SUPREME COURT OF QUEENSLAND

CITATION:	*R v BEH* [2024] QCA 56
PARTIES:	**R** **v** **BEH** (appellant)
FILE NO/S:	CA No 257 of 2022 DC No 47 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maryborough – Date of Conviction: 25 October 2022 (Byrne KC DCJ)
DELIVERED ON:	16 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2024
JUDGES:	Mullins P and Dalton and Flanagan JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted on one count of maintaining an unlawful relationship with a child, with a circumstance of aggravation – where the defence suggested there had been collusion between the complainant and his younger brother as there were similar aspects of the two brothers' evidence – where the appellant argued the trial judge did not give a balanced summary of the evidence relevant to the issue of collusion – whether the trial judge erred in giving directions about collusion such that a miscarriage of justice was occasioned *Castle v The Queen* (2016) 259 CLR 449; [2016] HCA 46, cited *Huxley v The Queen* (2023) 98 ALJR 62; [2023] HCA 40, cited
COUNSEL:	A M Hoare KC for the appellant C W Wallis for the respondent
SOLICITORS:	Suthers George Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P:** I agree with Dalton JA.

[2] **DALTON JA:** This is an appeal against conviction on one count of maintaining an unlawful relationship with a child, with a circumstance of aggravation. The ground of appeal is that the trial judge erred in giving directions about collusion such that a miscarriage of justice was occasioned. The appellant's argument is not that the trial judge did not deal with aspects of striking similarity in the evidence correctly as a matter of law, but that he did not give a balanced summary of the evidence relevant to this issue.

[3] The complainant was the accused man's nephew, and was 10 years younger than him. The maintaining count was particularised as being over seven years. At the start of the period the complainant was eight or nine years old; the appellant was 18 or 19. The Crown case was that the complainant was habitually abused over the years charged. The complainant could recall some specific events, but was not able to recall all the events.

[4] The Crown case was that the offending occurred at a rural property which was owned by a family member. When the appellant and complainant were visiting the property, the appellant would take the complainant to secluded parts of the property where the offending would take place. The complainant remembered the first time that the appellant took him to an out-of-the-way place on the property and enquired, "Do you want to see what makes babies?" The appellant then masturbated until he ejaculated. The complainant recalled that at the beginning of the period charged the appellant took him to an isolated spot and then masturbated in front of him, on several occasions. The abuse escalated over time to include the appellant masturbating the complainant, inserting his penis in the complainant's mouth, and eventually sodomising the complainant. In the latter part of the period charged, the complainant's parents bought a rural property themselves. The appellant would visit the family there and continue abusing the complainant in much the same way. As the complainant grew older, and the abuse escalated, the complainant began to object, and he tried to avoid the appellant. After the last occasion, which involved sodomy, the complainant fled from the appellant. Not long after this the appellant had a disagreement with the complainant's parents about money and moved away. At this stage the complainant was in about grade 9 or 10.

[5] The complainant told his wife about the abuse when he was 24 or 25 years old, but refrained from telling anyone else because he did not wish to upset his mother (the appellant is her brother). That first preliminary complaint was in about 2001. In about 2019 the appellant told his new partner, after splitting from his first wife, and at Christmas time that year he told his parents and then, shortly afterwards, the police.

[6] The complainant gave evidence that the appellant threatened him that if he did not co-operate in the abuse over the years, the appellant would instead abuse his younger brother. When he told his first wife about the abuse in 2001 he told her that he went along with the abuse because he wanted to protect his little brother.

[7] The revelation to the wider family of the accusations caused a split within the family. Some relatives "took the appellant's part" and some, the complainant's; the Crown called members of the family from both sides of the split.

The Potential for the Jury to Consider Collusion

[8] Not until the complainant told his family at the end of 2019 did he come to learn that his younger brother had also been abused by the appellant on one occasion. The younger brother gave evidence of a specific occasion when he was riding on a motorbike with the appellant. They stopped out in the fields and the appellant said to the younger brother, "Do you want to see what makes babies?", and then masturbated in front of the younger brother. The Crown focussed on the fact that both brothers gave evidence of the introductory phrase, "Do you want to see how babies are made?" as adding strength to its case. The defence suggested that there had been collusion between the complainant and his younger brother, and that them both giving evidence about the introductory phrase was a sign of that collusion. The phrase was a focus of attention in the trial.

[9] The prosecutor's first words to the jury in opening the Crown case were:

> "'Do you want to see what makes babies?' That's what the accused man … said to his nephew … when [the complainant] was perhaps eight or nine years old." – t 1-2.

[10] Also in his opening the prosecutor said of the complainant's younger brother:

> "Now, you'll hear from [the complainant's] younger brother, …. It's only at that time around Christmas 2019 that he found about his brother as well. You'll hear some of his recollections about being around the family property, and he'll tell you a specific occasion when he was riding on a motorbike as well with [the appellant]. They stopped out in the cane fields somewhere, and [the appellant] masturbated in front of him to the point that he ejaculated. So quite similar to one of those particulars that you see before you in relation to [the complainant]. I expect he'll also say that [the appellant] told him this: 'Do you want to see what makes babies?' Again, a distinctive comment which I keep coming back to. So the Crown will seek to use that to demonstrate his interest in his young nephews at the time." – t 2-5.

[11] In his closing address to the jury the prosecutor said:

> "I want to talk about [younger brother] now. [The complainant] gave evidence that [the appellant] said to him, 'Do you want to see how babies are made?' Sorry. [Younger brother] gave evidence [the appellant] said to him, 'Do you want to see how babies are made?' [The complainant's] evidence was:
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> > He asked me if I wanted to see what made babies.
>
> So those comments are not identical, but they are very, very similar. In relation to [younger brother], I asked him, in reference to the bike riding incident:
>
> > What happened? Tell us about this event.
>
> [Younger brother] said this to – 3-79:
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> > Well, there's three of us to start with. I don't remember if my brother was ahead, rode on, rode home – I don't remember.

> Then it just ended up two of us, and me and [the appellant] stopped in the bush. He would – I don't know how long we stopped for, but he said do you want to see how babies are made. I don't remember whether I said yes, no. I don't remember what he said – what I said. He then pulled his pants down and wanked off in front of me. I remember seeing the come on the ground because I was standing there, looking at that because I remember he spat on it. He then asked me if I wanted to have sex. I remember saying no to that. He then came over and give me a hug, and we went on riding. I don't remember where we went after that, but we continued riding.
>
> And then he spoke about how that was out in the bush near the cane fields and the scrubs. So that's very similar to the first incident that [the complainant] describes. The comment: not the same but very similar. The conduct: almost identical. Masturbating to porn of – ejaculation – ground. The location is the same as other acts which were described by [the complainant]. …" – tt 1-39-40.

[12] The prosecutor also said in his closing address, "And of course, [the complainant] wasn't the only child that [the appellant] exposed himself to. [Younger brother's] evidence you can find is quite powerful in this case." – t 2-21.

[13] Lastly, in his address the prosecutor referred to the evidence of the younger brother and said:

> "… So those similarities that the two boys have described are not necessarily common. Sexual offending in front of or to children is not common, particularly to multiple children. It's not the type of thing that's commonplace within the community, I'm sure you'll accept. That sort of behaviour is remarkable to suggest of innocent people, but here, we have two boys talking about it. You can find that the defendant had a tendency to act on his sexual urges he felt towards young boys within his family notwithstanding the risk of discovery.
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> Hopefully, you're blissfully unaware about things that are discussed in this courthouse all the time about the frequency of sexual offenders in Queensland. But here, you do hear about two people talking about it. If you were thinking, well, [the complainant's] evidence seems improbable about what was happening out the back in the shrubbery past [the] shed. You think about what [younger brother] says about the same act happening on the track or near the track when they went motorbike riding. So any doubt you might've had – you might think [younger brother] – off of that first act, you might think [younger brother] has assisted to help remove that." – t 1-40.

[14] In cross-examining the younger brother, counsel for the appellant put to him that his evidence as to his experience with the appellant was false, given to support his brother:

> "All right. Now, [younger brother], you're very close to your brother [the complainant] aren't you?---
>
> Yeah. We're close, like, he lives at … so we don't see each other that often anymore. But yeah, we're still close.
>
> When you were growing up together, you were very close to your brother weren't you?---We used to fight a lot as brothers do when you're kids.
>
> You like your brother, don't you?---Yeah. I like my brother, yeah.
>
> You'd do anything for him?---No.
>
> Assist him by saying that [the appellant] had masturbated in front of him?---No. I would never make that shit up. You don't want me sitting here talking about this." – t 3-82.

[15] There was also cross-examination about a series of three or four phone calls on one evening at the end of 2019 when the complainant told his younger brother that he had been abused by the appellant. The cross-examiner attempted to discover what the complainant's younger brother said about his own experiences. The younger brother said, "I just said he [the appellant] propositioned me" – t 3-83. When the younger brother was asked directly whether or not the complainant had told him that the appellant said, "Do you want to see what makes babies?", he denied that had been said to him – t 3-83. Counsel for the appellant then said:

> "Now, the reason that you're here saying that [the appellant] had masturbated in front of you and said those words of do you want to see how babies are made, is because you want to assist your brother isn't it, or words to that effect?---No.
>
> Now I'm going to suggest to you that what you've said happened between you and [the appellant] on this motorcycle ride, that just didn't happen, did it?---It happened." – t 3-83.

[16] Counsel for the appellant put to the complainant that the appellant did not masturbate in front of him and did not say words to the effect of, "Do you want to see what makes babies?" The complainant disagreed with both these assertions – t 2-29.

[17] The appellant's counsel suggested to the complainant that he told his younger brother the words, "Do you want to see what makes babies?" and put specifically to him that he and his younger brother concocted a story against the appellant:

> "And, during the conversation with [younger brother], did you tell [younger brother] what happened to you?---Yes, I did.
>
> Right. And did you tell [younger brother] about those words that you said that [the appellant] used? For example, do you want to see what makes babies? Did you tell him that?---I don't - I don't recall going into detail with [younger brother] as to what - as to what actually happened. My recollection of that was that I had just told him that [the appellant] had sexually abused me, and I think my words were, 'Please tell me he never got to you.'

> Right?---Or words to that effect.
>
> Isn't it the case - well, so, I'm going to suggest to you, you had a conversation with your brother that extended over more than an hour at parts - more than one conversation that extended over an hour. Do you accept that?---It - I don't recall.
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> Right. And are you - is it your evidence today that you did not tell your brother something as prominent that you say those words that [the appellant] has said, 'Do you want to see what makes babies'?---I do not recall my conversation with my brother word for word.
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> So is it possible that you told your brother those words?---I do not recall my conversation with my brother.
>
> You don't recall it at all?---I don't recall the speci - I've just told you the bits that I remember.
>
> Yes. Right. Thank you. I was just trying to clarify because you said you don't recall the conversation with your brother?---I don't recall every detail. I'm sorry. I do not recall every detail and every word of the conversation that I had with my brother.
>
> Is it the case that you got together with your brother now and concocted a story against[the appellant]?---No." – t 2-68.

[18] In re-examination the prosecutor asked:

> "Yes. Okay. And why didn't you tell your brother … until 23 or 24 December 2019?---Big brothers are supposed to protect, aren't they?
>
> Okay. Have you colluded with [younger brother] for this trial?---No." – t 2-87.

[19] In his address the prosecutor said to the jury:

> "So his Honour might tell you what his evidence – and remember, a suggestion that's rejected is not evidence. So in this trial, there's actually no evidence whatsoever of collusion between [younger brother] and [the complainant] or [the complainant] and his mother. No evidence whatsoever, only suggestions." – t 1-41.

Summing-up

[20] In summing-up to the jury about the aspect of the case relevant to this appeal the trial judge said:

> "As to the first aspect, the Prosecution argues that [younger brother's] evidence of the masturbation event is so strikingly similar to the account given by [the complainant] about the first occasion of offending against him that it provides compelling support for [the complainant's] account and therefore, you would more readily accept [the complainant's] account about that first incident as being accurate and reliable.

To support its argument, they point to these features: the fact that both boys, they say, it is a matter for you, must have been about eight or nine years old at the time. If you are not satisfied of those ages, they nonetheless were young and close in age; secondly, each of them were the Defendant's nephew, they were a member of his own family; thirdly, that on each occasion, the Defendant took advantage of an opportunity to be alone with the respective child in a semi-secluded area, one where there was seclusion but there was a risk of being seen or interrupted; fourthly, that the words used prior to masturbating on each occasion was similar, 'Do you want to see where babies come – come from?' 'Do you want to see what makes babies?' And fifthly, that the Defendant not only masturbated himself but ejaculated onto the ground in the view of the child.

The Prosecution argues that any differences in these accounts, and there are some, [younger brother] said that he was hugged afterwards, so forth, there are differences. There is some difference in the words used. But the Prosecution argues that the differences are to be expected because people do not behave in identical fashion every time they do something, and so its argument is that any differences in the accounts do not detract from an acceptance that they are strikingly similar.

It strongly relies on the evidence that there has been no collusion between these two men and also no opportunity for one to accidentally, if you like, or innocently become aware of the account of the other. Broadly put, neither had spoken to the other about any of this until the 23rd of December [2019] and it points to the fact that [younger brother] did not use words to the effect that the Defendant had said, 'Do you want to see where babies come from?' or words to that effect. They are matters for you.

The Prosecution argues that all this means that the evidence of each supports the other and makes it more likely that [the complainant's] account of the first offending is accurate, that is, it is truthful and reliable. In other words, the Prosecution argues that the degree of similarity between the two versions makes it highly improbable and it says to you, in realistic terms, impossible, that it is just by chance that these two witnesses would come up with the same false story.

Now, I need to mention to you certain criteria or tests which must be applied before you can use [younger brother's] evidence about this incident to support [the complainant's] account of the first incident. You must understand that if the criteria are met and [younger brother's] evidence can be used to support [the complainant's] account because they are strikingly similar, it only is used to support his account of the first incident he said he experienced, that is, to make it more likely than not that the first incident occurred.

Before you can use [younger brother's] evidence in support of the truthfulness and reliability of [the complainant] on that aspect of his evidence about the first incident, you need to be satisfied of these things.

Firstly, that there is no collusion between them. It was suggested to each there had been and each denied it. Remember, the evidence is in the answer. It is never in the question. That means there is no evidence from them that they concocted their accounts but it still remains a matter for you whether you accept that is the case or not. Remember, the Defence argument is that it beggars belief that there would not have been further inquiry and discussion of the matter as has been testified and that is a matter for you, but you must understand the value of any strength in numbers is completely worthless if there is any real risk that what they have said was falsely concocted by them. A real risk is one based on the evidence, not one that is fanciful or theoretical.

Secondly, if you are satisfied there is no real risk of concoction, you must also be satisfied that [younger brother's] evidence about this incident is truthful and accurate, that is, that he is reliable in that aspect of his evidence.

Thirdly, you must be satisfied that the allegations made by each are so strikingly similar that there is no reasonable view of [younger brother's] evidence other than that the Defendant committed the correlating acts that [the complainant] has alleged. If you think there is a view of his account, if you accept it to be truthful and accurate, that has a different explanation, it has no weight in supporting [the complainant's] account.

As I say to you, the Prosecution, in effect, say, well, these things are so similar that, when judged by common sense and experience, they have to be true and in that way, [younger brother's] evidence supports [the complainant's] account of that first incident. They argue that in the absence of collusion, it is highly improbable [the complainant] would complain of offending against him by the Defendant in terms of the masturbation incidents and especially given the similarity of the phrase used unless it occurred in similar circumstances to those alleged by [younger brother].

As I have said to you, the Defence argues you would not accept that there has been no collusion. Also, the Defence argues you would not be satisfied that [younger brother] is truthful and accurate as to this allegation, thus, it is argued, you cannot use [younger brother's] evidence to support [the complainant] in that first incident.

If you do not accept that sufficient similarities exist in the allegations of each witness so as to be able to rely on them to show that there is no rational view of the evidence other than – or no reasonable view of [younger brother's] evidence other than that the Defendant committed that first incident, then you would reject the Prosecution argument and look at [the complainant's] evidence about the first incident independently. Now, what I mean by independently is in light of all evidence except that part of [younger brother's] evidence.

The second aspect of [younger brother's] evidence is the place where he says it occurred, W… farm. Now, of course, [the complainant]

says some unlawful sexual acts occurred on W… farm involving him but says they were different forms of conduct.

[The] Prosecution argument is that this evidence also directly supports [the complainant] in that there was offending on W… farm. Because there is a marked difference in the sort of conduct that is said to have occurred between the two, the Prosecution does not suggest the evidence is strikingly similar, but it is argued that it shows a certain predilection on the part of the Defendant which provides support for [the complainant's] account he had been offended against and that it does not matter that it was a different style of offending. Again, central to this argument by the Prosecution is its argument that there has been no collusion between the two men.

The predilection that the Prosecution points to is a willingness, that the Defendant was prepared to put into effect – sorry, a willingness that he was prepared to put into effect to commit an unlawful sexual act on W... farm against one of his younger male relatives, bearing in mind W... farm is only semi-secluded. The directions I gave you about the use of what is said to be the strikingly similar evidence apply here except you do not need to look for striking similarity.

Let me briefly repeat them and I will just give you the headlines of each of those topics. You must be satisfied there has been no collusion between [the complainant] and [younger brother] about the allegation of offending on W... farm. Secondly, you must be satisfied that [younger brother's] account is accurate and reliable and thirdly, although you need not be satisfied this aspect of the evidence is strikingly similar to [the complainant's] accounts of offending on W... farm, you can only use it if you are satisfied it does in fact demonstrate the predilection that the Prosecution contends for and that there is no reasonable view of [younger brother's] account other than implicating the Defendant in the commission of unlawful sexual acts on [the complainant] at W... farm.

If you do not accept that every one of those criteria are met, you cannot use the second aspect of [younger brother's] evidence to support [the complainant's] account that there were those acts committed upon him at W... farm. In that event, you must look at [the complainant's] evidence about that in light of other evidence in the trial, that is, other than [younger brother's] evidence to see if you accept any such conduct was committed there on [the complainant].

What I am about to say now applies to both of those first two aspects of [younger brother's] evidence. I caution you that if you accept something happened with [younger brother] on W... farm but do not accept that either of the first two aspects of his account can be used by you consistently with the directions I have given, you must not use [younger brother's] evidence to think, well, Defendant's the sort of person who would commit these sorts of offences. He did it to [younger brother], you know, he's of bad character and so therefore, we are going to convict him of the charge. You cannot reason that way. You must be satisfied that the Defendant behaved as [the

> complainant] alleges before you can convict him. You are looking at [younger brother's] evidence in these two respects to see whether, consistently with the directions I have given that provide support for [the complainant], it does not independently prove the offence charged. You will always need to look at [the complainant's] evidence to be satisfied of the offence being proven.
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> Let me now turn to the third aspect of [younger brother's] evidence, that is, the propositioning for sex, to use the phrase he used. I direct you now that, unlike the first two aspects of his account, there is no way that this aspect of his evidence can be used to directly support [the complainant's] account. The fact he has testified that he was asked by the Defendant for sex does not in any way directly support [the complainant's] credibility or reliability.
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> The reason for adducing the evidence was to give context to and make some sense of [younger brother's] evidence of what he told his brother over the phone. Put another way, imagine if you had heard what he said to his brother over the phone about having been propositioned but there was no evidence of it occurring. It may well have seemed decidedly odd to you, and so it gives context in that sense and it is because of that that you may only use that third aspect of [younger brother's] evidence in the context of preliminary complaint in the manner I have directed you." – tt 1-19-22. (my underlining).

[21] On the hearing of this appeal it was conceded that the trial judge was correct to tell the jury that there was no direct evidence of collusion. However, the trial judge recognised that there was material from which the jury might draw an inference of collusion. It was conceded at the hearing of this appeal that the trial judge gave a proper direction as to the drawing of inferences.

[22] The appellant complains about the longest paragraph underlined in the part of the summing-up above. The complaint is that, in this passage, the trial judge did not remind the jury that the appellant ran a case theory at trial that the younger brother had a motive to collude: to support his brother. Further, that the trial judge did not remind the jury that the evidence of the complainant about his telephone conversation with his younger brother at the end of 2019 "did not expressly reject the possibility that [the younger brother] was told more detail of the abuse".[1] It was said that the direction "mirrored the prosecution arguments without appropriately balancing the arguments of the defence and the uncontested fact [sic] of the case". Further that, "The learned trial judge did not tell the jury that both witnesses accepted that they had a conversation about the abuse. The relevance of this uncontested fact was that there was a possibility, depending on the jury's assessment of the evidence, that the complainant and [younger brother] had colluded."[2]

[23] I cannot see that there is anything in this argument. The relevant part of the summing-up was a part in which the judge was telling the jury how they were to deal with a prosecution submission that the evidence given by the complainant and

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1 Appellant's written submissions, paragraph 17.1.

2 Appellant's written submissions, paragraph 17.2.

his younger brother was strikingly similar, and that that supported the prosecution case – see the first two underlined passages in the part of the summing-up extracted above. The judge told the jury, as was the fact, that there was no evidence of collusion from either the complainant or his brother. Nonetheless, the judge allowed for the fact that it was still a jury question as to whether or not there had been collusion, and referred to the defence argument on this topic. The reference to the defence argument was plainly a reference to the telephone conversations at the end of 2019. This part of the summing-up was not an appropriate place to outline all the competing contentions in relation to this evidence. As can be seen, the warnings required quite a deal of information to be given to the jury. To interpolate other matters would have meant that, to the disadvantage of the appellant, the warnings about similar fact evidence would have been diluted, and even more lengthy than they necessarily were. They would have become weaker and less comprehensible.

[24] A little further on in the summing-up the trial judge did summarise the rival contentions, including about collusion. He said that the prosecution case was that the complainant was honest and reliable and that the jury would accept his account beyond reasonable doubt. On the other hand, the defence case was that the jury would not accept the complainant as honest and reliable, and that further, "that you will not rely on [younger brother's] evidence to support [the complainant] because his account cannot be believed. [Defence counsel] have pointed to various reasons why but implicit in it is asking you to not accept the denials of … collusion - and that is a matter for you, ladies and gentlemen. They say, to use the phrase used on a few occasions, that it beggars belief, that there would not have been more discussion around this disclosure on the 23rd of December [2019] and that it beggars belief that one or the other did not know of the terms or the details of what happened." – t 1-25.

[25] The trial judge said at the beginning of his summary of the rival cases that he was not going to give a detailed recitation of all the factual matters because the addresses had been made to the jury that morning. He repeated that at the end of his summary of rival contentions, following it with advice to the jury that if they wished to be reminded of any evidence whatsoever, to send a message. The points which the appellant complains were not in the underlined passage of the summing-up above were made by counsel for the defence that morning. The defence address had begun at 9.08 that morning. While the transcript does not record either the time the Crown address started, or the time it finished, it does record that the summing-up began at 11.44 am and finished at 1.18 pm. The matters relied upon by the appellant had been explored in evidence with the relevant witnesses by both counsel and defence counsel had made the points to the jury the same morning as the summing-up.

[26] In my view, the trial judge gave a very clear warning and direction about the strikingly similar aspects of the two brothers' evidence, including about collusion. There was no application for a redirection by trial counsel. As the High Court has said on numerous occasions, this is not decisive, but is an indication that nothing was unfairly omitted.[3] As the High Court said in *Castle v The Queen*:[4] "How the judge structures the summing-up and the extent to which the judge reminds the jury

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3 *Castle v The Queen* (2016) 259 CLR 449, 471; *Huxley v The Queen* [2023] HCA 40, [92].

4 (2016) 259 CLR 449, [59].

of the evidence is a matter for individual judgment and will reflect the complexity of the issues, and the length and conduct of the case". Here, the only collusion suggested was between the two brothers in the series of phone calls on 23 December 2019, and the focus was on what the appellant submitted was the tell-tale repetition of the introductory phrase about making babies. In my view, the summing-up as to factual matters was perfectly adequate and fair. I would dismiss the appeal.

[27] **FLANAGAN JA:** I agree with Dalton JA.