SUPREME COURT OF QUEENSLAND

CITATION:	*R v Watson* [2017] QCA 82
PARTIES:	**R** **v** **WATSON, Steven Gary** (appellant/applicant)
FILE NO/S:	CA No 317 of 2016 DC No 328 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 18 November 2016; Date of Sentence: 21 November 2016
DELIVERED ON:	5 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2017
JUDGES:	Sofronoff P and Fraser JA and Applegarth J Judgment of the Court
ORDERS:	**1. The appeal is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of one count of maintaining an unlawful sexual relationship with a child under 16 and four counts of indecent treatment of a child under 12 under care – where the conduct in question involved the appellant touching the complainant on the outside of her clothing – where the appellant submits that the jury should not have found that the conduct amounted to a sexual relationship CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was indicted on five counts relating to the same child – where the appellant was convicted of three counts and acquitted of two counts relating to that child – where the appellant submits that the jury's finding of guilt on three counts was inconsistent with the jury not accepting that same complainant's evidence on the two other counts CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF

JUDGE – CONTROL OF PROCEEDINGS – SEPARATE TRIALS AND ELECTION – where the appellant made an application for separate trials under s 597A(1) of the *Criminal Code* (Qld) – where the application was dismissed – where the appellant submits that the counts relating to each complainant should have been severed because the evidence of each complainant was inadmissible to prove the counts relating to each of the other complainants – where the appellant submits that he was unduly prejudiced in his defence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to two years imprisonment suspended after 12 months for an operational period of two years and six months imprisonment on each of the four other counts – where the appellant submits that lesser sentences were imposed in analogous cases

Criminal Code (Qld), s 210, s 229B, s 567(2), s 597A(1), s 597A(1AA), s 668E(1)

Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54, cited
Hoch v The Queen (1988) 165 CLR 292; [1988] HCA 50, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, applied
R v BCG [2012] QCA 167, distinguished
R v DAL [2005] QCA 281, cited
R v FAL [2017] QCA 22, distinguished
R v Ikin [2007] QCA 224, cited

COUNSEL: S Courtney for the appellant/applicant
J W Wooldridge for the respondent

SOLICITORS: Holding Redlich for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** On 18 November 2016 the appellant was convicted of one count of maintaining an unlawful sexual relationship with a child under 16 and four counts of indecent treatment of a child under 12 under care. He was acquitted of six counts of indecent treatment of a child under 12 under care. He now appeals against his convictions and seeks leave to appeal against his sentence.

[2] The appellant was a teacher of children in Grade 5 at a State school. One of his pupils was AB. The first offence of indecent dealing in point of time, count 2, was alleged to have been committed near the beginning of term one of the school year when AB was nine or 10 years old. She was sitting at a desk in a room called the ICT room. The chair in which she was sitting was small, adapted for the use of children. AB was reading a book. She said that the appellant sat beside her and touched her "in the privates". She explained that his hand would "sneak under" the desk and touch her on the outer side of her clothing. She was cross-examined in a pre-recorded session and, for reasons that will appear, it is necessary to set out some of her evidence:

> "You remember watching your police video, and you told the police about two times that you could remember when Mr Watson touched you on the outside of your clothes as you were reading? – Yeah.
>
> Am I right that for both those times you can't remember exactly what happened? – I can't – yeah. I can't remember what exactly happened, but I can remember how – if it was inside or outside.
>
> Right. And the – and the two times that you spoke to the police about that you could remember, were they both outside? – I'm not quite sure.
>
> So I don't want to keep pressing this matter, AB, but do you remember any other detail about Mr Watson touching you as you were sitting, reading in the ICT room? – No, but I remember him touching me a lot, so ---
>
> Then there came a point when the reading came to an end. Who would – who would stop the reading? Would he say, "That's enough, AB," or would you say, "I've had enough reading Mr Watson"? How would it come to an end? – I can't remember."

[3] Count 4 also concerned an alleged touching of AB's "private part" while sitting at a desk in the ICT room. In her police interview AB described the incident as follows:

> "Well, um I'm sitting a-, at the desks.
>
> Yep.
>
> And, and I read to him.
>
> Do you remember what you were reading?
>
> No.
>
> Could you think back? No? You were reading to him?
>
> Yep.
>
> And what happened then?
>
> Then he would do it.
>
> Tell me more about him doing it this time when you're reading.
>
> Um –
>
> How would he do it?

Touch me.

Yep. And how, okay, And –

My privates.

Okay. So just remember, I wasn't there, so just explain to me where you were both, how you were both s-, s-, like where were you both when that happened?

Like, um –

You're in the I-C-T room [INDISTINCT].

Yeah.

And then –

And then we moved to like a, where it has a lot of books and that.

So did that, did he touch you when you were sitting at the desk, or –

S--, sometimes he did.

But this time, this last time, was it sitting at the desk, or –

Both.

Okay. So you were sitting at the desk. How were you sitting? Like, if, if I'm, if you, show me how you were sitting.

Just sitting like this reading.

A-, okay. So you were facing, what were you sitting on?

Chairs.

Mmhmm. And what were you facing? When you were sitting on the chairs, what were you facing? The desk?

Yeah.

Okay. So you were sitting there and –

He was sitting next to me.

Okay. And just show me how, what he, how he touched your private part. Like, I wasn't there. If he was sitting next to you.

I can't remember. I don't [INDISTINCT].

Was it inside your clothing?

Sometimes.

But this time?

No.

No? Was it outside your clothing?

Yeah.

Okay. And what were you wearing?

Pants.

What sort of pants?

Just pants.

…

Okay. So you're sitting next to him and he touched your private part. Just perhaps using your wrist, if you could show me how he touched your private part, like as far as how hard and how, or did he touch it soft or hard?...

Mmm, I can't remember that.

And whereabouts on your private part?

[INDISTINCT].

You said it was on the outside of your clothing. Which clothing are you talking about?

The pants.

Which pants? Your shorts or your –

No, my school shorts. The actual shorts stayed on top.

So it was on top of them –

Yeah.

Or underneath them?

On top.

Okay. And was it, did, how did that feel when he touched it? Could you feel it?

Sometimes.

Yeah? What about this time?

I think so.

… touch you?

His hand.

So, one hand?

Yeah.

Okay. Did he say anything to you when he's touching you?

No.

Did you say anything to him?

I was going to, then he stopped.

Okay. So when he touched you on your private part this time sitting and reading, was it underneath or on top or whereabouts on your, on your private part?

Just there.

Just there? Okay. Did he do anything else then?

No.

Did you feel anything? D-, how far away was his body from you?

I can't remember that."

[4] The indecent dealing which constituted Count 3 occurred on the same occasion as Count 2, during the first few weeks of AB's first term in grade 5. Her evidence, relevantly, about what happened after the incident constituting Count 2 was as follows:

"And then what happened?

Then I was like um, then I was like he said he said to turn on the computers.

To you?

Yeah. And stick in his password.

And what was he doing with his hand?

Um, when I was doing the computers, sometimes he would um touch my bum.

But this time?

Yeah.

So this time after he had touched you in the private, he said, turn on the computer?

Mmm.

So how did his, tell me about how he touched your bum.

Lightly.

Yeah.

And hold it for a couple of seconds.

Whereabouts on, on your bum?

Mmm I don't remember where.

How do you know he was touching you?

'Cause I could feel it.

Okay. And so, was his, where was the hand that he h-, what did he do after he touched you on the private? What did he do with his hand? Where did that, how did that get off your private?

Um, he just s-, he just took it off and said, turn on the computers.

> Yep. And then you turned on the computer and put in the –
>
> Yeah.
>
> Password, or, and then when did you feel his hand on your bottom, on your bum?
>
> Like, when I was um turning on all the computers and sticking in the passwords and that."

[5] The indecent dealing constituting Count 5 occurred on the same occasion as the incident that constituted Count 4 and immediately after it. AB's evidence was, relevantly:

> "Yeah? Okay. So after that, so you said you were reading for a little while and then he touched you, what did, what you said then, that was sitting at the table, but where did you got then to read, to where the books were?
>
> Then, I was, he touched me more over there.
>
> Yeah.
>
> When I was reading.
>
> Yeah. So tell me about that. Like, I haven't seen that room, so w-, if you're sitting at the table, where did you go then?
>
> It was near the door.
>
> Yeah. And what was it?
>
> And it was like a bookcase that moved the bookcases side to side side to side (*sic*) corner.
>
> Yep. And what, what happened over there this time once you got up from the computer? Did he say anything to you to make you walk over there?
>
> No, 'cause he's um, yeah, he said to grab a book, then he followed me.
>
> Yeah. And tell me more. What happened when he followed you?
>
> And then, he touched my bum, and yeah.
>
> How did he touch your bum.
>
> Can't remember. Lightly I think, yeah.
>
> And whereabouts on your b-, on your bum did he touch you?
>
> Mmm, on the side.
>
> Okay. So just show me whereabouts. If you just show me yourself whereabouts on your bottom he t--, on your bum he touched you.
>
> [INDISTINCT].
>
> Yeah. And you said –

> [INDISTINCT].
>
> And did he say anything?
>
> No.
>
> And was he, where were you when he touched you? Were you, how w-, how was he and how were you standing?
>
> Ah, just ah, trying to grab a book and he, he was behind me.
>
> Okay. And how long did he have his hand on your bottom for, your bum?
>
> I can't remember. A couple of seconds, I think.
>
> How did that make you feel?
>
> Uncomfortable.
>
> And what happened then?
>
> Then it was like time Mr Watson to get his class to come down."

[6] Count 1 was constituted by the appellant's maintaining an unlawful sexual relationship with AB. The relevant offences included those in Counts 2 to 5 as well as other uncharged offences.

[7] A second complainant was AC, AB's sister, who was also nine or 10 years old at the time of the alleged offence, Count 6. She alleged that, when alone with the appellant in a classroom, he had asked her to kneel and had then, from behind her, put his hand between her legs and touched her "rude bit" under her shorts but over the bike pants that she was also wearing.

[8] A third complainant was AD who was 10 or 11 at the time of the alleged offence constituting Count 7. At a time when she and AC were together with the appellant, he asked them for a hug. AD gave evidence that while the appellant was hugging her, he was "rubbing my bum".

[9] The fourth complainant was AE, who was nine or 10 at the time of the offences constituting Counts 10 and 11. In respect of Count 10, the complainant gave evidence that the appellant "squeezed my butt" on the outside of her clothes. In respect of Count 11, on a further occasion he did the same thing.

[10] The appellant was convicted on Counts 1, 3, 5, 10 and 11 and acquitted on Counts 2, 4, 6, 7, 8 and 9.

Should there have been separate trials?

[11] The appellant submits that there should have been separate trials in respect of each complainant. On 19 November 2015 he made an application for an order that there be separate trials. The application was dismissed.

[12] Section 567(2) of the *Criminal Code* provides as follows:

> "Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are

> founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

[13] Sections 597A(1) and (1AA) are as follows:

> "(1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in the person's defence by reason of the person's being charged with more than 1 offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any 1 or more than 1 offence charged in an indictment the court may order a separate trial of any count or counts in the indictment.
>
> (1AA) In considering potential prejudice, embarrassment or other reason for ordering separate trials under this provision in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion."

[14] It is contended that the counts relating to each complainant should have been severed because the evidence of each complainant was inadmissible to prove the counts relating to each of the other complainants. As a consequence, the appellant submits that he was unduly prejudiced in his defence.[1]

[15] The admissibility of such evidence depended upon the principles for admissibility of similar fact evidence established in *Pfennig v The Queen*[2] and *Phillips v The Queen*.[3]

[16] In *Phillips*, the High Court reaffirmed the proposition that the admission of similar fact evidence is exceptional.[4] The Court held that such evidence is only admissible when it has a really material bearing on the issues to be decided and only when its probative force clearly transcends its merely prejudicial effect.[5] It is necessary for there to be a "sufficient nexus" between the primary evidence on a particular charge and the similar fact evidence; there must be "some specific connection with or relation to the issues for decision in the subject case".[6]

[17] In dismissing the application for separate trials, the learned District Court judge who heard the application said that he was particularly influenced by the following factors:

> "1. All complaints were by female students who were taught by the applicant in their Grade 5 year. No male student has made any similar allegation, suggesting that any assertion that the

---

1 See eg. *R v MAP* [2006] QCA 220 at [37] per Keane JA.
2 (1995) 182 CLR 461.
3 (2006) 225 CLR 303.
4 *ibid* at [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
5 *ibid*.
6 *ibid*.

touchings were an "accident" is inherently improbably, as a matter of common sense.

2. All involved touching inside school buildings where teaching activities habitually took place. There is no suggestion that any such activities occurred in the open, for example, during sports events or during activities outside normal school hours.

3. Only the applicant and the student were present, except on one occasion where only two students were in the room.

4. Unusually, the applicant's conduct towards each complainant did not progress beyond touching on the outside of their clothing, generally in the area of the bottom but in respect of two of the complainants in the area of the vagina.

5. Unusually, the teacher gave money to three of the complainants on occasions, though not necessarily directly related to the alleged incidents, and in respect of the fourth complainant, gave her gifts."

[18] We would respectfully agree that these were all relevant factors in considering whether or not to sever the indictment.

[19] As the learned judge rightly concluded, there is an undeniable congruence in the accounts given by the complainants. Indeed, the appellant does not submit that there is no relevant similarity in the allegations. Rather, he submits that the evidence of each complainant is not so "strikingly" similar as to have justified a joinder of charges because such similarities in the case of a teacher who is alleged to have offended against his pupils are "entirely unremarkable". This expression has its origin, in the context of a consideration of the admissibility of similar fact evidence, in the reasons of the High Court in *Phillips*.[7] It was used in that case to describe the aggressive sexual proclivities of a teenaged boy; but in that case it was common ground that there was an absence of striking similarity, of unusual features and of underlying unity, system, pattern or signature.[8] It was simply the case of a teenaged boy having the sexual urges of most teenaged boys and who exhibited these urges by behaviour that resulted in an allegation of rape and who, the evidence showed, had engaged in similar behaviour with other girls in the past. It was the behaviour of a boy that was largely in keeping with the behaviour of boys who were not guilty of rape and, for that reason, "entirely unremarkable".

[20] That is not this case. It may be true that primary school teachers who prey sexually on their own pupils will often exhibit the same patterns of behaviour as were alleged against the appellant. But that is not to say that such patterns, because they are normally exhibited by such offenders, thereby become "entirely unremarkable". On the contrary, evidence of such behaviour is admissible precisely because such behaviour, while it might be normal for such offenders, is remarkable for innocent people.

[21] Each victim was of a similar tender age. Each was a girl. Each was a pupil of the appellant's who was vulnerable to his predation. Each offence involved the appellant's taking advantage of his position of dominance as a teacher of ten-year-old children.

---

7 *Phillips v The Queen* (2006) 225 CLR 303 at [56].
8 *Phillips v The Queen* (2006) 225 CLR 303 at [58].

Each involved similar and peculiar sexual assaults, touching in the area of the buttocks on the outside of the child's clothing. To use the words of Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen*,[9] the evidence of each complainant revealed a pattern of activity that, if accepted, bears no reasonable explanation other than the inculpation of the appellant in the offences.

[22] In our opinion, the counts were rightly joined in the same indictment. The judge who declined to order separate trials did not err in dismissing the application. Moreover, the refusal of an order for separate trials did not occasion a miscarriage of justice. The evidence at the trial did not substantially differ from the five matters which the judge relied upon, and which are noted at [17]. The evidence at the trial about the fifth matter, namely gifts and money, was complicated by the first complainant's thinking that earphones her daughter received were a loan, rather than a gift. However, little turns on that, since the learned judge who considered the matter did not say that any money or gifts were directly related to the alleged incidents. The fifth matter was not a critical part of the judge's ruling. No further application for a separate trial was made after the pre-recording of evidence. The evidence at the trial about money and gifts did not occasion a miscarriage of justice, or require separate trials to be then ordered.

Were the verdicts on counts 1, 3 and 5 inconsistent with the verdicts on counts, 2 and 4?

[23] The appellant also appeals on the ground that his convictions on Counts 1, 3 and 5 are inconsistent with his acquittals on Counts 2 and 4. He submits that an explanation for this result is that the jury used the evidence of AE to support the reliability of the evidence of AB. It will be recalled that AE gave evidence that the appellant had squeezed her buttocks on two occasions. The jury found the appellant guilty on these two counts. It is said that, having accepted that the appellant did this to AE, the jury then must have used her evidence to support a conclusion that he had done similar things to AB. The appellant argues that this reasoning "ignores" the requirement for the jury to be "satisfied of each complainant's honesty and reliability in isolation".

[24] It is difficult to grasp the point that the appellant is attempting to make. The appellant acknowledges that the learned trial judge gave appropriate directions about how the jury could use the evidence of one or more complainants to support the evidence of another. Relevantly, his Honour directed the jury that they could only use the evidence of one complainant to confirm, support or to strengthen the evidence of another complainant if the jury first accepted the former complainant as credible and reliable beyond a reasonable doubt. If, as appears from the convictions on Counts 10 and 11, the jury were satisfied beyond a reasonable doubt that the appellant had touched AE on the buttocks in the way that she related, then that conclusion could, consistently with the authorities and the trial judge's directions, be used to find that AB's account was true.

[25] As McHugh J said in *Osland v The Queen*,[10] omitting citations:

> "When an appellate court sets aside a jury's verdict of guilty on the ground that it is inconsistent with a verdict of acquittal, it usually

---

9 (1988) 165 CLR 292 at 294.

10 (1998) 197 CLR 316 at 356-357.

> does so for one of two reasons. First, the verdict of acquittal may necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty. Second, in acquitting the accused on one count, it may follow that the jury must have accepted evidence that required them to acquit on the count on which they convicted the accused. Sometimes, however, the verdicts may indicate that, if the jury did accept the evidence, it has misapplied or misunderstood the directions of law that it was given."

[26] It cannot be said in this case, and it is not said, that the appellant's conviction on Counts 1, 3 and 5 involved an acceptance of evidence that must have been rejected by the jury in acquitting him on Counts 7, 8 and 9. While the Counts 2 and 3 concerned the same occasion and Counts 4 and 5 involved another single occasion, there was nothing in the evidence that required the jury, in convicting the appellant on Count 3 to accept the complainant's evidence on Count 2. Nor was there anything that required the jury, before it could convict on Count 5, to accept the complainant's evidence on Count 4. There were two separate acts of indecent dealing alleged to have been perpetrated on each of two separate occasions. It was open to the jury to accept the complainant's evidence on one, both or neither of these acts on each of the two occasions without any logical inconsistency. The same considerations apply to the converse case referred to by McHugh J, an acceptance of evidence that led to acquittals while rejecting that same evidence in convicting.

[27] Nor can it be said that, in considering the differing verdicts, the jury misapplied or misunderstood the trial judge's directions about the use of similar fact evidence or any other evidence.

[28] The appellant also argues that reliance by the jury on its acceptance of the evidence of AE as a circumstance supporting the reliability of the evidence of AB "ignores" the fact that "Counts 7, 8, and 9 also involved touching on the bottom but the Appellant was acquitted".

[29] There is nothing anomalous about the acquittals on Counts 7, 8 and 9 and the convictions on Counts 3, 5, 10 and 11. The respective acquittals and convictions demonstrate that the jury must have examined the evidence in support of each count separately, and even taking into account similar fact evidence that could be used in their deliberations, were not satisfied beyond a reasonable doubt of the appellant's guilt in Counts 7, 8 and 9. Rather than showing misuse of similar fact evidence the outcome shows a fine appreciation on the part of the jury of the limited use that they could make of such evidence, in accordance with the learned trial judge's directions to consider each count separately.[11] As McPherson JA once observed in another, not dissimilar context, the appellant's acquittals on six of the eleven counts may be a matter of regret for the Crown but cannot be a source of legitimate complaint for the appellant.[12]

[30] In considering the question of inconsistent verdicts as a basis for establishing, in terms of s 668E(1) that the verdict of the jury was unreasonable, due respect for the jury's role also requires an appellate court to ensure that, if there is a proper way by

---

11 See eg. *R v CX* [2006] QCA 409 at [33] in particular Point 4 per Jerrard JA.

12 *R v DAL* [2005] QCA 281 at [6].

which the different verdicts can be reconciled, the jury's conclusions must be accepted.[13]

[31] In *MFA v The Queen*,[14] Gleeson CJ, Hayne and Callinan JJ said:

> "In the case of sexual offences, of which there may be no objective evidence … a juror might consider it more probable than not that a complainant is telling the truth but requires something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others".

[32] Their Honours continued:[15]

> "It appears from the review of decisions of trial judges and intermediate appellate courts undertaken in *Markuleski* that some judges have taken *Jones* as authority for the proposition that where multiple offences are alleged involving the one complainant, then verdicts of not guilty on some counts necessarily reflect a view that the complainant was untruthful or unreliable, and that an appellate court should consider the reasonableness of guilty verdicts on the basis that the complainant is a person of damaged credibility. That view is erroneous."

[33] In this case there is an evident explanation for the jury's refusal to convict the appellant on Counts 2 and 4 while convicting on Counts 3 and 5. Counsel for the Crown, Ms Wooldridge rightly submitted that the complainant's evidence in support of Counts 3 and 5 was more precise than her evidence on Counts 2 and 4. This can be discerned from the passages of evidence set out earlier. Her evidence on the latter counts is capable of being regarded as insufficiently certain to be the basis for a conviction. As Gaudron, Gummow and Kirby JJ said in *MacKenzie v The Queen*, "the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond a reasonable doubt".[16] During the pre-recording of her evidence in March 2016, the first complainant AB could not recall certain details of the circumstances under which the appellant touched her on her shorts when she

---

13 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ.
14 (2002) 213 CLR 606 at 617 [34] per Gleeson CJ, Hayne and Callinan JJ.
15 *MFA v The Queen* (2002) 213 CLR 606 at 617-618 [35] per Gleeson CJ, Hayne and Callinan JJ.
16 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

was reading.[17] This may explain why the jury returned not guilty verdicts on counts 2 and 4. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved.[18] It may reflect a cautious approach. Uncertainty as to matter of detail may lead a jury to conclude that a complainant is more reliable about some parts of her evidence than about others.[19] The jury's verdict of not guilty on counts 2 and 4 is consistent with the jury considering that it is more probable than not that the complainant is telling the truth, but not being satisfied beyond reasonable doubt because of the complainant's inability to recall matters of detail at the pre-recording. The verdicts of not guilty were explicable on such a basis, and "did not necessarily reflect a view that the complainant was untruthful or unreliable".[20]

[34] Accordingly, this ground has not been established.

Was a guilty verdict on count 1 based on momentary touching unreasonable?

[35] Finally, the appellant contends that his conviction on Count 1, maintaining an unlawful sexual relationship, is unreasonable and cannot be supported having regard to the evidence.

[36] His argument on this ground of appeal is succinct. It is said that "it is unreasonable for irregular (*sic*) touching on the bottom outside of clothing to amount to maintaining a sexual relationship". He submits that the conduct that the jury must have found had occurred "cannot amount to sexual relationship".

[37] The same proposition was urged in *R v FAL*[21] and rejected by a unanimous Court of Appeal. Gotterson JA, with whom Morrison and Philippides JJA agreed, said:

> "It may be accepted that physical contact need not have a sexual nature. However, it is for the jury to decide whether the instances of physical contact of which evidence is given before them have such a nature and, if they do so find, whether those instances have such a sufficient continuity or habituality to establish a maintaining charge."

[38] It is unarguable, in our view, that the touching of the complainants' bodies by the appellant, in respect of which the jury found him guilty, was sexual in its nature. However 'momentary' or 'marginal' that touching might have been, to use the terms employed by the appellant, that touching, which was proved to the satisfaction of the jury, justified his conviction on charges of indecent dealing under s 210 and therefore justified his conviction on a charge of maintaining an unlawful sexual relationship on the basis of his having engaged in "unlawful sexual acts" within the meaning of ss 229B(2) and (10).

[39] This ground also fails.

Leave to appeal against sentence

[40] The appellant also applies for leave to appeal against his sentence. On Count 1 he was sentenced to two years imprisonment suspended after 12 months for an

---

17 AB61 ll 14-32; 63 ll 18-20 ll 18-25; and Re X 65 ll 8 -14.
18 *MFA v The Queen* (2002) 213 CLR 606 at 617 [34] per Gleeson CJ, Hayne and Callinan JJ.
19 *ibid*.
20 *ibid* at 617-618 [35].
21 [2017] QCA 22 at [33].

operational period of two years. He was sentenced to six months imprisonment on each of the other counts, all sentences to be served concurrently.

[41] In order to obtain a grant of leave to appeal the appellant needs to demonstrate an arguable error in the exercise of discretion. It is the existence of error that grounds this Court's jurisdiction to interfere with the exercise of discretion of a sentencing judge.[22] An appellate court that disturbs a discretionary order is obliged to identify the error that constitutes the legal justification for its intervention and must disclose its reasoning for its conclusion that there has been an error. The error may be one of law or it may be one of fact. It may involve a failure to take into account a relevant consideration or it may involve the taking into account of an irrelevant consideration. It may be that it does not appear how the judge making the order reached a result but, if upon the facts the order is unreasonable or plainly unjust, an appellate court might infer that there has been a failure to exercise the discretion properly.[23]

[42] As Keane JA said in *R v Ikin*, citation omitted:[24]

> "In this regard, there may be cases where the sentence is so "unreasonable or plainly unjust" in the circumstances as to give rise to an inference that the discretion has miscarried. It is this idea which informs the familiar ground of appeal that a sentence is manifestly excessive. But that having been said, as was emphasised by Kirby J in *Dinsdale v The Queen*, this Court should allow an appeal against sentence only where the error is clearly apparent."

[43] Consequently, an applicant for leave to appeal must articulate with clarity and particularity the error in the exercise of discretion that is said to exist. The rubric that a sentence is "manifestly excessive" is a mere statement of a conclusion.[25] There remains the requirement to state the reasons for that conclusion. As Kirby J pointed out in *Dinsdale*,[26] an omission to identify the relevant error and also to explain the reasons for the conclusion that there is an error makes it "all too easy for the mind to slip into impermissible reasoning".

[44] A failure by an applicant to do anything except to assert that the sentence was too severe and to cite some previous sentences for the same or similar offences means that the Court has little upon which to base its consideration of the application. Cases of sexual offending against children are dealt with under various statutory provisions containing numerous different elements and, even in the case of convictions of persons for offences against the same provision as that which is the subject of an application, they present with widely differing circumstances.

[45] Here, in support of his application, the appellant referred to two decisions of this Court. The first, *R v BCG*,[27] was a case in which the appellant had been convicted of maintaining an unlawful sexual relationship with his 11 year old daughter over a period of a year. He had also been convicted of exposing her to an indecent film. The

---

22 *Dinsdale v The Queen* (2000) 202 CLR 321 at [66] per Kirby J.
23 *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.
24 [2007] QCA 224 at p 6.
25 *Dinsdale v The Queen* (*supra*) at [6] per Gleeson CJ and Hayne J.
26 (*supra*) at [65].
27 [2012] QCA 167.

maintaining charge was based upon his having massaged his daughter's vaginal area on the outside of her clothing, massaging her breasts, kissing her vaginal area on the outside of her clothing and various acts of masturbation in her presence. He was sentenced to three and half years imprisonment on this charge and to a two year term on the other charge, to run concurrently. He was granted leave to appeal and his sentences were reduced to two and a half years and twelve months imprisonment on the respective counts. The learned trial judge referred to this case in the course of his sentencing remarks and no submission has been advanced that his Honour in any way misunderstood the case or that he misapplied it.

[46] In the other case cited by the appellant, *R v FAL*,[28] the appellant had been convicted of maintaining an unlawful sexual relationship with a child under 16 years of age. The relevant acts were acts of touching on or around the genital area, the legs, the breasts and buttocks. The appellant had appealed against his conviction but had not challenged his sentence. That is not surprising.

[47] The facts of this case have already been set out. In summary, they were that the appellant was a primary school teacher who used his position to gratify his urges by sexually assaulting two young children in his care. He instructed one of his victims, aged 10, to make no complaint and, as he desired, she obeyed. He was, after all, her teacher. He offended separately and serially against two children entrusted to his care by their parents. He did not plead guilty. He has shown no remorse. The learned trial judge rightly described the offence against s 229B as serious.

[48] The facts here bear no relevant resemblance at all to the facts of the two authorities cited by the appellant. Nor do those cases stand for any particular principle of sentencing that the appellant has sought to invoke. In the present application they are simply irrelevant as precedents.

[49] A valid application for leave based upon the proposition that error can be inferred from the terms of the sentence itself must be formulated with more punctiliousness than has been done here. The mere filing of an application for leave asserting that the sentence was manifestly excessive, together with a submission containing references to cases involving similar offences, is likely to be insufficient even to raise an arguable case for leave.

[50] The appellant was found guilty of not just several instances of indecent dealing but of maintaining a sexual relationship with a girl aged 10 or 11, an offence for which the maximum penalty is life imprisonment. The sentence imposed for the maintaining count was two years imprisonment suspended after serving 12 months with an operational period of two years. It cannot be said that the sentence was, to use the expression used in *House v The King*, so "unreasonable or plainly unjust" as to give rise to an inference that, in some undetectable way, his Honour erred in exercising his discretion. It is impossible to infer error from the sentence itself and a consideration of the two dissimilar cases relied upon by the appellant does not advance the matter.

[51] No arguable basis for leave to appeal has been raised and the application for leave to appeal should be refused.

---

[28] [2017] QCA 22.