SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBN* [2016] QCA 341
PARTIES:	**R** **v** **HBN** (appellant)
FILE NO/S:	CA No 134 of 2016 DC No 22 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Dalby – Date of Conviction: 21 March 2016
DELIVERED ON:	19 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2016
JUDGES:	Margaret McMurdo P and Fraser JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The conviction is set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED –where the appellant was convicted of raping his seven year old great niece – where the complainant gave varying accounts of how many digits were used in the rape – where the appellant contends the complainant's evidence was uncorroborated and unreliable – where the complainant maintained at all times that the appellant digitally raped her – 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 – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the judge directed the jury in the terms of s 102 *Evidence Act* 1977 (Qld) – where this direction was unnecessary as there was no evidence of circumstances from which an inference could be drawn that the complainant had an incentive to conceal or misrepresent the facts – where this direction favoured the prosecution and may have caused the jury to reason impermissibly – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the prosecutor drew attention to the complainant's naivety and asked rhetorical questions in his closing address – where the complainant seemed unsophisticated and there was no evidence she had any prior sex education that would have enabled her to make a false complaint – where the prosecutor's rhetorical questions did not amount to a reversal of the onus of proof – whether there was a miscarriage of justice

Criminal Code (Qld), s 620
Evidence Act 1977 (Qld), s 21AW, s 93A, s 102

Libke v The Queen (2007) 230 CLR 559; [2007] HCA 30, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Mraz v The Queen (1955) 93 CLR 493; [1955] HCA 59, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, cited
R v Callaghan [1994] 2 Qd R 300; [1993] QCA 419, cited
R v Coss [2016] QCA 44, cited
R v Flynn [2010] QCA 254, cited
R v MAL [2005] QCA 238, cited
R v Rugari (2001) 122 A Crim R 1; [2001] NSWCCA 64, cited
R v TQ (2007) 173 A Crim R 385; [2007] QCA 255, cited
R v Van der Zyden [2012] 2 Qd R 568; [2012] QCA 89, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Wood v R (2012) 84 NSWLR 581; [2012] NSWCCA 21, cited

COUNSEL: B J Power for the appellant
S J Farnden for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was convicted on 21 March 2016 in the District Court at Dalby of raping his seven year old great niece on 18 December 2014. He has appealed against his conviction on three grounds. The first is that the verdict is unreasonable or cannot be supported having regard to the whole of the evidence. The second is that the judge erred in directing the jury, effectively reversing the onus of proof. The third is that a miscarriage of justice occurred through improper statements by the prosecutor as to the level of naivety of children and by then asking rhetorical questions of the jury that amounted to the reversal of the onus of proof.

[2] Although, I would allow the appeal on the second ground and order a retrial, I will consider all three grounds in order.

The evidence at trial

[3] A consideration of the first ground requires this Court to review the evidence at trial and determine whether, on the whole of that evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[1]

[1] *M v The Queen* (1994) 181 CLR 487, 493 – 495; *SKA v The Queen* (2001) 243 CLR 400, [12].

[4] On 19 December 2014, the complainant's mother discussed with the complainant a news report concerning eight children who were killed by their aunt. The mother said:

> "If anything happens to you, you would tell me. If anyone touches you or hurts you, you would tell me. Like [the appellant], Nanny, Poppy or anyone hurts you or touch you, you'd tell me, or Dad or anyone."[2]

The complainant responded "[the appellant] touched my wee-wee with two fingers." The mother cautioned, "You better not be lying because it's not something you'd lie about. You'd tell me the truth." The complainant said, "It's the absolute truth." The mother said they would talk about it later. Her three children, the complainant included, were in the car that afternoon when the mother picked up her husband, the complainant's father, from work. She told him what the complainant had said, outside her hearing. He then asked her, "Did anyone hurt you? What you said to Mum, was it true?" She then said: "[The appellant] touched my wee wee." Her parents then "dropped the subject."[3]

[5] The mother also gave evidence that the appellant, her uncle, who lived nearby, came to her house on Thursday, 18 December 2014. He was in the lounge room with her three children. She left the lounge room with two of the children, leaving the appellant and the complainant sitting on the lounge, some distance apart.[4] When she returned, the appellant was sitting directly beside the complainant with his legs touching her leg. As soon as she walked in he "turned back and instantly jumped." She told the children to get ready for bed. The appellant walked out of the lounge room and she asked her husband to take him home.[5]

[6] In cross-examination she said that, although she walked up behind the lounge, she did not consider the appellant's jump was a "startled reflex" as she was "heavy" and could be heard coming.[6] The complainant did not tell her Nanna or any family member other than her and her father about the incident.[7]

[7] The complainant's father gave evidence that on the evening of 18 December the appellant dropped in and went to the lounge room. As the mother was putting the children to bed, the appellant came from the lounge room into the kitchen and he drove him home. The father came home and went to bed. The next day when he asked the complainant what happened the previous evening, she responded, "He touched my wee-wee."[8]

[8] The following day, 20 December 2014, the complainant and her parents made a complaint to police. Her recorded interview with police on 24 December 2014 was tendered under s 93A *Evidence Act* 1977 (Qld).[9] She said that she was sitting next to the appellant on a three-seater lounge watching TV in the lounge room. He touched her wee-wee. She later said she used her "wee-wee" to go to the toilet. Her mother was walking through the house and when she reached the lounge room the appellant ran outside, sat on a chair and spoke to her father.[10] She was too frightened to tell her mother. Her mother said to tell her father to take the appellant out of the house and he "got

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2 T1-19, AB 54.
3 T1-19 – T1-20, AB 54 – 55.
4 T1-15, AB 50.
5 T1-18, AB 53.
6 T1-24, AB 59.
7 T1-31 – T1-32, AB 66 – 67.
8 T1-35, AB 70.
9 Exhibit 1, AB 147 – 168.
10 Above, pp. 5 – 6, AB 113 – 114.

kicked out" by her mother or father and her father drove him home. He took all his stuff and could never come back.[11]

[9] Her mother told her to say what happened on Thursday night. She said the appellant touched her wee-wee. Her mother said, "I thought so. He jumped" and that he was "never allowed to our house".

[10] When asked for more details about the touching she said the appellant used the finger next to his thumb, "the rude finger", to touch her wee-wee. He lifted her pants and knickers and put his finger in her wee-wee. She felt it. His finger was in her wee-wee for three or four seconds.[12] She told her mother and father but no one else. She then said she also told her Nanna. Her mother said she could tell Nanna but not Poppy or anyone else.[13]

[11] When the police asked her if anything like this ever happened before, there was the following rather odd exchange:

> "COMPLAINANT: Um no. Just it happened [INDISTINCT] Thursday. I hadn't had people touch my wee wee for ages.
>
> POLICE: Yeah? What do you mean for ages?
>
> COMPLAINANT: Um ages. They had me touch my wee wee.
>
> POLICE: Okay.
>
> COMPLAINANT: Um the [the appellant] was an ordinary bo-, man. But then he turned into a touch a wee wee man.
>
> POLICE: Okay. So he was a ordinary man. But he turned into a touching wee wee man? Okay.
>
> COMPLAINANT: Yep.
>
> POLICE: Has he ever touched?
>
> COMPLAINANT: [INDISTINCT] I touched my wee wee when I was at work and [INDISTINCT]. There was no people there. But just [INDISTINCT] students, me, Alex, Jennifer, Melita, Johnny [INDISTINCT] and Joey. Jack. And Joey. And my teacher. But then we moved out.
>
> POLICE: Where was that at?
>
> COMPLAINANT: At. That was at [redacted] State School.
>
> POLICE: So what happened at [redacted] State School?
>
> COMPLAINANT: Um nobody had just. Had never touched my wee wee.
>
> POLICE: Oh nobody had ever touched your wee wee there?
>
> COMPLAINANT: Yeah. No.
>
> POLICE: Okay.

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11 Above, p. 7, AB 115.
12 Above, p. 14, AB 122.
13 Above, pp. 7 – 8, AB 115 – 116.

COMPLAINANT: No one touched my wee wee.

POLICE: Alright. So is this the, the only time somebody's touched your wee-wee?

COMPLAINANT: Ah this is the first time."[14]

[12] By the time she gave pre-recorded evidence under s 21AK *Evidence Act* on 9 November 2015 she was eight years old. She said that she had watched the recording of her earlier interview with police and everything she told them was true. By reference to photographs,[15] she identified the lounge on which the appellant sat when he touched her. The prosecutor asked which fingers the appellant put in her wee-wee. She said he "used the rude finger, the one next to the thumb, and the thumb." She held up her thumb and the two fingers closest to it. She said the tops of those fingers went into her wee-wee. It felt "weirdy funny", "bad funny." She did not know if the thumb went in as well; it was the top of the rude finger and the one next to it.[16]

[13] In cross-examination she agreed she told police that the appellant had used only one finger. She said, "I can't quite think – remember that much."[17] She said he moved next to her on the lounge and touched her wee-wee when they were alone in the lounge room. She agreed that he did not actually run away; he just left.[18] She did not call out to her mother because she "was too afraid to talk to her or yell out". At first she said she did not push his hand away but then thought she might have. She also may have said: "Stop that." She may have told her "mum when [she] was a little bit brave enough at – at midnight…and the next night he came dad kicked him out"[19] and drove him home. She told her mother, her father and her Nanna. She was really sure she told her Nanna on the following Saturday night when she, her mother and father were at her Nanna's house and the appellant and Pop were out. When counsel put to her that the appellant did not put a finger or fingers in her private area, her wee-wee, she responded, "He did."[20]

[14] In re-examination she said that he moved her pants and knickers aside and touched her wee-wee with "about one or two or three" fingers. She then said he put one or two of his fingertips in her wee-wee.[21]

[15] The appellant did not give or call evidence. The defence case was that the jury could not accept the complainant's account because of inconsistencies in her evidence as to the number of fingers involved; that her mother, contradicting her, said the complainant did not tell her Nanna; the implausibility of the offence occurring in such close proximity to the parents; and the failure of the complainant to tell her parents at the time.

Was the jury verdict unreasonable

[16] The appellant contends that the complainant's evidence leaves open the possibility that he touched her wee-wee without penetrating it. In any case, the jury could not accept her evidence beyond reasonable doubt. He submits that she was suggestable.

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14 Above, pp. 17 – 18, AB 125 – 126. There are some differences between what I have transcribed after viewing this portion of the recording and the transcript of Exhibit 1.

15 Exhibit 2.

16 T1-11 – T1-12, AB 16 – 17.

17 T1-21, AB 26.

18 T1-23, AB 28.

19 T1-24 – T1-25, AB 29 – 30.

20 T1-26, AB 31.

21 T1-27, AB 32.

Her evidence varied as to how many digits were used. She appeared to be an immature seven year old with an active imagination. The mother gave evidence that the complainant did not tell her Nanna about the incident. The complainant said her father "kicked out" the appellant but this was not the father's evidence. Her evidence, the appellant contends, was uncorroborated and could not be accepted as reliable.

[17] The jury were correctly told by the judge that they could only convict the appellant if satisfied beyond reasonable doubt, after scrutinising the complainant's evidence with great care, that it was true and accurate. The judge specifically referred to the inconsistencies in her evidence emphasised by the defence at trial, all of which were relied on in this appeal.

[18] Despite those inconsistencies, the complainant maintained at all times that the appellant put at least one finger in her "wee-wee", the part of her body which she uses to go to the toilet. She said she felt his finger in her wee-wee for three or four seconds. If the jury accepted her account beyond reasonable doubt, penetration was established.

[19] Her evidence as a seven year old that this felt "weirdy funny", "bad funny" had the ring of truth. Her account also received some support from her mother's evidence of opportunity; of the changed seating positions of the appellant and complainant between when the mother left the lounge room and when she returned; and of the appellant immediately jumping up when he heard the mother. It is not unusual for offences of this kind to occur when other family members are elsewhere in the house. Nor is it unusual for a young child who is sexually abused by a family member not to make an immediate complaint or call for help. Her explanation that she was too afraid to yell out was plausible. Her subsequent complaints to her mother, father and police were relatively timely and were broadly consistent with her initial complaint, providing some bolster to her credibility.

[20] Her claim that she told her Nanna about the offence was not contradicted by admissible evidence. She may have told her Nanna without her mother knowing. But even if the mother's hearsay account that the complainant did not tell her Nanna were accepted, it did not require the jury to reject the complainant's evidence that the appellant committed the offence as she described. Nor did her evidence that on the next occasion he came to the house, her father "kicked [him] out" require the rejection of her evidence. The father was not asked about this incident.

[21] It is true, as the appellant emphasises, that the complainant was very young. Her initial complaint to her mother came as a result of questioning and was not spontaneous. There were inconsistencies in her account and some unusual aspects to her interview with police, particularly the passage set out at [11] of these reasons. As a result of those matters, her evidence had to be scrutinised carefully before accepting it. The appellant could have but did not explore in cross-examination precisely what the complainant was talking about in the passage set out in [11]. It raised unanswered possibilities but she maintained that the appellant touched her wee-wee. These matters, whether individually or collectively, did not mean the jury, after scrutinising her evidence with great care, could not accept it as reliable beyond reasonable doubt.

[22] After carefully reviewing the evidence at trial, I am satisfied that, despite the many issues raised by the appellant the jury were entitled, having scrutinised her evidence with great care, to accept it beyond reasonable doubt. On that evidence, the appellant raped her by placing at least one finger in her vagina. This ground of appeal is not made out.

Whether the judge misdirected the jury

[23] The appellant contends that the judge, relying on s 102 *Evidence Act*, misdirected the jury that, when assessing the complainant's statement to police,[22] they would:

> "need to consider that although it was contemporaneous with the alleged offence, did she have any incentive to conceal or misrepresent the facts she told [the Court] about."[23]

[24] The respondent contends that this direction was required, did not reverse the onus of proof and has not resulted in a miscarriage of justice. When the summing up is read as a whole, it is clear the respondent submits that the judge focussed the jury on their task of determining whether they could accept the complainant's evidence beyond reasonable doubt.

[25] In the exchange between the judge and counsel prior to closing addresses the judge stated that he would give a direction under s 102 *Evidence Act*.[24] His Honour rightly identified that such a direction would be favourable to the prosecution but considered that if he did not give it "there might be a ground for something being said somewhere else", that is, on appeal. Although there did not seem to be any evidence of motive, the judge nonetheless felt that he "ought to tell the jury those things seeing it's part of the statutory framework." Unfortunately, neither counsel sought to dissuade the judge from that course.

[26] Section 93A and s 102 are in Part 6 of the *Evidence Act*.[25] Section 102 provides:

> "**102 Weight to be attached to evidence**
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> In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[27] The complainant's evidence under s 93A was "a statement rendered admissible as evidence by this part" under s 102. But the judge seems to have mistakenly equated the terms of s 102 with those of s 21AW(2) which mandate the giving of stated judicial directions.[26] My earlier review of the evidence makes clear that in this case there was no evidence of "circumstances from which an inference can reasonably be drawn" that the complainant "had any incentive to conceal or misrepresent the facts".

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22 Exhibit 1, AB 147 – 168.
23 Summing Up, 4; AB 95.
24 See T1-38 – T1-39, l 40 – l 14, AB 73 – 74.
25 Although s 93A was enacted after s 102.
26 *R v MAL* [2005] QCA 238.

Nor did either counsel make that submission. It follows from the evidence in this case and the plain terms of s 102(b) that no direction under this section was required: see *R v TQ*[27] and *R v Flynn*.[28] The direction was not only unnecessary, it was positively unhelpful as it distracted the jury from focussing on the real issues in the case.[29] Indeed, it wrongly encouraged the jury to speculate about matters which were not in evidence.

[28] As there was no application for a redirection, this ground of appeal can succeed only if the direction has resulted in a miscarriage of justice. There will have been a miscarriage of justice if the appellant has been deprived of a chance which was fairly open of being acquitted.[30]

[29] The judge rightly observed that the direction favoured the prosecution. The jury, having been directed by the judge to consider whether the complainant had any incentive to give a false account, would inevitably have found on the evidence before them that she did not. In the absence of any pertinent directions from the judge, they may have reasoned that because there was no incentive for her to make up the allegation against the appellant, therefore her evidence was more likely to be true. The judge, having given the unnecessary direction under s 102(b), should have but did not give a further direction to restore some balance. His Honour should have but did not further direct that, even if satisfied there was no incentive to conceal or misrepresent the facts, this did not mean the complainant was truthful; it was necessary for them to satisfy themselves of that beyond reasonable doubt before convicting.[31]

[30] This case turned on the uncorroborated testimony of a young child, just seven and eight years old. Her evidence required careful scrutiny before being accepted. In light of the many matters raised by defence counsel at trial, a reasonable jury properly instructed may well have concluded that her evidence could not be relied on as accurate beyond reasonable doubt and acquitted the appellant. Despite the judge's many directions that the jury must accept the complainant's evidence beyond reasonable doubt before convicting, it is possible, relying on the judge's unnecessary direction under s 102(b) and without a warning of the kind discussed in the previous paragraph, the jury may have reasoned that, as she appeared to have no incentive to misrepresent the facts, she could be more easily believed. There is a real possibility that the misdirection deprived the appellant of the chance of an acquittal. It follows that the appeal must be allowed on this ground and a retrial ordered.

The address of the prosecutor

[31] Although it may not be necessary to deal with this ground in light of the orders I would make based on the second ground, my reasons on the third ground may be helpful in any retrial.

The impugned portion of the prosecutor's address

[32] The impugned portion of the prosecutor's address dealt with the complainant's credibility:

> "[The complainant] was only seven when the events that she spoke to police about happened. She is just a little girl. *With youth comes naivety from lack of life experience. So that naivety means children*

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27 [2007] QCA 255, [20].
28 [2010] QCA 254, Fraser JA, [56] – [58], White JA and Mullins J agreeing.
29 See *Criminal Code* 1899 (Qld) s 620(1).
30 *Mraz v The Queen* (1955) 93 CLR 493, 514.
31 *R v Van Der Zyden* [2012] 2 Qd R 568, [32].

> *don't necessarily know about too many things, particularly adult concepts like sexual interaction.* Those sort of things come later in life. Yet here, [the complainant] can detail something that children probably should just not know anything about: she could detail an act of digital penetration of her vagina. Even more sophisticated than that, she could detail [the appellant's] apparent shame in doing it when she described him as running off after having completed the act.
>
> Kids don't know that a person might get a sexual – a level of sexual pleasure out of engaging in an act like this, and kids don't necessarily know that it's wrong or why it's wrong, yet [the complainant] could explain both aspects to that situation in a child-like way. That she knows this and can articulate it gives you a real level of insight. *It begs the question: how does she know about these concepts? How does she know about the act that took place? And how does she know about the apparent shame associated with the acts when committed by an adult against a child?*
>
> There's no evidence that you've heard in this trial of any other source of information that might've given [the complainant] that knowledge. There is but one thing and that is that [the appellant] experienced these things and that's why she's able to recount them to you. So the fact that she's young but she can detail in a fairly sophisticated way concepts and actions that are very adult concepts and actions is, I'd suggest to you, the first marker of [the complainant's] honesty and reliability.
>
> It might, however, be argued that it was her mother that introduced the idea to her and that's where she got the knowledge. And, I mean, it was her mother that asked her – if anyone hurt her, she would encourage [the complainant] to tell her about it. But remember this, that [the complainant's] mother only raised that aspect, that [the complainant] should tell her if anyone hurt her. She doesn't raise how, she doesn't raise where or in what way. That information came entirely from [the complainant] and for that reason, you'd accept it as independent information coming from [the complainant], again based on an experience that she had to endure. (my emphasis)

The appellant's contentions

[33] The appellant submits that there was no evidence in the trial about the naivety of children in relation to sexual matters and contends that the prosecutor was wrong to discuss this with the jury. In *R v Callaghan*, Pincus JA and Thomas J observed:

> "it is not appropriate that Crown prosecutors use the dignity of their office in order to "tell" a jury something that is not in evidence...counsel's role is to make submissions, not express personal opinions or enter the fray as a contestant."[32]

[34] He submits that the prosecutor's conduct in contending that young children are naive about sexual matters and then asking rhetorical questions was improper. The address suggested that she would not have made the complaint unless it was true, effectively posing the rhetorical question "why would she lie?". Such a question was objectionable

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[32] [1994] 2 Qd R 300, 306.

for the reasons identified in *Palmer v The Queen.*[33] These principles were applicable with equal force to a prosecutor's address.[34] The appellant submits that the prosecutor's rhetorical questions invited the jury to consider whether the defence had answered these questions and effectively reversed the onus of proof.[35] It was not for the defence to establish how the complainant could have known about these matters.

[35] The prosecutor's impugned comments in the context of this trial, the appellant contends, gave rise to a miscarriage of justice. The judge should have directed the jury to disregard the prosecutor's assertions and corrected the suggested reversal of the onus of proof. Whilst no such redirection was sought by the appellant's trial counsel, there can have been no forensic advantage in not seeking that direction. The appellant submits that, in any case, the passage of the complainant's evidence set out at [11] may have provided some answer to the prosecutor's rhetorical questions. In oral submissions, the appellant submitted that seven year old children these days were not naive and received sex and stranger danger education. The absence of a direction from the judge correcting the improper prosecutorial submissions, he contends, may have deprived the appellant of the opportunity of an acquittal.

Conclusion on this ground of appeal

[36] A prosecutor has a duty not to obtain a conviction at any cost but to act as a minister of justice.[36] Unfairness may arise from the manner of a prosecutor's address.[37] But in the circumstances of this case, for the prosecutor to suggest to the jury that the seven year old complainant was naive because of lack of life experience was not to tell the jury something that was not in evidence. It was to invite the jury to use their life experience and their assessment of the complainant, having seen her recorded evidence, to draw the reasonably open inference that she was naive. I have watched that portion of the complainant's evidence set out at [11]. She seemed unsophisticated, even for a seven year old. The adjective "naive" was fitting. There was no direct evidence, nor any evidence compelling the inference, that the complainant had prior sex education which gave her knowledge of the kind to enable her to make a false complaint. The evidence was neutral on this issue. The evidence, however, suggested only that she came from a functional home. The jury saw her give lengthy evidence by way of her contemporaneously recorded statement to police and her later pre-recorded testimony which included extensive cross-examination. The jurors were entitled to infer from that evidence that she was naive about concepts like sexual interaction, without specific evidence to that effect. The passage of the complainant's evidence set out at [11] was confusing but it did not require the jury to draw a different inference or warrant a direction from the judge to that effect. Of course, defence counsel may have chosen to submit that the jury draw from it an inference favourable to the appellant. On the evidence, the prosecutor was entitled to ask the jury to infer that the complainant, a seven year old girl at the time of the allegations, was naive and lacking in life experience.

[37] It is true that a prosecutor should not ask questions of the jury in his or her closing address, even rhetorical questions, which invite the jury to consider whether the

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33 (1998) 193 CLR 1.

34 *R v Coss* [2016] QCA 44.

35 *Wood v R* (2012) 84 NSWLR 581, [605] – [606].

36 *Libke v The Queen* (2007) 230 CLR 559, [71] (Hayne J), [1] (Gleeson CJ agreeing), [177] (Heydon J agreeing); *R v Gathercole* [2016] QCA 336, [49].

37 *Libke* (2007) 230 CLR 559, [73]; *Gathercole* [2016] QCA 336, [49].

accused person has provided satisfactory answers to those questions where this amounts to a reversal of the onus of proof.[38] But that was not the effect of the impugned aspects of the prosecutor's address here. The prosecutor was entitled to make firm and fair submissions consistent with the evidence. He was entitled to invite the jury to consider the matters raised in the questions posed in assessing the complainant's credibility. Even so, prosecutors should be circumspect in the use of questions when addressing jurors in case they inadvertently overstep the mark and reverse the onus of proof.[39] That was not the case here.

[38] I note that the prosecutor in the last paragraph of the extract from his address set out in [32] said that the complainant's account as a naive seven year old was "independent information coming from" her. It is self-evident that a witness's own evidence cannot be information independent of that witness. But no complaint is made about that submission, no doubt because it was a throw-away, illogical comment which was not developed further and the jury could not have been swayed by it.

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

Orders

1. Appeal allowed.
2. The conviction is set aside.
3. A retrial is ordered.

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

[41] **McMEEKIN J:** I have had the advantage of reading the reasons of Margaret McMurdo P. I agree with those reasons and the orders that her Honour proposes.

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38 *R v Rugari* [2001] NSWCCA 64, [35] – [36]; *Wood* (2012) 84 NSWLR 581, [605] – [606].

39 See above.