DISTRICT COURT OF QUEENSLAND

CITATION:	*R v JOE* [2023] QDCPR 20
PARTIES:	**R** (respondent) **v** **JOE** (applicant)
FILE NO/S:	2602/21
DIVISION:	Criminal
PROCEEDING:	Pre-trial Application – s 590AA *Criminal Code* (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 March 2023 (*ex tempore)*
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2023
JUDGES:	Gardiner DCJ
ORDER:	**1. Prosecution is not to lead paragraph [19] of the complainant's statement as evidence-in-chief.** **2. Prosecution is not to lead the third and fourth sentence of paragraph [18] of the complainant's statement as evidence-in-chief.**
CATCHWORDS:	CRIMINAL LAW – WITNESSES – STATEMENTS OF CROWN WITNESSES – application for parts of the complainant's statement to not be lead in evidence-in-chief – whether evidence relating to witness's credit is permissible to be lead in evidence-in-chief – whether the statements are relevant to a fact in issue
CASES:	*R v Connolly* [1991] 2 Qd.R. 171.
COUNSEL:	M Andronicus for the respondent A Glynn KC for the applicant
SOLICITORS:	Office of the Director of Public Prosecutions for the respondent Robertson O'Gorman for the applicant

[1] The defendant seeks an order that the prosecution not be permitted to lead some evidence-in-chief from the complainant. The defendant's charged with one count of indecent treatment of a child under 16 in 1976. The complainant's now 62 and was in grade 11, aged either 15 or 16 at the time of the alleged offence. The defendant was her brother-in-law, eight years her senior.

[2] A complaint was made to the police in October 2019, and a formal statement as made in January 2020. The prosecution have agreed not to lead evidence of some matters in her statement; however, one remains contentious. After describing the indecent act occurring being digital vaginal penetration, the complainant said, in paragraph [18]:

> *I was in shock. I just froze. This was my brother-in-law. He had not long before married my sister.*

[3] At paragraph [19], the complainant goes on to say:

> *I remember I felt dirty and grubby about it. I got angry. I blamed myself.*

[4] The defendant objects to the prosecution leading paragraph [19]. Mr Glynn KC submits the evidence is irrelevant. Mr Andronicus for the prosecution submits the evidence is admissible as evidence of her contemporaneous emotional reaction to the alleged conduct, and that the evidence is relevant and admissible because it forms part of the *res gestae* of the offence. The prosecution doesn't rely on paragraph [19] as evidence of distressed condition.

[5] I'm of the view, asking the complainant witness about her own state of mind in this way in evidence-in-chief is inadmissible.

[6] Justice Thomas set out the relevant statement of principle in *R v Connolly* [1991] 2 Qd.R. 171. His Honour held at page 173:

> A habit has developed in both criminal and civil jurisdictions whereunder the caller of a witness has the witness state a fact and thereupon asks him to state his reasons for doing the act or to say why he remembers the fact, or to say something about his own state of mind at that moment. This is asked in the expectation that the witness will give a convincing reason and make it easier for the jury or judge to accept the stated fact. Such practices lengthen trials by spawning false issues. In most instances the evidence is quite inadmissible. Sometimes it leads to a miscarriage of justice. It is only when that witness's state of mind or purpose is relevant to the issues in a case that it may

> be led in chief, and then at best, except in rare instances, it is only the state of mind of a party that may be relevant in this way (e.g. *R. v. Masters* [1987] 2 Qd.R. 272, 274).
>
> Only facts in issue should be led in chief. A witness may not lift himself by his own bootstraps to enhance his credit. If the fact which he states is challenged by the adverse party then that will be made apparent during cross-examination. The witness's reasons for doing the act or his purpose in doing so may then quite properly be asked, because it may help to show whether he should be believed in relation to that particular fact (i.e. on the question of credit). But it is for the cross-examiner, not the party calling the witness, to raise matters that go to credit. When this happens it may be permissible in re-examination to adduce evidence of the witness's state of mind when he did the act or made the observation or statement. (R. v. Szach (1980) 23 S.A.S.R. 504, 513, 569 (F.C.); R. v. Nation [1954] S.A.S.R. 189; cf. Cross on Evidence (3rd Aust. ed.) para. 9.92. Unfortunately the practice of anticipation of such a challenge and the premature attempted rebuttal of the challenge has become widespread. The present case affords a good example why it should cease. *(my emphasis)*

[7] Justice Dowsett at page 180 said he entirely agreed with Thomas J's observations concerning the practice of preempting questions of credit. Kelly SPJ at 173 agreed with the reasons of Dowsett J.

[8] I uphold the objection to the prosecution leading the evidence in paragraph [19] as evidence-in-chief.

[9] Directly following this ruling, Mr Glynn KC made a further oral application that the prosecution does not lead paragraph [18] in evidence-in-chief. I further order that the prosecution not lead the third and fourth sentence of paragraph [18] as evidence-in-chief in reliance on *R v Connolly* [1991] 2 Qd.R.171.