SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tong (a pseudonym)* [2021] QCA 261
PARTIES:	**R** **v** **TONG (a pseudonym)** (appellant/applicant)
FILE NO/S:	CA No 280 of 2020 CA No 79 of 2021 DC No 43 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns - Date of Conviction: 25 March 2021; Date of Sentence: 25 March 2021 (Fantin DCJ)
DELIVERED ON:	3 December 2021
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2021
JUDGES:	Sofronoff P and McMurdo JA and Applegarth J
ORDERS:	**1. The appeal is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was found guilty by a jury of four counts of rape of an 11 year old girl – where the appellant was 17 years of age at the time – where the rapes occurred at a graduation function – where the complainant told a number of people about the offences – where the complainant's version of events, as told by preliminary complaint witnesses, differed between those preliminary complaint witnesses – whether the appellant had an opportunity to commit the charged offences – whether inconsistences between the complaints, as told to preliminary complaint witnesses and to police, ought to have given rise to a reasonable doubt as to the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the trial judge noted the difficulties prosecution witnesses might have experienced when giving evidence due to their age, culture and the passage of time – where

a redirection was sought and given – whether the trial judge gave the jury an unbalanced summing up

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR APPEAL – JUDGE ACTED ON WRONG PRINCIPLE – where the appellant was found guilty by a jury of four counts of rape of an 11 year old girl – where the appellant was 17 years of age at the time – where the sentencing judge noted that the offending involved a degree of force – where the appellant contended that he did not inflict gratuitous violence and made no threats of violence – whether the sentencing judge acted on an error of fact

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR APPEAL – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was found guilty by a jury of four counts of rape of an 11 year old girl – where the appellant was 17 years of age at the time – where the appellant received a sentence of three and a half years' imprisonment, with parole eligibility after serving half that sentence – whether the sentence was manifestly excessive

Youth Justice Act 1992 (Qld), s 140, s 144

McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, considered
R v Ashley [2005] QCA 293, considered
R v PZ; Ex parte Attorney-General (Qld) [2005] QCA 459, considered

COUNSEL: G M McGuire and A E Cappellano for the appellant/applicant
S Cupina for the respondent

SOLICITORS: Hannay Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** A jury found the appellant guilty on four counts of rape. He now appeals against those convictions and also against the severity of his sentence.

[2] On the night of 6 January 2018, the appellant and the complainant both attended a graduation party. The complainant, to whom I will refer by the pseudonym May, was then 11 years old. The appellant was 17 years of age. According to May's statement to police, which was tendered at the trial, during the course of the evening May asked the appellant if she could talk to him privately. The two of them walked away where they could not be overheard and May told the appellant that she "liked him". Later, when she and her mother were about to leave, May told her mother that she needed to go to the toilet. She went to the toilet and, as she was returning to her mother, she saw the appellant. He told her to follow him and she did so. He led her into a nearby shed where he removed her shorts, told her to turn around and inserted his penis into her vagina. This was count 1. The appellant had some difficulties with this and told May to "step outside". He told her to "be silent" and

to "lay down". She did so. He pulled her legs up and re-inserted his penis into her. This was count 2. After a short time he stopped doing this and told her to kneel. He inserted his penis into her mouth. This was count 3. He pushed her head up and down. He then removed his penis from her mouth and asked her if she wanted him to "put [his] dick into [her] vagina" or wanted "to suck it" or wanted him "to just do a bit of finger in [her] vagina". She said that she didn't want any of that. He inserted his finger into her vagina and told her to "be quiet". This was count 4.

[3] Afterward, he told her to keep secret what they had done, not to tell her mother or father and not to tell anyone.

[4] After she returned to school on 19 February 2018, May confided in two of her friends, whom I shall call Jane and Eve. According to their evidence, they noticed that May was upset and asked what was wrong. Jane's evidence was that May started crying and said that she had been raped by someone she knew. Jane said that May told her that this man had dragged her by the arm "into some room" and that she "got raped". Jane said that she and Eve told May to report the matter to police and to her parents but May was too frightened to do that. Eve's evidence was that May said "this guy raped her" and that his name was Tong. Eve understood rape to mean that "somebody does something to you and it's sexual". Eve knew this, she said, because she had "heard it but I haven't seen it yet".

[5] On the same day May also confided in one of her teachers, whom I will call Ms Brodie,[1] and whose evidence was that May told her that the appellant took her somewhere that was dark where he kissed her, touched her, forcibly held her down and raped her. The school chaplain, whom I will call Ms Sydney, was present at that interview. In her own evidence she recalled that May had told her and Ms Brodie that the appellant grabbed her and forced her to go to a dark area of the hall in which the function was being held. May said that "he was holding me very tight" and she begged him to let her go but he said, "No, not this time". May said, "He raped me". The evidence of Ms Brodie and Ms Sydney was not challenged.

[6] May's older, adult sister also gave evidence. I will call her Linda. She had been notified of the complaint by the school and so she arranged to meet with May and their mother and father that evening. Another of May's older sisters, whom I shall call Elizabeth, was also present. Linda understood that May had informed her teacher that a man named Tong had raped her. The family then looked up the appellant's name on Facebook and May's father immediately recognised the appellant as a man who was often asked to sing at community events. He knew the family. May was asked what had happened. According to Linda's evidence, May said that it had happened at the graduation function (which had taken place on 6 January that year). She said that the appellant took her shorts off. Linda asked her whether the appellant had put his penis into her vagina and she answered, "Yes". Linda asked whether the appellant was wearing a condom but May did not know what a condom was. Linda explained and May said that she could not recall that the appellant was wearing one of those. Linda's evidence was not challenged.

[7] May's other sister, Elizabeth, said in evidence that Linda told their parents that May had told a teacher that she had been raped and had identified the appellant as the rapist. Together they checked his identity on Facebook and recognised the

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1 To protect May's identity.

appellant. May said that she had been dragged from the kitchen outside. Elizabeth asked May "it's a big event. How can he drag you outside?". May said that the appellant had asked her to follow him and that after she had followed him he had dragged her outside. Elizabeth asked her what happened next but May "kind of was reluctant to say anything further to us". Linda asked whether the appellant had worn a condom and had to explain what that was. May said that he had not used one. Linda explained what a penis was and what a vagina was and what sex was "and [May] said yes". May appeared reluctant to talk and "nobody wanted to say anything else" so "we kind of just stopped".

[8] The prosecution called as a witness a man, whom I shall call Mr James, who had been present at the function on 6 January. He recalled being at the celebration but could not recall the year in which it was held. In fact it was held in January 2018 and Mr James gave his evidence at the trial in November 2020, almost three years later. He could recall waiting until the appellant had sung his "first song" after which the appellant then joined Mr James, and others, before going outside. Mr James went to fetch a bottle of water for the appellant and, as he left, "the girl was already there, pulling his hand". When he returned "they were gone" and he "didn't' see where they went after that". He saw the same girl on the patio later that night but never saw her again after that. He did not know the complainant or identify her. In cross-examination, Mr James said that the only period during which the appellant was not in his presence was when he left with the girl and this was for no more than three minutes.

[9] The first time Mr James was asked by police to furnish a statement was on the day before he gave evidence.

[10] The appellant neither gave evidence nor called any evidence. However, a field recording of his denials of the offence to police was tendered.

[11] Ground 1 of the appellant's appeal is that the appellant's convictions were unreasonable or that they cannot be supported by the evidence.[2] In substance, the appellant argues two things. First, that having regard to the evidence of Mr James, the appellant had no opportunity in which to commit the charged offences. Second, that there are inconsistencies between the accounts which the complainant gave to police and which she gave to the preliminary complaint witnesses and that these inconsistencies are so great that jury ought reasonably to have had a doubt about the appellant's guilt.

[12] The first point has no substance. Ms Cupina, who appeared for the respondent, submitted that this argument was based upon the false assumption that the jury had to accept the evidence of Mr James as reliable and accurate, but Mr James was giving evidence about a function he had attended almost three years previously and had not been asked to furnish a statement until the day before he gave that evidence. He was unable to recall the year the function took place, the purpose of the function which he attended, what the girl he saw looked like or when he left the party. Ms Cupina submitted that it was for the jury to assess the weight that should be given to his evidence about opportunity and that it was open to the jury to reject his evidence as being of no weight.

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2 Having regard to the principles enunciated in *M v The Queen* (1994) 181 CLR 487.

[13] That submission should be accepted.

[14] The second point seeks to build upon inconsistencies in the various accounts of the offending given to various people by May. It is helpful to consider first the respects in which these accounts were consistent. May told her two friends that she had been raped. She told Ms Brodie and Ms Sydney that she had been raped at a graduation party. She told her sisters and her parents that the appellant had raped her.

[15] She told police that she had been raped at a graduation party. They alone, of all her interlocutors, delved into matters of detail, as they are trained to do and as is their purpose in talking to a complainant, and she responded accordingly.

[16] By way of example, in response to non-leading questions, the complainant described in detail how the appellant removed her shorts, turned her around to face away from him, made her bend over and then inserted his penis into her vagina. She described how this felt, that she felt "surprise and it hurted" (*sic*). When asked "what part of your vagina was hurting" she replied, "Um, I'm not sure we haven't learned it yet". When asked a clarifying question, "Was your vagina hurting on the outside or on the inside?" she replied, "On the inside". She described that, "… he left it there but then it kept coming out" and that "… it couldn't fit and it was like, he told me to open my legs wider" and "… like then it wasn't good enough". Earlier, when asked "which way was the penis positioned", she replied, "Down" and elaborated that it "was like just flopping down".

[17] In *R v Ashley*[3] Williams JA observed that the initial description of an offence by a very young complainant will not satisfy the demands and scrutiny of the lawyers involved in a subsequent prosecution. For many understandable and natural reasons having nothing to do with a child witness's untruthfulness or reliability, such a witness will give varying accounts of the same event. This is particularly so when the hearers of these initial accounts, which are usually very brief, have different relationships with the young child who is reporting a sexual offence. It is to be expected that an account given to close childhood friends, sharing a lack of sexual experience, will be different from an account given to a teacher and that these accounts will be different from an account given in response to demands at a family meeting. Such accounts are often given with great reluctance and with an unjustified, but natural, feeling of shame or guilt. As observed earlier, both of May's sisters sensed a deep reluctance on May's part to talk about the matter. That is why police officers are specifically trained to be able to elicit and distil a complaint in detail without the use of leading questions and with an eye upon the rules of evidence.

[18] That is all that has happened in this case.

[19] May was 11 years old when these events happened and was still only 12 when questioned by police. Nevertheless, the account that she gave to police was detailed and had many hallmarks of verisimilitude, such as her descriptions of the appellant's penis, how he handled it, what he asked her to do, what he made her do and how she felt.

[20] The appellant submitted that aspects of the complainant's evidence were implausible. That was a matter for a jury to assess. Nothing in the complainant's evidence stood out as so incredible that it could be concluded that the whole of her account was unreliable. Nor was it in the least remarkable that May told nobody for

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3 [2005] QCA 293 at [2].

a number of weeks. Experience has shown, again and again, that many real victims of sexual offences delay reporting them, sometimes for years and even for decades. The significance of such delay is a jury question.

[21] The assessment of credit is one of the paramount tasks of a jury. The arguments of the appellant upon this ground are arguments that are not without substance but they are arguments upon which a jury is to decide, not the Court of Appeal. Indeed, they were put to the jury at the trial and the jury rejected them.[4]

[22] The first two of the statutory grounds of appeal permitted by s 668E of the *Criminal Code* can never be sustained by arguments that merely identify disputed questions of fact, including questions of credit, because the jury remains the constitutional tribunal for deciding such issues.[5] It was open to the jury to have regard to the totality of the evidence concerning the complainant's accounts and, having regard to all of the circumstances of the case, including the features that I have referred to about accounts given by children, to accept as true the substance of her detailed account to police and to find the appellant guilty.

[23] The appellant's final argument in support of this ground, that the Crown failed to prove penetration, is entirely without merit or foundation and need not be considered further.

[24] The appellant's second ground asserts that Fantin DCJ gave the jury an unbalanced summing up. The appellant invoked the decision of the High Court in *McKell v The Queen*[6] to support his case. The appellant submitted that the learned trial judge ought not to have "unnecessarily emphasized the difficulties that the prosecution witnesses, particularly the complainant, might have experienced when giving evidence due to age, culture and the passage of time".[7]

[25] The appellant pointed to the following passages in her Honour's summing up:

> "Bear in mind that the complainant, [May], and the two other child witnesses, [Jane] and [Eve], were children. They were not adults. Bear in mind that when the complainant, [May], first gave a statement to police, she was 11 years old. In considering her answers to police, bear in mind her age and the particular circumstances of that interview.
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> She was an 11 year old [R] girl being asked questions by two adult male police officers in a police station. Bear in mind that when she spoke to police, it was about six weeks after the alleged events. When she gave evidence in court and her evidence was pre-recorded, it was then one year and eight months, approximately, after the alleged rapes. That timing also applies to when the other children had their evidence pre-recorded in court. Also bear in mind that when the adult witnesses gave their evidence here in court in November 2020

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4 See eg Transcript of Proceedings, Appeal Book 45: "And my suggestion to you is no, you can't accept that because of those shifts and those changes in her evidence"; Appeal Book 51: "And so, when it comes down to the evidence of a child who gives that, and evidence of a child who shifts and changes in her version. And you really just can't rely on that".

5 *R v Baden-Clay* (2016) 258 CLR 308 at [65] *per* French CJ, Kiefel, Bell, Keane and Gordon JJ.

6 (2019) 264 CLR 307.

7 Appellant's Outline at [33.a].

> they were asked about conversations that they had back in February 2018, more than two and a half years before."

[26] And also the following passage:

> "How may you use that evidence of [May's] preliminary complaint to those six witnesses? This is important.
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> That evidence may **only** be used as it relates to the complainant [May's] credibility. Consistency between the account of each of those six witnesses of [May's] complaint, and [May's] evidence before you, is something you may take into account as possibly enhancing the likelihood that [May's] testimony is true. [May] did not descend into any detail about the alleged rapes when she told others about it. But you may think that what [May] said to those witnesses was broadly consistent with her evidence to police and in court about the alleged rapes. That is entirely a matter for you."

[27] And further:

> "Likewise, any inconsistencies between the account of those witnesses and [May's] evidence may cause you to have doubts about [May's] credibility or reliability.
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> Whether consistency or inconsistencies impact on [May's] credibility or reliability is a matter entirely up to you. Inconsistencies in describing events are relevant, whether or not evidence about them is truthful and reliable, and inconsistencies are a matter for you to consider in the course of your deliberations. But the mere existence of some inconsistencies does not necessarily mean you must reject the complainant [May's] evidence. Some inconsistency is to be expected. That is because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time to tell a slightly different version each time.
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> For example, the teacher, [Ms Brodie], and the chaplain, [Ms Sydney], were adults who were both present during the same conversation with [May] in which [May] made disclosures. They both heard the same thing but they each gave a slightly different account of what [May] said to them. They both said words, broadly, to the effect that [May] had told them she was raped by an older man known to her at a graduation party in Innisfail, somewhere that was dark, and they each referred to some use of force. But they did not give an identical account of that conversation with [May]. One refers to the defendant by his name, for example; the other refers to him by age and school. They both said slightly different things about what [May] had said about force used."

[28] And:

> "When considering the preliminary complaint evidence, remember the timing of when each of the witnesses gave their evidence. [May] disclosed the alleged offending to those six witnesses on the 19th of February – on or about the 19th of February 2018, about six weeks after she alleges the offending occurred. The four adult witnesses,

> that is, [Ms Brodie], [Ms Sydney], [Elizabeth] and [Linda], did not give evidence in court until November 2020; more than two and a-half years later.
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> Whereas the two children, [Jane] and [Eve], they gave their statements to police in February and March 2018, which were recorded, and you heard those recordings played to you. So you might consider that a person's memories of what occurred, and of a conversation, may have been better at a time shortly after the disclosures were made than when those children's evidence was pre-recorded in court in August 2019, which is a year and seven months after the disclosures were made to them.
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> In summary, and to repeat, consistencies and inconsistencies in the preliminary complaint evidence, and with [May's] evidence of what occurred, are matters you do need to take into account. The mere existence of inconsistencies does not mean you must necessarily reject [May's] evidence. Some inconsistency is to be expected, because it's natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time to tell a slightly different version each time."

[29] The appellant submitted that these statements by her Honour undermined a major plank of the defence case, which was to suggest that inconsistencies in the complainant's accounts rendered her evidence unreliable.

[30] There was a redirection sought in relation to one aspect of these directions and the learned judge re-directed the jury accordingly. No complaint is now made about that aspect of the summing up. No further or other directions were sought by defence counsel.

[31] The appellant relied upon *McKell v The Queen*.[8] That was a case in which the trial judge, in the course of his summing up, commented upon disputed facts of the case in a way which presented to the jury the judge's own view about those facts. The judge's comments implied or suggested how those disputes about questions of fact should be resolved. Any expression of opinion by a trial judge about how a factual dispute should be resolved would be inconsistent with the proper performance of the judicial function because it is the jury, and not the judge, that is the constitutional tribunal for deciding issues of fact. For that reason in *McKell* it was held that the trial judge's comments suggestive of his own views about the facts had resulted in a miscarriage of justice.

[32] A judge's comments about the facts, which are forbidden, are to be contrasted with a judge's warnings to a jury, which are often required. A trial judge has a duty to give such directions as a jury might need in order to be able to perform their function as the judges of fact. It follows that in an appropriate case a judge may have to warn a jury about how *not to* approach the resolution of a factual dispute. There are many commonplace examples: how an accused's decision not to give evidence is not to be used as an admission or as evidence of guilt;[9] about the dangers of convicting upon the uncorroborated evidence of a particular witness;[10]

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8 Supra.

9 *Azzopardi v The Queen* (2001) 205 CLR 50 at [68] *per* Gaudron, Gummow, Kirby and Hayne JJ.

10 *Robinson v The Queen* (1999) 197 CLR 162 at [21] *per* Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ.

about the possible prejudice to an accused caused by a complainant's delay in making a complaint or a prosecutor's delay in bringing charges to trial;[11] about the dangers of identification evidence;[12] about the danger that might be involved when asked to use an accused's lies as evidence of guilt.[13] The experience of judges and counsel over many years has demonstrated that, in cases like those, there may be a danger of fallacious reasoning for reasons that might not be apparent to a lay mind that lacks that experience. When there is a danger of that kind, a failure to warn a jury may give rise to a miscarriage of justice because of the risk of a wrong verdict. A warning is not always required because the trial might have been conducted in a way that makes a warning unnecessary. In other cases, a warning might even be prejudicial to the accused.[14]

[33] Conventionally, warnings about the risk of fallacious reasoning are warnings that guarded against injustice to the accused. However, although in Queensland the Crown cannot appeal against an acquittal, a trial that is unfair to the prosecution also presents a miscarriage of justice. Warnings about the risk of fallacious reasoning that might prejudice the Crown have been developed. An occasion for a warning about fallacious reasoning to ensure fairness to the Crown can arise in cases in which there is a question whether or not a complainant in a trial of a sexual offence has a motive to lie.[15] Cases in which an accused's motive to commit the offence is in issue also commonly give rise to a requirement to give the jury a warning about the significance of the Crown's failure to prove motive.

[34] Issues about the credibility of child witnesses generally, and particularly in sexual offence cases, often provoke a need to warn a jury. On the one hand, a warning about the dangers of convicting upon the evidence of a child might be required. On the other hand, for the reasons pointed by Williams JA in *R v Ashley*,[16] it may be appropriate for a trial judge to warn a jury about the existence of factors, of which they may be unaware, which could bear upon the credibility of a child witness. Forensic experience, including the consideration of cases involving guilty pleas in which a child is known to have previously given conflicting accounts of offending, have demonstrated over the course of many years that credibility is not to be determined superficially upon the footing that the presence of inconsistencies in a witness's various accounts renders those accounts unreliable.

[35] In my respectful opinion, the fallacy in the appellant's argument was to treat Fantin DCJ's orthodox warnings about the dangers inherent in assessing the complainant's evidence as if they were her Honour's expressions of her personal views about May's credit. The defence case was to assert as strongly as possible the unreliability of the complainant's evidence, to be inferred from the inconsistencies in her various accounts. The defence submission was, naturally, put in extreme terms: "… you really just can't rely on [the complainant's evidence]".

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11 *Longman v The Queen* (1989) 168 CLR 79 at 108 *per* McHugh J.

12 *Domican v The Queen* (1992) 173 CLR 555 at 561-562 *per* Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

13 *Edwards v The Queen* (1993) 178 CLR 193.

14 See eg *Zoneff v The Queen* (2000) 200 CLR 234 at [20] *per* Gleeson CJ, Gaudron, Gummow and Callinan JJ.

15 See *R v Bevinetto* [2019] 2 Qd R 320 at [50] *et seq*.

16 Supra.

[36] In a case conducted by the defence on that basis it was necessary and not unfair for the jury to be warned that, although they might rightly conclude that the evidence of May was, for the reasons identified by defence counsel, an unsafe foundation for a conviction, it would be wrong for them to conclude that the mere existence of the asserted inconsistencies, if they found that there were inconsistencies, they were *required* to reject her evidence. It was necessary and not unfair to point out why that might be so. As her Honour made clear, having had their attention drawn to aspects of factual reasoning of which they might have been unaware, it was then a matter for the jury to decide what conclusion to draw about the complainant's reliability as a witness.

[37] The passages relied upon by the appellant to support his submission that the summing up was unfair were not comments about the learned judge's own views about the case; rather, they constituted the fulfilment by her Honour of her duty to give a necessary and appropriate warning to the jury in the circumstances that arose in this particular case having regard to how it was run. Not surprisingly, and rightly, no redirection was sought. There was no miscarriage of justice.

[38] The appeal should be dismissed.

[39] The appellant has also applied for leave to appeal his sentence.

[40] The appellant was 17 years old when he committed these offences against the complainant, who was then 11 years old. He is now 21 years old. On each count Fantin DCJ sentenced the appellant to imprisonment for three and a half years. He will be eligible for parole after he has served half of his sentence.

[41] The appellant submits that Fantin DCJ sentenced the appellant upon a mistaken finding of fact. Her Honour said:

> "The rapes were painful and degrading. You persisted after she asked you to stop. You persisted after she removed your hand. You therefore used additional force over and above the violence inherent in the acts of rape themselves. You forced her head onto your penis so forcefully and repeatedly, she felt like vomiting."

[42] The appellant submitted that her Honour's finding that he had used "additional force" was erroneous. It is true, as the appellant submitted, that he inflicted no gratuitous violence and made no threats of violence. However, the learned judge did not find that he had and the sentence is not reflective of any such finding. The submission about an error of fact cannot be accepted because the complainant's evidence included this:

> "… then I had to suck it for him, like suck his penis, um, I done it slow and he wanted me to do it fast and he grabbed my head and then he was like keep pushing it and it was so like at the back of my throat … That it made me want to vomit … like he made me go faster … By pushing my head".

[43] In my respectful opinion, this was evidence that justified a finding that he had used additional force above the violence inherent in any act of rape.

[44] Otherwise, the appellant submitted that the sentence of three and a half years, with a parole eligibility date after serving half that sentence, was manifestly excessive. He

submits now, as he submitted below, that the appropriate sentence was one of two and a half years imprisonment, suspended immediately (taking into account a declared period of pre-sentence custody of 36 days and now taking into account also the post-sentence custody of almost six months) for an operational period of three years, in combination with a three-year probation order.

[45] Fantin DCJ took into account the objective seriousness of the offences as well as the appellant's continued denial of his offending and the absence of any remorse on his part.

[46] So far as the appellant's victim is concerned, the consequences for her have been serious. As a result of the appellant's rapes, she attempted suicide by overdose in early 2020 when she was 14 years old and suffers from post-traumatic stress disorder and depression. Her personality has been adversely affected and her schooling has become troubled. Her family has been traumatised by what was done to the complainant and by her suffering. These aspects of her situation were dealt with in detail in a report and in victim impact statements tendered at sentencing.

[47] As to mitigating factors, the most obvious and most significant of these is the appellant's youth. In addition, although the appellant is an Australian citizen, he is an immigrant from Thailand and has a poor grasp of English. He will suffer in prison because of language and cultural differences from the rest of the prison population. No doubt, as a young man, these effects will be more severe for him. A psychologist has opined that the appellant also suffers from post-traumatic stress disorder by reason of his experiences in this criminal litigation. He reported that the appellant felt great remorse about the effect of these criminal proceedings upon himself and his prospects for a future career. He reported nothing about any remorse expressed by the appellant towards his victim.

[48] Section 140(2) of the *Youth Justice Act* has the effect that, although the appellant was a child when he committed these offences, he must be sentenced as an adult. However, pursuant to s 144(1) of the Act, the Court must have regard to the fact that the appellant was a child when he committed these offences and must also have regard to the sentence that would have been imposed upon him as a child. Pursuant to s 144(3) of the Act, no sentence can be imposed upon the appellant that is longer than that which could have been imposed upon him as a child.

[49] The appellant does not submit that Fantin DCJ failed to take any of these matters into account or that her Honour erred in her assessment of any of them. The weight to be given to such matters is entirely for a sentencing judge to determine.

[50] Her Honour had regard to the decision of the Court of Appeal in *R v PZ; Ex parte Attorney-General (Qld)*,[17] in which Keane JA observed that, even after making allowance for a plea of guilty, for the absence of prior offending and for a dysfunctional upbringing, the cases show that a 16 year old who is convicted of rape should, unless the circumstances are exceptional, be sentenced to a substantial time in detention.[18] We were not asked to reconsider that proposition as a sentencing principle.

[51] As in *R v PZ*, there is nothing in this case, either in the objective facts or in the appellant's subjective circumstances, that could be regarded as warranting a

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17 [2005] QCA 459.

18 *Supra* at [30].

sentence that did not involve a substantial period of incarceration. Nothing remarkable or exceptional was identified by the appellant. It follows that no arguable error in the exercise of discretion has been demonstrated and leave to appeal should be refused.

[52] **McMURDO JA:** I have seen in draft the judgments of the President and Applegarth J. I, too, gratefully adopt the President's analysis of the facts, from which it should be concluded that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.

[53] I agree that the second ground of appeal should also be rejected. The passages from the summing up which were the suggested basis for this ground are set out in the President's reasons. In my opinion, they were not directions which the judge was required to give, in order to ensure that there was a fair trial. They were observations about the limitations of human memory which would be understood by a jury without any judicial instruction.[19] In my respectful opinion, the preferable course for a trial judge is not to provide advice of this kind, because of the risk that, on occasion, a jury will read too much into it and interpret it as an indication of the judge's own opinion about the facts. As *McKell v The Queen*[20] demonstrates, such a risk will not be avoided, in every case, by a trial judge also saying to the jury that it is the trier of the facts. The question is whether in this case that risk eventuated, and ultimately, I am unpersuaded that it did.

[54] I agree with the reasons given by the President for refusing the application for leave to appeal against sentence.

[55] **APPLEGARTH J:** I gratefully adopt the President's analysis of the facts. That analysis shows why, upon an independent assessment of the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.[21]

[56] The evidence of Mr James on timing did not command acceptance or prove that there was no opportunity to commit the offences. The evolution of the complainant's disclosures was unremarkable. The President has explained why suggested inconsistencies in accounts given to preliminary complaint witnesses did not discredit the complainant about the acts of rape.

[57] I would add that the fact that the complainant initially told a school friend, a guidance counsellor and then family members that she had been dragged outside from the kitchen by the appellant, but later acknowledged to police and others that she followed the appellant outside, did not discredit her account of the rapes. It was open to the jury to conclude that her initial account of being dragged outside was given by a child out of embarrassment or concern at what a friend or family member may have thought about her choice to accompany the appellant outside and into the dark voluntarily.

[58] This aspect of her evidence did not taint her evidence generally or mean her evidence about what happened outside lacked probative force.

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19 cf *Longman v The Queen* (1989) 168 CLR 79 at 91 per Brennan, Dawson and Toohey JJ.
20 (2019) 264 CLR 307.
21 *M v The Queen* (1994) 181 CLR 487 at 494-495.

[59] The jury had the benefit of having seen and heard the witnesses. There are some cases in which, despite a jury's acceptance of the credibility of a complainant and the advantages enjoyed by the jury, the court is bound to set aside a verdict.[22] This is not such a case. The evidence does not lead me to conclude that there is a significant possibility that an innocent person has been convicted.

[60] I agree with the President that neither ground of appeal against conviction is established and that the appeal should be dismissed. I also agree with the President's reasons why leave to appeal against sentence should be refused.

[61] I have had the advantage of reading the reasons of McMurdo JA about the second ground of appeal and agree with them.

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22 *R v Oliver* [2020] QCA 76 at [36].