

## **COLLINS v THE QUEEN (B68/2017)**

Court appealed from: Queensland Court of Appeal  
[2017] QCA 113

Date of judgment: 2 June 2017

Special leave granted: 17 November 2017

The Appellant was convicted of a number of sexual offences against a 19 year old woman, the most serious of which was rape. Some hours following the incident during which the offences were said to have been committed, the Complainant telephoned her mother (Ms M). In a brief conversation, she protested about what had taken place and was advised by Ms M to go to the police.

Ms M was called as a witness at the Appellant's committal hearing and later at his trial. On each occasion she was asked to give her account of this conversation and, in particular, to recall the words spoken by her daughter. The account which she gave at the trial however was different to that which she gave on the same topic at the committal hearing.

The sole ground of appeal is that a "miscarriage of justice occurred by reason of the way in which the learned trial judge directed the jury as to the use that could be made" of the account which Ms M gave at the committal hearing.

On 2 June 2017 the Court of Appeal (Gotterson & Morrison JJA, Burns J) unanimously dismissed the Appellant's appeal. This is despite their Honours finding that that a misdirection by the trial judge concerning Ms M's evidence had in fact occurred.

The Court of Appeal found that his Honour had erred when he instructed the jury that "what the mother said to the committal court seven years ago is not evidence of the fact that the Complainant *said* those things to her". Although it was correct to direct the jury, as his Honour immediately did thereafter, that such evidence is "not evidence of the truth of the contents of the statement", Ms M's prior account had also become part of her oral testimony at trial. It was therefore available for use by the jury when considering what the Complainant said by way of preliminary complaint to her mother. Thus, the use to which the evidence could be put extended beyond merely using it to assess Ms M's credit. If accepted, it was also available to determine the consistency or otherwise of the preliminary complaint and, therefore, the Complainant's credit.

Despite this misdirection, their Honours applied the proviso and dismissed the appeal, finding that no substantial miscarriage of justice had occurred. They noted that the Crown case was strong. They found that the Complainant's account of what took place was comprehensively tested in cross-examination and she was unmoved regarding any of its essential details. Physical evidence, although not going to the proof or otherwise of the issue of consent, nevertheless supported parts of her account. Furthermore, preliminary complaints were not only made to Ms M but also to a Ms Johnson and a Mr

Haberfield. The guilt of the Appellant on each of the offences for which he was convicted had therefore been proved beyond reasonable doubt.

The grounds of appeal are:

- The Court of Appeal made an error in applying the proviso when:
  - a) The Crown:
    - i. did not request its application;
    - ii. made no argument in support of its application;
    - iii. disavowed its application; and
    - iv. that position was objectively explicable and there is no suggestion of fraud or incompetence.
  - b) the defence had made a submission that the proviso should not apply; and
  - c) the Court did not give any indication it was inclined to a contrary position and did not invite submissions against its application.

On 6 December 2017 the Respondent filed a notice of contention, the grounds of which include:

- The Court of Appeal erred in concluding that the adoption by Ms M of her own earlier testimony amounted in the particular circumstances to an acceptance of the truth of the earlier account.