SUPREME COURT OF QUEENSLAND

CITATION:	*R v Leedie* [2015] QCA 216
PARTIES:	**R** **v** **LEEDIE, Jias Daniel Wesley** (appellant)
FILE NO/S:	CA No 49 of 2015 DC No 448 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Unreported, 18 March 2015
DELIVERED ON:	6 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2015
JUDGES:	Gotterson JA and Philip McMurdo and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of eight counts – where count 1 charged the appellant with an offence against s 355 of the *Criminal Code* (Qld), namely, deprivation of liberty – where counts 2, 3, 4, 6, 7 and 8 concerned offences against s 349 of the *Code*, namely, rape – where count 9 concerned an offence against s 320A(1) of the *Code*, namely, torture – where count 5 concerned an offence against section 350 of the *Code*, namely, attempted rape – where the jury found the appellant not guilty in relation to count 5 – where for each of counts 2, 3, 4, 6 and 8 the appellant was sentenced to twelve years' imprisonment – where by virtue of s 161A(a) of the *Penalties and Sentences Act* 1992 (Qld), the appellant was convicted of serious violent offences in respect of each of those counts – where on counts 7 and 9 the appellant was sentenced to eight years' imprisonment and on count 1 to twelve months' imprisonment – where all prison terms are to be served concurrently – where the complainant attended the appellant's house to engage in consensual sexual intercourse – where the appellant became aware of messages on the complainant's phone between her and the appellant's younger brother – where the appellant then began to deprive

the complainant of her liberty and repeatedly assaulted, raped and tortured the complainant – where the appellant advances two grounds of appeal – where the first is that the convictions were unreasonable and unsupported by the evidence – whether the convictions were unreasonable and unsupported by the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – OTHER CASES – where the second ground of appeal is that the learned trial judge erred in refusing to discharge the jury and order the complainant be further examined at the trial – whether the learned trial judge erred and a miscarriage of justice occurred as a consequence

Criminal Code (Qld), s 320A(1), s 349, s 350, s 355
Evidence Act 1977 (Qld), s 21AK
Penalties and Sentences Act 1992 (Qld), s 161A(a)

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, considered
R v Thompson [1983] 1 Qd R 224, considered

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

[1] **GOTTERSON JA:** On 18 March 2015, after a trial over six days in the District Court at Brisbane, the appellant, Jias Daniel Wesley Leedie, was convicted of eight counts. The appellant was charged on indictment with nine counts. The allegations each related to TMR who, from time to time, had been in a romantic relationship with the appellant. The offences were said to have occurred on or about 20 to 21 July 2013 on an occasion when the complainant visited the appellant at his home in Lawnton.

[2] Count 1 charged the appellant with an offence against section 355 of the *Criminal Code* (Qld), namely, deprivation of liberty. The count as particularised was that the complainant was held against her will by the appellant by "threats and/or violence and/or the fear of violence" from the time he demanded her mobile phone on 20 July 2013 until when, on 21 July 2013, he returned her to her home at Kallangur.

[3] Counts 2, 3, 4, 6, 7 and 8 concerned offences against section 349 of the *Code*, namely, rape. The complainant alleged that the appellant raped her on six occasions.

[4] Count 9 concerned an offence against section 320A(1) of the *Code*, namely, torture. This count was particularised as consisting of the acts which constituted counts 2 to 8 and other alleged physical assaults by the appellant involving the hitting and striking of the complainant with fists, a long dark pole, a boomerang and a machete, and kicking her in the back, head and bottom.

[5] Count 5 concerned an offence against section 350 of the *Code*, namely, attempted rape. The complainant alleged that the appellant attempted to insert a pole into her anus. The jury found the appellant not guilty in relation to this count.

[6] The appellant was sentenced on 19 March 2015. For each of counts 2, 3, 4, 6 and 8, a sentence of twelve years' imprisonment was imposed. By virtue of section 161A(a) of the *Penalties and Sentences Act* 1992 (Qld), the appellant was convicted of serious violent offences in respect of each of those counts. On counts 7 and 9 the appellant was sentenced to eight years' imprisonment and on count 1 to twelve months' imprisonment. All prison terms are to be served concurrently.

The complainant's evidence-in-chief

[7] In July 2013, the complainant was 31 years old and lived at Kallangur.[1] She had been in an "off and on" relationship with the appellant over a period of about six years.[2] Some months after the relationship with the appellant ended and in the month of July, the complainant saw the appellant at his house in Lawnton.[3] She went there because he had been ringing her and asking her to visit so they could have sexual intercourse.[4] The complainant drove to the appellant's house at around 10 o'clock at night.[5] He let her inside and they had consensual sex.[6] After the intercourse the complainant said she wanted to go home to her children but the appellant locked the door and would not let her leave.[7]

[8] The complainant's phone beeped and the appellant took it from her.[8] The appellant told the complainant that she was not allowed to leave until he had checked through her phone.[9] The complainant gave the appellant the PIN to unlock the phone and the appellant looked through her messages.[10] When the appellant saw a message from the complainant to his brother, Paul, he immediately began attacking the complainant.[11] The appellant grabbed her by the hair, threw her to the floor, spat on her and kicked and beat her.[12] The appellant put the complainant on the bed, tied her hands with a black belt, pulled down her pants and anally raped her.[13] When he ejaculated the appellant put his ejaculate over the complainant's back and hair.[14] These allegations constituted count 2.

[9] The complainant rolled onto the floor and freed her hands from the belt.[15] The appellant kicked her to the face and head and hit her with the belt.[16] The appellant then hit the complainant with a pole.[17]

[10] The appellant continued to hit the complainant with the pole.[18] The complainant crawled under a chair then the appellant picked her up and threw her on the bed.[19] He

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1 AB18, ll12-34.
2 AB19, ll20-26.
3 AB19, ll28-41; AB21, ll2-3.
4 AB20, ll1-20.
5 AB20, ll24-29.
6 AB21, ll9-23.
7 AB21, ll12-47.
8 AB22, ll6-7.
9 AB22, ll1-4.
10 AB22, ll15-21.
11 AB22, l21 – AB23, l18.
12 AB23, ll10-18.
13 AB23, ll43-44; AB24, ll1-35.
14 AB24, ll4-35.
15 AB25, ll2-3.
16 AB25, ll1-5.
17 AB25, ll6-7; AB25, l27 – AB26, l11.
18 AB27, ll3-15.
19 AB27, ll14-32.

then tied her up "like a pig tie"[20] and put a dirty sock in her mouth before anally raping her again.[21] These allegations constituted count 3.

[11] The complainant was able to free her feet from the rope and roll onto the floor.[22] As she was trying to free herself the appellant put a white object into her vagina.[23] These allegations constituted count 6.

[12] The appellant then took the pole and attempted to insert it into the complainant's anus.[24] This allegation constituted count 5.

[13] The complainant described being hit on the head with a boomerang which the appellant then inserted into her vagina.[25] This allegation constituted count 4.

[14] On the complainant's account, it would have been evident to the appellant that the complainant was not consenting to any of these acts. She said that she kept telling him to stop and that what he was doing was hurting her. He ignored her requests and complaints.[26]

[15] The appellant continued to assault the complainant throughout the evening and denied her water.[27] The appellant would not let the complainant use the toilet and she urinated and defecated on the floor.[28] The appellant forced the complainant to perform oral sex while there were faeces on his penis.[29] This allegation constituted count 7.

[16] As the sun rose on Sunday 21 July, the complainant attempted to break open the back door using a knife.[30] The appellant confronted her with a machete.[31] The appellant hit and strangled the complainant.[32] The appellant then tied a rope around her mouth and head and anally raped her. During this encounter the appellant pulled the rope back with such force that the complainant felt that her neck was going to snap. He ejaculated on her hair and face.[33] These allegations constituted count 8.

[17] The complainant then tried to escape through a closed window. The appellant pursued her and the window smashed.[34] The appellant threatened the complainant with the machete and told her to get into the car as they were going to drive to look for his brother.[35] The appellant drove the car to the complainant's house, with the complainant in the front passenger seat. At the house, the appellant looked for his brother. The complainant was able to change her clothes.[36] She and the appellant returned to the car. He drove it to other places continuing to look for his brother. Ultimately, he drove the car to his house.

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20 AB28, l1.
21 AB28, ll1-30.
22 AB28, ll32-35.
23 AB28, ll44-47.
24 AB30, ll4-32.
25 AB34, ll37-41.
26 AB37, ll1-30.
27 AB38, ll6-40.
28 AB39, l36 – AB40, l18.
29 AB41, ll4-10.
30 AB41, ll20-32.
31 AB42, l5.
32 AB44, ll1-12.
33 AB44, l26 – AB45, l6.
34 AB46, ll5-15.
35 AB46, ll16-18.
36 AB47, ll23-34.

[18] The appellant then left the complainant in the car. According to the complainant, she drove to the Petrie police station.[37] She felt sick and asked to use the toilet where she "passed out". She had a discussion with a male police officer about obtaining a restraining order. She then drove home because she wanted to see her children.[38]

Cross-examination of the complainant

[19] Under cross-examination it was put to the complainant that she smoked cannabis and the drug "ice" with the appellant when she arrived at his home. The complainant denied this suggestion.[39] The complainant agreed that she had consensual sexual intercourse when she first arrived at the appellant's house and that she had gone to the appellant's house for that reason.[40] It was suggested that consensual anal intercourse had occurred. The complainant denied this suggestion.[41] The complainant denied that it was commonplace during her relationship with the appellant for him to insert objects into her vagina or anus.[42] The complainant rejected the suggestion that her version of events was incorrect.[43]

The appellant's evidence-in-chief

[20] The appellant gave evidence at the trial. He was 32 years old and lived with his son at Lawnton. He had known the complainant for about seven years.[44] The appellant and complainant had been in a relationship but it had ended a couple of months before the weekend of the alleged offences.[45] On Saturday 20 July 2013 the complainant arrived at his house while he was using the toilet. When the appellant exited the bathroom, the complainant was inside the house. He did not know how she had gained entry.[46]

[21] The appellant testified that both he and the complainant were in the bedroom when the appellant chopped-up some cannabis and the complainant produced a bag of the drug "ice". The appellant said that they both smoked some cannabis and "ice" and then had consensual sexual intercourse that lasted an hour or two. The appellant noted that the complainant was not tied up or beaten at all during intercourse.[47] The appellant recounted that, later, he and the complainant again had intercourse in another bedroom. This sexual activity was vigorous and included consensual anal intercourse. The appellant maintained that the complainant was not tied up during that intercourse. He also said that he penetrated the complainant's vagina or anus with a boomerang and "some white thing".[48] Following this the appellant and complainant resumed smoking cannabis and "ice" together.[49]

[22] Later, while the complainant was using the toilet, the appellant saw her phone on the bed displaying the application "Facebook". The appellant saw messages which implied that something had occurred between the complainant and the appellant's younger brother. Although the appellant spoke to the complainant about the messages, he said

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37 AB51, ll30-47.
38 AB52, l3 – AB53, l10.
39 AB62, ll4-20.
40 AB62, ll25-43.
41 AB63, ll33-42.
42 AB64, ll13-15.
43 AB65, ll5-14; AB68, ll1-21; AB70, ll13-16.
44 AB292, l47 – AB 293, l7.
45 AB293, ll20-22.
46 AB293, ll35-43.
47 AB294, ll4-24.
48 AB294, l30 – AB295, l4.
49 AB295, l16.

they did not make him angry and he did not strike the complainant.[50] The appellant asked the complainant to leave and she "went into a rage".[51] The appellant said that the complainant pulled out a machete from underneath the dresser and held it over her head. He disarmed her and hid the machete in the laundry.[52] By the time the appellant returned from the laundry, the complainant had picked up a metal pole and was swinging it around.[53] Once again the appellant disarmed the complainant and hid the pole in the laundry. He asked the complainant to leave and then barricaded himself in his room.[54] The appellant heard the complainant smashing up the house.[55]

[23] When the appellant left the bedroom he saw the complainant armed with a knife. He disarmed her for a third time.[56] A window had been smashed and the complainant took up a piece of broken glass and tried to stab the appellant. The appellant disarmed her and then left the house. He drove first to the complainant's house[57] and then to his sister's house to find his younger brother.[58] The appellant was not armed with a machete whilst at the complainant's house.[59] The appellant saw the complainant, gave her money for petrol and then returned to his home.[60]

[24] When the police arrived at the appellant's home they took photos. There were photographs of red rope that the appellant said he had been given so he could practise tying knots for his mining ticket.[61]

[25] The appellant denied the allegations made by the complainant.[62]

Cross-examination of the appellant

[26] Under cross-examination the appellant accepted that he had sent messages[63] from the complainant's phone to his brother threating him and stating: "I got your message u dog on TMR (the complainant's) face book u r finished".[64] The appellant said that the complainant was already bruised when she arrived at his house and that he asked her about it while they were having sex.[65] The appellant accepted that he had caused injury to the complainant but denied that it was caused with a weapon. The appellant maintained he acted in self-defence.[66] The appellant maintained his denials of the complainant's allegations.

Other evidence at trial

[27] The prosecution called Dr Leilani Corbett. Dr Corbett examined the complainant at Redcliffe Hospital at about 8.00 pm on 22 July 2013, the complainant having arrived at the hospital by ambulance.[67] After taking a medical history Dr Corbett conducted an examination of the complainant. Dr Corbett observed tenderness to the complainant's

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50 AB296, ll1-30.
51 AB296, ll35-41.
52 AB297, ll6-30.
53 AB297, ll33-38.
54 AB298, ll10-15.
55 AB298, ll28-31.
56 AB299, ll8-23.
57 AB301, ll1-5.
58 AB300, ll33-47.
59 AB301, l16.
60 AB301, ll36-47.
61 AB302, ll7-22.
62 AB304, l41 – AB305, l19.
63 AB406-407.
64 AB309, l21 – AB310, l15.
65 AB310, ll34-40.
66 AB310, l43 – AB311, l11.
67 AB183, ll25-43.

cheeks, neck and the back of her head. She noted there was a three to four centimetre laceration to the left side of the complainant's lower jaw. There were also bruises to her sternum, clavicle and armpits with tenderness to her abdomen. Bruising was observed to her hips and "exquisite" tenderness was noted about her vulva and external genitalia, particularly the mons pubis.[68] Dr Corbett also noted that there were lacerations, bruising and tenderness on the complainant's back.[69] She specifically observed that there was bruising around the anus but there were no skin tears.[70] Bruising and tenderness was also seen on the limbs.

[28] Dr Corbett expressed the opinion that the injuries were consistent with the causes alleged by the complainant.[71] Under cross-examination she gave the following responses to questions from defence counsel:[72]

> "*Sexual intercourse, whether consensual or otherwise, could lead to injuries to a woman's anus or vagina, depending on which orifice was used?*---So as the question is addressed, it is possible that you could get such injuries. However, the amount of discomfort she had seemed out of proportion to consensual sexual activity.
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> *Well, it's unusual to find injuries in consensual sexual intercourse; is that what you're saying?* ---It is not common to come across such injuries from consensual sexual activity in my experience." (Questions in italics)

[29] The prosecution also called a number of other witnesses. They were Sandra Harris, Bernadette Bird, PR, Barbara Burleski, Dr Josephine Sundin and Mark McArthur. As well, police witnesses were called to prove photographic and mobile phone records evidence.

[30] Sandra Harris was a police officer working at Redcliffe on 22 July 2013. She was advised at about 9.00 pm that night that the complainant was at the Redcliffe Hospital. Officer Harris went to the hospital and spoke to the complainant. She took down a short version of what the complainant alleged had happened.[73]

[31] Ms Bird was an indigenous liaison officer at Redcliffe Hospital on 22 July 2013 when the complainant was admitted. Ms Bird spoke to the complainant who told her that she had been held against her will by her ex-partner and physically and sexually assaulted, including being anally raped with a boomerang.[74]

[32] Mr PR is the complainant's cousin. He was staying at her house at the time of the offences in July 2013. Mr PR recalled the complainant receiving a text message from the appellant and then the complainant asking him to look after the children as she left. Mr PR recalled that he saw the complainant returning, either early the next day or the day after, appearing "beaten, bruised and very shaky".[75]

[33] Constable Barbara Burleski was stationed at Petrie Police Station. She gave evidence that on 23 July 2013 she went to the Redcliffe Hospital and spoke to the complainant.[76] Constable Burleski later detained the appellant at his house and observed that he did not appear to be injured.[77]

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68 AB185, ll30-45.
69 AB186, l42 – AB 197, l4.
70 AB187, l5.
71 AB188, ll28-39.
72 AB190, ll15-23.
73 AB193-194.
74 AB196, ll11-19.
75 AB207, ll7-27.
76 AB209, ll9-46.
77 AB208, ll25-36.

[34] Dr Josephine Sundin, a consultant forensic psychiatrist, testified as to her examination of the complainant on 7 November 2014. Dr Sundin diagnosed the complainant as suffering chronic post-traumatic-stress-disorder that was moderate to severe in intensity at the time of the examination. In Dr Sundin's opinion, the symptoms she observed were related to the conduct of the appellant.[78]

[35] The prosecution tendered photographs of the complainant, the house at Lawnton where the alleged offending occurred and of faecal matter on the floor at the house through Detective Carl Ennis,[79] Senior Constable Brett Green,[80] and Senior Constable Garry L'Estrange.[81]

[36] Senior Constable Garry L'Estrange also gave evidence of an examination of the complainant's mobile phone using software called "Cellebrite".[82] He identified a document containing information obtained from the phone and explained how it showed messages either sent from or received by the phone.[83] In cross-examination SC L'Estrange agreed that he could find no police officer who could confirm that the complainant attended Petrie Police Station on 21 July 2013, as stated by the complainant in her evidence.[84]

[37] Senior Constable Mark McArthur is a scenes of crime officer who examined the appellant's house at Lawnton and took DNA swabs from the red rope and black belt found at the house.[85] The defence made admissions that the DNA analysis and swabs from the rope were consistent with the DNA of the complainant and appellant. Similar DNA results were found with respect to a large boomerang and a broom handle found in the bedroom.[86]

[38] The defence called the appellant's mother, Jacqueline Kyle. Ms Kyle said that one day in 2013 the appellant came to her daughter's house at Kallangur. It was near the complainant's house. The complainant was present with the appellant at that time. The appellant was looking for his brother and was angry. Ms Kyle did not see any bruises on the complainant.[87]

The grounds of appeal

[39] The appellant, who was represented by counsel at trial but appeared for himself at the hearing of the appeal, advances two grounds of appeal. The first is that the convictions were unreasonable and unsupported by the evidence. The second is that the learned trial judge erred in refusing to discharge the jury and order the complainant be further examined at the trial.

Ground 1

[40] An appeal that the jury's verdicts were unreasonable will succeed if "after making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted…".[88] However, this ground will fail if "upon

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78 AB221-222.
79 AB212-219.
80 AB228-238; AB256-258.
81 AB263-271.
82 AB273, ll38-47.
83 AB275-277.
84 AB279, l35.
85 AB291, l6.
86 AB459-462.
87 AB317, l1 – AB318, l16.
88 *MFA v The Queen* (2002) 213 CLR 606 at 623.

the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the [appellant] was guilty."[89]

[41] The complainant gave cogent, credible evidence of all the particularised acts constituting the offences of which the appellant was convicted.[90] Her chronology of events was not undermined by cross-examination. Moreover, it drew support from the observations of Mr PR, the photographic and DNA evidence, Dr Corbett's observations and opinions, and the messages recovered from the complainant's phone. The complainant's evidence, so supported, taken with the evidence of Dr Sundin was sufficient for the jury to have been satisfied beyond reasonable doubt that the appellant was guilty of each of the rapes, the deprivation of liberty and the torture.

[42] The acquittal on count 5, the attempted rape with the pole, is explicable by the comparative uncertainty in the complainant's evidence on the matter. The following exchange took place between the prosecutor and the complainant:[91]

> "*Now, can you remember whereabouts on your bottom it* (the pole) *touched you?*---I don't know. Bottom or vagina. One of those. I don't know. I can't remember. I was just – yeah, just panicking and like – lucky I seen him that I ended up rolling onto the floor. But he was – he did say, you know "I'm going to put this pole up your ass. I should. You reckon I should put it up your ass.
>
> *Okay. But is it the case that you don't – you're saying it didn't go up your ass?*---To be honest, I can't sort of remember. Like I said, too concentrating on breathing and – and – and everything was numb, my whole body. I just felt I couldn't move." (Questions in italics)

[43] The complainant's evidence as to count 5 lacked the cogency of her evidence concerning the other counts. It is unsurprising then that the appellant has not complained that the verdicts are unreasonable by reason of their being irreconcilably inconsistent.

[44] The appellant has failed to demonstrate that on the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of counts 1, 2, 3, 4, 6, 7, 8 and 9.

[45] This ground of appeal cannot succeed.

Ground 2

[46] This ground concerns an event which occurred when the complainant's mother, who was present with her as a support person whilst she gave evidence pursuant to section 21AK of the *Evidence Act* 1977 (Qld), made a suggestion to the complainant as to what she might say in her evidence in chief. Defence counsel made an application to discharge the jury which was refused by the learned trial judge on a discretionary basis. An appeal concerning the refusal by the learned trial judge to discharge the jury will only be successful if it is shown that the refusal produced a miscarriage of justice.[92]

[47] This event occurred in the following circumstances. The complainant was declared a special witness and her evidence was pre-recorded two days before the commencement of the trial. Her mother, Ms MSR, was permitted to be present as a support person while the complainant gave evidence. The pre-record judge, who became the trial

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89 *MFA v The Queen* (2002) 213 CLR 606 at 615.
90 AB435-436.
91 AB30, ll23-31.
92 *R v Thompson* [1983] 1 Qd R 224 at 227.

judge, warned Ms MSR that while her presence was important, she was "not to have any other participation in the proceedings."[93]

[48] During the pre-recording of the complainant's evidence there was a break in the proceedings.[94] The complainant had not, to that point, mentioned the use of the boomerang as particularised in count 4. When the court resumed, she mentioned the boomerang.[95] After the commencement of the trial and once the jury had been empanelled, the complainant's pre-recorded evidence was played.

[49] At the commencement of proceedings on the second day of the trial, the prosecutor informed the trial judge that when the evidence was being played to the jury, it was noticed by her and defence counsel that Ms MSR appeared to say something to the complainant just before the break.[96] By listening to the recording, his Honour determined that after the complainant said, "The pole and the white thing,"[97] and immediately before the break, Ms MSR said something like "and the boomerang"[98] to the complainant. Further investigations yielded evidence that Ms MSR repeated the word "boomerang" to the complainant outside the courtroom during the break.[99]

[50] The complainant's reference to conduct by the appellant on that occasion involving a boomerang was not unprecedented. As his Honour noted, she had mentioned a "boomerang incident" in a statement to the police some eighteen months before the trial.[100]

[51] Defence counsel applied for a mistrial. He submitted that the actions of Ms MSR produced such unfairness to the appellant that the jury should have been discharged and that there should have been an order for a substitute pre-recording of evidence from the complainant.[101] In response, the prosecutor submitted that this event was apt to reflect adversely on the credit of the complainant and that, consequently, any prejudice was to the prosecution rather than to the appellant.[102]

[52] Having considered the matter the trial judge indicated that his provisional view was that the jury need not be discharged. His Honour said:[103]

> "As the matter presently stands, I consider than an explanation by me of the evidentiary issue, accompanied by the playing on the two DVD recordings of the material parts to which I have referred, and appropriate directions by me to the effect that the jury should scrutinise the evidence of the complainant, Ms TMR, carefully, in light of those material parts of her pre-recorded evidence, is the appropriate course to take."

[53] He continued:[104]

> "I do not consider at this point that the accused will suffer prejudice in defending the charges if that course is taken. However, before formally ruling on Mr Reid's application, and indeed, leaving it open for further

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93 AB16, l11.
94 AB32, l10.
95 AB34, l37.
96 AB141.
97 AB31, l46.
98 AB160, l30.
99 AB163; AB439-447.
100 AB147, l6.
101 AB144, l20.
102 AB145, ll22-29.
103 AB165, ll10-15.
104 AB165, ll17-25.

> submissions, I am prepared to do two things if requested so to do by Mr Reid: firstly, I will order a further pre-recording of the complainant to afford both counsel the opportunity to deal with those material parts of her evidence to which I have referred, and secondly, I will permit a voir dire examination of Ms MSR about those material parts of the evidence. I will hear any further submissions from counsel, either now, or indeed, after any further evidence may be given, depending on what Mr Reid wishes to do."

[54] At that point, defence counsel sought the opportunity to take instructions. The following morning he indicated that the appellant did not wish to have further evidence taken on the topic. The trial judge then formalised his ruling.[105] His Honour directed the jury in accordance with the course that he had foreshadowed.[106] In so doing he said:[107]

> "… because of that event, you need to scrutinise the complainant's evidence very carefully when you come to assess it."

[55] The trial judge reminded the jury of this caution when summing up the case.[108] These directions were sufficient to convey to the jury that the reliability of the complainant's account may have been undermined by her having been reminded of the boomerang by Ms MSR. While Ms MSR's conduct was inappropriate, the directions given were appropriate to ensure that the appellant was not materially prejudiced by her conduct.

[56] In the circumstances, the refusal to discharge the jury did not produce a miscarriage of justice.

[57] This ground of appeal includes a contention that his Honour erred in not ordering that the complainant be further examined. As noted, in expressing his provisional view on the application, the trial judge indicated that he would, if requested to do so by the appellant, order a further pre-recording of the complainant's evidence in order to deal with those material parts of it.[109] The appellant did not take up this offer.[110] As a consequence, he forwent the opportunity to complain on this account.[111]

[58] For these reasons, this ground of appeal, too, cannot succeed.

Disposition

[59] As neither ground of appeal has succeeded, the appeal against conviction must be dismissed.

Orders

[60] I would propose the following order:

1. Appeal dismissed.

[61] **PHILIP McMURDO J:** I agree with Gotterson JA.

[62] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Gotterson JA, with which I agree. I also agree with the orders proposed by his Honour.

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105 AB176, ll14-29.
106 AB178, l14 – AB 180, l15.
107 AB180, l15.
108 AB332, l48; AB333, l44; AB334, l14.
109 AB165, l20.
110 AB171, ll5-9; AB176, l20.
111 *R v McCosker* [2010] QCA 52 as per Keane JA at [5].