SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCI* [2016] QCA 312
PARTIES:	**R** **v** **MCI** (appellant)
FILE NO/S:	CA No 106 of 2016 DC No 1736 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 8 April 2016
DELIVERED ON:	25 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and McMeekin J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Gotterson JA concurring as to the orders made, McMeekin J dissenting
ORDERS:	**1. The application for leave to adduce further evidence is refused.** **2. The appeal is allowed.** **3. The convictions are set aside.** **4. 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 three counts of indecent treatment of a child under 12, under care, and one count of rape – where the appellant contends there was no corroboration of the complainant's evidence, there were inconsistencies between the complainant's account and the preliminary complaint witnesses's accounts, and there was a long delay – 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 – OTHER IRREGULARITIES – where a prosecution witness gave inadmissible evidence in cross-examination about an

earlier allegation against the appellant of sexually abusing a child – where the trial judge refused to discharge the jury and gave a direction that the jury should disregard the inadmissible evidence – where the inadmissible evidence was highly prejudicial – whether the refusal to discharge the jury occasioned a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was acquitted of one count of indecent treatment of a child under 12, under care, and one count of rape – where the appellant contends that all alleged counts occurred serially on the same day and it was illogical for the jury to be satisfied that some counts occurred while others did not – where the quality of evidence in relation to each count varied – where the evidence of preliminary complaint witnesses supported some counts but not others – whether the verdicts were inconsistent

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FURTHER EVIDENCE – AVAILABILITY AT TRIAL, MATERIALITY AND COGENCY – where the appellant seeks leave to adduce further evidence about when the dress the complainant alleged she was wearing at the time of the offence was purchased, the complainant's victim impact statement, and the complainant's medical history – where the further evidence, except for the complainant's victim impact statement, was either available at trial or could have been discovered with reasonable diligence – where there was no adequate explanation for why the evidence was not adduced at trial – where the evidence was unlikely to rationally affect the jury's verdict – whether leave should be granted to adduce further evidence

Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22, cited
De Jesus v The Queen (1986) 61 ALJR 1; [1986] HCA 65, cited
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
Jones v The Queen (1997) 191 CLR 439; [1997] HCA 56, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, cited
R v Barry [1997] QCA 208, cited
R v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited
R v Spina [2012] QCA 179, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, applied

COUNSEL: The appellant appeared on his own behalf
M R Byrne QC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant has appealed against his convictions of rape and three counts of indecent treatment of child under 12, under care. I agree with McMeekin J's reasons except as to the first ground of appeal. I would uphold that ground, set aside the convictions, and order a retrial.

[2] The first ground of appeal was that a "miscarriage of justice was occasioned when the Learned Trial Judge declined to discharge the Jury, after evidence of an alleged offence went before the Jury not a part of the current indictment which the Jury was empanelled to try." The inadmissible prejudicial evidence is set out in McMeekin J's reasons at [32]. It was concerning that the witness, the complainant's stepmother, adverted to a matter in cross-examination which the jury was likely to have understood as relating to an earlier and different allegation that the appellant had sexually abused a child, perhaps the complainant.

[3] As Mason CJ and Toohey J noted in *R v Glennon*:[1]

> "Reception of inadmissible evidence of a prior conviction has been said to offend against one of the most deeply rooted and jealously guarded principles of our criminal law. And the wrongful reception or transmission of such evidence by or to the jury is calculated to set the prospect of a fair trial at risk. It is then for the trial judge to decide whether it is necessary to discharge the jury in the interests of securing a fair trial and, if the trial proceeds and results in a conviction, for a court of criminal appeal to decide whether the accused has been deprived of a fair trial."[2] (Footnotes omitted).

[4] The judge sensibly interrupted defence counsel's cross-examination before the witness could do more damage and sent the jury outside the courtroom. The jury did not return for about one hour during which it is likely the jurors discussed this inadmissible aspect of the witness's evidence. The judge then, having refused defence counsel's application to discharge the jury, asked (not, in terms, directed) the jury to disregard the witness's evidence "[o]ther than her saying that she mentioned the allegations the subject of this trial to him and that he denied them".[3] It would have been well open to the judge to have discharged the jury. But as the plurality noted in *Glennon* in the context of pre-trial publicity, in the absence of evidence, it is not legitimate to infer that the jury did not comply with the trial judge's direction.[4] Mason CJ and Toohey J, however, specifically noted that:

> "Knowledge of an admissible prior conviction for a similar offence stands in a different position from other prejudicial information."[5]

[5] Whilst the inadmissible prejudicial evidence was not of a prior conviction, it was of that character. It was an additional complaint of the appellant sexually abusing either the complainant or another child.

[6] It is true that the further warnings which the appellant now says should have been given were not sought by defence counsel at first instance. That is because they would have highlighted rather than diminished the damaging effect of the inadmissible

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1 (1992) 173 CLR 592, 604.
2 Above.
3 T2-54, AB 124. See McMeekin J's reasons at [35].
4 (1992) 173 CLR 592, 604 (Mason CJ and Toohey J); 614 – 615 (Brennan J); 625 (Dawson J agreeing).
5 Above, 604.

evidence and would not have assisted the appellant. Defence counsel, having been unsuccessful in his application to discharge the jury, had to do his best in the circumstances. The fact that he did not seek those further directions from the judge does not support the contention that the judge's request to the jury to ignore the inadmissible prejudicial evidence was adequate to avoid a miscarriage of justice.

[7] Nor can I accept the respondent's contention that because the jury acquitted the appellant on two counts, this shows that they were not influenced by the inadmissible evidence. There is no evidence as to the jury reasoning process to support or refute that contention and it is not for this Court to speculate about their reasoning process.

[8] This appeal is not against the primary judge's exercise of discretion not to discharge the jury; it is against the convictions.[6] The question is whether a substantial miscarriage of justice has resulted from the admission of the inadmissible prejudicial evidence, despite the judge asking the jury to disregard it. As counsel for the respondent submitted, that involves a consideration of whether it caused the appellant to lose a fair chance of an acquittal.[7] Whilst the judge's request to the jury to disregard the inadmissible evidence may well have been sufficient to guard against a miscarriage of justice in many, perhaps most, cases,[8] allegations of sexual abuse of children are, as Gibbs CJ said in *De Jesus v The Queen*,[9] "peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard". Unlike *R v Barry*,[10] this was not an overwhelming prosecution case. The complainant and the appellant gave competing testimony. Different juries could have reasonably reached different verdicts, either acquitting or convicting the appellant. The concern that an innocent person may have been convicted cannot be dismissed. There is a significant possibility that, despite the judge's request to the jury, the inadmissible and highly prejudicial evidence from the complainant's stepmother may have caused a substantial miscarriage of justice in that it deprived the appellant of the chance of an acquittal on the charges on which he was convicted.

[9] I agree with McMeekin J's reasons for concluding that there is no merit in the remaining grounds of appeal and the application to adduce further evidence. Having now listened to the recording of the inadmissible prejudicial evidence, I also agree with Gotterson JA's reasons.

[10] I would allow the appeal on ground 1; set aside the convictions; and instead order a retrial.

Orders

1. The application for leave to adduce further evidence is refused.
2. The appeal is allowed.
3. The convictions are set aside.
4. A retrial is ordered.

[11] **GOTTERSON JA:** I have had the advantage of reading the reasons of both Margaret McMurdo P and McMeekin J. I agree with the President that Ground 1 ought succeed

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6 *Webb v The Queen* (1994) 181 CLR 41, 89 – 90 (Toohey J), 56 (Mason CJ and McHugh J agreeing); *R v Barry* [1997] QCA 208, p. 4.

7 Respondent's Outline of Argument [23].

8 See, eg, *Gilbert v The Queen* (2000) 201 CLR 414, [13], [32].

9 [1986] HCA 65 [4].

10 [1997] QCA 208, p. 6.

for the reasons given by her Honour. I also agree with both of their Honours that all other grounds of appeal ought fail for the reasons given by McMeekin J. The orders proposed by the President are those that ought be made.

[12] I, too, am unable to rule out the significant possibility that despite the directions given by the learned trial judge, the evidence given by the appellant's step-mother caused a miscarriage of justice in that it may have deprived the appellant of the possibility of acquittal on the charges on which he was convicted. As Dawson J observed in *Crofts*, in the passage to which McMeekin J refers, the discretion is to be exercised in favour of discharging the jury when that course is necessary to prevent a miscarriage of justice.

[13] The inadmissible evidence given by the step-mother is, in my view, accurately characterised by the President as "highly prejudicial". So much can be gained from reading the printed word in the transcript. My view has been confirmed by listening to her relevant evidence which is set out by McMeekin J in his reasons.

[14] The jury's consciousness of this evidence would have been heightened by the following features of the way in which it was given. The witness paused hesitantly before she continued with the words "He also said that you believed me before". There followed another pause before defence counsel said in a surprised, if not disbelieving, tone of voice quite different from the tone in which he had been cross-examining, "He said what, sorry?" There was another pause before the witness responded, "You believed me before. A conversation before [indistinct] before that." Defence counsel then twice asked whether the witness was referring to an earlier allegation and the witness responded, "Yes" twice and without hesitation on each occasion.

[15] It may be expected that defence counsel was mindful of these features of the evidence. They would have contributed to a forensic decision not to ask for the directions that were given to be repeated in the summing up.

[16] I would add that I do not agree with an aspect of the reasoning articulated by the learned trial judge in the course of argument on the discharge application. Her Honour noted, correctly, that the evidence in question was given in a sequence in which the witness was first impermissibly asked about a wholly self-serving pretext call to which no objection was taken.[11] When defence counsel accepted her proposition that the question should not have been put, her Honour said:

> "That having happened I do think we can deal with it by a direction."[12]

[17] This statement implies that her Honour considered that because the initiating question was impermissible, then the impugned evidence later given could be left to a direction. I consider that reasoning to be inherently unsound in two respects. Firstly, it accords cogency to the impermissibility of the initiating question in the exercise of the discretion. Secondly, and more importantly, it diminishes from the legitimate significance of the highly prejudicial nature of the evidence for its exercise.

[18] **McMEEKIN J:** On 8 April 2016, after a trial conducted before Bowskill QC DCJ and a jury, the appellant was convicted of one count of rape and three counts of indecent treatment of a child under 12, under care. He was acquitted of one count of rape and one count of indecent treatment. The complainant was the appellant's half-sister. The offences were alleged to have occurred during one episode when the complainant

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11 AB117; Tr2-47 ll26-31.

12 *Ibid* ll35-40.

was six or seven years old. The charges were particularised as occurring on a date unknown between the first day of January and the eighth day of November 2008.

[19] The appellant filed a notice of appeal against his convictions. On the day of the hearing of the appeal he sought to rely on revised submissions which substituted additional grounds raised in the written outline of submissions filed on 15 September 2016. The appellant was effectively left with the following four grounds:

a) A miscarriage of justice was occasioned when the learned trial judge declined to discharge the jury, after evidence of an alleged offence went before the Jury not a part of the current indictment which the jury was empanelled to try;
b) The verdict was unsafe and unsatisfactory;
c) The learned trial judge erred in the sufficiency of the direction given to the jury, concerning the dangers of impermissible reasoning in regards to the inadmissible evidence disclosed by the final prosecution witness to be called. A miscarriage of justice was therefore occasioned;
d) Inconsistent verdicts.

[20] The appellant also argued that new and fresh evidence should be admitted.

[21] The appellant is self-represented.

The prosecution case

[22] The prosecution called ten witnesses – the complainant, six preliminary complaint witnesses (five friends and her step mother) and the complainant's mother, step father and sister.

[23] At the time of the alleged offending conduct the appellant did not live in the complainant's home but was the only adult in the home. He was aged about 18.

[24] The respondent summarised the case against the appellant in this way:

> "…the complainant was playing a computer game. The appellant directed her to shower and subsequently directed her to his bedroom. Once the complainant entered his bedroom, she sat on his bed and the appellant did the following, as the prosecution case was conducted:
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> a) Pulled down her underwear and licked her vagina (Count 1);
> b) Showed the complainant indecent pictures of naked woman and children on his Dell computer (Count 2) – **not guilty;**
> c) Pushed the complainant back onto the bed and licked her vagina (Count 3);
> d) Offered the complainant money, Oreos and a trip to Dreamworld. He then inserted his penis in the complainant's mouth (Count 4) – **not guilty;**
> e) Masturbated in front of the complainant (Count 5);
> f) Inserted his penis in the complainant's mouth and ejaculated (Count 6)."

[25] The appellant's evidence, if accepted supported each of those counts. However her initial account to the investigation officer given in October 2014 was not as complete:

> "And my brother came in and told me to go have a shower… and then he turned the computer off, so I got up, went to have my shower and then when I got out of the shower, I went back to my game and it saved U/I so I just turned the computer back on and then he told me to go

> into his room and I didn't know what for, so I did, and then he was in the kitchen getting a drink of water and then, I was just sitting on his bed waiting for him and then he came in and then he showed me pictures then he pulled my underwear down and then he said 'It's OK.' And then he licked my VJJ…And put his downstairs in my mouth and comed and then, I ran out. I had another shower and then I ran to my, and then I went to my um, sister's friends house…."[13]

[26] The complainant was cross examined. The topics canvassed included the appellant's perceived favouritism towards the sister brought about because he would buy the sister, but not the complainant, things (the examples given being declining to buy the complainant a lolly pop but buying the sister a mobile phone), a suggested motive to lie (namely to induce a friend to tell her a secret and separately in a game of "truth or dare" with her friends to induce her friends to tell her a secret she came up with a false story), the clothing she wore during the incident (a favourite floral dress she wore almost every day that she was "absolutely positive" she wore on the day of the offences), and the type of computer that the appellant was using (a Dell computer).

[27] The preliminary complaint evidence was admitted pursuant to s 4A *Criminal Law (Sexual Offences) Act* 1978 (Qld). It will be useful to summarise the various accounts as each party relied on them in support of their respective arguments - the appellant complaining of inconsistencies and the respondent contending that the accounts were to a large extent consistent. The complaints were made on five separate occasions, or at least the differences in the witnesses' description could support five separate occasions. A summary of those occasions and of the evidence of the witnesses follows:

5 Occasions

1. School bathroom in February or March 2014 with CW and AF;
2. School grounds in February or March 2014 with AF and H;[14]
3. Birthday party in March 2014 with CW, AF, KC and D;
4. Classroom in October 2014 with CR, FA, DL and S;[15]
5. At house on 20 October 2014 with the complainant's step-mother, LG.

CW

- In her police interview CW said that at school a few weeks before the birthday party the complainant told her and AF that when she was seven years old "She was playing on the computer and her brother came in and turned it off and told her to go in the room and he raped her."[16] CW said that she remembers at her birthday party the complainant "telling me again that night the same story what I said."[17]
- CW's evidence at trial was to the same effect but she added that the first instance occurred in the school bathroom.[18]

AF

- In her police interview AF said that during a game of truth or dare at CW's birthday party the complainant told her "that her brother bribed her to um, brother bribed her with Oreo's and money and a trip to Dream

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13 AB210.
14 Possibly the same occasion as number 1.
15 There are inconsistencies between the witnesses as to who was in the classroom at the time.
16 AB269.
17 AB270.
18 AB260.

World," "she said he put his dick near her" and "she said my brother raped me."[19]

- AF's evidence at trial was to the same effect but she added that the complainant had told her before the birthday party in the school grounds that her brother raped her "She didn't go into great detail. She just said her brother raped her."[20]

CR

- In her police interview CR said that in a classroom at school the complainant told her that "she was playing on her video game"… "And ah her brother told her to go and have a shower, they were alone at the house together"….she then showered and "went to her room with her clothes on, her brother walked in the room and he took her clothes off and then he, he, she said he started taking his clothes off"… "And that he licked her private part"… "And he comed on her"…. "And he put his, he put his, his private part in her mouth."[21]
- CR's evidence at trial was to the same effect but she described different people being in the classroom.[22]

DL

- In her police interview DL said that sitting on the floor at school the complainant told her that her brother "Started raping her something like that"… "And then he licked her thing"… "And then he put his thing in her mouth"… "And then she said he started humping her."[23]
- DL's evidence at trial was to the same effect but she had remembered that the complainant had told her where her parents were at the time and where she went after the incident.[24]

FA

- In her police interview FA said that in a classroom at school the complainant had told her that "a day where she was a child, about seven and umm… And she was on the couch, watching TV and then her brother just came up and then I blocked my ears because I didn't want to hear everything she said." … "And then umm. And then at the end umm, she told me that her big, big brother raped her."[25]
- FA's evidence at trial was to the same effect – adding that the complainant said to her "you may want to put your – like, put your hands in your ears – fingers in your ears to not hear this, because it's too gross." But FA heard her say her brother raped her "because that was after I unblocked my ears."[26]

LG

- LG, the complainant's step-mother, gave evidence that on 20 October 2014 at her house after a detective called her she spoke to the complainant who told her that "he put his penis in her mouth and cum"… "She just said he put his penis in my mouth and cum in my mouth."[27]

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19 AB275-277.
20 AB262.
21 AB284-285.
22 AB25-27.
23 AB292.
24 AB32.
25 AB305.
26 AF255.
27 AB107.

[28] The remaining witnesses served to establish that the appellant had the opportunity at times to be alone with the complainant, that he possessed a laptop computer in 2008 when these events were said to have occurred, that the appellant did give more attention to the complainant's sister and that there was some change in behaviour of the complainant after she had an apparent fit in 2008, she becoming more violent.

The Appellant's Case

[29] The appellant gave evidence denying the events alleged. He said that his relationship with the complainant was "a semi-decent" one with no animosity in the "overall scheme" but he had a better relationship with her older sister. He swore that in 2008 he owned an Acer or an Asus computer. He did not own a Dell Computer. He accepted that he may have been present at the home where the complainant alleged the events occurred sometime during 2008 and may have had a baby sitting role at times.

The course of the trial

[30] Prior to the commencement of the summing up the jury asked to have the complainant's evidence replayed to them. The judge determined to do so after she had completed her summing up. The video was then replayed with appropriate directions: see *Gately v The Queen*[28]. The Court then adjourned for the day. The jury returned at 9 am the following day and delivered their verdicts at 2.40 pm.

Evidence of a prior offence

[31] I will deal with grounds (a) and (c) together as they both relate to an alleged miscarriage of justice arising from the evidence disclosed by the complainant's step mother.

[32] In the course of cross examination of the complainant's step mother by the appellant's counsel the following exchange occurred:

> "On that day you called [the appellant] and put [the complainant's] versions of events to him, didn't you?---No. I just asked [the appellant] what happened, and then I might have said what she said, but that was it. I said, look, I've just got a phone call from the detective saying that – yes. I did say that you had done what I said.
>
> And he denied it, didn't he?---Yes. He did. He also said that you believed me before.
>
> He said what, sorry?---You believed me before. A conversation before [indistinct] before that.
>
> "Believed me before." You're not referring to an earlier allegation?---Yes.
>
> You are referring to an earlier allegation?---Yes. When - - -
>
> HER HONOUR: Sorry. Can I just ask, maybe, we'll just take a pause for a moment. Ladies and gentlemen, I'm just going to ask you to go to the jury room just for a moment."[29]

[33] The exchange occurred late on the second day of the trial and in the course of the evidence of the last witness for the prosecution.

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28 (2007) 232 CLR 208.

29 AB108.

[34] A *voir dire* then took place and there was further cross examination of the witness on the *voir dire*. There was then an adjournment to enable counsel to obtain instructions. Appellant's counsel then applied for the jury to be discharged.

[35] The appellant's trial counsel submitted, accurately, that the jury had heard evidence that was inadmissible and at least suggestive of an earlier allegation of a sexual nature. He submitted that the problem could not be cured by any direction for the trial judge and the jury should be discharged. The judge disagreed and immediately after excusing the witness (who gave no further evidence to the jury) directed the jury in these terms:

> "Ladies and gentlemen, just before we keep going, I'm going to ask you to disregard the answers you last heard from the witness … when she was being asked about a phone call she had with the defendant. Other than her saying that she mentioned the allegations the subject of this trial to him and that he denied them, the remainder of what she said has no relevance at all to this case, and for that reason I ask you to simply disregard it. Can I make it clear there is no evidence of any other allegations against this defendant. Right. Thank you."[30]

[36] The appellant submits:

a) The evidence was highly prejudicial;
b) The direction lacked sufficiency;
c) There was no warning of impermissible reasoning based on the evidence - the jury should have been told not to reason along these lines: that because there was evidence, albeit inadmissible, of allegations of uncharged acts against the appellant which he strongly denies that it was more likely than not that he was guilty of the charged acts;
d) The inadmissible evidence reflected on the appellant's character adversely and could be used by the jury in assessing his credibility;
e) The direction given did not rectify the prejudice the disclosure created;
f) The delay between the giving of the evidence (about 2.53 pm) and the giving of the direction (3.56 pm) exacerbated the prejudice;
g) The judge did not return to the issue in the summing up so that it remained uncorrected;
h) Justice therefore miscarried.

[37] The appellant's submissions as to the course that the trial judge ought to have taken – warn of impermissible reasoning and return to the matter in the summing up – could only have served to emphasise the issue to the appellant's prejudice. His counsel specifically asked the trial judge not to draw attention to the matter in her summing up. He was wise to do so. There is no merit in the complaints. The direction given was more effective than the alternatives now proposed.

[38] As to the delay it was not overly lengthy and it is difficult to see that it caused any particular prejudice. As well it came about because of the appellant's counsel's interest in cross examining the witness on the *voir dire* about the matter and to allow him time to seek instructions – both actions perceived to be in the appellant's interests.

[39] As to the sufficiency of the direction - in my view the trial judge's direction was appropriate.

[40] Obviously it was unfortunate that the evidence came out but it was adduced by a line of questioning from the appellant's counsel, it had the advantage to the appellant of

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30 AB124.

the introduction of the self-serving denial, it was relatively fleeting, and the prejudicial evidence was in no way contextualised. In the circumstances what was required was a strong statement to the jury that the evidence given was simply irrelevant. That is the direction that her Honour gave.

[41] In his oral submissions the Director, Mr Byrne of Queens Counsel, out of an abundance of caution, pointed out that the trial judge used the word "ask" ("I'm going to ask you to disregard"; "for that reason I ask you to simply disregard it") rather than "direct". In context where the judge concluded as she did ("Can I make it clear there is no evidence of any other allegations against this defendant") her intent was plain and I have no doubt that the jury understood that intent.

Discussion

[42] I have had the advantage of reading the reasons of the President and Gotterson JA. It seems to me that there are four relevant issues. The first is identification of the principles underlying the approach to interfering with the exercise of the discretion to discharge the jury plainly reposed in the trial judge. The second is whether there is a special rule in sexual cases where the jury learns of information such as the impugned evidence here. The third concerns protection of the integrity of the jury system. The fourth is whether there is any sound basis to find that the primary judge brought into account some wrong factor in exercising the discretion reposed in her.

The discretion

[43] In *Crofts v The Queen*[31] the plurality (Toohey, Gaudron, Gummow and Kirby JJ) emphasised both the advantages and the wide discretion that the trial judge enjoys in dealing with inadvertent and potentially prejudicial events in a trial:

> "No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues, the stage at which the mishap occurs, the deliberateness of the conduct, and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. As the court below acknowledged, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript."

[44] Dawson J's views in that same case were to much the same effect:

> "Whether or not a jury should be discharged by reason of some incident which occurs during the course of a trial is a matter within the trial judge's discretion. But it is a discretion which is to be exercised in favour of a discharge only when that course is necessary to prevent a miscarriage of justice. It is in that sense that it has been said that the underlying principle is that of necessity and that "a high degree of need for such discharge" must appear before a discharge will be ordered.

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31 (1996) 186 CLR 427 at 440-441.

> When a trial judge's refusal to discharge a jury is called in question, it must be borne in mind that he or she is ordinarily in a better position than an appeal court to assess whether, having regard to the course which the trial has taken and the atmosphere in which it has been conducted, any prejudice may be dispelled by a clear warning to the jury."[32]

[45] Bearing in mind the advantage that the trial judge had, the width of the discretion her Honour had reposed in her, and the "high degree of need for such discharge" is there reason shown here to intervene? As I follow the reasoning of the majority that need is said to lie in two circumstances - the special prejudice that charges involving sexual offences engender and that her Honour, in exercising the discretion vested in her, impermissibly brought into account that the inadmissible evidence was introduced by the blunder of the appellant's counsel. In my view in the circumstances pertaining there is not only no reason to think that the jury were influenced by any such prejudice, but good reason to think they were not. As to the second point, I am not persuaded that her Honour let any extraneous circumstance influence her.

No special rule

[46] In my view there is no special rule that applies in the circumstances here. Certainly the principle in *R v Glennon*[33] is not engaged. *Glennon* concerned the impact of pre-trial publicity of, amongst other things, a prior conviction. While knowledge in members of the jury could not be shown, a survey of the community had been conducted that demonstrated statistically that the members of the jury must have known of discreditable prejudicial sexual conduct of the accused. For present purposes the important point to note is that the judgments drew a distinction between demonstrated knowledge by members of the community of vague allegations concerning the defendant and knowledge of convictions. That is precisely the point here. The exception to the rule that it ought to be assumed that a jury has followed the trial judge's direction that the President draws attention to is expressly stated to be "[k]nowledge of an admissible prior conviction for a similar offence". The impugned evidence here was well short of evidence of a prior conviction for a similar offence. Whether the conduct the witness referred to was similar or not is unknown. And it did not involve a conviction. There is no good reason to extend the exception beyond the boundaries indicated in *Glennon*, to information of the type here in issue. The evidence involved a brief reference to an unspecified allegation brought by an unidentified person at an unspecified time of unspecified conduct which the witness was said to have not believed to be true. A conviction on the other hand involves a finding by a lawfully constituted court that the perpetrator has, beyond reasonable doubt, engaged in the criminal conduct in question. That a jury might give weight to the latter is understandable. That they might give weight to the former is extraordinary.

[47] While I appreciate that the President's reference to *De Jesus v The Queen*,[34] is not intended to equate that case to this, it is worth noting the point in issue in *De Jesus* and the context of the remark made by Gibbs CJ ("Sexual cases, however, are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard"). The issue there concerned the examination of the joinder of two rape charges. The Chief Justice was concerned about the ineffectiveness of a direction to a jury to disregard the evidence led, **in its entirety**, of a separate and unconnected charge of

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32 Ibid at 432.
33 (1992) 173 CLR 592 at 604.
34 [1986] HCA 65 [4].

rape that the defendant said had nothing to do with him. Even there the majority view (Mason and Deane JJ in their joint dissenting judgment and Brennan J) was that there was no special rule applicable to sexual offences regarding joinder merely because of that possibility of prejudice.

[48] Indeed decisions of this Court involving an appeal on the same ground have been rejected where the inadmissible evidence before the jury was far more prejudicial than here. *R v Barry*[35] provides an example. The case involved a charge of rape. The complainant in her evidence alleged that the defendant had raped her niece. That was both inadmissible and, given its content, grossly prejudicial reflecting as it did a specific allegation of like conduct, and plainly represented the witnesses' own belief, unlike here. The decision is not explained by the strength of the prosecution case. The Court (Fitzgerald P, Moynihan and Dowsett JJ) expressly disclaimed that as a factor saying "[a]lthough it is unnecessary to do so on this occasion, if it is appropriate to have regard to the strength of the prosecution case….".[36] In any case, while there was contemporaneous evidence available of "fresh complaint and her distressed condition and medical and scientific evidence which supported her claim" the Court apparently accepted that "the jury was substantially concerned with a credibility contest between [the complainant] and the appellant".[37]

[49] The decision in one case of course does not determine the decision in another. The relevant point here is that there is no special rule, applicable to offenses involving allegations of sexual abuse of children, to the effect that a direction of a trial judge is not likely to have the desired effect. All must depend on precisely what it is that the jury have heard and in this case the indications that we may have as to the impact of it.

The jury were demonstrably not prejudiced

[50] The majority approach not only requires acceptance of the proposition that the jury would ignore the directions of the trial judge but that the jury would proceed in what would be obvious to any reasonable juror as a patently and grossly unfair manner. Not only is there no evidence that they did so there is evidence they did not in the rendering of the not guilty verdicts.

[51] As the respondent submits the fact that the jury did acquit on two counts strongly indicated that the jury were not swayed by irrelevant evidence and conscientiously went about their task. The majority find this to be of no significance. I disagree. The fact of the jury verdicts is evidence that the jury have conscientiously carried out their duty in considering each charge separately and weighing the evidence.

[52] If the premise be that the jury have assumed that there was some cogency to the unexplored allegation such that they have impermissibly assumed that the defendant was of a character likely to commit such offences then why find him not guilty of two counts? Their own finding, with the evidence before them, was that complaints could be made that could not be sustained. Why then assume that they thought that he was guilty of charges about which they know nothing and which were not brought? The reasoning, with respect, involves a non sequitur. The necessary assumption is that this court should assume the jury acted as directed.

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35 [1997] QCA 208.
36 Ibid at 6.
37 Ibid at 3.

The integrity of the jury system

[53] I do not share the President's concern that "[f]or all this Court knows, but for the inadmissible evidence, the jury may have acquitted on all counts." Not only do I rely on the forgoing reasoning but as well on the integrity of the jurors. The jurors took an oath or affirmation to conscientiously try the charges against the defendant and decide them according to the evidence. They were expressly directed by the learned trial judge to ignore the impugned evidence. They were reminded in her summing up to comply with the directions that she had given. They would need to have been perverse to have ignored all this.

[54] To return to *Glennon*[38], the discussion there by Mason CJ and Toohey J not to underrate the integrity of the jury system is pertinent here:

> "The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. As Toohey J observed in *Hinch*, in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them.
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> …
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> To conclude otherwise is to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge."[39]

[55] To similar effect is this passage from the judgment of Brennan J in the same case:

> "In *Munday*, Street C.J. repeated an unreported passage from one of his Honour's earlier judgments:
>
> > '... it is relevant to note that the system of jury trial is geared to enable juries to be assisted in every possible way to put out of mind statements made outside the court, whether in the media or elsewhere. There is every reason to have confidence in the capacity of juries to do this. Judges do not have a monopoly on the ability to adjudicate fairly and impartially. Every Australian worthy of citizenship can be relied upon to discharge properly and responsibly his duty as a juror. Particularly is this so in the context of being one of a number or group of others all similarly charged with this responsible duty. I have great faith in the multiple wisdom and balance reflected in the verdict of a jury'."[40]

[56] *Glennon* was concerned with pre-trial publicity. If anything the problems there are more acute because the court cannot know what the jurors may or may not have heard. I have the same faith and confidence in jurors that Street CJ expressed and Brennan J endorsed where the issue is the learning of vague allegations in the course of the trial and in circumstances where the jury have been expressly told to ignore it.

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38 *R v Glennon* (1992) 173 CLR 592 at 603.

39 Footnotes omitted.

40 *R v Glennon* (1992) 173 CLR 592 at 614.

The trial judge did not bring into account irrelevancies

[57] Where an appeal is brought against conviction and a trial judge has not appreciated the point in issue then the appeal court can have little confidence in the trial judge's decision that the trial should go on despite the reception of inadmissible and potentially prejudicial evidence. But that is not this case. While her Honour recognised the impermissibility of the questioning by the defendant's counsel I cannot accept that she thought that to be the relevant consideration in reaching her decision to direct as she did. Her Honour said to the defendant's counsel on his application for discharge:

> "I mean, my concern is the fairness of this trial. What I'm proposing is that those matters will – I mean, what you're proposing would no doubt be right if there was content to the subject to those things before the jury, but there isn't."[41]

[58] With respect her Honour's approach was entirely proper. Her expressed view gave due weight to the lack of content concerning the allegation that I have discussed in paragraph [46] above.

Conclusion

[59] The decision whether or not to discharge the jury involved an exercise of a discretion, a discretion vested in the trial judge. The trial judge was in a better position than this court to judge the impact of the impugned evidence. No ground is shown to overturn that exercise. Her Honour gave a strong and accurate direction. In my opinion the trial judge's direction was sufficient to cure any prejudice. There was no need to discharge the jury. As it transpired the jury demonstrably followed her directions. I am comfortably satisfied that no miscarriage of justice occurred.

The verdicts were not inconsistent

[60] The appellant argues that it was unreasonable and illogical for the jury to find the appellant not guilty on counts 2 and 4 and then to find him guilty on the remaining counts.

[61] Count 2 alleged that the appellant showed the complainant indecent pictures of naked woman and children on his Dell computer. Count 4 alleged an act of oral rape but preceded, on the complainant's account, by an offer by the appellant to the complainant of money, Oreos and a trip to Dreamworld.

[62] The essential complaint by the appellant is that on the complainant's account one incident followed immediately after and was a continuation of the next so that if the jury were not satisfied the one occurred it was not logical to accept that the other occurred.

[63] The appellant relies on the following passage in *Jones v The Queen*[42]:

> "Given the jury's finding on the second count, it was not open to them, on the whole of the evidence, to be satisfied beyond reasonable doubt of the guilt of the appellant on the first and third counts. Once the jury found that the evidence of the complainant with respect to the second count lacked sufficient cogency to convict, the Crown case on the first and third counts wore a different complexion. For it meant that, when

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41 AB119.

42 (1997) 191 CLR 439 at 455.

> her evidence could be set against other reliable evidence, it failed to carry sufficient conviction to reach the criminal standard of proof.
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> As we have already said, nothing in the complainant's evidence gave any ground for thinking that the quality of her evidence was higher in respect of the first and third count than it was in respect of the second count. When the credibility factor is combined with the uncorroborated nature of the complaints and the effect of the lengthy and unexplained delay in the making of the complaints, the convictions on the first and third counts can only be regarded as unsafe and unsatisfactory."

[64] The starting point in any consideration of complaints of illogicality of verdicts must be that the jury were satisfied that the complainant was essentially honest and reliable to arrive at a verdict of guilty on the remaining counts. What is in issue is whether there is some reason to think that the quality of the evidence proffered differed from one count to the other. If no difference can be discerned it might lead to a conclusion that the jury simply failed to comprehend their task.

[65] Here, while it is true to say that the events of the separate counts on the indictment each followed in a very short space of time, it cannot be said that the quality of the evidence in relation to each was the same.

[66] The respondent submits, I think correctly, that as there was no corroboration of any of the conduct reflected in the individual counts it is very likely that the focus of the jury's deliberations would have centred on the first complaint to police and the preliminary complaint evidence. The trial judge expressly (and properly) directed the jury to consider the preliminary complaint evidence and any inconsistencies between the accounts of the friends and the complainant's evidence for the purpose of assessing the complainant's reliability. Her Honour also directed the jury that they needed to consider each count separately and that the evidence was not the same in relation to each. They were told that the verdicts did not need to be the same in relation to each count. Her Honour's comments and directions were accurate and the jury appear to have followed that last direction.

[67] So in relation to count 2 the respondent submits that the jury's verdict was explicable given:

a) none of the accounts to preliminary complaint witnesses included an allegation of exposure to pictures; and
b) it was open to the jury to have a doubt about the details of that part of the incident given the evidence of the appellant that he never owed a Dell computer, and the lack of other evidence to the contrary.

[68] In relation to count 4 the respondent submits that the jury's verdict was explicable given:

a) the accounts to preliminary complaint witnesses were confused as to the order in which events occurred but largely included only a single act of oral rape which culminated in ejaculation, as opposed to two acts of oral rape; and
b) the only witness who said that the complainant mentioned Oreos and Dreamworld (AF) recounted a version that the appellant put his penis near the complainant.

[69] Those submissions should be accepted.

[70] While some inconsistency is inevitable in the detail of what is related on occasions separated in time, and inevitable too when it is clear that the complainant was not

attempting to give an accurate and comprehensive narrative of events to her friends, the omission completely of the matters alleged, or the appearance in some but not other accounts, or the existence of countervailing evidence each deserved weight and could logically give the jury pause in deciding guilt beyond reasonable doubt. As well the jury may have had a view that some of the preliminary complaint witnesses through their demeanour, provided greater support for the complainant's credibility than others. These were matters for the jury to judge.

[71] These considerations provide a logical explanation for the verdicts here.

[72] In my view the verdicts are rationally explicable.

Unsafe and Unsatisfactory

The legal principles

[73] Where it is contended that the verdict is unreasonable or cannot be supported having regard to the evidence, the applicable principles are clear. *SKA v The Queen*[43] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact. To similar effect is the decision in *M v The Queen.*[44] There it was also held:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."[45]

[74] Recently the High Court has restated the pre-eminence of the jury. In *R v Baden-Clay*[46] the Court said:

> "It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact." Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of

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43 (2011) 243 CLR 400.
44 (1994) 181 CLR 487.
45 Ibid at 494.
46 (2016) 90 ALJR 1013 at 1023 [65]-[66].

> a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[75] The appellant advanced his case on the basis that the Court not only should review all of the evidence but also should bear in mind the alleged errors that he highlighted and consider whether, even if not deserving of setting aside the verdicts when taken singly, if taken together they should have that effect.

Discussion

[76] The principal points that can be made for the appellant are that there was no corroboration of the complainant; there was a long delay - she made no complaint for some six years; there were some inconsistencies between the preliminary complaint witnesses and between their account and her evidence; and the jury were obviously in doubt for some reason about parts of her account (the inconsistent verdict point). The difficulties facing any accused in defending charges of this nature when the complaint is long delayed are manifest.

[77] However each of these matters was highlighted by the appellant's counsel and squarely raised for the jury's deliberation. And there were several factors going the other way. The long delay was explicable given the complainant's age and relationship to the defendant. The alleged motive to lie arising from the game of "truth or dare" was met by the fact that, according to her friends CW and AF, the complainant had given a substantially similar version some months before at school. The extent of the strained relationship between the complainant and the appellant was explored in the evidence, the subject of the addresses and summing up, and its significance was something that the jury were well placed to assess. The complainant seems to me to give her evidence in a matter of fact way. As well there was a substantial degree of consistency in her accounts on several different occasions and to different people in her life.

[78] The trial judge summarized the evidence comprehensively and pointed out inconsistencies. The jury were appropriately warned by the trial judge, particularly that they had to scrutinize the complainant's evidence with great care.

[79] Essentially the defence arguments were entirely matters for the jury to weigh up in assessing the credibility and reliability of the complainant. In my judgment the various complaints that the appellant makes, taken singly or together, do not cause me after "making full allowance for the advantages enjoyed by the jury", to consider

that "there is a significant possibility that an innocent person has been convicted." Quite to the contrary. In *Baden-Clay* the Court concluded that "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'."[47] Upon reviewing the evidence I am satisfied that it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the counts in question.

[80] Finally, the appellant submitted that the trial miscarried in that the jury heard the evidence of the complainant twice over given their request to have it replayed. He contended that the direction given by the trial judge not to give the re-played evidence undue weight was insufficient to remove the prejudice of hearing the evidence twice. The direction given was in these terms:

> "Now, in the case of pre-recorded evidence when you ask to be reminded of it, it can be replayed and that means you hear it a second time and that's what we've just done in the case of [the complainant's] evidence, but because we've done that I need to remind you firstly to avoid giving undue weight to that evidence that's recorded and therefore available for you to hear a second time, as opposed to other evidence that you can't hear a second time and, secondly, to consider that evidence that you've just seen again in the context of the other competing evidence and, in that regard, I particularly draw to your attention the defendant's evidence denying the allegations and the evidence of [the complainant] about those events, and also to consider the evidence of the other witnesses that you heard from as well as the arguments of the – on behalf of the defendant in relation to all of that evidence."[48]

[81] In my view there is no merit in the complaint. The judge could hardly have refused the jury's request. The complainant's evidence was central to the jury's considerations. The direction given accorded with the decision in *Gately*.[49] It was entirely conventional. No objection was taken at trial to it. And it had the advantage to the appellant of drawing the attention of the jury immediately before they retired to his denials and the arguments his counsel had advanced.

Further evidence

[82] The appellant sought leave to adduce new evidence. The evidence was to be from three witnesses who were called - the appellant's mother, step father and sister - and two witnesses who were not – the appellant's father and a medical practitioner. The Court received the evidence that was tendered, initially at least, for the purposes of determining the application.

[83] The evidence that was to be led from the appellant's mother, step father and sister concerns:

a) When the floral dress - that the complainant said she was "absolutely positive" she was wearing at the time of the offence in 2008 - was purchased;
b) The complainant's victim impact statement; and
c) The complainant's medical history and how it would have affected the complainant.

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47 Ibid at 1024 [66].
48 AB184.
49 *Gately v The Queen* (2007) 232 CLR 208.

[84] The appellant sought to call his father to give a character reference statement to show "judgment of character". The appellant says he was not called at the trial because he was in New Zealand.

[85] The appellant sought to call the medical practitioner "to give a character reference statement to show judgment of character" and "refer to mental health history." The submissions state that the appellant is "unsure" why the witness was not called.

The relevant legal principles

[86] In *R v Spina*[50] McMurdo P set out the relevant principles:

> "Australian appellate courts have long recognised an important distinction between admitting fresh evidence and admitting new evidence. Fresh evidence is evidence which either did not exist at the time of the trial or which could not then with reasonable diligence have been discovered. See *Ratten v The Queen*; *Lawless v The Queen* and *R v Katsidis; ex parte A-G (Qld)*. New or further evidence is evidence on which a party seeks to rely in an appeal which was available at trial or could with reasonable diligence then have been discovered. The distinction between fresh and new evidence is sometimes blurred but it should remain significant for two reasons. The first is because the community has an interest in ensuring that defendants charged with criminal offences ordinarily have only one trial at which they have an opportunity to put forward all the available evidence upon which they rely. It is not in the public interest for defendants to hold back evidence so that, if they are unsuccessful at trial, they can use the withheld evidence to appeal and obtain a new trial. The second reason is that, where there is admissible fresh evidence, it is equally against the public interest for a conviction to stand as the conviction would not be based on all the available relevant evidence.
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> In determining whether to allow an appeal against conviction based on fresh evidence, the test is whether it is established that there is a significant possibility (or that it is likely) that, in light of all the admissible evidence, both the fresh evidence and the evidence at trial, a jury acting reasonably would have acquitted. See *Gallagher v The Queen* and *Mickelberg v The Queen*.
>
> Appellate courts recognise, however, that there remains a residual discretion in exceptional cases to receive new or further evidence which is not fresh in the legal sense where to refuse to do so would result in a miscarriage of justice. See *Mallard v The Queen*; *R v Young (No 2)*; *R v Condren; ex parte Attorney-General*; *R v Main*; *R v Daley; ex parte A-G (Qld)*; and *R v Katsidis*. In determining an appeal which turns on new or further evidence, there are strictly two questions. The first is whether the court should receive the evidence. The second is whether that evidence, if received, when combined with the evidence at trial, requires that the conviction be set aside to avoid a miscarriage of justice. Frequently those two questions can be conveniently dealt with together."

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50 [2012] QCA 179 at [32]-[34] (citations omitted).

Discussion

[87] The evidence that the appellant seeks to lead, save for the victim impact statement that was obtained for the sentence, is evidence that was available at the time of the trial or could with reasonable diligence have been discovered for the trial.

[88] The issue of the significance of the complainant fixing on the floral dress was quite obvious to trial counsel. So much is clear from his cross examination of the complainant. The dress was mentioned by the complainant in her s 93A statement. Trial counsel went to some lengths to have the complainant say that she was "absolutely positive" she was wearing it on the day of the events the subject of the indictment. One would expect that counsel would then follow up the questioning by casting doubt on the claim, presumably through other witnesses. Yet the topic was not explored with any of the three witnesses now advanced despite them being called at the trial.

[89] The appellant says that counsel's intention at trial was to argue that it was so improbable that the complainant could accurately recall what she was wearing six years before that her credit overall would suffer. That does not explain why the issue was not explored with the family members.

[90] The appellant now contends that the family members can say with some certainty when the dress was purchased. The evidence now sought to be led is to the effect that the dress was purchased new in 2009 for a family photo. The photo exists. It is said that the complainant's baby brother was eight months old in the photo thus fixing the date the photo was taken and hence the date of purchase.

[91] No material has been advanced to show that this new evidence is in fact corroborated by any independent record. Indeed it seems it depends entirely on a recollection of the dress being purchased for a particular purpose.

[92] The unavailability of the dress at the time of the offences because it was yet to be purchased was an obvious point. Why then no effort was made to determine when it was that the dress was purchased is simply inexplicable and certainly not explained by the appellant's suggestion that he thought that he could not talk to family members about such matters. There was nothing to prevent him or his lawyer from gathering evidence. There is a very strong inference that the instructions at trial were different to the facts now advanced.

[93] There are obvious difficulties with the late discovery, only after conviction, of the date of purchase of a floral dress some years ago. But assuming that the evidence has some cogency the problem is that the date of the alleged offences were hardly fixed in time with any certainty. The complainant's evidence was fairly vague despite efforts to fix the occasion in time by reference to family events. If this recollection of the wearing of the floral dress had become a central issue to the integrity of the complainant's evidence then the simple expedient was available to the prosecutor of amending the indictment to allege a range of dates that encompassed both the new evidence as well as the complainant's recollections of other parameters by which she fixed the possible date of the offence. The appellant has not attempted to show that was not feasible.

[94] The complainant's mental health was the subject of evidence at trial. It was said that she became more violent apparently after experiencing a fit. The subject of her health was explored with the three witnesses who were called. The submission was made

to the jury that the complainant was indulging in attention seeking behaviour. The point of the new evidence seems to be that while the complainant acted in a violent way towards some family members she did not do so towards the appellant. The evidence was marginally relevant at best at the trial. There is minimal prospect that if available it would have impacted on the jury's verdicts.

[95] The medical practitioner is to be called to speak of the appellant's character and mental health to what effect is not known. The appellant's father similarly is to be called to give character evidence.

[96] No adequate explanation is proffered as to why these witnesses were not called at the trial.

[97] As for the father arrangements could have been made to call evidence by video link from New Zealand if it was thought to be relevant, assuming that the witness could not attend in person and that is not shown.

[98] As to the medical practitioner no explanation is proffered for his non-appearance. In the absence of any explanation one assumes he could easily have been called. It is unclear what evidence he would give.

[99] A character reference under the hand of the father was tendered at sentence. It is quite general in its terms. Presumably that reflects the evidence that could have been led at trial. The reference says what one expects a father to say, particularly a father who, I suspect, does not accept the jury's verdict. The impact of the opinion of the father of his son's character on the jury's deliberations I would think would be minimal.

[100] The proposed new evidence is again marginally relevant at best, and unlikely to have had any significant impact on the jury's deliberations. Public interest in the finality of litigation strongly favour leave not being given to adduce this new evidence.

[101] The victim impact statement is fresh evidence – not available at trial – and so the test is whether there is a significant possibility (or that it is likely) that, in light of all the admissible evidence, both the fresh evidence and the evidence at trial, a jury acting reasonably would have acquitted.

[102] There is a reference in the statement to the appellant cutting herself. The victim impact statement does not make clear at what time the appellant engaged in that behaviour. The apparent point that the appellant wishes to make is that the family members will say that the complainant has not done so. No proof of evidence is advanced to enable the court to know with any confidence what precisely will be said. If the evidence merely involves a collateral attack on the complainant's credit, which seems likely, it is inadmissible. The issue seems to be marginal at best. I cannot see how any evidence on the subject could materially affect the jury's deliberations.

[103] Discretionary considerations are against receipt of the evidence the appellant now wishes to advance. There is no adequate explanation for the failure to call any of the evidence. As well, in my view, the evidence, if admitted, would not be likely to rationally affect the jury's verdicts.

Orders

[104] The orders I propose are:

1. The application for leave to adduce evidence is refused.
2. The appeal against conviction is dismissed.