SUPREME COURT OF QUEENSLAND

CITATION:	*R v GAZ* [2016] QCA 229
PARTIES:	**R** **v** **GAZ** (appellant)
FILE NO/S:	CA No 142 of 2016 DC No 12 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction: 12 May 2016
DELIVERED ON:	Orders delivered ex tempore 9 September 2016 Reasons delivered 13 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2016
JUDGES:	Margaret McMurdo P and Fraser JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 9 September 2016:** **1. The appeal is allowed.** **2. The verdict of guilty is set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of indecent treatment of a child – where the complainant was very young and gave three different accounts of the offending – where the first preliminary complaint to a kindergarten teacher was unprompted and spontaneous – where the subsequent complaint to her mother was unrelated – where both complaints were consistent with the complainant's evidence in cross-examination – where the jury were entitled reject the appellant's evidence – where the jury were entitled to accept the complainant's account as reliable beyond reasonable doubt CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the complainant gave two recorded statements to police – where the appellant contends the primary judge should

have exercised the discretion to exclude the evidence as the complainant's account was unlikely to be reliable – where defence counsel was fettered in challenging the differing accounts in the statements in cross-examination as the complainant could not recall them – where defence counsel did not apply to exclude the evidence at trial and this was a reasonable forensic decision

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the complainant's mother made repeated statements in cross-examination that the appellant pleaded with her not to go to police when first made aware of the complainant's allegations – where the mother stated in cross-examination that this was evidence of guilt – where the mother stated in cross-examination that the appellant was so aggressive that she was in fear of her life – where the judge was not invited to, and did not, direct the jury to disregard this evidence – whether there was a miscarriage of justice

Libke v The Queen (2007) 230 CLR 559; [2007] HCA 30, cited
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Cumner [1994] QCA 270, cited
R v D (2003) 141 A Crim R 471; [2003] QCA 151, cited
R v FAR [1996] 2 Qd R 49; [1995] QCA 330, cited

COUNSEL:	J M Sharp for the appellant C N Marco for the respondent
SOLICITORS:	Fisher Dore Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was convicted after a two day trial of indecent treatment of a child on a date unknown between 30 September 2013 and 3 August 2014 with circumstances of aggravation that the child was under 12 and his lineal descendant. The complainant was the appellant's daughter and was three or four years old at the time of the alleged offending. He has appealed against his conviction on the following grounds:

> Ground 1: The complainant's recorded statements to police made on 4 August and 6 August 2014 should not have been received into evidence in the trial.
>
> Ground 2: There was a miscarriage of justice by reason of the conduct of the prosecution in refusing to lead evidence of the 4 August 2014 statement.
>
> Ground 3: There was a miscarriage of justice by reason of the conduct of defence counsel in cross-examining the complainant's mother, compounded by a failure of the trial judge to remedy, or adequately remedy, the issues arising from it, namely –

(i) the repeated reference by the mother to material said to make a lie of the suggestion made on the appellant's behalf that she (rather than he) was unwilling to participate in family dispute resolution;

(ii) the admission of evidence of repeated communications of the appellant's requests to the mother not to go to police about the child's disclosure;

(iii) opinion offered by the mother as to the relevance of that conduct to the appellant's guilt; and

(iv) the admission of evidence that the appellant was very aggressive and that the mother feared for her life and relocated as a result.

Ground 4: The verdict is unreasonable and not supported by the evidence.

[2] For the following reasons I consider the appeal should be allowed, the guilty verdict set aside and a retrial ordered.

The relevant evidence and other aspects of the trial

[3] It is necessary to commence a discussion of these grounds of appeal by reviewing the relevant evidence and other aspects of the trial.

The teacher's evidence

[4] The complainant's kindergarten teacher gave evidence that on 31 July 2014 a boy pulled his pants down in the kindergarten playground and urinated. The teacher intervened and told him that he should do this in the toilet. The complainant spontaneously commented, "I touched my Daddy's doodle." The teacher looked at the complainant who said, "It's true. It's true." The children giggled and then talked about something else. The teacher reported the matter to the centre director and documented it.[1] In cross-examination she agreed the complainant "was a bit of a giggly child and she was just laughing because they were in a group of children."[2]

The evidence of the complainant's mother

[5] The complainant's mother gave evidence that the complainant was born in April 2010. The mother separated from the appellant in February 2012. She explained the arrangements made for the appellant to have access to the complainant. She agreed that he moved to the Rockhampton area in October 2013, just after the first date in the indictment, and that the complainant then visited him at his home.

[6] On 4 August 2014 the complainant said to her words to the effect of, "Daddy gets me to pull his pants down and play with his doodle."[3] The mother asked, if she phoned the appellant, would the complainant tell him what she had said. The complainant agreed. The mother phoned the appellant, asked the complainant to tell him what she had told her and the complainant did so.

[7] In cross-examination defence counsel suggested that the appellant tried to arrange mediation so that he could have access to the complainant. The mother insisted that

---

1 T1-56 – T1-57, AB 84 – 85.
2 T1-58, l 9 – l 10, AB 86.
3 T1-23, l 26 – l 27, AB 51.

she initiated mediation.[4] When defence counsel again suggested that the appellant initiated mediation but she did not wish to participate, she stated that this was "completely incorrect" and that she had "the actual documents and information from [a]... government-regulated organisation." She stated that she could easily get this documentation and offered to do so.[5] Defence counsel asked her to look at a letter from the Rockhampton Family Relationship Centre. She agreed it stated, "We are writing to advise you that your joint FDR is no longer proceeding as the other party to the dispute, [the mother], has indicated to us that they no longer wish to participate."[6] Whilst she accepted that was the effect of the letter, she did not accept that she was unwilling to proceed with mediation and maintained that she had never declined to do so. She insisted that she could, immediately on leaving court, obtain documentation to demonstrate that prior to the offending she was co-operative in facilitating access arrangements. She had allowed him to move into her house after his return to Rockhampton to help him get on his feet. She financially assisted him to relocate to Rockhampton where she was working and she and the complainant were living. She agreed he did not stay with her long, adding that there was "a lot of history and background there...it was not a safe environment for my daughter."[7] Defence counsel again suggested that, for one or two months after the appellant relocated to Rockhampton, she did not allow him any access to his daughter. She denied this, adding that during the lunch break she contacted Relationships Australia and had documents that clearly stated that on 14 July 2014 the appellant said he no longer wished to proceed with mediation.[8] She denied stopping his access to the complainant in July 2014. She again denied that he applied for mediation and repeated that she had an email which recorded that he advised he was not willing to proceed. She could retrieve it from her work computer and prove that defence counsel's contention was wrong.[9]

[8] Defence counsel suggested that she wished to take the complainant to Brisbane to prevent the appellant from seeing her. She denied this, stating that she relocated and downgraded her career path because the appellant was "a very, very aggressive man and [she] was fearing for [her] life." She was nervous she would run into him at a Rockhampton shopping centre. She was nervous because of this court case and feared that he would hurt her or the complainant.[10] She stated, "I have done everything in my power to keep my daughter safe and I will continue doing so."[11] She again maintained that she had documentation to establish that she commenced and he ended the mediation with Relationships Australia and asked for the opportunity to supply it.[12]

[9] When cross-examined about her telephone conversation with the appellant in which the complainant repeated her complaint, she said that he texted her that he did not want her to go to the police; the police had a copy of these texts. She stated that after the initial phone call, he repeatedly phoned and eventually she answered. She agreed that he wanted the three of them to sit down and chat about the allegation before she contacted the police because he was concerned about what the complainant had said.[13] She added that he knew she was going straight to the police. She continued:

---

4 T1-26, AB 54.
5 T1-27, AB 55.
6 T1-30, AB 58.
7 T1-31, AB 59.
8 T1-35, AB 63.
9 T1-39, AB 67.
10 T1-42, AB 70.
11 T1-42, AB 70.
12 T1-43, AB 71.
13 T1-46, AB 74.

> "…if somebody accused me of something and I knew I was not guilty, I would have no issue with them contacting the police. I would like the matter investigated. By no means would I send a text message to that person saying do not go to the police until I have had an opportunity to talk to [the complainant]...who in their right mind would want to have a conversation about it afterwards?"[14]

Her immediate reaction was to go to the police. She did not want to talk to him. She added:

> "You don't sit down and try and have a conversation with somebody about something that delicate. Nobody would do that. You don't see social services sitting down with an abusive family and trying to talk to them. What do they do? They report them to the police."[15]

[10] She agreed the complainant had just turned four but denied the possibility that she might have misconstrued something or made it up, adding:

> "I have educated my daughter from a very, very young age about body privacy. My daughter, if she was not educated the way she was at her age, she would not have been aware that what was happening to her was wrong. She would not have told somebody, because she would not have known it was wrong. That was because of education that my daughter was aware that people are not meant to touch your private parts, you are not meant to do any of those things. It is completely inappropriate. So I thank God every single day that I educated my little girl, because how long could this have dragged on for...Don't try and turn this around and try and make it look like it is a big story. That four year old little girl, okay, had to go into a police station, get put into a room by herself, okay, and – and testify as to what has happened. She has gone through hell because of this, so thank you for that."[16]

[11] She agreed that, when she rang the appellant she said something like, "You're a dirty, rotten paedophile. You're going to rot in jail."[17] She denied saying, "I got you now. You know I was molested as a child. How do you think I feel?" [18] She agreed that she had been sexually abused when she was young. She explained that was why she educated the complainant "as far as body parts are concerned" and was determined that her child would not have to go through what she did.[19] She denied that she overreacted when she heard the child's complaint. She agreed she was still receiving counselling. This was so she could cope with what had happened over the last two and a half years, be a stable mother and give her daughter the best possible future.[20] The complainant also received counselling for quite a few months and "went through a massive ordeal." The complainant stopped counselling about four or five months before the trial.[21]

[12] She agreed that the complainant did not disclose any information inculpating the appellant in the first interview with police for which she was present. The police told

---

14 T1-46 – T1-47, AB 74 – 75.
15 T1-47, AB 75.
16 T1-47 – T1-48, AB 75 – 76.
17 T1-48, AB 76.
18 T1-48, AB 76.
19 T1-49, AB 77.
20 T1-49, AB 77.
21 T1-50, AB 78.

her that if the complainant was not capable of giving an account as to what happened by herself in a second interview, a third interview was not recommended.[22]

[13] The day after the complainant told her what happened, she rang the complainant's school principal to explain why she would not be at kindergarten for a few days. The school principal told her that the complainant had given information to her kindergarten teacher and as a result Child Services had been informed. She said that the complainant never made things up or exaggerated;[23] she did not tell lies and understood the difference between right and wrong. She had raised her daughter to have very good morals and she was extremely intelligent. She was not aware of her using the word "doodle" before.[24] She emphatically denied that she had told the complainant to say these things so that the appellant would not have contact with her.[25]

[14] After the first interview she showed the complainant some books about the police being your friend and not to be scared of them. They were designed for victims of crime to explain to children why it is alright to talk to the police. She did not show her any anatomy books. On 5 August 2014 she told the complainant to let her know when she was ready to talk to the police. The complainant said she was ready. The mother most definitely did not pressure her. After the first interview she did not ask the complainant why she did not say anything and nor did she say that the complainant should have told the police what she told her. She said she was not going to place any more pressure on the complainant.[26]

[15] In re-examination she stated that the last day on which the appellant had a contact visit with the complainant was 25 July 2014,[27] just before the last date in the indictment.

The complainant's evidence

[16] On 4 August 2014 two police officers conducted a video-recorded interview with the complainant and her mother. They spent some time building a rapport with the complainant and she initially appeared relaxed. They then asked her about her relationship with her father:

> "POLICE: Well, I heard that your Dad does something else that you didn't like?
>
> COMPLAINANT: I don't know. I don't what that is.
>
> POLICE: You don't know what it was. Can't you remember?
>
> COMPLAINANT: Nope.
>
> POLICE: Mmm, I see. Um, let me think. I am trying to think what I heard and I can't remember. Was it something about Dad with his pants down or something? (Complainant nods). What was that about? Tell me about that bit?
>
> COMPLAINANT: I don't know. I don't know that bit. (Complainant moves onto her mother's lap).

---

22 T1-51, AB 79.
23 T1-51, AB 79.
24 T1-44, AB 72.
25 T1-52, AB 80.
26 T1-53, AB 81.
27 T1-52, AB 80.

> POLICE: Oh, you don't know that bit. Okay then. Um, I just heard something about that. Ah and you can't think of anything about that bit? (Complainant shakes head). Um, if you remembered something about that later, would you come and talk to us again about that, if you remembered it?
>
> COMPLAINANT: Yep."[28]

[17] This interview was not lead in the prosecution case but elicited by defence counsel when cross-examining a police officer.[29]

[18] After the interview concluded, the police advised the complainant's mother that, as there had been no disclosures, the matter would be finalised.[30] Two days later the complainant returned to the police station with her mother and police conducted a second video-recorded interview, this time without the mother present.[31] The prosecution lead evidence of this interview at trial under s 93A *Evidence Act* 1977 (Qld). It included:

> "POLICE: And when I talked to you the other day you – there was some things you didn't want to tell me 'cause they were a bit too yukky to talk about; isn't that right? Now, today your mum told me that you were telling her about it the other day and that you were ready to come and tell [the police] about it today. Do you remember what that was about? It was about your dad. What can you tell me about that?
>
> COMPLAINANT: Um, my dad pulled his pants down and tried to [indistinct] on my ginny.
>
> POLICE: On your jenny [sic]. Where – is that – is your jenny in there...what's inside your pants there?
>
> COMPLAINANT: Ginny, and my bum. (Touches her vaginal area outside her pants).
>
> POLICE: Oh, in your bum.
>
> COMPLAINANT: And my ginny.
>
> POLICE: And your ginny. Oh, is that what you call – what do you do with your ginny?
>
> COMPLAINANT: Do wees.
>
> ...
>
> POLICE: Where did this happen?
>
> COMPLAINANT: Tomorrow next week.
>
> POLICE: Where was it?
>
> COMPLAINANT: It was at my dad's house.
>
> POLICE: Oh, at your dad's house, and who was there?
>
> COMPLAINANT: Everyone [indistinct], the address was [indistinct], that one.

---

28 Transcript of Police Record of Interview (4 August 2014), p10, with additions after viewing the recording.
29 T1-11, AB 39 and MFI C.
30 T1-12, AB 40.
31 T1-12, AB 40.

POLICE: Oh...the address was in [a rural town]?

COMPLAINANT: Guess what; my dad got a bunny rabbit still [indistinct].

POLICE: Your dad's got a bunny rabbit still. And you say that he pulled his pants down and he tried to touch you on your ginny with it? Did you have your pants on? (Complainant nods). So you still had your pants on?

COMPLAINANT: Yeah, my dad put his hands – my pants off and pulled my ginny off and knickers.

POLICE: Oh, pulled your ginny off, knickies [sic] off too. What did – what did he say?

COMPLAINANT: Him say; don't tell my mum.

POLICE: He said 'Don't tell your mum?' Why do you think he said that?

COMPLAINANT: 'Cause mum – oh, yeah, then I just told my mum.

POLICE: Mmm. And how many times did this happen?

COMPLAINANT: Six, eleven million.

POLICE: Well, is that more than one, or just once?

COMPLAINANT: Just once.

POLICE: Oh, just once at Dad's house. And did Dad say anything to you other than 'don't tell your mum'?

COMPLAINANT: Nup.

POLICE: What did you think? What did you say to Dad?

COMPLAINANT: He says – I said 'yukky.'

POLICE: Oh, I see.

COMPLAINANT: It's yukky to put your pants down and knickers down. That's gross. You only do that in toilets.

POLICE: Oh, did you say you only do that in the toilet? What did Dad say?

COMPLAINANT: He just – he just – don't tell my mum.

POLICE: Oh, is that what Dad said; he said, 'Just don't tell your mum'? Mmm.

COMPLAINANT: And just – I tell my mum already.

POLICE: And your – did you tell anyone else?

COMPLAINANT: Just you.

POLICE: Oh, just me.

COMPLAINANT: I just keep it a secret – secret for you."[32]

---

32 Transcript of Police Record of Interview (6 August 2014), p2 – p3, with additions after viewing the recording.

[19] Later she added, "I still remember it." She said she did not remember what sort of pants he was wearing.[33] The interview continued:

> "POLICE: And can you tell me any more about this time that Dad pulled his pants down?
>
> COMPLAINANT: Just tomorrow.
>
> POLICE: Well, no, I don't think it's tomorrow because tomorrow hasn't come yet. It was when you were at Dad's place, wasn't it?
>
> COMPLAINANT: Yep, then keep it a secret.
>
> POLICE: Oh, and he said to keep it a secret, yes. And can you tell me any more about that.
>
> COMPLAINANT: Mmm, I think [indistinct].
>
> POLICE: But he – did he ask you to do anything else?
>
> COMPLAINANT: He just say that.
>
> POLICE: He just did that, and you thought it was yukky 'cause you said you only take your pants down when you go to the toilet. (Complainant nods). Was he going to the toilet? (Complainant shakes head). No. And what did he try to touch your ginny with?
>
> COMPLAINANT: His doodle I said.
>
> POLICE: His doodle, and – and what did his doodle look like?
>
> COMPLAINANT: It's the same colour like me. (Pointing to the skin on her calf).
>
> POLICE: Same colour like you, and it was – and it was out of his pants, was it? Oh. Can you tell me anything else about that? Is that all you can remember about that? Oh, okay."[34]

[20] She told police it happened in the appellant's room. The police asked her why she told them about this now but not "yesterday" [sic]. She said, "Because I keep it all secret."[35]

[21] On 20 July 2015 after considering the two police interviews the trial judge determined under s 9A *Evidence Act* that the complainant was competent to give evidence but did not determine whether she could give sworn or unsworn evidence. His Honour found that she had given an intelligible account of her version of events as to what she experienced. At this stage, the prosecution case turned on the complainant's account in the second interview.

[22] On 28 August 2015 the matter was listed before another judge for the pre-recording of the complainant's cross-examination under s 21AK *Evidence Act*. The judge determined she was not competent to give sworn evidence.[36] She told the prosecutor that she remembered talking to the police about her Dad a long time ago and agreed that she had told them the truth.

---

33 Above, p5.
34 Above, p6 – p7.
35 Above, p8.
36 T1-14 (28 August 2015, Pre-recorded Evidence), AB 20.

[23] In cross-examination the following exchange occurred:

> "Do you remember your dad? --- No
>
> Do you remember what he looks like? --- No.
>
> Okay. Has it been a long time since you've spoken to your dad? --- Yeah.
>
> Okay. Now, you were asked if you remember speaking to some policeman. And do you remember speaking to some policemen? ---No."
>
> …
>
> Did you watch a tape or a video of yourself talking to some policemen?---No.
>
> No. Excuse me. Do you remember having a look at the TV set and seeing you talking to some policemen about your dad? ---No.
>
> No. Did you do that yesterday?---Yes.
>
> Yeah. Did you watch the TV yesterday, to watch yourself talking to some policemen or talking to some men?---Yes.
>
> Okay. And can you tell me what you were talking about to those men?---No.
>
> Okay. Do you remember living in Rockhampton?---No.
>
> ...
>
> Can you remember going to spend some time with your daddy on visits?---No.
>
> ...
>
> And have you ever had a bunny rabbit as a pet? No. Did your daddy ever buy a bunny rabbit for you?---No.
>
> Can you remember if your dad did anything naughty to you?---Yes.
>
> Okay. You tell me what he did that was naughty?---He pulled down his pants.
>
> And what else did he do?---I don't know the rest.
>
> Okay. That's okay. But maybe you can help me just a little bit more and then we'll finish, okay?---Yeah.
>
> So just listen. You said that he pulled down his pants. Where was he when he pulled down his pants; do you remember?---At his home.
>
> Okay. And do you remember going to his home?---No.
>
> Okay. Whereabouts was he at his home; do you remember?---At Rockhampton.
>
> Okay, okay. Have you talked to your mummy about what you just told me?---No.

Did you talk to her today before you went to the courthouse there?---No.

...

Do you remember ever telling your mummy anything that daddy did that was naughty?---No.

...

Can you remember touching your daddy's private parts?---Yeah.

Okay. Tell me how you did that?---First, my daddy pulled down his pants.

Yeah?---And then my daddy makes me touch his private part.

Okay. And have you told your mummy about that before?---Yes.

Okay. And is that true?---Yes.

Or is that a lie?---True.

It's true. Did your mummy tell you to say that?---My mummy didn't know if I did pull down my private – my daddy pulled down his pants and then make me touch his private part.

Okay. So your daddy - - -? ---Mummy didn't know.

Your mum didn't know?---No.

Did he touch your private parts?---No.

Did you have your pants on?---Huh?

Did your daddy take – pull your pants off or pull them down?---No.

No. Did he pull your knickers down?---No.

And you can remember what you're telling me about now. Is that right?---Yes.

Do you remember going to the policeman to talk to him two different times?---No.

...

Okay. Have you had lots of talks to mummy about this?---Yes.

Have you told anybody else?---No."[37]

[24] The prosecution case was then particularised in accordance with the complainant's evidence in cross-examination, namely that the appellant permitted her to touch his penis.[38]

The appellant's evidence

[25] The appellant gave evidence that after he and the mother separated, he moved to Sydney where his family lived. The mother would not allow him to have regular telephone

---

37 T1-17 – T1-20 (28 August 2015, Pre-recorded Evidence), AB 23 – 26.

38 See MFI A, AB 156.

contact with the complainant and his attempts to stay in contact via Skype were unsatisfactory. This made him very angry because he wanted to have a sound relationship with his daughter.[39] He returned to Rockhampton twice in an attempt to arrange adequate access. On one occasion he spent all his savings to relocate to Rockhampton and moved in with the mother who subsequently told him that she did not want to be with him.[40] They tried mediation and, on a second occasion, lived together for about two or three weeks, but as there was drinking, fighting, it turned sour, and the complainant was involved, he left in November 2013 and lived on his own. The complainant visited each Wednesday.[41] When he took her on an outing with a female work friend and her son, the mother "just lost it." They commenced mediation but it was cancelled because she did not want to participate.[42] He denied ever allowing the complainant to touch his penis. They never kept secrets; they were best mates. The mother told him that she would be transferring for work around Christmas time.[43] He told her he could not move again and that he would take her to court. The mother then phoned him one morning at 7.30 am and said that he had abused the complainant. He was shocked. He rang back asking what was going on. The mother said she was going to the police and called him names; he was "freaking out."[44]

[26] In cross-examination, he said the complainant was never allowed to stay over at his house. He again denied ever pulling down his pants and having her touch his penis.[45]

Ground four: the verdict was unreasonable

[27] In contending the guilty verdict is unreasonable and against the weight of the evidence, the appellant emphasises that the complainant was very young at the time of her evidence, four or five years old, and even younger, perhaps three years old, at the time of the alleged offence. She gave no particularity as to the time or circumstances of the offending which was first disclosed in the context of a little boy exposing his penis in the kindergarten playground. Her disclosure that she touched her father's penis could have been a recollection of an innocent event. She later denied any misconduct by the appellant in the first police interview. The complainant's account in the second police interview came after her mother had shown her books "designed for victims of crime" and was completely different to the particularised offence at trial, which turned on her account in cross-examination more than one year after the initial complaints and in circumstances where the complainant's memory was poor. The appellant contends that her evidence was of such poor quality and was so unreliable it was not open for the jury to have been satisfied of the appellant's guilt beyond reasonable doubt.

[28] As the appellant points out, there were concerning aspects to the complainant's evidence. She was very young and her innocent and very endearing demeanour in her interviews with police would have engaged sympathy. The particularised prosecution case turned on her evidence in cross-examination almost two years after the alleged offending, in circumstances where she had given three different versions. The complaint came to light at a time when the appellant and the mother were separated and in

---

39 T1-60, AB 88.
40 T1-61, AB 89.
41 T1-63, AB 91.
42 T1-64, AB 92.
43 T1-65, AB 93.
44 T1-66, AB 94.
45 T1-67, AB 95.

dispute about issues, including access to the complainant. As the trial judge explained to the jury, they must exclude feelings of sympathy and prejudice and determine whether the complainant's account was reliable after scrutinising it with great care.[46] If this were the full extent of the evidence, I do not consider it would be sufficient for a jury to accept the complainant's evidence as reliable beyond reasonable doubt. But the complainant's initial account to her kindergarten teacher arose in an unprompted and innocent way. Her mother was unaware of this complaint until after the child complained to her a few days later. The spontaneous complaint to her teacher was completely independent of her subsequent complaint to her mother, and both complaints were consistent with the complainant's later evidence in cross-examination upon which the prosecution case relied. The jury were entitled to reject the appellant's exculpatory evidence. After reviewing the remaining evidence, despite the complainant's tender age, the delay and her earlier inconsistent statements, I am satisfied the jury were entitled to accept her account in cross-examination of the alleged offence as reliable beyond reasonable doubt.[47] This ground of appeal is not made out.

Ground 1: The complainant's statements to police should not have been received into evidence

[29] The appellant concedes that there was no application at trial to exclude the complainant's out of court statements to police on 4 and 6 August 2014. He also concedes that in the 4 August interview the complainant, when asked leading questions, made no statements implicating the appellant and that defence counsel elicited this at trial. The appellant accepts that both statements were admissible under s 93A *Evidence Act* but relies on s 98 and s 130 *Evidence Act* which provide a court with discretionary powers to exclude evidence to prevent an injustice.[48] Considerations of fairness included whether it was possible to test the evidence by cross-examination, and reliability.[49] A relevant factor was that the complainant was unable to recall either the incident or her interviews with police. Another concern was that the mother, who had been sexually abused herself, had read books to the complainant "designed for victims of crime" in between the two police interviews. Yet another concern was that the mother was in dispute with the appellant and had the opportunity and the ability to influence her.[50] These matters, the appellant submits, meant that the complainant's account to police on 6 August 2014 was unlikely to be reliable. It was also impossible for defence counsel to test or challenge those differing accounts in cross-examination because of the complainant's poor memory. Her lack of particularity as to time and circumstance in her second police statement also made it unfair to the appellant to receive it as evidence.

[30] As there was no application to exclude the police statements at trial, this ground of appeal can succeed only if the appellant demonstrates that, as a result of the evidence, there has been a miscarriage of justice, that is, that he has been deprived of the chance of an acquittal. The prosecution case was particularised on the basis of the complainant's evidence in cross-examination,[51] which made her statements to police on 4 and 6 August 2014 inconsistent with the prosecution case. Had evidence of them not been led, the prosecution case would have been stronger as the jury would have believed, wrongly,

---

46 Summing Up, 5 and 9, AB 111 and 115.
47 *MFA v The Queen* (2002) 213 CLR 606, [25].
48 *R v D* [2003] QCA 151, [59].
49 *R v FAR* [1996] 2 Qd R 49, 61.
50 See *R v Cumner* [1994] QCA 270.
51 See MFI A, AB 156.

that the complainant had first made a complaint to her teacher, a consistent complaint to her mother and then given consistent evidence that the appellant had her touch his penis. There were obvious sound forensic reasons for defence counsel not to apply to exclude these statements. The failure to exclude them has not deprived the appellant of a chance of an acquittal or caused a miscarriage of justice. This ground of appeal is not made out.

Ground 2: There was a miscarriage of justice by reason of the prosecutor refusing to lead evidence of the first police statement

[31] In arguing this ground of appeal, the appellant emphasises the responsibility of a prosecutor to ensure a fair trial and avoid miscarriages of justice, conducting the case with fairness and attachment and with the objective of establishing the whole truth: *Mallard v The Queen*[52] and *Libke v The Queen*.[53] He contends that it was incumbent on the prosecutor to fairly place before the jury the complete development of the complainant's allegations so that jurors could properly assess her reliability. Instead, defence counsel was forced to elicit the contents of the complainant's first statement to police in cross-examining a police officer and to argue in the presence of the jury why it should be received into evidence. In the prosecutor's closing address to the jury, he stated that he did not lead evidence of the first statement because in his view it had no probative value. The judge reminded the jury of this when summarising the prosecution case. The prosecutor's refusal to lead the evidence in the Crown case, the appellant contends, combined with his refusal to tender it once the defence elicited it in cross-examination and his prejudicial explanation to the jury as to why it was not led, diminished its value as a significant piece of evidence concerning the complainant's reliability. The appellant contends that these matters, in combination with each other and with the matters set out in Ground 3, have led to a miscarriage of justice.

[32] It is immediately apparent that the submissions in support of this ground of appeal are in direct contradiction with those in support of ground 2. But that is not the principle reason why I would reject them. Whilst it is a matter for the prosecution to determine how to present its case, had defence counsel requested it to lead evidence of both police interviews, I agree that it would have been prudent and fair to do so. This would have placed the full history of the complainant's accounts fairly before the jury. A prosecutor embarking on the course taken here is risking a mistrial or a successful appeal. It is true that the complainant's first police interview demonstrated an absence of complaint and an inconsistency with her evidence in cross-examination upon which the prosecution relied. But defence counsel ensured these matters were before the jury and were the subject of appropriate submissions. This aspect of the judge's directions was also adequate. In these circumstances, the conduct of the prosecution in not leading this evidence and his comment on it cannot have caused any miscarriage of justice or deprived the appellant of the chance of an acquittal. This ground of appeal is not made out.

Ground 3: Evidence arising during the cross-examination of the complainant's mother and the failure of the trial judge to remedy the issues arising

[33] The appellant contends that four matters arising out of defence counsel's cross-examination of the mother have, alone or in combination, caused a miscarriage of justice.

---

52 (2005) 224 CLR 125, Kirby J [82].

53 (2007) 230 CLR 559, Hayne J [71].

[34] The first is that a miscarriage of justice has arisen from the failure of defence counsel to address the document the mother claimed would show that she was willing to participate in family dispute resolution. Counsel could readily have tendered the document which demonstrated her unwillingness to participate in mediation with the appellant. The appellant emphasises that the judge's only direction on the topic was that the jury must not speculate about the contents of the documents.[54] This, the appellant contends, was insufficient to cure the damage done to the appellant's credibility by the mother's answers in cross-examination. The questioning about which the appellant complains is set out in [7] – [9] of these reasons.

[35] Defence counsel made a forensic decision, whilst cross-examining a witness who was angry and difficult to control, not to tender the document he showed her. This Court has not seen the document. There may have been other information in it that counsel did not want the jury to know about. In any case, the contents of the document which supported the defence contention were read out in court and defence counsel made submissions on them to the jury. Counsel may also have been concerned that, if his document was tendered, the document the mother was so keen to produce would also have been tendered and may have contained information damaging to the defence case. This Court has not seen the document to which the mother referred. On the material before this Court, it is impossible to conclude that this aspect of defence counsel's conduct, which appears to have been a reasonable forensic decision in the circumstances, has caused a miscarriage of justice. The judge's direction not to speculate about the documents was appropriate and adequate. This contention is not made out.

[36] The appellant's second contention under this ground of appeal is that a miscarriage of justice arose in cross-examining the mother about the appellant's repeated statements, after the complainant made her allegations to him on the telephone, pleading with the mother not to go to the police.[55] The appellant contends that the judge should have directed the jury to disregard this unexpected and highly prejudicial aspect of the mother's evidence, volunteered in cross-examination. The judge should also have directed them not to infer that this evidence supported a consciousness of guilt. The judge gave no direction to the jury as to how to deal with this damning evidence and this has resulted in a miscarriage of justice.

[37] The respondent emphasises that the judge was not invited to give such a direction, probably because counsel did not want to draw further attention to it in case the jury gave it more weight than it deserved. It would have been plain, the respondent contends, that her separation from the appellant was acrimonious and that she did not like him. Neither counsel referred to the evidence in their closing addresses so that, the respondent contends, there was no reason to conclude the jury used it to infer a consciousness of guilt. The judge's directions, the respondent submits, made clear that the jury could only return a guilty verdict if they accepted the complainant's evidence beyond a reasonable doubt, so that there has been no miscarriage of justice.

[38] Allegations like those made by the very young complainant required careful consideration by a jury properly instructed as to the law. Given her tender years and the natural sympathy that would be felt for her, her inconsistent statements and the delay between the alleged offences, her complaints and her cross-examination on which the prosecution case was based, the jury was, as the judge explained, required to scrutinise her evidence with meticulous care before treating it as reliable beyond reasonable doubt.

---

54 Summing Up 4, AB 110.

55 See [9] of these reasons.

It is unfortunate that neither counsel asked the judge to direct the jury on the evidence impugned in this contention. The complainant's mother not only unexpectedly and gratuitously volunteered that the appellant importuned her not to go to the police, she gave her strong view as to the inference of guilt that she considered should be drawn from it.[56] The mother's evidence as to the inference of guilt she would draw was highly prejudicial. This is not a case where the judge and counsel discussed the difficulty which had arisen and defence counsel clearly requested that no such direction was warranted for fear that it would unnecessarily focus the jury's attention on the prejudicial evidence. In the absence of such a request, at the very least the judge should have directed the jury to disregard the evidence of the mother as to the inference of guilt she would draw from the appellant's request to discuss the matter before the police were called. The judge should also have directed the jury that people in the appellant's position, confronted by their young daughter with an allegation of sexual abuse, may react in different ways; some may seek to discuss the matter before the police were called in case there was an innocent misunderstanding; as such a reaction could be entirely consistent with innocence, no inference of guilt could be drawn from it. In the absence of those jury directions, there is a real possibility that the jury used this evidence to more comfortably accept the reliability of the very young complainant's evidence.

[39] That was not the only matter of concern arising from the cross-examination of the complainant's mother. The appellant's final contention under this ground of appeal is that her evidence in cross-examination that the appellant was very aggressive and that she was so in fear of her life that she relocated,[57] at least in the absence of direction from the trial judge, has also resulted in a miscarriage of justice.

[40] The respondent again contends that to have made this evidence the subject of specific judicial comment would have given it unwarranted attention and it was a tactical decision of defence counsel not to ask for any direction in respect of it. Neither counsel referred to this evidence in their closing addresses so that, the respondent contends, there was no reason to conclude that the jury had regard to it in reaching their verdict.

[41] This unexpected and highly prejudicial response from the mother in cross-examination was regrettable, particularly as it followed on her uninvited and damning interpretation of the appellant's request to speak to her and the complainant before the police were contacted. It is perhaps surprising that defence counsel did not immediately apply to discharge the jury. At the very least, clear jury directions to disregard this outburst were required from the judge. I cannot accept the respondent's contention that defence counsel made a reasonable forensic decision not to have the judge direct the jury to disregard the mother's evidence about the appellant's past conduct which was not the subject of any charge. In the absence of such a direction, there is a real possibility that the jury may have used the mother's claim to more comfortably accept the complainant's evidence as reliable.

[42] As these two aspects of this ground of appeal which have been made out may have affected the jury verdict and resulted in a miscarriage of justice, the appeal must be allowed, the verdict of guilty set aside and a retrial ordered.

---

56 Above.

57 See [8] of these reasons.

Orders

1. The appeal is allowed.
2. The verdict of guilty is set aside.
3. A retrial is ordered.

[43] **FRASER JA:** I agree with the reasons for judgment of Margaret McMurdo P and the orders proposed by her Honour.

[44] **DAUBNEY J:** I respectfully agree with the President.