

SUPREME COURT OF QUEENSLAND

CITATION: *R v Hussein* [2026] QCA 197

PARTIES: **R**
v
HUSSEIN, Isse Hassan
(appellant)

FILE NO/S: CA No 272 of 2024
DC No 1514 of 2022

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction:
15 November 2024 (Dann DCJ)

DELIVERED ON: 9 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 15 September 2026

JUDGES: Bond JA, Doyle JA, Cooper J

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
OBJECTIONS OR POINTS NOT RAISED IN COURT
BELOW – MISDIRECTION AND NON-DIRECTION –
where the jury requested replay of the complainant’s evidence
after retiring to consider the verdict – where portions of the
complainant’s evidence were replayed before the jury
indicated it had reached a verdict – whether direction
concerning risk of giving undue weight to replayed evidence
was required before replay – whether subsequent redirection
was sufficient to address the risk of unfairness

CRIMINAL LAW – APPEAL AND NEW TRIAL –
MISCARRIAGE OF JUSTICE – PARTICULAR
CIRCUMSTANCES NOT AMOUNTING TO
MISCARRIAGE – where the complainant did not know how
certain injuries were sustained – whether the trial judge erred
in characterising the injuries as circumstantial evidence –
whether a further direction was required as to use of that
evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL –
MISCARRIAGE OF JUSTICE – PARTICULAR
CIRCUMSTANCES NOT AMOUNTING TO
MISCARRIAGE – MISDIRECTION OR NON-DIRECTION
– where the prosecution submitted that the appellant’s
explanation for the presence of certain physical evidence was

untruthful – whether the trial judge was required to direct the jury as to the use that could be made of any lie

Criminal Code (Qld), s 620

Evidence Act 1977 (Qld), s 21A, s 93A

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited

HCF v The Queen (2023) 280 CLR 596; [2023] HCA 35, cited
R v Ali [2015] QCA 191, cited

R v Enright [2023] QCA 89, cited

R v Gately (2007) 232 CLR 208; [2007] HCA 55, cited

R v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited

R v PBO [2024] QCA 238, considered

R v SCG (2014) 241 A Crim R 508; [2014] QCA 118, cited

R v SDL [2022] QCA 207, considered

R v SDU [2022] QCA 176, applied

R v Storey [2021] QCA 265, distinguished

R v VM [2022] QCA 88, cited

Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, cited

Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: K M Hillard for the appellant
 G J Cummings for the respondent

SOLICITORS: Karsas Lawyers for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **BOND JA:** I have had the advantage of reading in draft the reasons for judgment of Doyle JA, with which, subject to what follows, I agree.
- [2] In relation to ground 1, I agree with his Honour's view, and for the reasons he gives, that there was no miscarriage of justice occasioned by a failure by the trial judge to direct the jury properly after the replaying of the complainant's evidence in chief. Ultimately, however, I think that the question whether there was a miscarriage of justice because of the matters of which the appellant complains in relation to ground 1 should not be analysed as an inadequacy of directions case.
- [3] Given the appellant's reliance on *R v Storey*¹ the risk of which the appellant complains is that the jury may well have given too much weight to the parts of the evidence which they asked to rehear before they received the final warning such that that warning was unlikely to have had any effect. The appellant's real complaint is that the jury might not have discharged its function of rendering a verdict according to law, on the evidence, and in accordance with the directions which they were eventually given.
- [4] The test to be applied to the resolution of such a case was articulated by Gageler CJ, Gleeson and Jagot JJ in *HCF v The Queen*²:

¹ *R v Storey* [2021] QCA 265.

² *HCF v The Queen* (2023) 280 CLR 596 at [13] and [14], footnotes omitted.

“Accordingly, in all cases of jury or juror misconduct, what is required to establish a miscarriage of justice, and what will also establish a substantial miscarriage of justice, is that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge. Although the terms have been used interchangeably in this context, the test is best expressed in terms of a reasonable ‘apprehension’ rather than a reasonable ‘suspicion’. A suspicion is ‘a state of conjecture or surmise where proof is lacking’; it is ‘more than a mere idle wondering’; ‘it is a positive feeling of actual apprehension or mistrust’. To be reasonable, a suspicion or apprehension requires a positive feeling of actual apprehension or mistrust which has an objective basis in fact. To apply the reasonable apprehension test therefore requires first that such relevant facts as can be inferred from the available evidence be found on the balance of probabilities. In undertaking that necessary preliminary fact-finding, it is useful to record the truism that ‘[o]ne does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed’; inference requires ‘something more than mere conjecture, guesswork or surmise’.

In the circumstances of the present case, where the issue has arisen only after conviction, the question of miscarriage of justice may therefore be expressed in these terms:

‘On the facts to be found on the balance of probabilities, might a fair-minded and informed member of the public reasonably apprehend that the jury or a juror might not have discharged the function of deciding the appellant’s guilt according to law, on the evidence, and in accordance with the directions of the judge?’”

- [5] In the present case, the question of whether there has been a miscarriage of justice is to be resolved by answering the question posed in the last paragraph of the quotation from their Honours’ reasons. The appellant argued that the question should be answered in the affirmative and placed particular reliance on the short amount of time which elapsed between the final direction and when they returned their verdict. I disagree. I would resolve the question in this way:
- (a) The facts which I would find on the balance of probabilities are those recorded in the reasons of Doyle JA at [21] to [36] and [39].
 - (b) A fair-minded and informed member of the public would reasonably draw the same conclusions about the circumstances of the trial and the jury’s approach to their task as Doyle JA has articulated in his reasons at [48] to [50].
 - (c) The result is that the question should be answered in the negative.
- [6] I agree with the reasons of Doyle JA in relation to grounds 2 and 3 and, accordingly, with the orders which his Honour proposes in relation to the disposition of the appeal.

- [7] **DOYLE JA:** The appellant was convicted by a jury after a trial of rape of the complainant and sentenced to be imprisoned for 7 years. The complainant, at the time, was 14 years of age. The appellant was 28 at the time of the offending.
- [8] At the hearing of the appeal the appellant sought and was given leave to amend the Notice of Appeal to raise three Grounds of Appeal which I discuss below. The grant of that leave was not opposed by the respondent.
- [9] The appellant had applied for leave to adduce new evidence in the form of the results of DNA testing in support of a further proposed ground of appeal. But that was abandoned at the commencement of the hearing of the appeal (together with the associated proposed ground of appeal) and an order was made dismissing that application.

Factual Background

- [10] The complainant was 14 years of age when she ran away from home either on Friday, 20 August 2021 or around 4 pm Saturday, 21 August 2021. There was evidence that the complainant had walked away from home before, and that it was likely she would be in trouble with her parents for doing so.
- [11] On this occasion when she left, she took with her a bag with a change of clothes but not her phone. Her evidence was that she rode on trains within Brisbane and then wandered around Southbank until the very early hours of the morning of Sunday, 22 August.
- [12] She was walking around Grey Street at Southbank, when the appellant saw her and offered her somewhere to stay. CCTV footage shows her getting into his car at around 3 am that morning.
- [13] Her evidence was that the appellant drove her towards Kuraby and to his unit. His unit was at Woodridge and had, she believed, two bedrooms. They went into his bedroom, then she was pushed or “jumped” from behind. She ended up on the bed, her clothes removed, and she recalls that she saw a condom retrieved from the bedside table which she then heard being put on. Thereafter, she contends the appellant raped her by inserting his penis into her vagina.
- [14] She initially did not protest or fight back but eventually told him to stop. At some point her hands were held, she blacked out or passed out and did not wake until the following morning.
- [15] After doing so she went to have a shower, looked in the mirror and saw for the first time that she had marks on her face (around her eyes) which had not been there the night before. She said that she felt like she had been hit or punched in the face, but did not state that the appellant had punched her. Other parts of her interview with the police referred only to the appellant pushing her onto his bed, but not punching or striking her at all. Having gone downstairs she saw the appellant, who acted as if nothing had happened. He drove her to the Sunnybank train station. The complainant did not go straight home but rather caught a train towards the city and again, wandered around Southbank. Her evidence was that she threw her underwear in a bin at Southbank and went for a swim, eventually went home and slept on a table outside until late that night when she was discovered by her sister around 11.30 pm.

- [16] The sister was unable to rouse her and as a result the sister and their mother put the complainant inside to sleep it off. She slept in her sister's room until about 8 am on Monday, 23 August. She showered again that Monday.
- [17] That morning, accompanied by her mother, she was taken to the Queensland Children's Hospital at South Brisbane. She provided a recorded interview to police that day. Having regard to the nature of the matters she complained of, she was examined by a Sexual Assault Investigation nurse at about 7 am on Tuesday, 24 August 2021.
- [18] A second recorded interview with the police took place on Wednesday, 25 August 2021.
- [19] As a result of the CCTV footage to which I have referred the police were able to locate the appellant and on Thursday, 26 August a search of his unit was conducted. In his bedroom in a drawer of a bedside table (which was open enough to be able to see inside the drawer) an empty condom wrapper was located. The appellant was interviewed by police on 26 August 2021 during which he admitted that he had taken the complainant to his unit as suggested but otherwise denied any misconduct by him. He denied causing any of the complainant's facial injuries. His account of the condom wrapper was that some three or four weeks earlier he had opened it in the expectation of using it but did not. Whilst he threw the condom out, he did not throw out the wrapper.

Grounds of Appeal

- [20] The appellant relies upon three Grounds of Appeal, namely:
- “Ground 1 - The Appellant's trial miscarried from the failure to properly direct the jury after the replaying of the complainant's evidence in chief.
 - Ground 2 - The Appellant's trial miscarried from the failure to properly direct the jury about the complainant's facial injuries, namely:
 - a) Leaving the facial injury evidence as circumstantial evidence that could be relied on by the jury; and/ or
 - b) Failing to properly caution the jury of the use to be made of the facial injury evidence.
 - Ground 3 - The Appellant's trial miscarried from the failure to provide a credit lies direction to the jury.”

Ground 1: Undue Weight direction

- [21] The trial commenced on Tuesday 12 November 2024. The jury was selected and empanelled in the morning and the trial judge gave initial directions to the jury starting at 12.18 pm. The Crown then opened its case in the course of which the recorded interviews with the police (the s 93A statements) of the complainant were played to the jury. This was concluded at 4.24 pm on the first day. The next day (Wednesday) the complainant's s 21A pretrial recorded evidence was played to the jury. That was concluded and a morning break taken at 11.26 am. After the break the recording of the appellant's interview with the police was played to the jury and that concluded shortly before 12.58 pm when the lunch break was taken.

- [22] After lunch, the complainant's elder sister gave evidence. Her evidence, including cross examination, took just under 30 minutes. The investigating police constable was then called followed by the forensic nurse who had completed the sexual assault examination kit of the complainant. The next witness was a doctor who gave evidence concerning abrasions and other injuries sustained by the complainant. No other witnesses were called by the Crown and the second day concluded with the Crown tendering various documents. The appellant's counsel then advised the trial judge that he would neither give nor call evidence in the proceedings.
- [23] On Thursday 14 November 2024 both counsel made their addresses to the jury and the trial judge summed up to the jury. The jury retired at 2.13 pm.
- [24] The Court resumed the next day at 11.53 am when the trial judge recorded that she had received a note from the jury (the first message). It asked, "Can we request all testimony of the complainant, please". After some discussion between the judge and counsel, it was decided to play all of the complainant's evidence in Court.
- [25] The first to be played was the first of the section 93A recordings. That was concluded by 12.40 pm when the court adjourned. The trial judge told the jury before adjourning that "we'll plan to come back at 1.30 and watch the 93A and 21AK" recordings.
- [26] When the Court resumed, the trial judge advised that she had received a second note (the second message) from the jury asking: "Is it possible to have the recording from when they arrived at his apartment and not the whole tape. Thank you."
- [27] The course the trial judge determined upon, after discussion with counsel, was to identify the parts to which the jury had referred in the second message, and play those parts to them, but with counsel for the appellant adding "but then remind them, of course, of what the sister said and of what [the appellant] said and what she said in the cross-examination."
- [28] The jury then returned and the trial judge asked them if that note "relates to the second tape, the one that you haven't seen?" and that was confirmed, with the jury spokesperson identifying the part they wanted was from when "they arrived home... to when she was dropped back off at Sunnybank train station."
- [29] Arrangements were then made for the selected parts of the second s 93A record of interview to be identified so as to be played for the jury. The jury were told this is what would occur. Thereafter, parts of the second s 93A interview were played to the jury (the timing of the relevant parts being assisted by reference to the transcript of the recording). After this had progressed for some time (till shortly before 2.17 pm) the trial judge told the jury that there was a section of the recording dealing with the route taken to get to the train station and asked if that was the part the jury wished to hear. The response was no. That would seem to indicate that the jury did not wish to have the balance of the s 93A interview replayed to them.
- [30] The trial judge then said "Now there's also some evidence in the cross-examination in court where the complainant is asked some questions about the events when she's at the unit. Do you wish to hear that evidence?" The response was yes. This exchange I will refer to as the third message.
- [31] At 2.17 pm the jury retired so that the court (with counsel) could seek to identify those parts of the s 21AK recorded evidence. Before that process had been completed the

trial judge told the bailiff to advise the jury that she was organising the sections to be played and would notify them when the court was ready. This was at 2.30 pm.

[32] At 2.50 pm the trial judge advised counsel that she had received a third note (the fourth message) which stated “We’ve reached a verdict and do not need to watch the next video. Thank you.”.

[33] Counsel for the appellant is then recorded as stating that he had been thinking about “that unusual circumstance where they’ve asked to see further evidence” and adverted to a case, later identified to be, *R v Ali* [2015] QCA 191. Counsel for the appellant expressed his concern that the jury having asked to review all of the complainant’s evidence had in fact reviewed only some of it by the time their final note was received by the Court. In the end he submitted:

“...It is a vexing issue. Your Honour would at least – and perhaps this is what your Honour should do – remind them there was cross-examination about these matters and that they had requested that and that they are all satisfied that they can deliver a true verdict consistent with the evidence without seeing that. That might be the way in which your Honour approaches.”

[34] A little further on he made a submission also:

“MR KISSICK: And I suppose that case of Ali also not just reminds them about the fairness but remind them that they are – that they – ensure that they did not put too much weight on her evidence-in-chief at paragraph 22.

...

MR KISSICK: Or a reminder. Yes. You are not asking them to retire to consider their verdict further but just to retire before any verdict is taken if they are still at the verdict or something of that nature.”

[35] The jury was called back in at 3.38 pm and the primary judge then gave the following redirection:

“HER HONOUR: So, members of the jury, you will recall that this morning the first note that you gave me was a note where you asked to see all of the complainant’s evidence in the trial. We played the first 93A tape, and you had a sandwich, and then I got another note which said could you only see the part from when she got to the unit, and when you came back in, I clarified that that was the second tape that you wanted to see and we clarified that the part that you wanted to see was from arriving at the unit to being dropped off at the train station, and that was played, and then after that was played, I reminded you that there was evidence in the cross-examination of the complainant which also dealt with when the complainant was at the unit and that it was in several parts of that cross-examination tape, and I asked you if you wanted to see it, and you said yes, you did. Because it was in several parts, I said, ‘Well, if you go outside, we will find the parts on the tape to save you sitting here while we fumble our way through where all of those parts were.’

Then whilst we were in the process of doing that, I received the note that said that you had reached a verdict and you no longer needed to see that evidence. Now, you will remember that I said to you right at the start of the trial that it is my responsibility or my job to see that the trial is conducted according to law, and one of the relevant principles is one of fairness, in that, when a part of the evidence is played a second time, there is a risk that too much weight is placed on the evidence which the jury has seen twice without there being adequate weight or consideration being given to the other parts of the evidence. So, in those circumstances, there are a variety of courses, but one course can be that the other relevant parts of the evidence are played, which, in this case, would be the portions of the cross-examination. Or alternatively, that the Judge – that is, me – gives you a direction about the fairness issues.

So that would be that I give you a direction that you must not place too much weight upon the replayed evidence-in-chief of the complainant which you have seen and heard twice in circumstances where you have not seen other parts of her evidence that deal with the same issues a second time. And that is the cross-examination of the complainant, and you know that that is there, and I can also remind you that the defendant gave a record of interview to the police, and I think you have had that disc with you in the jury room. So given that I give you that direction about the weight concerns, having seen the evidence-in-chief twice and not the balance of the cross-examination which you had asked to see, then I want to ask you whether you are satisfied that you can reach a true verdict on all the evidence, consistently with your oath as jurors, without seeing the cross-examination.

Now, I do not expect you to answer that question right now. I am going to ask you to retire to the jury room to consider amongst yourselves whether, having been given that direction and been reminded of those elements of the note, that you seek to do anything other than deliver the verdict that your note says that you have reached. So can I ask you to go back out now to the jury room and tell Mr Bailiff when you need to communicate with us further what you need to do. Thank you.”

- [36] The jury retired at 3.43 pm. When asked, both Counsel advised that they had nothing arising out of the further direction given. At 3.53 pm the trial judge advised she had received a further note from the jury (the fifth message) which stated: “We are all satisfied with what we have seen, and we have reached a verdict.”. The jury then returned and the verdict taken.
- [37] The appellant’s contention is that this gave rise to a miscarriage of justice. In substance it is submitted:
 - (a) The jury ought to have been directed before any of the complainant’s evidence was replayed to them (that is after the first message) to be careful not to give undue weight to it merely because they had heard it again and to be reminded to take account of the appellant’s contentions as to the complainant’s reliability.
 - (b) The want of such a direction in this case could not be overcome by the re-direction in fact given to the jury because it could not overcome the risk of

prejudice to the appellant where the direction is only given after the jury had (by the fourth message) notified the court they had reached a verdict. The very short time that passed between the redirection and the rendering of the verdict did not enable the court to conclude that any prejudice to the appellant, by the jury possibly giving undue weight to the sections of the evidence that were replayed to them, had been overcome, but rather suggested the reverse: a commitment to a position taken possibly as a result of the giving of that undue weight.

- [38] This first ground of appeal is not made out.
- [39] This was a short trial. No issue is taken with the summing up by the primary judge which had, prior to the receipt of the various notes:
- (a) directed the jury that the prosecution bore the onus of establishing the elements of the offence beyond reasonable doubt;³
 - (b) directed them that they were to consider all of the evidence.⁴
- [40] There is an acknowledged need for caution when jurors are played or ask to hear parts of a complainant's evidence replayed to them to ensure that that section is not given undue weight and that they have regard to all of the complainant's evidence, in its context. For this reason often the whole of the s 93A interviews, pre-trial recorded material including the cross examination are replayed to the jury in court: *R v Ali* [2015] QCA 191 at [21]. But this is not an inflexible approach. Each case must be assessed individually and a determination made as to whether the risk of unfairness and balance requires that the whole of the evidence be replayed or whether some other course is appropriate: *R v SCG* [2014] QCA 118, (2014) 241 A Crim R 508, at [35]; *R v VM* [2022] QCA 88 at [55], [59]; *Gately v The Queen* (2007) 232 CLR 208 at [96] (Gleeson CJ, Heydon and Crennan JJ agreeing).
- [41] Three authorities in particular were relied on by the appellant in relation to this ground. The first was *R v SDL* [2022] QCA 207. That too was a relatively short trial, but one in which the accused gave evidence. The nature of the charge was, however, quite different, being of maintaining an unlawful sexual relationship with the accused's step daughter over a period of 6 years when she was aged from 9 to 15 years old. After the jury had retired, they sent a note asking if they could watch the complainant's police interview again. The trial judge (with counsels' agreement) allowed that but required that the jury also be played the cross examination of the complainant. After some time the jury advised they could not reach a verdict and a Black direction was given. The jury later returned a verdict of guilty. This was appealed on the basis that after the complainant's evidence was replayed to the jury the trial judge did not remind them of the accused's evidence and failed to warn them of the risk of giving undue weight to the parts played to them twice.
- [42] Dalton JA (with whom the President and Boddice JA agreed) held (allowing the appeal) at [39] that:

“As it was, the trial was distorted or unbalanced because nearly all the Crown case was replayed to the jury without any reminder of the defence case. I accept the submission on behalf of the appellant that

³ See T1-12.

⁴ T1-9 lines 39-41; T1-12 lines 24-25.

the fact that the appellant's evidence had been given on Friday, and that a weekend intervened before the complainant's evidence was replayed to the jury, exaggerated the effect of this. However, my view would have been the same even if the weekend had not intervened. I also accept that the jury's return to the courtroom to indicate they could not agree, soon after seeing the complainant's evidence replayed, is an indication that efforts to balance the trial after the complainant's evidence was replayed might well have made a difference to the verdict; that is, matters were finely balanced. Again however, my conclusion would be the same even had there not been this added factor."

- [43] The second authority is *R v PBO* [2024] QCA 238. This was a short case where the accused did not give evidence. An hour after the summing up finished the jury asked to review the complainant's interviews with the police. This was later reduced to just reviewing one of them. The trial judge, after they had heard that recording, told the jury again that merely because they had heard it twice did not make it more important than it was. A verdict of guilty was returned by the jury. On appeal the Court was satisfied that there was no risk that the jury would have forgotten the balance of the evidence given the short time frames involved and the only substantive issue was whether there was a need to caution against giving additional weight to the replayed parts because they had been reinforced by replaying. Having regard to the reminder in fact given by the trial judge the court held that no further direction needed to be given to the jury to avoid a miscarriage of justice; Bowskill CJ at [12]; Doyle AJA at [84], [90], (Boddice JA agreeing).
- [44] The third authority is *R v Storey* [2021] QCA 265. That case involved a six day trial on nine sexual offence counts, including five of rape of an 11 or 12 year old school boy. It bears some similarities to the present appeal, in that the jury had retired on the penultimate day at around 2.13 pm. The following day the jury requested a replaying of the complainant's evidence. After most of the evidence in chief but none of the cross examination had been replayed a break was taken (at 12.27 pm). The jury was to return at 1.30 pm to resume the replaying of the complainant's evidence and for the trial judge then to give them further directions reminding them of the accused's case. However, the jury advised they had reached a verdict and that they no longer needed to listen to the balance of the evidence. This was at 1.29 pm.
- [45] After consultation with Counsel (without either objection or real encouragement from the counsel) the trial judge gave a direction to the jury which in effect outlined what the judge had intended to do, asked them to retire and reflect on the direction before the verdict was actually taken. The trial judge then reminded them that what they had heard had to be considered in context with the cross examination of the complainant and the closing addresses by counsel; and not to give undue weight to the material which had just been replayed to them. The jury retired at 1.48 pm and returned with a verdict at 2.07 pm.
- [46] This Court, in allowing the appeal, concluded that the imbalance due to the jury only having replayed to them part of the complainant's evidence required a direction by the trial judge reminding them not to give the replayed parts undue weight (and to consider the remaining evidence) and reminding them of the accused's contentions and that that imbalance was not overcome by the direction given after the first indication the jury had reached their verdict. At [58] McMurdo JA (with whom Fraser and Mullins JJA agreed) stated:

“However, as appears from the shortness of the period which followed before they returned with their verdicts, by that stage the warning was unlikely to have had any effect. In practical terms, the jury had made up their minds before the warning was given. Moreover, at no stage had the jury been reminded of the passages from the cross-examination of the complainant, which defence counsel had identified for inclusion in the judge’s proposed redirections.”

[47] The appellant understandably points to this as supporting the conclusion for which he contends on this appeal. However, what is required must be assessed in the context of the trial as a whole including its length and the other evidence: *R v Enright* [2023] QCA 89 at [74]; *R v PBO*, supra at [4]-[5].

[48] In this case I am satisfied there was no risk of the jury giving undue weight to the parts that were replayed to them and proceeding without regard to the balance of the evidence including the cross examination in the pretrial recorded evidence (even though not, in the events, replayed to them).

- (a) This was a short trial, with a very compact range of issues.
- (b) They had heard the recording of the evidence of the complainant, the appellant’s recorded interview and limited other testimonial evidence over about a day and a half (over days 1 and 2 of the trial).
- (c) They had listened to the addresses and the trial judge’s summing up on day three. They had been retired considering their verdict since 2.13 pm that day.
- (d) From the evidence that they had heard, they selected what they wished to hear again. They requested (by the first message) and listened to some evidence until 12.40 pm and by 1.30 pm had refined (by the second message) what they wanted to listen to. They then listened to some of that before, as outlined above, the indication (by the third message) was that they still wished to hear the cross examination of the complainant as to events in a limited period. That changed at 2.50 pm when they advised (by the fourth message) they had reached a verdict and that they did not need to watch anything further.
- (e) This course (more than a day after the jury first retired to consider their verdict) provides an indication of the jury’s discernment as to what they did and did not wish to have replayed to them. In such a compact trial it is difficult to conclude there was any material risk of the jury not having proper regard to the whole of the evidence or that they may have forgotten its significance.
- (f) It follows that this is not a case where in the context of this trial there is an imbalance due to the jury not having heard all the complainant’s evidence including her cross examination or being reminded of the appellant’s contentions.
- (g) But the trial judge did not take their verdict and gave a redirection that reminded the jury of the risk of giving undue weight to the ‘replayed’ sections and also reminded the jury of the cross examination of the complainant. The trial judge also reminded the jury that the appellant had given a version in his interview with police the disc of which they had in the jury room. The jury was sent out again to consider that redirection.

- (h) No further redirection was sought by counsel.
 - (i) Absent some further consideration, it is not possible, in my view, to conclude that this redirection was not able to “cure” any perceived imbalance or unfairness to the appellant.
- [49] However, the jury came back with the verdict in a short time - some 10 minutes. In *R v Storey* the short length of time was said to indicate that the jury had previously made up their minds and that the warning was unlikely to have had any effect: at [58]. A like view is urged by the appellant in this case.
- [50] The shortness of the time passed in the present case does not, in my view, point to that conclusion.
- (a) Juries are given and generally are relied on to act in accordance with directions: *R v Glennon* (1992) 173 CLR 592 at 603-4 (per Mason CJ and Toohey J), 614-615 (per Brennan J, Dawson J agreeing);
 - (b) This jury had been out considering its verdict since early afternoon the prior day. The matters they wanted replayed to them were identified and then refined by them and then, they advised what was not needed;
 - (c) The short time between the redirection and the taking of the verdict, in those circumstances, should be seen as no more than an acknowledgement that the redirection was unnecessary because it reminded the jury of things they could not be taken to have overlooked.
- [51] In those circumstances, the appellant has not made out that there was a risk of the jury giving inappropriate or undue weight to a segment of the evidence because it was replayed to them so as to possibly distort the jury’s appreciation of the evidence as a whole such that it can be said that the error could realistically have affected the reasoning of the jury to its verdict.
- [52] This ground of appeal is not made out.

Ground 2: Circumstantial Evidence

- [53] By this ground the appellant contends the trial judge was wrong to sum up to the jury on the basis that the evidence as to the marks on the complainant’s face was circumstantial evidence and failed to direct them as to the proper use that could be made of it.
- [54] The trial judge, in her Honour’s summing up, in discussing circumstantial evidence gave this direction to the jury:

“Circumstantial evidence is evidence of circumstances which can be relied upon, not as proving a fact directly but, instead, as pointing to its existence. In this case, the evidence of the abrasions to the complainant’s face, which she says she saw for the first time when she woke up on the Sunday morning in the defendant’s unit, but she did not know how they happened, is circumstantial evidence. It does not prove that the defendant raped the complainant. The prosecution has led it as evidence in existence pointing to the fact that the defendant raped the complainant.”

- [55] Some context is required. The complainant in her s 93A interviews did not state that the appellant had inflicted these injuries. Her description of the rape was that the appellant pushed her onto the bed and removed her clothes, not that he struck her face in any way. Her statement that it felt like she had been punched was a description of how she felt and not a description of the means by which acquired the marks. When the prosecutor addressed the jury, he referred to the complainant's evidence.⁵ In anticipating the case that the appellant might seek to make out, that the complainant was lying, the prosecutor addressed the jury to the effect that it was highly unlikely that someone lying about the rape would give evidence of such gentleness by the accused and identify the facial marks but not seek to implicate the accused in her getting them.⁶
- [56] The fact of the facial marks was relied upon by the appellant's counsel to challenge that the appellant was the offender, because of the absence of his DNA from the facial swab and blood which had revealed, in fact, the presence of another male person's DNA. Additionally, he addressed the jury that because the marks were, as he put it, symmetrical, they looked like something you might get from lying face down with glasses on. The marks were, he submitted, an enigma but had nothing to do with the appellant.⁷
- [57] The appellant, in his record of interview with the police, said he did not recall seeing the complainant with any facial abrasions or injuries and of course denied that he had inflicted them.
- [58] It is the duty of the trial judge to instruct the jury as to the law applicable to the case with such observations upon the evidence as the judge thinks fit to make: section 620 of the *Criminal Code* (Qld). The scope of this obligation is not directly in issue on this appeal. The obligation, however, requires the trial judge to identify the real issues in the case and the law concerning those issues. This *may* require the judge to refer to the evidence where doing so is necessary to properly instruct the jury on those issues.
- [59] The appellant contends that it was wrong for the primary judge to have given the above direction because in the Crown's own address to the jury it referred to the facial injuries only in passing, when recounting the complainant's version of what occurred or obliquely in dismissing the DNA evidence from the facial injuries as irrelevant. That is, it is said the prosecutor did not refer to the evidence of the facial marks as circumstantial evidence.
- [60] That submission is premised upon a notion that the primary judge may not give a direction in relation to evidence led as circumstantial evidence, if the evidence was not referred to as circumstantial evidence by the prosecution in the summing up of the Crown's address to the jury. No authority was provided to support that proposition, and I do not believe it to be correct.
- [61] In *Shepherd v The Queen* (1990) 170 CLR 573 Dawson J stated, at 579 (Toohey, Gaudron JJ agreeing):

“Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence

⁵ Addresses T1-4 lines 19-20.

⁶ Addresses T1-8 lines 36 to 47.

⁷ Addressed T1-18 line 38 to T1-20 line 9.

of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.”

[62] By this definition, the evidence of the facial marks is capable of being described as circumstantial, but its probative value must be slender indeed. The marks were referred to as part of the narrative of events given by the complainant. The evidence might also be relevant to her credit in the ways addressed by both counsel. I do not accept therefore that it was wrong for the trial judge to refer to the evidence as circumstantial in the summing up.

[63] The appellant relied on the alternative contention that the trial judge had to instruct the jury that the evidence of the facial marks was led only as part of the narrative and could not be used to reason towards guilt. Given my view above, this issue does not arise. However, if otherwise some error had been made out in the trial judge’s directions in this regard, given the marginal significance of the evidence I would have concluded it had not been shown to be material.

[64] This ground of appeal is not made out.

Ground 3: The “Lie” Direction

[65] As mentioned above when interviewed by the police the appellant explained that the condom wrapper had been in the bed-side table drawer for some weeks and put there in different and innocent circumstances. The existence of the wrapper was a physical piece of evidence (together with the complainant’s evidence that the appellant took a condom from the bedside table and put it on before raping her) that was relevant to proof of the offence.

[66] In the course of addresses, the prosecutor adverted to the circumstance that the complainant was able to give evidence of the offender reaching for a condom and then her hearing it being put on. Nothing is said to arise from that aspect of the case. However, the prosecutor also submitted that the appellant’s version (of it being sought to be employed some weeks earlier with the condom itself being thrown away but not the wrapper) was improbable (it was called a Hollywood crime thriller). The complainant’s evidence was logical and could fit with all the evidence (it was said). On the other hand it was urged that “The [appellant’s] story lacks any logic. It doesn’t compare.” The appellant’s version did not, it was said have the ring of truth.

- [67] Arising from this the appellant now submits that the prosecutor was inviting the jury to conclude the appellant was lying and that accordingly the trial judge ought to have given a direction warning the jury against reasoning from a conclusion that the appellant was lying about the circumstances in which he had opened the condom wrapper three or four weeks earlier, to a conclusion of guilt of the charged offence. It is submitted that there may be many reasons why that lie was told “including to bolster a true defence, out of panic or confusion, or to conceal disgraceful conduct”: Appellant’s Submissions [64].
- [68] No such direction was sought at the trial.
- [69] The respondent on appeal submitted that the prosecutor’s address did not amount to calling the appellant a liar, as distinct from his version being improbable: Respondent’s submissions at [41]. This is too subtle a distinction and not one which I would draw in the present case.
- [70] The direction the appellant submits ought to have been given is one to guard against the reasoning directly from something being a lie to it being proof of guilt of the offence. Where an accused’s lie could only be relevant to their credit, juries may need to be warned against uncritical reasoning that because the accused person is telling a lie about something, that it is evidence of their guilt of the offence: *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28. But here there is no lie except if the accused is lying to conceal guilt of the offence. It was clear there was a condom wrapper in his bedside table. He does not put that in issue and the photos support one being one there when the police searched his unit. He did not lie about it. There is nothing wrong with his having condoms or their wrappers in his bedside table and so to suggest it was necessary to direct the jury that there may be many reasons why a lie was told, which might include reasons such as “to bolster a true defence, out of panic or confusion, or to conceal disgraceful conduct”, cannot be sustained.
- [71] Rather, the significance of the condom wrapper lay in the circumstance that the complainant had seen a condom taken from the drawer in the bed-side table when she was at the appellant’s house.⁸ This is the same table where the wrapper was located. This is a case, as discussed in *R v SDU* [2022] QCA 176 at [19]:
- “... in which the jury had to reject the appellant’s denial of the offences if it was to act on the complainant’s account of the offences as reliable. In such a case, as the plurality in *Zoneff v The Queen* explained, it is ‘unnecessary, indeed undesirable, that a direction of the kind with which *Edwards* was concerned be given’. The plurality in *Zoneff* suggested the terms of a direction which may be given as a safeguard against misunderstanding in cases where there is a risk of the jury inferring guilt from lies which are relevant only to the credit of a defendant’s account. However, a direction in the terms suggested in *Zoneff* is only apt where there exists such a risk. It is not required merely because it is suggested something a defendant has said should be rejected as untrue.”
- [72] Here there is no risk of impermissible reasoning from a lie to proof of guilt. The lie, if there was one, is only made out as being a lie by rejecting the appellant’s denial of the commission of the offence. If such a direction was required in this case, then it

⁸ Second s 93A interview at page 26 lines 55 to 56.

would be required in every case where an accused told police that he or she did not commit the offence. To require such a direction in that situation would be both unorthodox and also likely to cause confusion for the jury.

[73] This ground does not make out a miscarriage of justice in this case.

Conclusion

[74] In my view none of the grounds of appeal has been made out.

[75] The appropriate order is that the appeal is dismissed.

[76] **COOPER J:** I have read the draft reasons for judgment of both Bond JA and Doyle JA.

[77] I agree with Doyle JA, for the reasons his Honour gives, that ground 1 (as articulated by the appellant in the amended Notice of Appeal), ground 2 and ground 3 all fail and that the appeal must be dismissed.

[78] If, contrary to the way ground 1 was framed in the amended Notice of Appeal, the substance of the appellant's complaint under that ground does not concern the inadequacy of the direction given to the jury after they indicated they had reached a verdict, but that the jury might not have discharged its function of rendering a verdict according to law, on the evidence, and in accordance with the direction they were given following that indication, I agree with Bond JA, for the reasons his Honour gives, that the appellant has not established a miscarriage of justice on that basis.