THE IMPACT AND USE OF INCONSISTENT STATEMENTS IN A CRIMINAL TRIAL

Paper presented by Judge A J Rafter, SC at CPD event sponsored by the Crown Prosecutors' Association of Queensland in conjunction with the Bar Association of Queensland

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The purpose of establishing a prior inconsistent statement

[1] The usual purpose of establishing that a witness has made a prior inconsistent statement is to attack the credibility and reliability of the witness. In *R v Etheridge*[1], Sofronoff P (Fraser and Morrison JJA agreeing) said: "[t]he aim is to destroy the reliability of the evidence given in court by demonstrating that the witness was prepared to give a different version of events on a prior occasion."

[2] The following exchange in cross-examination referred to by the Hon. Justice MH McHugh AC in a speech delivered at the New South Wales Bar Association 1995 Tutors' and Readers' Dinner[2] illustrates a failed attempt to discredit a witness:

> "Young silk: I want to put this proposition to you. You used the company's money for your own purposes?
>
> Defendant: No.
>
> Young silk: Look at the document I hand to you! Isn't that a sworn statement, in your own handwriting, in which you admit that you used the company's funds to pay your own debts?
>
> Defendant: No. I have never seen this document before today.
>
> Young silk: Do you seriously tell his Honour that this is the first occasion on which you have seen the document that I just handed you?
>
> Defendant: Yes, I do. The document you just handed me is headed – "Notes for Cross-examination of the Defendant".

[3] However, as the facts in *R v Etheridge* demonstrate, an attack on the credibility and reliability of a witness is not the only purpose of establishing a prior inconsistent

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1 (2020) 3 QR 481 at 486 [12]; [2020] QCA 34 [12].
2 (1995) NSW Bar Association News [17].

statement. The appellant entered the complainant's home, struck her on the head with a hammer, stole her wallet and car keys and drove away in her car. The victim suffered very serious injuries: depressed fractures on both sides of her skull, a fractured cheekbone involving multiple breaks and lost teeth. The appellant was charged with 10 counts. He pleaded guilty to seven counts. He pleaded not guilty to attempted murder and the alternative of doing grievous bodily harm with intent. He pleaded guilty to doing grievous bodily harm but the Crown did not accept his plea. The only issue was whether the Crown had proved that the appellant intended to kill the victim or alternatively whether he intended to cause grievous bodily harm.

[4] The victim's recollection of the events was described as "understandably patchy". However, the evidence was that on the morning of the events, the appellant came to the victim's front door wearing shorts and was splattered with mud. He said that he had been fishing and that his son had hurt himself. He said that his son needed a drink of water. The victim went to the kitchen and brought back a bottle of water. She then felt extreme pain. The victim's evidence at the trial was that her next recollection was being treated at the hospital.

[5] The victim could not remember a conversation with a police officer at the hospital. The police officer was cross-examined about the conversation. He said that the victim had told him that when she returned from the fridge, the appellant was standing in the front doorway with a hammer. She was struck several times before she sat on the couch. While on the couch the appellant threatened her with the hammer and demanded her wallet and keys. He then drove away in her vehicle.

[6] The appellant gave evidence. He said he was suffering a serious drug addiction on the day of the offences. On the day of the offences, he had consumed Xanax, LSD and methamphetamines, all washed down with alcohol. He had no recollection of the encounter with the victim.

[7] The defence case was that the Crown had failed to exclude the reasonable hypothesis consistent with innocence that the appellant had assaulted the victim with the intention of robbing her, but had no intention to kill or do grievous bodily harm.

[8] The defence placed heavy reliance on the victim's conversation with the police officer, arguing that the attack followed immediately by a demand to hand over

property was inconsistent with an intention to kill and was consistent only with intention to rob with actual violence.

[9] The trial judge's directions to the jury in relation to the victim's conversation with the police officer included the following:

> "The previous statement made by [the victim] is evidence of any fact stated in it. It is a question for you whether you accept the evidence and, if so, what weight you attach to it.
>
> In estimating the weight that can be attached to the statement, have regard to all the circumstances from which an inference can reasonably be drawn as to its accuracy or otherwise.
>
> You should consider whether the statement was made around about the same time was the occurrence of the facts to which it relates.
>
> Bear in mind both that the statement was not given on oath and that you did not have the advantage of seeing and hearing the witness make the statement, as you do have when witnesses give their evidence before you.
>
> In dealing with a statement such as this – made out of court – **greater care is needed**. The statement is not in the same category as sworn evidence before you. It is a matter for you as to how much weight you put on the statement." (emphasis added)

[10] The directions to the jury were in accordance with the Supreme and District Courts Criminal Directions Benchbook No. 46 (Prior Inconsistent Statements).

[11] Sofronoff P said that the victim's statement to the police officer was one of the few facts proved by the evidence which was capable of giving rise to an inference consistent with innocence. His Honour held that the effect of the direction was to present the jury with the option of rejecting the evidence although (for good reasons) neither party had suggested any doubt about its truth.[3]

[12] It was pointed out that the Benchbook direction: "[i]n estimating the weight that can be attached to the statement, have regard to all the circumstances from which an inference can reasonably be drawn as to its accuracy or otherwise" is based on the decision in *R v Perera*[4]. However, in that case the issue of whether the prior inconsistent statement was made was a contested issue.

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3 (2020) 3 QR 481 at 492 [40]; [2020] QCA 34 at [40].
4 [1986] 2 Qd R 431.

[13] Sofronoff P pointed out that the direction to the jury may have resulted in the jury putting aside the victim's statement to the police officer leaving for consideration the remaining uncontested evidence.[5]

Do inconsistencies matter?

[14] A significant inconsistency that is not satisfactorily explained may affect the credibility or reliability of the witness. A standard direction to the jury is that they may take into account whether a witness has said something different at an earlier time.[6] Where a prior inconsistent statement assumes importance, the suggested direction includes the following: "[o]bviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question."[7]

[15] In cases of sexual offences where there is evidence of preliminary complaint, the standard direction to the jury is that inconsistencies between the evidence of the complainant and the recipient of the preliminary complaint may cause doubts about the complainant's credibility or reliability.[8]

[16] In the context of appeals against convictions on the ground that the verdict of the jury is unreasonable based on inconsistencies in the evidence of the complainant, the Court of Appeal generally takes into account that honest witnesses can make errors about the details of events.[9]

[17] In *M v The Queen*[10] McHugh J (in dissent) made the following observations:

> "It is the everyday experience of the courts that honest witnesses are frequently in error about the details of events. The more accounts that they are asked to give the greater is the chance that there will be discrepancies about details and even inconsistencies in the various accounts. Of course, it is legitimate to test the honesty or accuracy of a witness's evidence by analysing the discrepancies and inconsistencies in his or her accounts of an incident. In a case where accuracy of recollection is vital - such as the account of a conversation in a fraud case or the description of a person where identity is the issue - discrepancies and inconsistencies in the witness's account may make

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5 (2020) 3 QR 481 at 492 [42]; [2020] QCA 34 at [42].
6 Supreme and District Courts Criminal Directions Benchbook No. 23.7.
7 Supreme and District Courts Criminal Directions Benchbook No. 23.7 footnote 17.
8 Supreme and District Courts Criminal Directions Benchbook No. 68.1.
9 *R v Miller* [2021] QCA 126 at [24]; *R v HMN* [2022] QCA 3 at [136]; *R v Panagaris* [2022] QCA 192 at [52]-[53].
10 (1994) 181 CLR 487 at 534; [1994] HCA 63 at [63].

> it impossible to accept that person's evidence, no matter how honest he or she appears to be. But in other cases, discrepancies and inconsistencies may be of far less importance if the honesty of the witness, as opposed to the accuracy of the detail, is the crucial issue. If a jury thinks that the demeanour of the witness or the probability of occurrence of the witness's general account is persuasive, they may reasonably think that discrepancies or even inconsistencies concerning details are of little moment."

[18] When considering the potential significance of inconsistencies it is helpful to consider the way in which human memory works. In an article titled "Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies"[11] the authors explore how assumptions about memory can influence legal decisions. The complainant's evidence was criticised on the basis that he made strategic alterations to his evidence "when confronted by the impossibility of the allegations." Some inconsistences and new details emerged for the first time in cross-examination. The complainant explained that he didn't disclose the new details earlier because he didn't think they were important and no one had asked him about the details before.

[19] The authors state that:

> "The explanation provided by the complainant is consistent with the general scientifically derived principle of memory that what is remembered depends on the goodness of the match between conditions at the time of encoding and at the time of retrieval. Extensive research has shown that different questions asked across multiple interviews are likely to produce different recollections, and that the fact that these differences emerge does not diminish the overall report accuracy. Empirical research shows that inconsistencies and errors relating to peripheral details to a central event are common, and do not indicate that a person is lying."[12]

[20] It is important to consider the significance of inconsistencies in the context of the main issues in the case. Inconsistencies on peripheral details may be inconsequential and do little to detract from the credibility of the witness. There is a risk that eliciting a small number of minor inconsistencies will enhance, rather than detract from the credibility of the witness.

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11 Jane Goodman-Delahunty, Natalie Martschuk and Mark Nolan, "Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies" (2020) 44 Crim LJ 232.

12 (2020) 44 Crim LJ 232 at 243-244.

[21] The significance of inconsistencies will need to be considered in the context of legislative changes with respect to the reception of expert evidence and jury directions.

[22] The Women's Safety and Justice Taskforce chaired by the Honourable Margaret McMurdo AC recommended that the Attorney-General and Minister for Justice, Minister for the Prevention Domestic and Family Violence progress amendments to the *Evidence Act 1977* to:

- allow for the admission of expert evidence about the nature and effects of domestic and family violence and sexual violence, in similar terms to s 388 *Criminal Procedure Act 2009* (Vic); and
- adopt ss 76-80 and s 108C of the Uniform Evidence Law, with any necessary adaptions, for the purpose of criminal proceedings for domestic and family violence offences and sexual offences in Queensland.[13]

Expert evidence

[23] The Evidence Act 1977 was amended by the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023 by the insertion of Part 6A, Div 1A. Section 103CC(1) provides that expert evidence about domestic violence is admissible in a criminal proceeding. The evidence may include evidence about the nature and effects of domestic violence on persons generally (s.103CC(2)(a)) and the effect of domestic violence on a particular person (s.103CC (2)(b)).

[24] It can be anticipated that similar amendments will be made in relation to sexual offences.

[25] The *Uniform Evidence Act* 1995 provides for the admissibility of evidence of persons with specialised knowledge (s.108C(1). This includes specialised knowledge of child development and child behaviour (including the impact of sexual abuse on children and their behaviour during and following the abuse (s.108C(2)(a)).

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13 Hear her Voice – report 2 recommendation 79.

[26] The expert evidence sometimes includes the opinion that it is quite common for child victims of sexual abuse to take time to make a disclosure and to do so in a piecemeal fashion: *Aziz (a pseudonym) v R*[14]

[27] In the recent defamation proceeding in *Lehrmann v Network Ten Pty Ltd*[15], Network Ten proposed to lead expert evidence to establish that the behaviour of a person alleged to be the victim of sexual assault was not demonstrative of untruthfulness. The evidence was to be led to support the proposition that any counterintuitive behaviour relied upon by the plaintiff was of neutral significance. The trial judge (Lee J) raised with the parties his preliminary view that even if the evidence was admissible, it would be of marginal utility because: (a) the proceeding was a judge-alone trial; and (b) the counter-intuitive conduct simply reflected the accumulated experience of the common law or ordinary human experience. In the result the parties agreed on these facts: [16]

> "(1) trauma has a severe impact on memory by splintering and fragmenting memories; such that semantic or meaning elements become separated from emotion; and interfering with the timespan memories require to consolidate and become permanent;
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> (2) due to the potential for cuing of emotional responses to fragmented memories, memory can change, be subject to reconsolidation effects, and even when these effects are not marked initially, memories may remain labile for some time (thus changes in what the person reports as their memory of an event can be expected);
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> (3) lack of clarity and confused accounts can be expected until such time as the memory has consolidated;
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> (4) inconsistencies in reporting following a traumatic event are often observed and explicable through underlying theories of trauma and memory function;
>
> (5) omissions can be understood as alterations in awareness due to high arousal at the time of the event that consolidate over time;
>
> (6) inconsistency is often observed in reliable reports of sexual assault and is not *ipso facto* a measure of deception;
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> (7) in understanding the account of an alleged "survivor", a person must consider how that account was elicited; this includes the skill and attitudes towards the person by the investigating

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14 [2022] NSWCCA 76 at [26]
15 [2024] FCA 369.
16 [2024] FCA 369 at [117].

officers; the time elapsed between the traumatic event and the formal interview; and the psychological/emotional state of the person being interviewed at the time of interview;

(8) the first forensic interview is potentially a trigger for intrusive thoughts that can lead to fragmentation of memory and dissociation; patterns of behaviour such as high confidence and clarity in the account are not helpful in determining whether the account is accurate;

(9) despite the belief that the emergence of inconsistencies across interviews is a sign of lying (people "can't keep their story straight"), the literature on memory, impacts of trauma and the dynamic between interviewee and the interviewer must be considered; and

(10) multiple interviews are typically necessary to construct a clear narrative of events; however, the consequence of these multiple interviews may be patterns of inconsistency or omissions especially early in the interview process (which need to be carefully evaluated but are not in and of themselves necessarily indicative of deception or accuracy)."

Jury directions on inconsistencies in sexual offence cases

[28] The *Criminal Law (Coercive Control and Affirmative Consent) and other Legislation Amendment Act 2024*, s 59 will insert Part 6B into the *Evidence Act 1977*. These provisions are to commence on a date to be fixed by proclamation: s 2(1).

[29] Section 103ZY deals with directions to the jury where the evidence suggests a difference in the complainant's account:

"**103ZY Direction on differences in complainant's account**

(1) This section applies if evidence is given, or likely to be given, or a question is asked, or likely to be asked, of a witness that tends to suggest a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability.

(2) The judge must direct the jury—

(a) that experience shows—

(i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and

(ii) trauma may affect people differently, including affecting how they recall events; and

(iii) it is common for there to be differences in accounts of a sexual offence; and

(iv) both truthful and untruthful accounts of a sexual offence may contain differences; and

(b) that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.

(3) In this section—

difference, in an account, includes—

(a) a gap in the account; and

(b) an inconsistency in the account; and

(c) a difference between the account and another account."

Sources of inconsistencies

[30] An inconsistency in the evidence of a witness may arise from:

(a) a prior written or recorded statement by the witness or evidence given on a previous occasion (such as at the committal hearing or a previous trial); or

(b) a version of a conversation given by another person (such as a preliminary complaint witness or something said during conference with the Crown prosecutor).

[31] An inconsistency based on a statement or previous evidence given by a witness may be very damaging to the credit of the witness.

[32] A common example of inconsistencies which depend on the accuracy of another witness is evidence of preliminary complaint. In such cases there are a number of matters to consider. First, is it often assumed that the evidence of the recipient of the complaint has given accurate evidence of the disclosure, so that where there are differences in versions, it is the complainant's reliability that is adversely affected. Second, in some cases the complainant is not asked in evidence-in-chief or cross-examination to give their version of the conversation.

[33] Third, it is wrong to assume that the evidence of the recipient of the complaint is necessarily accurate: see *R v Miller*.[17] As was pointed out, a complainant of sexual offending would approach the task of confiding their story in different ways including

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17 [2021] QCA 126 at [24] (Sofronoff P, Morrison JA and Ryan J).

the nature of the relationship with the person to whom they are speaking, the circumstances of the conversation, the age of the complainant and many other factors.

[34] Fourth, there are many factors that may affect the accuracy or reliability of the version of a conversation given by the recipient of a preliminary complaint. When was the witness first asked to recall the conversation? How important to the witness were all the details of the conversation?

[35] Inconsistencies are sometimes based on notes of pre-trial conferences between the Crown prosecutor and a witness. The Crown's disclosure obligations in s 590AH(2)(e) *Criminal Code* require that the accused person be given a copy of any statement of a witness in the possession of the prosecution.[18]

[36] Guideline 29(iv) issued by the Director of Public Prosecutions[19] provides for the disclosure of inconsistent statements:

> "(iv) **Inconsistent Statement**
>
> Where a prosecution witness has made a statement that may be inconsistent in a material way with the witness's previous evidence the prosecutor should inform the defence of that fact and make available the statement. This extends to any inconsistencies made in conference or in a victim impact statement."

[37] Guideline 29(xi) relates to conferences with witnesses:

> "(xi) **Witness Conferences**
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> The Director will not claim privilege in respect of any taped or written record of a conference with a witness provided there is a legitimate forensic purpose to the disclosure, for example: -
>
> (a) an inconsistent statement on a material fact;
>
> (b) an exculpatory statement; or
>
> (c) further allegations.
>
> The lawyer concerned must immediately file note the incident and arrange for a supplementary statement to be taken by investigators. The statement should be forwarded to the defence."

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18 A "statement" of a person includes any representation of fact, whether in words or otherwise, made by the person: *Criminal Code*, s 590AD(c).

19 The guidelines are issued by the Director of Public Prosecutions under s 11(1)(a)(i) of the *Director of Public Prosecutions Act 1984*.

[38] It is preferable that any notes taken at a conference are adopted by the witness, particularly if there are inconsistencies between the statement of the witness and matters discussed in conference. Guideline 29 (xi) specifically requires that a supplementary statement be taken.

[39] It is not uncommon that inconsistencies that emerged at a conference between the Crown Prosecutor and a witness are based on notes taken by a legal support officer or clerk. The facts in *R v Clancy*[20] illustrate the type of issues that can arise in relation to notes taken at such a conference. The appellant was convicted of rape. The complainant had been out celebrating her 19th birthday. After having dinner with her father, her cousin and a friend, she went to a concert on her own because she only had one ticket. She had arranged to meet friends afterwards at a bar in Fortitude Valley. While waiting for the friends the complainant met the appellant who she described as a lot older than her or even her father. She estimated that he was older than 40. When she told the appellant that it was her birthday he offered to buy her a drink. They had a tequila shot each. By this stage the complainant was very drunk. She told the appellant that she had to go to the bathroom.

[40] The complainant went to the female toilet. As she went to close the toilet door the appellant entered and locked the door behind him. The appellant watched the complainant urinate. She then went to the sink and started to wash her hands. The appellant ran his hands up her thighs and hips and pulled her skirt up. He then unzipped his jeans and had sexual intercourse with the complainant over the sink of the bathroom for about one minute.

[41] The issues at the trial were, first, whether the appellant had sexual intercourse without the complainant's consent, and second, whether the appellant did not honestly and reasonably believe that the complainant was consenting.

[42] One of the grounds of appeal was based on the trial judge's interventions in cross-examination of the complainant and defence counsel's closing address. Some interventions in cross-examination related to the critical issue of consent. The Court of Appeal held that the trial judge erred in preventing defence counsel from asking questions to the effect that the complainant allowed the appellant to have sex with

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20 (2022) 11 QR 582; [2022] QCA 162.

her. The Court considered that the cross-examination was relevant and permissible in testing the complainant's state of mind as to whether sexual intercourse was consensual. This was particularly pertinent because during a conference with the Crown prosecutor the day before giving evidence the complainant said she thought the sex was consensual. There was a formal admission in the following terms:

> "The complainant participated in a conference with the Crown Prosecutor on 21 September 2021. A legal Support Officer employed in the Office of the Director of Public Prosecutions attended that conference and took shorthand notes. The Legal Support Officer in attendance made the following note; 'She thought the sex was consensual and thought that she was a slut and felt vile about herself for doing that on her birthday'."

[43] In cross-examination the complainant initially denied telling the Crown prosecutor that the sex was consensual, but then agreed she had said that. However she said she did not recall saying the words that the sex was consensual and that she had never thought it was consensual. The Crown prosecutor submitted to the jury that the complainant did not say the word "consensual" at the conference.

[44] On the hearing of the appeal it was submitted by the Crown that the formal admission did not establish a prior inconsistent statement but merely the content of shorthand notes made by an attendee at the conference. The Court of Appeal rejected that submission:

> "… In circumstances where the crown prosecutor continued to act as counsel in the trial, it seems inevitable that the note is to be taken to reflect what the complainant actually said, not merely the understanding of the clerk who took the note. Moreover, read in the narrow way now contended by the respondent, which was not put by the Crown at trial, it is difficult to see how the admission was probative of anything. In these circumstances, the admission did not sit comfortably with the prosecution submission that the complainant did not use the word 'consensual'".[21]

[45] The Court pointed out that the complainant's apparent statement to the prosecutor the day before trial that the sex was consensual was central to the defence case. The Court held that the combined effect of the judge's summaries of the competing contentions on that point compounded the unfairness. The trial judge had bolstered

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21 [2022] QCA 162 at [59].

the prosecution case by advancing an alternative explanation for the complainant's statement that the sex was consensual.[22]

[46] The case illustrates a number of important issues including: first, shorthand notes of significant matters discussed in conference risk errors in interpretation; second, it would usually be expected that there would be context about what was meant to be conveyed by a statement that a complainant thought that sex was consensual. A complete note of the entirety of what was said by the complainant is essential; third, where there is an inconsistency it is prudent to have the witness make a supplementary statement or at the very least adopt the conference notes as an accurate record.

[47] Finally, it is perhaps worthwhile considering the way in which conferences with witnesses are conducted. Conferring with a witness will assist in gaining a proper understanding of the evidence to be given and determining a logical way to elicit the evidence-in-chief. Consider whether the best way to conduct the conference is to take the witness through their statement.

[48] A barrister must of course observe the requirements concerning the integrity of evidence contained in the Barristers' Conduct Rules.

[49] Rule 68 states that a barrister must not coach a witness by advising what answers should be given to questions which might be asked. Rule 69 provides that a barrister will not have breached rule 68 by, for example, questioning and testing in conference the version of evidence to be given by a witness including drawing the witness's attention to inconsistencies or other difficulties with the evidence.

[50] In relation to conferring with witnesses, see generally the following:

> IF Sheppard, "Communications with Witnesses Before and During their Evidence", (1987) 3 Aust Bar Review 28
>
> Corones, Stobbs and Thomas, "Professional Responsibility and Legal Ethics in Queensland", 2nd ed (2014) at [12.60]

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22 [2022] QCA 162 at [62].

Proof of prior inconsistent statements

[51] The relevant provisions of the *Evidence Act 1977* (Qld) are sections 18, 19, 101 and 102. Here set out are each of those provisions:

> "**18 Proof of previous inconsistent statement of witness**
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> (1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.
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> (2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement.
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> **19 Witness may be cross-examined as to written statement without being shown it**
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> (1) A witness may be cross-examined as to a previous statement made by the witness in writing or reduced into writing relative to the subject matter of the proceeding without such writing being shown to the witness.
>
> (1A) However, if it is intended to contradict the witness by the writing the attention of the witness must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting the witness.
>
> (2) A court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) be produced to the court and the court may make such use in the proceeding of the writing as the court thinks fit.
>
> **101 Witness's previous statement, if proved, to be evidence of facts stated**
>
> (1) Where in any proceeding—
>
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or
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> (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated; that statement shall be admissible as

evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

(2) Subsection (1) shall apply to any statement or information proved by virtue of section 94(1)(b) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in subsection (1)(a).

(3) Nothing in this part shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by the person to refresh the person's memory, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh the person's memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

102 Weight to be attached to evidence

In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

(a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates;

(b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[52] The operation of these provisions was analysed in detail in *R v Collins*[23] (Burns J with whom Gotterson and Morrison JJA agreed). The appellant was convicted of a number of sexual offences the most serious of which was rape. The complainant was a 19 year old female. Some hours after the incident the complainant telephoned her mother. In a brief conversation she spoke of what had taken place and was advised to go to the police. The mother was called to give evidence at the trial. Her account

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[23] [2018] 1 Qd R 364; [2017] QCA 113. An appeal to the High Court succeeded on the issue of the application of the proviso: *Collins v R* (2018) 265 CLR 178; [2018] HCA 18. The reasoning of the Court of Appeal on the proof of prior inconsistent statements was held to be correct.

of the conversation with her daughter was different to evidence she had given at the committal hearing.

[53] The complainant's evidence was that she told her mother that she had been raped. That evidence was not challenged.

[54] The mother's evidence was that the complainant phoned her and told her that she had been raped. In cross-examination the mother agreed that when giving evidence at the committal hearing she had said that her daughter told her "Mum, I think he's drugged me and I think he's raped me". It is perhaps worth mentioning that the offences occurred in 2000, the committal hearing was in 2007 and the trial was held in 2014.

[55] Burns J explained that where the witness admits making the prior inconsistent statement, there is no scope for the statement to be proved under s 18. His Honour said:

> "[36] Unlike the section that precedes them, ss 18 and 19 are concerned with cross-examination and, in particular, cross-examination on a 'former' or 'previous' statement made by the witness relative to the subject matter of the proceeding. The term, 'statement', is defined to mean 'any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise' and because the expression, 'former statement', is otherwise unqualified in s 18, that provision has application to both oral and written statements. However, the expression, 'previous statement', is qualified in s 19; it can only apply to statements that are 'in writing or reduced into writing'. As such, s 19 comprehends a previous statement relative to the subject matter of the proceeding that was either (1) made by the witness or (2) expressed by the witness and reduced to writing by another. As to (2):
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> (a) a transcript of the evidence given by the witness at a committal hearing in the proceeding and forming part of the depositions would qualify as a statement 'reduced into writing' within the meaning of this provision; and
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> (b) unless the authenticity of what was reduced into writing is not in issue, there will need to be some evidence – either from the witness or another source – to establish that the writing faithfully records what the witness actually said.
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> …

[38] The application of one or both of ss 18 and 19 in a given case will not always be straightforward. Indeed, the drafting of the two provisions may only have antiquity to commend it. Nonetheless, they are intended to, and do, work together and each contemplates the receipt into evidence of a previous inconsistent (or contradictory) statement of the witness once certain preconditions are met. The way in which that is achieved is through the giving of 'proof' of the making of the previous statement; it will not be enough to introduce such a statement into evidence to merely establish that the witness failed to 'distinctly admit' that the statement was made or that it is needed to 'contradict the witness'. Thus to the extent that s 18(1) provides that 'proof may be given', it 'amounts to no more than a statement that the evidence in question is admissible', and the same observation may be made about the expression, 'contradictory proof can be given' where it appears in s 19. It follows that something more is required, although in practice such proof is often not insisted on by the cross-examiner's opponent.

[39] Section 18 is 'essentially declaratory of the common law'. By its terms, proof that a witness has made a prior inconsistent statement can only be given if the witness 'does not distinctly admit that the witness has made such statement' and if the former statement is inconsistent with 'the present testimony of the witness'. Inconsistency must be demonstrated. Importantly, 'before such proof can be given', the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether he or she made the statement. In the first-mentioned respect, the particular occasion on which the previous statement was made must be identified in sufficient detail to provide the witness with an opportunity to distinctly admit (or not) that he or she made the statement. It is only if the witness fails to distinctly admit its making that the previous inconsistent statement will be receivable in evidence under s 18.

[40] At this point, where the previous inconsistent statement is in writing and its authenticity is either not in issue or has been satisfactorily established by other evidence, it (or, more precisely, the parts of it that are inconsistent with the witness' present testimony and relative to the subject matter of the proceeding) may be tendered. In the case of an oral previous inconsistent statement, evidence will need to be adduced as to its making.

…

[47] The point earlier made can therefore be appreciated, at least so far as the admission of prior inconsistent statements is concerned – s 19(1A) supplements the operation of s 18. Thus, and assuming the other preconditions to proof in each case are

> met: (a) a previous inconsistent oral statement may only be proved where the witness does not distinctly admit making it: s 18(1); (b) a previous written statement (i.e., a statement 'in writing or reduced into writing') may only be proved: (i) where the witness does not distinctly admit making it: s 18(1); or (ii) where the making of the statement is admitted but the witness disputes that its relevant contents are true: s 19(1A).
>
> [48] It follows that where, as here, the witness distinctly admits the making of a previous inconsistent statement and does not dispute the truth or accuracy of that earlier statement, it cannot be proved in evidence pursuant to either s 18 or s 19. In particular, s 19(1A) can have no operation because there is nothing left to contradict 'by the writing' and no other basis to advance it into evidence. That being the case, s 101 will not be engaged because no statement will have been 'proved by virtue of' that provision (or, for that matter, by s 18)."

Splitting the Crown case

***R v Soma* (2003) 212 CLR 299; [2003] HCA 13**

[56] As a general rule the prosecution must present all of the evidence upon which it relies in its own case: at 308 [28]; 311 [36].

[57] Where a police interview with an accused contains statements that are adverse to interest, it should be tendered in the Crown case: at 309-310 [30]-[31].

[58] It was therefore objectionable for the prosecutor to cross-examine the accused about an inconsistency between his evidence in court and a statement made in his police interview: at 310 [32]-[33]. The High Court held that the Court of Appeal was correct to conclude that the prosecution had split its case: at 312 [40].

[59] The Crown's obligation to conduct the prosecution case fairly also requires the tender of police interviews containing mixed statements: *Nguyen v R.*[24] In some jurisdictions purely self-serving statements are tendered as a matter of course. In Queensland self-serving statements are considered inadmissible and are not tendered: *R v Callaghan*[25]*, R v Bartzis*[26]. In a Queensland case, *Holzinger v R*[27] the High Court of Australia (Kiefel CJ and Keane J) refused special leave to appeal where the application was made on the basis of differences in procedure between jurisdictions.

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24 (2020) 269 CLR 299; [2020] HCA 23.
25 [1994] 2 Qd R 300.
26 [2012] QCA 225 at 32.
27 [2017] HCA Trans 160.

The point had been argued at trial but was not a ground of appeal before the Court of Appeal: *R v Holzinger*.[28]

***R v MCI (No 2)* [2018] QCA 141**

[60] In *R v MCI (No 2)* the prosecutor cross-examined the accused about a prior inconsistent statement made in an audio recording of a pre-text call. The recording was not tendered in the Crown case because it was self-serving and therefore inadmissible.

[61] The trial related to child sex offences committed against the appellant's younger half-sister. In evidence-in-chief he denied ever having a shower with the complainant. This was different to what was said in the pretext call.

[62] The procedure adopted by the prosecutor was to ask the appellant to listen to the recording through headphones so that others in the court could not hear.

[63] After the appellant listened to the recording the prosecutor asked him to say, without saying what was on the recording, whether he recognised the voices. He was then asked whether he maintained that the complainant would never jump in the shower with him.

[64] The Court of Appeal held that the Crown had not split its case by cross-examining the appellant on his own evidence as to credit: at para [27]. Fraser JA (Gotterson and Philippides JJA agreeing) said:

> "[29] There is a considerable body of authority which supports the admissibility of a question in cross-examination asking whether a witness adheres to previous testimony after reading a document produced to the witness by the cross-examiner. That has been approved even in relation to cases in which the document is not admissible in evidence, but the rule is subject to the qualification that the author of the document and its content must not be disclosed to the witness."

[65] There was no prejudice to the appellant in the procedure adopted whereby he was given headphones to listen to the recording: at [32].

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28 [2016] QCA 160.

Procedure

[66] In *R v Soma* the procedure adopted by the Crown prosecutor was as follows:

- The prosecutor asked the accused whether the complainant had been crying outside the house and whether he had pushed her on the ground.
- The accused denied both suggestions.
- It was then put to the accused that in speaking to police on the specified date he said that the complainant had been crying outside the house and that he had pushed her on the ground.
- The accused denied saying those things.
- The prosecutor then played that part of the tape recording where the accused had said those things.

[67] In discussing the relevant provisions of the *Evidence Act 1977* (Qld), the plurality (Gleeson CJ, Gummow, Kirby and Hayne JJ) said:

> "[22] Proof that a witness has made a prior inconsistent statement can be given only if the witness 'does not distinctly admit that the witness has made such statement' and only if the former statement is inconsistent with 'the present testimony of the witness'. In the present case, before the tape recording was played, the respondent denied that the complainant had been crying, he denied that he had pushed her onto the ground and he denied that he had told the police that she had been crying or that he had pushed her onto the ground. What he had told the police was inconsistent with what he had said earlier in the course of the prosecutor's cross-examination and thus was inconsistent with the present testimony of the witness. The circumstances of the prior statement 'sufficient to designate the particular occasion' had been mentioned to the respondent. If attention is confined to s18, as the appellant submitted it should be, the conditions specified in that section for the prosecutor, as cross-examiner, to prove that the respondent had made the prior statements to the police admitting that the complainant had been crying, and that he had pushed her to the ground, were satisfied.
>
> [23] Again, confining attention to the provisions dealing with prior inconsistent statements, it was then open to the cross-examiner to pursue alternative courses. The cross-examiner could have handed the witness a transcript of the interview, asked him to read it to himself, and then asked whether the witness adhered to his earlier testimony. If an affirmative answer had been given, the cross-examiner could then later seek to lead evidence of the

> making of the prior inconsistent statement. Alternatively, as occurred in this case, the cross-examiner could have asked the witness questions designed to establish the authenticity of the record of the prior inconsistent statement and then, in the course of the cross-examination, tender the tape in evidence. (The New South Wales practice of delaying the tender until the opening or reopening of the cross-examiner's case is not followed in other States.) In this case, the respondent's admission that his voice was heard on the tape rendered it unnecessary to adopt some other method of proving that he had made the earlier inconsistent statement. Once in evidence, the prior inconsistent statement was admissible as evidence of the facts stated in it."
>
> [citations omitted]

[68] There is guidance on the procedure that can be adopted in *Garside v Rohan & Ors* [2018] QSC 295 [175] (Davis J):

- The witness can be asked if they said the things sought to be proved by the prior statement.
- If the witness admits having made the statements that may end the problem (subject to also asking whether the prior statements are true).
- If not admitted or denied, the document can be shown to the witness, without asking the witness to identify it but asking that it be read to themselves and then asking whether they adhere to their evidence.
- If, having been shown the document the witness nevertheless adheres to their evidence, the prior statement can be proved.

[69] In *Garside*, cross-examining counsel was required to tender the statement. During cross-examination of the plaintiff, counsel showed him the statement, asked him to identify it, drew his attention to a relevant passage and then read the passage. In doing so counsel proved the document and introduced it into evidence. Counsel for the Nominal Defendant required that it be tendered. Davis J ruled that counsel was required to tender the statement. a

[70] The cross-examiner need not tender the document if the questions and answers are clear without it:

Thiess v TCN Channel Nine Pty Ltd (No. 4)[29]

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29 [1994] 2 Qd R 549 at 550 (Williams J).

JRS Forbes, Evidence Law in Queensland (9th ed at [19.16])

J D Heydon, Cross on Evidence at [17560]

[71] In criminal proceedings, the Crown would rarely insist on a statement being tendered to prove a prior inconsistent statement. In *R v Collins* at footnote 71 Burns J observed that where the occasion arises for proof of a prior inconsistent statement "… the Crown will usually agree in the interests of fairness to make the tender, and such a practice is to be encouraged."

Some examples

***R v Lace* [2001] QCA 255**

[72] In *R v Lace* the appellant was convicted of murder. It was common ground that he shot and killed the deceased. The issue at the trial was whether the shooting was intentional. The appellant pulled the trigger on his revolver while holding it just inches from the deceased's head. His case was that he thought the chamber of the gun was empty.

[73] The Crown called a witness who spoke to the appellant after the shooting. The appellant told the witness that he had to go away because he had just shot a person and she was dead. The Crown relied on the admission not only to prove that the appellant shot the deceased, but because he did not qualify the statement, that he did so intentionally.

[74] In cross-examination the witness denied that the appellant told her that he did not intend to shoot the deceased.

[75] The trial judge excluded evidence from the appellant's former solicitor that the witness had told him that in the conversation with the appellant he had said that he did not intend to shoot the deceased.

[76] The court held that as the witness had denied the conversation, the appellant was entitled to adduce it in evidence pursuant to s 18(1) *Evidence Act*: at [8].

***R v Barker* [2023] QCA 117**

[77] In *R v Barker* the trial judge directed the Crown prosecutor to read a portion of the statement of a preliminary complaint witness. The witness gave evidence that the

complainant had made a disclosure that the appellant had touched her. The cross-examination elicited an apparent inconsistency between the evidence-in-chief of the witness and her police statement. The Crown prosecutor did not seek to re-examine the witness which was unsurprising as any inconsistency between the witness's evidence-in-chief and her statement had been clarified in cross-examination.

[78] Against that background the trial judge has suggested that certain paragraphs of the statement should be read out because there was a risk that the inconsistences would be taken out of context. The Crown prosecutor prefaced the re-examination by informing the jury that the paragraphs were being read out "just out of fairness".

[79] The Court of Appeal (Flanagan JA; Bond and Boddice JJA agreeing) held that the procedure was impermissible: [31]. The reading of the paragraphs of the statement was not permitted by the application of any relevant provision of the *Evidence Act 1977* (Qld): [32]. The trial judge's intervention in the presence of the jury suggested that the evidence of the witness given in cross-examination may have been elicited in circumstances that were not only unfair to the witness but were "taken out of context"; [37]. Further the trial judge's interventions impacted on the efficacy of defence counsel's forensic use of the inconsistency: [38].