

SUPREME COURT OF QUEENSLAND

CITATION: *R v CEA* [2026] QCA 138

PARTIES: **R**
v
CEA
(appellant)

FILE NO/S: CA No 245 of 2024
DC No 665 of 2023

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich – Date of Conviction: 18 October 2024 (Power KC DCJ)

DELIVERED ON: 24 July 2026

DELIVERED AT: Brisbane

HEARING DATE: 17 September 2025

JUDGES: Bradley JA, Doyle JA, Williams J

ORDERS: **1. Application for leave to adduce new evidence refused.**
2. Appeal dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – AVAILABILITY AT TRIAL, MATERIALITY AND COGENCY – GENERALLY – where the appellant was convicted of one count of maintaining a sexual relationship with a child, two counts of rape and one count of indecent treatment of a child under 16 and of lineal descent – where the sole complainant was the appellant’s daughter – where the appellant seeks to adduce new evidence provided by the complainant’s mother – where the appellant had instructed his solicitors not to give or call evidence at trial, including evidence from the complainant’s mother – whether the new evidence, combined with the evidence adduced at trial, would require the appellant’s convictions to be set aside by reason of depriving the accused of a chance of acquittal that was reasonably open

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant contends changing accounts and inconsistencies in the complainant’s interviews with police, and other matters peculiar to the complainant, ought to have

been the subject of a warning to the jury – where the appellant contends the trial judge misdirected the jury in using the phrase “the experience of the court shows” rather than the phrase “experience shows” that is prescribed by s 103ZY of the *Evidence Act 1977* (Qld) – where the appellant contends that the mandatory directions under part 6B division 3 of the *Evidence Act 1977* (Qld) are currently inadequate because, where there are inconsistencies or gaps in a complainant’s evidence, the mandatory directions mean juries are directed to almost completely ignore inconsistencies – whether the trial judge’s directions invited the jury to ignore inconsistencies in the evidence – whether it was necessary to use the precise words contained in s 103ZY when providing a direction under that section – whether a failure to give a direction on “matters personal to the witness, or from the circumstances”, as explained in *Robinson v The Queen* (1999) 197 CLR 162, gave rise to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – STRIKING OUT AND WARNING JURY TO DISREGARD EVIDENCE – where evidence was given at trial that the appellant had said certain things relating to the complainant’s bras, body piercings, underwear and breasts – where the trial judge ruled that none of this was admissible as evidence of sexual interest in the complainant – where the trial judge directed the jury to disregard the evidence of the comments about the complainant’s breasts entirely – where the trial judge directed the jury to use the other evidence as relationship evidence only – whether the prejudicial effect of the statements ruled inadmissible as sexual interest evidence was cured by the directions given to the jury

Criminal Code (Qld), s 632

Evidence Act 1977 (Qld), s 103ZY

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied

Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, applied

R v BEC (2023) 16 QR 1; [\[2023\] QCA 154](#), cited

R v LBK [\[2025\] QCA 111](#), cited

R v MFC [\[2026\] QCA 122](#), applied

R v Spina [\[2012\] QCA 179](#), applied

Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, distinguished

TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, applied

COUNSEL:

S L Kissick for the appellant

S L Dennis for the respondent

SOLICITORS: Millwater Tyrell Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **BRADLEY JA:** On 18 October 2024, the appellant was convicted of one count of maintaining a sexual relationship with a child, two counts of rape and one count of indecent treatment of a child under 16 who is a lineal descendant. The appellant was found to have committed the offences over a period of almost three years. Each count was a domestic violence offence. The sole complainant was the appellant's daughter, aged between 12 and 15 years at the time of the offending. On 14 February 2025, he was sentenced to imprisonment for ten years for the maintaining offence, with lesser concurrent sentences of seven years and five years for the rape offences, and two years for the indecent dealing offence.
- [2] The appellant challenges his conviction on six grounds:
- (a) Ground 1 is that the jury's verdict is unreasonable or cannot be supported having regard to the evidence.
 - (b) Ground 2 is that there was a miscarriage of justice because the learned trial judge failed to give the jury a *Robinson* direction in terms permitted by s 632(3) of the *Criminal Code*.
 - (c) Ground 3 is that there was a miscarriage of justice because the trial judge gave the jury a direction on distressed condition that was incomplete and invited speculation on the part of the jury.
 - (d) Ground 4 is that there was a miscarriage of justice because the trial judge admitted evidence of bra shopping, comments about the complainant's body and comments about piercings that were not admissible, and the Court would not be satisfied that the prejudicial effect of this evidence was cured by the directions given to the jury.
 - (e) Ground 5 is that there was a miscarriage of justice because the trial judge failed to direct the jury (or gave inadequate directions to the jury) about the acceptance of evidence of a witness in whole or in part and testamentary accuracy indicators.
 - (f) Ground 6 is that there was a miscarriage of justice because the trial judge misdirected the jury on differences in the complainant's account.
- [3] The appellant also seeks the Court's leave to adduce evidence in the form of an affidavit of the appellant's wife (**Ms P**), who is the mother of the complainant. It is convenient to deal with the leave application before turning to the grounds of appeal.

Leave to adduce new evidence

- [4] As the appellant concedes, Ms P's evidence was readily available at the trial. He had alerted his solicitors and defence counsel that Ms P was available as a potential witness. The appellant's written instructions to his defence lawyers show that he was given legal advice about the advantages and disadvantages of calling Ms P to give evidence at the trial. The advice appears to have been given in conferences on 10 and 15 October 2024. It included advice about the forensic advantage to the appellant of not giving or calling evidence in his defence and allowing defence counsel the final address to the jury.

- [5] On 16 October 2024, the appellant signed a document to confirm his instructions not to call Ms P. That was the third day of the trial. The advice and the instructions were given more than ten months after the complainant's evidence was recorded, long after her interviews with police had been disclosed, and on the cusp of the appellant being called upon.
- [6] The appellant's former solicitor gave evidence that defence counsel considered the possibility of calling Ms P to give evidence as part of the defence case. Her notes of conferences with the appellant and defence counsel record: discussion of whether to call Ms P; arrangements for Ms P to come to court to discuss her giving evidence; if Ms P were to be called as a witness that she may be challenged about knowing something of the appellant's alleged offending and about driving the complainant to stay with the appellant in his truck (where she was allegedly raped or indecently dealt with); counsel's advice not to call or give evidence; that it was up to the appellant to decide; and that the appellant would think about that issue overnight before giving instructions at a conference the next day. The notes also record that the appellant's defence counsel would request his relevant logbooks from Ms P, which were to be tendered by the Crown at the trial.
- [7] The Court must consider whether, if admitted, Ms P's evidence, when combined with the evidence adduced at the trial, would require the appellant's convictions to be set aside to avoid a miscarriage of justice.¹
- [8] Adopting the formulation of Gaudron J in *TKWJ v The Queen*, the usual question before the Court is whether the omission of the evidence "deprived the accused of a chance of acquittal that was fairly open".²
- [9] In her first affidavit, Ms P said she was not contacted by police to provide a statement after 9 November 2021, when she refused to let police into her house and "vaguely answered their questions." In her later affidavit, she stated, "No Queensland Police Officer has ever asked me to provide a statement in this matter."
- [10] At the trial, the investigating police officer gave evidence that Ms P twice refused to provide a statement, when he approached her for that purpose. The first time was shortly after the appellant's arrest. The second was about four months later. The appellant's defence counsel did not challenge this evidence in cross-examination. The officer's evidence explained why the Crown did not call Ms P to give evidence.
- [11] At the trial, the Crown agreed to tender copies of all the electronic communications between Ms P and the complainant on the night the complainant first informed Ms P of the allegation that the appellant sexually assaulted her. One of these was the exchange that included the complainant's preliminary complaint to Ms P, which the prosecution intended to tender on that basis. It was common ground that the Crown agreed to tender all the communications of that evening so that the appellant would not have to call Ms P as a witness.
- [12] In her second affidavit, Ms P said she never walked in on the appellant in the complainant's room under a blanket and on top of the complainant. She confirmed that the complainant and the appellant "would on occasion sleep in the same bedroom together." Ms P said she was not aware of any allegation until she received the

¹ *R v Spina* [2012] QCA 179 [34].

² (2002) 212 CLR 124, 133 [26].

electronic message from the complainant alleging sexual assault. She said she did not inform the appellant about this exchange of messages, as her first reaction “was to investigate the veracity of the claim”.

- [13] In her second affidavit, Ms P also said that between 31 December 2018 and 10 November 2021, she observed that the appellant “did not perform sex with me whilst he was on top” because “He could not to my observation lift his own weight for a sufficient period of time.” In her first affidavit, Ms P said, “at no time have I ever witnessed [the appellant] being inappropriate to [the complainant] as [the complainant] has alleged,” and she had “never ‘caught him in the act’ as [the complainant] has alleged.”
- [14] Ms P’s evidence in the two affidavits is otherwise not exculpatory.
- [15] Objectively, the obvious reason for not calling Ms P to give evidence at the trial was to preserve the appellant’s right of final address. Other obvious considerations include the risk that Ms P might be challenged about her knowledge of the appellant’s alleged offending. This might include her apparent refusal to provide a statement to the police. It might also include her role in driving the complainant to the appellant and leaving her with him in his truck for the night.
- [16] Another objective reason is that, under cross-examination, Ms P could have confirmed the appellant’s opportunity to offend against the complainant. Her first affidavit attests to this.
- [17] An objective reason to call Ms P as a witness at the trial was to deny the complainant’s allegation, made in a police interview, that Ms P had walked in on the appellant and the complainant in bed under a blanket in her room, with the appellant on top of the complainant, and walked out without saying anything. The complainant’s allegation was in general terms. She did not allege that Ms P saw that anything was happening under the blanket and did not exclude the possibility that Ms P did not see or identify the position of the appellant and the complainant under the blanket. So, in this respect, Ms P’s evidence would be of limited benefit to the appellant’s defence. Another objective reason to call her would be to adduce Ms P’s evidence of her observation that the appellant could not lift his own weight long enough to have sexual intercourse with Ms P while on top of her. This would involve some explanation of the mechanics and duration of intercourse between Ms P and the appellant. It could have been curtailed by the limits of the earlier cross-examination of the complainant.
- [18] Ms P’s first affidavit confirmed that the appellant would sometimes sleep with the complainant in her bedroom. If Ms P gave evidence, it was possible that she would confirm the same to the jury. If Ms P were to be cross-examined, the jury might take an adverse view of Ms P, who left the complainant with the appellant in his truck overnight, and later “stood by” the appellant rather than her daughter in the investigation and prosecution processes.
- [19] Cross-examination of Ms P about the police officer’s attempts to interview her about the alleged offending might have weakened an element of the appellant’s defence case about alleged deficiencies in the police investigation, specifically that police had not obtained statements from other family members.
- [20] In the circumstances, the appellant’s instruction not to call Ms P to give evidence at the trial³ was explicable on the basis that Ms P’s evidence would be of very limited

³ And his defence counsel acting on the instruction.

benefit to the appellant, would have confirmed the appellant's opportunity to commit the alleged offences (at home and in the truck), and would have forfeited the forensic advantage of final address. It was an informed and deliberate decision. Objectively assessed, the advantage of calling Ms P as a witness would have been slight compared with actual and potential disadvantages of doing so.⁴

- [21] Recently, in *R v MFC*, Henry J explained the test for leave to adduce new evidence in this way:

“The usual test for new evidence effectively requires it to be shown that the appellant should be acquitted, whereas the usual test for fresh evidence requires only that there is a significant possibility the appellant would have been acquitted. Why is the test for new evidence more demanding?

An appellant who at the time of trial knew or with reasonable diligence should have known of the allegedly material evidence sought to be relied on in the appeal, is differently positioned to an appellant who could not have known of the evidence because it is fresh evidence. The latter has been deprived of a fair trial because of the unavailability at trial of the evidence, despite the reasonable diligence of the defence. The former has not been deprived of a fair trial, having had, but been selective about exercising, the opportunity to have gathered and deployed evidence with the potential to have resulted in an acquittal.

The singular goal of those defending criminal charges is to give the defendant the best chance of being acquitted, but there is not a singular way of pursuing that goal. A variable array of choices must be made, including about what evidence should or should not be sought out for potential use in potential defence of the case and what evidence should or should not be adduced at trial. This invariably involves choices between pursuing different evidentiary paths, each of which may be perceived as providing a significant prospect of achieving an acquittal, with one being preferred over the other as giving the defendant the more significant prospect of acquittal.

Having made such choices and deployed them at a regularly conducted trial, there will usually be no proper basis to complain to this Court that, having lost, the appellant now wants a second chance to run the trial a different way, using new evidence, unless taken with the rest of the evidence, it shows (per the usual test for new evidence) that the appellant is innocent or that there must at least be a reasonable doubt as to the appellant's guilt. A mere significant possibility that the new evidence may have resulted in acquittal is not enough, because that possibility was present when the defendant nonetheless made the decision at a fair trial to prefer an evidentiary path perceived as providing a more significant prospect of an acquittal. There can be no miscarriage of justice merely because the defence chose an evidentiary path which did not result in an acquittal.”⁵

- [22] The appellant's decision not to call Ms P was a valid forensic choice. The course his defence counsel adopted on his instructions meant that the option of calling Ms P to

⁴ *TKWJ v The Queen* (2002) 212 CLR 124, 134-135 [32]-[33] (Gaudron J).

⁵ [2026] QCA 122, [52]-[55] (references omitted) (Bond and Doyle JJA agreeing).

give evidence in the defence case was not fairly open at the trial. It follows that the appellant was not deprived of a chance of acquittal that was reasonably open.

- [23] Leave to adduce the new evidence of Ms P should be refused.

Ground 1

- [24] The test for whether a verdict is unreasonable or cannot be supported by the evidence is clear. This Court must undertake an independent assessment to determine whether, on the consideration of the evidence as a whole, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of each of the offences. In doing so, this Court must give due regard to the role of the jury and the advantages afforded to a jury in having seen and heard the witnesses give evidence at trial.⁶ If the independent assessment of the record as a whole reveals inadequacies or discrepancies or other reasons why, notwithstanding those advantages, the jury ought to have entertained a reasonable doubt as to the appellant's guilt of that offence, then this Court should set aside the verdict on any of the counts as unreasonable.⁷
- [25] The complainant participated in four interviews with police, on 10 and 29 November 2021, 8 November 2022 and 17 May 2023. The complainant's evidence in court was recorded at a preliminary hearing on 7 December 2023. Recordings of each of these interviews were played for the jury, in addition to an edited version of her evidence at the preliminary hearing. The parties did not include the recordings in the record book for the appeal. The record book included transcripts of the interviews, which were marked for identification at the trial. The parties identified relevant parts of the interviews by reference to the transcripts. Neither party suggested that the Court should obtain and review any of the recordings.
- [26] As the police interviews progressed, the complainant moved from a clear reluctance to speak with police to being willing to give police more, and more detailed, information about the alleged offending by the appellant.
- [27] In her evidence in court, the complainant said she had watched the recordings of her interviews with police and that the things she said in the interviews were the truth. The complainant gave some further evidence in chief and was cross-examined by the appellant's defence counsel.
- [28] The complainant's evidence was that the appellant regularly engaged her in sexual conduct when she was in the family home. She said this happened during school holidays, when her mother was at work, and on Friday and Saturday nights when the appellant was home from his work, over the period between December 2018 and November 2021. She described one other occasion of offending when she was with the appellant in his truck. She described the appellant's behaviour over time as starting with kissing her on the mouth, escalating to touching her breasts and vagina, and then to penetrating her vagina and mouth with his penis.
- [29] The complainant said she disclosed some of the appellant's conduct to others, including her friends. Two friends gave evidence that she had done so. Their evidence was in recordings of interviews with police and at a preliminary hearing in the court. These were played for the jury.

⁶ *M v The Queen* (1994) 181 CLR 487, 493, 494; *R v ZT* (2025) 281 CLR 137, 144-146 [7]-[11].

⁷ *Pell v The Queen* (2020) 268 CLR 123, 145 [39].

- [30] Some objective facts about the circumstances were confirmed by the appellant's logbooks (as to the appellant's location and movements on relevant dates or times), a photograph (as to when and where the complainant was in the truck), and text messages between the complainant and her mother (as to her preliminary complaint).
- [31] There were inconsistencies between the information the complainant gave police in different interviews and between that information and her evidence in the court. There were also differences between the recollections of the friends and her mother about what the complainant had told each of them and what she recalled having said to them, or what she told police had occurred.
- [32] The complainant told police several times that she was not comfortable talking about the appellant's conduct, because she had tried not to think about it, did not want to remember it, and did not want to speak about it. In the earlier interviews, she said she had "blocked out" and could not remember some early conduct by the appellant, which she said she now thought was grooming and manipulation by him. In those interviews, she did not want to go to court. She told police she had said "less" about the appellant's conduct to her mother than she had told police, and that her mother was unhappy at being told about it after the complainant had told her friends.
- [33] In later interviews, the complainant spoke of "flashbacks" she experienced of the more serious alleged offending. She said, at the time of the offending, she did not have "any idea of what sex was" and was not sure that what the appellant had done was "rape".
- [34] The complainant did not disclose the vaginal rape in the truck to police until her final interview. She said that immediately after the rape in the truck, and an oral rape at home, she "trauma blocked" remembering what happened. She said she remembered aspects of the offending, including the part of the truck where the offending occurred and the taste of the appellant's semen. She told the court, "I was not comfortable at all talking about it. It's been a very touchy subject for me up until about now where I feel as though I can confidently tell people what's happened to me – what I've been through." The first time she said that the appellant had not used a condom when he raped her was when she gave her recorded evidence in court.
- [35] When asked in cross-examination, the complainant said also she did not remember how many times the appellant penetrated her vagina with his penis, saying it was "four or five time at least." She could not describe the appellant's penis.
- [36] These aspects of the complainant's evidence were the subject of the defence counsel's address to the jury. The trial judge directed the jury that these were matters for the jury to consider when assessing the credibility and reliability of the complainant's evidence in the context of all the evidence adduced at the trial.
- [37] The complainant was 12-14 years of age when the events she described occurred. She was 14 when she made the preliminary complaints and at the time of the first two police interviews, 15 at the third police interview, and 16 at the fourth police interview. She was almost 17 when she gave her pre-recorded evidence in court. The emerging detail, clarification and expansion of the conduct she described is consistent with an emerging understanding of the nature and significance of the conduct the subject of questioning. Her initial reluctance to complain, and her preference not to recall and speak about the conduct, is understandable. As a matter of ordinary human

experience and understanding, the inconsistencies in the complainant's evidence indicate the frankness and honesty with which she spoke of events she described as traumatic. As a matter of logic, they do not raise any lasting concern about her credibility or reliability.

[38] Having considered the transcripts of the complainant's evidence (in and out of court), the transcripts of the evidence given by her two friends, the evidence of the investigating police officer, and the documents tendered at the trial, I have concluded that it was open to the jury to accept the complainant's evidence and to be left with no reasonable doubt that the material facts to which she testified occurred in the way she described. My assessment of the sufficiency and quality of the whole of the evidence does not leave me with a doubt about the guilt of the appellant.

[39] The appeal should fail on ground 1.

Ground 2

[40] The appellant contends that there was a miscarriage of justice because the trial judge did not give the jury a direction on "matters personal to the witness, or from the circumstances", as explained in *Robinson v The Queen*.⁸ The appellant bore the onus of persuading this Court that this was so.⁹

[41] The appellant submitted that, in addition to "changing accounts and inconsistencies" in the complainant's interviews with police, there were seven other matters "peculiar" to the complainant that ought to have been the subject of a warning to the jury. These were:

- (a) The complainant's home life at the time she made the initial disclosure;
- (b) The suggestions made by her friends when questioning her about the appellant's conduct;
- (c) Her inability or unwillingness to give her mother any detail of the appellant's conduct;
- (d) Her adoption of the expression "trauma blocked", used by her friends, and her use of the term "flashbacks" to the effect that her "memories" were being "revived";
- (e) That she had seen kissing on TikTok;
- (f) The way her complaint came to the attention of the police; and
- (g) Her unwillingness to speak to police and the child safety officer at the first interview at school.

[42] These matters were highlighted in the closing address by the appellant's defence counsel at the trial.

[43] The trial judge concluded the summing-up with a lengthy summary of the rival contentions. In summarising defence counsel's closing address, his Honour noted defence counsel's contentions on each of the matters summarised in [41] above. His Honour did so, noting it "may seem unnecessary to do it given you have just heard them".

⁸ (1999) 197 CLR 162, 168 [19].

⁹ *Dhanhoa v The Queen* (2003) 217 CLR 1, 13 [38], 15 [49] (McHugh and Gummow JJ).

- [44] The primary judge directed the jury that they must be satisfied of the complainant's honesty and reliability beyond reasonable doubt before they could act on her testimony. In the context of the jury's role of assessing the credibility and reliability of the evidence of the witnesses, his Honour told the jury:

“you will remember the competing submissions that are made to you about how you would treat particularly the complainant's evidence, the central witness in this case. They are factors that you can take into account, and should take into account, but, ultimately, it is you, the jury, who are the judges of the facts.”

- [45] The trial judge directed the jury “to apply [their] own life experience and common sense and determine what [they] consider the facts are”, and that, in doing so, the jury could “accept all of what a witness says or only part of it, or none of it.” In this context, his Honour reminded the jury that the “credibility and the reliability of witnesses, particularly ... the complainant is critical to this case.”

- [46] In this appeal, Counsel for the appellant submitted that “the directions around using common sense and looking at the evidence are currently inadequate” because, where there are inconsistencies or gaps in a complainant's evidence, the mandatory directions mean juries “are directed to almost ignore inconsistencies completely.” With respect, the mandatory directions are not to that effect.¹⁰

- [47] His Honour gave the following directions relevant to differences in the complainant's various accounts of the offending:

“You are the representatives of our community. You apply your commonsense and life experience, but the circumstances of sexual offending against a child is not something that one hopes many people in a jury share, so it is not an experience that forms part of the repertoire of people's lives, generally speaking. It may or may not for any one of you, but as was said by both counsel, it is important to look at the evidence and not apply sort of shortcuts as to how people should behave because sometimes people do apply preconceived expectations of how a complainant should react, how they should behave, how they should be affected; whether they should make an immediate complaint.

And so whilst you apply your own wisdom and knowledge of the human condition, it is important that you do not judge the facts on a preconceived expectation. And so to guard against that risk, I am going to give you a series of directions and those are directions of law, but, as I said, you nonetheless have to determine this based on your assessment of the evidence.

...

The next aspect relates to differences in the complainant's account and you will remember that both counsel made submissions about how you should treat the fact that over time, further details were given by the complainant that were not mentioned in the first interview with the police.

¹⁰ Evidence Act 1977 (Qld), part 6B division 3.

Now, the experience of the court shows that people may not remember all the details of a sexual offence or they may not describe a sexual offence in the same way each time and that trauma may affect people differently, including how they recall events, and that it is, in the experience of the court, common for there to be differences in accounts of sexual offending and both truthful and untruthful accounts of a sexual offence may contain differences.

It is up to you ultimately to determine whether or not differences in the complainant's account are important in assessing the complainant's truthfulness and reliability, and I stress nothing that I have said in these directions remove that primary responsibility for you, the jury, to determine what evidence you are satisfied of beyond reasonable doubt.

...

... inconsistencies between the complainant's account and any part of the complainant's evidence before you may cause you to have doubts about the complainant's credibility or reliability, but whether those consistencies or inconsistencies impact on the credibility or reliability of the complainant is a matter for you.

Now, inconsistencies in describing events are relevant as to whether evidence about them is truthful and reliable and any inconsistency, and defence pointed to inconsistencies, are a matter for you to consider in the course of your deliberations, but the mere existence of inconsistencies does not mean that of necessity you must reject the complainant's evidence and you would understand that some inconsistencies to be expected because a person who is asked to tell, or tell someone else about sexual offending may tell a slightly different version at a time, they may not because of the relationship, fully describe the events, or the person who hears it may not remember it correctly. So it is a matter ultimately for you to consider."

[48] The appellant's submission that his Honour directed the jury to "almost ignore" inconsistencies in the complainant's evidence should be rejected. The trial judge brought the differences to the attention of the jury in summing-up, after directing the jury, with respect, appropriately about how they should approach their fact-finding task.

[49] At the trial, neither counsel identified any matter about the complainant or her circumstances that the jury might not appreciate may possibly make her evidence unreliable. The trial judge directed the jury as to all the matters the appellant's defence counsel had identified as relevant to the credibility or reliability of the complainant's evidence, including:

"... there is no typical normal or proper response to non-consensual sexual activity. A person who is subject to non-consensual sexual activity may respond in different ways, including by freezing and not saying anything or doing anything.

The situation in this case is that it is not alleged that the complainant received physical injuries or was subjected to violence when any of the offending occurred.

I direct you that people who do not consent to a sexual activity may not be physically injured or subjected to violence or be threatened with physical injury or violence and the absence of that does not of itself mean that a person is not telling the truth about the sexual offence.

The next direction relates to how people give evidence. Now, if a person has been the subject of sexual offending, that may affect people differently and that means that some people may show obvious signs of emotion or distress when giving evidence in court, or speaking about the matter to police in a recorded interview, but others may not and the presence or absence of emotional distress does not of itself mean that a person is not telling the truth about a sexual offence.

...

You will remember that defence counsel made a significant attack upon the complainant, suggesting that if she truly had been sexually offended against, she would have made a complaint at a much earlier time. Now, again, the experience of the court is that the absence of complaint or delay in making a complaint does not of itself indicate that the allegation that a sexual offence was committed is false.

Now, there may be good reasons why a person does not – a person does not make an immediate complaint or hesitates before making a complaint or is reluctant to make a complaint about a sexual offence, and examples of good reasons can include a fear of what will happen if they do make a complaint. Their mixed feelings towards the person particularly within a family of the person who they say sexually offended against them and there may well be, on the evidence, other reasons that you come to by your inference or from direct evidence from complainant as to why a person may not make an immediate complaint.

Another aspect of this case that defence relied upon was that there had been ongoing contact of a friendly nature on the surface between the complainant and her father at the time when offending was alleged to have occurred.

Now, the experience of the court is that people may react differently to sexual offending against them and that there is no typical normal or proper response to being the victim of sexual offending and that some people who are subjected to sexual offending might never contact the person again, but others, and the experience of the court is that others may continue in a relationship with a person who has offended against them and may otherwise continue to communicate with that person, and that there may be good reasons why a person who is subjected to sexual offending continues in a relationship with a person and continues to communicate with that person.

And, again, that is similar for the reasons that I have discussed but ultimately that calls for your consideration of the circumstances of this case.”

[50] Neither counsel asked the trial judge to give a further direction of that nature. In the appeal, the appellant’s counsel did not identify, in terms, the direction it was

submitted ought to have been given at the trial. These aspects are not determinative, but they are relevant to this ground of appeal.

- [51] None of the matters summarised at paragraph [41] above was a matter that the jury might not appreciate without a warning. Each was the subject of evidence and addresses. No specific warning was necessary.
- [52] The appellant's trial occurred after the commencement of s 132BAA of the *Evidence Act 1977* (Qld), which prohibited a trial judge from giving a direction that children are unreliable witnesses, or that it would be dangerous or unsafe to convict the appellant on the uncorroborated evidence of children, or that they should scrutinise with great care the evidence of child witnesses.
- [53] His Honour could make a comment on the evidence, provided the comment was appropriate to make in the interests of justice.¹¹ However, as the trial judge told the jury, they could ignore the comment.¹² Indeed, they were not to follow any of his comments on the facts, unless their own independent assessment of the evidence led them to the same view. The safer course, adopted by the trial judge, was to make no comment on the facts beyond reminding the jury of the arguments put by counsel.¹³
- [54] There was no miscarriage of justice as contended by ground 2.

Ground 3

- [55] In summing-up, the trial judge told the jury:

“Now, in this case you will remember that the preliminary complaint witnesses indicated that [the complainant] was crying when she related to them the sexual offending that occurred against her. That is present as part of the narrative of events. It is not led to support as independent evidence of the complainant's account that she was sexually offended against, and it must not be used for that purpose.

The fact that she showed distress at the time speaking to those people has no relevance to the defendant's guilt and there may be many reasons why, as a matter of common sense and human experience, she may have been distressed or crying at the time of relating those things. But you must not use it in support of the truth of the complainant's account and you should disregard the evidence of the distress condition, except to the extent that it is part of the narrative of events of that particular day, that is, for instance, you could take it into account that maybe there was not a fulsome account given because she was distressed but it does not provide independent evidence.”

- [56] The appellant submitted that the trial judge's directions were “incomplete and invited speculation”. The appellant submitted that his Honour should have told the jury that the complainant's distress may have been “feigned or exaggerated”.
- [57] The trial judge's direction about this evidence was clear. It told the jurors to use their commonsense and experience. It did not invite them to speculate about why the

¹¹ *Evidence Act*, s 132B(3).

¹² *Azzopardi v The Queen* (2001) 205 CLR 50, 69-70 [50] (Gaudron, Gummow, Kirby and Hayne JJ).

¹³ *RPS v The Queen* (2000) 199 CLR 620, 637 [42] (Gaudron A-CJ, Gummow, Kirby and Hayne JJ).

complainant might have shown signs of distress. Importantly, it instructed the jurors not to draw an inference supportive of the complainant's credibility, or adverse to the appellant, from the evidence of her distressed state.

- [58] The trial judge's direction was consistent with law.¹⁴ The absence of a suggestion that the complainant may have been feigning or exaggerating her distress did not cause a miscarriage of justice.

Ground 4

- [59] Put on notice by the trial judge, after the Crown case closed, the prosecutor accepted his Honour's view that the complainant's comments in a police interview about the appellant's questions when he accompanied her and her mother shopping for bras was not admissible as evidence of the appellant's sexual interest in the complainant, and that the statement of one of the complainant's friends in a police interview that the appellant "sometimes made comments" about the complainant's breasts, was not admissible for any purpose.

- [60] The appellant's defence counsel had not objected to this evidence being played to the jury. Defence counsel indicated she intended to cross-examine the complainant about this evidence but had inadvertently omitted to do so. There was no application to exclude that evidence. There was no application for a mistrial. After discussing the matter with counsel, the trial judge ruled that the evidence could not be used as evidence of sexual interest, and he would address the jury accordingly. Counsel agreed to this course. While not conclusive on the point, this procedural background indicates something of the way the trial was conducted and the view the close participants took of the potential effect of the bra shopping evidence and the evidence of the inappropriate comments in the atmosphere of the trial.

- [61] In relation to the inappropriate comments, the trial judge instructed the jury:

"[I]n her interview with police, [the friend] said that the defendant had not seemed creepy or weird towards her or [the complainant], but – she said, "But if I was" – and this is at the family home, "But if I was up and [the complainant] was asleep, he would come in and talk to me. He sometimes made comments on [the complainant] on her body", and when asked what were those comments, she replied, "Just stuff about her breasts", and when asked, "Well, what would he say about her breasts?", she said, "I am not exactly sure", because she said it is been a year since that occurred.

Now, I direct I that you must not treat that as evidence that can be considered to show a sexual interest in the child. It is evidence that you must entirely disregard; it is not evidence that you can act on in that way. I am sure you understand that, but it is necessary for me to give you a specific direction that you must not use that evidence in any way adverse to the defendant."

- [62] As to the bra shopping evidence, the trial judge told the jury:

"[T]he complainant described that she had been bra shopping with her mother and that the defendant had come shopping and he had said,

¹⁴ *Evidence Act*, s 103ZV.

“What about this bra? What about this bra?” Now, I direct you that you must not use that evidence in any way adverse to the defendant. You must not use it to reason that because that occurred, if you accept it occurred, that it in any way makes it more likely that the offending occurred. It is simply part of the background describing the relationship between the defendant and his daughter the complainant, but you must not use it to reason that it is more likely that the offence was committed.”

- [63] Shortly after the jury retired to deliberate, a note was received from a juror about the use the jury could make of the evidence about comments by the appellant about the complainant’s body piercings and the underwear she was wearing. The question asked whether the jury should treat this evidence in the same way they were to treat the evidence about the appellant’s comments during the bra shopping. After consulting with trial counsel, the jury returned, and his Honour answered the juror’s question:

“The prosecution has led that evidence as context to what is said to be the charged offences, but you must understand that the relevance of that evidence is limited. Even if you accept this evidence, you must not conclude that it makes it more probable that the defendant committed any of the charged offences. It is relevant only to answer questions which might naturally occur about the background to the incidents which the prosecution alleged were the charged offences and to be entirely specific, you must not use any of that evidence to infer a sexual interest in the complainant.”

- [64] There is no reason to think the jury did not follow the clear directions of the trial judge. The question indicates the juror recalled and understood the effect of his Honour’s original direction and was conscientiously seeking to follow it. The juror’s question gave his Honour an opportunity to reinforce the original direction to the whole jury.
- [65] For the appellant, it was submitted that “despite the clear directions of the trial judge”, this Court “could not be satisfied that the properly instructed jury were able to fully ignore the evidence” and, so, “could not be satisfied that it has not created a miscarriage of justice.” The appellant’s counsel submitted to this Court that his Honour ought to have declared a mistrial and discharged the jury.
- [66] The appellant’s submission on this ground should be rejected. His Honour’s direction was clear and sufficient. There was no reason to be concerned that the jurors might not follow it.

Ground 5

- [67] The appellant contended that the trial judge made no direction or no adequate direction about drawing inferences, about the acceptance of evidence in whole or in part, or about “testamentary accuracy indicators”.
- [68] This should be rejected. The prosecution case against the appellant was based on the complainant’s direct evidence of what she said the appellant did. It was not a circumstantial case. It did not require the jury to draw inferences from facts. The trial judge gave the jury the usual directions on the drawing of inferences. The trial judge gave the jury the usual direction that they could “accept all of what a witness

says or only part of it, or none of it.” The case did not call for the trial judge to give the jury more extensive directions on either the acceptance of evidence or on drawing inferences.

- [69] As to testamentary accuracy indicators, the trial judge gave the usual warning about the demeanour of a person not used to giving evidence. His Honour did not direct the jury expressly to consider the likelihood of a witness’s account compared with other evidence the jury accepted. The “objective facts” that the jury might have accepted established opportunities for the appellant to offend were consistent with the complainant’s allegations. A specific direction about comparing the witnesses’ accounts with such evidence would not have assisted the defence.
- [70] The prosecution and defence cases, and the evidence presented to the jury, did not call for a direction to consider the ability or opportunity any witness had to see, hear, or know the things about which the witness testified. The witnesses, in particular the complainant, gave evidence of things they said they saw, heard or knew firsthand.
- [71] There was no miscarriage of justice as contended by ground 5.

Ground 6

- [72] The final ground of appeal concerns the directions the trial judge gave related to sexual offences.¹⁵
- [73] A judge in his Honour’s position was required to direct the jury “that experience shows” certain things.¹⁶ In the directions, extracted in paragraph [47] above, his Honour used the expression “the experience of the court shows”.
- [74] At the trial, neither counsel sought any redirection on this point. Counsel would have been on notice, as the trial judge had used the same expression on the first day of the trial in directing the jury, before the recordings of the complainant’s police interviews were played.
- [75] In her closing address to the jury, anticipating the summing up, defence counsel had adopted the same expression:

“[H]is Honour will no doubt give you a number of directions about this, about the **experience of the court**, and that’s obviously quite proper directions which the law requires in cases such as this, and you no doubt, in your everyday life, have heard about expectations or myths about how complaints should arise, and a lot of them are a bit backwards and outdated these days, and many of you may appreciate that, and his Honour has directed you on some of those and will direct you again perhaps on those and some more in relation to **the court’s experience**.” (emphasis added)

- [76] Parliament does not require that a trial judge “use a particular form of words” in giving the direction.¹⁷ As Crowley J explained in *R v LBK*:

“It is important to bear in mind however that directions given by a trial judge to a jury are not a judicial instruction about what facts the jury

¹⁵ Under *Evidence Act*, part 6B, division 3, subdivision 4.

¹⁶ Ibid, s 103ZY.

¹⁷ Ibid, s 103ZQ(5).

should find. The directions required by Part 6B [of the *Evidence Act*] are designed to ensure that when jurors assess the evidence, they do not deliberately or unwittingly reason in an illogical or impermissible way. But that is not to say that jurors may not use their common sense, wisdom and experience of the human condition when evaluating the evidence. They may, and indeed must, do that as the representatives of our community charged with determining whether the Crown has proven its charge beyond reasonable doubt. However, the legislature has determined that in cases of this kind, the collective, common sense, wisdom and experience of the human condition that jurors bring to bear upon the issues raised at trial cannot be deployed without guidance. That is because the lived experience of victims of sexual offences, results of dedicated research and the accumulated curial experience of cases like the present shows that without such instruction, juries may wrongly assess matters on the basis of ‘rape myths’ or misconceptions about how they think victims of sexual offences should behave, despite having no actual knowledge or direct experience of such matters to draw upon.”¹⁸

- [77] His Honour’s direction fulfilled the purpose for which the statute was enacted. It did not represent a material departure from the requirements of the statute. There was therefore no miscarriage of justice on the ground advanced by the appellant.

Another matter

- [78] During the hearing of the appeal, there were exchanges between the Court and counsel about issues associated with providing recordings and transcripts to the jury during deliberations in the jury room.¹⁹ The trial judge had allowed the jury to have the recordings and transcripts before the final addresses at the request of defence counsel and with the agreement of the prosecutor.²⁰ In her closing address, defence counsel identified passages in the transcripts and invited the jurors to look closely at them while deliberating. In summing up, his Honour repeated the usual directions that transcripts are not evidence but merely an aid to follow or find parts of the evidence on the recordings. The trial judge had given those directions several times during the trial when the recordings were played.
- [79] The appellant’s counsel told the Court he had considered the matter before the appeal hearing and did not make an application for this topic to become another ground of appeal. Counsel suggested the topic did “sit with” ground 5 as a failure to direct the jury about “evidential testamentary factors”. It was not raised by that ground of appeal and was not pursued on that basis. It was not the subject of written submissions or considered oral submissions. This Court should refrain from further comment on it.

Final disposition

- [80] The Court should order:

¹⁸ [2025] QCA 111, [134] (Mullins P and Boddice JA agreeing).

¹⁹ Williams J referred counsel to the reasons of Livesey AJA in *R v BEC* (2023) 16 QR 1, 34 [103], 38-39 [113]-[116], 41 [124], and 45-46 [141]-[143].

²⁰ These circumstances seem to distinguish it from those in *BEC*. See (2023) 16 QR 1, 48-49 [159] (Callaghan J).

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

[81] **DOYLE JA:** I have had the advantage of reading in draft the reasons of Bradley JA. I agree with his Honour's reasons and with the orders his Honour proposes.

[82] **WILLIAMS J:** I have read the reasons and proposed order of Bradley JA.

[83] In respect of the application for leave to adduce new evidence, I agree that leave should be refused for the reasons expressed by Bradley JA.

[84] In respect of Ground 1, I have undertaken an independent assessment of the evidence adduced at the appellant's trial. My assessment of the sufficiency and quality of the evidence, taking into account the jury's role and the advantages the jury enjoys, is that it was open to the jury to accept the complainant's evidence and to be satisfied beyond reasonable doubt of the appellant's guilt. I agree with Bradley JA's reasons and conclusion that the verdict was not unreasonable, and that Ground 1 should be dismissed.

[85] In respect of Grounds 2 to 6 and the additional matter, I agree with the reasons of Bradley JA and that Grounds 2 to 6 should be dismissed.

[86] Accordingly, I agree that the appeal should be dismissed.