did you say no to Mr Wheatley? – Yes. Actually, no, I didn't. I didn't say anything.
>
> Did you cross your legs or roll away or make any sort of signal that you weren't willing to participate? – I was moving.
>
> Well, how were you moving? – I was trying to push myself away from him.
>
> Did you make any other signal that you did not—? – No."

[22] In re-examination, the complainant said that her attempt to push herself away from the appellant was not very effective because she was "completely out of it because [she] had smoked marijuana earlier that night" and that she was not really able to talk coherently. She said that she did not consent to intercourse.

> "And you were asked did you move and you said something like you were trying to push yourself away from him? – Yes.
>
> How effective could you actually do that? – Not very effective at all.
>
> Why's that? – I was completely out of it because I had smoked marijuana earlier that night.
>
> All right. Were you able to talk coherently? – Not really, no.

> Right. Did you consent to Tony Wheatley putting his penis in your vagina that night? – No."

[23] The count 4 offence was also allegedly committed during the first occasion on which the complainant resided with the appellant. The complainant told police that the night after the commission of the count 2 offence, the appellant stuck his tongue inside her vagina. In cross-examination, she said that the appellant licked her vagina.

[24] The count 9 and 19 offences were alleged to have occurred on the second occasion on which the complainant resided with the appellant. She told police that she had woken up in her bed to find the appellant with one or two fingers inside her vagina. She felt angry and upset, "It felt like forever". She told him to stop, but the appellant "pushed in harder once and then let go". Count 9 was based on this conduct.

[25] Asked in cross-examination if she said anything to signal that "she did not want that to occur", she replied, "No. I was too scared". In re-examination she was referred to passages in her police interview where she had told police that she told the appellant to stop twice. She then said, "Well, I must have said 'stop', but it's a bit hazy". She said that she did not give the appellant permission or authority to put his fingers in her vagina.

[26] Count 19 also involved an allegation of digital rape. The complainant explained that she was sitting on a chair when the appellant began rubbing her thigh. He then helped her up from the chair and placed one hand on her breast and the other inside her underpants. He proceeded to rub inside her labia. In re-examination, the complainant said that she did not give the appellant any permission or authority to act as he did. She explained that the appellant was helping her to bed because she had just smoked marijuana and was feeling "out of it".

[27] In opening the prosecution case, the prosecutor explained that consent had to be "freely and voluntarily given by a person with the cognitive capacity to give consent" and that consent was not free and voluntary if obtained by the exercise of authority. He said that the complainant:

> "…[was] very intoxicated with marijuana. She in that state [did] not have the cognitive capacity to… consent… she's so intoxicated, she can't even sit up, she has to lie down, but by exercise of his authority, the fact that he is, as us (sic) lawyers say, in loco parentis. The Crown says it's his exercise of authority that, as it were, stops her from, as it were, manifesting that lack of consent. But it's quite obvious that she's 15 at this time, she's stoned off her brain as she said in the thing and he's just taken advantage of her. The law says that that is – but that's again a matter for you to decide whether or not the Crown has proved this element of consent."

[28] In his closing address the prosecutor relied only on absence of consent and made no mention of any exercise of authority by the appellant over the complainant or of any lack of cognitive capacity. Nevertheless, the trial judge directed the jury in respect of both cognitive capacity and exercise of authority. The direction, relevantly, was:

> "Consent is defined in section 348 of the Criminal Code as follows:
> 1. In this chapter consent means consent freely and voluntarily given

> by a person with the cognitive capacity to give consent. I might repeat that: in this chapter consent means consent freely and voluntarily given by a person with the cognitive capacity to give consent.
>
> The second subsection provides: without limiting subsection 1 a person's consent to an act is not freely and voluntarily given if it is obtained by exercise of authority. I will repeat that also: without limiting subsection 1 a person's consent to an act is not freely and voluntarily (sic) if it is obtained by exercise of authority.
>
> It is the prosecution contention in respect of count 9 that [the complainant] did not give her consent because she woke to find the defendant's fingers in her vagina when her consent had not been given because she was asleep and probably then said, 'Stop.' In respect of the other three charges of rape, counts 2, 4 and 19 it argues that through smoking cannabis she did not have the cognitive capacity to give consent or, alternatively, if you are not satisfied of that her consent was obtained by Mr Wheatley's exercise of authority over her.
>
> Those give rise to issues of fact that are for you to resolve, but you may wish to bear in mind that her evidence that she tried to push herself away in respect of count 2 suggests that she did then have the cognitive capacity to give or refuse consent but may have lacked the physical capacity to do so because of the effects of the cannabis. She may not have been so incapacitated as to lack that cognitive capacity in the sense that she was not comatose. Her evidence of 'being out to it' in respect to the other rape charges in counts 4 and 19 may lead to a similarity in respect of them given her apparent ability to move of her own volition at the times relevant to those charges."

[29] Counsel for the appellant submitted that the trial judge's directions were inadequate and apt to mislead the jury as to the real issues on the evidence in that:

- the directions permitted the jury to find a lack of consent on the basis of a lack of cognitive capacity of the complainant when such a finding was not reasonably open on the evidence and, moreover, the prosecutor had abandoned reliance on lack of cognitive capacity;
- the directions failed to give any useful meaning to the words "cognitive capacity" in the context of the evidence;
- the directions that the complainant may have lacked "the physical capacity" "to give or refuse consent" with respect to count 2 and the reference to the complainant's "apparent ability to move of her own volition at the times relevant to" counts 4 and 19 were confusing and tended to suggest that lack of consent might be proved by an inability to manifest consent or lack thereof;
- the directions permitted the jury to find a lack of consent on the basis consent was obtained by exercise of authority when such a finding was not reasonably open on the evidence; and
- the directions failed to give any useful meaning to the words "exercise of authority" in the context of the evidence.

[30] Counsel submitted, "The directions fell below the duty of a judge to explain to the jury how the relevant law applied to the facts of the case."[2]

**Ground 2 – the prosecutor's closing address so exceeded the bounds of proper comment and submission as to cause a miscarriage of justice – the appellant's contentions**

[31] The prosecutor in his closing address made repeated comments denigrating defence counsel and the defence submissions. Counsel for the appellant submitted that the comments that a society is judged on how it protects persons such as the complainant would reasonably be understood as an exhortation of the jury to protect the complainant and persons like her in rendering their verdicts. It was submitted that it was significant that such comments were referred to by the trial judge without correction and that there was a real possibility that the comments may have influenced the jury to return their verdicts.

[32] The derogatory comments relied on commenced with the following opening salvo by the prosecutor:

> "Well, ladies and gentlemen, there's been a consistency in the approach by Tony Shane Wheatley towards the complainant, …both when he had her at his house and now here in the courtroom through the way that his counsel, Mr Gunn, has treated her, and that really, not to put too fine a point on it, is worthless, she's a liar, she's not to be believed, she's not to be accepted, and why? Simply because she's different.
>
> See, on the surface, Mr Wheatley was nice, polite, told her, 'I am not like your parents.', but below the surface he had nothing but contempt for her, and the address you …just heard, really urges you to treat her with contempt because she's a self-confessed liar, because she's a cannabis user, because she hallucinates or has a jumbled memory or has other problems, but really they all boil down to this allegation that she is so self-centred, so determined to get what she wants, that she would deliberately fabricate a story against someone who has been nothing but nice to her and continue with that fabrication for three days with police and through two times having to come here to this Court, and all for one thing, so that she could not leave Brisbane when, in fact, the upshot of making the complaint was going to be she wasn't going to be staying in Brisbane. Treat her with contempt. Show her no regard at all."

[33] The prosecutor then drew the jury's attention to the complainant's vulnerability and to the social desirability of protecting people such as her. He said:

> "She's not one of the strong in society. She's not one of the privileged people in society. Ladies and gentlemen, how do we judge the worth of the society? Do we judge a worth of a society on how it protects its strong, how it protects its wealthy, its educated, its independent, its healthy of mind and of body? We don't, because such people will always be able to protect themselves. A society is judged on how it protects its weak and vulnerable, how it protects its sick, its disenfranchised, its [the complainant's] of the world."

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2 *Fingleton v The Queen* (2005) 227 CLR 166.

[34] The other parts of the prosecutor's address relied on by the appellant are set out later.

**Ground 3 – The verdicts are unreasonable and unsupported by the evidence – the appellant's contentions**

[35] Counsel for the appellant argued that the following matters fatally weakened the complainant's credibility:

- the lack of complaint as to the offending in counts 1 to 4 after the complainant's return to Tamworth;
- the complainant's willingness to return to reside with the appellant notwithstanding the alleged commission of counts 1 to 4;
- the complainant's statements that the appellant's penis was circumcised when in fact it was uncircumcised and the complainant would have known that had her account been true; and
- the fact the complainant had an intact hymen in light of the allegations on which count 4 was based.

[36] Alternatively, because of the matters relevant to proof of lack of consent and the evidence going to honest and reasonable mistake as to consent, the verdicts on counts 2, 4, 9, and 19 should be set aside as unreasonable and not supported by the evidence.

**Ground 1 – consideration**

[37] Although the defence case was that the appellant had not sexually penetrated the complainant in any way, it remained necessary for the trial judge to direct the jury that they needed to be satisfied beyond reasonable doubt that the complainant did not consent to the alleged act of carnal knowledge. The trial judge directed the jury as follows:

> "Then we go on then to talk about rape. To prove rape on the evidence that has been led here the prosecution must prove the defendant, first, had carnal knowledge of or with the complainant; secondly, without her consent or, first, penetrated the vulva, vagina or anus of the other person; secondly to any extent; thirdly, with a thing or part of the defendant's body that is not a penis; and, fourthly, without the consent of the other person.
>
> The main issue in this case generally is whether you believe the evidence of the complainant …that the events charged as rape occurred."

[38] The trial judge then dealt with the circumstances in which each offence was alleged to have occurred and added:

> "A common feature in respect to these charges is whether the prosecution has proved not only that they occurred but that they occurred without the consent of the complainant. In that context let me tell you something of the legal definition of consent in this context."

[39] The directions set out in paragraph [28] hereof were then given.

[40] A central issue between the parties was whether the acts alleged by the complainant had occurred at all. The oral evidence of the complainant did not admit the possibility that the alleged acts were consensual. The appellant's case was that there were no sexual acts, consensual or otherwise.

[41] However, the content of the complainant's records of interview raised some potentially complex issues in relation to whether the complainant's consent was free and voluntary, whether the complainant had cognitive capacity and whether, if there was consent, it was obtained by the appellant's exercise of authority over the complainant. The jury were entitled to conclude from the interviews that: the appellant regularly supplied the complainant with "pot", particularly in the evenings; the complainant found the effects of smoking the drug more beneficial than her prescribed medication for her depression; and the appellant, in speaking to the complainant about his supply of the drug, linked its supply to the provision of sexual favours.

[42] Asked what she felt like when she smoked the pot supplied by the appellant, the complainant said, "Like nothing matters. It's, it's just like I haven't got depression anymore. Um, happy, I giggle a lot". She described her condition on different occasions as "really stoned", "a very big blur", "relaxed", "hallucinat[ing]", "feel[ing] sick", "pretty out of it", "very out of it" and "not knowing what was going on".

[43] That evidence, when regard is had to the age of the complainant, her depressive illness and her psychological condition, raised serious questions, at least in respect of some of the rape counts, as to whether, if consent had been given, the complainant had the cognitive capacity to give it or if it was given freely and voluntarily. Some of the difficulties which may arise in determining whether consent was "freely and voluntarily" given were discussed in *R v Winchester*.[3]

[44] In this case, there was no clear dividing line between the evidence relevant to free and voluntary consent and the evidence concerning cognitive capacity. Any exposition of the latter by the primary judge was likely to bear on the former, particularly if accompanied by any discussion of the facts.

[45] In my view, the possibility that the jury may have had regard to the question of cognitive capacity could not be considered remote. Consequently, there is little merit in the argument that there was insufficient evidence of lack of cognitive capacity for that to be left to the jury, except in relation to count 2 where the complainant's telephone call to the help line suggested consensual intercourse as did the pretext telephone call. There is, however, substance in the complaint that the jury were not informed by the trial judge that the prosecution was no longer relying on absence of cognitive capacity. The proceedings, being adversarial in nature, the prosecution was free to abandon reliance on absence of cognitive capacity if it so desired[4] and the jury should have been directed that lack of cognitive capacity was not in issue.

[46] The primary judge discussed with counsel the directions he was proposing to give and the prosecutor informed the trial judge that he was not relying on a lack of cognitive capacity. In those circumstances, and having regard to the fact that the

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3 [2011] QCA 374.

4 *Libke v The Queen* (2007) 230 CLR 559 at 586-587; and *R v Cannell* [2009] QCA 94 at [54].

prosecutor did not address on cognitive capacity, it is difficult to conclude that the failure to seek a re-direction explaining to the jury that cognitive capacity was not an issue, objectively viewed, was explicable as a rational forensic decision. In my view, the failure to advise the jury of the prosecution's abandonment of the cognitive capacity issue gave rise to a material risk that the jury would reach a verdict by reference to that issue without the prosecutor or defence counsel having had the opportunity to address on it. There was thus a material error of law in the summing up in respect of counts 4, 9 and 19 but, having regard to my conclusions in respect of ground 2, it is unnecessary to discuss the consequences of this error.

[47] I consider also that in the circumstances of this case, had lack of cognitive capacity been in issue, it would have been desirable for the primary judge to explain to the jury that "cognitive capacity" would be lacking if the complainant was unable to understand what it was that she was consenting to, assuming that consent was found to have been given.[5]

[48] The complaint about the failure to elaborate on the meaning of "exercise of authority" is not persuasive. Those words have a plain everyday meaning. The evidence did not suggest that the appellant relied on his custodial role to exert authority in order to procure the complainant's consent. In the circumstances, the direction was sufficient. Nor is it the case that the trial judge relevantly failed to explain to the jury how the relevant law applied to the facts of the case. His exposition of consent was sufficiently enmeshed with the facts of each offence to provide the jury with a sufficient explanation of the role of the relevant concepts.

**Ground 2 – consideration**

[49] The principles governing the conduct of a prosecutor were considered recently in *Libke v The Queen*.[6] In the course of their reasons, Kirby and Callinan JJ quoted the following passage from the reasons of Deane J in *Whitehorn v The Queen*:[7]

> "Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered."

[50] Their Honours then, after quoting from the reasons of Dawson J, said:[8]

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5 See *Libke v The Queen* (2007) 230 CLR 559 at 592.

6 (2007) 230 CLR 559 at 576.

7 (1983) 152 CLR 657 at 663-664.

8 *Libke v The Queen* (2007) 230 CLR 559 at 577.

> "The role of prosecuting counsel is not to be passive. He or she may be robust, and be expected and required to conduct the prosecution conscientiously and firmly. Because a criminal trial is an adversarial proceeding, there is at least the same expectation of defence counsel. The obligation of counsel extends to the making of timely objections to impermissible or unacceptable questions and conduct. But it is also the duty of the trial judge to make appropriate interventions if questions of those kinds, capable of jeopardising a fair trial, are asked. The duty of the trial judge is the highest duty of all. It is a transcendent duty to ensure a fair trial."

[51] In *Libke*, Hayne J, with whose reasons Heydon J agreed, addressed the same issue as follows:

> "[71] A criminal trial in Australia is an accusatorial and adversarial process. In that process, prosecuting counsel has a role that is bounded by long-established duties and responsibilities. Those duties and responsibilities are summarised when it is said that '[t]he duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice'. In the Supreme Court of Canada, Rand J described the role of the prosecutor as being:
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> > not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed *with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*.
>
> A central, even the central, element in that role is 'ensuring that the Crown case is presented *with fairness to the accused*'.
>
> [72] The prosecution case is to be presented in the context of an adversarial process in which each side 'is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked'. But again, there are boundaries to that process. The choices that have been described are to be made 'subject to the rules of evidence, fairness and admissibility'. As Dawson J said in *Whitehorn v The Queen*:
>
> > A trial does not involve the pursuit of truth by any means. The adversary system is the means

> adopted and *the judge's role in that system is to hold the balance between the contending parties* without himself taking part in their disputations.
>
> It is not for the judge to attempt to remedy the deficiencies of a party's case. As was pointed out in *Whitehorn*, and earlier in *Richardson v The Queen*, the judge will frequently lack the knowledge and the information that would be necessary to making a decision about whether and how any deficiency would be remedied. But it is for the judge to 'hold the balance between the contending parties'. It is for the judge to ensure that the trial is conducted fairly."

[52] In my view, the prosecutor did not act with the degree of detachment, fairness and professional restraint expected of a person fulfilling the role of Crown Prosecutor. The first part of the address criticised, that referring to the protection of the weak, was, I think, a flight of rhetoric intended, perhaps, to engender some sympathy for the complainant. As such it was ill advised. The implicit exhortation to the jury to be sympathetic towards and to protect the "weak and vulnerable" complainant was inconsistent with the jury's duty to consider the evidence and arrive at their verdict dispassionately uninfluenced by sympathy for, prejudice against, or like or dislike of the appellant, the complainant or any other person.

[53] The part of the prosecutor's address which preceded the passage just considered was equally ill considered. The prosecutor submitted, inaccurately, unfairly and disparagingly, that defence counsel had treated the complainant as:

> "…worthless, she's a liar, she's not to be believed, she's not to be accepted, and why? Simply because she's different… the address you heard… urges you to treat her with contempt because she's a self-confessed liar, because she's a cannabis user… Treat her with contempt. Show her no regard at all".

[54] The prosecutor's approach, as well as misrepresenting defence counsel's cross-examination and address, implicitly and wrongly asserted that defence counsel had behaved improperly towards the complainant. This personal attack set the scene for the exhortation to protect the weak and vulnerable. The prosecutor's approach, in my view, whether intentional or merely misguided, encouraged the jury to substitute emotion for dispassionate reasoning.

[55] Elsewhere in his address, the prosecutor, in passages the subject of complaint, said:

> "You listen to that, and it is absolutely amazing that my learned friend can say to you with a straight face that that was ambiguous, that you need to consider the possibility that he was saying that she asked for sex and it did not occur. Ladies and gentlemen, how could anyone get up, after listening to that, and tell you that that's what that means?
>
> Really, it is one of those things that's - one might say, 'Well, no wonder the legal profession doesn't have a good name if someone can get up and tell you that that is a proper connotation on what actually happened.'
>
> …

> Ladies and gentlemen, she tells you what that's about. What other explanation is there? What other contrivance does the defence come up with to explain that? None. None. It's as if they've stayed up all night for quite a number of ways - trying to talk their way around the, 'You've had sex with me, Stumpy' business. Can't do anything about the blackmailing. Blackmailing about what? What? Blackmailing?
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> …
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> The coincidence of those four things backing her up, those four things existing when she, according to that side of the Bar table, is nothing but a liar - nothing but a liar - ladies and gentlemen, she told you the truth. Why wouldn't you believe her? It's a rhetorical question. Why wouldn't you believe her? See, she says these things happened.
>
> …
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> Simply, she gets stoned, she's in that sort of out-of-it thing, she has to lie down and he just jumps on top of her. Honestly believe that she was consenting? Honestly? And the thing is - look, it's something that you do have to consider, but not even that side of the Bar table would say that he was honestly believing that. They say it just didn't happen.
>
> …
>
> So what if she says it's circumcised and the penis is uncircumcised? Is that something that's really, really going to be the game changer, the deal breaker that my learned friend thinks it is? Really when you have a look - and this is one of the things that I say - have a look with very great care what it is that she says. The Crown says that you would be satisfied that there's nothing in that."

[56] In these passages, the prosecutor, variously, continued to denigrate defence counsel, implicitly alleged that defence counsel was colluding with his client to invent a false explanation concerning allegedly incriminating evidence, continued to distort and colour defence counsel's submissions ("she… is nothing but a liar") and to attack him personally.

[57] These passages, if they stood alone, whilst inconsistent with the proper exercise of a prosecutor's function, were unlikely to have been treated by the jury as other than examples of an advocate's excess of zeal and lack of professional restraint. However, the possible impact on the jury of these later passages cannot be viewed in isolation. They came after, and to a degree, built upon the foundation laid at the beginning of the address.

[58] The primary judge said:

> "[The prosecutor] commenced his address by reminding you that we measure a society by how well it protect (sic) its vulnerable citizens. He submitted that the defendant has shown nothing but contempt for [the complainant] in arguing that she is so self-centred as to fabricate a story against him simply so as not to leave Brisbane when the inevitable consequence of her story would be that she would go back to where her parents lived in Tamworth."

[59] Counsel for the appellant submitted that the failure of the judge to direct the jury in relation to these submissions exacerbated the problem he identified.

[60] Counsel for the respondent relied on the failure of defence counsel to object or seek an appropriate direction from the trial judge. He submitted that defence counsel and the trial judge were better placed than this Court to assess the likely impact on the jury of the matters now complained of.

[61] He submitted also that the following direction by the trial judge would have addressed any problems caused by the prosecutor's conduct:

> "You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the defendant or anyone else such as the deceased (sic). No such prejudice or emotion has any part to play in your decision. Nor should you allow public opinion to influence you. You must approach your duty dispassionately deciding the facts upon the whole of the evidence."

[62] Those conventional directions, arguably, may have gone some way towards negating the effect of the prosecutor's call for sympathy with and protection of the weak and vulnerable were it not for the trial judge's implicit acceptance of the legitimacy of the matters the subject of complaint. In my view, the summing up quoted in paragraph [58] hereof and a general lack of criticism of the prosecutor's conduct may well have confused the jury or, perhaps more likely, distracted them from focussing on the need for detachment and impartiality.

[63] Counsel for the respondent (who did not appear at the trial) submitted that the trial judge's identification in the passage above of the defence argument with the appellant rather than defence counsel would have defused the attack on defence counsel. I do not find this argument persuasive. It attributes to jurors the unlikely understanding that the meaning of the directions given to them may not be obvious and able to be taken at face value.

[64] The failure of defence counsel to object or to seek an appropriate direction is a highly pertinent consideration, but it is not fatal to the success of the ground now under consideration if it appears that there was a "serious possibility" that the offending conduct may have influenced the jury to return a guilty verdict[9] or if there was a serious or substantial miscarriage of justice.[10]

[65] It is, I think, of particular concern that the case involved allegations of the sexual abuse by a mature male of a child in his care. The following observations of Cooper J in *R v M* [11] explain why this is so:

> "Cases of child abuse raise particular difficulties. They often involve young children who have been sexually abused by persons in positions of trust. The natural inclination of adults to protect and nurture their children gives rise to strong emotions where proven cases of sexual interference with children come to light. Often there are no witnesses other than the parties involved and the evidence consists of allegations and denials and nothing more. Particularly in

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9 *R v M* [1991] 2 Qd R 68 at 84-85.

10 *Libke v The Queen* (2007) 230 CLR 559.

11 [1991] 2 Qd R 68 at 82-83.

> these cases, but in all cases of sexual interference of children, there is the possibility of tension between two principles fundamental to the administration of criminal justice. The first principle is that offenders, where the evidence is available, ought to be convicted and sentenced in relation to the criminality of the conduct involved. In the case of sexual interference with children the protective element of the criminal justice system is in the imposition of a penalty which acts as punishment of the offender and as a deterrent to the offender and others from committing in the future like offences. There is no protective element in the discharge by the jury of its functions. The sole function of the jury is to determine the guilt or innocence of the accused in respect of the particular offence for which the accused has been committed into the charge of the jury. The second principle is the basic right of an accused to a fair trial on the material properly admitted into evidence and before the jury. This right underlies the invariable general direction to juries that they are to determine the case on the evidence alone, free from any extraneous considerations, and, without sympathy or prejudice to the accused, the complainant, or any other person.
>
> In cases of this type prosecuting counsel are required to be particularly vigilant not to do anything which appeals to the prejudice or sympathy of the jury where such emotions are so easily aroused. So too, the court must be quick to intervene in the interests of a fair trial whenever such conduct occurs or where the trial judge perceives a real risk that it will occur."

[66] Here there was no prosecutorial vigilance or judicial intervention. There should have been. The repetition of the prosecution's offending submissions without comment in the summing up heightened the risk that the jury may have been confused, distracted or otherwise led into error. The prosecution case was strong, but hardly overwhelming, particularly on the issue of consent.

**Ground 3 – consideration**

[67] The absence of complaint concerning counts 1 to 4 during the period of the complainant's return to Tamworth is not particularly significant. The complainant was not only a troubled child, she and her mother had an uneasy relationship. It resulted in the complainant being sent with the appellant to Brisbane. Additionally, experience tells one that there is nothing particularly unusual in delayed complaints in offences of this nature.

[68] The complainant's evidence was that she was not happy about returning to Brisbane. The fact that she did return was no doubt a matter which the jury needed to weigh in considering her credibility. In that regard, the jury would no doubt have considered the circumstances under which it was thought best that she leave Tamworth in the first place.

[69] The complainant's intact hymen in the light of the conduct alleged to constitute count 4 was a relevant consideration, but the evidence suggested that the fact that the complainant's hymen remained intact was in no way remarkable.

[70] The complainant's response to a police officer's question about whether the appellant was circumcised was "Oh I say it's circumcised". This may have

suggested a lack of certainty on her part. The complainant did not think that she had ever seen the appellant's penis in a non-erect state and a medical practitioner gave evidence that an uncircumcised penis would look "fairly similar" to a circumcised one when erect. In this regard, however, there were some statements by the complainant which, if accepted, supported the inference that the complainant had seen the appellant's flaccid and partially erect penis more than once.

[71] Counsel for the respondent submitted that it was relevant to take into account, in this regard, that the observations were being made by a 15 year old girl. It may also be thought that the circumstances in which any relevant observations were made by the complainant were not particularly conducive to the making of careful inspections and appraisals.

[72] The complainant's evidence of being supplied cannabis by the appellant was corroborated, to a degree, by the detection of chemicals in her blood consistent with her having used cannabis, although those chemicals could have come from the use of cannabis obtained by the complainant from another source.

[73] The appellant's statements in the pretext telephone conversation also provided strong support for the complainant's allegations that there had been a sexual relationship between the appellant and her and that the appellant had supplied her with cannabis. At the very least, the content of the pretext telephone conversation was damaging to the appellant's credibility.

[74] All of the issues discussed above were ventilated in addresses and their resolution was well within the province of the jury's role as triers of fact.

[75] The evidentiary difficulties relied on by the appellant were not such that it was not open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that the appellant was guilty. This ground was not made out.

**Conclusion**

[76] For the reasons discussed above, the appellant did not have fair trial. There was a miscarriage of justice and the verdicts must be set aside. There is, however, no good reason why a re-trial should not be ordered. These conclusions make it unnecessary to consider the appellant's contention that the verdicts on counts 3, 6, 7, 11, 13, 15 and 20 were not in respect of the circumstances of aggravation alleged on the indictment.

[77] I would order that:

1. The appeal against convictions be allowed.

2. The convictions in respect of all counts on the indictment be set aside.

3. There be a re-trial on those counts.

[78] **MARGARET WILSON AJA:** I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.

[79] **APPLEGARTH J**: I have had the advantage of reading the reasons of Muir JA, with which I agree. I also agree with the orders proposed by his Honour.