SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBU* [2009] QCA 385
PARTIES:	**R** **v** **BBU** (applicant)
FILE NO/S:	CA No 194 of 2009 DC No 561 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	15 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2009
JUDGES:	McMurdo P, Fraser JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURES – MATERIAL RELEVANT FOR DETERMINING APPROPRIATE SENTENCE – VICTIM IMPACT STATEMENT – the appellant was convicted after a jury trial of two counts of rape – the complainant was a friend of the appellant's daughter – the victim impact statement was in existence before the end of the prosecution case but it was not disclosed at that stage – the victim impact statement included information about the mistreatment of the victim by the appellant's daughter – the appellant contends that the victim impact statement could have been used to cross-examine the complainant as to her credit and reliability, and to allege malice and bias – whether the appellant lost some forensic advantage – whether the appeal should be allowed CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – the prosecution did not disclose the victim impact statement until the verdicts were returned – the prosecutor states this was in line with 'office policy' – the appellant contends that the prosecutor's actions were inconsistent with the proper practice identified in case law and statute – whether the prosecutorial disclosure requirements were met

APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – JUDGE'S SUMMING UP – CONSIDERATION OF THE SUMMING UP AS A WHOLE – the appellant contends that he was denied a fair trial because the trial judge's summing-up lacked balance because it emphasised evidence favourable to the prosecution, failed to mention evidence favourable to the appellant; and failed to direct the jury with respect to a reasonable inference favourable to the appellant – the trial was short and the judge's summing up concluded on the second day – whether the summing up lacked balance – whether the appeal should be allowed

Criminal Code 1899 (Qld), s 590AB, s 590AD, s 590AL
Criminal Law (Sexual Offences) Act 1978 (Qld), s 4

B v The Queen (1992) 175 CLR 599; [1992] HCA 68, considered
R v Cornwell [2009] QCA 294, considered
R v HAU [2009] QCA 165, considered
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Spizzirri [2001] 2 Qd R 686; [2000] QCA 469, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited

COUNSEL: F D Richards for the appellant
D Meredith for the respondent

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

[1] **McMURDO P:** The appellant was convicted on 22 July 2009 in the District Court at Cairns on two counts of rape. He was sentenced to three years imprisonment on the first count (digital rape), and six years imprisonment on the second (penile rape). He now appeals only against his conviction on three grounds. First, he contends that he was denied a fair trial because the Director of Public Prosecutions failed to disclose the victim impact statement prior to the close of the prosecution case. Second, he contends that the prosecutor applied an office policy which had the effect of unfairly avoiding the prosecution's disclosure obligations. Third, he contends that the learned trial judge's summing-up to the jury lacked balance because it emphasised evidence favourable to the prosecution; failed to mention evidence favourable to the appellant; and failed to direct the jury with respect to a reasonable inference favourable to the appellant.

[2] These are my reasons for dismissing the appeal.

[3] Before returning to discuss the grounds of appeal, it is necessary to summarise the relevant aspects of the evidence at trial; the judge's summing-up; and the victim impact statement.

The proceedings at first instance

The complainant's evidence

[4] The complainant's evidence was central to the prosecution case. The complainant was a 17 year old friend of the appellant's daughter. The appellant was divorced from his wife but kept regular contact with his children, including his daughter who lived with her mother. In August 2007, he invited the complainant to stay at his place for a few nights, together with his daughter and son. During this visit, the complainant and the appellant went for a drive alone. They stopped the car and she sat on the bonnet. He came up to her, stood between her legs and said, "I really want to feel your legs wrapped around me." She said, "No." He tried to kiss her. The complainant moved away and asked if they could go home. He agreed and she drove his car home. When she told the appellant's daughter about his advances, the daughter merely laughed.

[5] About a week later on 30 August 2007, the appellant was visiting his daughter and son at his former wife's home. His daughter asked him to buy alcohol and he purchased a carton of mid-strength beer. Also present at the house were Ashley (the complainant's then boyfriend); Jason; the appellant's daughter and son; Ashley's friend, Kane; and the appellant's former wife. Most of the group were drinking alcohol. Some were dancing. There was a conversation about "penis sizes" in which the complainant joined. Later in the evening she asked the appellant for a cigarette. He said she could have one if she had a shot of Johnnie Walker scotch. She had two shots within five minutes. Earlier in the evening, she had drunk about six cans of mid-strength beer. After the shots of scotch, she drank another two cans of beer. She began to feel drunk and decided to go to bed.

[6] She went to bed in the appellant's daughter's room somewhere between 12 and 1 o'clock on the morning of 31 August 2007. Ashley came with her to put her to sleep. She took off her pants and lay down in her singlet and underwear. Ashley lay behind her, cuddling her until she fell asleep. There was no-one else in the room and the lights were off.

[7] The next thing she remembered, she was dreaming that she was "having sexual intercourse and that it was really painful and uncomfortable". She woke up because of the pain. She realised there was someone behind her with their fingers inside her vagina. It felt like two or three fingers thrusting in and out. A hand was coming from behind, in between her legs. This evidence constituted count 1.

[8] She thought at first it was Ashley, but it was too painful to be him as her previous sexual experiences with Ashley were always gentle. She rolled over to face the person and touched his hair. He came towards her to kiss her and she felt his beard. She moved away. She realised it was the appellant. She rolled the other way to get to the opposite side of the bed and bumped into the appellant's daughter who was sleeping between the complainant and the wall. She tried to wake up the appellant's daughter by putting her left hand on her stomach and shaking her, but she could not raise her. She called out Ashley's name but she did not scream it out. The appellant was still lying beside and behind her with one arm over her ribs and his other arm over her shoulder around her neck. He pulled down the top of her singlet and touched her right breast.

[9] This evidence constituted count 2. The complainant's evidence continued in this fashion:

> "Okay. What were you doing while this happened?-- I was just laying there.
> Did you make any noise at any time?-- Yes.
> What did you do?-- I said, "Uh-huh", a couple - about three times or four times.
> And by doing that you mean - what does that mean?-- No.
> All right. Was he still behind you at that stage?-- Yes.
> Had his position changed?-- I don't know.
> Had your position changed?-- I - no, not that I think of.
> All right. Can you tell me what happened after that?-- After I felt him trying to undo or pull down his pants he then pulled his - my underwear to the side and put his penis inside my vagina, and pushed it the whole way in. He then thrusted about four or five times and he moved his arm as if to reposition himself and that's when I got up.
> Okay. Did he try and position you at all in any way?-- No.
> How did you get up?-- I sort of jumped up and grabbed my pants from the end of the bed and left the room.
> Did you have your pants on when you left the room?-- Yes.
> So you put your pants on inside the room and then went out?-- They were at the bottom of the bed, so as I got off the bed started putting them on so by the time I got to the door they were already on.
> Did you speak to [the appellant] at all?-- No.
> Did he speak to you?-- He asked what was wrong.
> Is that all he said?-- Yes."

[10] This evidence constituted count 2. She then ran into the lounge room to Ashley and Jason. She lay down on the couch with Ashley. He asked her what was wrong. She did not respond but she was crying. Jason put his hand on her shoulder. The appellant walked out of the bedroom, saying, "What the hell's wrong with her?" She got up from the couch and ran out the front door onto the street. Jason and Ashley followed her. She collapsed on the road, crying. Jason caught her and asked her what was wrong. She stood up and walked to the police station. Sometimes she ran. She told Jason, "bits and pieces of what had happened in the bedroom". She said, "I can't believe that he would do this to me. His daughter's best friend." She kept saying, "It hurts".

Other prosecution evidence

[11] Ashley gave the following evidence. He was staying at the home of the complainant's son and daughter on 30 August 2007. He and others were drinking alcohol. Later in the evening, he helped the complainant to bed. He was lying on the mattress with her, unsure whether she was asleep or awake. The appellant told him to go out and get a drink. Ashley sat in the lounge room drinking with Jason for some time, probably less than an hour. The complainant then came running out of the bedroom. She was crying and jumped on top of him. He was trying to ask her what was wrong. She would not say anything. She was holding him and crying. She then took off outside and ran down the road. He and Jason followed her. Later when Ashley returned to the house, he saw the appellant sitting out the front. Ashley asked him what was wrong with the complainant. The appellant did not say anything other than, "I don't know." The only thing the complainant said on the way to the police station was that "it hurts" and "he put it in me". Ashley waited at the police station for the complainant. His father picked them up from the police station.

[12] Jason gave the following evidence. He was at the home of the appellant's daughter on the evening of 30 August 2007. He recalled that there were a number of people in the bedroom of the house, including the appellant's daughter, the complainant, Kane, and the appellant. The light was on and the door was open. The appellant was standing there talking. Jason and Ashley went to the lounge room where they talked for hours. Later, the complainant came out of the bedroom. She was upset. She was doing up the button of her pants. She dived straight onto Ashley. Ashley and Jason tried to ask her what was wrong but she would not answer. She began to cry. The appellant came out of the bedroom and asked if she was alright. The complainant ran outside and just sat there. The appellant came outside and again asked if she was alright. Jason said, "She's just had a bad dream." The complainant then took off again and Jason and Ashley followed her. She collapsed in the street. Jason and Ashley asked her what happened. She responded, "He did it, he did it." When Jason asked her "What?", she did not answer. Ashley went inside the house to find his phone so that he could call his father. The complainant took off and started running. She was crying and screaming and cursing at the sky, blaming God and saying, "Why me?" Jason followed her. She told him to go away but he kept following her, all the way to the police station. Ashley eventually arrived there. Jason returned to the house to collect his belongings. Everyone at the house was asleep.

[13] The appellant's daughter gave the following evidence. She remembered an incident when the complainant and her father went for a drive together. The complainant did not say anything to her afterwards about her father's conduct. On the evening of 30 August 2007, she had a party at her home and her father was chaperoning. She drank a lot of alcohol. It was common for party-goers to "crash" in her bedroom. When she woke up the next day, no-one was present except her mother and perhaps her brother. Her father was outside sleeping in the car. She had no real memory of the evening.

[14] In cross-examination, she re-affirmed that the complainant said nothing to her after driving alone with the appellant about her "father coming on to her". She understood the allegations the complainant had made against her father. Her assessment of her father over her almost 21 years was that such conduct was inconsistent with his character.

[15] The appellant's former wife gave evidence that, on the night of the alleged offence, she slept next to the room in which her daughter was sleeping. She did not drink any alcohol. She regularly went into her daughter's room to check on her breathing whilst she slept, and she did so that night. She heard and noticed nothing untoward until the police arrived at 7.00 am. She has known the appellant for many years and considered the complainant's allegations inconsistent with the appellant's character.

[16] The doctor who examined the appellant gave the following evidence. On 31 August 2007 at 1.00 pm he took specimens from the appellant, including scalp hair, nail clippings, blood, pubic hair and swabs from the penis. In cross-examination the doctor explained that he took a penile swab from the glans (the rounded end) of the penis and from the coronal sulcus (the groove just behind the head of the penis). He also took a swab by wiping the cotton bud along the shaft of the penis. As the coronal sulcus was a groove, it was the place most likely to harbour things like cells from other people. But, to get a representative sample, he ran another cotton bud down the length of the shaft of the penis each side and down the back of the penis two or three times.

[17] The appellant, through his counsel, admitted the following matters. A doctor examined the complainant on 31 August 2007 at 4.45 am and found no scratches or lacerations to the introitus or vagina. The doctor took higher and low vaginal swabs and blood samples from her.

[18] Adriano Pippia, a DNA analyst at the Queensland Health Forensic and Scientific Services, gave the following evidence. He conducted examinations on the body samples taken from the complainant and the appellant and compared them. The samples were separated into sperm fractions and epithelial or non-sperm fractions. The sperm fraction sample from the complainant's low vaginal and vulval swabs and slides revealed a DNA profile from an unknown male, not the appellant. As to the samples taken from the appellant, semen was not detected on the swabs from the glans of his penis but a mixed DNA profile was obtained which indicated the presence of DNA from two contributors. The appellant's DNA was subtracted. The remaining DNA profile matched the DNA profile of the unknown male found in the complainant's low vaginal swab. As these DNA components matched, it was highly probable that they came from the one contributor. The other swab taken from the shaft and back of the appellant's penis again disclosed a mixed DNA profile but, because of the low level of DNA present, no reliable conclusion could be drawn as to any potential contributors. The appellant's left fingernail clippings gave a mixed DNA profile which indicated DNA from two contributors. After again removing the appellant's DNA components, the remaining DNA profile matched the complainant's DNA profile. The chance of the DNA coming from someone other than and unrelated to the complainant was approximately 1 in 14 billion, based on the Queensland Caucasian data. The appellant's right fingernail clippings gave a DNA profile which matched the appellant's.

[19] In cross-examination, Mr Pippia agreed that it was possible for semen to drain from the vagina onto the vulva area so that a man's finger touching the external surface of the vagina wet with semen, could transfer the semen onto the finger; the semen could then be transferred from the finger, in the course of urinating, to the penis. Mr Pippia also agreed that if there was drainage fluid containing semen on the outside of the vaginal area, and this was touched by a man's finger, the fluid could get underneath the man's fingernails. He agreed that "one possible scenario" from his findings was that the appellant's hand, being in the complainant's vulval area where there was drainage fluid containing semen from the unknown male, transferred that semen, which was under his fingernails, onto the appellant's penis when he held it whilst urinating.

[20] In re-examination, Mr Pippia stated that, as to the fingernail clippings, the DNA analysis did not determine whether it was semen or epithelial cells. The only samples he received from the appellant's hands were from the fingernail clippings, not from the hands generally. DNA from the unknown male which was detected in the vaginal swab and penile glans swab was not detected in the appellant's fingernail clippings.

The defence evidence

[21] The appellant gave the following evidence. His only prior offending history was for traffic offences; in 1995 for ill-treating a dog; and in 2000 for failing to provide food, drink and shelter to a horse. He met the complainant through his daughter. The two girls stayed at his home in August 2007 on the occasion when he and the complainant went for a drive alone in his vehicle. He denied that he positioned himself between her legs or tried to kiss her on that occasion.

[22] On 30 August 2007 he was visiting his children who lived with his former wife. He agreed to stay over and chaperone a party there. Most of those present were drinking alcohol. The complainant, the appellant's daughter, and later Kane, went to sleep on a mattress in the bedroom. The light was off. The appellant had mislaid his cigarettes. He got down on his hands and knees to feel for his cigarettes which he thought may have been on the bed. As he was feeling around for the cigarettes, a hand grabbed his left hand and put it in between the complainant's legs. He pulled his hand out straight away and said, "What are you doing?" She rolled over, hopped up and walked out of the room. He continued looking for his cigarettes and eventually found them. He then walked out to have a smoke and go to the toilet. He saw the complainant and asked, "What is wrong with her?" He walked outside the house "and done a leak". He denied ever putting his fingers inside the complainant's vagina. He denied ever inserting his penis into her vagina.

[23] In cross-examination, he said he did not think to turn the light on to look for his cigarettes because he did not know where the light switch was. He denied feeling the complainant's breast. He agreed that he encouraged the complainant to drink scotch that night; that he had told his former wife that he would be the chaperone; and that he allowed the complainant and his daughter to get very drunk. He was also very intoxicated, having drunk about a dozen beers and three-quarters of a bottle of scotch. He could not be sure of every detail of what happened that night, but he knew what happened and he did not commit the offences.

The judge's summing-up

[24] The judge's directions to the jury included the following. It was for them to determine the facts of the case based on the evidence. Whilst he may comment on the evidence, they were not obliged to accept any comment he made about the evidence. They should ignore any such comment unless it coincided with their own independent view as they were the sole judges of the facts. The prosecution must prove every element of the charges it has brought against the appellant beyond reasonable doubt. The appellant did not have to give evidence. In doing so, he did not assume any responsibility of proving his innocence. Even if they rejected the appellant's account in evidence, they should only convict him if they were satisfied beyond reasonable doubt of his guilt on the prosecution evidence.

[25] In dealing with the DNA evidence, his Honour's directions included the following. The probability of the DNA found on the fingernails of the appellant's left hand coming from someone other than the complainant was 1 in 14 billion. The prosecution relied on the fact that the complainant's DNA was found on the fingernails of the appellant's left hand and:

> "that DNA from an unknown male's semen found in the complainant's vagina matched DNA present on the [appellant's] penis. It should be noted that none of the DNA of the unknown male was found on any of the fingernails of the [appellant], however."

[26] The judge explained that honest and reasonable mistake of fact was an issue in the trial, so that, even if they were satisfied that the appellant raped the complainant, in each count they must also consider whether they were satisfied beyond reasonable doubt that the appellant did not have an honest and reasonable belief that she was consenting. In respect of count 2, the complainant said:

> "'Uh-huh' a couple of times – and in fact up to four times – and this meant 'no'. The complainant says that she did not consent and that

> she made this clear to the [appellant]. If you accept the complainant's evidence in this regard, you might think that the [appellant] could not have honestly and reasonably believed that she was consenting."

[27] The judge summarised the rival contentions of counsel in this way. The prosecution case was that the 40 year old appellant preyed on the 17 year old complainant, ensuring that she got drunk, before digitally raping her while she slept and then committing penile rape on her as she woke up. The defence contended that the appellant was merely looking for his cigarettes when, in her sleep, the complainant guided his hand to her vaginal region. The presence of her boyfriend's semen on the appellant's penis was a result of brief contact with her vaginal region and then touching his penis while urinating shortly afterwards.

[28] The judge pointed out that the complainant did not scream out loudly or protest loudly. When assessing the appellant's version, he invited the jury to:

> "have regard to the fact that the evidence is that at the relevant time the complainant was in fact wearing underwear, that the expert evidence that's been presented shows no DNA from semen – from the unknown male detected on the [appellant's] hands. And that in response to the proposition that the [appellant] could simply have turned on the light to locate his cigarettes, he alleges he didn't because he didn't know where the switch was. These are matters for you to consider when weighing up the facts and, as I've indicated, you are the sole judges of the facts."

[29] After the jury retired, defence counsel raised his concern that the judge told the jury that nothing had been found on the appellant's hands when the medical evidence was that the swabs were taken at 1.00 pm the following afternoon. He submitted that the matter raised by the judge with the jury was not a matter investigated at the trial. The judge pointed out that defence counsel had submitted to the jury that there was seminal fluid under the appellant's fingernails when that was inconsistent with the evidence. That was why, his Honour stated, that he directed the jury in those terms. The judge declined to give the redirections sought but gave a jury redirection in these terms:

> "… I mentioned that there was no evidence of any DNA from semen being detected on the [appellant's] hands. What I was referring to was the fact that the only DNA evidence that was taken from the [appellant's] hands was taken in the nature of fingernail clippings; and the only DNA evidence obtained from the fingernail clippings was DNA evidence matching the complainant's DNA. The DNA evidence that was found relating to the semen of the unknown male was detected in the complainant's vagina and on the [appellant's] penis. There was - the only testing of the hands that was in evidence before you was the testing that was done of the fingernail clippings and, as you may recall, that evidence showed the presence of the complainant's DNA but no other DNA other than the [appellant's] DNA. … So, when I'm referring to his hands I'm referring to the fingernail clippings."

[30] The jury retired to consider their verdict at 3.01 pm. At 5.02 pm they sought the following redirection:

"Clarification of
*where the sperm DNA was on the penis – which part?
*What inferences can be drawn from the lack of [the complainant's] DNA on [the appellant's] penis – was it tested or just not picked up?"

[31] In response, the judge read to the jury the appropriate portions of the expert evidence to the effect that the only DNA evidence found from swabs taken from the penis was in the swab taken from the glans of the penis. The judge told the jury that the question of inferences was a matter for them but there was no evidence of any of the complainant's DNA being found on the appellant's penis.

[32] The jury retired again at 5.12 pm to consider their verdict. They adjourned their deliberations at 6.00 pm until the next morning and returned with their verdict at 10.57 am the next day.

Victim impact statement

[33] During the sentencing proceedings, the prosecutor tendered a victim impact statement. The following portions are relevant to this appeal.

> "One big impact is that [the appellant's daughter's] friendship is gone and having her turn against me. She put up posters around … that implied that I was a slut. People recognised me on the poster and were laughing at me and my boyfriend. I felt like I had no privacy. I lost a lot of friends through this. Some sided with [the appellant] and [the appellant's daughter] and some with me. Photos of my dad who died when I was 12 were burnt by [the appellant's daughter]. I was shown photos of her burning the photos and a jumper that he used to wear. I was really angry.
>
> About six months afterwards, I went to counselling at Family Planning Queensland for about 4 sessions. Friends and family were prompting me to get help. Before I went to counselling I never went anywhere, and didn't want to see people. I felt like people were judging me. My relationship with my partner, Joshua, has been under strain. …
> … Josh went AWOL at the time he heard what happened to me; it stays in his head. He has lost his social life too."

[34] Before passing sentence, the judge had the following exchange with the prosecutor:

> HIS HONOUR: Mr English,[1] just before I proceed to sentence, there's a very recent Court of Appeal decision - in fact it was one of the decisions of the Court of Appeal when they sat in Cairns that says you've got to hand these victim impact statements over beforehand.
> MR ENGLISH: Your Honour, certainly. That victim impact statement was provided after she gave evidence, your Honour, on Monday afternoon. I was provided with a copy of that yesterday, your Honour.
> HIS HONOUR: Well, what I'm informing you - because it's the law----
> MR ENGLISH: Yes, your Honour.

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1 The prosecutor.

HIS HONOUR: -----is that these things have to be obtained - if you're going to use them, if you're going to get one, you have to get it before trial and it has to be given to the other side before trial. This - this is - the circumstances of this don't appear to be particularly relevant to the circumstances under consideration by the Court of Appeal in the other case, in fact, I don't think there's - on my quick look and at this victim impact statement. I understand why Mr Sumner-Potts[2] has done what he's done, but I don't think it leads anywhere in my preliminary view, but if the policy of the DPP is to obtain a victim impact statement for use on sentence, it has to be done before the complainant gives evidence-----
MR ENGLISH: Your Honour-----
HIS HONOUR: -----or you run the risk - you run the risk of what occurred in the case I'm referring to - are you familiar with the case?
MR ENGLISH: Yes, your Honour, I'll take your comments back to the office, your Honour, because-----
HIS HONOUR: It's just going to create problems every time if you continue to do it this way.
MR ENGLISH: Well, your Honour, this is a policy that we've adopted since that - the office has adopted since that case, your Honour, so I will certainly take your comments-----
HIS HONOUR: Well, this is only-----
MR ENGLISH: -----back to it.
HIS HONOUR: -----a few weeks after the case-----
MR ENGLISH: Yes, your Honour.
HIS HONOUR: -----and the policy hasn't been implemented, so I mean if you-----
MR ENGLISH: No, your Honour, my apologies for - but the policy has been that we would now seek the victim impact statements after evidence has been given. So, I will take your comments back so that-----
HIS HONOUR: Well - well you-----
MR ENGLISH: -----the policy-----
HIS HONOUR: -----alternatively you can actually just disclose the victim impact statement-----
MR ENGLISH: Yes, your Honour.
HIS HONOUR: -----as part of the prosecution brief. That would seem to me a safer way of not having any other issues arise after evidence has been given.
MR ENGLISH: Certainly, your Honour.
HIS HONOUR: I mean there's stuff in there that - well, doesn't seem particularly relevant to this trial, but it's certainly not the sort of stuff that was canvassed in this trial and-----
MR ENGLISH: Certainly.
HIS HONOUR: -----for the very reason doesn't seem to be particularly relevant, but it's a bit contentious.
MR ENGLISH: Yes, your Honour.
HIS HONOUR: I - I don't propose to give it any particular weight the - these issues that go outside the direct impact because, I mean, it's

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[2] Defence counsel.

> also, in my submission, not particularly relevant what the defendant's daughter did. I mean that's really a peripheral matter. If she's committed certain offences relating to the way she's responded to her father being charged - or if she's defamed or otherwise wronged the complainant in a civil sense, that's not particularly relevant.
> MR ENGLISH: No, your Honour.
> HIS HONOUR: And - and I guess it's just - this is why I'm raising it, I just don't - don't want to see difficulties arise where a victim impact statement's wide ranging and it's only obtained after the complainant's given evidence.
> MR ENGLISH: Certainly, your Honour.
> HIS HONOUR: All right, I just note that.
> MR SUMNER-POTTS: I - I - might I make plain my position – and I've done it inferentially before - but had I know[n] about what was in that document, I anticipate that I would have taken it up with the - with the complainant in - in evidence. It provides a basis for - for malice and for so being firm or - unyielding in her evidence with a view to getting back at the - at my client's daughter, than by - you know, the - the – the way that has been framed, so-----
> HIS HONOUR: The difficulty for you, Mr Sumner-Potts, is that she had already made the complaint at the time-----
> MR SUMNER-POTTS: I understand that, I understand that.
> HIS HONOUR: -----these allegations are made.
> MR SUMNER-POTTS: But - but it may be that had there – there not been, what appears to be, significant ill - ill feeling, she - the complainant might have been - prepared to make more concessions that she would have otherwise.
> HIS HONOUR: Well, whatever I say, Mr Sumner-Potts, doesn't-----
> MR SUMNER-POTTS: No, I understand, your Honour-----
> HIS HONOUR: -----have any bearing on it.
> MR SUMNER-POTTS: -----I understand, I'm taking the opportunity to record it and put it on record, so-----
> HIS HONOUR: I appreciate that, if you want to raise it in another forum, that's a matter for you.
> MR SUMNER-POTTS: I intend to.
> HIS HONOUR: All right, well, that's a matter for you. But, Mr English, this could have been completely avoided by your office actually following a course of conduct which is identified as an appropriate course of conduct in the decision I'm referring to.
> MR ENGLISH: Yes, your Honour.
> HIS HONOUR: And by deciding to do something different, you've potentially created a problem for yourselves and I don't think it's a very smart thing to do."

The timing and circumstances of the disclosure of the victim impact statement

[35] I return now to the grounds of appeal. The first two grounds are interconnected and can be discussed together.

The appellant's contentions

[36] The appellant's barrister's contentions on these grounds are as follows. The victim impact statement was in existence before the end of the prosecution case and should

have been disclosed at that time to the defence. Instead, it was disclosed just prior to the sentencing process. The prosecutor told the judge that, since the Court of Appeal decision in *R v HAU*,[3] his office had a policy of not taking victim impact statements until after the complainant's trial evidence had been given. This late taking of, and subsequent late disclosure of, the victim impact statement in this case was inconsistent with the proper practice identified in *HAU* and in *R v Cornwell*[4] and with the prosecutorial obligation under s 590AB and s 590AL *Criminal Code* 1899 (Qld). The prosecutor's failure to disclose the victim impact statement as soon as it was obtained on the second day of the trial denied the defence the opportunity of testing the complainant's credibility. Her credibility was central to the case. As a result, the appellant has been denied procedural fairness so that, even though the case against him was a strong one, the appeal should be allowed, the convictions quashed, and a re-trial ordered. If the non-disclosure of the victim impact statement may have influenced the result of the trial, then the appeal must be allowed: *HAU*;[5] *R v Spizzirri*;[6] *Cornwell*.[7]

[37] The appellant contends that if defence counsel had access to the victim impact statement during the trial, he could have cross-examined the complainant by challenging her credit, her reliability and by alleging malice and bias. Her extraordinary claims in the victim impact statement of the cruel conduct directed at her by the appellant's daughter could have been tested in cross-examination. The claims could have been investigated and perhaps contradicted by other evidence. In her victim impact statement, the complainant talks about her relationship with her partner "Josh". Yet her claimed emotional commitment to him seems at odds with her relationship on the night of the offence with Ashley. She would not concede in cross-examination the possibility that she could have moved the appellant's hand onto her vaginal area, mistakenly thinking that it was Ashley's hand. She may have made that concession if she had not been motivated by ill-will to the appellant's daughter as a result of the daughter's post-offence conduct towards her. Her alleged treatment by the appellant's daughter, and her troubled relationship with her current partner, Josh, may have motivated her to persist in her complaint and to adhere to a version about which she is, in truth, uncertain. Her general unwillingness to make sensible concessions in cross-examination could have been challenged by defence counsel on the basis of the victim impact statement. It could have been suggested that she was not making those sensible concessions because she was motivated by malice towards the appellant and his daughter arising from the issues in her victim impact statement.

[38] The appellant contends that, had defence counsel had the opportunity at trial to use the victim impact statement in this way, it could have made a difference to the verdict and it follows that the appeal must be allowed.

Conclusion

[39] Section 590AB *Criminal Code* provides as follows:

> "**590AB Disclosure obligation**
>
> (1) This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are

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3 [2009] QCA 165.
4 [2009] QCA 294.
5 [2009] QCA 165 at [37].
6 [2001] 2 Qd R 686 at 693 [30].
7 [2009] QCA 294 at [40].

conducted fairly with the single aim of determining and establishing truth.

(2) Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of—

(a) all evidence the prosecution proposes to rely on in the proceeding; and

(b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person."

[40] The term "relevant proceeding" is defined in s 590AD *Criminal Code* as meaning:

"(a) a committal proceeding; or

(b) a prescribed summary trial; or

(c) a trial on indictment."

[41] Section 590AL *Criminal Code* imposes an ongoing obligation to disclose a thing to an accused person as soon as practicable after the thing comes into the possession of the prosecution.

[42] During the hearing of this appeal the Court obtained copies of the Director of Public Prosecution's guidelines which relevantly provide:

"**27. DISCLOSURE: Section 590AB to 590AX of the Criminal Code**

…

(iv) **Inconsistent Statement**

Where a prosecution witness has made a statement that may be inconsistent in a material way with the witness's previous evidence the prosecutor should inform the defence of that fact and make available the statement. This extends to any inconsistencies made in conference or in a victim impact statement.

…

44. SENTENCE

…

(iv) **Victim impact statements**

Where a victim impact statement has been received by the prosecution, a copy should be provided to the defence as soon as possible after a plea of guilty has been indicated.

Inflammatory or inadmissible material, such as a reference to uncharged criminal conduct, should be blocked out of the victim impact statement. If the defence objects to the tender of the edited statement, the unobjectionable passages should be read into the record."

[43] The victim impact statement was provided to the prosecutor on the second day of the trial, the day after the complainant gave evidence. The prosecutor did not hand it to defence counsel until after the guilty verdicts were returned on the morning of the third day of trial. It is concerning that the prosecutor's statements to the judge, on one view, seem to suggest that the taking of the victim impact statement at this

time was to avoid the effect of this Court's decisions in *HAU* and *Cornwell*. But I can see nothing improper in this case in the taking of the victim impact statement at this time. There is no suggestion that the prosecution considered the victim impact statement in this case might reveal something damaging to the prosecution case or helpful to the defence case. Once the victim impact statement was obtained in this case, unlike in *HAU* and *Cornwell*, nothing in it amounted to an inconsistent statement or raised a concern about the truthfulness or reliability of the complainant's evidence at trial.

[44] This victim impact statement, like any victim impact statement, is not relevant to the commission of the offence (the issue to be determined at trial). It is concerned with the effect on the victim of the offence (an issue relevant to the sentence to be imposed on the offender if and when convicted). I note that the prosecutor's provision of the victim impact statement after the appellant's conviction did not offend the Director of Public Prosecution's published guidelines. It is comforting that the guide to amendments on the cover sheet to those guidelines does not suggest that the relevant guidelines were amended since or as a result of the decisions in *HAU* and *Cornwell* in the attempt to avoid the prosecutorial responsibilities identified in those cases.

[45] But have the prosecutorial disclosure obligations under the *Criminal Code* been met? There does not seem to have any been reason for the prosecutor to consider it necessary to provide the victim impact statement to the appellant during the trial to ensure the determination and establishment of the truth. It follows that s 590AB(1) *Criminal Code* did not require its disclosure. There was nothing in the victim impact statement upon which the prosecution proposed to rely in the trial, the "relevant proceeding" under s 590AB. I note at this point that, whilst the issue was not argued in this appeal, a "relevant proceeding" in context means "a trial on indictment". The ordinary meaning of "trial on indictment" does not seem to extend to the sentencing proceeding. My preliminary view is that a trial concludes with the verdict. See the scheme of Pt 8 *Criminal Code*, for example, s 597C, s 598, s 604, s 614, s 615E, s 631A, s 646, s 648 and s 650. Section 590AB(2)(a) did not require disclosure of the victim impact statement. Nor do I consider that the victim impact statement would have tended to help the case for the appellant under s 590AB(2)(b). But a prosecutor is not aware of the information in possession of the defence. Out of an abundance of caution and to ensure fairness, it would have been prudent for the prosecutor in this case to have provided a copy of the victim impact statement to defence counsel at trial as soon as it was taken.

[46] Despite my doubts, I am prepared to assume for the purposes of discussing the appellant's contentions that the prosecutor in this case failed to comply with his statutory obligations under s 590AB(2)(b). There is no suggestion in this case that the prosecutor deliberately withheld the victim impact statement knowing that it might be helpful to the appellant's case at trial. The appellant contends that his trial was compromised because his counsel could have cross-examined the complainant about her extraordinary claims in the victim impact statement as to the post-offence conduct of the appellant's daughter and contradicted those claims by other evidence. These matters go only to the complainant's credit. Again, for the purposes of discussing the appellant's contentions, I will assume that the complainant's credibility was so central to the issue in this case that a denial by her on these issues could have been contradicted by defence evidence. But no such contradictory evidence has been placed before this Court. There is no reason for this Court to

consider that the complainant's victim impact statement as to the post-offence conduct of the appellant's daughter is false or unreliable.

[47] The appellant next contends that, had he access to the victim impact statement at trial, his counsel could have suggested to the complainant in cross-examination that she was unwilling to make sensible concessions because she felt animosity towards the appellant's daughter as a result of the daughter's post-offence conduct towards the complainant. This seems to me to be a peculiar way to conduct the appellant's defence. It was likely to have been met with the submission by the prosecutor that the complainant went to police with her allegations against the appellant even though it meant jeopardising her close friendship with his daughter. The loss of that friendship and her treatment by the appellant's daughter, which was not highlighted in evidence at trial, was likely to have made the jury more sympathetic towards the complainant and less sympathetic towards the appellant and his daughter. This contention seems completely inconsistent with sound advocacy. It does not suggest to me that the appellant could possibly have lost a chance of acquittal through the inability to cross-examine the complainant in this way.

[48] The appellant further contends that his trial counsel could have cross-examined the complainant about her relationship with Josh had he seen the victim impact statement before the close of the prosecution case. The offences allegedly occurred in August 2007. The victim impact statement was made at the trial in July 2009, nearly two years later. The complainant's intimate relationship with Josh may have commenced after the offences the subject of this appeal, in which case they are completely irrelevant. It seems almost certain that leave to cross-examine the complainant about her relationship with Josh would have been refused under s 4 *Criminal Law (Sexual Offences) Act* 1978 (Qld). If the complainant's present relationship with Josh pre-dated the alleged offences, that relationship still seems irrelevant to the complainant's allegations against the appellant. It cannot be sensibly suggested that the complainant made a false allegation to preserve her relationship with Josh and to cover up a consensual sexual indiscretion with the appellant. After all, a key part of the prosecution case was that she had consensual intercourse with her then boyfriend, Ashley, at around noon on the day before the alleged offences. I cannot see why leave would be given under s 4 to cross-examine the complainant about her relationship with Josh or how it would further the appellant's case.

[49] The appellant has not demonstrated that he has lost some forensic advantage in the present case through the late taking and disclosure to him of the victim impact statement. He has not demonstrated that the loss of the opportunity to cross-examine the complainant was a material disadvantage to him in the conduct of his trial. He has not demonstrated that, in the present circumstances, the prosecutor's late taking and disclosure of the victim impact statement was so procedurally unfair as to warrant the allowing of this appeal and the quashing of the convictions. It follows that the first two grounds of appeal fail.

Was the appellant denied a fair trial because the trial judge's summing-up lacked balance?

The appellant's contentions

[50] I turn now to the third ground of appeal. The judge told the jury in his summing-up that "[i]t should be noted that none of the DNA of the unknown male was found on

any of the fingernails of the [appellant], however". The appellant contends that this suggested to the jury that the chain of contact, upon which the appellant's explanation for the DNA found on his penis being consistent with the male DNA found in the low vagina of the complainant, was broken. He contends that the judge should have dealt with the following possibilities. The unknown male's DNA may have been present on the appellant's fingernails but was undetected. The unknown male's DNA may have been present on the appellant's fingers or hands rather than his fingernails, but his fingers and hands were not tested. The unknown male's DNA may have been present on the appellant's fingernails, fingers or hands but have been washed off or wiped off before the samples were taken. He contends that those comments of the judge, without any balancing statements as to possible inferences which might be drawn in favour of the appellant, may have given disproportionate importance in the jury's minds to this absence of the unknown male's DNA on the appellant's fingernails, fingers or hands. The judge should have directed the jury that where there was a reasonable inference consistent with innocence that they must draw that inference.

[51] Further, the appellant contends that the judge's jury directions were unfair in that, in referring to the complainant's evidence that she was not consenting to the penile penetration, the judge said:

> "If you accept the complainant's evidence in this regard, you might think that the [appellant] could not have honestly and reasonably believed that she was consenting."

Conclusion

[52] The appellant's case was that, consistent with his evidence, the appellant did not commit the offences. It was that the DNA found on his penis, which matched the DNA material from the unknown male found in the complainant's low vagina, must have been transferred from the outside of the complainant's vagina to his penis by way of his hands when he urinated outside shortly afterwards.

[53] The judge's comments to the jury identified by the appellant were not helpful to the defence case but they were accurate. It is nevertheless fair to observe that the body samples were taken from the appellant at 1.00 pm on 31 August 2007, almost 12 hours after the alleged offences. Because of that significant intervening period, it is not surprising that, accepting the appellant's hypothesis, any DNA material from the unknown male on the appellant's hands would very likely have been washed or wiped off.

[54] But the judge told the jury on a number of occasions in his summing-up, and immediately after making the impugned observation, that his comments as to the facts were not binding on them and they should not act on them unless they reached the same conclusion. Moreover, the judge told counsel that he made the comment in an attempt to correct defence counsel's mis-statement to the jury that there was semen under the appellant's fingernails. The DNA evidence was not to that effect. The complainant's DNA was found under the appellant's left fingernail. Although defence counsel's summing-up to the jury has not been included in the appeal record book, the appellant has not suggested that his Honour was wrong in expressing the need to correct defence counsel's mis-statement. Indeed, his Honour's observations seem entirely consistent with defence counsel's cross-examination of Mr Pippia about the DNA evidence.[8] Significantly, in his re-direction to the jury, the judge

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[8] See these reasons at [19].

accurately summarised the DNA evidence in relation to the body samples taken from the appellant.[9] The judge's directions as to the DNA evidence when considered as a whole were both accurate and balanced.

[55] In cases based entirely, or even largely, on circumstantial evidence the following jury direction is prudent. If there is an inference reasonably open which is adverse to the accused person and one which is favourable, then the jury should draw the inference of guilt only if it overcame all other possible inferences so as to leave no reasonable doubt in their minds. The appellant contends that direction should have been given in this case. The complainant gave direct evidence that the appellant committed both offences. This case did not turn largely on circumstantial evidence. The absence of such a direction in this case was not an error and nor did it cause unfairness to the appellant.

[56] The appellant contends that the judge's comments to the jury about the defence of honest and reasonable mistake of fact were unfair. That portion of the judge's directions is summarised in these reasons at [26]. The appellant contends the judge's comment on this issue ignored the complainant's use of the expression "uh-huh". As the appellant points out, the expression "uh-huh", can, depending on the way it is said and its context, amount to either an agreement or a dissent. The complainant made clear in her evidence that she was using that expression to indicate her lack of consent to the appellant's conduct. The judge was entitled to point this out to the jury and to suggest that, if they accepted the complainant's evidence in this regard, they may think the appellant could not have honestly and reasonably believed she was consenting. I note that the judge did not make reference to a body of other relevant evidence favourable to the prosecution: on the night of the alleged offences, the appellant encouraged the complainant to drink alcohol; he knew she had been vomiting from drinking alcohol to excess; and he knew that she had fallen into a drunken stupor not long before the alleged offences occurred. These matters strongly suggested that, if the appellant behaved as the complainant said he did, he was not acting under an honest and reasonable mistake of fact as to her consent. The judge's observations to the jury as to honest and reasonable mistake of fact as to consent, a matter raised on the evidence although not on the appellant's version, were by no means unfair.

[57] The appellant also contends the judge's summing-up lacked balance in that the judge failed to refer in his summing-up to the following facts. The complainant said the offence occurred in a room next to where the appellant's ex-wife was sleeping, and close to the lounge room where Ashley and Jason were drinking and talking. It occurred in a bed where both the appellant's daughter and Kane were sleeping. The bedroom door was open. The appellant's ex-wife regularly checked on her daughter during the night and did so on this night. The complainant did not seek help from either the appellant's daughter, Kane, or any other person nearby.

[58] The trial was short with the judge's summing-up concluding on the second day. All the evidence would have been fresh in the jury's minds. The judge was not obliged to remind them of every aspect of the evidence favourable to the appellant. The judge's omission to refer to this evidence did not lead to a summing-up lacking in balance. As Brennan J noted in *B v The Queen*,[10] a trial judge has a broad discretion when commenting on the facts as long as the comments stop short of

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9 See these reasons at [29].

10 (1992) 175 CLR 599 at 605.

overawing the jury. The judge's summing-up in this case sufficiently maintained judicial balance so as not to deprive the jury of an adequate opportunity of understanding and giving effect to the appellant's defence. The judge's directions impugned by the appellant would not have overawed the jury. This is so whether the matters relied on by the appellant in respect of this ground of appeal are considered individually or collectively. The judge fairly and adequately summarised the defence case as was his obligation: see *R v Mogg*;[11] *RPS v The Queen*.[12] None of the appellant's contentions, whether considered alone or in combination, demonstrate that the summing-up was so unfair or unbalanced as to cause a miscarriage of justice. This ground of appeal also fails.

[59] It follows that the appeal against convictions must be dismissed.

[60] **FRASER JA:** I agree with the reasons for judgment of the President and the order proposed by her Honour.

[61] **ATKINSON J:** I agree with the orders proposed by the President and with her Honour's reasons.

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11 [2000] QCA 244; (2000) 112 A Crim R 417 at [49].

12 (2000) 199 CLR 620 at 637-638.