SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nguyen* [2013] QCA 133
PARTIES:	**R** **v** **NGUYEN, Phuc Hoang** (appellant)
FILE NO/S:	CA No 261 of 2012 DC No 614 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	31 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2013
JUDGES:	White JA and Philippides and Ann Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Conviction and verdict set aside.** **3. New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – where the appellant was convicted by a jury in the District Court of one count of rape – where the complainant's various accounts of the alleged rape contained inconsistencies – where the complainant's account of the alleged rape in court was not contradicted by other testimony – where the appellant contended that the evidence in the case was of such poor quality that the jury could not have been satisfied to the requisite standard of the appellant's guilt – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant contended there was a miscarriage of justice because the learned trial judge failed to give a sufficiently clear and ample "Robinson" direction in light of the

inconsistencies in the complainant's evidence – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant contended there was a miscarriage of justice because the learned trial judge failed to properly direct the jury in relation to the complainant's distressed condition – whether there was a miscarriage of justice

Criminal Code 1899 (Qld), s 632, s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, considered
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, considered
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, considered

COUNSEL: C Heaton SC for the appellant
B J Power for the respondent

SOLICITORS: Howden Saggers Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WHITE JA:** I have read the reasons of Ann Lyons J. I agree with her Honour that the inconsistencies in the complainant's several accounts required a clear and ample direction.

[2] While it is not, of course, essential that the particular model direction set out in the Benchbook be followed word for word, it does direct attention to what authoritative decisions of this and the High Court regard as important on the topic.

[3] As her Honour has observed, it was necessary to tell the jury, independently of defence counsel, of the weaknesses in the prosecution case and to identify them as weaknesses.

[4] I agree with her Honour's conclusion with respect to the other grounds of appeal.

[5] I agree that the appeal should be allowed and a new trial ordered.

[6] **PHILIPPIDES J**: I agree with the judgment of Ann Lyons J and with the order proposed.

[7] **ANN LYONS J:**

The trial

[8] On 18 September 2012, the appellant was convicted by a jury in the District Court at Brisbane of one count of rape. The complainant alleged that she had been raped at the appellant's home around 11 or 11.30 am on Friday, 18 March 2011. The only evidence of the rape was the uncorroborated evidence of the complainant.

[9] The appellant was sentenced on 19 September 2012 to a period of imprisonment of five years and three months.

[10] The appellant's conviction came after a retrial. He had faced trial two weeks earlier but the jury had been discharged when it was unable to reach either a unanimous or a majority verdict after asking for the whole of the complainant's evidence to be read to them from the transcript.

[11] The retrial had commenced on 17 September 2012 and lasted two days, with the complainant and four witnesses giving evidence. On the first day of the trial, evidence was given by the complainant, the investigating police officer Constable Ablett, and the complainant's neighbours KS and GC, to whom she had made complaints on 22 March 2011. Another police officer, Constable Anna Ryan, gave evidence on the second day of the trial after which counsel addressed the jury and the judge summed-up the case. The jury retired to consider its verdict at lunchtime and returned a verdict of guilty later that afternoon. During its deliberations, the jury had asked for the complainant's evidence under cross-examination to be read to them.

[12] The appellant was given leave at the hearing of the appeal to file an Amended Notice of Appeal. Ground One has been abandoned and the appeal is now argued on three bases:

(a) That the verdict of the jury is unreasonable or cannot be supported having regard to the evidence (Ground 2);
(b) A miscarriage of justice has resulted from the failure of the learned trial judge to give a proper "Robinson" direction (Ground 3); and
(c) A miscarriage of justice has resulted from the failure of the learned trial judge to properly direct the jury in relation to the complainant's distressed condition (Ground 4).

The circumstances of the rape

[13] The complainant was 27 years of age and was living with her two young children in the same street as the appellant. The complainant and the appellant had become friends three or four weeks prior to the alleged rape, after meeting through their mutual friends and neighbours KS and GC. A friendship developed and the complainant and the appellant met regularly during the week for coffee in the morning and for drinks in the afternoon and evening. They would meet at the appellant's house, the complainant's house or at their friends' home. The uncontested evidence was that they were spending long periods of time together.

[14] The complainant's evidence was that on the morning of Friday, 18 March 2011, she received a text message around 9 am from the appellant asking her to go over to his house. She replied that she could not go at that time as she was getting her children ready for school and childcare but indicated that she would go over around lunch time. She then said that around 11 or 11.30 am she went to the appellant's home, entered the lounge room and told him she was there. She waited for about 15 minutes in the lounge room for him to come out but he failed to do so. She stated that at that stage she called out to him and told him that she would come back as he was obviously busy.

[15] The complainant indicated that she was about to leave when the appellant called her into his bedroom. She stated that as she came into his bedroom, he asked her for

a hug but she refused. She then said that when the appellant insisted that he wanted a hug, she sat on the bed next to him. It was at that point that he then pushed her down onto the bed, and said that he wanted to have sex with her. When she said "no" he told her she would "enjoy it". After she said no again she stated that he pulled down her tights and had his penis "already out and yeah, just – um – put it inside me".[1]

[16] The complainant told the court that she had been wearing tights and underpants and that the appellant pulled her tights down but only pulled her underpants to the side rather than removing them. She also said that he did not remove his jeans but rather, had his penis out from inside his jeans. The complainant's evidence was that she was held down by him during the episode of sexual intercourse and he had his arms on her upper arms. She stated that the appellant did not touch her anywhere else beside having his arms on her. The complainant was asked:

> "And where were his hands when he had sex with you? -- On my arms.
> And how was he holding on to your arms? -- Just holding me down, like that."[2]

[17] Her evidence was that the intercourse went on for two or three minutes, after which time he rolled onto his back and ejaculated onto himself. She stated that she did not struggle because she was "scared" of him and that she ran out afterwards.

[18] She stated that she did not speak to the appellant again after the alleged rape on Friday, 18 March and that when he came over later that day, she did not answer the door. She indicated that she did not see him again until the following Monday night on 21 March at about 7 pm when he came to her house and began banging on her door, trying to get in.

[19] The complainant's evidence was that the first person she told about the incident was her neighbour, KS, who came over to see if she was all right after the appellant had been banging on her door on 21 March. She said she told KS "that [the appellant] had invited me around there and that he raped me"[3] and that she subsequently told GC "what I'd told [KS]" and that "he put me straight in the car and took me to the police station".[4]

The cross-examination

[20] During cross-examination the complainant accepted that she and the appellant met often in the two or three weeks that they knew each other and that they would "frequently" smoke marijuana together. She indicated she was a regular user of marijuana and would use it "close" to every day. She agreed that at the time of the rape, she was a very heavy user of marijuana and that she had been using marijuana heavily for more than five years.

[21] Whilst the complainant initially indicated that she had used speed "once", in response to questions under cross-examination, she conceded that she had not been totally accurate in her answers in relation to her speed use as follows:

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1 Appeal Record Book p 26; Transcript 1-19 l 11.
2 Appeal Record Book p 26; Transcript 1-19 ll 48-52.
3 Appeal Record Book p 27; Transcript 1-20 ll 54-55.
4 Appeal Record Book p 28; Transcript 1-21 ll 22-25.

> "And you told him, after you'd been talking for some time, that you were also having problems with speed or amphetamines?--
> No. That's incorrect.
> You didn't tell him that?-- No.
> I suggest that you told him that you were using speed and it was a problem for you?-- No. I never had a problem with speed.
> Never had a problem with speed?-- No.
> But you've used it?-- Once.
> Once?-- Yes.
> Only once?-- From what I can remember, yeah, ages ago, years ago.
> You're quite certain it's only once?-- Yeah.
> Are you prepared to swear on oath about that-----?-- Yeah.
> -----here in this Court? That's the only time you've ever used speed?-- Yes.
> You've briefly given evidence in relation to this matter, haven't you? You remember I've asked you questions on another occasion?-- Yeah.
> Do you remember when I asked you about your speed use?--
> Yeah, I used-----
> On that occasion?-- I said a few times.
> And you said "a few times"; didn't you?-- Yeah.
> And now you're saying you've only ever used it once? Well, which one is it?-- A few times.
> A few times? So what you just told this Court about only once was a lie----"[5]

[22] The complainant also agreed that she had told the appellant about her relationship with her ex boyfriend and of the difficulties she was having in her life. She accepted that she spoke to him about all aspects of her life and that they got to know each other pretty well. The complainant also agreed that she would often stay at the appellant's house until after dark drinking beer and talking and that sometimes after the children had gone to bed the appellant would come up to her place as well. She also accepted that sometimes she would go into his bedroom so that her children did not see her smoking marijuana and that she had been into the appellant's bedroom before. She also agreed that the friendship developed through "coffees, alcohol, chatting and smoking dope."[6]

[23] The complainant denied that there had been consensual sex on 18 March at her home whilst they were both using speed or that she and the appellant had continued drinking, partying, using marijuana and dancing after the children had gone to bed. She denied that she had had a discussion with the appellant on Sunday, 20 March about what half-asian and half-white babies would look like and that he had said he did not want any more children. She denied that there had been a discussion with the appellant about his girlfriend coming home or that she had become agitated and angry when he indicated that when she returned he would not be able to see her anymore.

[24] The complainant confirmed that the appellant had come to her home on the evening of 21 March around 7 pm and that he had also come over earlier in the day at about 3 pm when she had not answered the door. She accepted that the appellant had

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5 Appeal Record Book p 31; Transcript 1-24 ll 22-57.
6 Appeal Record Book p 33; Transcript 1-26 ll 50-51.

come around with beers in his hand that afternoon but indicated that she had called out through the door that she had to go out and that at around 3.30 pm she drove around for awhile trying to avoid the appellant.

[25] The complainant accepted that on the day of the alleged rape she would have had to run home past KS and GC's house but that she didn't go in to tell them. She indicated that KS was the first person she told about the rape and initially stated that she told her about the rape on the day that they went to the police station, namely Tuesday, 22 March. She then corrected herself and said "No, it would have been the 21st because [KS] come up to see if I was all right after [the appellant] was banging on my door"[7] She stated that she saw KS the next morning again and was taken to the police station that day by GC.

[26] Defence counsel then asked the complainant the following questions:

> "And on the way to the police station you told [GC] that [the appellant] had raped you a couple of nights ago?-- I was under a lot of stress.
> But that's what you told him, a couple of nights ago?—Yeah - well, I can't remember. This is a year ago.
> I'm suggesting to you that's what you told [GC]-----?--
> Yeah, I know what you're suggesting.
> Well, do you agree with me that that's what you told him, that he raped you a couple of nights ago?-- I told him - I don't remember saying "a couple of nights ago". I know I told him, but I can't exactly put in exactly what I said to him.
> Well, your account that you're telling the Court here is that it happened at around lunchtime?-- Yeah.
> You said you went there at about 11 to 11.30?-- Yeah.
> And you were there about 15 minutes before you say you went into the bedroom?-- Yes.
> So that would put it at about lunchtime?-- Yes.
> It would clearly be daytime?-- Yes.
> So you'd had no reason to be saying only a few days later, on the 22nd of March, that he raped you a couple of nights ago?-- Oh, well, just a figure of speech. I don't know. I was stressed."[8]

[27] The complainant also indicated that when she attended at the police station she had a conversation with a female officer in the following terms:

> "Well, on that day, the 22nd of March 2011, when you arrived at the police station you spoke with a female officer at the counter. Do you remember that?-- Yep.
> And about the very first thing you said was, "[the appellant] raped me two days ago." You said that, didn't you?-- No.
> You didn't say that? You didn't say, "[the appellant] raped me two days ago."?-- I didn't say two days ago.
> You didn't say two days ago just so we're clear?-- Yeah, we're clear.
> Because on the 22nd of March, the day you were at the police station, two days ago would be the 20th of March, wouldn't it-----?-- Yeah.

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7 Appeal Record Book p 41; Transcript 1-34 ll 7-10.

8 Appeal Record Book p 41; Transcript 1-34 ll 23-53.

> -----not the 18th?-- It was the 18th. Think I wouldn't remember something like that, what the date was?
> Well, I'm suggesting to you that you told the police officer that he raped you two days ago and you said that it occurred on the 20th of March 2011?-- Nuh."[9]

[28] The complainant also agreed that despite the fact that the appellant had used a fair bit of force, she "did not have a single bruise, a single scratch, a single mark".[10]

The various accounts

[29] The evidence before the jury therefore indicated that on 21 and 22 March 2011 the complainant had told a number of people what had occurred. She gave accounts not only to her neighbours KS and GC but to Constable Anna Ryan after she arrived at the police station. Those three witnesses gave evidence of those accounts at the trial.

[30] As I have already indicated, the complainant's evidence was that she told KS on Monday, 21 March when she came over to check on her after the appellant had been banging on her door that evening. She stated, "I told her at my house" and "that [the appellant] had invited me around there and that he raped me."[11]

[31] KS's evidence, however, was that whilst she went to see the complainant at her home after hearing yelling from the appellant at the house on 21 March, she was not told about the rape until Tuesday, 22 March when the complainant came over and "crumpled" to the ground in front of the house and told her about the rape:

> "she told me that her and [the appellant] were having a few drinks and she couldn't fight him off … She said, 'I'm not sure if it's my fault. I couldn't fight him off. I – couldn't say no.' - - 'Is it my fault?'"[12]

KS stated that after she was told about the rape, GC took the complainant straightaway to police.

[32] GC gave evidence that on 22 March the complainant had come over to their home and she told him that the appellant had raped her "a couple of nights ago" or within the "last couple of nights".[13] His evidence was that the rape had occurred at the complainant's home:

> "When you did drive [the complainant] to the police station, did she tell you anything about when she said she was raped?-- Within a - the "last couple of nights" is what I put on the statement and, to me, "a couple of nights" can mean a week, the day before, an hour before.
> Yeah, but that's what she said to you, is it, "the past couple of nights", or something like that. Maybe it was "a couple of nights ago"?-- As I'm led to believe.
> I - I'm asking you about what she said. She said to you, did she, that she'd been raped a couple of nights ago?-- This is what I've put in the statement.

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9 Appeal Record Book p 43; Transcript 1-36 ll 21-43.
10 Appeal Record Book p 44; Transcript 1-37 ll 23-24.
11 Appeal Record Book p 27; Transcript 1-20 ll 50-55.
12 Appeal Record Book p 50; Transcript 1-43 ll 45-53.
13 Appeal Record Book p 54; Transcript 1-47 ll 30-31.

> But that - that's because what she said - that's what she said to you, isn't it?-- As far as I can remember, that's what she said.
> Yeah?-- With the way you're questioning me, I don't know whether to believe it.
> There's nothing - I'm just asking you about what she said to you in the car that day?-- Right.
> And she said she'd been raped a couple of nights ago?—She said that she'd been assaulted, sexually assaulted.
> But she - she told you on the way to the police station, "It was a couple of nights ago."?-- That I can't honestly answer."[14]

[33] GC also agreed that he had indicated that the complainant had told him that "it occurred at her house". He stated that:

> "Well, do you remember previously I asked you this question:
> "And you've previously told people that [the complainant] told you that it 'occurred at her house, didn't you?'?-- She did say she'd been assaulted at her house, yes.
> Let me finish. She did say that she'd been assaulted her house? (sic) Yes. And you answered on that occasion, 'As I'm led to believe, sir, yes', and then I asked you, 'But you've told people that, haven't you that that's what she said?'?-- Yes.
> 'Yes", was what you answered, and then I asked the question, 'And that's what she said to you, isn't it?'?-- As I'm led to believe.
> Well, you've answered on that occasion, 'Yes.' She's told you, hasn't she, that it occurred at her house?-- Yeah."[15]

[34] Constable Anna Ryan gave evidence that she had a conversation at the station with the complainant on 22 March 2011. She indicated that she "asked" her about the rape and made notes of that conversation. Those notes indicate that the offence had occurred between 11 am and 1 pm on 20 March 2011 and that the complainant was called into the appellant's room where he pulled her onto a bed and whilst she tried to get up, she was held down and he took the clothing off the lower part of her body. Constable Ryan noted that the appellant penetrated the complainant both digitally and with his penis, and that during the event the complainant kept saying "no, no, no".

[35] As the first ground of appeal has now been withdrawn, I turn to a consideration of Ground Two which is that the verdict is unreasonable or cannot be supported having regard to the evidence.

Ground Two - That the verdict of the jury is unreasonable or cannot be supported having regard to the evidence

[36] Counsel for the appellant argues that the evidence in this case is of such poor quality that the jury ought not to have been satisfied to the requisite standard of the guilt of the appellant. Counsel argues that an assessment of the evidence leaves a doubt as to the truthfulness of the complainant's allegations.

[37] Section 668E(1) of the *Criminal Code Act* 1899 (Qld) (the "Criminal Code") provides that the court should allow an appeal against conviction if it is of the

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[14] Appeal Record Book p 54; Transcript 1-47 ll 28-53.
[15] Appeal Record Book p 55; Transcript 1-48 ll 35-50.

opinion that the verdict should be set aside on the ground that it is unreasonable. In *M v The Queen*[16] the High Court indicated that the test that the court must apply is:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[17]

[38] The court is required to make an independent assessment of the evidence, both as to its sufficiency and quality. There is no doubt the description of the rape is somewhat difficult to comprehend, particularly that the appellant was able to pull the complainant's tights down and pull her underwear to the side, whilst at the same time managing to hold her down forcefully with his arms and rape her. There are also some incongruities in the evidence such as the need for the appellant to hold the complainant down forcefully when her evidence was that she did not struggle. The complainant also stated that the reason she did not struggle against him was that she was scared, whereas there was clear evidence that they were friends.

[39] It would also seem clear that the complainant, whilst being very close to her neighbour KS, ran past her house to get home and did not tell her about the rape until some four days later. The first complaint was made only after the appellant had been knocking aggressively on her door on the night of Monday, 21 March and KS subsequently inquired as to her welfare.

[40] There were also clear inconsistencies in the evidence as the complainant had indicated to various witnesses that the rape had occurred "two days ago" or "two nights ago" whereas on her account, it had in fact occurred four days previously. The complainant also told police that there was both digital and penile penetration but that was not the evidence she gave in court. There were also inconsistencies as to the place of the rape, the time of the rape, whether the complainant had been drinking or not and whether she had said "no" repeatedly during the intercourse.

[41] Whilst the complainant's account of the alleged rape was brief, I do not consider that the account of the rape was so implausible that it was not able to be believed. In terms of the varying accounts, the evidence of the investigating officer Constable Ablett was that KS and GC had not been asked to give statements until a year after the events. Such a lapse in time may well explain the inconsistencies. It is also clear that the jury had the opportunity to observe the complainant and the witnesses giving their evidence.

[42] It is clear that on paper, the evidence raised numerous doubts about the complainant's credibility. The jury must have been aware of these doubts from the cross-examination, the addresses and the summing up. The verdict of guilty necessarily meant that the jury accepted her credibility notwithstanding the inconsistencies. As the complainant's account was not actually contradicted by other testimony it was open to the jury to accept that the incongruities were minor and to be expected given the delay in obtaining the statements of KS and GC. If accepted, there was evidence before the jury which was capable of forming a basis for the jury to return a verdict of guilty of rape if they were properly instructed in relation to those inconsistencies.

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16 (1994) 181 CLR 487.

17 Ibid, at 493.

[43] Accordingly, despite the inconsistencies, the incongruity and to some extent the implausibility of the details of the rape, I do not consider that it was not open to a properly instructed jury to accept the complainant's evidence about the rape. It was indeed open for a properly instructed jury to accept the complainant's account despite all of those concerns.

[44] In my view, the real issue in this appeal is whether the jury were properly instructed as to how they should consider that evidence. If they were properly instructed, that evidence was capable, in my view, of satisfying the jury.

[45] This ground of appeal must fail.

Ground Three - A miscarriage of justice has resulted from the failure of the learned trial judge to give a proper "Robinson" direction

[46] Counsel for the appellant argues that in this case the direction given by the learned trial judge about the need to scrutinize the complainant's evidence carefully in light of the inconsistencies identified above was insufficient. In particular, counsel argues that the learned trial judge failed to identify to the jury the actual features of the case which warranted the giving of the warning, the reason for the warning and the need for the jury to scrutinise the evidence with great care. It is argued that the warning given did not have the quality of the authority of the court but was simply a summary of the evidence in the case.

Was the warning given sufficient?

[47] At trial there was clear agreement between counsel and the judge that a "Robinson" direction was required in this case. In his summing up the learned trial judge referred first to the inconsistency of the complainant's accounts when he gave the following direction which was in the form of a "Preliminary Complaint" warning:

> "So, as I've told you, consistency between what the witness said to others and what the witness says in Court might enhance the likelihood that her testimony is true.
>
> Inconsistency between out-of-Court statements and the complainant's evidence in Court *might affect* your assessment again of her reliability.
>
> Now, whether these consistencies or inconsistencies affect the way you assess her credibility and reliability is entirely a matter for you. Some submissions were made to you about that and I'll be reviewing those soon."[18]

[48] That warning was slightly different from the Benchbook Direction which is in stronger terms. A warning in strict accordance with Benchbook would have been along the following lines:

> "In relation to the evidence of the preliminary complaints of [the complainant] that she said to [KS, GC] and Constable Ryan on 21 and 22 March that [the appellant] had raped her.
>
> That evidence may only be used as it relates to the complainant's credibility. Consistency between that account of those witnesses and the complainant's evidence before you is something you may take

[18] Appeal Record Book p 91; Summing-up 2-11 ll 25-46.

> into account as possibly enhancing the likelihood that her/his testimony is true.
>
> However, you cannot regard the things said in those out-of-court statements as proof of what actually happened. In other words, evidence of what was said on that occasion may, depending on the view you take of it, bolster the complainant's credit because of consistency, but it does not independently prove anything.
>
> Likewise any inconsistencies between that account of [KS, GC] and Constable Ryan and the complainant's *evidence may cause you to have doubts about the complainant's credibility or reliability*. Whether consistencies or inconsistencies impact on the reliability of the complainant is a matter for you.
>
> Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable, and the inconsistencies are a matter for you to consider in the course of your deliberations. But the mere existence of inconsistencies does not mean that of necessity you must reject [the complainant's] evidence. Some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time."[19] (my emphasis)

[49] That warning preceded the "Robinson" warning which was given by the learned trial judge after he summarised the opposing arguments. After reminding the jury that the complainant was a heavy user of marijuana, the warning given was as follows:

> "Those, in a nutshell, were the arguments of counsel. Members of the jury, the prosecution case rests on the evidence of [the complainant]. There's no supporting evidence. You must scrutinise her evidence very carefully. That just means consider it closely. Examine it for consistency or inconsistency. You may not convict the defendant unless you are satisfied beyond reasonable doubt of the truthfulness and reliability of the complainant's account."[20]

[50] There is no doubt that s 632 of the *Criminal Code* indicates that there is no requirement for a judge to warn a jury that it is unsafe to convict the accused on the uncorroborated testimony of one witness. Section 632 provides:

> "**632 Corroboration**
>
> (1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
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> *Editor's note—*
> See sections 52 (Sedition), 125 (Evidence on charge of perjury) and 195 (Evidence).

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19 Benchbook Direction 64.1.

20 Appeal Record Book p 99; Summing-up 2-19 ll 35-49.

> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

[51] However, as the High Court made clear in *Robinson v The Queen*,[21] which was subsequently endorsed in *Tully v The Queen*[22] and *R v Tichowitsch*,[23] neither s 632(1) nor s 632(2) of the Criminal Code prevents a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice. In *R v Tichowitsch*, Williams JA, specifically referred to *Robinson v The Queen* and s 632 of the *Criminal Code*, and stated:

> "[64] On this basis, the High Court went on to say that, once the above is established with respect to s 632(2):
>
> > "its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect.
> >
> > Sub-section (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury 'that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness'. That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies, or matters relating to the circumstances, which bring into operation the general requirement considered in *Longman*. Moreover, the very nature of the prosecution's onus of proof may require a judge to advert to the absence of corroboration …
> >
> > As the dissenting judgment in the Court of Appeal pointed out, there were particular features of the case which demanded a suitable warning. Without seeking to describe these features exhaustively, they included the age of the complainant at the time of the alleged offences, the long period that elapsed before complaint, which in turn meant that it was impossible for a medical examination to verify or falsify the complaint, and the inconsistency in some aspects of the complainant's evidence as to whether penetration occurred. A curious feature of the case was the absence of any conversation of any kind, on the evening in question or later, between the complainant and the appellant, about the appellant's conduct. There was no threat, and no warning to the complainant not to tell

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21 (1999) 197 CLR 162.

22 (2006) 230 CLR 234.

23 [2007] 2 Qd R 462.

> anyone. The complainant and the appellant maintained a harmonious relationship. There was no suggestion of any earlier or later misconduct by the appellant towards the complainant. An important aspect of the inconsistency and uncertainty about the matter of penetration was that the complainant said he was asleep when the first act of penetration occurred, and that he woke up while it was going on. Finally, some features of the history of complaint may have indicated a degree of suggestibility on the part of the complainant.
>
> Taken together with the absence of corroboration, these matters created a perceptible risk of a miscarriage of justice which required a warning of a kind which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt. That warning should have referred to the circumstances set out above, and should have been expressed in terms which made clear the caution to be exercised in the light of those circumstances.""[24]

[52] The Appeal Record Book unfortunately does not contain a record of counsel's addresses to the jury but I have no doubt that defence counsel would have referred in extensive detail to the varying accounts of the time, place and location of the rape. Those variations raised very real issues that the complainant had, over a period of a couple of hours, given inconsistent accounts of the rape. Whilst the complainant's evidence was that it had happened around 11 or 11.30 in the morning, GC's evidence was that he was told it had happened at night. He also thought it had occurred at the complainant's home. KS's evidence was that the complainant told her she had been drinking and couldn't say "no", whereas the complainant's evidence and the evidence of Constable Ryan was that she had not been drinking and that she kept saying "no".

[53] Constable Ryan had also recorded that the rape had occurred on Sunday, 20 March, whereas the complainant's evidence at trial was that it was Friday, 18 March. Constable Ryan referred to both digital and penile penetration and a complete removal of clothing whereas the complainant gave evidence which indicated penile rape and that her clothing was not completely removed.

[54] The trial judge in his summing up summarised the defence case in great detail and in particular summarised defence counsel's arguments about the various inconsistencies. I have no doubt that the trial judge provided a comprehensive summary of those inconsistencies as related by defence counsel. However, he did not in his directions to the jury make any specific reference himself to those inconsistencies. The nature and the detail of the inconsistencies were only referred to by way of a summary of defence counsel's arguments.

[55] I consider that the fact that there were at least three varying accounts called for a very specific warning from the trial judge about those actual inconsistencies and not simply a summary of what defence counsel had submitted. In my view, the trial

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[24] (2006) 230 CLR 234, citing *Robinson v The Queen* (1999) 197 CLR 162 at [20]-[26].

judge should have specifically referred to those variations and referred to the fact that the time, place, date and details of the rape varied in those accounts. In particular, the trial judge needed to specifically refer to the fact that there was one account which indicated that the complainant was "unable" to say "no" but that the complainant's evidence at trial and to Constable Ryan was that she "just kept saying 'no'". He should have referred to the fact that the time, place and details of the rape as given to others did indeed vary.

[56] I consider that the trial judge needed to warn the jury that because of those specific variations and inconsistencies, they needed to scrutinise the complaint's evidence with great care. Those features demanded a "suitable warning". A suitable warning included the need for the judge to actually specify what those variations were. He needed to actually list those inconsistencies and variations.

[57] In my view, it is also significant that the learned trial judge did not actually tell the jury that those inconsistent accounts given to three different people over a very short period of time may cause them to "doubt" the evidence. Rather, he told them it might "affect" their assessment of the evidence. I do not consider that such a statement would necessarily alert the jury to the need to examine that evidence carefully and that it could give rise to a real issue or in fact cause them to "doubt" the complainant's evidence. In my view, that omission in relation to the "Preliminary Complaint" direction, when combined with the minimalist "Robinson" direction which was subsequently given, was not sufficient to alert the jury to the need to *scrutinise* the complainant's evidence with great care with the actual inconsistencies firmly in their minds.

[58] As the High Court explained in *Robinson v The Queen*, the inconsistencies in that case together with the absence of corroboration, actually created a perceptible risk of a miscarriage of justice and accordingly required a warning of the need for the jury to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt. The High Court clearly indicated that the warning should have referred to "the circumstances" which brought about the requirement for the warning and that the warning "should have been expressed in terms which made clear the caution to be exercised in the light of those circumstances."[25]

[59] Indeed the Benchbook indicates that a "Robinson" warning should specify the actual circumstances as follows:

> "A suggested '*Robinson*' warning might be:
> **You will need to scrutinize the evidence of (the complainant) with great care before you could arrive at a conclusion of guilt. That is because of (the following circumstances):**
> - **the delay between the time of (each) (the) alleged incident and the time the defendant was told of the complaint, and the lack of any opportunity to prove or disprove the allegation by, for example, a timely medical examination;**
> - **the age of the complainant at the time of the alleged incident;**
> - **the difference between the accounts the complainant has given;**

[25] (1999) 197 CLR 162, at 171.

- **these other matters** (identify them).

You should only act on that evidence if, after considering it with that warning in mind, and all the other evidence, you are convinced of its truth and accuracy."[26]

[60] Given the lack of detail by the trial judge about the actual circumstances which called for scrutiny, I do not consider that a suitable "Robinson" warning was given in the circumstances of this case. No doubt the jury was well aware of the inconsistencies in the complainant's evidence but without the imprimatur of the trial judge, the significance of those inconsistencies was not brought home to the jury. I agree with the submission of counsel for the appellant that failure by the trial judge to outline those inconsistencies meant that the trial judge did not lend the "unmistakeable authority of the court" to the significance of the inconsistencies.

[61] I consider that given those matters, there is a perceptible risk of miscarriage of justice.

[62] I consider that the appeal should be allowed and a new trial ordered.

Ground Four - A miscarriage of justice has resulted from the failure of the learned trial judge to properly direct the jury in relation to the complainant's distressed condition

[63] Evidence of the complainant's distressed condition was led by the Crown, particularly in relation to the disclosure that she made to KS and also the evidence that when she spoke to Constable Ryan she was "distressed and crying". In the discussion with counsel prior to the summing up it was clear that the Crown was not relying on the evidence of distressed condition as corroboration of the complainant's evidence but rather the Crown indicated that evidence had been led simply as part of the "narrative" and was not evidence supporting a conclusion of guilt. Accordingly, the learned trial judge directed the jury as follows:

> "There's one other area of the evidence that I want to talk to you about. There's not - it's a fairly small point but it's worth covering. There has been some evidence placed before you of what can be described as the distressed condition of [the complainant], particularly the evidence of her condition on the day that she made her disclosure to KS. You might remember some evidence about her effectively collapsing on the ground or something like that. There's that and there's the evidence from the Officer Ryan that she was upset. I don't by repeating that mean to highlight that because I'm really about to - well, you'll see.
>
> The prosecution's led that evidence really as part of the narrative of events. It's just a necessary part of the story. It's not placed before you in support of the complainant's evidence that she was raped. It mustn't be used by you for that purpose and so in that sense it has no relevance directly to the defendant's guilt and you may well think that there are reasons for the condition as described which don't point to the guilt of the defendant. Particularly you had heard some evidence of other conduct in the time between when the complainant says the offence occurred and the time she spoke to the neighbours

[26] Benchbook Direction 60.3.

> and so there may be any number of reasons why [the complainant] was in a distressed state. It's important that you understand that that evidence of her state is not led to prove guilt of the charge. It's led as part of the account, part of the narrative. You should therefore disregard the evidence of distressed condition except to the extent that it is part of the narrative of events."[27]

[64] Counsel for the appellant argues that there is a real risk that in the absence of proper directions as to the caution to be employed when using evidence of this nature, the jury may have improperly used the evidence to bolster the credit of the complainant which was otherwise found to be wanting. Counsel argues that in the absence of a clear and meaningful direction, the jury may have uncritically accepted that her presentation to the police was consistent with what she complained of without considering other possibilities.

[65] It is also argued that the evidence of Constable Ryan as to the complainant's presentation has no relevance except as possibly supporting the credibility of the complainant. Counsel argues that the jury should have been directed that there may be reasons for her observed condition, such as regret, after consensual intercourse or sexual contact or concern about some other issue entirely unrelated to the alleged sexual activity. It is also argued that the jury should have been specifically directed that the complainant's condition may have been feigned or exaggerated.

[66] Counsel also argues that the directions given had the potential to confuse and it is hard to see how the presentation of the complainant is part of the narrative and not in essence something that may be consistent with a woman who has been the victim of a traumatic offence. Counsel argues that by telling the jury to disregard it, except to the extent that it is part of the narrative does not address sufficiently the risk associated with the potential reliance on this evidence as being consistent with the complainant's account.

[67] Having considered the learned trial judge's direction to the jury in this respect, however, I consider that the directions given were clear and his Honour directed the jury in very specific terms that the evidence had no direct relevance to the defendant's guilt and he clearly said that there may have been many reasons for the complainant's condition. His Honour made a very clear direction that they should disregard the evidence of distressed condition in relation to guilt, and that it was simply part of the narrative of events. He also explained what he meant by the narrative indicating that it meant "account".

[68] In my view, that direction was appropriate and sufficient. I also note that counsel for the appellant at the trial did not seek any redirection and I accept that it may have been a good forensic decision for defence counsel not to seek the amplification of the reasons why the complainant may have been distressed. There may also have been good forensic reason not to have the judge say to the jury that the complainant's distressed condition may have been feigned or exaggerated.

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

[70] In my view however I consider that the appeal should be allowed on Ground Three and a new trial ordered.

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[27] Appeal Record Book p 93; Summing-up 2-13.