

SUPREME COURT OF QUEENSLAND

CITATION: *R v NAL* [2026] QCA 218

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

FILE NO/S: CA No 298 of 2025
DC No 84 of 2025

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Cairns – Date of Conviction: 27 August 2025 (Fantin DCJ)

DELIVERED ON: 30 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 8 October 2026

JUDGES: Mullins P, Callaghan J, Sullivan J

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted after trial of rape – where the respondent invited the jury to reason displayed a consciousness of guilt – where the appellant contends that the evidence could not give rise to any inference of consciousness of guilt – where the submissions of the respondent on consciousness of guilt were adopted by the trial judge – where the trial judge later gave a direction guarding against the misuse of the evidence – where there was no error

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant sent a letter asking his mother to convince the complainant to withdraw the charges – where the letter was led by the prosecution as evidence of the appellant's consciousness of guilt – where the appellant contends that the evidence was inadmissible – where there was no error in admitting the letter

De Silva v The Queen (2019) 268 CLR 57; [2019] HCA 48, considered

Edmunds v Edmunds [1935] VLR 177, considered

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

Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66, considered

R v Douglas [2018] QCA 69, considered

R v Fellowes, Jackson, McGeough & Buttigieg [1987] 2 Qd R 606, considered

R v Kerim [1988] 1 Qd R 426, considered

COUNSEL: T B Feeney for the appellant
M B Lehané for the respondent

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

[1] **MULLINS P:** I agree with Callaghan J.

[2] **CALLAGHAN J:** The appellant appeals against his conviction on one count of rape. He is the biological father of the complainant, who was 22 years old at the time of the trial.

The complainant's evidence

[3] The complainant gave evidence that on one occasion when she was 11 years old, the appellant rubbed his penis against her vagina on the outside of her clothes. This conduct was the subject of count 1 – indecent treatment of a child (under 12) who was a lineal descendant.

[4] The complainant also gave evidence that when she was in grade 7, her family were all sleeping on some couches in their home. Her father asked if she wanted to cuddle up with him. She did so, and he started to touch her breasts. He then pulled down his shorts and then hers, telling her not to worry. He then inserted his penis into her vagina and she felt him moving in and out of her. After this finished, she started crying and asked him if this was normal. He replied that every father and daughter does it so the tampon can fit in later. This conduct was the subject of count 2 – rape.

[5] Preliminary complaints were made to her partner (when she was in grade 11), her schoolfriends (on several occasions, the first was when she was in grade 7) and her mother (when she was in grade 8).

Post-offence conduct

[6] Other evidence included a recording of a conversation that the appellant had with his mother over the phone while he was remanded in custody. He asked whether she had received letters that he had sent her. She had not.

[7] A letter sent by the appellant had in fact been intercepted by staff at the correctional centre. In it he suggested to his mother that she tell the complainant that she (his mother) needed him there with her to look after her as her “health isn’t good”. He asked his mother to “try everything anything for [the complainant] to drop the

charges”. He finished the letter by asking her to throw the letter, and others, in the toilet as he would not want anyone to read them.

- [8] The jury was directed that this letter might be used in the following way:

“If, and only if, you reach the conclusion that there is no other explanation for his conduct and that it was not motivated by, for example, matters like panic or fear of wrongful accusation or consciousness of guilt of other misconduct or a desire to get out of prison, then you are entitled to use that finding as a circumstance pointing to the guilt of the defendant to be considered with all the other evidence in the case.”

The appellant’s case; a mixed verdict

- [9] The appellant testified and denied both offences.

- [10] The jury was unable to reach a verdict on count 1 but convicted on count 2.

Grounds 2 and 3

- [11] It is convenient to deal first with these grounds, which read:

“Ground 2: A miscarriage of justice was occasioned by the admission of irrelevant evidence in the form of post-offence conduct, namely, the sending of a letter attempting to have the charges withdrawn; and,

Ground 3: In the alternative to Ground 2, a miscarriage of justice was occasioned by the failure of the trial judge to exercise the discretion to exclude the alleged post-offence conduct, namely, the sending of a letter attempting to have the charges withdrawn.”

- [12] The letter sent by the appellant was an attempt to suborn a witness. It is well-established that evidence of such an attempt is admissible because it is capable of demonstrating a consciousness of guilt.

- [13] It is true that the correspondence in question did not contain any express admissions, but that did not mean it was, as the appellant suggests, “intractably neutral”. In fact, it is likely to be a rare thing for an attempt to pressure a witness to be accompanied by an explicit confession of guilt. That is why such evidence is correctly categorised as an implied admission.¹

- [14] The directions given made it clear that it was open to interpret the letter in different ways, depending on the context provided by all the other evidence – including the appellant’s. These directions were intended and would have been understood to mean that there was no mandatory interpretation applicable to the document. It was open for it to be explained away or rationalised as something which did not implicate. It

¹ Heydon, *Cross on Evidence*, LexisNexis at [33435].

was also open to conclude that it did implicate the appellant in the offences charged. Such directions ensured that the evidence would not be misused.

- [15] On any reading, however, it was always relevant and admissible. There was no reason for the trial judge to exercise her discretion to exclude it. These grounds should be dismissed.

Ground 1

- [16] Ground 1 reads:

“A miscarriage of justice was occasioned by the learned Crown Prosecutor at trial, in effect, inviting the jury to reason the defendant displayed a consciousness of guilt while giving evidence where:

- a) the evidence given by the defendant could not give rise to any inference of consciousness of guilt and no direction was given guarding against improper consciousness of guilt reasoning; or,
- b) if the defendant’s evidence could be used to demonstrate consciousness of guilt, the learned trial judge did not give an appropriate protective direction guarding against the misuse of that evidence.”

- [17] The appellant directs attention first to this passage in the cross-examination of the appellant:

“Have you ever held S in a position where you have rubbed your penis against her vagina in the M home?---No.

...

Have you ever laid down with S under a blanket on the three-seater lounge while you were living at the M house?---No.

Have you ever laid down with S under a blanket on the sofa bed while you were living at the M house?---No.

...

“Have you ever laid down with S underneath a blanket on any couch or lounge in the lounge room at the M house?---Not at all.

Have you ever touched or fondled S’s breast while on a couch in the M house?---No.

Have you ever inserted your penis into S’s vagina while on a couch or a sofa bed in the M house?---No.”

- [18] The focus of this appeal then switches to this passage of the Crown prosecutor’s closing speech:

“You might have assessed yesterday – and perhaps you could glean it from the way argument was just raised with you by my learned friend – that some of the answers that Mr N gave were infected by his fear of being trapped by the truth. He told you that he had a positive

relationship with S when they were living as a family unit in M, a loving household where all the kids were living in M together.

He tells you that he never, not once in that household, picked up one of his daughters, not once in that loving household. He never laid down on any couch in that house with S with a blanket ever in the time that they lived there in that loving household. He actually said later, he never laid down on a couch of any kind with any of his kids at all.” (emphasis added)

- [19] The appellant’s point – well taken by Mr T Feeney of Counsel – is that there was nothing in the evidence to which the prosecutor was referring which conceivably could have been used by the jury to reason towards a conclusion of guilt. It could not meet the tests which must be passed before evidence can be used in that way.² On the contrary, the appellant’s evidence amounted to a series of denials which were contradicted only by the evidence of the complainant. There was nothing – independent of the complainant herself – which could establish the falsehood of these statements. Nothing about the evidence in question indicated that the appellant must have known that the truth would implicate him.
- [20] The law can be stated simply – “by no torturing of the statement ‘I did not do the act’ can you extract the evidence ‘I did do the act’”.³
- [21] The prosecutor’s submission suggested, however, that the appellant’s own evidence could in fact be used in this way.
- [22] The mischief was compounded, so the argument runs, by the way in which the prosecutor characterised the letter sent by the appellant to his mother. As to that, he told the jury:

“Of course he knew it was an offence when he asked his mother and he lied when he said he didn’t. You might find it difficult to accept the submission to you that his evidence has been consistent. F has been consistent in telling his story. It should be obvious to you that his fear of being trapped by the truth was something that had endured in his mind for years beforehand; it’s why he sent the letter. It’s why he put it all on the line on that occasion. He weaponised his own mum. He accepts that his conduct was emotional manipulation of his daughter, the commentary about the necessity for his mum to receive care, to need him in the community with her; he accepts that’s manipulation on his behalf to have his daughter withdraw her complaint.” (emphasis added)

- [23] On this point it was open for the prosecutor to submit as he did, that the letter was sent because of the appellant’s “fear of being trapped by the truth.” However, by

² See *R v Fellowes, Jackson, McGeough & Buttigieg* [1987] 2 Qd R 606; *Edwards v The Queen* (1993) 178 CLR 193.

³ *Edmunds v Edmunds* [1935] VLR 177; *R v Kerim* [1988] 1 Qd R 426 at 439-440: “In *Perera* (1982) 6 A.Crim.R. 225 in the Court of Criminal Appeal, Victoria, Young C.J. held that mere denial by an accused of a charge laid could not be used to indicate a consciousness of guilt. At 228, 229 the learned chief justice appears to accept the view that the mere giving of false evidence does not of itself have probative force.”

echoing the same phrase when speaking about very different parts of the evidence, the appellant's denials – which proved nothing for the Crown – were equated with something which, as noted above, was capable of being used to demonstrate a consciousness of guilt.

- [24] There is considerable force in the appellant's argument up until this point. The jury was invited – perhaps carelessly rather than intentionally, but in any event impermissibly – to use certain evidence for a purpose that was not open. Responsibly, the respondent in this court allows that the prosecutor's submission was “unfortunate and unnecessary ... made without a proper evidential basis and was lacking in substance”.
- [25] In some cases that would be enough to secure a retrial for the appellant. An uncorrected submission which invites a jury to reason along a path which is not open can cause a miscarriage of justice.⁴
- [26] However, the prosecutor's submissions must be considered in the context of the whole trial. They were followed by a summing up which included directions that the jury was found to follow. These included a ‘Liberato’ direction which was delivered in these terms:⁵

“I have already told you that the defendant does not have to give evidence or call other people to give evidence on his behalf or otherwise produce evidence. The fact that the defendant has done so – that is, that he has elected to give evidence – does not mean he has assumed a responsibility of proving his own innocence. The burden of proof has not shifted to him. The defendant's evidence is simply added to the evidence called for the prosecution. The prosecution always has the burden of proving each of the elements of the offence beyond reasonable doubt, and it is upon the whole of the evidence that you have heard in court that you must be satisfied beyond reasonable doubt that the prosecution has proved the case before the defendant may be convicted.

Sometimes cases are described as ones of word against word. That is not an accurate description in a criminal trial. You must understand that in a criminal trial, it is not a question of you making a choice between the evidence of the prosecution's principal witness, in this case the complainant, S, and its other witnesses, on the one hand, and the evidence of the defendant on the other hand.

The proper approach is to understand that the prosecution case depends upon you, the jury, accepting that the evidence of the prosecution's principal witness – in this case, the complainant, S was true and accurate beyond reasonable doubt, despite the sworn evidence of the defendant, F. You do not have to believe the defendant, F, is telling the truth before he is entitled to be found not guilty.

⁴ See, for example, *R v Douglas* [2018] QCA 69.

⁵ See *Liberato v The Queen* (1985) 159 CLR 507; *De Silva v The Queen* (2019) 268 CLR 57.

Where there is defence evidence, as there is here, usually one of three possible results will follow, and these are in order of most favourable to the defendant to least favourable.

First, you may think the defendant F's evidence is credible and reliable and that it provides a satisfying answer to the prosecution's case. If so, your verdict would be not guilty.

Or, second option, you might be uncertain about the defendant F's evidence but consider it might be true. In that case, again, your verdict would be not guilty.

Or, third option, you may not have accepted the defendant's evidence. You may not have accepted him as a truthful and reliable witness, in which case you simply put the defendant F's evidence to one side. You must not jump from deciding not to accept the defendant F's evidence to automatically concluding he is guilty. If you do not accept the defendant F's evidence, simply put it to one side and go back to the evidence that you do accept and ask yourself if, on the basis of that evidence, the prosecution has satisfied you beyond reasonable doubt that the defendant is guilty.

That is the proper way to reason in a case involving evidence from the defendant."

[27] A further direction followed:

"In this case, for each count, the prosecution case rests upon you, the jury, accepting the evidence of the complainant, S, about that particular count beyond reasonable doubt. So in order to convict of a particular count, you must be satisfied beyond reasonable doubt of the truth and accuracy of the complainant's evidence about the elements of that particular offence, count 1 or count 2."

[28] The first of these directions shifted focus away from anything to do with the appellant's evidence. If that was found wanting by the jury, they were invited to "put it to one side", where it would receive no further scrutiny. The second direction reinforced the need for the case to be made out solely on the evidence of the complainant. The combined effect of these directions would have been to eliminate the mischief created by the Crown prosecutor's address.

[29] The issue does not, however, rest there. The problem was re-enlivened at a later point in the summing up. Her Honour had requested from counsel a document which summarised the points made by them in their closing addresses. In this "summary of contentions" the prosecutor included a repetition of the submission that he had made to the effect that the appellant's denials were "avoidant" and were driven by his fear of being "trapped by the truth." This part of the document was then read verbatim to the jury by her Honour.

[30] There was no request from defence counsel for a redirection – then or at any later point. There may have been reasons for that, because defence counsel was placed in an impossible forensic position. A redirection might have assisted but certainly it would have magnified the significance of a few amongst the many words spoken after

evidence concluded. It would have been preferable for some concern about the situation to have been registered, but in any case there was at that point a flaw in the proceeding. And had nothing further been said, the repetition of the prosecutor's misguided characterisation of the appellant's evidence would have made things problematic for the respondent.

- [31] There was, however, an important development during the course of the jury's deliberations. That is, they requested to hear again the pre-recorded evidence of the complainant. During discussion about that request the Crown prosecutor, very much to his credit, suggested that her Honour "would re-emphasise the Liberato direction."
- [32] The complainant's evidence was played again, in full. This was followed by a replay, in full, of the appellant's evidence. The jury was then, for the second time, given a direction in the same terms recorded above at [22].
- [33] That is, it was emphasised that the prosecution case depended on their acceptance of the complainant's evidence as true and accurate beyond reasonable doubt despite the evidence of the defendant. Nothing which occurred after the second Liberato direction could have diminished its effect.

Conclusion

- [34] The 'Liberato' direction was delivered twice. On the second occasion it was uncomplicated by any invitation to reason impermissibly. After its delivery the jury also requested the replay of evidence from two other witnesses, so can be taken to have been directing their focus away from the appellant's evidence.
- [35] In all those circumstances it is fair to conclude that, by the point of verdict, any effect of the Crown prosecutor's comments had faded behind the rehearsal of the evidence itself, and would have in any event been neutralised by the more recently given directions.
- [36] It is not therefore open to entertain any reasonable possibility that the verdict was affected by the erroneous submission. This ground cannot be made out and the appeal must be dismissed.
- [37] **SULLIVAN J:** I agree with the reasons for judgment of Callaghan J and with the order proposed.