

SUPREME COURT OF QUEENSLAND

CITATION: *R v RBU* [2026] QCA 151

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

FILE NO/S: CA No 35 of 2025
DC No 6 of 2024

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Emerald – Date of Conviction: 14 February 2025 (Clarke DCJ)

DELIVERED ON: 21 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 9 March 2026

JUDGES: Brown JA, Bradley JA and Crowley J

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted by a jury for sexual offences against two complainants who were children at the time of the offences – where the appellant contends that the trial judge erred in directing the jury about the use of the preliminary complaint evidence in relation to each complaint – where preliminary complainant evidence is not admitted as evidence of the facts in issue but as evidence of consistency which lends to credit of the complainant whether the trial judge made a wrong decision on a question of law – whether a trial judge has made a decision is to be considered in the context of the duties and obligation of the trial judge in the criminal trial – whether a misdirection may amount to a wrong decision on a question of law – whether that decision was material and could realistically affect the jury’s reasoning to return a guilty verdict – whether a substantial miscarriage of justice has actually occurred

Criminal Code (Qld), s 668E(1)
Evidence Act 1977 (Qld), s 93A, s 94A, s 103ZY

Collins v The Queen (2018) 265 CLR 178; [2018] HCA 18, cited
MDP v The King (2025) 99 ALJR 969; [2025] HCA 24, cited

R v CDI [2024] QCA 232, cited
R v LSS [2000] 1 Qd R 546; [1998] QCA 303, cited
R v Mason [2006] QCA 125, cited
Suresh v The Queen (1998) 153 ALJR 145; [1998] HCA 23, cited

COUNSEL: T A Ryan KC for the appellant
 E L Kelso for the respondent

SOLICITORS: KF Solicitors for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **BROWN JA:** I agree that the appeal should be dismissed for the reasons set out by Crowley J.
- [2] **BRADLEY JA:** I agree with the reasons of Crowley J and with the order proposed by his Honour.
- [3] **CROWLEY J:** After a four-day trial by jury in the District Court, the appellant was convicted of four sexual offences against two complainants, “S” and “K”. He now appeals against his convictions.
- [4] The offences of which the appellant was convicted were committed on various occasions over a lengthy period from 1992 to 2014. S was the appellant’s stepdaughter, and K was his biological daughter. Each complainant was a child at the time of the offending. By the time of the trial, K was 25 years of age, and S was 39.
- [5] The appellant’s former wife, RL, is the mother of each complainant. When S was a young girl, her mother married the appellant. She and her older brothers then lived together as a family with their mother and the appellant in Winton and Longreach for several years. During that time, K and her younger brother, RH, were born. In the years following the births of their children, the relationship between the appellant and RL deteriorated. They eventually separated in about 2000.
- [6] It was during the time the family resided at Longreach and Winton that the appellant maintained an unlawful sexual relationship with S, a child under 16 years (**Count 1**). A circumstance of aggravation was that during the course of maintaining the unlawful sexual relationship, the appellant had raped S.
- [7] After separating from the appellant in about January 2000, RL moved away with the children to St George. The appellant stayed in the Longreach area. Thereafter, S no longer had contact with the appellant. Later, in October 2000, S disclosed to her mother and others that she had been sexually abused by the appellant. Her mother then took her to see the local doctor and the police. Upon examination, the doctor found S’s hymen was intact and did not see any evidence of sexual abuse.
- [8] S subsequently provided a formal witness statement to police, in which she detailed her complaint and the nature of the appellant’s alleged offending against her. After some delay, police eventually arranged a pre-text telephone call between S and the appellant. During the call, the appellant made no admissions and denied S’s allegations. The police told S that if she wanted to go ahead with her complaint it would be her word against the appellant’s. S decided not to pursue the matter and police took no further action at the time.

- [9] Notwithstanding these events and S's allegations, K and RH continued to have regular contact with the appellant. For many years, they would go to Longreach to stay with him during the school holidays. It was over the course of these visits that the appellant maintained an unlawful sexual relationship with K, a child under 16 years, (**Count 2**). On one particular occasion, he indecently dealt with her by rubbing his penis on her vagina (**Count 3**). On another, he penetrated her vagina with his thumb (**Count 4**). After that visit, K no longer went back to see the appellant.
- [10] For many years, K said nothing to anyone about what the appellant had been doing to her when she visited him. On several occasions, after she had returned from her holiday visits, S had asked her directly whether the appellant had touched her. Each time K told her nothing had happened. However, on one occasion when she was visiting the appellant, K telephoned her mother and complained about the appellant's conduct towards her. Her mother told her that if she wanted it to stop, she would have to call the police herself. K did not do so.
- [11] It was only many years later, when she was an adult, that K disclosed the appellant's offending towards her. She told S and others. She then went to the police and made a formal statement, detailing her complaint. Police then arranged a pre-text telephone call between K and the appellant. During that call, the appellant made no admissions and denied K's allegations.
- [12] Because K had come forward and made her complaint to police, S revived her own complaint against the appellant. In doing so, she gave a further written statement to police.
- [13] The Crown case against the appellant at his trial ultimately depended on the jury accepting each of the complainants, beyond reasonable doubt, as credible and reliable witnesses. The Crown relied upon their evidence to prove the appellant's alleged offending against them individually, but also as similar fact evidence in support of the alleged offending against the other complainant. There were otherwise no eyewitnesses to any alleged incident and there was no medical or forensic evidence to support the complainants' allegations. The Crown called several witnesses who gave evidence of S and K's preliminary complaints.
- [14] The appellant's case at trial was that no sexual abuse or sexual acts had occurred and the complainants had made up their allegations. He did not give evidence. He called evidence from a medical practitioner, Dr Louis Izzo, who opined that the presence of an intact hymen in a girl of the age S was when examined by Dr Marshall was not consistent with repeated acts of vaginal penetration.
- [15] By an amended notice of appeal, the appellant's sole ground of appeal is:
- "The learned trial judge erred in directing the jury about their use of preliminary complaint evidence in relation to each complainant."

Evidence at trial

Complainant S

- [16] S was 14 years old when she provided her initial written statement to police on 20 October 2000. Her statement was read to the jury and formed part of her evidence, pursuant to s 93A of the *Evidence Act 1977* (Qld). She also gave oral evidence at

trial, during which she adopted and confirmed the contents of her statement. The key aspects of her evidence were as follows.

- [17] She was about 6 years old when her mother married the appellant. They lived together at Longreach until the end of 1992, then moved to Winton. About halfway through grade three, the appellant started coming into her bedroom at night. He would kiss her on her lips and cheek. Sometimes she could feel his tongue and could feel him lick her lips. He would sometimes say, "This is our little secret" and "Don't tell anyone else, and don't let Mum know". She would feel awful. She did not understand why he was kissing her. She wanted to tell someone but did not know how. The kissing would happen about once a week and went on for about one year.
- [18] When she was in grade four, the appellant would come into her room to say goodnight. He would kiss her on the cheek and then would start touching her breasts with his hands. He would then kiss her breasts. He would not say anything and would just leave her room. This happened about once a week and continued on for about two years.
- [19] When she was in grade six and about 10 years old, the appellant kept pigs on a property out of town. She would go with him in his work ute to help look after the pigs. After helping with the pigs, the appellant would get into the back of the ute with her. He would guide her into a lying down position and would start kissing her. He would kiss her on the lips and would often use his tongue and put it inside her mouth. He would lift up her top and kiss her breasts and would put his hand down her shorts and touch her vagina. He would put his fingers in the lips of her vagina and sometimes he would take her pants off before he touched her. This happened about twice a week. When it happened, he would say, "I love you". He would also take her hand and put it on his penis and say, "Don't be afraid to touch it". She was scared that if she did not do what he wanted he would get mad at her. Sometimes he would get her to touch his penis through his pants and sometimes it would be directly onto the skin of his penis. Sometimes his penis would be hard and other times it would be wrinkly. This would go on for about five or ten minutes.
- [20] The touching got worse as the appellant started rubbing her vagina hole, making direct skin on skin contact with his thumb and fingers.
- [21] The appellant made S touch his penis on other occasions as well. It happened when they were in the car together, as well as at their house, in the main bedroom, or in the spa, or shower. The appellant would also touch her vagina when they were in the spa together.
- [22] Most of the time when the appellant made her touch his penis, "stuff" would come out. By the time she made her first statement, she knew the name for this stuff to be sperm. Sometimes after the sperm had come out, the appellant would say, "Now it's my turn". He would then start kissing her on her private parts and would kiss her on the lips of her vagina and her breasts. Sometimes he would say, "If it hurts then, I will stop". But even if she told him that it hurt, he would not stop. After a while, the appellant made her put her lips on his penis. He told her, "now it's your time." She would put her lips around his penis and go in and out with his penis in her mouth and she used to feel really awful. Sometimes white stuff would come out and go into her mouth. Sometimes he would make her do it again. She could not recall if the oral sex acts happened before she and the appellant started to tend to the pigs together but said it happened in the main bedroom of the home, at least a couple of times a week.

- [23] Similar events also happened when she went with the appellant to visit his parents at their properties in Longreach and on one occasion when they went to Mt Isa for car racing and stayed in a motel.
- [24] The appellant told her not to say anything to anyone. They would go to the pigs nearly every afternoon at about five or six o'clock. He would also come into her room and do the same kind of things that he did while they were out at the pigs. That happened at least twice a week and sometimes it would go on for up to half an hour. S remembered feeling really hurt that her father would do those things to her and feeling sad and not wanting to go home. Around this time, she approached her older brother, B. She told him the appellant was touching her and he told her, "Don't worry". She did not try and tell anyone else.
- [25] The incidents in the ute and her room continued on until she was about 13 years old. Things stayed about the same between the ages of 10 and 13. She remembered that because when she was nearly 13 they were living at an address in Winton while renovating another house in town. She recalled being at the new house whilst it was being renovated and being with the appellant in the room that was to be hers. It was nighttime and after tea. He started kissing her and then began to kiss her on the lips of her vagina. He made her suck his penis. He laid down on the carpet, took off his shorts and underpants, and took off her shorts and underpants and told her to lie down on top of him. He then used his hand to put his penis into the hole of her vagina, saying, "It won't hurt that much". She did not know what he was talking about and was scared. He was kissing her and she told him it was hurting. He said, "It's okay if it hurts a little bit, but tell me if it hurts too much". She thought his penis went all the way into her vagina. She felt as though someone was putting something into a space where it would not fit. She felt a throbbing pain in the area below her tummy, and her vagina felt really sore. She recalled trying really hard not to cry. She told the appellant it was hurting again, and he took his penis out of her vagina and sat her up. He then tried to put his penis into her vagina again, but she said she needed to go to the toilet. Because there was no working toilet there at the time they had to go home.
- [26] After this incident, the appellant continued to come into her room, but not as often as before. He would still kiss her and touch her in the area of her vagina, and he still made her touch him and kiss his penis until sperm came out. The appellant never spoke about what they did at any time, except when he was touching her.
- [27] They eventually moved into the renovated house in Easter 1999. S remembered one Friday night, about two or three weeks before the end of 1999, she was staying on the couch in the lounge-room so she could watch a movie. The appellant was also staying in the lounge-room on a mattress. While she was lying on the couch, he came over and knelt beside her and started kissing her and touching her on her breasts. She remembered thinking at the time that she would be safe because he had never done anything while she was in an area of the house where someone might have seen. Her mother was in the bath at the time. Someone started coming down the stairs and the appellant got up and went to the toilet. Later, after she had fallen asleep on the couch, she woke up to the appellant kissing her and touching her on her vagina and breasts. She told him she had to go to the toilet. When she came back to the couch, the appellant came over and held her hand. He then led her over to the couch, and they sat down on the mattress. He laid her down and took off her shorts and underwear. He told her to sit on his lap and put her legs around his waist. He then used his hand

to put his penis in her vagina. He told her he loved her. She recalled a tingling type of feeling. It was hurting and she could feel pain in her vagina area and a throbbing pain in her lower belly. She told the appellant she was tired and wanted to stop. She was confused, scared, sad and angry. He took his penis out of her, and she told him she was going to bed and went and laid on the couch. Before she went to sleep, he said to her, "I love you, and I would never hurt you." She recalled thinking that, if he loved her, how could he do that to her. She thought the same thing whenever he was touching her or when he was yelling abuse at her or at her brothers and her mother.

- [28] S gave evidence that she specifically recalled the occasion at the renovated house, as she knew he had put his penis inside her, not just his fingers. She said there were lots of times that "stuff" happened when she would go with the appellant to the house while it was being renovated, but she could not recall when it had started. She confirmed that she never consented to any penile sex with the appellant. When asked how often that particular act would occur, she said:

"... probably about three to four times a week. Whether it be the same thing as what he was doing or maybe not as much, but he would always come in about that many times a week... But it – a couple of times a week, he would definitely come into my room."

- [29] She did not recall the appellant ever ejaculating in her vagina. She said afterwards she would sit on the toilet in pain. She recalled one particular occasion when she wiped her vagina and there was the tiniest bit of blood on the toilet paper.
- [30] After Christmas that year, her mother, her brother RH and K went to St George for a holiday. Not long after, they all left Winton and moved to St George to live. They were all scared of the appellant and did not want to live with him anymore.
- [31] On 12 October 2000, S had a conversation with her twin cousins, RSA and RST. She stated, "I told them I was molested by my stepdad. I told them that he had sex with me." She recalled they urged her to tell her mother and asked her if she wanted them to tell her. She eventually agreed and they went and told her mother. Her mother then approached her and had a conversation with her. She stated, "I told mum what [the appellant] had been doing to me".
- [32] S's mother then rang Dr Desley Marshall and later took her to see the doctor at the medical centre. Dr Marshall told her that she would have to contact the police to tell them what had happened. On 19 October 2000, she attended the St George Police Station and provided her statement.
- [33] S recalled the pre-text phone call with the appellant, in which he "pretty much told me that I was a liar, and it was my word against his." The police told her that if she wanted to go to court it would be her word against the appellant's. She said at that age she was frightened, and there was no way she could have done that.
- [34] In cross-examination, S denied the suggestion put to her that no sexual acts or sexual abuse had ever occurred between her and the appellant. She agreed that she did not complain to her mother before October 2000. She disagreed that, prior to the separation, her mother had asked her on numerous occasions whether the appellant had touched her. She said she could recall one such occasion where her mother had asked her if anything had happened and she had lied and told her, "No". She

explained that her mother and the appellant would argue regularly back then and she was too scared to say anything. She said she had “bottled it up for years” and that even after the separation she did not say anything until her cousins had told her nanna that she was a lesbian and that was what had triggered her to say, “Hang on a minute. This is what has happened to me. No, I am not a lesbian.” She confirmed that was then the catalyst for her to make her statement to police. She denied that the real reason for her complaint was an ongoing family law dispute between her mother and the appellant.

- [35] S said that even after making the disclosure to her cousins, she did not tell her mother what had happened “in full detail”. She agreed that in her police statement she had written that she had told her mother what the appellant had been doing to her but said she had never gone into detail about what she went through and was pretty sure she did not tell her all the details of what had happened. She said she had told her, “some of the stuff”.
- [36] S agreed that her mother arranged for her to see the doctor. She did not recall being told by Dr Marshall that her hymen was intact. She agreed that it was when her family had later moved from St George to Mt Isa that she had gone to the police station to make the pre-text phone call to the appellant. She did not know whether the phone call had occurred on 24 January 2003, as suggested to her, but disagreed that, when she made the phone call, she did not even know if she had been raped, adding, “...I know what I went through...I know exactly what had happened.” She agreed she had asked the appellant why he had had sex with her and that he had denied that he had. She agreed that she had then said to the appellant, “Well, whatever you did to me.” She agreed that after the pre-text call the police had spoken to her and said they did not consider it was appropriate to proceed with the investigation of her complaint and she had decided not to at that stage.
- [37] S agreed that when her sister, K, was young that K would sometimes visit the appellant. She agreed that back then, before she had made her statement to police, she had not told her mother not to send K to visit the appellant. She said her sister was only a baby then and she did not think anything would happen to her. She agreed that K had later lived with her for a time. She said her mother had moved out when she was 16 years old and K stayed with her until she was about 4 years old. She agreed that during this time she had never told K not to go to visit the appellant, but said that sometimes when K would come back, she would ask her if anything had happened, or if K needed to tell her something, and K would say that nothing had happened. She said she stopped asking after a while. She recalled one occasion when K had come home early from the appellant’s and she had taken her for a drive and had told her “bits and pieces that had happened”, without going into detail of what the appellant had done to her when she was younger, but that K did not say anything about what had happened to her. She agreed that would have been around 2013 or 2014. She said she stopped asking K whether anything had happened to her and just assumed that it had not.
- [38] S agreed that she had provided her second statement to police on 24 August 2021, after K had provided her statement. When asked if she had complained in her second statement of numerous incidents of penile penetration by the appellant, occurring three or four times a week, S at first said, “maybe not the penile penetration, but everything else”. After being reminded of what she had stated in her second statement, she agreed that she had written that the appellant would often walk into

her room and bring her downstairs and start having sex with her and that this would happen three or four times a week. She nevertheless maintained that her recollection now was that were two acts of penile penetration that had occurred on the two occasions she had described in her earlier evidence, but that other sexual acts would happen three or four times a week. She agreed with the suggestion that when she had made her second statement, she had remembered some further incidents had occurred but that she did not now recall any other acts of penile penetration. She accepted that she would have remembered all the things she had disclosed in her second statement at the time she had made her first statement but said she would have been scared to say then what had happened to her. She said she had “blanked a lot out to cope”. She further explained that there were things she had missed out in her statements and then later on she had said things that she remembered. She disagreed she had made her second statement to help out her sister, K.

- [39] In re-examination, S explained that she had made her second statement to police because K had been to the police to make a statement and had asked her if she would go back to make another statement. When asked if she could explain the apparent discrepancy in her recollection of the number of occasions of penile penetration occurring, S said that she could only remember the two specific occasions, but added, “[I]t probably did happen more than twice”.

Complainant K

- [40] The key aspects of K’s evidence were as follows.
- [41] Her parents separated when she was a child and she then lived with her mother. She and her younger brother RH would still see the appellant almost every school holidays. He lived at Winton and later on a cattle station outside Longreach.
- [42] When she visited the appellant at the station things of a sexual nature happened. It happened more than once but K was unable to say when it started, stating, “To be completely honest, I can’t remember. I was too little... looking back now, now that I have my own children, it started a lot younger than what I originally thought.” Things would happen in the car when they drove around the property, but they mainly happened in the house. When she, RH and the appellant would all be in the front of the car there was not much room, so she would have to sit in the centre. When RH got out of the car to open gates or for other reasons, the appellant would touch her legs and her vagina through her clothes. He would stop when RH got back in. She was about six or seven years old when this first happened. As she got older things got progressively worse. Things happened until she was about 12 or 13 years old.
- [43] In the house, things would mainly happen in the appellant’s bedroom. When she was around 10 years old, the appellant would buy her bras and underwear, and she would try them on for him. On one occasion he bought her a bikini. She would change into the clothes while he sat on the bed with his legs open. Sometimes he was clothed and other times not. He would tell her how good she looked. On one occasion he told her she was “sexy” and she saw he had an erection. He pulled her back onto the bed and rubbed his penis on her vagina and said, “You are so wet”.
- [44] Sometimes things would happen in the shower. She would sometimes shower with the appellant, and he would touch her, washing her or feeling her, but not inserting anything, or he would make her touch him. She said it started out innocently enough

but that he would become aroused and his penis would be erect. She remembered calling her mother after a while and telling her that she did not want to shower with the appellant anymore and asked her mother to come and pick her up. At the time she was “clueless” and did not know anything about what had happened to S. She recalled this was after she had turned 12 years old as she had her own phone. Her mother said she would call her back and hung up. When her mother rang back, she told K that if she wanted it to stop, she would need to ring the police herself.

- [45] The last time something happened was at Winton after the wedding of the daughter of the appellant’s girlfriend. K thought it was 2012 or 2013, when she was 12 or 13 years old. They were staying at a neighbour’s house at the time. After they got back from the wedding, she went to bed but later woke up in pain and feeling like her vagina was on fire. The appellant had his thumb inside her vagina. She got out of bed and went to the toilet and stayed in there a long while. When the appellant asked her to come back to bed, she said to him, “I am your daughter. You do not do this to me. You don’t.” The next morning, she told him she was going home. She then got the bus back home and that was the last time she went out to see the appellant for the holidays.
- [46] When asked to further describe where the appellant was when she woke up during this incident, K said, “With his finger inside me”. In response to a direct question of whether she had consented to the appellant penetrating her vagina with his thumb, K said, “Absolutely not”.
- [47] K had seen the appellant on a few subsequent occasions. One time was at her grandfather’s funeral, and another time was when the appellant had cancer. She said her mother made her go to see him that time. She had also spoken to him on the phone after her own daughter was born and said that she had “completely lost it”.
- [48] When cross-examined, K agreed that she had made her police statement on 20 August 2020. She agreed that back then she had read it over to make sure it was accurate. With respect to her evidence about the appellant touching her on occasions in the car, K denied that she had said something different to what she had put in her statement. She nevertheless agreed that in her statement she had stated that the appellant would touch her when RH got out of the car as well as when the appellant was changing gears. K explained that this was only very brief touching, that she was only very young at the time, and there was a lot of things that had happened that she did not put in her statement. She agreed that she was aware that her brother RH had said that he did not see any touching in the car but denied that she had tailored her evidence because of that.
- [49] K denied that S had wanted her to join in a complaint to police. She said that S had spoken to her once about whether she “got touched up” and that was the time she had come home on the bus. When asked what she had said to her in response, K said, “I told her nothing”. K denied the truth was that nothing had in fact happened. She said the conversation with S was very brief and it was the first time that she had ever heard of the appellant doing anything to her. She recalled S wanted to know if he had done that to her as well. She said she told S, “No. He was just drunk and abusive, like he normally is”. She said she gave that answer as she was scared because she was just a little kid at the time and after calling her mother she felt no-one believed her. She accepted that she had lied to S for seven years about the appellant not doing

anything and said it was only after her own daughter had been born that she confessed that he had actually done something.

- [50] K agreed that the conversation with S happened seven years before she had actually gone to the police. She said that in that time she had told GT, the partner of her brother RH, about it. She had found out they were going to visit the appellant, and she had told her to not ever leave their daughter alone with him. When GT asked why, K told her, "Because he has done stuff".
- [51] K agreed that in her pre-text telephone call with the appellant, she had raised the last incident with him. She said that she had tried to get an admission out of him but that he refused to say "yes" to anything. She denied that what she had said about the appellant on the last occasion she visited him was made up. She said the time she called her mother she had begged her to pick her up but that her mother had said, "If you want it to stop, you need to ring the police yourself." She agreed that she thought her mother was telling her what the police had told her. She did not recall telling any of her teachers what had happened when she returned. She denied the suggestion put to her that nothing of a sexual nature had ever occurred between her and the appellant.
- [52] In re-examination, K said that after she came home following the last incident, she did not speak again to her mother about the things that had happened with the appellant. She said she had not told her teachers about anything as she was scared.
- [53] When asked to explain how she had eventually made her police statement, K said that she had gone to the police and said that she wanted to make a statement about what had happened to her, as she had found out that her older brother was taking his ten-year old daughter out to see the appellant and she wanted to make a statement, "so when she comes forward, it'll be there to support her." She said the police officer told her that was not going to stop something happening and suggested that she make a complaint as that might stop something further happening. She then said:

"...I walked out. I sat on the front steps. I rang [S] and I said, 'If I go in there and put that statement in there, I know that you're going to be brought into it. I need to know that you are strong enough to get through this with me.' She burst into tears and she said, 'If you go in there and do it, I will stand by you.' And so I did."

Preliminary complaint evidence

- [54] **RL**, the mother of the complainants, gave the following evidence.
- [55] In September 1992 she married the appellant. He is K's biological father. When they were first married, they lived in Longreach. They later moved to Winton, where she worked as an assistant in nursing at the hospital. S lived with them in their home at Winton. She and the appellant separated in January 2000.
- [56] She took S to the police after her sister's twin girls came and told her that something was wrong. She went to see S, who was "in a state". S started to tell her what had happened, but she was very upset. She said S said, "[the appellant] had touched her", but at that stage she did not tell her a lot. When she asked S what she meant, S did not say a lot. She then took S to see Dr Marshall at the medical centre.
- [57] After her relationship with the appellant ended in January 2000, K and her brother RH would still see the appellant under a court order for custody of the children. She

would take them to Winton so he could have his time with them. She recalled a time when K was staying with the appellant on holidays and she had called and asked to come home. She said she was not able to go and get her at the time. She said K rang her and told her that “her father had been trying to touch her ... and she didn’t like it. ... And she was frightened.” RL said she was at Mt Isa at the time and had no way of getting to Longreach. She said not long after K stopped going to visit the appellant on school holidays.

- [58] When she later asked K what had happened with the appellant, K just said to her “Dads don’t do [that]”¹ and wouldn’t say anything when she tried to speak to her. She said that conversation took place a couple of days after she had come home. She described K as very reserved and that she did not want to talk. She asked K if she wanted to go to the police station and she said “No” at that stage.
- [59] In cross examination, RL confirmed that in October 2000 her sister’s daughters had come to see her and told her that something was wrong with S. She said they told her that she needed to go and see S, as something had happened. It was then that she spoke to S and asked her what was wrong. S was sobbing and said, “[appellant] had touched her”. She reiterated that S did not go into detail at that stage. She rang the medical centre because S was quite upset. Between ringing and getting to the medical centre, S told her that “he had touched her private parts”. After taking S to see Dr Marshall, she took her to the police station. Dr Marshall later examined S while she was present in the room.
- [60] With respect to K, RL agreed that from about the age of three she would take K to see the appellant. That continued until she was much older. She would sometimes ask her children if anyone had touched them. When it was put to her that K never told her she had been touched, RL said “[K] never said anything to me for a long time, no.” She agreed that K did not speak to her until she was an adult. She agreed that over the years she would have talked to K on numerous occasions, more than ten, about whether she had been touched. On some occasions K would not even answer her and she did not press her. She agreed that there were some occasions where K had told her nothing had happened.
- [61] When asked about the telephone call that K had made to her the time she was visiting the appellant, she said that she had told K that she had to ring the police station, but K said she did not know if she could. She said K was upset, sobbing and crying and that she had to tell her to slow down for her to tell her what was wrong. She agreed that when K came home, she asked her if she wanted to go to the police and she said “No”. She said K did not clarify exactly what had happened and all she said was the appellant “had tried to touch her and tried to get into bed.” She was unable to remember if K had stopped going to see the appellant after that phone call.
- [62] She agreed that there had been times when K had travelled, either alone or with her brother, to visit the appellant. She said that she did speak to K after she returned on these occasions, but that K did not confide in her about anything. She said K did say that “she wasn’t comfortable”. She further said that when she asked her why, K just said she did not feel comfortable. She agreed that K may have said, “You know what he’s like, abusive”. She agreed that K had not said anything at all about being

¹ ARB 294. The transcript records that the witness’ evidence was that K said, “Dads don’t do” but in a follow up leading question asked of the witness the prosecutor put that the witness had said, “Dads don’t do that.” Nothing turns on this difference.

touched, adding “Not at that stage, no.” She agreed that K had not said anything for many years after.

- [63] **PE** was K’s former manager at McDonalds in Mt Isa in about 2013 or 2014. She gave the following evidence.
- [64] K had told her something of a sexual nature had happened with the appellant. Her recollection was, “She told me that her father had done inappropriate stuff to her, um, like, um – sorry ... Um, like, um, fingering her and penetrating and asking inappropriate things of her.” She said this conversation happened at the end of 2018 or early 2019. She recalled K had just had a little baby girl and that she just did not want the same thing to happen to her.
- [65] She had another conversation with K, probably six to eight months later. K again told her she did not want what had happened to her to happen to her daughter. K told her this had happened at Longreach on a station where she lived with her father. When asked whether K had commented on the frequency with which these things occurred, she said “It would happen multiple times”.
- [66] In cross-examination PE agreed that K had also told her that the appellant had penetrated her with his penis. She said K did not tell her how often that happened. She agreed that what K had said about being penetrated was in the context of her vagina being penetrated by the appellant’s penis. She agreed that K had told her it was “frequent” and that she was not consenting. She agreed that K had told her it had occurred over a number of years and that it was, “Not just once or twice. Like, it was an extended period.”
- [67] In re-examination, PE said she had a memory of K specifically telling her about penile sex with the appellant occurring. She said K only brought it up on that one occasion and she could not recall the exact words that she had used.
- [68] **RSA** is one of S’s cousins. She agreed that she had made a statement dated 22 May 2001, when she was 14 years old. A copy of that statement was marked for identification and read to the jury by the trial judge.² It contained the following relevant evidence.
- [69] Her cousin S was 15 years old at the time. She would see S most days as they went to school together. She knew the appellant as S’s stepfather. In October last year (2000), she remembered being in S’s bedroom with her twin sister and S. S started crying and was really upset. She stated, “I can’t remember how the conversation started but I remember [S] told us something.” She said, “[the appellant] has molested me”. She further stated that she told S that she and her sister should tell S’s mother, but S did not want them to do that. She could not remember the exact conversation, but they talked S into telling her mum. She and her sister then went out to the kitchen where their aunty, S’s mum, was talking to someone. They took her outside and had a conversation with her.
- [70] The only other thing she could remember was that after S had the conversation with them in the bedroom, S would often cry when she saw them at school. She said S would tell them a little bit about why she was crying but she had no other information in relation to the matter.

² MFI “D”.

- [71] In cross-examination, RSA maintained that S had told her that she had been molested. She denied that had occurred in the context of her calling S a lesbian.
- [72] **RST** is the sister of RSA and the other twin cousin of S. She had provided a statement to police on 22 May 2001. That statement was marked for identification and read to the jury by the trial judge.³ It contained the following relevant evidence.
- [73] S was 15 years old at the time. She saw her most days as they went to school together. She knew the appellant as her stepfather. She remembered October last year (2000), when she and her sister were in S's bedroom with S. S started crying and was really upset. She could not remember how the conversation had started but S had told them something, saying, "[the appellant] has been molesting me when – has been molesting me when I lived at Winton." She could not remember if it was her or her sister but one of them said they were going to tell S's mother and S said "No". She and her sister went out to the kitchen to speak to their aunty. She had no other information in relation to the matter.
- [74] In cross-examination, RST agreed that S did not want her and her sister to tell her mother and wanted to keep it between the cousins.
- [75] **RH** is the brother of S and K. His biological parents are the appellant and RL. He gave the following evidence.
- [76] There was a time K told him something of a sexual nature had happened between her and the appellant. She told him, "Things have happened". When asked what she had actually said, he replied, "She just said things have happened, I believe." He explained that they were "pretty much" the words she had used. She did not tell him when this had happened. He said the conversation with his sister happened a few years ago, around "2020-ish".
- [77] When asked by the trial judge if he could clarify precisely in what context K had said "Things had happened", RH said, "This is what she said. 'Things have happened and I want you to be aware that things have happened', because I have a daughter of my own." When asked how old his daughter was at the time K had the conversation with him, he calculated that the conversation must have been in 2017 or 2018 because he knew his own daughter was not yet five years old at the time.
- [78] In cross-examination, RH agreed that K was an adult at the time she spoke to him. He recalled she was upset at the time but did not remember if she was crying.
- [79] **GT** was in a relationship with RH. She had known his sister, K, since she had first started dating RH. She gave the following evidence.
- [80] K told her something about the appellant just before she and RH went out with their children to visit him for the Easter long weekend. She said K told her, "... that she wasn't treated very nice and she was sexually assaulted, but she didn't go into much detail. She just thought I would like to know ... before taking my daughters out there". She could not recall the words that K had used. In response to a question from the trial judge, GT confirmed that K had told her that she had been sexually abused by the appellant.

³ MFI "E".

- [81] In cross-examination, she agreed that K had never told her anything about what the sexual assault was, adding “I didn’t push her into details and I wasn’t expecting her to.”

Medical evidence

- [82] ***Dr Desley Marshall*** was formerly a registered medical practitioner with a general practice at St George. She gave evidence in the prosecution case. Although she did not have any qualifications in forensic medicine, she had been a Government Medical Officer since 1979 and had conducted many female genital examinations. In October 2000, RL brought her daughter, S, into the clinic. Dr Marshall had no independent recollection of seeing S but had made contemporaneous notes and had later made a statement, on 31 March 2001, by reference to the notes.
- [83] Using her statement to refresh her memory, Dr Marshall said that on 12 October 2000 she met with RL and S. She understood that S had been sexually abused by her stepfather in the past. She did not examine S at the time. That only occurred later, on 31 March 2001. She could not recall why she did not do the examination on 12 October. She thought that she had examined S at the request of the police. She did a general examination looking for signs of trauma and also conducted a genital examination looking for signs of injury. She performed the examination by having S lay back with her legs spread to expose her genitalia. She did not use a speculum. She used her fingers and conducted a visual inspection.
- [84] When cross-examined, Dr Marshall agreed that she found no signs of sexual abuse. She confirmed that what she meant by that was that upon examination she found S’s hymen was intact. She explained that the hymen is a thin piece of skin at the entrance of the vagina and that it could get some ragged edges if penetrated. She agreed that if there was a lot of penetration occurring that you could see evidence of the ragged edge or tears to the hymen. She agreed that she did not see any other trauma to S’s genitalia.
- [85] ***Dr Catherine Skellern*** is employed by the Queensland Children’s Hospital as a staff specialist in child protection and forensic medicine. She had been a paediatric specialist since 2000. She gave evidence in the prosecution case. Dr Skellern provided a critique of the adequacy of Dr Marshall’s examination of S and an explanation for her examination findings. She also gave evidence to counter the anticipated expert evidence to be given by Dr Izzo in the defence case.
- [86] The essential parts of Dr Skellern’s evidence were as follows.
- [87] Dr Skellern had been provided with copies of S’s witness statements and a copy of Dr Marshall’s witness statement to review. She described the anatomy of the hymen and the technical difficulties of examining a young girl the age of S. Whilst she thought it might be within the realms of a general practitioner to look for acute problems in the genital area, when the examination was remote in time from when the events happened, as was the case with S, she considered it became more of a forensic examination. That would be difficult for someone without training in forensic medicine. Interpretation of the appearance of the hymen was difficult. She thought a general practitioner would not undertake the examination in the same way as a trained forensic examiner, but that even a trained forensic examiner may not have adequate visualisation of the hymen to be able to make any inference. A visual

inspection of the kind Dr Marshall had conducted would be a very limited examination.

[88] According to Dr Skellern, contact may or may not cause problems with the hymen; and pressure could cause a bruise, abrasion, laceration or tear, which could be present within a period of time after there had been an application of force. She agreed that in this case, where the examination had occurred over a year after the alleged events, the examiner would be looking for a change in the hymen and that would be the only thing that would be an indicator of sexual abuse.

[89] Dr Skellern said that the hymen could also accommodate insertion without causing injury or abnormality. When penetrative sexual activity first occurred that would not necessarily cause permanent injury to the hymen. The fact that there was no injury did not mean that there had not been penetration. She further explained:

“So it is well understood that the hymen doesn’t necessarily get injured or change when there is sexual intercourse, and in fact it’s not known how long it takes and it – whether it ever – so sometimes it may change over time, but it is certainly not, um, an expectation that there would be something to see later on down the track, um, to – to indicate that, um, intercourse had taken place.”

[90] Dr Skellern said that hymenal evidence was not reliable in determining whether sexual activity had occurred. She said that if S had experienced an episode of penile-vaginal penetration followed by seeing some blood on some toilet paper that would suggest some sort of acute injury. However, she said that it might be a laceration or an abrasion that had subsequently healed, or that the abnormality had simply not been visualised on the limited examination by a general practitioner. She said that would not necessarily result in a change to the hymen. She considered the examination of S was inadequate to clarify the anatomy of the hymen at that time.

[91] Dr Skellern agreed that she had been provided with a report of Dr Izzo, prepared on behalf of the appellant. She said she had read the report and completely disagreed with Dr Izzo’s opinion that it was inconceivable that after many acts of intercourse, as described by the complainant S, that her hymen would remain intact. Dr Skellern said she disputed the view that there was an expectation that there should be abnormality of the hymen. She noted that Dr Izzo himself accepted that the hymen does not necessarily get injured or change following penetration; and that Dr Izzo’s experience was in examining women for the purposes of gynaecology and obstetrics, whereas her experience was as a forensic examiner and in interpreting physical findings.

[92] When cross-examined, Dr Skellern agreed that inserting something sharp into the entrance of the vagina was more likely to cause potential injury than a blunt object, such as a penis. She agreed there were a number of variables relevant to whether a penis inserted into the vagina might cause injury, such as the size of the penis, amount of force used, and the dynamic and frictional forces involved. She did not agree with the suggestion that “the more often something is attacked, the less likely [it’s] able to continue its resistance to that force.” She said that each episode may or may not be injurious.

[93] Dr Skellern agreed that she had recited the factual basis for her opinion in her report, which referred to two instances of sexual intercourse. She agreed that she had not

referred to it occurring three to four times a week. She further said that the amount of times intercourse occurred was irrelevant to whether there would be any expectation of visible abnormality of the hymen.

- [94] In re-examination, Dr Skellern agreed that the fact that Dr Marshall did not have qualifications in forensic medicine would have affected her examination of S and that it would have been outside the scope of her expertise. She further agreed that the depth of penetration into the vagina was another factor that would affect whether a hymenal injury might occur.
- [95] **Dr Louis Izzo** is a qualified medical practitioner and an Associate Professor in obstetrics and gynaecology at the University of Notre Dame in Western Australia. He gave evidence that he has a particular interest in medico-legal matters and had previously given evidence for both prosecution and defence in about thirty or forty matters involving suspected sexual abuse.
- [96] Dr Izzo confirmed he had prepared a report in respect of the matter involving S. To prepare his report he had been provided with copies of S's two statements and a letter from Dr Marshall. Dr Izzo had also seen a transcript of the evidence given by Dr Skellern in the trial.
- [97] Dr Izzo essentially agreed with Dr Skellern's evidence about the anatomy of the hymen. He said that because it was so thin, it was not surprising that when someone had a number of acts of intercourse that the membrane was ruptured. Because of its location, Dr Izzo said a speculum was of no assistance in an examination as the speculum would pass that area. He said the hymen would be visible with the naked eye in an examination where the patient lay back, spread their legs and the examiner separated the labia majora and labia minora.
- [98] When asked what factors might lead to whether the hymen was damaged or not, Dr Izzo said it depended on how it looked in the first place, as a hymen with multiple small holes would tend to tear differently to one with a large hole in the middle. Dr Izzo noted that in her second statement, S claimed there had been sexual intercourse three to four times a week.

The trial judge's directions

- [99] At the commencement of the trial judge's summing up, his Honour framed the central issue for the jury's determination as follows:

“The issue for your determination is incredibly straightforward, you might think, whether you accept the evidence of each of these complainants beyond reasonable doubt, that the defendant, who was then either their stepfather in count 1, or their biological father in counts 2, 3, and 4 did these things. If you are satisfied beyond reasonable doubt these things happened, you would convict the defendant, that is find him guilty. If you are not satisfied, you would acquit, that is find him not guilty.

The defendant's case, as you know, is that none of these things happened at all, they must be all a complete fabrication. The evidence of [S] is sufficient to prove the elements of count 1. The evidence of [K] is sufficient to prove the elements of counts 2, 3, and 4. If you find

they did not conspire to make up their false complaints, and you think that what each of them is saying is reliable and is also similar, it may be used by you to confirm, support or strengthen the evidence that you are considering in respect of the other complainant, because commonsense would tell you that it would be a very unusual coincidence for two people to independently make up allegations like this.

It all boils down to the impression [S] and [K] made upon you. What you thought of them when they were giving their evidence. Were they speaking from some rehearsed made-up story or were they reliving and talking to you about what had happened to them. Whether they impressed you as honest and reliable witnesses or not.”

- [100] When giving further general directions as to how the jury would approach the issue thus framed, the trial judge gave the following standard directions:

“Matters which will be of concern to you will be the credibility of the witnesses and the reliability of their evidence. Credibility has to do with honesty. Reliability can sometimes be different. Sometimes an honest witness can be good, but profess to a lack or poor memory. It is for you to decide what you accept, whether it be the whole of what someone says, part of it or even none of it. You can accept or reject such parts of the evidence that you think fit, collectively discussing it amongst yourselves. It is for you to judge whether a witness is telling the truth and correctly recalls what they are talking about and what they have given evidence about.”

- [101] When dealing with preliminary complaint evidence, the trial judge gave these directions:⁴

“Turning then to the topic of preliminary complaint. For good reason, hearsay evidence, that is the recalling of what someone said in a spoken conversation to someone else at some other point, is just not admissible, unless there is some exception to it. In cases like this, there is an exception to it and the evidence is allowed. The reason for it is actually quite archaic, and I often wonder the relevance of it in this day and age, but in any event, putting that to one side, in this case then you have heard evidence of what [S] and [K] said to other people prior to [S]’s police statement back in 2001, when she was still a child, and before [K] gave her statement on 20 August 2021. Once they give a statement to police, the evidence does not become admissible.

So that is why it is called preliminary complaint evidence. It is evidence preliminary, or before, the police statement. The use that you can make of this evidence is quite limited. You use it to consider what the complainant said, what each of those complainants said, or perhaps more precisely what those people now remember they said, and then make a determination if you think it is similar or if it differs or if it even matters. And you, as Judges of the facts, you make these determinations about those three things.

⁴

ARB 79-80.

The fact that each of those people said something to other people does not mean what they are talking about happened. You can use the evidence only to see if it is similar or if it differs to what they talked about here in court. And, as I have said, it is up to you whether any similarity or difference then impacts on your assessment of them as a witness. So the evidence can only be used to make a determination about those witnesses' honesty or credibility.

Consistency is something you can take into account. So if you think that there has been a consistency of the complaint, well, you might think it is more likely that what they are saying is accurate and true. If you think that there is vast differences, that might cause you to have some concern about their accuracy and truthfulness. It is entirely a matter for you. As I have said, it is up to you what you make of it.

The mere existence of inconsistencies does not mean that, of necessity, you must just outrightly reject the complainant's evidence. You would expect some inconsistency. It is natural enough for people who talk about things more than once about something, to tell a slightly different version, or the memory is different each time when they are then recounting what they were told.

And bearing in mind here, people were being asked to recall spoken-word conversations from many years ago, and it may have been a long time between when the conversation happened and they were first asked to recall what was said. You would consider the relationship existing between the people, and the emotion which might impact either talking about it, and also the people's recollection of what had been said, in conversations like this." (emphasis added)

- [102] The impugned directions that are the subject of this appeal are those that appear in the underlined passage in the above excerpt.

Submissions

- [103] The appellant says the impugned directions were erroneous in two ways. Firstly, he submits that the initial part of the directions wrongly instructed the jury that the preliminary complaint evidence could be used to bolster the reliability of the evidence of a complainant. Secondly, he submits that in the latter part of the impugned directions the trial judge erred by directing the jury to determine whether there were "vast differences" when instructing the jury to consider whether there was any inconsistency in the complaints made. The appellant says that, in circumstances where there was obvious inconsistency between the preliminary complaint evidence and the evidence given by each complainant with respect to the particular sexual acts that were the subject of the charges, the impugned directions wrongly limited the jury's assessment of such inconsistencies.
- [104] With respect to the complainant S, the appellant accepts that the general preliminary complaint evidence of RL, RSA and RST was consistent with S's allegations that she had been touched sexually in some way by the appellant, but says the evidence is otherwise inconsistent with S's evidence that the appellant had penetrated her vagina with his finger and his penis.
- [105] Similarly, with respect to the complainant K, the appellant accepts that the general preliminary complaint evidence of RL, RH and GT, was consistent with her evidence

that she had been dealt with sexually by the appellant; but that the more specific preliminary complaint evidence of PE, that the appellant had engaged in acts of penile penetration of K's vagina over an extended period of time, was inconsistent with her testimony at trial.

- [106] As to the first issue taken with the directions, the appellant accepts that the initial portion of the trial judge's summing up on this issue was correct. However, he submits that the trial judge's subsequent directions in the underlined passage above were clearly wrong as a matter of law. He says the impugned directions clearly misstated the permissible use that the jury could make of consistent preliminary complaint evidence. He contends that preliminary complaint evidence is only ever admissible as evidence that may support the credibility of a complainant. It may do so, he argues, if there is consistency between the preliminary complaint and the complainant's account given in evidence at trial. Here however, the appellant says the trial judge's directions impermissibly instructed the jury that they could consider the preliminary complaint evidence as relevant to their assessment of both the reliability of the evidence of the complainants and their credibility.
- [107] The appellant argues that the concepts of "reliability" and "credibility" in this context are distinct. He submits credibility is concerned with the truthfulness of the witness, whereas reliability is concerned with the accuracy of the witness's account. He says there was no lawful basis for a direction that permitted a jury to rely on a complainant's prior consistent statement as being relevant to the reliability of their evidence as to how they were sexually abused.
- [108] As to the second issue, the appellant says the effect of the impugned direction was to wrongly instruct the jury that inconsistency would only raise a concern about a complainant's evidence if there was a "vast difference" between the evidence of a complainant and the evidence of a preliminary complaint witness. He submits that this not only reinforced the erroneous directions already given about how the preliminary complaint evidence might be used; but that it also placed an arbitrary and unjustified limitation on the extent to which any inconsistency between the evidence of a complainant and the evidence of a preliminary complaint witness could cause the jury to entertain a doubt about the accuracy and truthfulness of the evidence of that complainant.
- [109] The appellant argues that acceptance by the jury of the evidence of the complainants as *prima facie* credible, would not lead inevitably to convictions, or in the case of Count 1, proof beyond reasonable doubt of the circumstance of aggravation that the complainant had been raped. The appellant submits that the jury could only convict him if it was satisfied beyond reasonable doubt that the complainant had reliably described the particularised sexual acts that were the subject of each of the individual counts. He contends that impugned directions of the trial judge give rise to a real risk that the jury may have impermissibly used the preliminary complaint evidence, to the extent that they considered it to be consistent with a complainant's evidence, as relevant to the reliability of that complainant's account. Furthermore, he argues, there is a real risk that the erroneous directions led the jury to impermissibly apply a test of "vast difference" in determining whether any inconsistencies detracted from a complainant's reliability.
- [110] The respondent submits that the trial judge's directions were not erroneous. With respect to the first point raised by the appellant, the respondent says the impugned

directions were not wrong as the concepts of reliability and credibility are not actually distinct in a case such as this. In that regard, it says the jury could only have convicted the appellant if it was satisfied that the events described by the complainants were true. It further points to the fact that the impugned directions were consistent with the relevant Benchbook directions on preliminary complaint, which provide for the jury to be told, “[W]hether consistencies or inconsistencies impact on the credibility or reliability of the complainant is a matter for you.”⁵

- [111] The respondent additionally notes that, later in the summing up, the trial judge gave mandatory directions of the kind required by s 103ZY of the *Evidence Act*, which included a direction that it was up to the jury to decide whether or not any differences, gaps or inconsistencies in the complainant’s account were important in assessing the complainant’s truthfulness or reliability.⁶ The respondent submits that the impugned directions were consistent with these mandatory directions and the other general directions given by the trial judge.
- [112] As to the appellant’s second point, involving the trial judge’s use of the phrase “vast difference”, the respondent says that having regard to the nature of the preliminary complaint evidence given at trial the direction did not amount to an unjustified limitation on the jury’s consideration of any inconsistencies between the preliminary complaint evidence and the evidence of the complainants. It argues that the preliminary complaint evidence was vague and lacking in detail, save for the evidence of PE which included the apparent disclosure of an allegation of repeated penile vaginal rape that was not given in evidence by K. It says that such inconsistency could only be considered as “vast” and therefore the trial judge’s directions could not have restricted the jury’s consideration of that inconsistency. Otherwise, it submits, the preliminary complaint evidence was neither consistent nor inconsistent.
- [113] The respondent contends that when the directions are read as a whole, and not considered in a piecemeal way, there is no real risk that the jury would have been misled or misused the evidence. It further says that there was no real risk that the jury would treat the evidence of preliminary complaint as confirmatory of the facts on which the charges were based.

Consideration

- [114] To succeed with his appeal, the appellant must establish that the trial judge made a decision on a question of law; that it was a wrong decision; and that the wrong decision was material, as it could realistically have affected the reasoning of the jury to the verdict of guilty that was returned in the trial that occurred.⁷ If each of these things are established, the appeal must then be allowed and the appellant’s convictions must be set aside, unless the respondent persuades the court that “no substantial miscarriage of justice has actually occurred”, according to the proviso in s 668E(1A) of the *Criminal Code*.
- [115] The appellant does not contend that the impugned directions constitute an error or irregularity that was fundamental to the trial, in the sense discussed in relevant

⁵ Supreme and District Courts Criminal Directions Benchbook, Chapter 68.

⁶ ARB 83.

⁷ Section 668E(1) *Criminal Code*; *MDP v The King* (2025) 99 ALJR 969, [3] (Gageler CJ); [106]-[108] (Gleeson, Jagot and Beech-Jones JJ); [9],[30]-[33] (Gordon and Steward JJ); [44]-[46],[62],[64]-[65] (Edelman J).

authorities. Nor does the respondent contend that if the trial judge did make a wrong decision on a question of law that the court would nonetheless dismiss the appeal as no substantial miscarriage of justice has actually occurred.

- [116] A misdirection may amount to a wrong decision on a question of law. That is so regardless of whether the trial judge is specifically asked to make a determination on a disputed issue. The natural and ordinary meaning of a decision on a question of law involves some determination or response to a question of law by a trial judge that has legal effect in the trial. Whether a trial judge has made a decision is to be considered in the context of the duties and obligations of the trial judge in a criminal trial.⁸
- [117] I am satisfied that, in giving the impugned directions, the trial judge did make a decision on a question of law, namely a decision about the directions to be given to the jury about the use that the jury could properly make of the preliminary complaint evidence when determining whether the Crown had proven its charges beyond reasonable doubt. The trial judge was obliged to direct the jury on this question in accordance with the law. The form of the directions to be given to the jury was a decision made by the trial judge.
- [118] That being so, it is next necessary to consider whether, by giving the impugned directions, the trial judge made a wrong decision on a question of law. In that respect, it is necessary to examine how and why preliminary complaint evidence is admissible.
- [119] Preliminary complaint evidence was previously made admissible in a proceeding for a sexual offence by s 4A of the *Criminal Law (Sexual Offences) Act 1978*. That provision has since been repealed and replaced by s 94A of the *Evidence Act*,⁹ which now extends the admissibility of preliminary complaint evidence to domestic violence offences as well as sexual offences. Section 94A is otherwise in materially the same form as previous s 4A. As with the former s 4A, there is no requirement that the preliminary complaint be “fresh” or “recent”. Under s 94A(2), “Evidence of how and when any preliminary complaint was made by the complainant about the commission of the alleged offence by the defendant is admissible in evidence regardless of when the preliminary complaint was made.” Under s 94A(6), a “complaint” includes a disclosure and a “preliminary complaint” means any complaint other than the complainant’s first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence.
- [120] Whilst preliminary complaint evidence is made admissible by s 94A, its use remains limited. In *R v CDI*¹⁰ the court noted that it was well settled that the purpose of admitting evidence of this kind was not as evidence of the truth of its content but as evidence of consistency or inconsistency with the complainant’s evidence, to be considered in assessing the credibility of the complainant.¹¹
- [121] Though s 94A removes the common law requirements that the complaint be “fresh” or “recent” and that it be made at the first reasonable opportunity, the rationale for

⁸ Ibid, [3] (Gageler CJ); [30] (Gordon and Steward JJ); [56]-[57] (Edelman J); [78],[99]-[102] (Gleeson, Jagot and Beech-Jones JJ).

⁹ *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024*, ss 103, 62.

¹⁰ [2024] QCA 232.

¹¹ Ibid, [8]-[9], citing *R v Lillyman* [1896] 2 QB 167; *Jones v The Queen* (1997) 71 ALJR 538 and *R v RH* [2005] 1 Qd R 180, [23]. See also *Collins v The Queen* (2018) 265 CLR 178, [15].

admitting preliminary complaint evidence under that provision remain consistent with the position under the common law. As Gaudron and Gummow JJ explained in *Suresh v The Queen*:¹²

“Evidence of prior complaint is admissible in sexual offence cases by way of exception to the rule against hearsay. It is admissible because of the tendency of people to assume, at least in earlier times, that the victim of a sexual offence will complain at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false...And it is admitted not as evidence of the facts in issue, but as evidence of consistency which buttresses the credit of the complainant.”

[122] Similarly, in *R v LSS*,¹³ Thomas JA stated:

“...The limited basis upon which such evidence may be received and used has been well established in Australia since *Kilby*, and probably much earlier. Its effect is confined to showing consistency of statement or conduct, the evidence having itself no probative value or capacity to prove the truth of what is said (or written). The familiar direction given in summings up is that such evidence constitutes a buttress to the credit of the complainant but that it does not independently prove anything.”

[123] Consequently, where a complainant’s credibility is central to the Crown case it will be necessary for the trial judge to direct the jury as to this limited use that may be made of any preliminary complaint evidence, including an instruction that the evidence does not independently prove the facts constituting the alleged offence that is the subject of the complaint.¹⁴

[124] The above stated position is reflected in the Benchbook directions on preliminary complaint, which relevantly include the following:

“That evidence may only be used as it relates to the complainant’s credibility. Consistency between the account of [insert name of person to whom preliminary complaint made] of the complainant’s complaint and the complainant’s evidence before you is something you may take into account as possibly enhancing the likelihood that [his/her] testimony is true.

However, you cannot regard the things said in those out-of-court statements by the complainant as proof of what actually happened. In other words, evidence of what was said on that occasion may, depending on the view you take of it, bolster the complainant’s credit because of consistency, but it does not independently prove anything.

Likewise, any inconsistencies between the account of [insert name] of the complainant’s complaint and the complainant’s evidence may cause you to have doubts about the complainant’s credibility or reliability.

¹² (1998) 153 ALJR 145, [4].

¹³ [2000] 1 Qd R 546.

¹⁴ *R v Mason* [2006] QCA 125, [26]-[27].

Whether consistencies or inconsistencies impact on the credibility or reliability of the complainant is a matter for you.

Inconsistencies 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. But the mere existence of inconsistencies in the complainant's account, if you find there are any, does not mean that of necessity you must reject [his/her] evidence." (emphasis added)

- [125] As previously noted, the respondent contends the trial judge's directions were consistent with the underlined portion of the Benchbook directions and were therefore not erroneous. I do not accept that argument. Within the context of the entire model directions, it is apparent that the underlined portion is a composite conclusory paragraph, summarising how a jury may approach its assessment of the evidence according to the directions given in the preceding paragraphs. The first two paragraphs of the directions above deal with consistency between the preliminary complaint evidence and the complainant's evidence and make plain that such consistency may bolster the complainant's credibility. That explains how the evidence may be used to support the evidence of a complainant in the prosecution's case. The next paragraph, commencing, "Likewise, any inconsistencies..." deals with how inconsistencies in the complainant's account may undermine the prosecution case, by causing the jury to have doubts about the complainant's credibility or reliability. It is plain that the underlined paragraph refers to both "consistency" and "inconsistency" and "credibility" and "reliability" to summarise both preceding paragraphs without further distinction.
- [126] The Benchbook directions on preliminary complaint highlight the anomalous ways in which preliminary complaint evidence may generally be treated. Consistency of complaint may bolster a complainant's credibility but may not be used to enhance the reliability of the complainant's account; while inconsistency of complaint may affect the assessment of both the complainant's credibility and the reliability of their account.
- [127] In a broad sense, the respondent's argument about reliability and credibility each being components of objective truth is correct. Proof of the commission of a criminal offence ultimately requires a jury to be satisfied beyond reasonable doubt that the prosecution has proven the essential elements of the offence to that standard. In other words, the jury must find beyond reasonable doubt that certain facts existed at the relevant time the alleged criminal conduct was engaged in by the defendant. In a case like the present, it is therefore not wrong, as a general proposition, to say that the prosecution can only prove its charge if the jury accepts beyond reasonable doubt that the matters of which the complainant complains are true.
- [128] However, that is not to say that there no difference between the concepts of "reliability" and "credibility" in a case like this. Whilst they may sometimes overlap, a distinction is to be made. As Nettle and Gordon JJ explained in *IMM v The Queen*:¹⁵

"...At common law, a distinction was ordinarily drawn between the two concepts. The credibility of a witness was commonly understood as meaning the 'truthfulness' of the witness – whether the witness

¹⁵ (2016) 257 CLR 300, [114].

genuinely believed that he or she was telling the truth. Reliability, on the other hand, referred to the ability of the witness accurately to discern and relay the truth as to an event, including the witness's ability to observe and remember facts. For example, if an event occurred a long time ago, that might affect the reliability of the witness because it is generally accepted that memory is prone to fade over time...”

- [129] This distinction was relevant in the present case. Although the jury was required to assess the credibility of each complainant and the reliability of the respective accounts they gave in evidence when determining whether the particular allegations against the appellant had been proven beyond reasonable doubt to be true, when it came to the use to be made of the preliminary complaint evidence the trial judge was required to instruct the jury that such evidence could only be used in the prosecution case to assess the complainants’ credibility.
- [130] I observe that the impugned directions given by the trial judge in this case did not entirely accord with the model Benchbook directions. There was of course no need for the trial judge to slavishly follow the Benchbook. The Benchbook model directions provide a great deal of assistance to a trial judge, but they are only a guide. They are not prescriptive. It is the duty and responsibility of a trial judge to give the necessary directions that are required to ensure the fair trial of an accused according to the circumstances and issues that arise in any given case. In doing so, it is a matter for the trial judge to determine how the directions should be fashioned and expressed to best achieve that purpose.
- [131] In my view, the impugned directions were erroneous. They tended to contradict the earlier clear and correct directions the trial judge had given about the limited use that could be made of the preliminary complaint evidence to assess the honesty or credibility of the complainants. They suggested that consistency between the preliminary complaint evidence and the evidence of a complainant could be used to assess whether what the complainant’s evidence was “accurate” and “true”. In other words, consistency of complaint could be used not only to bolster the credibility of the complainant but also to assess whether the complainant’s account given in evidence was reliable. That would be an impermissible use of the preliminary complaint evidence and to that extent it was a misdirection.
- [132] I am therefore satisfied that the trial judge made a wrong decision on a question of law.
- [133] The final critical question to then be considered is whether the erroneous direction was material. In my view, it was not. The question of materiality must be examined in the context of the whole of the summing up, the trial evidence and issues the jury was required to consider, and the way the trial was conducted.
- [134] To begin with, it is important to recall the way the case for the appellant was conducted and the central issues that therefore arose for the jury’s consideration. As the trial judge observed, each complainant gave evidence that was capable, if accepted, of proving the charges against the appellant. Aside from the preliminary complaint evidence, there was no other evidence in the case that supported the accounts of the complainants. Ultimately therefore, proof of the Crown case in respect of each charge required that the jury would accept the evidence of the particular complainant beyond reasonable doubt. That required the jury to accept that each was a credible witness and that they gave a reliable account of the particular matters that were the subject of the charges.

- [135] The appellant did not suggest that the complainants were unreliable because they were unable to accurately observe or recall what they each alleged had taken place. Rather, his case was that no sexual abuse of any kind had happened at all. He contended that the complainants were simply not telling the truth and had fabricated their complaints for some ulterior purpose or reason. He suggested that the complainants had colluded and that their evidence was implausible. He put the Crown to proof and did not give evidence. Through his cross-examination of the complainants and the other prosecution witnesses, and through the evidence he called from Dr Izzo, he sought to challenge the credibility of the complainants. In part, he sought to do so by highlighting inconsistencies in their accounts. Amongst other things, he drew out and highlighted instances of supposed internal inconsistencies in the evidence given by each of the complainants.
- [136] With respect to S, the appellant pointed to the supposed inconsistency between her evidence of frequent penile penetration of her vagina by the appellant, the evidence of Dr Marshall that S's hymen was intact when she examined her, and Dr Izzo's opinion evidence to the effect that if there had been such frequent penetration then one would expect to see tears or damage to the hymen. The appellant did not otherwise suggest that there was any inconsistency between the complainant's account and the preliminary complaint evidence. With respect to K, the appellant pointed to the inconsistency between her evidence of the acts and conduct of the appellant, which included an allegation that he had penetrated her vagina with his thumb on one occasion, and the preliminary complaint evidence given by PE that the complainant had disclosed to her that the appellant had penetrated her with his penis multiple times over an extended period. He did not otherwise suggest that there was any inconsistency between her account and the preliminary complaint evidence.
- [137] Aside from pointing to these matters, the appellant's counsel said nothing at all about any consistency or inconsistency of the preliminary complaint evidence in respect of either complainant in his closing address to the jury. That was perhaps unsurprising, given that the evidence of the disclosures made by the complainants to the other preliminary complaint witnesses was otherwise quite general in nature and provided no real detail whatsoever. Hence, there was no basis to suggest that the evidence of the complainants was otherwise inconsistent with their preliminary complaints.
- [138] It is to be recalled that with respect to S, the preliminary complaint evidence was:
- (a) Her mother, RL, said S told her, "[the appellant] had touched her", and that "he had touched her private parts";
 - (b) Her cousins, RSA and RST, said S told them that the appellant had "molested" her.
- [139] The general nature of this preliminary complaint evidence meant there was simply no detail that could have allowed the jury to conclude that the reliability of the complainant's account was somehow enhanced because of the consistency of her complaint. Despite the misdirection, the jury could not realistically have concluded that there was such a degree of consistency between the preliminary complaint evidence and the complainant's account that it was more likely that the complainant's account was accurate. Even if the jury considered that there was some consistency in the complaint, in practical terms the jury could only have considered that was a matter that supported the complainant's credibility generally and therefore made it more likely that she was telling the truth, rather than more likely that what she said was

accurate in terms of her ability to observe and recall the events of which she gave evidence about.

[140] The same may be said with even greater force of the majority of the preliminary complaint evidence concerning K. In her case, the preliminary complaint evidence was:

- (a) RL said K told her that “her father had been trying to touch her ... and she did not like it. ... And she was frightened”, and later told her the appellant “had tried to touch her and tried to get into bed”;
- (b) Her brother, RH, said K told him, “Things have happened” with the appellant;
- (c) Her brother’s partner, GT, said K told her “... that she wasn’t treated very nice and she was sexually assaulted by the appellant.”

[141] Again, the preliminary complaint evidence was general in nature and lacked detail. Despite the misdirection, the jury could not realistically have considered the preliminary evidence somehow enhanced the reliability of the complainant’s account. There was no real consistency between the preliminary complaint evidence and the complainant’s specific evidence of the offending acts and conduct of the appellant.

[142] In each instance, the preliminary complaint evidence amounted to non-specific disclosures of inappropriate sexual conduct and provided little more than general consistency of a complaint of sexual abuse by the appellant. The jury was properly instructed that such evidence was not evidence that what the witnesses had been told by the complainants had happened. The subsequent misdirection was wrong in law, but it did not instruct the jury that they could use the preliminary complaint evidence as evidence of the occurrence of the matters disclosed by the complainants.

[143] The evidence of K’s friend, PE was more specific. She said K told her that “...her father had done inappropriate stuff to her...like... fingering her and penetrating and asking inappropriate things of her”; she agreed that what K had said about the appellant penetrating her was in the context of her vagina being penetrated by the appellant’s penis; and she accepted that K told her the appellant had frequently penetrated her with his penis over an extended period. Even so, the misdirection could not realistically have led the jury to assess K’s evidence as more likely to be reliable. Once again, PE’s evidence that K had disclosed the appellant had done “inappropriate stuff” to her like fingering her, was quite general in nature. It may be accepted that it broadly corresponded with the particulars of Count 2, particularly that the appellant had touched K’s “vaginal area with his finger/s” and the evidence K gave. It was otherwise not consistent with any of the particularised acts or conduct of the appellant for any of Counts 2, 3 or 4, or K’s evidence about those matters. Neither was PE’s evidence that K had disclosed that the appellant had penetrated her with his penis. K had only given evidence of an occasion when she said the appellant had penetrated her vagina with his thumb. That was a particular of Count 2 and the subject of the separate Count 4 rape allegation. The appellant relied heavily on this apparent inconsistency in the complainant’s account.

[144] As with S, whilst the jury may have considered that the general consistency of the preliminary complaint evidence concerning K may have bolstered her credibility, the jury could not realistically have considered that it enhanced the reliability of her evidence, in that she was more likely to have accurately observed and recalled the

particular matters she gave evidence about because of the earlier general disclosures she had made to preliminary complaint witnesses.

- [145] As to the appellant's second point of complaint, I do not consider the trial judge further erred by instructing the jury that if there were "vast differences" between the evidence of the complainants and the preliminary complaint evidence that might cause the jury to have some concern about the accuracy and truthfulness of the complainants. It is quite clear that here, and elsewhere in the summing up, that the trial judge instructed the jury that it was a matter for the jury to decide whether there were inconsistencies in a complainant's account and, if so, what to make of it. It seems to me that when viewed in context, the trial judge used the phrase "vast differences" to illustrate the kind of inconsistency that might be significant, but the balance of the directions nevertheless made plain that it remained a matter for the jury's own assessment.
- [146] In particular, it is significant in my view that the jury were given directions on how the complainant's truthfulness or reliability were to be assessed in accordance with s 103ZY of the *Evidence Act*. Those directions accurately reflected the law and there is no complaint about them.

- [147] In that respect, the trial judge instructed the jury as follows:¹⁶

"Further, in this case there was cross-examination to suggest a difference in the complainant's account that may be relevant to your consideration of the complainant's truthfulness or reliability. A difference may be a gap in the evidence, an inconsistency as you find it to be, a difference in the account of that witness's evidence and other witnesses. And I direct you that experience shows that people may not remember all of the details of a sexual offence, or may not describe a sexual offence in the same way each time. That is repeated, of course, in circumstances where there is more than one allegation made.

Trauma can affect different people entirely differently, including affecting how they are able to recall and talk about events. It is common for there to be differences in accounts of allegations of a sexual offence. Both truthful and untruthful accounts of alleged sexual offending contains [sic. contain] differences. It is up to you to decide whether or not there are any differences, gaps, or inconsistencies in the complainant's account, and if so, whether they are important in assessing the complainant's truthfulness and reliability." (emphasis added)

- [148] These directions were required to be given by the trial judge by reason of s 103ZY(2), as evidence had been given, or questions had been asked of each complainant, that tended to suggest a difference in their accounts that may have been relevant to their truthfulness or reliability. The cross-examination of the preliminary complaint witnesses who testified at trial included the asking of questions to the same effect. In those circumstances, the purpose of these directions was to inform the jury of certain matters in order to guard against the risk of the jury acting on unjustified assumptions or preconceived notions about how an alleged victim of a sexual assault should or

¹⁶

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should not react or behave when assessing any suggested inconsistencies in the accounts of the complainants.

[149] I would add that is only logical that when undertaking such an assessment the jury would also implicitly consider whether there was any consistency in the complainant's account.

[150] In any event, even if the trial judge's use of the phrase "vast differences" was itself a further misdirection constituting a wrong decision on a question of law, it would not be material. On any view of it, the major inconsistencies that the appellant emphasised between the preliminary complaint evidence and the complainants accounts were obvious and could only be described as "vast". The significance and weight to be given to such inconsistencies was a matter for the jury's assessment.

[151] In my view, when considered in the context of the entire summing-up and the particular s 103ZY directions given by the trial judge, it cannot be said that the impugned directions unduly limited or restricted the use the jury could make of any inconsistencies in the accounts of the complainants.

Conclusion

[152] For the foregoing reasons the appellant's sole ground of appeal is not established and his appeal should be dismissed.