SUPREME COURT OF QUEENSLAND

CITATION:	*R v Downes* [2018] QCA 206
PARTIES:	**R** **v** **DOWNES, Allen John** (appellant)
FILE NO/S:	CA No 223 of 2017 DC No 207 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 28 August 2017 (Chief Judge O'Brien)
DELIVERED ON:	4 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2018
JUDGES:	Fraser and Morrison JJA and Boddice J
ORDERS:	**1. Refuse the appellant's application for leave to adduce evidence in the appeal.** **2. Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of one count of wilfully exposing a child under 16 to an indecent film and one count of indecently dealing with a child under 16 – where the appellant argued that the considerable delay between the alleged offending and the first opportunity to investigate the allegations, and the inconsistencies between the complainant's evidence and the preliminary complaint evidence made the guilty verdicts unreasonable – where a key issue was identification of the offender – where the preliminary complaint evidence of identification was inconsistent regarding the complainant's knowledge of the offender's name – where there were inconsistencies between the preliminary complaint accounts of the offending conduct – whether the inconsistencies in the evidence rendered the guilty verdicts unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUND OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the complainant made a

preliminary complaint to a police officer – where the police officer took notes of the conversation and generated a report as a result of these notes – where the complainant did not proceed with the complaint at that time – where the police officer gave evidence at the trial of his conversation with the complainant – where the primary judge determined that the report was not admissible – where the appellant argued that the report provided evidence adverse to the Crown case concerning the complainant's reliability and a potential misidentification of the appellant as the offender – where the appellant could not identify any basis upon which the report was admissible – where the ground of appeal was inconsistent with the way defence counsel conducted the trial – whether a miscarriage of justice occurred by the primary judge's refusal to admit the report – whether leave should be granted to admit the report as new evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the primary judge gave the jury a *Robinson* direction – where the primary judge did not draw the jury's attention to particular features of the evidence that gave rise to a need for the warning, in particular the inconsistencies between the complainant's evidence and preliminary complaint evidence – where the primary judge highlighted these inconsistencies earlier in the summing up – whether there was a miscarriage of justice by the primary judge failing to give an adequate warning to the jury about the complainant's evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where the appellant argued there was a miscarriage of justice by the failure to lead evidence, other than from the appellant, about the timing of renovations to the appellant's house – where the renovations were relevant because they arguably contradicted parts of the complainant's evidence – where the witness was the appellant's neighbour and was called at trial to give good character evidence but was not asked to give evidence about the timing of the renovations – whether a miscarriage of justice occurred by the failure to elucidate further evidence from the character witness – whether leave should be granted to adduce further evidence from the character witness

Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, applied
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v Nguyen [2013] QCA 133, distinguished
R v Thaiday [2009] QCA 27, distinguished
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42,

cited

COUNSEL: S Lewis with K McMahon for the appellant
D Nardone for the respondent

SOLICITORS: Go to Court Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On the sixth day of a trial in the District Court in August 2017, the appellant was found guilty of two offences committed between 31 December 1998 and 1 August 2000: wilfully exposing a child under 16 years to an indecent film (count 1) and indecently dealing with a child under 16 years (count 2). The appellant has appealed against his convictions.

[2] The Crown case depended upon the evidence of the complainant. The complainant gave evidence that on one occasion at the appellant's home the appellant showed him a pornographic film and masturbated the complainant's penis. In addition, the prosecutor adduced evidence of complaints by the complainant to eight people, each of whom gave evidence: the complainant's brother, mother, and father, a general practitioner, a psychologist who the complainant described as a counsellor, another psychologist, a work friend, and a police officer to whom the complainant spoke in 2011. The arresting police officer gave some uncontentious evidence. The appellant gave evidence in which he acknowledged that he had met the complainant but denied that the complainant had ever been in his home. The appellant denied that he had done any of the acts alleged by the complainant. Two witnesses gave character evidence favourable to the appellant.

[3] Because one of the four grounds of appeal is that the verdict of the jury was unreasonable, I will first summarise the evidence at the trial.

The complainant's evidence

[4] The complainant was aged between 12 and 13 years old in the period when the offences were alleged to have occurred. He said that his family moved to the Sunshine Coast at the beginning of 1999, which was the year in which the complainant commenced grade 8 at school. He often went fishing at the Mooloolaba boat ramp, either by himself or with his brother (who is a year younger).

[5] On an occasion when the complainant was fishing alone at the boat ramp he spoke to a man who said that his name was Allen. The complainant described Allen as being probably about 40, with "sort of grey, scruffy hair", and wearing stubby pants and nothing on his feet. He drove a Toyota Landcruiser, a four wheel drive vehicle, in which quite a few people could fit in the back.

[6] During the complainant's grade 8 year, Allen sometimes drove the complainant to places to fish. That happened every now and again. On one occasion Allen took him to a beach to go bodyboarding. Allen once took the complainant to markets at a road the complainant named, where Allen's mother had a stall. The complainant said that the appellant told him that he had a boat at Tin Can Bay (where the complainant had never been) and the complainant knew that the appellant crabbed and would have sold the crab.

[7] Allen took the complainant back to his place on two occasions. On one occasion Allen's mother was also there. On the other occasion the complainant and Allen watched the movie "Jaws". Not long after watching that movie, Allen put on a pornographic movie (count 1). During a sex scene in that movie Allen rubbed the complainant's leg, looked at him, smiled, and asked him if he was getting an erection. The complainant did not know what was going on and said nothing in response. After the pornographic movie had been on for about ten minutes, Allen took the complainant into his bedroom. Allen put the complainant onto his bed, told him to relax, pulled his pants and underwear down, and started trying to masturbate the complainant with his hands (count 2). The complainant's penis did not become erect and Allen stopped after about five minutes. The complainant could not recall any other conversation apart from Allen saying to just relax.

[8] In cross-examination the complainant remembered that after the movie the offender took him into the bedroom. He did not know where the bedroom was or whose bedroom it was. He remembered it was quite large. The complainant rejected a suggestion that it was not the appellant who was the person responsible for sexually offending against him by showing him the pornographic movie and masturbating him as he had described in evidence. The complainant said that the appellant was the man who showed him the pornographic movie and masturbated him.

[9] That was the worst of the interactions between the complainant and Allen. On other occasions, when they were driving, Allen rubbed the complainant's upper right thigh, smiling at him when he was doing it and asking the complainant if he was getting an erection. Allen sometimes said other inappropriate things to the complainant. When asked whether those occasions were before or after the occasion at the house, the complainant said that it was "one big blur" and he did not know. Subsequently the complainant said that he felt that he didn't see Allen again after leaving his house. The complainant lived in the house near the boat ramp for about a year. After his family moved to a different area, the complainant felt that everything had stopped. In cross-examination, the complainant said he was pretty certain that after the occasion at the house he had no further contact with the offender. He was pretty certain about that because they moved after a year and the complainant had stopped fishing and going to the boat ramp. Subsequently, he agreed that he remembered going go-kart racing with Allen. He could not remember if that was before or after the Jaws movie.

[10] The complainant did not speak to anybody about what had happened until in his early twenties. It all became too much for him to deal with at that time. He broke down and told his brother what had happened with the man he used to go fishing with. The complainant told his brother that the man used to drive him around and touch his legs, the man took him back to his house and masturbated him, and the man used to do "stuff like that". The complainant was pretty sure he told his brother what happened. The complainant was pretty emotional when telling him. (It is not clear whether the reference to telling "him" was to telling his brother or to telling Dr Bown.) In cross-examination the complainant remembered telling his brother about the touching and the rubbing and when the appellant took him back to his place. He was "[p]retty sure I did run it through him … I would have ran through what he did to me." He definitely told his brother that it was the guy he went fishing with.

[11] The complainant spoke to his mother straight away after speaking to his brother. The complainant told his mother what had happened, but probably not "in full detail". He remembered saying that it was the guy that he went fishing with and he was "pretty certain it was Allen". (In cross-examination the complainant said, when asked whether he used the name of the offender, that he "may have used the name. Yes. I say yes.") The complainant's mother then took him to her doctor, Dr Bown. The complainant was "pretty sure" that he told Dr Bown what happened in detail. After that the complainant went to his mother's counsellor, Ms Auguston; the complainant went through everything with her. They spoke during a period of probably two or three years when the complainant was in his early to mid-twenties. Subsequently the complainant spoke to another psychologist, Ms Horan; the complainant was pretty sure that he went into full detail with her. The complainant also spoke with a work friend, Mr Bennett, but did not tell him the full detail. The complainant could not recall the specifics of what he told Mr Bennett.

[12] Some years afterwards – the complainant could not remember exactly what year – the complainant saw Allen driving a white Commodore at a shop the complainant named. As a result the complainant contacted police. He subsequently spoke by telephone with a police investigator. The complainant did not tell the investigator the details of what happened. The investigator explained to him what the process was. The investigator said the complainant would have to write out a statement and hand it in. The complainant started to write down the details of what had happened to him. He did not go through with it and threw out the piece of paper. The investigator explained to the complainant that it was sometimes a lengthy process and some people weren't strong enough to do it. That was when the complainant backed out of it. In cross-examination the complainant said he thought that he had spoken to that police investigator about five or six years ago. The complainant did not give the name of the offender to the police investigator. The complainant denied that he did not then know the name of the offender. The complainant did not then know the address of the offender. He disagreed that one of the reasons why his statement to the police investigator did not proceed was because he did not know the name and address of the offender. If the investigator had wanted the name of the offender the complainant would have given it but the investigator was "more explaining to me the process of what I needed to do, not actually writing the statement". The complainant could not remember the exact details that he had told the investigator but it was the Child Abuse Unit so the investigator knew it was a sexual abuse claim. The complainant was pretty sure that he gave the police investigator the registration details of the Commodore.

[13] A couple of years before giving evidence, the complainant saw Allen again. When the complainant was driving along a street (which was proved to be the street in which the appellant resided) the complainant saw Allen walking towards him. Allen was pushing his mother in a wheelchair. The complainant recognised Allen straight away. He drove around the block. He remembered a curved part of the street as being where Allen had taken him to his house. The complainant saw the white Commodore which he had seen years earlier at the shop. The car was parked in the garage at a house the complainant recognised as being Allen's house.

[14] The complainant was shown photographs of a road and house dated April 2017. In addition to showing the house being on a bend of the road which the complainant said he had recognised as being where Allen's house was, the photographs show a driveway into what, from a little distance, appears to be a garage. The

photographs taken closer to the house indicate that what appeared to be an enclosed garage has a glass front, including what appear to be sliding doors. Between that and the boundary fence there is a carport with a concrete floor and a roof. The complainant said the photographs showed what looked like Allen's house. He referred to "the garage". In cross-examination the complainant said that on the occasion when the appellant's mother was at the house the appellant showed him fishing rods stacked on the wall in the garage. He remembered the garage being straight away past the fence at the front of the house as you walked in. It was the not the open area in front of the house. It was enclosed. He remembered it being old and spacious. He did not remember where the door was or what it was like. He couldn't say whether he got into the garage from the front of the house or whether he had to go into the garage. The complainant said that the roller door "would have been up and I would have walked into the garage and that would have been also another way to get into the house." He did not remember if there was a car in the garage but he agreed that you would be able to put a car in it. When the complainant was referred to the photographs to identify the entrance to the garage, he said that it looked "kind of funny" and the doors looked "more like sliding doors", but it was "definitely a garage". He could not quite see that but assumed that there would have been a garage through the doors. Looking at the photograph now he could not see how he went into the house into the garage. When asked whether he was sure that there was a garage in front of the house where the sexual offending happened he said, "Not 100 per cent sure, but I knew that there was a garage … [the photograph] [m]akes me question myself, yes. But there was definitely a garage."

[15] As a result of the complainant seeing Allen and his house he went to police. He provided the police with Allen's name and the name of the street in which he lived.

[16] In cross-examination the complainant agreed that in his formal statement to the arresting police officer he disclosed everything that had happened to him. That statement was prepared in mid-July 2015 and he had not given any other police statement. The complainant agreed that he would not have said anything different or extra to the psychologists or the doctors or the police investigator the complainant had spoken to earlier.

[17] On the occasion when the complainant went to Allen's house and met Allen's mother, Allen showed the complainant Allen's fishing gear in the garage. The complainant described the Landcruiser that Allen drove as having back seats on the side of the car in addition to the driver's and passenger's front seats. The entry to the back seats was through the door at the back of the vehicle. The complainant was not 100 per cent sure that the Landcruiser had seats in the back. He knew that it was big and that those styles of utes had seats on the side but he could not fully remember if the seats were down the side. The complainant was shown a photograph of a boat and asked whether it looked like the tinnie that the complainant went fishing in. The complainant responded that it was similar.

[18] The complainant described the offender as a forty year old man with slightly grey hair, wearing stubbies and having bare feet. The offender was probably five foot ten or five foot eleven. He seemed big to the complainant at the time because the complainant was 12. The offender was definitely not skinny but the complainant would not call him overweight. The complainant did not remember the offender having an injury or being on crutches. The complainant knew the offender for

roughly a year. The complainant saw him about every two or three weeks or every now and again.

[19] On the occasion when the complainant went on the boat with the offender, the complainant was pretty sure that the complainant's brother was not there. The complainant agreed that nothing happened on that occasion. He agreed that he may have asked Allen if he could go on the boat with him. The complainant said that he was not mistaken in thinking that the person he went fishing with was the same person with whom he went bodyboarding. The complainant agreed that the person did go around once and meet the complainant's mother and father. He would have spoken to the complainant's mother. The complainant was pretty sure that his mother took down the offender's phone number and name.

[20] The complainant agreed that he did not touch the man on his penis. The offender did not get the complainant to touch his penis or masturbate him. The complainant had not ever told anybody that this is what happened. The complainant did not ever see the offender's penis. The offender did not ever masturbate in front of him. The complainant denied that he said to the investigator that the older man masturbated in front of him. The complainant denied that he said to Dr Auguston that he and the offender had engaged in mutual masturbation. That did not occur.

[21] The conduct of the offender in driving him around, rubbing his leg, and taking him back to his house and making inappropriate comments included conduct that occurred during the whole year that the complainant knew the offender. That was when the complainant was in grade 8 in 1999. The occasion of the Jaws movie was definitely when the complainant was in grade 8. He did not remember it happening in grade 9. The complainant did not know if he lived in the same house into grade 9. When it was put to him that, even if he lived in the same house when he was in grade 9, he was saying that nothing happened in grade 9, the complainant responded, "[a]fter that incident, that was it, whether it was in grade 9 or not, it was definitely that first year of that – it was definitely – yeah". That year started in the complainant's first year of high school in 1999 in grade 8.

[22] It was put to the complainant that he told Ms Horan that his memories of being molested were triggered by his talking to somebody. The complainant responded, "Yes, it – like, as I begun to talk about it, more memories came up". As he began to explain it, more memories emerged and he began to remember things that had happened to him. That was in 2015. He always had a memory of the sexual offending against him since it had happened. The details that came into his head during therapy were "little stuff, yeah, like driving in the car". Before speaking with Ms Horan he remembered everything about the incident but he had tried to push the memories aside. That did not work after so many years and when he was talking to Ms Horan certain memories would pop up.

Other evidence in the Crown case

[23] The complainant's brother gave evidence that he met Allen when he was fishing with the complainant at the boat ramp. He remembered Allen coming to help them fish a couple of times, being in Allen's white Landcruiser, and going out crabbing on Allen's tinnie. He could not recall when or how he learnt that the man's name was Allen. Years afterward the complainant told him that "the guy we used to go fishing with" or "that older guy" had done things to the complainant. The

complainant did not really elaborate upon that, but the complainant's brother "sort of understood what he was saying at the time". He did not recall that the complainant told him "the exact things" or "the exact details", but the complainant told him the nature of what had happened. The complainant's brother was around 20 years old at the time of that conversation. In cross-examination, the complainant's brother agreed that the complainant did not mention "masturbation" or anything like it. He never saw Allen acting inappropriately with the complainant.

[24] The complainant's mother gave evidence that the family moved to the Sunshine Coast in about August 1998 and stayed in the same house until moving out in the middle of 2000. The complainant and his brother went fishing in most of their spare time after school and on weekends. The complainant told her of a man who wanted him to go on a fishing boat for a day. The complainant's mother thought they should meet the man. He came to their house, but because the complainant's mother was sick, her husband went out and spoke to the man. Subsequently the complainant went fishing with that man. She did not meet the man.

[25] Some years ago, the complainant told her that he had been molested a few years earlier. The complainant's mother remembered this conversation occurred after the complainant had left school and was at work. The complainant told her about it and she tried to listen to what he was telling her. The complainant said it was the fishing guy they used to see at the river. The complainant said that his mother thought that the complainant was with his brother, but his brother used to go and play with his friends. The complainant was with the fisherman. They didn't always go fishing. The man took the complainant back to his house sometimes, showed him pornography and masturbated him. The man would drive the complainant around in the truck, put his hand on his knee and try to be intimate with him.

[26] The complainant's mother said that as far as she could understand the complainant was telling her that it was happening all the time when the complainant was with the man. When the complainant was talking to her she was very shocked so that what she said in evidence was all she could really remember. The complainant did not say it was every single time or anything as specific as that but that it was regular and often. It happened a lot. The complainant did not specifically say what happened a lot. She did not know how often the complainant went to the house or how often he would drive around in the car. She remembered that the complainant said that the man would lie him on the bed or something, laying and touching him, touching him on his genitals and masturbate him. The complainant said the offending happened when he was going fishing. The complainant stopped fishing when they moved from the house.

[27] The complainant's mother agreed with defence counsel's suggestions that: the complainant said he had been molested on more than one occasion; the complainant mentioned that the man had masturbated him; the complainant said that the man had got the complainant to masturbate him on more than one occasion; the man would get the complainant to touch him on his penis; and the complainant said he would watch pornography at the man's place. It was quite clear to the complainant's mother that it happened more than once. She did not know if the masturbation to the complainant happened more than once. He did not talk in a specific way because the complainant's mother was very shocked at the time. She concentrated on doing what she needed to do to support the complainant and didn't question him about details. The complainant did not say whether anything happened on the day

of the fishing trip. The complainant's mother did not know whether the abuse happened before or after the fishing trip or both. The fishing boat trip involved just the complainant and not his brother. She did not know of any other fishing boat trip.

[28] Doctor Bown gave evidence that he spoke with the complainant, a patient, in July 2008. The complainant said that he had been sexually abused at the age of 13 and that had occurred for a few months. The complainant did not say who had abused him. Dr Bown's recollection was that the complainant said that it was an older gentleman and that it occurred at or around the boat ramp.

[29] Ms Auguston, a psychologist, gave evidence that she saw the complainant in her practice around July 2008 until March 2009. She did not have any notes. She recalled that the complainant told her that when he was fishing he met a middle aged person, whose name was Allen. The complainant visited Allen's house and Allen took him out fishing. Allen put on pornographic movies and when the complainant and Allen were watching it together, there was some mutual masturbation. She could not recall whether the words "mutual masturbation" were used by the complainant. She had taken clinical notes, which were not verbatim notes. She kept the notes for five years. She had not taken a detailed history of the offending. The complainant said that Allen would pick him up from home, they would go out fishing together, and sometimes Allen would drop him off at home. She could not remember how frequently things occurred but her impression was that it was quite regularly. She had only a vague memory of the general terms of the conversation. She had a very clear memory that the complainant discussed that he had been sexually abused on a number of occasions by an older man. Her memory was that the things happened in Allen's home in the lounge room.

[30] In cross-examination, Ms Auguston agreed with suggestions that the complainant told her that: the offending occurred on multiple occasions; it occurred on more than two occasions; she seemed to remember that the complainant said that pornographic movies had been viewed on many occasions; mutual masturbation occurred on several occasions, definitely more than once or twice; the complainant told her that the man had touched his penis and masturbated his penis, and he had masturbated the man's penis; and the complainant told her that there was ejaculation but he did not remember who had ejaculated. Ms Auguston also remembered there was one incident when the complainant was talking about something happening in the toilets near a kart racing track. That was the final interaction from what she remembered that the complainant had told her in relation to the sexual abuse. She could not remember whether any offending happened at the go-kart racing but she remembered that the complainant got frightened.

[31] The complainant's father gave evidence that the family moved to the Sunshine Coast when the complainant was about 12 or 13. They stayed in the same house for the first one or two years before moving. The complainant and his brother used to go fishing on their own at the boat ramp not far from the house. The complainant's father remembered meeting a man who had asked the complainant to go fishing with him. It was a brief meeting in which the man asked if it was okay if he took the complainant fishing in his boat. The man was in his 30s to 40s and was not taller than about five foot ten. The complainant's father recalled that the boat was on the other side of the road. It was not a tinnie but had a sort of cabin over it. He did not remember the colour or anything else distinctive about the boat. The complainant's father said that "crabbing rings a bell". The complainant's father could

not recall taking any particular details about the man. He never saw him again. In about 2010 or 2011 the complainant told him that he had been sexually assaulted. It was to do with the person that came and asked about the fishing trip. The complainant did not go into much detail.

[32] A work friend of the complainant gave evidence that sometime between early 2011 and about 2013, the complainant told him that whilst the complainant was fishing a man approached him; the complainant said something about getting back to the car where he got touched. The witness believed this was at the car but he was not 100 per cent sure because it was quite a while ago. The complainant would have been 12 at the time. The work friend thought the complainant said he was touched on the genitals. He was not sure if the complainant was asked to touch the man as well.

[33] A police officer, Detective Senior Constable Enright, gave evidence that in 2011 he was with the Child Abuse Investigation Unit on the Sunshine Coast. In around June 2011, he spoke by telephone with the complainant. He could recall "a little bit" of that conversation. The complainant stated that he saw a person "that looked very similar or was the person" at the place where the complainant used to go fishing; and that person sexually abused the complainant as a younger child. Enright could not recall whether the complainant gave an age or approximate age. The complainant said that he went back to the man's place, watched pornographic movies, and there was masturbation involved as well. Enright could not recall any other details being given about the pornographic movie or the masturbation or who was masturbating whom. Enright took notes and generated a report as a result of the conversation. Enright advised the complainant that if he wanted to make a complaint he could come back to the police. From memory, Enright provided details as a result of that. He could not recall having any other conversations with the complainant.

[34] Defence counsel suggested to Enright that: the complainant told Enright that he thought he saw the same man but that he was not 100 per cent sure that it was the same person; he and a male person had watched adult porn and the adult person had masturbated in front of the complainant; and the complainant did not know the name or the address of the man. In response to each suggestion, Enright said words to the effect that if it was in his report then that was what he had noted. In re-examination, Enright said he did not recall whether he asked the complainant any specific questions about a name or address.

[35] Ms Horan, a psychologist, gave evidence that the complainant consulted her between January 2014 and May 2016. The first disclosure made by the complainant was that he had been sexually abused when aged 13 by someone the complainant believed to be about 40 who the complainant had met while fishing. That abuse had continued over some time. She did not have the name in her records and would have written it down if the complainant had told her. She could not recall whether a name was referred to. When she was directed to her notes, she said that there was a name "Allen". On a subsequent occasion the complainant mentioned that he had a vivid memory of being taken to the person's house and masturbated on that person's bed. The complainant referred to being scared with a Jaws movie, the man talking dirty and showing the complainant pornographic pictures. In cross-examination Ms Horan said that the complainant guessed that he was about 12 when it happened.

[36] The arresting police officer gave evidence that as a result of speaking with the complainant in mid-July 2015 she attended the appellant's residence and spoke to him. The conversation occurred at the entrance to the building and then in a lounge room which appeared to be a converted garage. The appellant said that it was a converted garage. She identified the room as the room shown in a photograph she had obtained from the internet. The photograph shows a large empty room with brick walls and a flat ceiling, with sliding glass doors occupying most of the wall between the room and the driveway to the street. It was obvious that the room was lived in as part of the home.

Evidence in the defence case

[37] The appellant denied that he had ever touched the complainant's leg while they were in the car, made any sexualised or lewd comments to him, showed the complainant a pornographic movie, masturbated the complainant, or touched him sexually.

[38] The appellant met the complainant at the boat ramp around November 2000. He could identify that date because the spanner crab season opened on 20 December and shut in the following year on 20 November. During the spanner crab season he was mostly in Tin Can Bay fishing and working, and when it closed at the end of November he spent more time at home. The appellant spent the majority of his time in Tin Can Bay, but he would come back most weeks and stay for one or two days.

[39] The appellant took the complainant fishing with him at the complainant's request in November 2000. He said that he could identify that date because he would not have been at the Sunshine Coast much before that because he was at Tin Can Bay. The appellant identified the tinnie in an undated photograph which shows an aluminium boat, with an outboard motor and no cabin, on a trailer. The appellant identified an entry on a document dated 6 April 2016 recording payments he had made to a boat sales yard. The document specifies amounts paid for a new boat to the boat sales yard in late January 2000, within a stated date range of 7 June 1999 through 6 November 2000. The appellant used the software program named on the document to keep tax records and he had searched for the boat in the date range. The appellant said he had earlier owned a different tinnie between 1981 and 1984.

[40] The appellant went to the complainant's residence to meet his parents to ensure that they gave permission for him to take the complainant out fishing. The appellant took the complainant out on the boat immediately after receiving permission to do so. He did not ever take the complainant's brother fishing. The appellant took the boat with him when he went to the complainant's house. He was driving his cream coloured Landcruiser. He had owned that vehicle for about 18 years from November 1981. The complainant had been in the appellant's Landcruiser for the fishing trip and for a trip to the go-kart track. The appellant said that his Landcruiser had seats in the back from November 2000 onwards. He had purchased the seats in November 2000 and installed them himself. On an accounting record dated 26 July 2016 the appellant had created using his software program, he identified an entry dated 11 November 2000 for the purchase of seats from a named supplier.

[41] The appellant had never taken the complainant bodyboarding or surfing. The appellant has a broken bone in his neck and would risk being paralysed if he went

surfing or swimming. He was on crutches for about six months in 1999 and was extremely overweight. He limped after that six month period. The appellant identified entries on a chemist's accounting record for the purchase of antibiotics and crutches in August 1999.

[42] The appellant said that in 1999 and 2000 he did not have grey hair. His hair was slightly darker than as at the date of trial. He said that the amount of hair he had then was similar to what he had at the date of trial. (The record does not reveal the state of the appellant's hair at the time of trial.) The appellant identified himself as the person standing in front of the photograph of the tinnie which the appellant said was taken some time around the middle of 2000. In that photograph the appellant's hair appears to be dark and he is wearing a shirt and short shorts (which he described as "ruggers").

[43] The complainant accepted that the photographs of the house tendered in the Crown case were photographs of his home. The appellant acknowledged that there had been a garage which had been converted into the room in which he spoke to the arresting police officer. An application had been lodged with the Council in 1993. The bulk of the structural work had been finished in 1993. The appellant said that the bulk of the work was finished and he put in the glass sliding doors and the carpet in 1997, just after the appellant's brother died on 8 September 1997. Once the carpet had been put on the floor at the end of 1997 the new room was complete. It was used basically as a sunken lounge room. The room looked as it does in the photograph from 1997, although it had more furniture in it than was shown in the photograph; the furniture included a round dining table, chairs, photographs on the wall, a TV unit against one wall, and a large cabinet against another wall. (The TV unit was installed in 2008, the appellant thought.) The appellant identified a document dated 25 March 1993 as being an approval for the site works. The document is described as a building permit issued for "addition to dwelling". One of the conditions stated in it requires notice to be given in writing of inspections at identified stages, including trenches with steel in place, slab before pouring concrete, and frame before cladding and roof covering is commenced. The appellant accepted in cross-examination that the document mentions that the permit was issued for an addition to the dwelling and there was no specific reference to any conversion of the room in the house, the garage, or the carport. The appellant had no other documentation referring to any of that. He had no photographs taken during the process of the conversion or any other receipts or anything with respect to when it occurred.

[44] The appellant gave evidence that his fishing rods mostly stayed on the boat but occasionally they would be kept down the side of the house. He did not keep them in the garage because they smell. At the time when the complainant said that he came to the appellant's house, the garage was not still in existence. The appellant said that there was no occasion when the complainant came to his house either for a visit or because the appellant was taking him somewhere.

[45] The appellant gave evidence that his mother lived in the house until she died in November 2015. From 1997 or 1998 onwards his mother was not well. The appellant said that the complainant had never met the appellant's mother. In cross-examination the appellant agreed that his mother had a stall at the markets. She ceased operating that stall in September 1998. He had no recollection of having

discussed with the complainant that the appellant's mother had a stall at the markets. The appellant had possibly talked about his mother with the complainant.

[46] A man who was 12 years old when he started work experience with the appellant, and continued to work for him for many years, gave evidence that the appellant's general reputation in the community was as a hard working fisherman with a good rapport with all of the other fisherman, and who did not lie. A retired sergeant of the Queensland Police Service, Smith, gave evidence that he had been a neighbour of the appellant's for about 30 years. The appellant's general reputation in the community was that he was very well liked, of good character, and always honest and truthful.

Admissions

[47] It was formally admitted that the appellant had no criminal history, the complainant attended an identified high school from 20 January 1999 to 21 November 2003, the appellant was presently the registered owner of the house at an identified address and previously sole ownership of that property had been transferred to the appellant's mother on a date in 1995, as at a date in April 1999 the appellant was the registered owner of a Toyota Landcruiser minibus vehicle, on a date in July 2015 the appellant informed police that he knew the complainant as he saw him fishing down at the boat ramp, and photographs of the house (which were tendered in evidence) were of the appellant's residence at the identified address.

Appeal ground 1: The verdicts are unreasonable or cannot be supported having regard to the evidence.

[48] The appellant argued that the guilty verdicts are unreasonable having regard to a combination of factors, particularly the considerable delay between the alleged offending and the first opportunity to investigate the allegations, and inconsistencies between the complainant's evidence and the preliminary complaint evidence. For the following reasons I would accept the respondent's argument that upon the whole of the evidence it was reasonably open for a jury to accept that the Crown had proved beyond reasonable doubt that the appellant committed the offences.

[49] The complainant gave clear and consistent evidence that the appellant did the acts alleged against him. There was no material inconsistency within his evidence. I will discuss the inconsistencies between that evidence and some parts of the preliminary complaint evidence, but it is sufficient here to make two points upon that topic: there were reasonable grounds upon which the jury could prefer the complainant's evidence about the appellant's conduct, and about the terms of the complainant's disclosures about that conduct, where that evidence conflicted with the evidence of other witnesses; and the evidence of the only witness who gave evidence of disclosures by the complainant with reference to contemporaneous notes, Ms Horan, was consistent with the complainant's account of the offences and the circumstances in which they occurred.

[50] I will first discuss the issue whether the Crown proved beyond reasonable doubt that the appellant was the offender. Upon the complainant's evidence he had ample time to become very familiar with the offender just as, upon the appellant's evidence, the complainant had ample time to become familiar with him. The jury readily could accept the complainant's evidence identifying the man who sexually abused him as the man who met the complainant whilst he was fishing at the local boat ramp and later took him fishing in a boat after obtaining parental permission to do so. The

preliminary complaint evidence was consistent with this identification of the offender. In particular, each of the complainant's brother, mother, father, and Ms Auguston gave evidence to the effect that the complainant told them he had been sexually abused by the man who had taken him fishing. There was no evidence to suggest that the complainant had met any other man at the boat ramp who had taken him fishing or had sought permission to do so from the complainant's parents. Upon the appellant's evidence he fitted the complainant's description of the offender as the man who met the complainant at the local boat ramp and took him fishing in his tinnie after obtaining parental permission to do so. The combination of those circumstances persuasively identified the appellant as the offender.

[51] Furthermore, the complainant's evidence that the offender's name was Allen is consistent with Ms Auguston's evidence that in mid-2008 the complainant referred to the name Allen, in the context of his statement to the effect that the offender had taken the complainant to the offender's residence, and with the fact that the appellant resided in the house identified by the complainant as the house in which the appellant committed the offences. In addition, the complainant's evidence that on one occasion the complainant met the appellant's mother at the appellant's house (which was contrary to the appellant's evidence that the complainant had never been in the appellant's house) was consistent with the appellant's evidence that his mother lived at that house.

[52] The appellant argued that a significant possibility that the complainant misidentified the appellant as the person who committed the offences arose because of the long delay in the identification, although the complainant said that he told his mother the name of the person who offended against him she did not give evidence that he did tell her, and it was very curious that the complainant did not tell Enright the name of the offender when the complainant was 80 per cent sure he had known the name of the offender was Allen and had not told Enright when Enright's evidence suggested that he and the complainant discussed the name of the man but the complainant did not provide it. Those arguments do not materially detract from the force of the identification of the appellant by the evidence mentioned in the preceding two paragraphs. There are also other weaknesses in the argument. The complainant's mother did not give evidence that the complainant did not tell her the name of the offender. The appellant's argument about Enright's evidence assumes that the complainant would have given Enright the name of the offender if the complainant knew that name. But there appears to be no sound basis for making such an assumption in circumstances in which both the complainant's and Enright's evidence is to the effect that the complainant did not complete the process of making a complaint after he was informed about what that process would involve, and the evidence of Ms Auguston could be accepted by the jury as establishing that the complainant identified the appellant's name as Allen some three years before the complainant spoke to Enright.

[53] The jury could accept the complainant's evidence of what the appellant looked like at the time of the offending in preference to the evidence given by the appellant or they could regard any differences as being of no real account in the context of the evidence in [50]-[51] of these reasons. The inconsistency between the evidence of the complainant and his mother that the complainant's brother did not go on the fishing trip, and the evidence of the complainant's brother that he did go on the trip, seems innocuous in circumstances in which the complainant did not suggest that the

appellant misconducted himself in any way on that trip. Whether it was the complainant's mother or father who spoke to the appellant about taking the complainant on the fishing trip has no apparent significance in the context of the identification of the appellant as the offender or otherwise. The difference between the complainant's recollection of what he told his brother about the detail of the sexual offending and the complainant's brother's recollection of an absence of detail, and the difference about whether the complainant told his brother that the name of the man was Allen, seem insignificant in the context of the passage of time between when those complaints were made and when the complainant's brother gave evidence.

[54] The jury's conclusion that the Crown proved beyond reasonable doubt that the appellant did the particular acts which constituted the offences alleged against him cannot be regarded as unreasonable. As I have indicated, the complainant gave clear and consistent evidence to that effect. Consistently with that evidence, Ms Horan gave evidence with reference to contemporaneous notes that the complainant had referred to seeing a Jaws movie, being shown a pornographic picture, and being masturbated on the bed of the person he had met when fishing; the complainant's mother gave evidence that the complainant told her that the fisherman he used to see at the river took him back to his house, showed him pornography, and masturbated him; and Enright gave evidence that the complainant told him that he went back to the place of the man who he had met fishing, watched pornographic movies, and there was masturbation involved as well.

[55] The additional, inconsistent evidence the complainant's mother gave in cross-examination, that the complainant told her that the man got the complainant to masturbate him, is not insignificant. But it does not follow that the inconsistency should have contributed to a reasonable doubt about the appellant's guilt of the offences. One way in which the jury could reconcile the evidence as a whole was to prefer the evidence of the complainant that he did not make such a statement and find that his mother's evidence upon that point should not be given any weight. Such an approach could not be regarded as unreasonable in circumstances in which the complainant's mother gave unsurprising evidence that she was very shocked at the time and did not question the complainant about details, and a very lengthy period of time had elapsed between the date of the conversation and the trial. Ms Auguston's evidence that the complainant told her there had been mutual masturbation also could be rejected by the jury notwithstanding its consistency with the complainant's mothers' additional evidence and some evidence given by Enright. Ms Auguston gave evidence that she did not recall that the complainant used the words "mutual masturbation", she gave her evidence many years after her conversation with the complainant, she had not taken verbatim notes, and she did not have any means of refreshing her recollection. Enright's evidence (see [33]-[34] of these reasons) is discussed with reference to ground 2 (see in particular [66]-[69]). To the extent that his evidence was consistent with the complainant having said that the appellant masturbated in front of the complainant, the jury could take into account the evidence that the complainant did not complete the process of making a complaint. That inconsistency was not necessarily inconsistent with the complainant's evidence of count 2. It was not at all inconsistent with his evidence of count 1.

[56] The jury readily could conclude that none of the documentary or photographic evidence should be regarded as support for the appellant's evidence that the garage

in his house had been converted into a lounge room before the end of 1997 or that in 1999 (when the offences were committed, upon the complainant's evidence) the appellant did not own a tinnie and there were no seats in the back of his four wheel drive. None of the relevant photographs were dated. Upon the appellant's own evidence he went to the complainant's home and obtained the complainant's parent's permission to take and he did take the complainant fishing in his tinnie. The record concerning the tinnie was created by the appellant and in any event did not record that the appellant did not have the use of a tinnie in 1999. The building permit concerned an extension not a conversion. As the respondent argued, it is also the case that the complainant did not give unambiguous evidence that he remembered that there was a garage being used as a garage; and even the photographs of the converted garage indicate its origin as a garage. It is also relevant that the evidence does not suggest that the nature of the use of the room the complainant thought was a garage was likely to have been of any significance to the complainant at the relevant time. As to the four wheel drive, the record was created by the appellant, it was not inconsistent with there being seats in the back of that vehicle before the recorded purchase of "seats", and the complaint did not express his evidence about the presence of back seats with certainty.

[57] The appellant argued that his case was similar to that *R v Thaiday*,[1] in which (in an historical sex offence case) the complainant's evidence that the offender had penetrated her vagina was inconsistent with her original complaint that the offender had touched her vagina. The facts of that case are too dissimilar to make it of any relevance in the resolution of the question whether the guilty verdicts in this case are unreasonable.

[58] It is necessary to bear in mind the exacting standard of proof beyond reasonable doubt in a criminal trial, the effect of the very long delay before a complaint was made in depriving the appellant of the chance of an early investigation and the discovery of exculpatory evidence, the appellant's sworn denials of the conduct alleged against him, and the character evidence adduced in the appellant's favour. Those matters also must be taken into account in making the necessary independent assessment of the sufficiency and quality of the evidence at trial and in deciding whether, upon the whole of the evidence, it was reasonably open for the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted.

[59] The inconsistencies in the evidence were not so marked as to require the jury to doubt the complainant's credibility or the reliability of his evidence of the offences. The jury reasonably could attribute little weight to the good character evidence. The jury must have rejected the appellant's evidence that he did not commit the offences and no basis appears for holding that this was unreasonable. It is necessary also to bear in mind that "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial".[2] For those reasons and the other reasons already given, I conclude that upon the whole of the evidence at the trial the guilty verdicts were reasonably open to the jury.

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1 [2009] QCA 27.

2 *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65], citing *M v The Queen* (1994) 181 CLR 487 at 494 and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56].

Appeal Ground Two: There was a miscarriage of justice because the report of Detective Senior Constable Enright was ruled inadmissible by the learned trial judge.

[60] As I have indicated, Enright accepted that matters put to him were said by the complainant if those matters were in his report. The matters emphasised by the appellant in relation to the present ground were suggestions by defence counsel that the complainant told Enright that the complainant thought he saw the same man but was not 100 per cent sure; the reason the complainant did not want to make a complaint was because of the limited information he provided; the man had masturbated in front of the complainant; and the complainant did not know the name or address of the man.

[61] After the conclusion of Enright's evidence, the jury sent a note to the trial judge asking whether they were able to view Enright's report. The appellant referred to part of the following discussion between the trial judge and counsel, in which the trial judge observed that the report was not admissible under the rules of evidence. The trial judge directed the jury that under the rules of evidence the trial was by oral evidence rather than by report or statement: "Reference can be made to documents for a limited purpose during the course of evidence, but beyond that, in the usual case, the documents themselves are not admissible as evidence." The trial judge explained to the jury that the report was not in evidence.

[62] The appellant argued that the failure to tender the report occasioned a miscarriage of justice because the report provided evidence adverse to the Crown case concerning the complainant's reliability and a potential misidentification of the appellant as the offender.

[63] This ground of appeal could succeed only if the trial judge was in error in ruling that the report was inadmissible. But neither defence counsel nor the different counsel who appeared for the appellant in the appeal identified any basis upon which the report was admissible. The appellant's counsel frankly informed the Court that "there are some difficulties with the argument" that the report was admissible. He did not seek to contradict the submission for the respondent that the report was a contemporaneous record of the conversation from which the police officer could refresh his memory but that the document itself was not admissible. He disavowed any invitation to the court to revisit the rules concerning the admissibility in evidence in a criminal trial of a document of this character.

[64] The absence of any identified ground upon which the document might have been admitted in evidence is a sufficient basis for rejecting this ground of appeal. In addition, the ground is inconsistent with the way in which defence counsel conducted the trial. Not only did defence counsel not seek to have the report admitted in evidence, in the course of discussion about the jury's question defence counsel submitted to the trial judge that parts of the report would be prejudicial to the defendant. Furthermore, for the following reasons the appellant was not materially prejudiced by the manner in which defence counsel conducted this part of the defence.

[65] The appellant applied for leave to adduce the report as evidence in this appeal. Relevantly the report includes the following information:

(a) Information received from a police officer (the police officer to whom the complainant first spoke) stating that the complainant "wanted to make a complaint that he had been sexually assaulted when he was 12 years of age."

The admission of a police record of that statement might not unreasonably have been regarded by defence counsel as being prejudicial to the appellant.

(b) Two days after that initial statement, Enright contacted the complainant and the complainant disclosed that:

> "- when he was 12 years of age he use to fish at [location].
>
> - this is where he became friends with an older male (unknown name or any other details).
>
> - after fishing he went to this males person address (unknown address).
>
> - they watched adult porn.
>
> - older male would masturbate in front of [the complainant]."

Again, the admission of a police record of those statements might not unreasonably have been regarded by defence counsel as being prejudicial to the appellant. Defence counsel could seek to take forensic advantage only of the last statement and the parenthetical references to unknown name, other details and address. But the document does not make it clear whether the parenthetical references reflect anything said by the complainant or merely the fact, of which both Enright and the complainant gave evidence, that the complainant did not complete the process of making a complaint. For all that is revealed by the evidence at trial and the document, Enright might have used the parentheses to indicate that the statements within them were not said by the complainant.

(c) "[The complainant] stated that he was in [the same location] the other day and thought that he saw the same male with a younger boy about 12 years of age. [The complainant] stated that he was not 100% certain that this male was the same person but just wanted police to know."

The first statement is prejudicial but could have been masked. The second might have been used to the appellant's advantage, but the absence of 100 per cent certainty in this identification might reasonably have been considered to be a small point in the context of the circumstantial evidence of identification already discussed in these reasons.

(d) "[The complainant] did not want to make a complaint to police."

This is consistent with the complainant's and Enright's evidence.

(e) "Due to the limited information provided and that [the complainant] does not want to make a complaint to police about the information provided in this notification, no further police investigation is warranted at this time."

Again, this does not make it clear whether the parenthetical references in (b) reflect anything said by the complainant or merely the fact, of which both Enright and the complainant gave evidence, that the complainant did not complete the process of making a complaint.

[66] The main point the appellant made concerning the relevance of that report to the reliability of the complainant was the inconsistency between the complainant's evidence and the statement in the report that the offender masturbated in front of the complainant. In relation to the appellant's argument that there was a doubt about the identification of the appellant as the offender, the appellant also relied upon the statement in the report that the complainant stated that he was not "100% certain" that the male he saw was the offender. I have indicated why that is not a strong point.

[67] Both points were put by defence counsel to Enright in cross-examination. In addition, Enright referred to having reproduced his notes in the "QPRIME report" and defence counsel secured Enright's agreement to the suggestion: "QPRIME report. That's what they look like?" That was a reference to a document defence counsel was reading from in the course of questioning Enright. The question was objectionable upon the ground of relevance, given that the document in defence counsel's possession was not shown to the witness or tendered in evidence. But there was no objection. Enright's affirmative answer to that question formed the basis of an argument to the jury in which defence counsel read out the transcript of her questions and Enright's answers in cross-examination upon those and other matters and submitted:

> "So what's in the report is he and this male person had watched adult porn and the male person had masturbated in front of [the complainant]. And you will recall that I had a report in my hand and I held it up. I said: [defence counsel here quoted the reference to Enright agreeing about what the QPRIME report looked like]."

[68] Defence counsel submitted that the jury should keep in mind that, when she asked questions about what was in the report the prosecutor undoubtedly would have objected if she had misrepresented anything or not put something properly. Not only did the prosecutor not contradict that submission, the jury would have been left with the impression that the trial judge endorsed it. The trial judge gave conventional directions about the use of preliminary complaint evidence in relation to the credibility of the complainant, including that any inconsistencies between accounts which the complainant gave to the witnesses and the complainant's evidence might cause the jury to have doubts about the complainant's credibility or reliability. The trial judge then told the jury that it was a matter for the jury to determine how to use the preliminary complaint evidence and that he would remind the jury of that evidence and of the respective submissions made by counsel about it. In that context, the trial judge summarised the evidence given by Enright. The trial judge then referred to Enright's responses that if it was in his report that's what he said, and commented to the jury that Enright "didn't in any way dispute that that was in his report, members of the jury, when [defence counsel] was putting it to him". The trial judge referred to the suggestion made to Enright that the complainant told him that the male person had masturbated in front of the complainant, and commented to the jury that Enright "didn't dispute that that's what he said, members of the jury, that he'd recorded". In that context the trial judge also referred to defence counsel's suggestion that the complainant did not know the name or the address of the man and Enright's answer to the effect that what was in the report recorded the information given to him.

[69] In that way, defence counsel secured the forensic advantage of the trial judge endorsing her submission to the jury that Enright did not dispute that the subject matter of defence counsel's suggestions reflected what was in the report. At the same time, defence counsel ensured both that the prejudicial statement in the report did not go before the jury and that Enright did not have access to the report to refresh his memory, with the consequential risk that some of his answers about what the complainant had told him might be adverse to the appellant.

[70] As already indicated, the ground must fail because the appellant did not identify any basis upon which the report was admissible in evidence. For the reasons just given, the ground must fail also because the appellant did not establish that any miscarriage of justice resulted from the absence of the report from evidence. Furthermore, because the appellant did not tender or seek to tender the report in evidence at the trial, a miscarriage of justice could only be established if leave were first given to admit the report in evidence. A difficulty for the appellant in that respect lies in the inference that defence counsel made a forensic decision that the admission of the report in evidence would be prejudicial to the appellant. The report apparently being in defence counsel's hands at the trial, it could be regarded only as new evidence on appeal that is not "fresh evidence". That being so, a miscarriage of justice is not established if the evidence not called at trial taken in conjunction with the evidence that was adduced at the trial "falls short of establishing that the accused should not have been convicted".[3] That is the case here. The omission of the report from the evidence at the trial did not cause a miscarriage of justice.

[71] Accordingly, I would refuse leave to admit the report as new evidence in the appeal and I would reject this ground of appeal.

Appeal Ground 3: There was a miscarriage of justice because the learned trial judge failed to give adequate warning to the jury about the complainant's evidence.

[72] The trial judge gave the jury the following direction (referred to as a "*Robinson* direction"[4]):

> "And so I must warn you that it would be dangerous to convict upon the complainant's testimony alone in this case, and the Crown here relies entirely upon the complainant's testimony. It would be dangerous for you to convict upon his evidence alone unless, having scrutinised his evidence with great care, considering the circumstances relevant to its evaluation and paying heed to this warning which I now give you, you are satisfied beyond reasonable doubt of the truth and the accuracy of the complainant's account."

[73] The appellant argued that the direction was inadequate because it did not draw the jury's attention to the particular features of the evidence that gave rise to the need for the warning. The features to which the appellant referred were the inconsistencies between the complainant's evidence and complaints and the preliminary complaint evidence of his complaints, and the risk of mistaken identification of the appellant because of the lapse of time. The appellant relied

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3 *Lawless v The Queen* (1979) 142 CLR 659 at 676; *R v Hodges* [2018] QCA 92 at [21].

4 *Robinson v The Queen* (1999) 197 CLR 162 at 168-169 [20]-[21].

upon the statement in *Robinson*[5] that the "warning should have referred to the circumstances set out above, and should have been expressed in terms which made clear the caution to be exercised in the light of those circumstances". The appellant also relied upon a statement in *R v Nguyen* that, "[a] suitable warning included the need for the judge to actually specify what those variations [in the complainant's accounts] were. He needed to actually list those inconsistencies and variations".[6] The appellant submitted that the failure to relate the warning to the jury to the particular circumstances which required such a warning gave rise to a miscarriage of justice.

[74] In *R v Nguyen*[7] the inconsistencies between that complainant's evidence and the evidence of two preliminary complaint witnesses were far more significant than in the present case. That complainant gave evidence that the offender had raped her in his bedroom in his house on the morning of 18 March after she had been asked to go into that room and she had told him that she did not want to have sex with him, whereas: one neighbour gave evidence that on 22 March (the complainant said the conversation was on 21 March) the complainant told her that she and the appellant were having a few drinks and she "couldn't say no"; another neighbour gave evidence that on 22 March the complainant told her that the appellant had raped the complainant at the complainant's home "a couple of nights ago"; and a police officer gave evidence that on 22 March the complainant told her that the offence occurred between 11 am and 1 pm on 20 March and included both digital and penile rape, with the complainant repeatedly saying "no, no, no". It was the combination of those inconsistencies together with other significant weaknesses in the Crown case that were held to require a "*Robinson*" warning. Importantly for present purposes, the Court found a miscarriage of justice by reason, not only of the failure to give a suitable warning which outlined the combination of circumstances which required it, but also, because the trial judge's directions about the preliminary complaint evidence were held to be inadequate. The appellant did not make any submission to similar effect in this appeal. This case is not governed by the statement the appellant quoted from *R v Nguyen*.

[75] *Robinson* is not authority for the proposition that a warning of the kind described in that case must be given whenever there are inconsistences or weaknesses in the Crown case. As the Court explained,[8] "[t]he law requires a warning to be given 'whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case.'". Whether a warning is required and its content must necessarily depend upon the circumstance or combination of circumstances which in a particular case might give rise to a perceptible risk of a miscarriage of justice. In *Robinson*, the circumstances were non-exhaustively described as including the age of the complainant (eight years) at the time of the alleged offences, the long period (three years) that elapsed before complaint with the consequent impossibility for a medical examination to verify or falsify the complaint, inconsistencies in aspects of the complainant's evidence as to whether penetration occurred, the absence from the complainant's evidence of any conversation between the complainant and the appellant about the alleged conduct, the absence of any threat or warning to the complainant not to tell anyone, the

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5 (1999) 197 CLR 162 at 171 [26].
6 [2013] QCA 133 at [56].
7 [2013] QCA 133.
8 *Robinson v The Queen* (1999) 197 CLR 162 at 168, quoting from *Longman v The Queen* (1989) 168 CLR 79 at 86.

maintenance between them of a harmonious relationship, the absence of any suggestion of earlier or later misconduct by the appellant, uncertainty about the matter of penetration arising from the complainant's evidence that he was asleep when the first act occurred and woke up while it was going on, and a possible degree of suggestibility on the part of the complainant. It was the combination of those matters together with the absence of corroboration that was held to create a perceptible risk of a miscarriage of justice which required a warning referring to the identified circumstances, making "clear the caution to be exercised in the light of those circumstances", and bringing home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt.[9]

[76] The appellant referred also to the suggested *Robinson* warning in the bench book, which refers the jury to the need to scrutinise the evidence of the complainant with great care before arriving at a conclusion of guilt because of circumstances (which, the bench book suggests, should be listed) and which concludes with the direction that the jury should only act on that evidence if, after considering it with that warning in mind, and all the other evidence, the jury are convinced of its truth and accuracy. Trial judges generally and prudently follow this bench book precedent appropriately adapted to the particular circumstance of each case, but where a warning is required a failure to follow the bench book will not necessarily mean that there has been a miscarriage of justice. Each appeal in which there is such a contention must be assessed with reference to its own circumstances, including the effect of the directions given by the trial judge in the context of the summing up as a whole.

[77] For the reasons already given, the Crown case upon the identification of the appellant as the offender was not weak. There was no particular circumstance that required a warning directed specifically to a risk of misidentification as opposed to the more general question whether the Crown proved beyond reasonable doubt that the appellant committed the alleged offences. The need for a warning of the kind described in *Robinson* arose from the combination of three circumstances: first, the very lengthy delay between the alleged offences and when they were reported, with the consequential difficulties in testing and meeting the complainant's evidence and assembling any available exculpatory evidence; secondly, the Crown case depended entirely upon the complainant's testimony; and, thirdly, the identified inconsistencies between the complainant's evidence and some of the evidence given by preliminary complaint witnesses. It is uncontroversial that the first circumstance was brought home to the jury in the directions immediately before the warning and the second circumstance was brought home to the jury in the warning itself. For the following reasons, the jury would have understood that the warning was referable not only to those circumstances but also to the third circumstance, namely, identified inconsistencies between the complainant's evidence and some of the evidence given by preliminary complaint witnesses.

[78] As the introductory words of the warning ("And so I must warn you") conveyed, it followed the trial judge's references to the matters giving rise to the need for the warning. Earlier in the summing up, the trial judge referred to the evidence of the witnesses who spoke of disclosures made by the complainant to them of the alleged offences. The trial judge explained that the jury's decision about what the complainant did and said by way of raising his allegations, depended upon the

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9 *Robinson v The Queen* (1999) 197 CLR 162 at 171 [26].

jury's assessment of the credibility and reliability, not only of the complainant, but also of those persons to whom he spoke; consistency between the account given by the complainant to those witnesses and the complainant's evidence could be taken into account by the jury as possibly enhancing the likelihood that his testimony was true. The trial judge then directed the jury that any inconsistencies between the accounts which the complainant gave to those people and the complainant's evidence might cause the jury to have doubts about the complainant's credibility or reliability. The question whether consistencies or inconsistencies impacted upon the complainant's reliability was a matter for the jury; "[i]nconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable, and the inconsistencies are a matter for you to consider in the course of your deliberations." After referring further to the significance of inconsistencies, the trial judge observed that the preliminary complaint evidence "does not prove anything, but it may be relevant to your assessment of the credibility of the complainant".

[79] The trial judge reminded the jury that both counsel had made extensive references in their addresses to the evidence of those other witnesses. The trial judge observed for that reason it was important to remind the jury of that evidence. Thereafter the trial judge quoted the salient parts of the evidence of the complainant and of each of the preliminary complaint witnesses in so far as the evidence revealed consistencies and inconsistences upon which the prosecutor and defence counsel had relied in their submissions. Following that summary, the trial judge reminded the jury of the essence of the competing submissions about that evidence. The trial judge first summarised the submissions upon that topic by the prosecutor. The trial judge then summarised the submissions by defence counsel to the effect that the inconsistencies would cause the jury concern in relation to the complainant's credibility and reliability. The trial judge completed that summary by referring to defence counsel's submissions highlighting the inconsistencies between the evidence of the complainant about what had occurred and the detail of his complaints and other evidence: the evidence of the complainant's brother that the complainant did not tell him the detail to which the complainant referred; the evidence of the complainant's mother that the complainant told her that on more than one occasion the complainant had touched the man's penis; the evidence of Enright that the complainant was not 100 per cent sure that the man he had seen was the person who had touched him, and that the man had masturbated in front of the complainant; and defence counsel's reference in particular to the evidence of Ms Auguston, already summarised by the trial judge, which defence counsel submitted the jury would accept as being reliable and as significantly at odds with the complainant's account. The trial judge concluded that topic with a reference to the defence submissions that the jury would not see the evidence of preliminary complaints as enhancing the complainant's credibility but would see it as reflecting adversely upon the complainant's credibility.

[80] The trial judge then turned to the different topic of the significant delay between the reporting of the incident and the alleged commission of the offence. After referring to the extent of the delay as being perhaps in the order of 15 years, the trial judge directed the jury that the long delay could have the important consequence that the complainant's evidence could not be adequately tested after the passage of so many years, the appellant having lost by reason of that delay possible means of testing and meeting the allegations and evidence that might otherwise have been available; the appellant had been denied the chance to assemble, soon after the incident was said

to have occurred, evidence as to what he and perhaps other potential witnesses were doing when, according to the complainant, the incidents occurred. The trial judge elaborated briefly upon that topic and directed the jury that the fairness of the trial had necessarily been impaired by that delay.

[81] The trial judge then gave the jury the warning I have quoted. In the context of the extensive quoting from, the summary of, and the appropriate directions about the effect of inconsistent preliminary complaint evidence very shortly before the warning was given, the jury must have understood that the reference in the warning to "the circumstances relevant to its evaluation" comprehended the identified inconsistencies between the complainant's evidence and some of the preliminary complaint evidence. With all of those matters in mind, the jury must have understood the warning as being referable to the three circumstances which required it and as making clear the caution the jury was obliged to exercise in the light of those circumstances. That conclusion is also consistent with the absence of any submission by defence counsel that the warning given by the trial judge was inadequate when the trial judge invited submissions after concluding the summing up.

[82] Ground 3 fails for those reasons.

Appeal Ground 4: There was a miscarriage of justice because of the failure to lead evidence, other than from the appellant, of the timing of renovations to the appellant's house.

[83] At the trial, Smith gave only good character evidence. The appellant has applied for leave to adduce evidence in the appeal by Smith concerning the date when the garage at the appellant's house was converted to a lounge room. The appellant submits that if the jury heard and accepted Smith's new evidence, the jury necessarily would reject the evidence given by the complainant describing the appellant's home at the time of the offences. It is submitted that there is a significant possibility that the jury would have acquitted the appellant if the new evidence had been adduced, the case being a finally balanced one.

[84] Smith deposed that he was a retired sergeant of the Queensland Police Force and had been a neighbour of the appellant for between 28 and 30 years. He recalled that the solicitors for the appellant took instructions from him about the renovations at the house before giving evidence at the trial. In relation to the renovations at the appellant's house Smith deposed as follows. He could not recall exactly when the renovations were completed. When the conversion was done there was a carport built covering half the front of the building. The garage was converted to a living room and had lots of furniture in it, including curtains, a lounge suite and a dining table. He understood that it was used as a dining room area. The walls were of exposed brick. He could not recall the exact date when the garage was converted. He recalled, however, that the garage was converted "immediately after" the death of the appellant's brother, whose funeral was held on Smith's 50th birthday in September 1998. Smith "would say that the garage conversion was completed within one month of" his brother's death in 1998. Immediately before that last statement, Smith described the conversion: the appellant installed sliding doors, laid carpets, and made a ramp down from the main house to the converted room. A big rectangular table was put in the room, but Smith did not state when the furniture, including curtains, a lounge suite and a dining table, were added.

[85] The appellant argued that this new evidence was particularly important because the prosecutor made much in her closing argument of the absence of any objective evidence to back up the appellant's evidence. In that respect the prosecutor referred to the fact that the building permit upon which the appellant relied did not concern the conversion of the garage and did not prove that the conversion occurred at a particular time; the prosecutor submitted that "there is no evidence beyond the defendant's testimony that anything even occurred at that time …".

[86] The complainant did refer in his evidence to there being a garage at the appellant's house on the occasion when the complainant met the appellant's mother at the house. His evidence about the garage is set out in [14] of these reasons. Although the complainant's recollection was that he went into a room with fishing rods stacked on the wall which he thought was a garage, it is not clear from his evidence that the conversion of the garage was complete at the time when he visited the house. Furthermore, although Smith's affidavit evidence is given with reference to a date he might well recall (the appellant's brother's funeral shortly before Smith's 50th birthday in September 1998), the relevant evidence is merely of his unaided recollection, some 19 years after the event, of how long after that date in September 1998 the garage conversion was completed.

[87] Such forensic benefit as the appellant might have obtained by adducing that evidence might reasonably have been regarded by defence counsel as being substantially outweighed by the stark inconsistency between it and the appellant's evidence that "the bulk of the work was finished and I put the glass sliding doors and the carpet in 1997 just after my brother had passed away" on "8th of September '97", and once the carpet was on the floor at the end of 1997 the new room was complete.[10] Smith's affidavit is quite clear that the garage was not converted until after the appellant's brother's death "a couple of weeks prior to my birthday 20 years ago, in 1998". A possible reconciliation of this conflict is that the appellant incorrectly recalled that his brother died in 1997 rather than in 1998. Upon that footing, however, the jury might have concluded that the conversion of the garage was completed around about the end of 1998, which is the beginning of the period during which counts 1 and 2 were alleged to have been committed. Another possible view is that Smith's recollection underestimated the delay between his 50th birthday and the completion of the garage conversion. If the jury adopted either view, the appellant's credibility might have been regarded by the jury as badly damaged.

[88] In the context of the evidence identifying the appellant as the offender outlined in [50] and [51] of these reasons, Smith's affidavit evidence about the garage lacks cogency. In any event, upon an objective analysis defence counsel made a justifiable forensic decision not to adduce the evidence that Smith might have given upon that topic. The evidence now sought to be adduced in the appeal is not "fresh" evidence. If it were taken in conjunction with the other evidence tendered at the trial, it would fall far short of establishing that the accused should not have been convicted.[11]

[89] I would refuse leave to the appellant to adduce the affidavit of Smith as new evidence in the appeal.

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10 Transcript 23 August 2017 at 3-31.

11 See *R v Hodges* [2018] QCA 92, cited at [70] of these reasons.

Proposed Orders

[90] I would refuse the appellant's application for leave to adduce evidence in the appeal and I would dismiss the appeal.

[91] **MORRISON JA:** I agree with the reasons of Fraser JA and the orders his Honour proposes.

[92] **BODDICE J:** I agree with Fraser JA.