SUPREME COURT OF QUEENSLAND

CITATION:	*R v Menk* [2013] QCA 367
PARTIES:	**R** **v** **MENK, Anthony Ian** (appellant)
FILE NO/S:	CA No 170 of 2013 DC No 14 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Roma
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2013
JUDGES:	Holmes and Muir JJA and Applegarth J Separate reasons for judgment of each member of the Court, Muir JA and Applegarth J concurring as to the order made, Holmes JA dissenting
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where, following a trial, the appellant was convicted of one count of burglary and two counts of indecent treatment of a child – where the appellant and the 15 year old complainant resided in adjoining rooms at a hotel in Roma – where the appellant had previously expressed a desire to "go further" with the complainant – where, on the date of the subject incidents, the appellant had entered the complainant's room, applied cream to her arms, shoulders and back and rubbed her stomach – where the complainant later awoke to an intruder rubbing her stomach in the same manner in which the appellant had done so earlier – where the complainant pretended to be asleep throughout the subject offences – where the complainant immediately recognised the intruder's voice as that of the appellant – where the appellant's DNA was found on the complainant's right breast – where the appellant contends that the verdict was unreasonable and insupportable due to "paltry" evidence of identification – whether the verdict was unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant submits that the trial judge's *Domican* direction was inadequate in that it did not specify the matters the jury needed to consider in assessing the identification evidence – where the appellant submits that the trial judge should have identified: the fact that the complainant was asleep at the commencement of the offending conduct; the fact that the complainant's eyes remained closed in a darkened room; the possibility that the complainant panicked; the fleeting basis on which the complainant heard the intruder speak; the lack of any distinctive quality to the intruder's voice; the uncertainty the complainant displayed in cross-examination; and the lack of detail of the rubbing – where defence counsel did not seek any redirection in this regard – whether the trial judge erred in failing to direct the jury adequately on the issue of identification

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant's DNA was found on the complainant's right breast – where the trial judge told the jury that the DNA evidence might be capable of innocent explanation – where the appellant submits that the jury should have been directed that the DNA evidence could only be used as proof of the appellant's guilt if they could exclude all reasonable hypotheses consistent with innocence – whether the trial judge erred in not giving a circumstantial evidence direction on the DNA evidence

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, considered
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, considered

COUNSEL: N V Weston for the appellant
G J Cummings for the respondent

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

[1] **HOLMES JA:** I have had the advantage of reading the judgment of Muir JA. I respectfully agree with his Honour's conclusions as to the first and third grounds of appeal; that is, that the verdict was not unreasonable and that there was no error in not giving the circumstantial evidence direction contended for. But I have reached a different conclusion as to the second ground, concerning the adequacy of the warning given in relation to the identification evidence.

[2] In the passage from *Domican v The Queen* which Muir JA has set out, the High Court emphasises the necessity of tailoring the warning to the evidence in the case and in particular, drawing the jury's attention to any weaknesses in the evidence. Those strictures are equally apposite in a voice identification case.[1] I do not think that the directions given by the trial judge did meet the requirements set out in *Domican*. The identification evidence here consisted of the complainant's recognition of the appellant's voice. (Her evidence about the way in which the intruder rubbed her stomach was not, in my view, identification evidence but merely a circumstance which might go to support an identification.)

[3] The factors relevant to the voice recognition evidence were that the number of words spoken was extremely limited, consisting of half a dozen words; that the complainant's acquaintance with the appellant was limited to the period of a month; that she had said in her statement that when the intruder was rubbing her clitoris she was "panicked and scared"; and that her answers in cross-examination were at least capable of being interpreted as indicating an initial uncertainty. Those were matters which could, depending on the view the jury took of them, undermine the identification. They might have been obvious features of the case, but it was not enough that the jury be aware of them. It was necessary that they also appreciate their possible bearing on the reliability of the identification evidence.

[4] The appellant in the record of interview had acknowledged being in the complainant's room that evening, but it is clear that his account of what occurred, apart from its timing, coincided with her description of the earlier occasion on which, by consent, he rubbed cream into her limbs, shoulders, back and stomach. The case still turned on the accuracy of the complainant's recognition of the appellant as the intruder in what on her version was a distinct event, occurring in darkness. In those circumstances, the trial judge's failure to point to and explain the significance of the features which might cast doubt on her identification constituted a miscarriage of justice.

[5] For that reason, in my view, the appeal should be allowed, the conviction set aside and a re-trial ordered.

[6] **MUIR JA: Introduction** The appellant appeals against his convictions after a trial in the Roma District Court of one count of burglary (count 1) and two counts of indecent treatment (counts 2 and 3). The conviction on count 3 was in the alternative to a count of rape, the offence alleged on the indictment. The grounds of appeal are that:

1. the verdict is unreasonable and unsupported by the evidence;
2. the trial judge erred in failing to direct the jury adequately on the issue of identification; and
3. the trial judge erred in not giving a circumstantial evidence direction on the DNA evidence.

The complainant's evidence

[7] The complainant gave the following evidence. She was 15 years of age at relevant times and was boarding in a hotel in Roma while attending school. The appellant

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1 *Bulejcik v The Queen* (1996) 185 CLR 375; Toohey and Gaudron JJ at 397-398.

resided in an adjoining room. About a week after she met the appellant at the hotel, he told her that he would like her "to go further with him". She told him her age and he remarked that he thought that she was older than 15.

[8] On 16 October 2011, the date of the subject incidents, the appellant banged on her door, calling out as he did so, "You've got 3 minutes and then I'm coming in". A little later, the complainant observed a card, shaped like a keycard, being inserted between the hallway door and the doorframe. The appellant came into the room holding the card that he had used to open the door. He told the complainant to get out of bed and pulled off her doona, saying, "Get out of bed you lazy bones". He then asked her if she wanted cream on her legs and feet. She said, "Yeah" and the appellant applied the cream. He then applied it to her arms, shoulders and back. As he did so, he observed that she was lucky that he was just doing her arms "because he was usually a tit person". After the complainant told the appellant that she had an upset stomach, he volunteered to rub it for her and she acquiesced. He left the room as soon as he finished.

[9] The complainant then showered and dressed. During the afternoon, she lay on her bed and fell asleep. She was awakened by the feeling of a hand moving in a circular motion on her stomach. Her top was lifted up to just below the level of her bra. She was frightened and pretended to be asleep. The intruder felt her breasts under her bra. He then undid the jeans she was wearing, inserted a hand under her jeans and underwear and commenced manipulating her clitoris. After a while, the hand was removed and the complainant felt the bed move as if the intruder was removing his pants. The intruder then took her right hand and placed it on his erect penis. She still pretended to be asleep. The intruder said, "I so want to fuck you". The complainant immediately recognised the voice as the appellant's. She had already suspected that he was the intruder as the way in which her stomach had been rubbed was "much similar to the way [the appellant] was doing it earlier". The complainant, still pretending to be asleep, started coughing and rolled onto her left side to face the wall. After she coughed again, the intruder got off the bed and left the room.

[10] Not long after the intruder left the room, the appellant came to her door, saying, words to the effect, that it was 6.30 pm and that she should get up. He asked her if she wanted to talk. She responded, "No. I just need to go for a walk".

[11] The complainant, who was shocked, rang a school friend at about 6.45 pm telling her what had happened. About 15 minutes later, she went to the police station and made a complaint.

Other evidence

[12] The complainant was medically examined. None of the appellant's DNA was located in her vulval area but the appellant's DNA was found on her right breast.

[13] Apart from that of the complainant, the only other evidence given on the trial was that of: the complainant's school friend to whom complaint was first made; another hotel resident, Mr Jones; Sergeant Silk, a scenes of crime officer; Senior Constable Colquhoun, an investigating police officer; Dr Thavnayagam, who examined the complainant and took DNA swabs from her genital region and breasts on the evening of 16 October; and Ms Taylor, who gave evidence in relation to the DNA

testing. Additionally, a recording of an interview between police and the appellant that occurred late on the night in question was played to the jury. In that interview the appellant recounted being in the complainant's room earlier that night at around 6.30 pm and rubbing the complainant's back, shoulders and both sides. He said that the complainant jumped up out of bed when he told her it was 6.30 pm. He denied the complainant's allegations.

[14] It is against this evidence that the merits of the grounds of appeal must be assessed.

Ground 1

[15] Counsel for the appellant argued that the verdict was unreasonable and unsupported by the evidence due to, what he described as, "paltry" evidence of identification. He relied upon the following points. The complainant did not see the offender. Her eyes were closed throughout the incident and the room was dark. She was asleep when the indecent treatment commenced. The only words spoken by the intruder would have taken only a second or two. Although the complainant relied on the manner of rubbing being the same as that done earlier by the appellant, she gave no detail about it. There is nothing in the DNA evidence which strengthens the prosecution case.

[16] The following exchange occurred in the cross-examination of the complainant:

> "All right. [Complainant], I'm suggesting to you that [the appellant] did not touch you on the breasts and stomach and private area whilst you were sleeping in the room. You understand what I'm saying? I'm saying that [the appellant] did not do these things to you; was not [the appellant] that did anything to you?-- Yeah, I don't know.
>
> Sorry?-- With all my – I honestly think it was [the appellant] that did it because, like, when I woke up they were rubbing my stomach and that was the exact same way that [the appellant] was doing it earlier-----
>
> Yes?-- -----and when they said that they wanted to fuck me, that was [the appellant's] voice – like yeah.
>
> All right. Now-----?-- I'm a hundred per cent certain that it was [the appellant] that did this."

[17] It was submitted that the first answer shows that the complainant was uncertain about her identification.

Consideration

[18] There was no evidence of any intruder in the hotel or of any sign of a forced entry or of property missing from the complainant's room. The appellant had manifested a sexual interest in the complainant and had shown a willingness to enter the complainant's room uninvited and engage physically with her. The manner in which the intruder felt her stomach was recognised by the complainant as being much the same as the manner in which she had been handled by the appellant a short time before. It is unlikely that some other sexual predator would have massaged the complainant's stomach as a prelude to his more sexual and invasive conduct. It is even more unlikely that such a person would have employed the same rubbing motion that the appellant had employed earlier in the day.

[19] The complainant was familiar with the appellant's voice. She had sensed, before he spoke, that he was the intruder. She recognised his voice instantly. Only a few words were spoken but there is no suggestion that they were not clearly spoken and heard.

[20] Not only did the appellant have the opportunity to enter the complainant's room but he had previously demonstrated his ability to open her locked door. The evidence showed that he was in the hotel at around the time of the incident. By his own admission, he was in the complainant's room and rubbing parts of her body with cream at the time of the alleged offences.

[21] Whatever the complainant may have meant by her response, "Yeah, I don't know" in the passage quoted in paragraph [16] above, it is plain from the context in which the words were uttered that she was not expressing any doubt about the identity of the intruder. No doubt was expressed either in the complainant's record of interview or in the account she gave her friend when making her first complaint.

[22] Defence counsel was unsure of what the complainant had said. After she was reported as having said, "Yeah, I don't know", he queried, "Sorry?" It is significant also that after the complainant expressed her "hundred per cent" certainty, defence counsel did not refer to the earlier answer or otherwise challenge the complainant's evidence in this regard.

[23] It was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt. This ground was not made out.

Ground 2

[24] The essence of the appellant's complaint is that the general warning given by the trial judge did not specify the matters that the jury needed to consider in assessing the identification evidence. Reliance was placed on the observation in the joint reasons in *Domican v The Queen*,[2] in which, speaking of the warning that should be given by a trial judge in respect of identification evidence, the reliability of which was in dispute, their Honours said:

> "The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence." (citations omitted)

[25] It was submitted that the trial judge should have raised the following matters in his warning on identification:

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2 (1992) 173 CLR 555 at 561–562.

(a) the complainant was asleep when the offence commenced;

(b) the complainant kept her eyes closed in a darkened room;

(c) the possibility that the complainant panicked when she woke up;

(d) the "fleeting basis [on which] she would have had to have heard the offender speak";

(e) the uncertainty in her evidence under cross-examination;

(f) the lack of detail about the rubbing;

(g) the possibility that the complainant may have been confused and jumped to the conclusion that the appellant was the offender;

(h) the lack of any distinctive quality to the offender's voice; and

(i) the length of time the complainant had known the appellant and the degree to which she was familiar with his voice.

Consideration

[26] The summing up in respect of recognition was as follows:

> "The issue of identification or of recognition in this case is one for you to decide as a question of fact. The case against the [appellant] depends to a significant degree on the correctness of the complainant's identification or recognition of the [appellant] which the [appellant] alleges was mistaken, perhaps because of the circumstances of panic that ensued in her mind at the time.
>
> I must, therefore, warn you of the special need for caution before convicting in reliance on the correctness of the complainant's identification. The reason for this is that it's quite possible for an honest witness to make a mistake in identification and if it's then made to replicate it, for example, in conversation with [the complainant's school friend] and with the police. And there have been occasions of notorious miscarriages of justice where incorrect identification has been made. A mistaken witness could appear to you to be convincing. You must carefully examine the circumstances in which the recognition of the [appellant] by the witness was made.
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> In this case the [complainant] relied primarily on two factors and I'll come to them later when I deal with her evidence, but two primary factors. She said that when he spoke the words 'I so want to fuck you' that she immediately recognised his voice, which she knew well because they had been friends, at least, for a period of a month or so. And, secondly, because when he rubbed her stomach he did so in exactly the same way as it had been done consensually when he was putting the Savlon cream on her or some other cream on her earlier that night.

> Now, it's important, I think, also to recognise that she said the recognition was immediate and the statement to the police and to [the complainant's school friend] followed immediately after those incidents. The evidence of the complainant about identification is, of course, critical. It can't, however, be regarded in isolation from other evidence which may be considered by you in considering whether the complainant's identification or recognition of the [appellant] as the offender is accurate.
>
> Such other evidence includes that of the nature of the friendship between them evidenced by their mucking around earlier that day, involving the squirting of water and putting of cards in his door and then, perhaps, in hers or perhaps throwing cards at her. Some mucking around I could generally describe it. You don't have to make a formal finding about what occurred there, but that's part of the basis of their friendly relationship. Also her allowing him to massage her legs below the knees or up to the knees, her stomach, her back and her shoulders with cream because of the peeling of the skin might be relevant to the assessment of that relationship and is part of the factual matrix in which you consider her evidence about identification based on his voice and her recognition of his manner in rubbing her stomach.
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> It also includes her evidence that he expressed his earlier statement that he'd like to go further with her at a time he was talking about his wife and what they used to do. You must remember, however, that it was then that she told him that she was only 15 and his reply that he had thought that she was older."

[27] The appellant's criticisms are unjustified. The allegation of uncertainty in the complainant's evidence in cross-examination was addressed earlier. Had the trial judge taken the jury to the relevant exchange between the complainant and defence counsel, it would have served only to highlight the complainant's assertion of certainty and the absence of a challenge to her evidence in that regard. The fact that the complainant was asleep when the offending conduct commenced is merely a background circumstance. On her evidence, she was awake, thinking about the appropriate response to her predicament, for a considerable time. It was apparent from her evidence that she retained her presence of mind. It was therefore unnecessary to refer to the possibility of panic but the trial judge did so, thus favouring the defence. That the complainant kept her eyes closed in a darkened room did not need mentioning. The complainant did not claim to have seen the intruder.

[28] There was no need either for the trial judge to mention the brevity of the spoken words. That was obvious. The trial judge correctly identified, at least by inference, the extent of the social contact between the appellant and the complainant as relevant to her ability to recognise the appellant, particularly his voice. Complaint (i) was, thus, unjustified. Nor was there any need for comment on the lack or otherwise of any distinctive quality to the offender's voice. The complainant was not cross-examined in relation to the quality of the voice that she heard. The complaint that the trial judge should have mentioned the lack of detail about the stomach rubbing is also unfounded. The complainant said that the intruder had rubbed her stomach with his hand using a circular motion.

[29] The trial judge's warning was appropriate in the circumstances of the case. The critical aspects of the recognition evidence were: the voice of the intruder; the complainant's familiarity with it; the stomach rubbing; and the complainant's recognition of its similarity with the earlier rubbing against the background discussed in paragraphs [18] to [23] above. The summing up dealt adequately with these matters.

[30] That experienced defence counsel did not seek any redirection in this regard tends to support the conclusion that the complaints lacked merit.

[31] This ground was not made out.

Ground 3

[32] It was submitted that the jury should have been directed that the DNA evidence could be used as proof of the appellant's guilt only if they could exclude all reasonable hypotheses consistent with innocence.[3] The trial judge told the jury that the DNA evidence might be capable of innocent explanation. In the circumstances, it was argued, that was insufficient as it was possible that the jury could have "fastened on to the evidence as a means of corroborating" the evidence of the complainant.

Consideration

[33] In his summing up, the trial judge, after remarking on the high degree of probability that the DNA detected on the complainant's right breast was the appellant's, referred to the possibility that it was there because of "secondary transfer" as a result of the touching by the appellant of the complainant's hands in the course of their physical contact that day or by some other acts on the part of the complainant. The trial judge remarked that the DNA evidence was "not inconsistent with the [appellant's] evidence" and that there was the possibility of an innocent explanation for it. The trial judge's summing up was appropriate. He did not emphasise the significance of the DNA evidence, quite the contrary. The prosecution case was circumstantial only in part. The most damning evidence may be thought to have been the evidence of voice recognition followed by the complainant's evidence that her stomach was rubbed in the same manner in which it had been rubbed by the appellant earlier that day. As remarked earlier, it would have been a remarkable coincidence if a stranger intent on sexual molestation had behaved in this way.

[34] In *Shepherd v The Queen*,[4] on which the appellant relied, Dawson J, with whose reasons Toohey and Gaudron JJ agreed and with which Mason CJ was relevantly in general agreement, referring to the customary direction that where the jury relied on circumstantial evidence, guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances, said:[5]

> "Whilst a direction of that kind is customarily given in cases turning upon circumstantial evidence, it is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt. In many, if not most, cases involving substantial circumstantial

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3 *Shepherd v The Queen* (1990) 170 CLR 573.
4 (1990) 170 CLR 573.
5 *Shepherd v The Queen* (1990) 170 CLR 573 at 578.

> evidence, it will be a helpful direction. In other cases, particularly where the amount of circumstantial evidence involved is slight, a direction in those terms may be confusing rather than helpful. Sometimes such a direction may be necessary to enable the jury to go about their task properly. But there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given. As Barwick C.J., speaking for the Court, observed in *Grant v. The Queen*:
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> > 'Where the circumstances of the case seem to require that some such direction be given, the summing up regarded as a whole may prove to be, and generally may be likely to be, inadequate. On the other hand, having regard to the circumstances of the case and the nature of the summing up, the failure to give the special direction may not in a particular case result in an inadequacy of the summing up as a whole. It may none the less be concluded from the terms of the summing up that the jury were fully instructed.'" (citations omitted)

[35] Here, the prosecution case was only partly circumstantial and the way in which the DNA evidence should be approached was properly explained. A conclusion by the jury that the appellant's DNA was found on the complainant's breast was not "an indispensable, intermediate step in the reasoning process towards an inference of guilt".[6] Proof beyond reasonable doubt was thus not required and nor was the direction contended for by the appellant.[7] This ground of appeal was not made out.

Conclusion

[36] For the above reasons, I would order that the appeal be dismissed.

[37] **APPLEGARTH J**: I have had the advantage of reading the reasons of Muir JA with which I agree. I also have had the advantage of reading the reasons of Holmes JA. I add the following about the adequacy of the warning given by the trial judge in relation to the issue of identification.

[38] The essential issue is whether more should have been said about one aspect of the identification evidence, namely the complainant's recognition of the appellant's voice. The governing principles are derived from *Domican v The Queen*[8] and have been quoted by Muir JA at [24].

[39] The length and clarity of the speech heard, the complainant's familiarity with the appellant's voice and the time between the occasion when she heard the voice of the perpetrator and occasions when she heard the voice of the appellant were factors which together affected the reliability of the identification or recognition evidence.

[40] The trial judge might have said that the voice identification was based on a limited number of words being spoken by the perpetrator. But as Muir JA observes, that

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6 *Shepherd v The Queen* (1990) 170 CLR 573 at 585.

7 See *Shepherd v The Queen* (1990) 170 CLR 573 at 585.

8 (1992) 173 CLR 555 at 561-562.

was obvious. The direction quoted the words and it was obvious to the jury that they were few in number. It may have been as well for the trial judge to say that they were few in number, but his directions on the issue of identification were not inadequate because he did not specifically say so.

[41] Holmes JA observes that the factors relevant to the voice recognition evidence included "that the complainant's acquaintance with the appellant was limited to the period of a month". I would not regard this as a weakness and, in any event, the trial judge stated that they had been friends for a month or so. They lived in neighbouring rooms. They saw each other around the hotel, and, after getting to know the appellant, the complainant had several conversations with him. Her familiarity with his voice was not limited to conversations in recent weeks. She conversed with the appellant on the day the offences were committed and gave evidence of speaking to him when he came to the doorway shortly after the events in question.

[42] The complainant's familiarity with the appellant's voice was not a weakness in the identification evidence and the trial judge was not required to draw the attention of the jury to it in order to comply with *Domican*.

[43] The appellant submits that the trial judge should have mentioned, as part of the warning on identification, the possibility that the appellant panicked when she woke up. But the trial judge specifically raised the possibility that the complainant's identification or recognition of the appellant was mistaken because of "the circumstances of panic that ensued in her mind at the time". The complainant's witness statement said that she "was just panicked and scared" when the perpetrator was rubbing her clitoris. Later in her witness statement she recalled a further episode when the perpetrator placed her right hand on his penis. At this stage, the complainant pretended that she was still asleep and kept her hand relaxed. She did not state that she was panicking at that stage, which was when the intruder said "I so want to fuck you". But if she was in a state of panic at that stage, the trial judge's warning referred to panic as a possible reason for mistake.

[44] Holmes JA refers to the complainant's answers in cross-examination being at least capable of being interpreted as indicating an initial uncertainty. I agree with Muir JA that the relevant passage does not express any doubt about the identity of the intruder. Having heard the evidence, the trial judge and trial counsel were in a better position than this Court to assess whether or not the complainant expressed an initial uncertainty. The words "Yeah, I don't know" were not in response to a single question. The first proposition put to the complainant, which prompted this response, was the suggestion that the appellant did not touch her on the breasts and stomach and private area "whilst you were sleeping in the room". The response is consistent with the complainant agreeing, in effect, that she did not know what occurred when she was asleep. As the respondent's written submissions note, her response also could be interpreted as saying that she did not know what the cross-examiner was saying.

[45] If the trial judge had directed the jury's attention to this part of the cross-examination then it would have been necessary to fairly state that the response continued with the complainant saying that she honestly thought it was the appellant for the reasons that she gave and that she was "a hundred per cent certain" that it was him that did it. Reference to answers in cross-examination would have served

to emphasise her certainty, rather than, any uncertainty. It is understandable, in the circumstances, that defence counsel did not seek a redirection about possible uncertainty in her evidence under cross-examination.

[46] I conclude that the directions were sufficient to direct the attention of the jury to the fact that identification based on voice recognition depended on a few words being spoken to someone who was familiar with the appellant's voice. Another judge may have framed the warning in different terms by, for example:

(a) saying that the perpetrator only spoke a few words rather than quoting the few words that were spoken; and

(b) elaborating on the complainant's familiarity with the appellant's voice by reference to their many conversations over the previous month and the occasions when the appellant spoke to the complainant on the day in question.

The sufficiency of the warning is not assessed by reference to a different form of words that might have been used. The warning directed attention to the few words that were spoken. To say that only a few words were spoken would have been to state the obvious. Reference to the few words that were spoken directed attention to a weakness in the identification evidence. The warning was sufficient to communicate the fact that the complainant's voice identification was based on a few words.

[47] For these reasons and the reasons given by Muir JA, I would order that the appeal be dismissed.