

SUPREME COURT OF QUEENSLAND

CITATION: *R v Mallie* [2026] QCA 196

PARTIES: **R**
v
MALLIE, William Michael
(appellant)

FILE NO/S: CA No 267 of 2023
DC No 693 of 2021

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 8 December 2023 (Morzone KC DCJ)

DELIVERED ON: 2 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 19 August 2025

JUDGES: Bond JA, Brown JA, Doyle JA

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was tried before a jury on four counts of sexual offending against the complainant – where the four counts were said to have occurred over the course of a single night – where the appellant was found guilty on three of the counts and not guilty on one of the counts – where the mix of verdicts could be reconciled on the evidence as having been logically open to a jury acting reasonably

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – TEST TO BE APPLIED – where it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the impugned verdicts

CRIMINAL LAW – EVIDENCE – MISCELLANEOUS MATTERS – EVIDENCE OF SEXUAL EXPERIENCE, REPUTATION AND MORALITY – where the appellant applied pursuant to s 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) for leave to cross-examine the complainant at trial – where the appellant sought to rely on a number of documents, including from social media and Department of Child Safety, about the complainant’s alleged behavioural problems prior to the offending – where counsel at trial

contended the cross-examination would strictly go to the question of the complainant's credibility – where the trial judge refused that leave – where the appellant failed to demonstrate any error by the trial judge in refusing leave

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v ABI (2023) 310 A Crim R 307; [\[2023\] QCA 166](#), cited
R v Green [\[2025\] QCA 148](#), followed
R v Miller (2021) 8 QR 221; [\[2021\] QCA 126](#), followed
R v Smith [2015] 2 Qd R 452; [\[2014\] QCA 277](#), cited
R v Thrupp; *R v Taiao*; *R v Walker*; *R v Daniels* [\[2024\] QCA 134](#), cited
R v ZT (2025) 281 CLR 137; [2025] HCA 9, applied

COUNSEL: The appellant appeared on his own behalf
 M A Green for the respondent

SOLICITORS: The appellant appeared on his own behalf
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **BOND JA:** On 4 December 2023 the appellant faced trial in the District Court on an indictment alleging four counts of sexual offending against the complainant on 14 May 2021.
- [2] Count 1 alleged unlawful and indecent assault, the particulars of which were that the appellant grabbed the complainant's bottom with his hand, without her consent, and made sexual comments to her at the time.
- [3] Count 2 alleged assault with intent to rape, the particulars of which were that the appellant had applied or threatened to apply force upon the complainant, with the intent of raping her, by one or more of the following:
 - (a) grabbing her by the arms and putting her on the ground;
 - (b) holding her down on the ground with his hand or hands;
 - (c) putting his hand around her throat;
 - (d) covering her mouth;
 - (e) threatening to pound her head into the ground.
- [4] Counts 3 and 4 were counts of rape. Count 3 alleged non-consensual penile/vaginal penetration and count 4 alleged non-consensual penile/oral penetration.
- [5] On 7 December 2023 the jury recorded guilty verdicts in respect of counts 1, 2 and 4 but a not guilty verdict in respect of count 3.
- [6] The appellant appealed his conviction on counts 1, 2 and 4 on the following grounds:
 - (a) Ground 1: The verdicts of the jury were unreasonable and cannot be supported having regard to the evidence; and
 - (b) Ground 2: The trial judge erred by refusing leave to cross-examine the complainant about past sexual activities pursuant to s 4 of the *Criminal Law*

(Sexual Offences) Act 1978 (Qld) which resulted in a miscarriage of justice by such evidence not being adduced.

- [7] Although the appellant was represented by counsel at trial, he represented himself at the appeal. As part of his oral argument in support of ground 1 he relied upon an alleged inconsistency between the acquittal on count 3 and the guilty verdict on counts 1, 2 and 4. Although that ground was not specifically articulated in the appellant's notice of appeal, with the consent of the respondent, the Court permitted the appellant to rely on that argument as part of his argument in support of ground 1. It is convenient to identify the unreasonable and unsupported ground as Ground 1(a) and the inconsistency ground as Ground 1(b).
- [8] For reasons which follow, none of the grounds of appeal can be maintained. The appeal must be dismissed.

The evidence at trial

- [9] It is appropriate briefly to summarise the evidence at trial before turning to consider the grounds of appeal.

The complainant

- [10] The evidence of the complainant came in four parts. In order of the time the evidence was created, the parts were:
- (a) a recording of the complainant's triple zero call made shortly after the events which were the subject of the complaint;
 - (b) the audio and visual recording from police body worn camera, made when police attended soon after the triple zero call;
 - (c) the statement which she gave to police the day after the events, which was read to the jury by the trial judge's associate; and
 - (d) the complainant's pre-recorded evidence given pursuant to s 21AK of the *Evidence Act 1977 (Qld)*.

Triple zero recording

- [11] The recording of the complainant's triple zero call to a police operator on 14 May 2021 was played to the jury.
- [12] The complainant gave the operator her address, said she had been raped that morning, that she was 16, that the guy was in her house and that she did not know what to do.
- [13] She said she had walked into town with a male friend and then the friend "bailed on [her]". She was walking home from town and the guy (in context, her rapist) had said he would walk her home. He started flirting with her and then pulled down her pants in the bushes. He was someone she knew and he was still at her address.
- [14] The operator told her that police were on their way. The complainant said she lived with her mother, who was there, but asleep. She was ringing from the kitchen. She said the rape had occurred at about 2 o'clock in the morning. She said she hadn't been injured, but she was really scared.

- [15] The operator stayed on the line until the recording revealed that the police had arrived. The recording revealed that she told the police that there was a man in her house and that he was in her room and that he had raped her. The recording then ceased.

Police body-worn camera recording

- [16] The recording was made on 14 May 2021 of the police attendance at the complainant's mother's house consequent upon the triple zero call.
- [17] Upon attendance the police arrested the appellant in the complainant's bedroom and then took the complainant aside to talk to her.
- [18] The complainant told police that at about 8 o'clock the previous night she left to go for a walk. She saw her ex-boyfriend, Dylan, and they ended up walking into town. He disappeared and she decided to walk home. She was near the TAFE when she saw the appellant. He offered to walk her home through a shortcut which was a dark walkway. He started flirting with her, then he grabbed her. She struggled and screamed out but the appellant choked her. He pulled down her pants and was rubbing her vagina, then started to get his dick out of his pants. It went on for about half an hour or an hour.
- [19] She told police she was wearing the same clothes she had on. She did not think the appellant had ejaculated. She said the appellant was touching her bum and she was telling him to stop. She said the appellant had grabbed her arms and physically put her in the bushes. He pulled down her pants and rubbed her vagina. He pulled his dick out and stuck it in her.
- [20] She was asked how she ended up back at her home and said that she had it all figured out in her head. She told police she kept saying to the appellant they should go to her house because sex would be better in a bed. The appellant forced her to suck his dick. He eventually agreed to go back to her house. She let him in, she got a knife, went to her mother's computer desk to see if the landline was charged and then rang triple zero. She told police that she had not spoken to her mother, that she did not want to wake her in case the appellant harmed her.
- [21] While police were talking to her, her mother came to speak with her. She told her mother she was raped and that she had screamed, she tried as hard as she could but he had covered her mouth. Her mother initially thought that the events had occurred in the house, but the complainant explained that it had occurred after she had walked into town and had come back. Her mother asked how he ended up back in the house and the complainant repeated that she had it all figured out in her head: she would bring him to the house, go to the computer desk and check if the phone was charged, call the police, which she did, with a knife in her hand.

Written statement to police

- [22] The complainant's statement to police was a written statement signed by her and made on 15 May 2021, the day after the events with which it dealt. It was tendered pursuant to s 93A of the *Evidence Act*.
- [23] The complainant was 16 years old, residing with her mother. She had previously seen the appellant around her neighbourhood. She left her residence on the night of Thursday 13 May 2021.

- [24] She met her ex-boyfriend and walked into town with him. She lost contact with him. She looked for him for about two hours and then decided to walk home in the early hours of the morning. She thought it was about 2.00 am to 2.30 am, but she didn't wear a watch and did not have her phone with her so she could not be sure.
- [25] She walked down Florence Street, past the 24-hour medical centre. She saw the appellant standing near the door of the medical centre and recognised him as also having been to her mother's unit once before.
- [26] The appellant asked her for a cigarette. She said she was going home and the appellant said he would walk her home. They stopped at McDonalds, then left along Martyn Street. The appellant said he knew a shortcut. She agreed, even though she had a feeling it was a bad idea.
- [27] They turned off Martyn Street, along another street to a pathway running alongside a creek on the left side and bush on the right. The appellant started "hitting on [her]". He started touching her and "talk[ed] sexy". He grabbed her bottom and said: "I can't wait to lick your pussy. I can't wait to shove my dick into your pussy. Do you like big dicks?". He grabbed her by her arms and put her in the bushes, sitting her on her bottom. She got up but was pushed back down. The appellant removed her shorts. He took his pants off and held her down. He said: "I'm going to put my cock in your pussy". She screamed and the appellant covered her mouth and told her to "shut up". She kicked and punched him to try and get him off her.
- [28] The complainant started screaming again and the appellant put both hands around her throat, choking her so she couldn't breathe. The appellant told her to shut up or he would pound her head in the ground. The complainant was scared and stopped fighting. The appellant put his penis inside her – she could feel it was soft and he was struggling to put his penis inside her, using his hand. She didn't think he had a condom on. The appellant told her to get on her knees. He grabbed her hair and forced his penis into her mouth. He pulled her head back and forward for about 3-4 minutes. At one point this caused the complainant to vomit. The appellant continued to force her to suck his penis. The complainant kept suggesting to the appellant they should go to her house to be more comfortable – she thought she would be able to call police.
- [29] The appellant eventually agreed and they walked to her mother's unit. The complainant directed him to her bedroom and she went into the toilet and closed the door. She then went and got the home phone, took it into the kitchen and got a knife. She called '000'. She said she had been raped and the person was in her house. She stayed on the phone until police arrived. The appellant was arrested. She and her mother went with police in the detective's car. As they were driving, she saw the path where she had been raped and pointed it out to police. Police then took her to the hospital.

Section 21AK recording

- [30] The recording was made in Court on 26 August 2022, a little more than 15 months after the relevant events.
- [31] In her evidence in chief the complainant confirmed the truth of what she had told the triple zero operator and the police when they attended and also the truth of the

contents of the written statement she had made to police. She identified the locations dealt with in that evidence by reference to some photographs which were then tendered.

- [32] She was cross-examined by counsel on behalf of the appellant. The cross-examination took her through the broad details of the chronology of the events as depicted in the written statement. So far as the details of what the statement records her saying about what the appellant said to her, she confirmed that she remembered what the appellant had said back when she spoke to police but could not recall the details now. The cross-examiner came back to that topic in relation to her statement that the appellant had told her “I’m going to put my cock in your pussy” and she said she now remembered that he had used those exact words.
- [33] She was asked questions about her statement that she had started kicking and punching the appellant. The complainant said she could not recall how many times she punched the appellant. She was punching him on the top of his head. She also kicked his legs. She said she couldn’t remember how long the appellant put his penis in her vagina – she agreed his penis was soft. She said when she was told to get on her knees she was on the grass. She agreed she vomited whilst she had his penis in her mouth.
- [34] The complainant said the appellant did touch her bottom and did choke her. She disagreed that she had told him she wanted to have sex. She said she did not take her own pants off. She disagreed that the appellant had said he didn’t want to have sex and wanted a head job. She said she did not say she had herpes. The complainant could not remember if he had put a finger in her vagina.
- [35] She was asked some questions about her past. The cross-examiner elicited that she had a long history with the Department of Child Safety; she had a placement with carers but left voluntarily to go back to live with her mother; whilst Child Safety had been responsible for her there had been many occasions where she had become angry and used violence; there was an occasion when she had assaulted a carer and that she had had to be restrained by police; there had been other occasions when she had assaulted carers; there had been an occasion when she had lied about the assaults; she had stolen from carers; she had also gone into people’s houses and stolen from them.

The complainant’s mother

- [36] In evidence in chief the complainant’s mother explained that the complainant had been at home when she went to bed around 11.00 pm. She was woken by police knocking on her bedroom door. She saw they had a naked man in handcuffs. The complainant told her she had been raped. She went with the complainant and police in their car. The complainant told her and the police where her vomit was. The complainant told them the man had told her to get on the ground. He put his hand around her throat and told her to give him a head job. They then went to the hospital.
- [37] She was cross-examined only briefly. She said that the complainant left the house at night almost every night. When asked whether the complainant ever told her what she was doing when she left the house at night, she said that the complainant would sometimes say that she did not know what she was doing and that she was sometimes with friends. She also said that the complainant often got upset when she asked her what she was doing when she left the house.

Tamara O'Loughlin – registered nurse

- [38] Ms O'Loughlin was a registered nurse trained as a sexual assault nurse-examiner.
- [39] She had examined the complainant at 11.15 am on 14 May 2021. The only injury identified was a small circular bruise on her upper arm. She took forensic swabs from the complainant.
- [40] She was cross-examined with reference to clinical notes taken by a doctor-examiner. She agreed the notes recorded that a man followed the complainant, grabbed her from behind on the bottom, pushed her to the ground and choked her for a short period with no loss of consciousness.
- [41] She further agreed the notes recorded the complainant had said she was threatened whilst on the ground underneath a man, then sexually assaulted vaginally and orally. On examination there were no obvious external injuries and no bruising on her neck. She agreed the complainant had told her she had a sexually transmitted infection. The presence of the infection had been confirmed on 4 May 2021.

Dr Leslie Griffiths

- [42] Dr Griffiths gave evidence by telephone. He confirmed he took forensic swabs from the appellant on 14 May 2021. In cross-examination he confirmed he would have noted any visible obvious injuries and had not recorded any injuries on examining the appellant.

Detective Sergeant Nathan Porter

- [43] DS Porter gave evidence that on the morning of 14 May 2021 he had attended at the complainant's address and later driven the complainant and her mother to the hospital. During that drive the complainant identified the area where the offending had occurred. He recalled seeing vomit on the path along with other items and organised for the area to be secured. He transported the complainant to hospital and later took her formal statement. He then conducted a videotaped interview with the appellant.
- [44] In cross-examination DS Porter confirmed that the records revealed that the appellant had been arrested at 2.47 am on 14 May 2021 and that he had driven the complainant and her mother to hospital arriving at 4.25 am on that morning. It was suggested to him that the complainant had made no mention of vomit before having seen it on the pathway when stopped. DS Porter stated the complainant had told them there would be vomit at the scene before they saw it.
- [45] An attempt was made to elicit from him admissions as to inadequacies in the police investigation of the alleged offending, but to no particular avail.

Matthew Hunt – forensic scientist

- [46] Mr Hunt gave evidence by audio-visual link. He had conducted scientific testing on the swabs that had been collected.
- [47] He explained that DNA does not always transfer when a person touches something. Whether it does depends on a number of factors. The main factor would be the amount of DNA load which was deposited; whether the touching was repeated and extended over time; whether there had been cleaning of the area touched and also the type of surface that is touched. DNA tends to degrade on a surface over time.

- [48] The vaginal and labial swabs from the complainant produced a single DNA profile, assumed to be the complainant's profile. In simple terms that meant that the only DNA found in the swab was that of the complainant. The swab of vomit produced a single contributor result, with the DNA profile obtained greater than 100 billion times more likely to have occurred if the complainant had contributed DNA rather than if she had not.
- [49] The wet glans penis swab of the appellant indicated the presence of DNA from two contributors. One was assumed to be the appellant and on statistical analysis, it was estimated that the mixed DNA profile obtained is greater than 100 billion times more likely to have occurred if the complainant had contributed DNA along with the appellant rather than if she had not. In simple terms that meant that it was extremely likely that the complainant's DNA was found in the swab taken from the appellant's penis, although Mr Hunt could not say it was definitely her DNA. The other swabs taken from the appellant's penis produced the same resultant mixed DNA profile.
- [50] The swab from a condom wrapper produced a mixed profile of two contributors. It was estimated that the mixed DNA profile obtained was approximately 5.9 million times more likely to have occurred if the appellant had contributed DNA rather than if he had not and it was estimated that the mixed DNA profile obtained was approximately 13 times more likely to have occurred if the complainant had not contributed DNA rather than if she had.

The appellant's police interview

- [51] The recording of the interview which DS Porter and a Senior Constable Scott had conducted of the appellant on 14 May 2021 was played before the jury and tendered by prosecution during the trial.
- [52] The appellant stated he had consumed four litres of wine the previous day starting in the early afternoon. He was being interviewed at 10.00 am the next day. However he did not think that the alcohol he had the previous evening affected his ability to participate in the interview.
- [53] The appellant's account of the evening was given as:
- “I was drinking. Um, she had hit on me, um, I just asked her for a head job. And stuck my finger in there and at the end of it I stopped ‘cause she said that she was young. And near a bush and um she offered to take me home to her place. I went there. She opened the door, um, asked me to come in, I walked in, sat on the bed. Fell asleep. Woke up I'm in handcuffs.”
- [54] The appellant stated the complainant offered sex but he said “no”, he would rather have a head job. He said she had pulled her shorts down and offered sex. He said he didn't have sex with her but “told her to suck me off, used my finger. I gave up straight away, wasn't interested, too drunk”. He said he was touching, feeling and/or rubbing the complainant's “clit”. He said the complainant was giving him “head. A blow job”. He thought that his fingers had gone inside her vagina. He said it didn't go on for long. She offered to take him home, he said he would follow her home to drop her off and then would take off. She asked him inside her house. He sat down and fell asleep and woke up with police saying he was under arrest.

- [55] On his version of events the complainant invited him to have sex with her, but he was too drunk, and could not get an erection and did not do so. She gave him oral sex but when she said she was only 16 he pushed her off him to stop her doing so.
- [56] When police read the complainant's account to him, the appellant denied the account stating it "didn't happen". When specifically asked if the complainant had vomited, he said that didn't happen.

Conclusion

- [57] The appellant neither gave nor called any evidence.

Appeal ground 1(a): The guilty verdicts were unreasonable and unsupported by the evidence

- [58] The central task for this Court when considering this ground of appeal is to conduct its own independent assessment of the sufficiency and quality of the whole of the evidence, and to decide whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the impugned verdicts.¹ In *R v ZT*,² the High Court recently emphasised that it is up to the appellant to identify clearly the points which demonstrate the unreasonableness of the jury's decision. The burden on an appellant was explained further in *R v Miller*.³
- [59] The appellant contended that the evidence of the complainant was "simply too equivocal to enable a jury to be satisfied beyond reasonable doubt of guilt". He pointed to some minor aspects of the evidence in which the complainant said there were some matters which she did not remember and some other inconsistencies. He pointed to her uncertainty about time and how long events might have taken. He pointed to her concessions that in dealing with carers she had been prepared to lie. He pointed to the absence of any evidence that she had been injured. He said his DNA was not found in the vomit. He was critical of the extent of DNA testing.
- [60] Nothing the appellant pointed to went anywhere near discharging the burden which lay upon him. There was strong consistency between the essential elements of the complainant's version of events recorded in the first three parts of the complainant's evidence, all of which occurred on the day or the day after the relevant events. The evidence supported the fact that she had vomited. The absence of his DNA was of no moment.
- [61] The version of events expressed in the first three parts of the complainant's evidence was supported by her pre-recorded evidence and no challenge of any particular merit was successfully advanced against her version of events during cross-examination. That her memory might be less precise at the time of the pre-record than it was on the day and day after the events, is perfectly understandable.
- [62] It was well open to the jury to accept the complainant's evidence as proving guilt beyond reasonable doubt.
- [63] Ground 1(a) fails.

¹ The leading decisions of the High Court explaining the approach to be taken in conducting that assessment were identified and summarised in *R v Thrupp*; *R v Taiao*; *R v Walker*; *R v Daniels* [2024] QCA 134 at [123].

² *R v ZT* (2025) 281 CLR 137 per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ at [11] to [12].

³ *R v Miller* (2021) 8 QR 221 at [16] to [18].

Appeal ground 1(b): The guilty verdicts were inconsistent with the acquittal on count 3

[64] In *R v Green*⁴ Henry J observed that:

“The test of appellate intervention, where a jury’s verdicts are alleged to be unreasonable on account of inconsistency between them, has been described as one of logic and reasonableness.⁵ Where there have been mixed verdicts, if there is evidence to support the guilty verdict or verdicts, an appellate court should not interfere where the mix of verdicts can be reconciled on the evidence as having been logically open to a jury acting reasonably.”⁶

[65] In the present case the jury acquittal for the vaginal rape (count 3) and its conviction for the oral rape (count 4) may be readily reconciled:

- (a) The guilty verdicts conveyed that the jury generally accepted the complainant’s credibility and reliability, especially on the non-consensual nature of the sexual interactions between she and the appellant.
- (b) There was no doubt that there had been oral penetration. That was common ground between the evidence of the complainant and the appellant’s statements to the police. It was supported by the evidence of vomiting. Acceptance of the complainant’s evidence that there was non-consensual oral penetration would explain the conviction on count 4.
- (c) The evidence of vaginal penetration was less strong. The complainant’s evidence supported it, but she also accepted that the appellant’s penis had been soft and he had struggled to put it in her. That evidence combined with the appellant’s statement to police about the amount of alcohol he had consumed and his inability to get an erection may have been sufficient for the jury to conclude there was a reasonable doubt about penetration, notwithstanding their general acceptance of the complainant’s evidence.
- (d) The DNA evidence did not demonstrate that there had been vaginal penetration, merely that her DNA was present on the appellant’s penis. That could be explicable in a number of ways, including by unsuccessful attempts by him to accomplish vaginal penetration. The jury may have accepted that the oral penetration explained the mixed DNA profile present in the wet glans penis swab.
- (e) There is no reason to infer from the possibility that the jury were not prepared to accept beyond reasonable doubt the complainant’s evidence concerning vaginal penetration that there was anything illogical or inconsistent in their preparedness to accept her evidence beyond reasonable doubt for the purpose of conviction on the remaining counts.

[66] Ground 1(b) fails.

⁴ *R v Green* [2025] QCA 148 at [76] per Henry J with whom Bond JA and Gotterson AJA agreed, footnotes in original.

⁵ *MacKenzie v The Queen* (1996) 190 CLR 348, 366.

⁶ *MacKenzie v The Queen* (1996) 190 CLR 348, 366-367.

Ground 2: Alleged miscarriage of justice based on refusal of leave to cross examine the complainant about past sexual activities pursuant to s 4 of the *Criminal Law (Sexual Offences) Act 1978 (Qld)*

[67] On 26 August 2022 counsel on behalf of the appellant made an application before a District Court judge pursuant to s 4 of the *Criminal Law (Sexual Offences) Act 1978* for leave to cross-examine the complainant.

[68] At that time, s 4 of the Act provided:

“Special rules limiting particular evidence about sexual offences

The following rules shall apply in relation to any examination of witnesses or trial in relation to a sexual offence whether or not the examination or trial relates also to a charge of an offence other than a sexual offence against the same or any other defendant—

- 1 The court shall not receive evidence of and shall disallow any question as to the general reputation of the complainant with respect to chastity.
- 2 Without leave of the court—
 - (a) cross-examination of the complainant shall not be permitted as to the sexual activities of the complainant with any person; and
 - (b) evidence shall not be received as to the sexual activities of the complainant with any person.
- 3 The court shall not grant leave under rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.
- 4 Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons must not be regarded as having substantial relevance to the facts in issue only because of any inference it may raise about general disposition.

Example of inference about general disposition—

an inference that the complainant, because of having engaged in conduct of a sexual nature, is more likely to have consented to the conduct involved in the offence

Without prejudice to the substantial relevance of other evidence, evidence of an act or event that is substantially contemporaneous with any offence with which a defendant is charged in an examination of witnesses or a trial or that is part of a sequence of acts or events that explains the circumstances in which such an offence was committed shall be regarded as having substantial relevance to the facts in issue.

- 5 Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or

persons is not proper matter for cross-examination as to credit unless, because of special circumstances, the court considers the evidence would be likely to materially impair confidence in the reliability of the complainant's evidence.

The purpose of this rule is to ensure that a complainant is not regarded as less worthy of belief as a witness only because the complainant has engaged in sexual activity.

- 6 An application for leave under rule 2 shall be made in the absence of the jury (if any) and, if the defendant so requests, in the absence of the complainant and shall be determined after the court has allowed such submissions or evidence (sworn or unsworn) as the court considers necessary for the determination of the application."

[69] Counsel for the appellant advanced the application for leave to cross-examine the complainant concerning –

- (a) her use of social media and the internet in general throughout 2020 and possibly into 2021 "to share or broadcast images or video of herself engaged in sexual acts, engaging in sexually explicit conversations with others particularly older males and receive as part of those conversations sexually explicit images from those males"; and
- (b) "on the subject revealed by a subpoenaed note from May 2020 that the complainant was regularly engaged in pretend masturbation by putting her hand down her pants and moving it in the car with her carers".

[70] Counsel founded the first part of the application on records obtained from the Department of Child Safety and in records of the Cairns Hospital in 2020 which supported the possibility that the complainant may have behaved in the way suggested up to November 2020. He contended that it was possible that the behaviour had continued into 2021 and up to the time of the offences. His argument was that the proposed subject of the cross-examination had substantial relevance to the credit of the complainant and that subject was the principal issue in the proposed trial. He suggested that he should be entitled to develop the proposition that the complainant had a history of engaging in risky and in some sense public sexual acts with older men who were strangers to her. He stated that he would not suggest that the evidence meant that she was more likely to have consented in what occurred. Counsel conceded that the second subject matter of the application was "perhaps less significant" but that it demonstrated the complainant engaging in sexualised behaviour in front of others and a degree of lack of impulse control.

[71] Counsel for the prosecution resisted the application. She submitted that the proposed subject matter of cross examination could not be said to be in relation to the complainant's credit: it did not concern matters where she was demonstrated to have lied or been untruthful. Rather, she characterised the revealed purpose was examining the general reputation of the complainant with respect to chastity and submitted that the evident intention of the section was that such cross-examination should not be permitted. Counsel drew the attention of the judge to *R v Smith*⁷ to advance the submission that even if evidence was relevant to facts in issue, it could not be regarded as substantially relevant.

⁷ *R v Smith* [2014] QCA 277.

- [72] The judge ruled against the application.
- [73] Before this Court the appellant sought to support the conclusion that the ruling was erroneous by suggesting that leave should have been granted because it denied the appellant an opportunity to show the jury that the complainant “gave consent by her subjective state of mind”. It may be noted first that the submission was contrary to the basis on which the application was advanced on his behalf below. His counsel had specifically stated that he did not propose to suggest that the subject of the proposed cross-examination would mean that she was more likely to have consented. Counsel had founded the application on relevance to credit not on relevance to facts in issue.
- [74] Counsel’s then judgment that there was no merit in seeking to found the application on any suggested substantial relevance to the facts in issue was correct. The submissions of counsel for the prosecution were preferable in this regard. The facts in issue were whether the appellant had assaulted the complainant in the manner alleged and whether the sexual activity was non-consensual and the proposed evidence was not evidence which tended to prove or disprove those matters in any material way. The appellant’s submission to the contrary amounted to an invitation to conclude substantial relevance to the facts in issue only because of an inference the evidence may raise about general disposition, and that is precisely what the section provided that the judge should not do.
- [75] The appellant also suggested to this Court that the evidence was a proper subject matter for cross-examination as to credit. However the submission failed to engage in any respect with the statutory requirement to demonstrate that because of special circumstances the court should have considered that the evidence would be likely to materially impair confidence in the reliability of the complainant’s evidence. It is evident that the judge below was not so convinced. His Honour was right not to be. There was nothing in the proposed subject matter which could be so regarded and the appellant had not provided any argument to the contrary. The importance of the demonstration of satisfaction of the statutory requirement has been recognised by this Court in *R v ABI*.⁸
- [76] Ground 2 fails.

Conclusion

- [77] I would order the appeal be dismissed.
- [78] **BROWN JA:** I agree with the proposed order of Bond JA that the appeal should be dismissed. As to what is identified by Bond JA as ground(1)(a) of the appeal, I have independently assessed the sufficiency and quality of the whole of the evidence and agree that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. I also agree for the reasons stated by Bond JA that the other grounds of appeal have not been established.
- [79] **DOYLE JA:** I have read and agree with the reasons for judgment of Bond JA and with the order proposed by his Honour.

⁸ *R v ABI* [2023] QCA 166 at [65] to [71] per Flanagan JA with whom Bond JA and Bradley J (as his Honour then was) agreed.