SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCI (No 2)* [2018] QCA 141
PARTIES:	**R** **v** **MCI** (appellant)
FILE NO/S:	CA No 249 of 2017 DC No 773 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 19 October 2017 (Dearden DCJ)
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2018
JUDGES:	Fraser and Gotterson and Philippides JJA
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the appellant was originally tried for four counts of indecent treatment of a child under 12 under care and two counts of rape – where a jury found the appellant guilty of three counts of indecent treatment of a child under 12 under care and one count of rape and not guilty of one count of indecent treatment of a child under 12 under care and one count of rape – where the appellant successfully appealed and was retried on the four counts on which he was found guilty – where the complainant's evidence was that the offences all occurred during one episode in 2008 – where the complainant was absolutely positive she was wearing a particular dress on the day of the offences – where at the original trial the appellant's mother was called to give evidence that the dress was bought in late 2009 – where the appellant's mother was not called at the retrial – where the date range on the indictment was broadened at the retrial – where other witnesses gave evidence as to when the dress was bought – where the prosecutor expressed concerns about the reliability of the appellant's mother's evidence – whether the prosecution's failure to call the appellant's mother resulted in a miscarriage

of justice consistent with *R v Manning*

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was found guilty of four sexual offences and acquitted of two sexual offences against the same complainant at the original trial – where the appellant was re-tried in relation to the four counts of which he was found guilty – where the complainant's police interview was edited to remove all references to the two offences of which he was acquitted – where the appellant argues that the recording of the interview still included reference to one of the acquitted counts – where defence counsel did not object to the edited interview at the retrial – whether the contentious part of the edited interview is referable to the acquitted counts – whether a miscarriage of justice occurred due to the admission of evidence that related to an offence of which the applicant had previously been acquitted

CRIMINAL LAW – EVIDENCE – CREDIBILITY – PRIOR INCONSISTENT STATEMENTS – GENERALLY – where the appellant chose to give evidence – where the appellant was asked to listen to a recording which the prosecution did not identify to the jury – where the appellant was then asked whether he still adhered to his previous testimony – where the appellant disclosed details about the nature and content of the recording despite being told he was not required to do so – where the respondent argued the recording was not admissible in their case as it contained self-serving statements by the appellant – where the respondent contended the evidence went to credibility only – whether cross-examination on the recording resulted in the Crown splitting its case – whether this cross-examination led to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant argues the prosecutor relied on the evidence given in cross-examination as confessional evidence – where the trial judge did not give the jury directions about out of court confessions or statements against interest – whether a miscarriage of justice arose by the trial judge's failure to direct the jury in relation to the manner in which they could use the "damning admissions" the appellant was said to have made

Alister v The Queen (1984) 154 CLR 404; [1984] HCA 85, cited
R v Carroll (2002) 213 CLR 635; [2002] HCA 55, cited
R v Manning [2017] QCA 23, cited

R v MCI [2016] QCA 312, related
R v Soma (2003) 212 CLR 299; [2003] HCA 13, applied
R v Storey (1978) 140 CLR 364; [1978] HCA 39, cited
R v T, WA (2013) 118 SASR 382; [2014] SASCFC 3, cited
Sambasivan v Public Prosecutor, Federation of Malaya [1950] AC 458, cited
Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2006] 2 Qd R 145, cited

COUNSEL: J Robson for the appellant
The appellant represented himself
D Balic for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant has appealed against convictions at a re-trial of four child sex offences committed against his younger half-sister. The grounds of the appellant's appeal are:

> Ground 1: Failure of the Crown to call [M] which resulted in a miscarriage of justice, consistent with *R v Manning* [2017] QCA 23.
>
> Ground 2: A miscarriage of justice arose from the admission of evidence that was led in direct proof of count 4 when that evidence in fact related to an offence of which the applicant had previously been acquitted.
>
> Ground 3: A miscarriage of justice arose from the cross-examination of the appellant which led to the admission of evidence that was not led in the prosecution case.
>
> Ground 4: A miscarriage of justice arose because the trial judge failed to direct the jury, adequately or at all, in relation to the manner in which they could use "damning admissions" the appellant was said to have made.

[2] The appellant represented himself in the first ground of his appeal and he was represented by counsel in the remaining three grounds.

Ground 1: Failure of the Crown to call [M] which resulted in a miscarriage of justice, consistent with *R v Manning* [2017] QCA 23.

[3] The witnesses in the Crown case were the complainant, the complainant's stepfather (who married the complainant's and appellant's mother ("M") in November 2008), the complainant's sister, and a woman (G) (who started a relationship with the complainant's father around 2007) and five friends of the complainant (all of whom gave evidence of preliminary complaints by her). The only evidence of the offences came from the complainant. Upon her evidence the offences occurred during one episode. At the time of the alleged offences the appellant did not live in the complainant's home but he was the only adult present. The Crown case at the first

trial was that the six offences charged were committed between 1 January 2008 and 8 November 2008. Upon that range of dates, the complainant was six or seven years old at the time of the offences. At the re-trial, the period was enlarged for each of the four counts to between 1 January 2008 and 31 December 2009. The complainant was 12 years old when her first complaint was made and when she gave her video recorded account of the offending to police on 12 March 2012. (That recording was adduced in evidence at the first trial under s 93A of the *Evidence Act* 1977 (Qld). A version of it was adduced in evidence at the re-trial.) The complainant subsequently gave pre-recorded evidence. In brief evidence in chief she added a few details (including that the appellant got into the shower with her earlier on the day he committed the offences) but otherwise merely said that everything she told the police officer in the police interview was true. In the course of cross-examination defence counsel put to the complainant, and she denied, that she had made up her account of the offending. Amongst other matters, the complainant was cross-examined upon her statement in the police interview that she wore a particular floral dress on the day when the offences were committed. The complainant agreed that the floral dress was her favourite dress and she used to wear it almost every day. She denied the suggestion that she could not really be sure that she was wearing the dress on that day and agreed that she was absolutely positive that "on that date in 2008" she was wearing that dress.[1] The appellant gave evidence in which he denied all of the allegations made against him in the complainant's evidence.

[4] At the re-trial, defence counsel submitted that M should be called by the Crown to give evidence. The trial judge treated that as an application for the trial judge to indicate to the Crown that the witness should be called or for the Court to call the witness itself. The trial judge refused the application.

[5] The affidavit evidence before the trial judge suggested that M would give evidence that the floral dress described by the complainant was purchased in late 2009. If so, the complainant could not have been wearing it in 2008. In the Court's decision to order the re-trial McMeekin J observed of this inconsistency that if the evidence had some cogency the problem for the appellant was that the alleged offences were not fixed in time with any certainty, the complainant's evidence was fairly vague about that date, and if the recollection of the wearing of the floral dress had become a central issue to the integrity of the complainant's evidence the simple expedient was available to the prosecutor of amending the indictment to allege a range of dates that encompassed both the evidence about the purchase of the dress and the complainant's recollection of other parameters by which she fixed the possible date of the offence.[2] As I have indicated, the fresh indictment presented at the re-trial enlarged the dates for each of the four counts so that the period extended to 31 December 2009.

[6] The appellant referred the Court to affidavit evidence, including an affidavit by M, that the floral dress described by the complainant was bought in late 2009 for a particular photoshoot and argued that the Crown was obliged to call M to give evidence at the re-trial. The appellant acknowledged that at the re-trial the prosecutor expressed concerns about the reliability of the evidence that might be given by M. The appellant referred to authorities (including *R v Jensen*[3]) for the

---

1 Transcript 16 November 2015 at T1-11: Supplementary ARB 22 from previous appeal.
2 *R v MCI* [2016] QCA 312 at [93].
3 (2009) 23 VR 591 at 599 [59].

proposition that in some circumstances fairness to the accused may require a prosecutor or the Court to call a witness who is able to give evidence the jury may regard as highly significant, despite doubts about that witness's truthfulness and reliability. However, the appellant did not seek to identify any error in the exercise of the discretion by the trial judge to refuse defence counsel's application at the re-trial.

[7] The question for the Court is whether the Crown's failure to call M gave rise to a miscarriage of justice.[4] In considering that question it is relevant that at the re-trial the Crown adduced evidence from two other witnesses to the same effect as that to which M had deposed. Both the complainant's stepfather and her older sister gave evidence that the dress was purchased and used for a photoshoot in November 2009. The complainant's stepfather gave evidence that he and M purchased the dress specifically for the photoshoot. He identified a photograph taken at the photoshoot on 3 November 2009 by a professional company. In cross-examination he adhered to his evidence and gave more details about the purchase. The complainant's sister gave evidence in cross-examination that she knew that the dress was purchased specifically for that photoshoot because (as her stepfather also said in evidence) a dress was also purchased for her for the photoshoots. The prosecutor did not re-examine her upon that evidence. Another relevant circumstance is that, as the prosecutor submitted to the trial judge, at the first trial M made it clear that she had a very poor memory of the relevant events. (Amongst other disclaimers of the reliability of her memory, M said that her memory was "like a sieve".) In addition, the prosecutor told the trial judge that a result of a conference with M the prosecutor had formed the view that the evidence she would give was unreliable and unreasonable.[5]

[8] In these circumstances no miscarriage of justice arose as a result of the Crown's failure to call M to give evidence.

Ground 2: A miscarriage of justice arose from the admission of evidence that was led in direct proof of count 4 when that evidence in fact related to an offence of which the applicant had previously been acquitted.

[9] At the first trial, in addition to the appellant being charged with the four sexual offences upon which he was convicted and subsequently re-tried, he was charged with two sexual offences against the same complainant. The jury found him not guilty of those two offences. Ground 2 concerns the offence of rape in count 4 on the indictment at the re-trial, which had been charged as count (6) at the first trial. (In these reasons I have added parentheses around the count numbers on the indictment at the first trial.)

[10] The first three columns of the following table correlate the count numbers on the different indictments at the trial and re-trial, describe the offences indicted at the first trial, and identify those counts of the indictment upon which the appellant was acquitted. The fourth column describes the statement of the Crown case in the summing up by the trial judge at the first trial:

---

4 *R v Apostilides* (1984) 154 CLR 563 at 575.

5 Supplementary ARB 91; Transcript 16 October 2017 at T1-11: ARB 23.

Re-trial Count	**First trial Count**	**Offence**	**Crown case at the first trial**
1	(1)	Indecent treatment of a child under 12, under care	"[A]fter [the complainant] had a shower she was in the defendant's room lying down on his bed, and he came in, pulled her underwear down and … 'licked my VJJ.'"
	(2) NG	Indecent treatment of a child under 12, under care	"[T]he defendant wilfully and unlawfully exposed [the complainant] to an indecent picture." "[A]fter the defendant had licked her vagina she felt uncomfortable and sat up, and then the defendant showed her pictures on his computer of naked women and girls with no clothes on…"
2	(3)	Indecent treatment of a child under 12, under care	Indecent dealing. "[A]fter showing her the pictures the defendant pushed her back down again and licked her vagina again."
	(4) NG	Rape	"[A]fter licking her vagina again she sat up again, told the defendant she didn't want to do this, that he said, 'That's okay,' that he made her a promise about giving her $50, taking her and her friend to Dreamworld and giving her a packet of Oreos, and then … **'**He put his dick in my mouth.' **She described the defendant's penis probably reaching about a tooth before her last tooth.** And the elements of the offence of rape are set out there [in a document given to the jury]. That is, that the defendant penetrated the mouth of the complainant to any extent with his penis."
3	(5)	Indecent treatment of a child under 12, under care	"The defendant wilfully and unlawfully exposed [the complainant] to an indecent act by himself… [A]fter about a minute [of the allegation of count (4)] the defendant… "Pulled it out and then started, like, shaking his dick … holding his dick and then moving his hands up and down on his dick … He started to come".
4	(6)	Rape	"[T]he defendant then put his dick back in her mouth and … 'Comed'" "after which she said she pushed him away". The trial judge had

Re-trial Count	First trial Count	Offence	Crown case at the first trial
			previously observed that the relevant element of rape was that "the defendant penetrated the mouth of the complainant to any extent with his penis".

[11] At the re-trial, the prosecutor edited the recording of the complainant's police interview with a view to redacting references to statements relating only to the two counts (counts (2) and (4)) upon which the appellant was acquitted at the first trial. The prosecutor did not redact the passage in the complainant's police interview from which the trial judge at the first trial derived the statement relating to count (4) which is in bold type in the table. That passage is in bold type in the following extract from a transcript of the complainant's police interview, which also shows the redactions made for the re-trial:

> "[C][6] And my brother came in and told me to go have a shower, so, and then I asked him if I could finish off the game that I was playing and he said no, so, and then I just kept on, I ignored him and just kept on playing and then he turned the computer off, so I got up, went to go have my shower and then when I got out of the shower, I went back to my game and it saved U/I so I just turned the computer back on and then he told me to go into his room and I didn't know what for, so I did, and then he was in the kitchen getting a drink of water and then, I was just sitting on his bed waiting for him and then he came in and ~~then he showed me pictures~~ then he pulled my underwear down and then he said 'It's OK'. And then he licked my VJJ
>
> …
>
> [C] And put his downstairs in my mouth and comed and then, I ran out. I had another shower and then I ran to my, and then I went to my um, sisters friend's house and waited for her and I didn't want to tell anyone so I just told Sharna that I didn't want to stay home cause I was bored, so I haven't told anyone, U/I anyone that really because I didn't know how or I didn't know that I needed to, and then when I told my friend, Storm and Canada, Canada and Storm told the teacher and then it ended up here and…
>
> …
>
> [C] When I turned 8, actually I was probably about 7 because it happened a couple of months before my birthday, and I, when I, and on my birthday I turned 8 and I had my birthday at Centenary Lakes Park and me and my brother, we don't really get on well anymore. He's moved down to the Gold Coast with his girlfriend, U/I and now I live here and when I do, when I, he used to um, work, like, as, um, traffic holder thing,

---

6 The complainant.

and when he was off, he came down to Mums and, but I never stayed home alone with him ever again.

…

[C] And then he was like, well that's OK, ~~Just remember the pictures~~, and then he was like, oh, when we're done, I'll give you $50 and I'll take you and a friend to Dream World and I'll give you a packet of Oreo's.

[PO][7] Um hmm.

[C] And then he put his dick in my mouth.

[PO] Um hmm

[C] And comed…

…

[C] He, well, yeah, he pulled my pants down, then he licked for probably about 10 seconds and then I sat up, ~~and when I sat up he showed me the photo's~~, then he did it again and then I sat up.

…

[C] He put his penis in my mouth

…

[C] At that stage, I had tears running down my eyes and I was digging my nails into my arm

…

[C] At that stage, I felt really uncomfortable, I felt really sick and I just felt like killing myself.

…

[C] Er, that went on for about a minute and then he started to come and then I

…

[PO] You didn't pay attention, OK, you just know that it went into your mouth. Tell me how far did it, in your mouth did it go?

[C] Um, it didn't reach my thing thing at the back of my throat

[PO] OK, but tell me how far did it go in?

[C] Um, it probably reached, well my teeth are really weird and that, so it probably reached about a tooth before my last tooth

---

7 The interviewing police officer.

[PO] OK, and tell me once he put it into your mouth, tell me what happened then? What was he doing?

[C] He comed

[PO] OK. But before he came, come, tell me what was he doing? So his penis went into your mouth and then what, tell me what his actions were doing?

[C] And then, well since I was crying I, my eyes got really watery, I only saw a blur but

…

[PO] So he's come in, pulled your pants down, licked your vagina or VJJ for 10min, for 10 seconds, you were uncomfortable, ~~he's got up, got his computer~~

[C] ~~Yep~~

…

[PO] And then he's gone back down, for about a minute, you got up, when you got up, tell me what do you mean 'You got up'.

[C] Well, I sat up, I closed my legs, sat up and pushed him away

[PO] OK, pushed him away and then what did he do? U/I

[C] And then, he kept on telling me it was OK and that, and then he said about the Oreo's and Dream World and that

[PO] Yep, Yep

[C] ~~And then he said that, and then he put his penis in my mouth.~~

[PO] ~~OK, and tell me how long did that go on for?~~

[C] ~~Er that went on for about a minute~~

[PO] ~~A minute~~

[C] ~~He pulled it out and~~ then started like shaking his dick and then

[PO] Um hmm, tell me what do you mean by he was shaking his dick?

[C] I don't really know, just shaking it

[PO] OK, can you sort of, with your hand movements, just show me what do you mean by that?

[C] Umm

[PO] Like if you get your hands up here and just, what do you mean by shaking?

[C] Well he wasn't, he was getting his hands, holding his dick and then moving his hands up and down on his dick and then

[PO] OK. Yep

[C] He started to come

[PO] Yep

[C] Then he put his dick ~~back~~ in my mouth, comed and then I've pushed him away again

[PO] OK, so tell me that part where he come in your mouth, tell me what do you mean by that?

[C] Um, he comed in my mouth

[PO] But tell me what do you mean by 'comed'?

[C] Um, I don't get you

[PO] Ok, describe that bit where you said he come in your mouth. Describe what you were feeling at that stage.

[C] Oh um …I still had, I was still crying except this time I was like, actually crying U/I. U/I tears coming."

[12] The appellant argued that the "telling detail" about the extent of penetration in count (4) at the first trial was inadmissible at the re-trial because the appellant had been found not guilty by the jury of that count; that evidence, as it appeared in the edited recording of the police interview, appeared to be a description of the single act the subject of count 4 at the re-trial, whereas it in fact concerned only count (4) at the first trial, upon which the appellant had been acquitted. The appellant relied upon Lord McDermott's statement in *Sambasivan v Public Prosecutor, Federation of Malaya*[8] that a verdict of acquittal "is binding and conclusive in all subsequent proceedings between the parties to the adjudication", as well as having the effect that the person acquitted cannot be tried again for the same offence. The appellant also referred to *R v Storey*,[9] in which Mason J held that *Sambasivan* and *Garrett v The Queen*[10] established that "the principle of res judicata as applied in criminal proceedings will preclude the Crown from challenging the effect of a previous acquittal, not merely in proceedings for the same or a substantially similar offence, but also for proceedings for a different offence when evidence of the transaction the subject of the acquittal is sought to be relied upon"; and "… once a person is acquitted of an offence, the acquittal must be recognized fully and without qualification for all purposes in criminal proceedings". The appellant argued that the use at the re-trial of the "acquittal evidence" amounted to a miscarriage of justice.

[13] The respondent argued that in the police interview the complainant commenced by giving a general description of what she perceived to be a single episode of an alleged rape, so that her description of the extent of penetration should be regarded as being equally applicable to each of the separate rape offences she described in the last part of the quoted passage. If so, the evidence was admissible upon the basis that it described the offence charged in count 4 at the re-trial.

[14] A premise of the appellant's argument, that he was convicted of offending on the strength of evidence that related only to a count of which he had previously been acquitted, should not be accepted. Defence counsel did not object to the admission of the complainant's statement about the extent of penetration at the re-trial which the appellant now argues was inadmissible. That defence counsel did not do so is consistent with my interpretation of the complainant's recorded police interview that, if the contentious statement concerned count (4) at the first trial at all, it also concerned count (6) at the first trial (count 4 at the re-trial). That is suggested

---

8 [1950] AC 458 (PC) at 479.

9 (1978) 140 CLR 364 at 396-397.

10 (1977) 139 CLR 437 at 444-445.

particularly by the circumstance that in the context of the contentious statement the complainant referred to the appellant ejaculating, which related only to the latter count. It follows that the contentious statement was relevant as part of the proof of count 4 at the re-trial. For the same reason, the contentious statement was not rendered inadmissible at the re-trial merely because in summing up to the jury at the first trial the trial judge referred to it as part of the factual basis of count (4) and the jury acquitted on that count. Furthermore, the absence of any reference to the contentious statement in the part of the summing up at the first trial concerning count (6) (count 4 at the re-trial) is not equivalent to a ruling by that trial judge or a decision by the jury that the evidence did not describe the event charged in that count.

[15] The contentious evidence was not adduced at the re-trial as evidence that, contrary to the acquittal on count (4) at the first trial, the appellant was guilty of that count. The prosecutor's redactions of the recorded interview omitted the complainant's evidence that related only to count (4) at the first trial, with the result that the contentious statement was made to seem referable only to the event charged as count 4 at the re-trial. For that reason the evidence adduced at the re-trial did not wear the appearance of "evidence of the transaction the subject of the acquittal".[11]

[16] If the complainant's statement about the extent of penetration were thought to describe what occurred in both count (4) at the first trial and count 4 at the retrial (rather than describing only what occurred in count 4 at the re-trial, which is an available view of the complainant's evidence) an incidental effect of the contentious evidence, if accepted by the jury, is that it raised a possibility that the acquittal of count (4) at the first trial was a mistake. But in *R v Carroll*[12] Gleeson CJ and Hayne J observed that, "[f]inality of a verdict of acquittal does not necessarily prevent the institution of proceedings, or the tender of evidence, which might have the incidental effect of casting doubt upon, or even demonstrating the error of, an earlier decision." Their Honours referred, as examples, to cases in which similar fact evidence is adduced at a trial even though the accused had been acquitted of an offence said to be constituted by that conduct. (Gaudron and Gummow JJ also referred to authorities in which such evidence had been admitted, although they did not express a view about that aspect of the law.[13])

[17] I have indicated that the circumstance that at the re-trial the contentious statement seemed referable only to the event charged as count 4 was the result of redacting all references to count (4). It is not clear from the transcript of the re-trial when defence counsel first became aware that the contentious statement had not been redacted, but it seems that it must at least have been before the trial judge summed up, when the prosecutor explained that the transcript "was edited in such a way as to allow [the complainant] to give a description of what she meant by putting his penis in her mouth, and how far in and so on …".[14] An alternative to redacting the complainant's recorded interview to make that part of the evidence appear as though it related only to count 4 at the re-trial was for the trial judge to have allowed the whole of the recorded interview to be adduced and to have directed the jury that the appellant was to be given the full benefit of the acquittals. (In *R v Storey*[15] Mason J observed that in some cases, of which *Storey* was an example, "the exclusion of a part of the testimony of a material witness in deference to the principle of res

---

11 *R v Storey* (1978) 140 CLR 364 at 396.
12 (2002) 213 CLR 635 at 651 [50].
13 (2002) 213 CLR 635 at 663 [94].
14 Transcript 18 October 2017 at T3-6.
15 (1978) 140 CLR 364 at 396-397.

judicata would render the balance of the witness' testimony so incomplete and artificial as to provoke dangerous speculation on the part of the jury"; and in such a case it is preferable that the evidence should be led and "precise instructions should be given to the jury as to the use to which that evidence can be put" provided that does not work an injustice to the accused.) But the prosecutor and, inferentially, defence counsel preferred to redact all references to evidence relating only to the counts upon which the appellant was acquitted at the first trial. The appellant did not argue that the failure to adopt the alternative approach prejudiced the appellant at the re-trial.

[18] Ground 2 is not established.

Ground 3: A miscarriage of justice arose from the cross-examination of the appellant which led to the admission of evidence that was not led in the prosecution case.

[19] One of the details which the complainant added to her police interview when she gave her pre-recorded evidence was her statement that, after she had watched the recording of her police interview, she remembered that when she had a shower, the appellant got into the shower with her and nothing had happened. She said that after she finished showering, she returned to her computer game and it was after that that the appellant did things to her on a bed. In cross-examination defence counsel put to the complainant that she had made up her story, but he did not ask any question that was specifically directed to her evidence that the appellant had got into the shower with her. Early in the appellant's evidence in chief he denied that he ever had a shower with the complainant. Ground 3 concerns the prosecutor's cross-examination upon that denial.

[20] Ground 3 invokes the principle that, as a general rule, "the prosecution must offer all its proofs during the progress of its case".[16] *R v Soma*[17] confirmed that the general rule applies in relation to a statement in which an accused makes an admission (rather than only self-serving denials[18]) which would be admissible in the Crown case but which is sought to be admitted after the close of the Crown case pursuant to s 18 of the *Evidence Act* 1977 (Qld) as a statement which is inconsistent with evidence given by the accused in his own defence. The appellant argued that the general rule was contravened in this case by the cross-examination of the accused by the prosecutor in relation to a prior statement given by the accused to G. The prior statement was contained in an audio recording of a pretext telephone call. At the first trial, the prosecutor made it clear that the evidence of the pretext call would not be adduced in the Crown case because it was self-serving and therefore inadmissible. The prosecutor at the re-trial did not seek to depart from that concession. Consistently with that concession the prosecutor did not seek to adduce the recording in the Crown case.

[21] In the recording of the pretext call the appellant spoke of the only thing he could think of, being that his siblings when they were younger would "all jump in the shower with him". This information was volunteered when the appellant was pressed about "why would she lie?" and "why would she come out with this all of a sudden?" (I note that the appellant submitted that the recording might have been ruled inadmissible if sought to be tendered because it infringed the rule in *Palmer v*

---

16 *R v Soma* (2003) 212 CLR 299 at 311 [36].
17 (2003) 212 CLR 299 at 308-312 [27]-[40].
18 (2003) 212 CLR 299 at 309 [30].

The Queen[19] but the appellant did not ask this Court to rule that the recording was inadmissible upon that basis or develop any argument upon that point.)

[22] In cross-examination of the appellant, the prosecutor asked the appellant to listen through headphones to a recording which could not be heard by others in the Court room. After the appellant had listened to the recording, the prosecutor asked the appellant to say, without saying what was on that recording, whether he recognised the voices he had heard.[20] The appellant said that he did. The following exchange occurred:

> "Having heard that, do you still say on your oath that [the complainant] would never jump in the shower with you?---No, I don't say that. However, the – it – I'm just trying to think. Ba – basically, in this recording, I've said that there's a - - -
>
> Well – so you don't have to say what was in the recording if you don't want to, but you may if you like?---I – I think the wording I used before, whilst honest, was inappropriate in the sense that I used the wrong words.
>
> Before, in your evidence?---Yes.
>
> When you denied that [the complainant] had ever jumped in the shower with you?---Yes. That – that's still my honest opinion and hon – honest truth."

[23] The prosecutor cross-examined further:

> "Well, in what way is it inaccurate?---It's inaccurate in the sense that the pretext call that I just listened to, I mentioned to [G], who had called me to see if I'd raped [the complainant] – which I denied. And I was bewildered – I'd – obviously just having these allegations put towards. So I said potentially that I had had showers with all three siblings: [the complainant, her younger brother, and her older sister]. But – and in that pretext, I said, yeah, nothing sexual or anything. So my evidence earlier with you saying had they jumped in with me – I stand by that. However, the wording that I used in that was, "They jumped in with me." So it – it's – yeah.
>
> Well, aren't accepting that that did happen, then?---I thi – I believe it's more in the sense – I'm trying to think. Like, as a – as a parent, now - - -
>
> Well – no, no, no. No. What I'm asking you about is whether it was true that [the complainant] had jumped in the shower with you, and whether you're now accepting that that did happen?---I don't accept that she jumped in the shower with me. No.
>
> Well, did the two of you ever end up in the shower together, [the appellant]?---No. I think the more appropriate wording that I was looking for at the time of the pretext – and what I'm looking for now – is when she – when all three were infants, and in that caring

---

19 (1998) 193 CLR 1, as applied in *R v SAP* (2005) 155 A Crim R 291 at [14], [29].

20 Transcript 17 October 2017 at T2-50.

> position, I would, you know – well, prior to them being able to them being able to do it themselves, wash them.
>
> By being in the shower with them?---No."

[24] The prosecutor asked further questions about the appellant's evidence concerning showering with the complainant. The appellant referred to occasions when she was an infant. In the course of the cross-examination, which in total occupies about five pages in transcript form, the appellant denied that he got into the shower with the complainant or she got into the shower with him. The cross-examination included the following:-

> "Well, you were talking in the recording about showering, weren't you?---As I said, I just got a allegation put towards me, and I was also on night shift at the time, so I was half asleep. So my wording was – yeah.
>
> …
>
> So, when I asked you that, just a minute ago, after listening to the recording – I asked that same question I just asked you then, "Do you still say on your oath [the complainant] never jumped in the shower?" and you said, "Well, what I – I was being honest but inaccurate in what I said before"?---Inaccurate, because, like – I mentioned that earlier, the baby bath and stuff like that.
>
> …
>
> Well, why was it – why is it that – why do you say, after listening to the recording, that it was wrong to say that – you were wrong to say that [the complainant] never jumped in the shower with you, or that it was inaccurate, if you're now saying that it was true, and she never did?---It's wrong in that I said in the pre-record that, you know, in or out – if I jump in with her or if she jumps in with me, all these different variations of what I see as the same thing – that's where I'm saying the inaccuracy is. I'm standing by what I've said on oath and affirmation today, that I have not got into the same shower or bath as her. So for me to bath her as an infant, I'd be standing outside, fully clothed
>
> …
>
> Well – so why would you then admit her jumping in the shower with you?---I – I –look, I don't know how many times I need to say this. Yes, I'm still on the stand. I get that. But I'm saying what I'm saying. Whether that's coming across or not, I don't know. Maybe I need a translator here. Maybe I need to write it out. I don't know.
>
> …
>
> Why did you admit [the complainant] jumped in the shower with you?---I do apologise.
>
> Why did you admit [the complainant] jumped in the shower with you?---On the pretext or - - -

> In the recording you heard?---Well, (1) I'd just been told by [G] that I allegedly raped my sister. So – shock, bewilderment – you know, all those – disgust – emotions that go through you. Secondly, I was a night-shift worker. I'd – I'd lit – I was not thinking cognitively."

[25] The appellant also said in cross-examination that when he admitted that the complainant jumped into the shower with him he did not know that getting into the shower with her was alleged on the day the appellant assaulted her.

[26] A disk containing audio of the pretext phone call was marked as an exhibit for identification but the disk was not admitted into evidence or provided to the jury. The appellant's argument that the cross-examination of the appellant resulted in the Crown case being split is based upon the contention that the prosecutor's questioning impermissibly produced testimonial evidence of a confession that, if admissible, was admissible as part of the Crown case.

[27] The Crown did not split its case. The recording of the pretext call was inadmissible in the Crown case because, as the prosecutor conceded at the first trial, it comprised self-serving statements by the appellant. The complainant explained in her own evidence in chief that nothing had happened in the shower and at the re-trial, as at the first trial, the prosecutor did not seek to rely upon the appellant's recorded statement in the pretext phone call about his siblings jumping into the shower with him when they were younger as an inculpatory statement. The Crown did not split its case merely by the prosecutor cross-examining the appellant upon his own evidence as to credit.[21]

[28] The appellant argued that doubts had been raised about the legitimacy of the prosecutor's initial question in this passage of cross-examination,[22] but the appellant appropriately acknowledged that there were academic opinions[23] and judicial statements[24] supporting the prosecutor's initial approach of playing the recording, without identifying it, and asking the appellant whether he adhered to his previous testimony. The appellant also argued that the procedure was arguably unfair because the implication from the appellant being given headphones to listen to a recording whilst in the witness box was that the recording contradicted his assertion that he did not shower with the complainant. It was also submitted that the prosecutor overstepped the limits stated in cases approving the procedure by inviting the appellant to disclose the content of the recording and cross-examining him about its details.

[29] There is a considerable body of authority which supports the admissibility of a question in cross-examination asking whether a witness adheres to previous testimony after reading a document produced to the witness by the cross-examiner. That has been approved even in relation to cases in which the document is not admissible in evidence, but the rule is subject to the qualification that the author of the document and its content must not be disclosed to the witness. In addition to the

---

21 See *R v Naharni* [2006] QCA 488 at [39]-[41].

22 *R v Hawes* (1994) 35 NSWLR 294 particularly at 302-303; and *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2006] 2 Qd R 145.

23 M H McHugh QC (as his Honour then was) "Cross Examination on Documents" (1985) 1 *Aust Bar Rev* 51 at 53-56, but cf 72 to 73; and D K Malcolm QC (as his Honour then was) "Cross-Examination on Documents" (1986) 2 *Aust Bar Rev* 267 at 273-274.

24 *R v Orton* [1922] VLR 469; *R v Bedington* [1970] Qd R 353 at 359-360; *R v Langer* [1972] VR 973 at 982; *R v Trotter* (1982) 7 A Crim R 8 at 22; *Alister v The Queen* (1984) 154 CLR 404 at 442-443 and cases cited therein; and also see *R v Soma* (2003) 212 CLR 299 at 307 [23].

cases cited by the appellant's counsel I would refer to *R v T, WA*,[25] a decision of the Court of Criminal Appeal of the Supreme Court of South Australia, as an example of a recent case affirming the rule. The appellant did not invite the Court to reconsider the validity of the rule. I would be disinclined to do so because of the long pedigree of the rule and its approval by two members of the High Court in *Alister v The Queen*[26] and four members of the High Court in *R v Soma*.[27] In the latter case, in the context of a discussion of the statutory provisions concerning prior inconsistent statements Gleeson CJ, Gummow, Kirby and Hayne JJ observed that, "The cross-examiner could have handed the witness a transcript of the interview, asked him to read it himself, and then asked whether the witness adhered to his earlier testimony."[28]

[30] The criticisms of this procedure mentioned by Chesterman J in *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*[29] and Hunt CJ at CL in *R v Hawes*[30] focussed upon the application of the rule to a case in which counsel sought to cross-examine a witness by reference to a statement of another witness or a document prepared by someone else. That is not this case. In my opinion the prosecutor's first question was admissible. When the appellant started to volunteer what was in the recording defence counsel did not object, but the prosecutor fairly informed the appellant that he did not have to say what was in the recording if he did not want to but could do so if he liked. If the appellant had adhered to the evidence he had given and the prosecutor had then sought to comply with the requirements for admission of a prior inconsistent statement different questions would have arisen, but the appellant made it plain in his first answer that he did not adhere to his previous evidence. The prosecutor was then entitled to cross-examine the appellant as to credit and upon his departure from his previous evidence. That is what the prosecutor did.

[31] The prosecutor did not travel beyond the qualifications upon the rule under which he asked the initial question. The prosecutor did not identify the author or content of the recording. But despite the prosecutor having told the appellant that he did not have to say what was in the recording, the appellant volunteered that it was a pretext call in which he had denied he had raped the complainant or done anything sexual, he potentially had showers with all three siblings, and he had said in the pretext call that they "jumped in [the shower]" with the appellant. It was only after the appellant had given that evidence that the prosecutor asked questions with reference to the statements in the recording the appellant volunteered that he had made. Those questions merely substantially restated evidence the appellant had given.

[32] It is now a commonplace occurrence for people to listen to recordings through headphones in public places. I do not accept the submission for the appellant that the mere adoption of the procedure under which the appellant was given a headphone to listen to a recording created material prejudice for the appellant. If there was any form of unfairness capable of judicial correction in a criminal trial, defence counsel (who had appeared in the first trial and presumably knew what was in the recording played to the appellant) could have objected and asked the trial judge to

---

25 (2013) 118 SASR 382 (Kourakis CJ, Vanstone and Anderson JJ).
26 (1984) 154 CLR 404 at 442-443 (Wilson and Dawson JJ).
27 (2003) 212 CLR 299 at [23] 307.
28 *R v Soma* (2003) 212 CLR 299 at 307 [23].
29 [2006] 2 Qd R 145.
30 (1994) 35 NSWLR 294 at 302-303.

intervene. In the absence of any such objection it should not be inferred that any such unfairness did arise.

Ground 4: A miscarriage of justice arose because the trial judge failed to direct the jury, adequately or at all, in relation to the manner in which they could use "damning admissions" the appellant was said to have made.

[33] The appellant argued that the prosecutor inappropriately relied upon the evidence adduced in cross-examination of the appellant in relation to the recording as confessional evidence and that the trial judge wrongly gave to the prosecution arguments about that evidence "a weight and a dignity and importance"[31] which they otherwise would not have had. The appellant argued that the jury instead should have been directed not to use the "damning admissions", unless the jury was satisfied that the admissions were made and were truthful and accurate.[32] The appellant also submitted that the extent of the cross-examination and the arguments advanced by the Crown prosecutor enhanced a need for the jury to be appropriately directed. Reference was made to a section of the Supreme and District Courts Bench Book concerning "Out-of-Court Confessional Statements". It was insufficient, the appellant submitted, for the trial judge simply to remind the jury of the rival contentions about the evidence. The appellant also referred to submissions by the Crown prosecutor to the effect that the appellant admitted having got into the shower with the complainant before the appellant knew that that was part of the complainant's allegation. The appellant argued that the prosecutor's submissions conveyed that the suggested admission revealed a consciousness of guilt by the appellant. It was also submitted that the evidence given by the appellant did not allow for a submission that the appellant had admitted getting into the shower with the complainant. The suggested flaw was said to be exacerbated by the trial judge mentioning in the summing up that the appellant claimed that "he just got in the shower [with the complainant]" when the appellant was confronted with the allegation.[33]

[34] The appellant's argument is largely based upon the premise that the prosecutor relied upon the evidence as an admission that he committed one of the charged offences. That is not the effect of the prosecutor's submissions. The prosecutor did refer to the appellant's admission that he had showered with the complainant as a "damning admission", but that was in the context of a submission that the appellant sought to get away from the admission and that the jury could consider whether there was an inconsistency between the appellant's initial denials in the witness box and what he subsequently admitted; the prosecutor submitted that the appellant's explanation for those inconsistencies was "thoroughly unconvincing".[34] The prosecutor went on to refer to the appellant's denial of the complainant's evidence that the appellant had showered with the complainant, the appellant's evidence that he denied the allegations of sexual abuse in the conversation with G, and the appellant's evidence in cross-examination that he did not adhere to his earlier evidence that the complainant would never jump in the shower with him. The prosecutor then criticised some answers given by the appellant in cross-examination in ways that might affect the appellant's credibility. The conclusion urged by the prosecutor was that the jury might think that the appellant's explanations for his previous admissions

---

31 *R v Giffin* [1971] Qd R 12 at 17.
32 *Burns v The Queen* (1975) 132 CLR 258.
33 Summing Up 18 October 2017 at p 22 L18-21.
34 Prosecutor's Address 18 October 2017 at T1-25.

were "thoroughly unconvincing" and "really left his credibility in shreds".[35] The prosecutor then suggested to the jury that they would be "most comfortable just absolutely putting his self-serving evidence to one side, and then you'd come back to [the complainant]'s evidence, and you'd decide whether her evidence convinces you of the charges beyond reasonable doubt." The prosecutor's submission throughout was directed to the credibility of the appellant's evidence. In the context of the prosecutor's submission, the jury would not have understood the prosecutor's reference to a "damning admission" as a submission that the appellant had admitted any element of the offences alleged against him.

[35] The trial judge did not endorse the prosecutor's argument but merely summarised it in the course of referring to the competing submissions by counsel. In particular, the trial judge's reference to the prosecutor's relevant submission, that when the appellant was confronted by G with the sexual assault allegation the appellant responded that he had just got in the shower with the complainant, immediately followed a summary of the prosecutor's submission that the appellant had been thoroughly unconvincing in his explanation for his admission to G that he had showered with the complainant. And the trial judge immediately afterwards summarised the prosecutor's submission that the jury would put the appellant's evidence to one side, assess the complainant's evidence and then would be satisfied of her evidence beyond reasonable doubt. The trial judge appropriately conveyed to the jury that the effect of the prosecutor's submission concerned the credibility of the appellant's evidence denying the offences alleged against him.

[36] The trial judge gave the jury conventional directions that the final addresses were not evidence but arguments which a jury might take into account in evaluating the evidence, the fact that the appellant had given evidence did not mean that he assumed the responsibility of proving his innocence, the burden of proof had not shifted to him, a criminal trial did not involve the jury making a choice between the evidence of the prosecution and the evidence of the appellant, the correct approach was that the prosecution case depended upon the jury accepting the evidence of the prosecution's witnesses as being true and accurate beyond reasonable doubt despite the sworn evidence of the appellant, and the jury did not have to believe that the appellant was telling the truth before he was entitled to be found not guilty. After elaborating upon those directions and giving directions about the need for separate verdicts for each charge, the trial judge instructed the jury to scrutinise the evidence of the complainant with great care before arriving at a conclusion of guilt.

[37] It was not necessary or appropriate for the trial judge to give the jury the directions about out of court confessions or statements against interest when no issue about that had been raised. That no such directions were necessary is also suggested by the absence of any request for such a direction by defence counsel.

[38] No miscarriage of justice arose because of the trial judge's failure to give directions about the manner in which the jury could use the relevant evidence.

Proposed Orders

[39] I would dismiss the appeal.

---

35 Prosecution's Address 18 October 2017 at T1-30.

[40] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[41] **PHILIPPIDES JA:** I agree for the reasons stated by Fraser JA that the appeal should be dismissed.