SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wollaston* [2018] QCA 43
PARTIES:	**R** **v** **WOLLASTON, Ronald Leslie** (applicant)
FILE NO/S:	CA No 84 of 2017 DC No 227 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Charleville – Date of Conviction: 28 March 2017 (Dearden DCJ)
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2017
JUDGES:	Sofronoff P and Gotterson JA and Atkinson J
ORDERS:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was a family friend of the complainant – where the appellant was aged 63 and the complainant was aged 12 at the time of the alleged offending – where on one occasion the appellant stayed over at the complainant's house – where the appellant dragged his hand over the complainant's breast for a few seconds – where the complainant gave evidence that she thought the touching may have been accidental – where the complainant's gestures while giving evidence were suggestive of deliberate touching – where the complainant's friend M witnessed the touching but gave evidence that the touching was more prolonged than the complainant said – where M gave opinion evidence that the touching was deliberate – where the issue at trial was whether the touching was intentional – where the Crown led evidence that the appellant had behaved in a sexualised manner around the complainant on other occasions – where the trial judge admitted this evidence – whether there was some innocent explanation for this evidence that rendered it inadmissible CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF

MISDIRECTION OR NON-DIRECTION – where the Crown led evidence that the appellant had behaved in a sexualised manner around the complainant on other occasions – where the trial judge admitted this evidence – whether the trial judge erred by failing to direct the jury that they had to be satisfied beyond reasonable doubt that this conduct was sexual before relying on it to negative accident

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the complainant gave evidence that she thought the touching may have been accidental – where the complainant's friend M witnessed the touching but gave evidence that the touching was more prolonged than the complainant said – where M gave opinion evidence that the touching was deliberate – where the issue at trial was whether the touching was intentional – whether the trial judge erred by failing to direct the jury that they had to be satisfied beyond reasonable doubt about the truth of M's evidence before they could use that evidence to convict the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where s 23(1)(a) of the *Criminal Code* provides a defence where the touching was accidental – where s 23(1)(b) provides a defence where the person did not foresee or intend the touching – whether the trial judge erred by directing the jury in relation to s 23(1)(b) instead of s 23(1)(a)

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the complainant gave evidence as to the manner in which she was touched by the appellant – where the complainant's evidence that she initially thought the touching was unintentional was an expression of opinion – where the complainant's evidence was otherwise consistent with a deliberate touching – where M's opinion evidence was that the touching was deliberate – whether the evidence of what was seen by the complainant and M and what was felt by the complainant was capable of supporting a conclusion that the appellant deliberately stroked the complainant's breast

Criminal Code (Qld), s 23(1)(a), s 23(1)(b)

GAX v The Queen (2017) 91 ALJR 698; [2017] HCA 25, cited
Gipp v The Queen (1998) 194 CLR 106; [1998] HCA 21, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

Naxakis v Western General Hospital (1999) 197 CLR 269; [1999] HCA 22, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, cited
R v Jones (2011) 209 A Crim R 379; [2011] QCA 19, distinguished
Sherrard v Jacob [1965] NI 151, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: A D Anderson (*sol*) for the appellant (pro bono)
G J Cummings for the respondent

SOLICITORS: Anderson Fredericks Turner for the appellant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was found guilty after a trial of one count of indecent dealing with a child under 16 years.

[2] In December 2015, the appellant stayed overnight at the complainant's home. At the time the appellant was 63 years old. The complainant was 12 years old.

[3] It is convenient to start with the complainant's first description of the offence which she gave when interviewed by a police officer. The following statements by her have been compressed by me in order to more succinctly convey the effect of the complainant's description:

> "COMPLAINANT: Um so I got home and I went to um put all my stuff in my room. And them um I went to watch T-V for a little bit while he was still in [my brother's] room, and, and um me and M decided to go see him, 'cause I wanted to say hello. And Dad was on the computer, and um I asked Dad where he was, and he said, oh he's just in [your brother's] room. And so I went in there. And I sat on the floor. And I said hi to him. And he said, hi, M and S. And, um then my little sister came in also, and um she was just playing with [my brother's] toys and stuff. …
>
> And then he said, oh S come and sit up on the bed. And then he put his arm around me and pushed me a bit closer. And then that's when he started um doing the arm thing, and the back. And um he did that for a while he was talking to M, but I can't remember what they were talking about.
>
> …
>
> A/SGT ROCKETT: Okay. You mentioned before that he touched you in some other places.
>
> COMPLAINANT: Yeah.
>
> A/SGT ROCKETT: Do you wanna tell me about that?

COMPLAINANT: Um s-, um he touched me like um on my breast and um my chest.

A/SGT ROCKETT: Just tell me everything about that.

COMPLAINANT: Um I didn't feel comfortable because I didn't want anyone to do that, and um I didn't know that he was gonna do that, and so I just moved a little bit, and he just started going back on my arm again.

A/SGT ROCKETT: And when did that happen?

COMPLAINANT: Um in [my brother's] room right before M ah told him about the horse.

A/SGT ROCKETT: And what happened next?

COMPLAINANT: And then M told him about the horse.

A/SGT ROCKETT: Yeah

COMPLAINANT: And um after that he went back to playing with my arm. And um, and that was the only place like he really did it, like in this area.

A/SGT ROCKETT: Yeah.

COMPLAINANT: Um but yeah, no other places, so.

A/SGT ROCKETT: So no, you, before you said the word –

COMPLAINANT: Mmm.

A/SGT ROCKETT: Down a bit.

COMPLAINANT: Oh yeah, [INDISTINCT] went down there.

A/SGT ROCKETT: Ah is that what you meant?

COMPLAINANT: Yeah.

A/SGT ROCKETT: Down your chest. And how m-, how many times did he do that?

COMPLAINANT: Oh once.

A/SGT ROCKETT: Once.

COMPLAINANT: Yeah."

[4] In her evidence the complainant described what happened as follows:

"PROSECUTOR: I just want to ask you a few questions about what you told the police officer and what happened with Ron on that day. When he touched you on your breast, was that under your clothes or on the outside of your clothes?---Outside of my clothes.

Do you recall what you were wearing that day?---No, but I was – I was covered and everything.

When he touched your breast, how do you know that he did that? Was it – did you see him do it or not – or did you not seem him do it?---I didn't see him do it, but I – I felt it.

And if you felt him do it, what was the sensation that you felt?---I felt uncomfortable.

And how did that – what, was it a – how long was that feeling of uncomfortable, where it felt uncomfortable?--- Just a few seconds [indistinct] yeah.

PROSECUTOR: ?--- Just a few seconds – yeah.

So when you say you were uncomfortable, was that something feeling uncomfortable on you breast or uncomfortable inside or some other sort of uncomfortable?---Just everywhere. Just inside and out.

So you felt uncomfortable in yourself?---Yeah.

So how did it feel on your breast at the time that he touched you on the breast? What did – what sensation did you feel on your breast?---Just a dragging sensation.

A dragging sensation?---Yeah. He was just dragging – I don't know how to describe it. It was this – yeah, just dragging.

And was it a momentary dragging or did it take – a longer dragging? How long would we say that?---It was only quick.

And when you say dragging, what was it that he was dragging?---He – his – his fingers.

And which breast was that on?---My left."

[5] In cross-examination there was the following exchange:

"DEFENCE COUNSEL: So when the hand was going up, did your breast get touched then?---No.

Right. So it was on the way down it got touched?---Yeah. Yes.

Okay. And so you never said anything to dad about that when he was sitting in the office, did you?---No.

Did you think it was an accident?---I didn't think he – I didn't think much of it at the time. I didn't know that he - I thought it was just an accident.

Yes. And because of the way in which it happened; is that right?---Sorry.

Because of the way in which you got touched, you thought it was an accident?---Yes.

Yes. And that's why you didn't say anything to dad about it - - -?---Yes.

- - - at that time; is that correct?---Yes.

Did you tell dad at a later time that Ron had touched you on the breast?---No.

> Okay. So did you tell mum at a later time that dad [*sic*] had touched you on the breast?---No."

[6] Immediately after the appellant touched the complainant's breast, the complainant and her friend decided to go for a swim. They asked the appellant to join them. He told them that he had not brought any swimming togs. He said something to the effect of "look, I've only got my jocks. It wouldn't be appropriate". He motioned with his hand to his genital area to indicate that if he swam in his underwear that children might look at his genital area.

[7] The touching of the complainant's breast had been witnessed by the complainant's friend M who described it to police:

> "M: … So it's just very, yeah she got on the bed and she didn't lie down, she only sat up.
>
> A/SGT ROCKETT: Yeah.
>
> M: So, yeah, and um I think her legs were off the bed at one point and then she put them on. And yeah he just kept rubbing her and pushing her closer to him.
>
> A/SGT ROCKETT: Yeah.
>
> A/SGT ROCKETT: Okay. Tell me about um h-, we'll start with him rubbing her arm. Tell me everything about that.
>
> M: So he didn't start, he didn't do that when he rubbing the whole time, he did that with his nails.
>
> A/SGT ROCKETT: Yeah.
>
> M: And then after he, about five or ten minutes of doing that on--
>
> A/SGT ROCKETT: Yeah.
>
> M: Arm he touched her breast.
>
> A/SGT ROCKETT: Yeah.
>
> M: W-, just once though. So he m-, he made it look like it was a mistake--
>
> A/SGT ROCKETT: Yeah.
>
> M: But he didn't, it wasn't a mistake. You could tell because he purposely went up like that and down like that.
>
> A/SGT ROCKETT: Yeah.
>
> M: And then kept rubbing there, and then he started going up on her shoulder and then behind her neck, and then on her other shoulder.
>
> …
>
> A/SGT ROCKETT: Yeah. Okay. And a-, you said, he tried to make it look like an accident but it wasn't.
>
> M: Yeah [INDISTINCT]--

A/SGT ROCKETT: Tell me more about that.

M: Okay, so he was going up like that, and 'cause once you've been doing that a while it looks like if you like, um like, 'cause he was doing that for quite a while it looked like he just slipped his arm--

A/SGT ROCKETT: Yeah.

M: But you can tell he didn't, because he touched, he touched it.

A/SGT ROCKETT: He touched her?

M: Yeah he like squeezed it a little bit, um but only just like the side, not full-on, but--

A/SGT ROCKETT: Yeah.

M: He still did touch it. And then he went down and then up again, and touched--

A/SGT ROCKETT: Yeah.

M: It on the way up, and then he went back on the normal line again.

A/SGT ROCKETT: Yeah.

M: 'Cause like he ma-, tried to make it look like he just did that, and then it slipped.

A/SGT ROCKETT: Yeah.

M: But nah, but he purposely touched her breasts, twice."

[8] About a week after these events, the complainant's father received a phone call from M's mother. As a result of that call he questioned his daughter about whether anything had happened:

> "And she stated that – only when she was in her room with Ron that she was – he was, you know, rubbing his hand on her arm and her leg. She felt a bit weird, but thought he was just being – trying to be nice, to which stage she was getting very nervous. I said, it's all right. You haven't done anything wrong. I'm just asking, and I said, was that it? Just the arm, just the leg, that was all right? And she said, oh, he was sort of going across my chest a bit, but he only hit my boob once, and I said, oh, that's all right. That's okay, S. I said, it's all right. I'll go sort it out. And that was it. That was the conversation."

[9] The prosecution also led evidence of "discreditable conduct". As I have said, the complainant was 12 years old and the appellant was a man in his sixties. The appellant was not a relative or family friend with whom the complainant had had a close or intimate family relationship. She knew the appellant as a member of the church community who was a good friend of her parents. The appellant was seated in the church directly behind the complainant and her father. He then made a point of coming forward and seating himself between them so that he was between the complainant and her father. The appellant put his hand on the complainant's knee and squeezed it. She moved away at his touch "to make him stop". He then put his

arm around her shoulder and "he did that for a while and then I stopped, then he stopped". He put his arm around her shoulder and pulled in towards him. She then hugged him and he said, "hi pretty girl" and "hi sweetheart". He tried to hold her hand but she resisted this. He "just started like putting his arm around me for like the whole time, and I didn't know that that was bad or anything, so I just went with it".

[10] After a lunch break the service resumed. The complainant described what happened:

> "…he didn't like do as much as he did before, but he still put his arm around me and stuff, and he was, um, saying how he's glad his wife isn't here because apparently she gets jealous when he's with kids. And ah I thought that was a little weird. And um he said, so you, when she's around just don't hug me or anything. And I thought that was a little weird".

[11] The Crown relied upon this evidence to show that the defendant had a sexual interest in the complainant and that he was willing to give effect to that interest. The prosecution also used the evidence to rebut accidental touching.

[12] The appellant did not give evidence. There was no suggestion made on his behalf at the trial that he had not touched the complainant's breast. The defence case was that the touching had been accidental.

[13] The appellant appealed on four grounds:

(i) The trial judge erred in directing the jury as to discreditable conduct in proof of the charge, as well as to rebut accident.

(ii) The trial judge erred in directing the jury in relation to the element of indecency.

(iii) The trial judge erred in directing the jury as to s 23(1)(b) of the *Criminal Code*.

(iv) The verdict was unreasonable or cannot be supported having regard to the evidence.

[14] As I have said, the central issue at trial, indeed the only issue, was whether the appellant's touching of the complainant's breasts had been intentional. If he deliberately touched her breast then it followed that the touching was both unlawful and indecent. If the touching was accidental then it could not have been indecent. The contrary was not submitted at trial or on appeal.

[15] The typed transcript of the complainant's statement to police, parts of which I have quoted, does not convey a comprehensive account of what she conveyed. Her oral description of the appellant's actions in terms that "he just started, um, like putting his hand on my arm, and then on my chest, and then um he went down a bit, but only once and then went back on my arm" was accompanied by gestures of her right hand imitating what she was describing verbally. Those gestures showed that the appellant had stroked the complainant's upper chest and left breast in a way that did not appear to be accidental or unintentional. After she had described other matters, she was asked to describe again what had happened between her and the appellant. Again, she described his act of stroking her left arm repeatedly and then moving to

stroke her upper chest, just below her neck, and then her left breast. Her words and actions showed a seemingly deliberate stroking of the parts of her body that she said he touched. Her description and her demonstration of the touching of her breast area by the appellant was, at the very least, capable of excluding an accidental or unintentional touching.

[16] Her friend M, who had seen what happened, supported the complainant's evidence. M's description of the appellant's touching differed from the description given by the complainant. M alleged that there had been two instances of touching of the complainant's breast. The complainant related only one. M referred to the appellant squeezing the complainant's breast. The complainant did not refer to a squeeze.

[17] In order to prove that the touching of the complainant's breast had been intentional the prosecution sought to prove that the appellant had a sexual interest in the complainant and that that interest gave him a motive to touch the complainant's breast. If the Crown established such an interest, then that gave him a reason to touch her breast. That would make it more likely that the touching, in the context in which it occurred and the way in which it occurred, had been intentional.

[18] The evidence of the appellant's acts at the church service was admitted without objection. As the appellant acknowledges, that may well have been for a tactical reason because the appellant's highly experienced counsel referred to that episode as evidence of the appellant's innocence in doing acts that were simply affectionate. It was submitted that this was proved by his having done these things in the presence of the complainant's father and in the presence of other people. In addition, as the complainant herself described, she reciprocated this normal physical affection by hugging him.

[19] The Crown invited the jury to find that the appellant's behaviour at the church service was so abnormal as to be indicative of his sexual interest in her. He, a man in his sixties, moved especially to sit by the side of a 12 year old girl and then squeezed her leg, pulled her body close to his and murmured endearments to her. He warned her not to hug him in his wife's presence. After a lunch break, he resumed these acts.

[20] The appellant's behaviour at the religious gathering did not involve anything unlawful. It is capable of being regarded as wholly un-sexualised behaviour. However, by reason of its unexplained and persistent physical intrusiveness, maintained after the girl's subtle but insistent resistance to it, it was also capable of being regarded as being so incongruous according to expected standards of behaviour by an elderly man towards a 12 year old girl, as to evidence a prurient sexual interest on his part.

[21] The same can be said about the appellant's lewd allusion to his genitals when invited to go swimming.

[22] The appellant's submission that such evidence was inadmissible because it does not "unequivocally bespeak sexual acts or acts motivated by sexual interest" must be rejected. Such evidence was not unequivocal if, by use of that term, the appellant means that it is not possible rationally to prefer one interpretation over another. It was evidence that a jury had to assess in the same way in which it has to assess any

evidence and it must not be forgotten that the constitutional arbiter of disputed questions of fact in a criminal jury trial is the jury.

[23] As I have said, the evidence was admitted without objection and no complaint has been made about the directions actually given in relation to it. The learned trial judge directed the jury, first, that they could not use any of this evidence unless they were satisfied beyond a reasonable doubt that the acts had occurred as the complainant described them. Second, he directed the jury that they could not use the evidence against the appellant unless satisfied beyond a reasonable doubt that the appellant's behaviour demonstrated that he had a sexual interest in the complainant and was prepared to act to satisfy that interest. Third, he warned the jury not to use the evidence and findings to reason that, by reason of his bad character, he must have committed the offence with which he had been charged.

[24] These were orthodox directions given consistently with the authorities.[1] The complaint that is now made about his Honour's directions, which was not made at trial, is that the trial judge should have warned the jury "to guard against propensity reasoning rather than encourage it". But this is exactly what the learned judge did. As I have said he expressly warned against reasoning that, if the jury found that the appellant was of bad character then he must, for that reason, have committed the offence. He directed the jury that the evidence had been led only to prove sexual interest and to show that the appellant was prepared to give effect to that interest and to rebut accidental touching. That direction was, in my respectful opinion, correct.

[25] I would reject this ground.

[26] The appellant also appeals upon the ground that the learned trial judge erred in his directions concerning indecency. The appellant submits that "the real issue for the jury was whether sexual gratification motivated the touching or if the touching occurred absent such a motive". He cites *R v Jones*.[2] That case concerned a paramedic who had been charged with indecent assault. The assault was alleged to have been constituted by his deliberate touching of the complainant's breasts while attaching electrodes in order to perform an ECG examination. The issue was whether the appellant had initiated the examination merely as a pretext to allow him to fondle the complainant's breasts. In either case the touching was deliberate. Its nature was in issue. That is not this case. Here the touching was either deliberate or it was accidental. If it was deliberate, then there was no issue about its indecency. The learned judge put to the jury that:

> "I remind you that in order to convict the defendant of indecent dealing with a child under 16 you must be persuaded beyond reasonable doubt that there was an intentional and non-accidental touching on the breast of the complainant by the defendant."

[27] However, the appellant submits that the learned judge did not "place the motive of the appellant before the jury for their deliberation and decision". The appellant's touching of the complainant's breast was not disputed. It was common ground that the real question was whether the Crown had proved that the touching had been

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1 *Gipp v The Queen* (1998) 194 CLR 106 at [81]-[85]; *Pfennig v The Queen* (1995) 182 CLR 461 at 530; *HML v The Queen* (2008) 235 CLR 334 at [8], [24], [26], [31], [200], [489] and [493].

2 [2011] QCA 19.

deliberate. On the facts of this case, as the parties litigated it, and unlike *Jones'* case, there could not have been a deliberate non-sexual touching. Second, the whole of the Crown case was directed to proof of a sexually motivated, non-accidental touching. Only in this way could the Crown secure a conviction. The leading of the evidence of discreditable acts was directed only to that issue. The evidence of the witness, M, was led to prove that. The judge spent much of his time in summing up on that issue alone. The case was fought upon the issue of motive. Motive was at the forefront of the judge's directions, inherent as it was in this contested issue of intention to touch. This ground should be rejected.

[28] The appellant contends, as a further ground of appeal, that the learned judge erred in directing the jury on s 23(1)(b) of the *Criminal Code*.

[29] Section 23 provides:

> "**23 Intention-motive**
>
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for–
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that–
>
> (i) the person does not intend or foresee as a possible consequence; and
>
> (ii) an ordinary person would not reasonably foresee as a possible consequence."

[30] His Honour directed as follows:

> "Accident: If the defendant did not intend or foresee the touching of the breast of the complainant as a possible outcome of his actions of stroking the complainant's arm and/or back, and if an ordinary person in the position of the defendant would not have seen that as a possible outcome of those actions, then the defendant would be excused by law, and you would have to find him not guilty. It is not for the defendant to prove anything. Unless the prosecution proves beyond reasonable doubt that an ordinary person, in the position of the defendant, would reasonably have foreseen the touching of the breast as a possible outcome of his actions, or that the defendant intended or foresaw that, you must find him not guilty. I remind you that in order to convict the defendant of indecent dealing with a child under 16, you must be persuaded, beyond reasonable doubt, that there was an intentional and non-accidental touching on the breast of the complainant by the defendant."

[31] The effect of this direction was that it merely posed the sole issue in the case in a different way. The Crown case was never to prove a merely foreseeable touching. It set out to prove an intentional touching or it failed. The direction about foreseeability was therefore redundant but, in the context of this short case and the

judge's clear and precise directions otherwise, resulted in no miscarriage of justice. The jury could have been left in no doubt about the real issue in the case.

[32] It remains necessary to consider the fourth ground. The principles to be applied by an appellate court in considering the fourth ground of this appeal are settled. The Court has to make an independent assessment of the whole of the evidence in order to determine whether the verdict of guilty can be supported.[3]

[33] Although there may be evidence to sustain a verdict, the Court must ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The judges of the Court must independently form a conclusion about whether the evidence as a whole excludes any reasonable doubt.[4] In performing this task the Court is obliged to take as its starting point that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and that, in aid of that responsibility, it has the benefit of seeing and hearing the witnesses.[5] For that reason, although in most cases a doubt experienced by an appellate court will be a doubt which a jury ought also have experienced, a court may nevertheless conclude that there has been no miscarriage of justice because the jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by the Court.[6]

[34] For the reasons that I have already given, the evidence in this case, given by the complainant and her friend who witnessed the acts that were alleged to constitute the offence, was capable of supporting a conclusion that the appellant had deliberately stroked the complainant's breast. The complainant's uncorroborated evidence alone would have been sufficient. It was corroborated by the eye-witness. It was supported by evidence capable of proving a sexual motive on the part of the appellant.

[35] In this connection it is useful to make some observations about the lay opinion evidence in this case. The complainant agreed in cross-examination that, at the time of the acts, she thought that the appellant's touching of her breast had been accidental, that is to say, unintentional. In her statement to police, the eye-witness, M, said that she thought that the appellant had "made it look like a mistake … it wasn't a mistake. You could tell because he purposely went up like that and down like that … but he purposely touched her breast twice".

[36] Intention was the issue at the heart of this case. Intention is a state of mind to be inferred from observable facts. It was for the jury to draw that inference if it was satisfied to the requisite degree that that inference should be drawn. The evidence of the opinion of M that the touching was intentional was an opinion. Equally, the evidence elicited by the defence from the complainant, that, in her opinion at the time, the touching had been unintentional, was an expression of opinion. The only evidence that really mattered was what these two witnesses saw, heard or felt. These were the facts from which the relevant inference could be drawn and it was these facts alone that were relevant for the jury's consideration.

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3 *SKA v The Queen* (2011) 243 CLR 400 at [22] per French CJ, Gummow and Kiefel JJ.
4 *cf. GAX v The Queen* (2017) 91 ALJR 698 at [20] and [25] per Bell, Gageler, Nettle and Gordon JJ.
5 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.
6 *ibid.* at 494.

[37] In general, non-expert opinion evidence of this kind may be admissible. *Cross on Evidence* quotes the following from an American case:

> "Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe. In short, evidence of opinion can be given if it is difficult or impossible for a witness to separate the opinion from the facts on which it is based."[7][citations omitted]

[38] In this case, the added complication was that the complainant and M were giving an opinion about the very issue in the case.

[39] In *Naxakis v Western General Hospital*[8] Callinan J expressed the view that a court should generally uphold an objection to opinion evidence on the ultimate legal issue.[9] The learned editors of *Cross on Evidence* offer the view that it is "sounder to recognise that in some exceptional situations a witness who is not an expert may give his opinion on the ultimate issue in a case".[10]

[40] The point was not argued in this appeal and, consequently, this is not an appropriate case in which to express concluded views about the law on this matter. It appears that each side took some advantage from this opinion evidence and it was not objected to. It also appears that the factual bases that supported the opinions of the two girls were before the jury and, consequently, there is no reason to think that the jury might have been improperly swayed by this evidence.

[41] I would reject the appellant's fourth ground and dismiss the appeal.

[42] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

[43] **ATKINSON J:** I agree that the appeal should be dismissed for the reasons given by the President.

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7 *Sherrard v Jacob* [1965] NI 151 at 157-8 quoted in *Cross on Evidence*, Australian Edition, at [29085].

8 (1999) 197 CLR 269.

9 *ibid.* at [110].

10 *Cross on Evidence*, Australian Edition, at [29130].