SUPREME COURT OF QUEENSLAND

CITATION:	*R v Agnew* [2021] QCA 190
PARTIES:	**R** **v** **AGNEW, Peter James** (appellant)
FILE NO/S:	CA No 148 of 2020 DC No 1106 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – [2020] QDC 157 (Richards DCJ)
DELIVERED ON:	3 September 2021
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2021 Supplementary written submissions: 17 June 2021
JUDGES:	Sofronoff P and Morrison JA and Flanagan J
ORDERS:	**1. Application for leave to adduce evidence refused.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of rape and indecent assault following a trial – where the judge sat without a jury – where the Crown case consisted predominantly of witness testimony, including the complainant's own evidence – where the appellant elected to give evidence – where there were some inconsistencies in the evidence given by Crown witnesses – where the offences occurred more than 40 years prior to the trial – where the complainant was unable to recall several specific details – where the complainant's evidence was that her first recollection of the offending occurred 35 years post-event – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the appellant submits that a miscarriage of justice occurred because the trial judge made a material error of fact – where the alleged error was finding the complainant's testimony to be consistent with the evidence of

preliminary complaint – where the complainant's evidence was generally consistent, albeit not perfectly consistent, with the preliminary complaint evidence – whether a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – AVAILABILITY AT TRIAL, MATERIALITY AND COGENCY – MATERIALITY AND COGENCY – EVIDENCE DIRECTED TO CREDIT – where the appellant seeks leave to adduce a victim impact statement tendered after trial – where the complainant, in the victim impact statement, states that she has an extraordinary memory as a result of suffering from autism spectrum disorder – where the complainant was unable to recall certain details during cross-examination – where the appellant submits that, if the victim impact statement had been tendered at trial, it would have materially affected the trial judge's assessment of the complainant's credibility – whether the victim impact statement is admissible as fresh evidence – whether the victim impact statement tends to establish that a miscarriage of justice occurred

Craig v The King (1933) 49 CLR 429; [1933] HCA 41, cited
Filippou v The Queen (2015) 256 CLR 47; [2015] HCA 29, cited
Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
R v BBU (2009) 213 A Crim R 512; [2009] QCA 385, considered
R v Cornwell [2009] QCA 294, distinguished
R v GAL [2011] QCA 185, considered
R v HAU [2009] QCA 165, distinguished
R v Kelly [2021] QCA 134, cited

COUNSEL: S C Holt QC, with D Caruana, for the appellant
M A Green for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Flanagan J and with the orders proposed by his Honour.

[2] **MORRISON JA:** I have read the reasons of Flanagan J and agree with those reasons and the orders his Honour proposes.

[3] **FLANAGAN J:** On 10 July 2020, Richards DCJ, sitting without a jury, found the appellant guilty of one count of indecent assault[1] and one count of rape.[2] The trial

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1 *Criminal Code* (Qld) s 350 (as at 31 December 1980); s 352 (***Criminal Code***).
2 *Criminal Code* s 347 (as at 31 December 1980); s 349.

was heard over three days from 22 June 2020 to 24 June 2020. The appellant was sentenced to six months' imprisonment for indecent assault and to seven years' imprisonment for rape. His parole eligibility date was set at 10 January 2024 and it was declared that 18 days spent in pre-sentence custody from 10 July 2020 to 27 July 2020 be taken to be imprisonment already served under the sentence.[3]

[4] The appellant appeals against both convictions on three grounds:

(a) Ground 1 – the convictions on both counts were unreasonable and cannot be supported having regard to the evidence;

(b) Ground 2 – a miscarriage of justice occurred because the learned trial judge made material errors of fact; and

(c) Ground 3 – a miscarriage of justice occurred because a victim impact statement of the complainant, created after the complainant gave evidence, was inconsistent, in a material way, with her evidence.[4]

[5] The appellant abandoned his application for leave to appeal against sentence.[5]

Ground 1

[6] While Ground 1 is raised in relation to both counts, Mr Holt QC, who appeared with Mr Caruana for the appellant, focused his submissions on the rape count. While not abandoning Ground 1 in relation to the indecent assault count, Mr Holt acknowledged that "it would be an ambitious submission to press it".[6] Given the evidence in relation to the indecent assault count outlined below, this concession was appropriate.[7]

Legal principles

[7] In *R v Kelly*,[8] this Court recently considered the principles that govern an appeal against conviction in a judge alone trial on the ground that the verdict is unreasonable or cannot be supported having regard to the evidence:

> "In *R v Harris*, … [h]aving considered the High Court's decisions in *Fleming v The Queen* and *Filippou v The Queen*, Fraser JA (with whom Sofronoff P and North J agreed) concluded that each of the three grounds of appeal in s 668E(1) of the *Criminal Code* is capable of application to the verdict of a judge alone. His Honour stated:
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> > 'Accordingly, in an appeal against conviction in a judge alone trial upon the ground that the verdict of the judge is unreasonable or cannot be supported having regard to the evidence, the Court must undertake an independent examination of the whole of the evidence at the trial and decide whether it was open to the judge to be satisfied beyond reasonable doubt of the appellant's guilt.'

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3 *Penalties and Sentences Act 1992* (Qld) s 159A.
4 Amended notice of appeal against conviction filed 14 May 2021.
5 Notice of abandonment of appeal or application filed 27 May 2021.
6 T 1-2, lines 34-36.
7 See [14]-[16] and [23]-[24] below.
8 [2021] QCA 134.

That exercise 'must take into account any advantage of the trial judge in seeing and hearing the evidence at the trial in the way described by the High Court in *M v The Queen* ...'.

This Court has also recently emphasised the limitations of an appeal against a guilty verdict on a question of fact:

> 'In our respectful opinion, not enough attention has been given to the limitations enunciated in *M v The Queen* and which are consistent with early judicial appreciations of the limitations of an appeal against the verdict of a jury on a question of fact. It is fundamental that it is not sufficient for an appellant merely to show "discrepancies" or "inadequacies" in the evidence or to show that the evidence is "tainted" or "otherwise lacks probative force". It is necessary to demonstrate that such features appear in the evidence "*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".'

The Court further stated:

> 'An appellant who contends that the verdict of the jury was unreasonable or that it was unsupported by the evidence must identify the weaknesses in the evidence and *must then also* demonstrate that these weaknesses reduced the probative value of the evidence *in such a way* that the appellate court ought 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.'"[9]

Examination of the evidence

[8] The Crown's evidence at trial consisted of: the complainant's own evidence; the witness evidence of Ms Susan Tonks; the evidence of preliminary complaint, being the testimony of Mr Andrew Flint and Senior Constable Olivia Shaw; the expert evidence of a pharmacologist, Professor Lindsay Brown; a covert recording of a conversation between the appellant and the complainant in 2016; and a recording of the appellant's interview with the police in 2017.[10]

[9] The appellant gave evidence at trial and called several witnesses to provide character evidence.

The complainant's evidence

[10] The complainant commenced working for the appellant as a qualified dental nurse in 1980 when she was almost 20, having previously worked as a dental nurse for about 12 months. The dental practice was in Stafford and was owned by the appellant. During her employment with the appellant, she did not have a friendship with him, nor did she reveal personal information to him; their relationship was

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9 *R v Kelly* [2021] QCA 134, [3]-[6] (*per curiam*) (citations omitted, emphasis in original).

10 The Crown also called Senior Detective Constable Jocelyn Ablett: AB147-152.

"very formal".[11] The complainant was the most junior employee at the practice, the only other employee being a receptionist with whom the complainant's relationship was not friendly.

[11] A month or so into her employment, the complainant was eating lunch in the tech lab, which was one of the rooms in the practice. While the appellant would sometimes go home for lunch, on that day he came into the tech lab via the back door and placed his briefcase on the table in the complainant's presence. He opened the briefcase and removed a pornographic magazine, flipped through it, and showed the pictures to the complainant. She did not recall any conversation during this encounter, other than that the appellant said words to the effect of, "Have a look at this".[12] The complainant was terrified and did not know how to handle the situation. The pornography was graphic and involved people having intercourse. The encounter lasted for approximately five minutes before the complainant left the room as soon as she felt she could do so. Nobody else was in the room.

[12] There were also several subsequent incidents where the appellant briefly put his hand up the complainant's uniform and groped her around her buttocks. This occurred in the treatment room, with the door closed, out of the view of patients who were sitting in the examination chair. The presence of patients in the room prevented the complainant from saying anything at the time. This conduct continued over the course of a couple of weeks until the complainant changed her pre-examination routine to deprive the appellant of the opportunity to grope her.

[13] There was also one Saturday night, a Stradbroke Cup Day, when the appellant arrived uninvited to the complainant's flat. He sat on the couch for around 10 minutes and then left. He did not give her anything. He was wearing a brown jumper and leather jacket. The encounter was "incredibly awkward".[13]

[14] Around a month or so after the groping incidents, the complainant asked the appellant to examine her tooth because she had lost a filling. He agreed to examine it, but said that she would have to stay after work, which she agreed to do. Because of "what had happened before",[14] the complainant arranged to have her then friend, Ms Tonks, attend the practice while he looked at her tooth. When Ms Tonks arrived, the practice was closed and nobody else was present other than the complainant and the appellant. Ms Tonks sat in the waiting room. The appellant was "annoyed" when he became aware of Ms Tonks' presence.[15] Her evidence was that, once the complainant and the appellant had entered the treatment room and closed the door, he said "What the hell is she doing here?"[16] In her statement, the complainant had previously said that he spoke those words in Ms Tonks' presence *before* entering the treatment room.

[15] The complainant then got into the examination chair and the appellant looked at her tooth and told her that a filling was required. He then administered nitrous oxide gas to the complainant which, after a couple of minutes, caused her to feel "really

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11 AB81.
12 AB83.
13 AB90.
14 AB86.
15 AB87.
16 AB87.

dizzy and sort of disoriented".[17] She felt unlike how she had previously felt from nitrous oxide, which had been more of a "chilling out".[18] The nitrous oxide meter was located next to her against the wall of the treatment room, and the complainant tipped her head to look at it. While a typical ratio of nitrous oxide to oxygen was two or three to one, she thought that it said 16 to one. During cross-examination, the complainant was unable to recall any details about the appearance, position or angle of the gauges. The appellant then put his hands over the complainant and started to unzip her dress, which had a zip on the front from the neck down to just below the waist pockets. The complainant attempted to prevent him from unzipping her uniform by holding his forearms but he was too strong for her. During cross-examination, the complainant said that she could not recall whether she was laughing at any point during this incident. The appellant did not get the chance to touch the complainant's body, but he did unzip her uniform to just above her waist. This conduct constitutes the count of indecent assault.

[16] Ms Tonks then "burst" into the room and asked, "What's going on?".[19] The appellant was taken aback at her entry. The complainant got up out of the examination chair, zipped her uniform up and left the practice with Ms Tonks. The complainant recalled struggling to get out of the chair, which was still in a horizontal position, because of the nitrous oxide. During cross-examination, the complainant's evidence was that she and Ms Tonks did not discuss the incident when they left the practice because they were in separate cars and, in fact, never had a conversation about the appellant. She could not recall whether Ms Tonks ever asked her what had been going on in the room. The complainant said that the appellant never brought the incident up with her afterwards.

[17] During her employment, the appellant told the complainant about his wife and their baby. He also told her that he married his wife because her family was wealthy. The appellant told the complainant that, before the baby was born, his wife would greet the appellant at the door naked. The complainant did not share details about her life, and it was "awkward" when the appellant engaged in this sort of conversation.[20]

[18] One of the complainant's duties at the appellant's practice was to close down each evening and prepare the practice for the following day's first patient. The receptionist and the appellant would usually have gone home by the time she undertook this procedure. One day when she was turning off the lights in the reception room whilst closing down, the appellant walked into the room from the tech lab. The receptionist had gone home. He walked over to the complainant, pushed her to the floor, pulled down her underwear and raped her by penetrating her vagina with his erect penis. The complainant was kicking the door with her left foot, crying and repeatedly saying, "no".[21] The appellant then let the complainant up. He had not ejaculated. She grabbed her handbag from the tech lab and left the practice. This conduct constitutes the count of rape.

[19] The next day, the complainant telephoned the appellant and resigned. She never went back to the practice after the rape. During cross-examination, the complainant's

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17 AB88.
18 AB89.
19 AB88.
20 AB90.
21 AB93.

evidence was that she could not recall whether she told the police about her resignation.

[20] The first time that the complainant recounted the rape to anyone was when she told her de facto partner, Mr Andrew Flint, in 2015. Mr Flint and the complainant were in their lounge room, scrolling through their tablets. The complainant was reading the comments on a LinkedIn article about workplace bullying and harassment that Mr Flint had previously read. Whilst reading one of the comments, "it just all came back in detail" to the complainant.[22] That is, the comments to the article triggered memories that she had not experienced before and which she had "buried".[23] She told Mr Flint, "Oh my god, my boss raped me",[24] but she did not go into detail; Mr Flint "didn't want to know".[25] The complainant's testimony was that she "blurted" it out,[26] and that her telling Mr Flint was not a gradual process whereby he "dragged it out" of the complainant.[27] Her direct evidence was that it was a short conversation but, during cross-examination, the complainant could not recall whether she spent as much as an hour explaining the incident to Mr Flint. She told defence counsel that:

> "When we were inside, I remember that we sat outside where we used to go and smoke cigarettes at the front of the house. We sat out there and had a long conversation. But he said that he didn't want to hear details."[28]

[21] She told defence counsel that it was correct to say that she did not tell Mr Flint details of the rape, but she could not recall whether she had told him that she "laid there during the rape and just waited for it to finish".[29] She also could not recall whether she told Mr Flint, in describing the rape to him, that the appellant had "finished".[30]

[22] Soon after that preliminary complaint to Mr Flint, the complainant then made a report to the police. On that occasion, she spent 15 minutes telling the police what happened but did not go into a lot of detail. She told the police that she had been raped in 1980 by her boss. She did not mention any other incidents involving the appellant. During cross-examination, the complainant testified that she could not recall whether she had told the police that she had pushed the appellant off her during the rape. She also could not recall whether she had told the police whether the appellant had ejaculated.

Ms Tonks' evidence

[23] Ms Tonks was the complainant's friend at the relevant time and recalled the complainant asking her one day in 1980 to attend at a dental clinic in Stafford where the complainant worked. She did attend and, when she arrived, she initially saw nobody there other than the complainant. However, she recalled briefly being

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22 AB96.
23 AB132.
24 AB96.
25 AB96.
26 AB132.
27 AB133.
28 AB128.
29 AB128.
30 AB133.

introduced to the appellant before he and the complainant went into the treatment room and closed the door, while Ms Tonks sat in the waiting area. The complainant's uniform was zipped when she entered the treatment room with the appellant. Approximately 15 to 20 minutes later, Ms Tonks heard some noise from the treatment room, including some conversation where the complainant said "no" a few times in a "slurred" manner.[31] She heard some laughter. After a short while of hearing this, Ms Tonks walked (but did not "burst"[32]) into the treatment room. She saw the complainant in "a bit of disarray", laughing and struggling to get out of the dental chair.[33] Her uniform was partly unzipped at the front to below her bra line. The appellant was off to her side, just behind her. Ms Tonks saw the appellant trying to place the aspirator[34] around the complainant's breast area. She recalled that the appellant was also laughing as if there was no hostility, like it was "a bit of a joke".[35] Ms Tonks then told the complainant that they needed to leave. She helped the complainant up out of the chair, and they left. The appellant did not confront Ms Tonks as they left.

[24] During cross-examination, Ms Tonks told the Court that she and the complainant discussed the incident afterwards. Outside the practice, she asked the complainant what had happened in the room and whether she was okay. They both then left in separate cars. She also testified that, before going to the practice that day, the complainant had told Ms Tonks that the appellant knew that Ms Tonks was coming and that he was not happy about it.

Professor Brown's evidence

[25] Professor Brown gave expert evidence about the use and effects of nitrous oxide on people. He confirmed that nitrous oxide has been used in dental practice for 150 years for sedation and anaesthesia and that it is commonly known as "laughing gas" because it causes patients to laugh when administered too quickly. Professor Brown described the effects of overdose, including dizziness. His evidence was that effects on movement are usually minimal, although a person may be unable to stand up straight if given nitrous oxide in high quantities. Professor Brown said that the effects of the gas mainly occur whilst inhaling it. During cross-examination, Professor Brown agreed that a person would be rendered unconscious relatively quickly at a 94 per cent nitrous oxide concentration "in most cases".[36] He also gave evidence that, at a 70 per cent nitrous oxide concentration, amnesiac effects would occur, but would likely last only for two or three minutes after the administration of the gas ceased.

Preliminary complaint evidence – Mr Flint

[26] Mr Flint's evidence was that, in October 2015, he was in a de facto relationship and living with the complainant. On a date in mid to late October 2015, the complainant and Mr Flint retired to their lounge room and both used their electronic devices. Mr Flint was looking at an article about workplace harassment and bullying on a social media page and forwarded the article to the complainant because it was a topic in which they were both interested. She took 15 to 20 minutes to read the

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31 AB106-107.
32 AB110.
33 AB107.
34 A piece of dental equipment used to suction saliva.
35 AB108.
36 AB144.

article and "went very quiet".[37] Mr Flint recalled that there "appeared to be something very wrong with her, you know, general demeanour and state of mind".[38] Mr Flint rejected the proposition that the complainant immediately blurted out to him that she had been raped. He asked her what was wrong and she indicated that they go out on to the front patio where they often sat. He recalled that:

> "She then struggled to basically say a couple of things to me, along the lines of, 'I've got something to say. I've never told anybody this before, but I was raped when I was younger, and that article you sent me has brought up some memories of that, and I've just realised – you know' well, not just realised, I guess, but it effectively brought the memory forward."[39]

[27] Ultimately, Mr Flint's evidence was that the complainant did not use the words, "I've just realised", but that she said:

> "I have something to tell you. I have never told anybody about this before. … I was raped when I was younger."[40]

[28] The effect of what the complainant said to Mr Flint was that the article had triggered a memory that was previously buried. Mr Flint recalled that he then prompted the complainant for further information, and she described the nature of the assault and the rape, including that she was raped by the appellant when she was approximately 18 or 19. The complainant told Mr Flint that she was locking-up one evening when the appellant "came back after hours and proceeded to commit a rape upon her right then and there".[41] Mr Flint recalled that the complainant said it occurred on the floor and that "she pretty much lay there and let it happen" because she perceived no alternative.[42] The complainant told Mr Flint that the appellant "finished" and then she left the premises promptly after.[43] The complainant described other incidents with the appellant to Mr Flint, including an earlier instance when she was getting some after-hours dental treatment from the appellant and she felt semi-conscious and that something of a sexual nature was happening to her. He recalled the complainant saying that she was given nitrous oxide and that her friend called Susan interrupted the episode. The complainant told Mr Flint that the appellant "was touching me inappropriately",[44] but Mr Flint did not know exactly what the nature of the touching was.

[29] In cross-examination, Mr Flint estimated that this conversation took "probably half an hour, 45 minutes".[45] When it was put to him that his written statement of 19 January 2018 stated that the complainant spoke for an hour, Mr Flint replied, "That could be well near the case".[46]

Preliminary complaint evidence – Senior Constable Shaw

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37 AB115.
38 AB115.
39 AB115.
40 AB118.
41 AB116.
42 AB116.
43 AB116.
44 AB116.
45 AB117.
46 AB117.

[30] Senior Constable Olivia Shaw's evidence was as follows. Ms Shaw was stationed at the Brisbane City Station on 13 December 2015. She took a front counter complaint from the complainant who wanted to report a historical sexual assault. Ms Shaw took notes of the conversation which were tendered at the trial. Those notes record as follows:

> "It was about 5pm when the dental surgery closed. I was working for Peter Agnew dental surgery as a dental nurse & Peter was the only dentist in the surgery. I knew Peter had left for the day & I was to lock up the surgery & make sure everything was ready for the next day.
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> I was heading out the lab tech room & toward the back door to leave the surgery. Peter walked in the back door & we met in the waiting room. He forced me down onto the floor, he was on top of me & I was fully clothed in my dental nurse uniform. He pulled down my underware [sic] & forced his penis into my vagina. I was telling him NO, NO, NO over & over. I was trying to kick the door so someone might hear. He penetrated my vagina & forced himself against me for what felt like 5-10 minutes.
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> I don't remember how I got out from under him. I just remember standing up, pulling my undies up & running out the back door. I never went back to work after that & have never been in contact since. I would describe Peter then as: Auburn hair & moustache, 5ft 10, solid, freckly skin, caucasian"[47]

[31] The notes specify that the incident occurred between October and December 1980 at a dental surgery on Stafford Road in Stafford.

[32] During cross-examination, Ms Shaw confirmed that the complainant did not mention an incident where she was given gas and sexually assaulted. She could not recall whether she asked the complainant whether the appellant ejaculated, but later agreed that she must have asked the complainant about this because she recorded in the QPRIME system the words, "Unknown in [sic] suspect ejaculated".[48] Similarly, Ms Shaw agreed that, when describing the rape, the complainant must have told Ms Shaw words to the effect that she managed to push the appellant off her during the rape, because those words were recorded by Ms Shaw in the QPRIME system.

Covert recording

[33] After the complainant reported the rape to Ms Shaw, the complainant agreed to visit the appellant at his then workplace wearing a listening device that was used by the police to record the conversation between the appellant and the complainant. The Crown played the recording to the judge and the transcript was marked for identification. The encounter took place in the appellant's consultation room in Toowong.

[34] The appellant did not initially appear to recognise the complainant and struggled to remember who she was, even when the complainant explained that she was his former dental nurse. When the complainant recalled him showing her pornography,

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47 AB244-248.

48 AB79. Ms Shaw clarified that this was supposed to say, "Unknown <u>if</u> suspect ejaculated".

he responded, "I did, did I?", "God that's a bit out of, out of order," and "I have no idea why I'd do that." [49] He denied both her allegation of him putting his hand up her uniform and of him visiting her flat. When the complainant told him about the incident where the appellant unzipped the complainant's uniform while she was under the influence of nitrous oxide, the appellant said, "I'm sorry I this is just totally I don't remember any of this."[50] The appellant denied having sex with the complainant or any of his employees. The appellant appeared to have difficulty placing the complainant's period of employment within the timeline of his career. He repeatedly said phrases such as, "I don't recall this" and "I'm just trying to remember". He also repeatedly apologised to her, although he did not expressly apologise for doing any of the things that she alleged against him.

Police interview with the appellant

[35] Also part of the Crown case was a record of police interview of the appellant conducted on 26 June 2017. The record of interview was played to the judge and the transcript was marked for identification. During the interview, the appellant told the police that he remembered the complainant's name but that he could not remember her face. He said that she would have been employed as his dental assistant. He recalled that her employment ended when she "just resigned".[51]

[36] He recounted the conversation that he had with the complainant when she visited him in 2016, and recalled that he was careful about what he said to her because he was concerned that she may be trying to blackmail him. He also said that he suspected that his ex-wife may have been "behind" the encounter.[52]

[37] The appellant told the police that he vaguely remembered visiting the complainant's flat, but that it could have been to deliver wages or uniforms. He said that he had no recollection of an occasion where a Ms Tonks came to the practice whilst he examined the complainant's teeth after-hours. He denied that he unzipped the complainant's uniform on that occasion. He agreed that he examined employees' teeth from time to time as a favour but said that he did not do so after-hours because he required a dental assistant. He said that, when he worked on employees' teeth, his receptionist, Jan, would have been there to assist him. He also denied that he had raped the complainant while she was closing the surgery one day, saying that he had "absolutely no recollection of any of that sort of stuff".[53]

[38] When asked whether he enjoyed looking at pornography, the appellant told police that he did, that he looked at "normal" pornography in the form of videos and magazines.[54] He denied ever having pornographic material at the surgery or ever showing it to anybody (including the complainant), although he admitted that he may have taken some pornographic magazines to the surgery in his briefcase.

The appellant's evidence

[39] The appellant's own evidence at trial was as follows.

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49 AB317-318.
50 AB320.
51 AB375.
52 AB378.
53 AB395.
54 AB399.

[40] The appellant "barely – vaguely" recalled the complainant working for him.[55] He did not show the complainant a pornographic magazine one lunchtime, although he agreed that they generally used to have lunch in the tech lab. He might have "occasionally" brought pornographic magazines to work in his briefcase,[56] but he denied that this was to test the complainant's reaction to the sexual content.

[41] He did not put his hand up the back of the complainant's dress and grope her backside. He did not agree to do any dental work on the complainant. The appellant reiterated that he would not have worked on the complainant's teeth after hours given the impracticality of doing so without an assistant. He agreed that, when he had performed fillings on staff previously, he had always done so with an assistant. There was not an occasion when the appellant administered nitrous oxide to the complainant whilst she was in the patient's chair in the treatment room. He denied that he administered nitrous oxide to the complainant to render her "compliant", which, it was put to him, was consistent with his sexual interests.[57] He never attempted to unzip the complainant's top. The appellant's evidence was that the nitrous oxide equipment in the Stafford practice would not have been capable of delivering a ratio of 16 parts nitrous oxide to one part oxygen, based on his research of the equipment prior to the trial. There was not an occasion when the appellant pushed the complainant to the ground late one afternoon and raped her. He vaguely recollected going to the complainant's home one day, but he could not recall the circumstances except that he thought he dropped something off such as wages, uniforms, or keys.

[42] The appellant was asked about the conversation between himself and the complainant in 2016 which was the subject of the covert recording. He was specifically asked whether he understood the difference between denying that something happened and saying that he could not recall it happening. The appellant's evidence was that he did not wish to call the complainant a liar because it would "inflame the situation".[58] He explained that he knew he could not admit to doing something that he did not do, and yet he could see that the complainant was "in pain", so he tried to give her sympathy and compassion.[59] He characterised his behaviour during the encounter as follows:

> "I denied it [the rape], but I denied it as gently as I could, because I'm sitting in a work environment and I'm assessing her as needing some sympathy and some feedback and some compassion."[60]
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> …
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> "I never forcefully [denied raping her], because I didn't know the reaction."[61]

Character evidence

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55 AB163.
56 AB191.
57 AB195.
58 AB169.
59 AB169.
60 AB197.
61 AB197.

[43] The appellant called several witnesses to give character evidence. Their evidence need not to be repeated comprehensively, and it suffices to say that each spoke favourably of the appellant's character and standing within the community.

The approach of the trial judge

[44] Richards DCJ considered each count separately but accepted that a finding of guilt on the charge of indecent assault may have been relevant to her Honour's consideration of the relationship that existed between the appellant and the complainant in relation to the rape charge. Her Honour also acknowledged that the complainant's evidence, being the only evidence of the rape, was crucial to her consideration of the charges. Her Honour was cognisant of the consequences of the 40-year delay between the alleged offending and the trial, including the possible loss of evidence such as an alibi (if one existed) or the general ability of witnesses to recall events in detail. The learned trial judge accepted that she could not convict on the complainant's testimony alone unless, after scrutinising it with great care, and considering the circumstances relevant to its evaluation, she was satisfied beyond reasonable doubt of its truth and accuracy. The learned trial judge also accepted that the complainant's demeanour had to be treated with caution in assessing her consistency, truthfulness and reliability.

[45] The learned trial judge accepted that, while the complainant could not recall matters on a large number of occasions, this was chiefly in relation to conversations between herself and the police and Mr Flint around five years ago, which was "unsurprising".[62] Her Honour opined that there was little inconsistency in her accounts of what happened between herself and the appellant. In substantially accepting the complainant's account of events, her Honour did not rely on the absence of an apparent motive to lie.

[46] The learned trial judge considered the evidence of sexual interest by the appellant towards the complainant prior to the indecent assault and the rape. That evidence included the pornographic material, the touching, the unsolicited flat visit and his comments to the complainant about his wife. Her Honour found the complainant's evidence in this regard to be credible. Her Honour was of the view that it:

> "… demonstrates an escalating behaviour towards the complainant, and the fact that she was compliant and did not rebuff him strongly but merely chose to move away from him, leads to a conclusion that he was emboldened by his advances to take matters further."[63]

[47] In reviewing the evidence, her Honour also made the following specific observations:

(a) there was a minor discrepancy between the complainant's and the appellant's descriptions of the tech lab room layout;

(b) the complainant's written statement was inconsistent with her testimony regarding the timing of the appellant expressing his displeasure at Ms Tonks' presence in the practice;

(c) Ms Tonks' estimated time of arrival at the practice was probably wrong, but this was an insignificant inconsistency; and

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62 *R v Agnew* [2020] QDC 157, [19] (**Trial Judgment**).

63 Trial Judgment, [65].

(d) there was an inconsistency between Senior Constable Shaw's written notes (to the effect that the complainant could not remember, in relation to the rape, how she "got out from under him") and the QPRIME entry (to the effect that she had pushed him away). Her Honour concluded that the QPRIME entry was to be treated with caution because it seemed "curious" that the complainant could have given two different versions of events in such a short period of time.[64]

[48] The trial judge regarded the appellant's behaviour in the covert recording as "unusual".[65] Her Honour also regarded as selective his comments in not denying the pornography, denying the groping and not recollecting the rape. Her Honour opined that most people would have reacted differently when confronted with such a situation. However, ultimately, the learned trial judge did not regard the appellant's conduct as constituting any admission, finding that:

> "Human reaction is not always consistent or predictable and this is one of those occasions. In all the circumstances it seems to me given the fact that the defendant was confronted unexpectedly after 35 years with these allegations it would be unfair to assume that his reaction was that of a person deliberately acting out of a consciousness of guilt and I do not regard it in that way."[66]

[49] In coming to her verdict, the learned trial judge considered the evidence that the appellant was a person of unblemished character and of standing in his community.

[50] On the indecent assault count, the learned trial judge found that Ms Tonks' evidence was impressive, strongly corroborative and largely consistent with the complainant's account, allowing for differences of memory after 35 years. The trial judge explained those differences by reference to the fact that the complainant was under the effects of nitrous oxide which also explained her unlikely account that the gas ratio was 16 to one. Her Honour was untroubled by the difficulty of performing dental work alone because the appellant's actual intentions that day did not involve dental work. For these reasons, the appellant was found guilty of indecent assault.

[51] On the rape count, her Honour reasoned as follows. The appellant showed sexual interest in the complainant and he was probably emboldened by the fact that the complainant returned to work and said nothing to him following the indecent assault. Her Honour noted that the complainant's evidence was uncorroborated, and her Honour did not rely on the appellant's comments made during the covert recording in coming to her verdict on the rape count. However, she found the appellant's evidence unconvincing. His memory was "patchy",[67] although her Honour accepted that this was understandable in the circumstances. Her Honour concluded that his presentation to others in his life as a person of honesty and integrity was not present in his interactions with the complainant at that stage of his life.

[52] On the other hand, the learned trial judge found the complainant's evidence of the rape convincing and consistent by reference to the fact that the complainant gave significant detail of the events. The learned trial judge observed that the

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64 Trial Judgment, [36].
65 Trial Judgment, [37].
66 Trial Judgment, [41].
67 Trial Judgment, [78].

preliminary complaint evidence was consistent with her evidence at trial. Her Honour acknowledged that her lack of recall of the conversation with Mr Flint was of "some significance",[68] but not to the extent that it caused her to reject the evidence. The learned trial judge found that Mr Flint's recollection was consistent with the complainant's.[69]

[53] Her Honour reasoned that the complainant's substantial delay in reporting the offences was explainable by reference to the fact that such delay is not unusual in sexual offence cases, the complainant gave evidence that she was ashamed, embarrassed and concerned that she would not be believed, and the appellant threatened to "blacklist" her. On this basis, her Honour was satisfied beyond reasonable doubt that the appellant raped the complainant.

Submissions on Ground 1

[54] The appellant relies on a single matter which is said to render the guilty verdict unreasonable.[70] He submits that the complainant's evidence is rendered "profoundly unreliable" by the fact that she purported to have recovered memory of the rape 35 years later, having previously repressed it.[71]

[55] In support of this submission, the appellant refers to two passages of the complainant's evidence. The first was given in evidence-in-chief:

> "And what – just describe the circumstances of you telling your de facto partner?--- We were both in the lounge room, just scrolling through our tablets, and he had read an article – I think on LinkedIn – about workplace bullying and harassment – sorry, it's distracting – and there were comments in the article, and I was reading the comments, I don't remember which comment it was, but there was something that I read that it just – all came back in detail.
>
> And what did you say to Andrew – happened to you?--- I said, 'Oh my god, my boss raped me.'
>
> But did you go into detail - - -?--- No."[72]

[56] The second was in cross-examination:

> "Now, this article that your then-partner showed you, am I right that he sent it to you by some means, am I right that he sent it to you by some means, whether by email, or some sort of messaging service?--- Yes.
>
> And it triggered these memories, is that right?--- The comments.
>
> The comments to the article triggered the memories?--- Yes, yes.
>
> And were these memories that you had not experienced before?--- No.
>
> But they came flooding back, didn't they?--- They did.

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68 Trial Judgment, [79].

69 Ground 2 challenges this factual finding as constituting a material error of fact resulting in a miscarriage of justice.

70 T 1-2, lines 43-44.

71 Appellant's Submissions, paragraphs 17 and 18.

72 AB96.

> Had you buried them?--- Absolutely.
>
> But the process was a sudden one, on your version, that you read it, the memories came flooding back, and you blurted out that you were raped, is that right?--- Yes.
>
> It wasn't as though there was some sort of gradual process, whereby he sort of dragged it out of you?--- No."[73]

[57] The appellant also refers to the following evidence of Mr Flint given in cross-examination:

> "But immediately prior to that, she told you that sections of that article had triggered a memory?--- Yes.
>
> And was she telling you that this was a memory that had been buried?--- Those words weren't mentioned.
>
> Was that the effect of what she told you?--- I would say that was the effect of it, yes.
>
> And is that why you used the words a few minutes ago that if not the – if not – what she actually said – the effect of what she said to you was that she had just realised what had occurred to her?--- I think it had brought forward some fairly intense feelings about that particular matter.
>
> But it certainly wasn't the case that she read the article and immediately blurted out to you that she'd been raped. This was a - - -?---Not at all.
>
> - - - process that took some time?--- That's correct."[74]

[58] The appellant submits that the Court would have significant concern regarding the evidence of a recovered or triggered memory.[75]

[59] The Crown submits that it would be erroneous to consider the circumstances of the complainant's recollection of the rape in isolation.[76] In assessing the complainant's evidence, the whole of her evidence should be considered.[77] The Crown notes that the complainant's account of how she came to specifically recall the circumstances of the rape was not explored in great detail at trial. Nor was the extent of the complainant's recollection prior to reading the relevant article truly explored.[78]

Consideration of Ground 1

[60] When the complainant's evidence is considered as a whole, it was open to the learned trial judge to be satisfied beyond reasonable doubt as to its truth and accuracy. While her Honour had the significant advantage of being able to assess each witness as they gave their evidence, her Honour identified the need to exercise

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73 AB132-133.
74 AB118.
75 Appellant's Submissions, paragraph 20.
76 Respondent's Submissions, paragraph 5.
77 T 1-13, lines 43-45.
78 Respondent's Submissions, paragraph 4.

extreme caution in using demeanour to address questions of the consistency, reliability or truthfulness of the complainant's evidence.[79]

[61] The evidence of the appellant's sexual interest in the complainant makes it more likely that he committed both offences. The learned trial judge found the complainant's evidence of that sexual interest credible.[80] The sexual interest evidence included the appellant showing pornography to the complainant.[81] Although the appellant denied ever having pornographic material at the surgery or ever showing it to anybody (including the complainant), he admitted that he may have taken some pornographic magazines to the surgery in his briefcase.[82]

[62] There was also evidence of the appellant groping the complainant.[83] This conduct, which continued over the course of a couple of weeks, caused the complainant to change her pre-examination routine to deprive the appellant of the opportunity to grope her. The complainant's evidence about changing her work routine was unchallenged. The appellant denied that he put his hand up the back of the complainant's dress and groped her.

[63] The appellant's sexual interest in the complainant is further supported by the appellant sharing intimate details concerning his wife.[84] The complainant was able to give the names of both the wife and the child. The appellant stated that he was "surprised" the complainant knew his wife's name.[85] There is also the evidence of the appellant's uninvited arrival at the complainant's flat.[86] The appellant vaguely recalled going to her home one day but he could not recall the circumstances, except that he thought he dropped something off such as wages, uniforms or keys.

[64] It is significant that, the day after the rape, the complainant called the appellant and resigned, never to return to the practice. Although the complainant's evidence was that she could not recall whether she told police about her resignation, in his own interview with police, the appellant recalled that the complainant's employment ended when she "just resigned".[87]

[65] Evidence that the appellant was sexually interested in the complainant was also supported by the conduct constituting the indecent assault. As stated by the learned trial judge:

> "The accused again was likely emboldened from the fact that despite what happened in Count 1 the complainant came back to work and did not say anything to him about what he had done."[88]

[66] As found by the learned trial judge, the indecent assault offending was strongly corroborated by Ms Tonks' evidence. Her Honour considered that Ms Tonks was an impressive witness. There was no suggestion of collusion between Ms Tonks

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79 Trial Judgment, [18].
80 Trial Judgment, [65].
81 See [11] above.
82 See [40] above.
83 See [12] above.
84 See [17] above.
85 AB164.
86 See [13] above.
87 AB375.
88 Trial Judgment, [77].

and the complainant in giving their accounts, nor was there any evidence that the two had any significant contact with each other in the years following the incident.[89]

[67] When one has regard to the whole of the evidence, including the complainant's detailed evidence of the circumstances of the rape,[90] Ground 1 is not made out.

Ground 2

[68] The appellant alleges that the learned trial judge made a factual error in finding that Mr Flint's preliminary complaint evidence was consistent with the complainant's evidence at trial in relation to the rape. Her Honour found:

> "On the other hand the complainant's evidence in relation to the detail of this offence and her other interactions with the defendant has been largely consistent. She has given significant detail of the events. Whilst acknowledging that the preliminary complaint evidence does not prove anything independently of the complainant it was also consistent with her evidence at trial. Her lack of recall of her conversation with Mr Flint is of some significance but not to such an extent that it would cause me to reject her evidence. The conversation that he recounted is again consistent with her evidence. I found her evidence convincing. I find there is some support for her evidence, not amounting to actual corroboration in the sexual interest showed by the accused before the rape."[91]

[69] The appellant submits that her Honour was "plainly wrong to say that the preliminary complaint evidence regarding the rape was consistent with the complainant's evidence at trial".[92] The appellant points to an alleged inconsistency between the complainant's evidence that she repeatedly said "no" to the appellant and kicked out at a door to make noise, making clear her lack of consent, with Mr Flint's evidence that the complainant told him that she just lay there and let it happen as she thought that was her only choice. This, according to the appellant, constitutes "a clear inconsistency between the accounts and one that should have led to a negative credit finding rather than a positive one".[93]

[70] In *Filippou v The Queen*,[94] the High Court stated that, in dealing with an appeal from a judge alone, it is first necessary to determine whether the judge has erred, either in fact or law.[95] If there is such an error, the court must then decide whether the error, either alone or in conjunction with any other error or circumstance, results in a miscarriage of justice.[96]

[71] In the same case, Gageler J stated:

> "Having made the point that the onus rests on an appellant to show that a misstatement of fact amounted to a miscarriage of justice, the unanimous judgment in *Simic* continued:

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89 Respondent's Submissions, paragraph 11.
90 See [18] above.
91 Trial Judgment, [79].
92 Appellant's Submissions, paragraph 29.
93 Appellant's Submissions, paragraph 29.
94 (2015) 256 CLR 47.
95 *Filippou v The Queen* (2015) 256 CLR 47, [4] (French CJ and Bell, Keane and Nettle JJ).
96 *Filippou v The Queen* (2015) 256 CLR 47, [4] (French CJ and Bell, Keane and Nettle JJ).

> 'Of course minor inaccuracies and omissions will not be likely to make it possible that the verdict was affected. Bare and remote possibilities may be disregarded, but if it is considered reasonably possible that the misstatement may have affected the verdict and if the jury might reasonably have acquitted the appellant if the misstatement had not been made, there will have been a miscarriage of justice, and a substantial one. In considering a question of this kind, the appellate court must have regard to the gravity of the misstatement as well as to the strength of the case against the appellant.'"[97]

[72] The learned trial judge's finding quoted above does not, in my view, constitute a material misstatement of evidence amounting to a miscarriage of justice.

[73] Mr Flint's evidence of what the complainant told him is set out at [26] to [29] above. He recalls that the complainant said the rape occurred on the floor and that "she pretty much lay there and let it happen" because she perceived no alternative. The complainant told Mr Flint that the appellant "finished" and then she left the premises promptly after. The complainant's evidence at [18] above was that the appellant walked over to her, pushed her to floor, pulled down her underwear and raped her by penetrating her vagina with his erect penis. The complainant was kicking the door with her left foot, crying and repeatedly told the appellant "no". The appellant did not ejaculate. The complainant's evidence that the appellant pushed her to the floor is generally consistent with Mr Flint's evidence that the rape was committed "on the floor". Each version is also consistent with the rape occurring after hours while the complainant was locking up. In giving his evidence, Mr Flint sought to give the effect of what the complainant had told him about the rape.[98] The complainant's evidence that she kept saying "no" and that she was kicking the door is not necessarily inconsistent with Mr Flint's evidence that the complainant said "she pretty much just lay there and let it happen". As correctly submitted by the Crown:

> "The complainant did not directly state in her evidence that she 'wasn't fighting' the appellant, or that she was 'just laying there' but both descriptions could be characterised as consistent with the detail she gave. She did not suggest that there were any actions by her to 'fight' the appellant and described the only positive action by her was to kick the door to make noise (not to fight the appellant)."[99]

[74] The effect of the complainant's evidence and the effect of Mr Flint's evidence of what she told him is, in my view, generally consistent and no error in her Honour's finding is established. Any perceived inconsistencies are minor and not productive of a miscarriage of justice. Ground 2 is not made out.

Ground 3

[75] The appellant applies for leave to adduce evidence, namely the complainant's victim impact statement, in support of his appeal against conviction. The victim

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97 (2015) 256 CLR 47, [86].
98 AB116, lines 23-25.
99 Respondent's Submissions, paragraph 18.

impact statement was received by the Crown for the sentencing hearing, after the complainant had given evidence and the verdicts announced.

[76] In her victim impact statement, the complainant referred to her Autism Spectrum Disorder diagnosis and its effects:

> "I have difficulty in reading social cues and in recognising when I am in a dangerous situation. I had the answer to my question, why me? simply because I didn't understand the warning signs. Being neurodiverse means that I am vulnerable to predators, but it also gives me an extraordinary memory. I am able to recall details that may bypass neurotypicals."[100]

[77] The appellant submits that complainant's claim to possessing an "extraordinary memory" stands in stark contrast to the way in which the complainant gave evidence at trial, particularly under cross-examination. She responded "I don't recall" to defence counsel on over 30 different occasions.[101] According to the appellant, if the victim impact statement was available to be deployed in cross-examination of the complainant at trial, it is likely that the learned trial judge would have taken a different view of the complainant's numerous recall failures. This, according to the appellant, would have made a material difference to the trial.

[78] Her Honour dealt with this aspect of the complainant's cross-examination as follows:

> "It was submitted by defence counsel that she was repeatedly deploying loss of memory in cross-examination in order to avoid answering questions that she thought might pose difficulties. It is fair to say that she did say she could not recall matters on a large number of occasions, however that was chiefly in relation to conversations she had had with the police, how her statement was taken or the conversation she had had with her partner, Mr Flint, when she first complained of the assault. She also had difficulty recalling the make and type of gas gauge on the nitrous oxide. There was however little inconsistency in her account of what happened in relation to the conduct between herself and the defendant."[102]

[79] It is necessary to consider the categories of evidence upon which the complainant was being cross-examined that elicited the response "I don't recall". The complainant could not recall the following matters:[103]

(a) the configuration of the nitrous cylinders and gauge in the practice;

(b) whether she had told Senior Constable Shaw that she had managed to push the appellant off her and whether he had ejaculated;

(c) the process involved in police taking her statement;

(d) the circumstances of the indecent assault including the reading on the gauge; whether she was struggling, laughing or shouting at the appellant at the time

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100 AB252.
101 Appellant's Submissions, paragraph 35.
102 Trial Judgment, [17].
103 AB120-132.

and the timing of the appellant expressing his annoyance at Ms Tonks being present;

(e) whether she and Ms Tonks ever discussed the indecent assault afterwards;

(f) whether she told Mr Flint that she "laid there during the rape and just waited for it to finish";[104]

(g) whether she told police that the day after the rape she rang the appellant and told him she had a new job.

[80] Having reviewed this cross-examination, I accept, as submitted by the Crown, that the learned trial judge adequately summarised the categories of evidence where the complainant gave such a response. I also accept that none of those areas "could be characterised as of such significance to undermine the complainant's credibility".[105]

[81] Pursuant to s 668E(1) of the *Criminal Code* (Qld), the Court may set aside a verdict of guilty if it is of the opinion that on any ground whatsoever there was a miscarriage of justice. The victim impact statement constitutes fresh evidence as it could not, with reasonable diligence, have been produced by the appellant at the trial.[106] This Court must therefore determine whether a miscarriage of justice has occurred because the victim impact statement was unavailable to be utilised in the cross-examination of the complainant. As the statement was only received by the Crown after the verdicts were announced, there is no suggestion that the Crown has failed to disclose the statement pursuant to s 590AB of the *Criminal Code*.

[82] In *Craig v The King*,[107] Rich and Dixon JJ stated:

> "A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance."[108]

[83] While issues of cogency, plausibility and relevance of the fresh evidence may assist in determining whether there has been a miscarriage of justice, the ultimate question is whether a miscarriage of justice has occurred. As stated by Gibbs CJ in *Gallagher v The Queen*:

> "… it is important to remember that the fundamental question is whether a miscarriage of justice has occurred, and that the principles that may be extracted from the authorities 'should not ... be regarded as absolute or hard and fast rules': *Green v. The King*. The circumstances

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104 AB128, lines 35-36.
105 Respondent's Submissions, paragraph 24.
106 *Ratten v The Queen* (1974) 131 CLR 510.
107 (1933) 49 CLR 429.
108 *Craig v The King* (1933) 49 CLR 429, 439.

> of cases may vary widely, and it is undesirable to fetter the power of Courts of Criminal Appeal to remedy a miscarriage of justice. I respectfully agree with the statement of King C.J. in *Reg. v. McIntee* that 'appellate courts will always receive fresh evidence if it can be clearly shown that failure to receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand'."[109]

[84] Whether the unavailability of a victim impact statement at trial is productive of a miscarriage of justice depends on its content. In *R v HAU*,[110] the Crown failed to disclose a victim impact statement which contained allegations that were inconsistent with aspects of the account given by the complainant at trial. Keane JA, as his Honour then was, held that where documents are not disclosed by the Crown in breach of its obligation:

> "… this Court cannot ignore even a relatively slim possibility that the defence has been forensically disadvantaged by the non-disclosure. It is enough that the opportunity which the defence was denied 'could have made a difference to the verdict'.
>
> There is a real possibility that the appellant suffered some forensic disadvantage in the present case. Some of the assertions in the victim impact statement were the very kind of thing which the Crown Prosecutor had argued to the jury could have damaged the complainant's credibility. In these circumstances, it seems to me that the Crown cannot be heard to say that this material could not have made a difference to the verdict."[111]

[85] In *R v Cornwell*,[112] the Crown did not disclose a victim impact statement until after the jury had been deliberating for more than half a day. The statement contained assertions that had not been previously raised by the complainant or contradicted by other evidence. In those circumstances, Muir JA (with whom Fraser JA and Jones J agreed) concluded that the appellant was denied an opportunity to conduct his case in a way which "could have made a difference to the verdict" or which may have created "a significant possibility that the jury, acting reasonably, would have acquitted the appellant".[113]

[86] In *R v BBU*,[114] McMurdo P (with whom Fraser JA and Atkinson J agreed) considered that the Crown had failed to comply with its disclosure obligations in failing to provide a victim impact statement.[115] The appellant contended that his trial was compromised because his counsel could have cross-examined the complainant "about her extraordinary claims in the victim impact statement as to the post-offence conduct of the appellant's daughter and contradicted those claims by other evidence".[116] These matters, as noted by McMurdo P, only went to the complainant's credit. Her Honour reasoned as follows:

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109 *Gallagher v The Queen* (1986) 160 CLR 392, 395 (citations omitted).
110 [2009] QCA 165.
111 *R v HAU* [2009] QCA 165, [40]-[41] (Cullinane and Jones JJ agreeing).
112 [2009] QCA 294.
113 *R v Cornwell* [2009] QCA 294, [40] (citations omitted).
114 [2009] QCA 385.
115 *R v BBU* [2009] QCA 385, [36].
116 *R v BBU* [2009] QCA 385, [46] (McMurdo P).

> "Again, for the purposes of discussing the appellant's contentions, I will assume that the complainant's credibility was so central to the issue in this case that a denial by her on these issues could have been contradicted by defence evidence. But no such contradictory evidence has been placed before this Court. There is no reason for this Court to consider that the complainant's victim impact statement as to the post-offence conduct of the appellant's daughter is false or unreliable."[117]

[87] Her Honour concluded that the appellant had not demonstrated that he had lost some forensic advantage through the late disclosure of the victim impact statement.[118] In analysing the victim impact statement, her Honour considered whether anything in it amounted to an inconsistent statement or raised a concern about the truthfulness or reliability of the complainant's evidence at trial.[119]

[88] In *R v GAL*,[120] the Court considered a victim impact statement that had been disclosed at trial to the defendant's solicitors but had not been received by his counsel. As observed by Dalton J (with whom McMurdo P and Fraser JA agreed), it was necessary in those circumstances for the appellant to show that there was a miscarriage of justice because defence counsel did not receive the victim impact statement until after the jury had retired.[121] Her Honour stated:

> "It is therefore necessary to look to see what parts of the victim impact statement are relied upon as being so significant that there was a miscarriage of justice when defence counsel ran the trial without being appraised of them."[122]

[89] In the victim impact statement in *R v GAL*, the complainant stated that she was crying during a rape. She did not mention this in her evidence at trial. Further, the statement listed practitioners and institutions from whom the complainant had received counselling and psychiatric treatment. The appellant submitted that he would have subpoenaed relevant records of those practitioners if he had received the victim impact statement earlier. Dalton J was not of the view that there had been a miscarriage of justice as a result of defence counsel being without the victim impact statement during the trial. Her Honour regarded the inconsistency as "small" and stated:

> "Any forensic advantage to the defence case in cross-examining about these two points would likewise have been small and necessarily to be weighed against the significant forensic disadvantages to the defence if the prosecution required the defence to tender the victim impact statement, having cross-examined on it."[123]

[90] In the present appeal, unlike in *R v HAU* and *R v Cornwell*, the complainant's victim impact statement contains no prior inconsistent statements. There is nothing

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117 *R v BBU* [2009] QCA 385, [46].
118 *R v BBU* [2009] QCA 385, [49].
119 *R v BBU* [2009] QCA 385, [43].
120 [2011] QCA 185.
121 *R v GAL* [2011] QCA 185, [20].
122 *R v GAL* [2011] QCA 185, [20].
123 *R v GAL* [2011] QCA 185, [21].

in the victim impact statement that is probative of any miscarriage of justice. The claim of an extraordinary memory is nothing more than an expression of the complainant's own opinion as to her cognitive abilities arising from her diagnosis. The victim impact statement would have offered little additional forensic advantage in cross-examining the complainant at trial. How the complainant came to recall being raped by the appellant 35 years earlier was always going to be an important aspect of cross-examination, irrespective of the complainant's own opinion as to her ability to remember. As conceded by Mr Holt, the availability of the victim impact statement was not necessary to explore the issue at trial.[124] The complainant was cross-examined in relation to the circumstances of both the indecent assault and the rape. The complainant's memory failures in relation to the categories of evidence identified at [79] above do not, in my view, impact overall on the reliability of her evidence concerning the details of the indecent assault and the rape.

[91] The appellant has failed to establish that the unavailability of this statement at trial was productive of a miscarriage of justice. The application for leave to adduce evidence should be refused.

[92] Ground 3 is not made out.

Disposition

[93] I would make the following orders:

1. Application for leave to adduce evidence refused.
2. Appeal dismissed.

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[124] T 1-12, line 44 to T 1-13, line 25.