SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCR* [2018] QCA 166
PARTIES:	**R** **v** **MCR** (appellant)
FILE NO/S:	CA No 126 of 2017 DC No 248 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 1 June 2017 (Muir DCJ)
DELIVERED ON:	27 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2017
JUDGES:	Holmes CJ and Philippides and McMurdo JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of three counts of indecent treatment of a child under 12 under care, one count of attempted indecent treatment of a child under 12 under care and five counts of indecent treatment of a child under 12 – where the evidence at trial included police interviews pursuant to s 93A of the *Evidence Act* 1977 (Qld), by the complainant and pre-recorded evidence, evidence by the complainant's mother and grandmother, a friend of the complainant's mother, two clinical psychologists, a guidance officer and the police officer who conducted the s 93A interviews – where the appellant did not give or call evidence – where there were aspects of the complainant's evidence that contained discrepancies and inconsistencies – whether the verdict of the jury was unreasonable and cannot be supported having regard to the evidence *Evidence Act* 1977 (Qld), s 93A

Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
R v Ali [2017] QCA 300, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: J R Hunter QC, with C F C Wilson, for the appellant
D Balic for the respondent

SOLICITORS: Buckland Allen Criminal Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philippides JA and with the order she proposes.

[2] **PHILIPPIDES JA:** The appellant appeals against his conviction after a trial on eight counts of indecent treatment of a child and one count of attempted indecent treatment of a child as follows:

1. three counts of indecent treatment of a child under 12 under care (counts 1, 4 and 9);
2. one count of attempted indecent treatment of a child under 12 under care (count 2); and
3. five counts of indecent treatment of a child under 12 (counts 3, 5, 6, 7 and 8).

[3] The indictment as amended charged offending between 29 February 2008 and 1 May 2009, however, the offences were alleged to have occurred over a short period of weeks in 2008. The appellant was a friend of the complainant's mother. The complainant was born on 29 April 2000 and was seven to eight years of age at the time of the alleged offending.

[4] Two of the offences were alleged to have occurred when the complainant was alone with the appellant in a vehicle driven by the appellant, while the remainder were alleged to have occurred in three different houses.

[5] The evidence at the trial included the complainant's evidence which was comprised of three police interviews pursuant to s 93A of the *Evidence Act* 1977 (Qld), given on 11 December 2012, 16 November 2013 (when a drive around interview took place identifying various addresses) and 13 May 2014. The complainant also gave

further brief pre-recorded evidence on 18 July 2016 and was cross examined.[1] Evidence was also given by the complainant's mother and grandmother; a friend of the complainant's mother, AM; two clinical psychologists, A and C; a guidance officer at the school that the complainant attended and the police officer who conducted the s 93A interviews.

[6] The appellant did not give or call evidence.

[7] The sole ground of appeal is that the verdict of the jury is unreasonable and cannot be supported having regard to the evidence.

Count 1

[8] Count 1 was alleged to have occurred when the complainant's mother and the complainant were staying at the house of her boyfriend, S, at Helensvale. Count 1 was alleged to have occurred one night when the appellant and his three children were visiting. The complainant's evidence was that the appellant took him in his car to "the service station to get Maccas"[2] which he identified as the McDonalds "Right near movie world".[3]

[9] The complainant was alone with the appellant in a car, "a big black or silver 4WD"[4] and sitting in the front passenger seat. He recalled he was wearing a T-shirt and pants, but no shoes or socks.[5] The complainant said that after the appellant bought the food at McDonalds, they "drove a little bit further"[6] from McDonalds, "pulled over then [the appellant] pulled down my pants then he touched me"[7] and that the appellant said, "has anyone else ever done this to you".[8] The complainant said he answered "the doctor has"[9] and that the appellant was rubbing the complainant's penis for "About 20 seconds maybe".[10]

[10] The appellant then pulled the complainant's pants back up. The complainant later identified the service station and McDonalds in the drive around interview forming the second s 93A statement.

Count 2

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1 AB 18-63.

2 AB 256.

3 AB 261.

4 AB 261.

5 AB 262.

6 AB 261.

7 AB 261.

8 AB 256.

9 AB 256.

10 AB 262.

[11] In respect of the attempted indecent treatment the subject of count 2, the complainant's evidence was that, after the incident comprising of count 1, the appellant drove off again. He said he had "done it to his own son"[11] and then pulled down his own pants, while still driving, and said "come on have a feel"[12] to the complainant. The complainant said, "I don't want to I'm too shy".[13] The appellant then pulled his pants back up and kept driving. He told the complainant to promise not to tell anyone, which the complainant did.[14]

Count 3

[12] Count 3 concerned an incident that the complainant gave evidence of having occurred about two weeks later when the complainant's mother was no longer living at S's house.[15] The complainant's mother gave evidence that she had to move out of the Helensvale house as was sold.[16] She said that she then moved into a house at Paradise Point. She came to be staying there because it was owned by the mother of the appellant, she had known the appellant before she had children and he was helping her out by letting her stay there and at two other houses for a week.[17] She was in an occasional sexual relationship with the appellant.[18] The complainant's mother and her two sons were part of a group people staying at the Paradise Point house.

[13] The complainant's mother described the house as a white house with eight bedrooms, a lift, spa and theatre room.[19] The complainant described the house as a "mansion"[20] and identified it in the second drive around interview.[21]

[14] The complainant's evidence given in his first s 93A statement was that the incident constituting count 3 happened in the theatre room which "had about 10 couches and … a popcorn machine".[22] The complainant said he was wearing shorts and a shirt.[23] He described the incident as follows:[24]

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11 AB at 262.

12 AB 263.

13 AB 263.

14 AB 263.

15 AB 257, 263.

16 AB 116.

17 AB 109.

18 AB 118.

19 AB 111.

20 AB 257.

21 AB 275.

22 AB 264.

23 AB 265.

> "… I was sitting on the single couch right in front of the big screen and he was putting a music track on down the ground somewhere and then he got up and just pulled down my pants and started doing it to me again and then he was talking, I can't remember what he said
>
> So was he standing at the time?---Yeah
>
> So you said that [the appellant] sucked you, what part of the body did he suck you?---My penis
>
> And which part of [the appellant's] body did he use?---His mouth
>
> How long did this go for?---About 5 minutes that one was".

Count 4

[15] Count 4 was alleged to have occurred the day after the events of count 3. The complainant gave evidence that the appellant needed to go to his own house to get something and took the complainant with him.[25] They travelled in a Chrysler, owned by the appellant's mother and went to the appellant's house, which was about 15 minutes away.[26] The complainant said he had been to the house four times before and described it as having a long drive way[27] and identified the house in the drive around interview.[28] The complainant's evidence was that the appellant took him to the house and "did it again".[29] He described a black couch in the lounge room and said:[30]

> "… I was on the couch laying down and he pulled down my pants, took off my pants and took off my undies and then he started sucking my penis again and he thought somebody was at the front door so he hopped up and went and looked and then it stopped, he stopped
>
> So how long was he sucking your penis for?---About 2 minutes".

[16] The complainant said that on their return his mother asked the appellant why they had been so long and that the appellant replied that he that was getting fish and chips but the line was too long so they left.[31] The complainant denied that they had gone to get fish and chips.[32]

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24 AB 265.

25 AB 257, 276.

26 AB 266.

27 AB 266.

28 AB 276.

29 AB 257, 266.

30 AB 266-267.

31 AB 267.

32 AB 267.

Counts 5 and 6

[17] The complainant said that later on the same night, the appellant and complainant again were alone in the theatre room at the house at Paradise Point. The complainant said he was watching the show, Sponge Bob and described what happened in his first s 93A statement as follows:[33]

> "Yeah that night he, we went into the theatre and I was watching Sponge Bob and he pulled down my pants and started sucking my penis again and about 5 minutes later my mum walked in, she looked and didn't even make a face and then she just walked off and then he just kept on doing it
>
> So whereabouts were you in the theatre?---In the front seat again
>
> So you said it happened for 5 minutes---Yeah
>
> So your mum walked in---Yeah
>
> What did you say she did with her face?---She walked in, looked, didn't make a face or anything
>
> Oh didn't make a face---Yeah and then walked off
>
> Why don't you think she made a face?---Not sure probably on drugs maybe
>
> Yeah and how long did it continue after she walked out?--- Um 2 minutes maybe".

Count 7

[18] The offending the subject of count 7 was alleged to have occurred the following morning in the upstairs spare bedroom of the Paradise Point house.[34] The complainant said he had slept in a bed in the middle of the room and was woken at about 7.30 am in the morning by the appellant. In his first s 93A statement, he described the following as happening:[35]

> "… He woke me up and started talking to me and he did it again, I don't know what the conversation was though
>
> … and when you said did it again just tell me what---Sucked my penis again".

[19] The complainant was on his back on the bed and was only wearing his boxers.[36]

Count 8

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33 AB 267-268.

34 AB 268.

35 AB 268-269.

36 AB 268-269.

[20] Count 8 was alleged to have occurred at the same house some hours after count 7.[37] The account given by the complainant in his first s 93A statement was that the incident occurred:[38]

> "… [in a] Kind of a weird section it was like a bedroom, … it's near the kitchen and it's just this straight little hallway and a really sharp corner and then a long hallway with two mirrors on the side going longways and then just a big open area and that's a big bedroom and I was leaning against the wall and he was on his knees
>
> Is this upstairs or downstairs?---Downstairs
>
> And just to confirm when you say him, he was on his knees who are you referring to?---[the appellant]
>
> Tell me what he did with your pants---He pulled them down and sucked my penis
>
> How long did it go for?---A couple of minutes maybe, 2
>
> Yep and you said your brother came through---Yeah
>
> … he came through and looked and … I don't know what time my brother came in though and then [the appellant] said um I don't know what he said to him but [my brother] has walked off
>
> So [the appellant] said something to [your brother]---Yeah"

[21] The complainant referred to the incident as "the last time" and said that the complainant did not see the appellant again.[39]

Count 9

[22] Count 9 was the only incident which the complainant did not recall when in giving his first s 93A interview. The particulars of that incident were first mentioned by the complainant during the drive around interview. It arose in the context of the complainant referring to "another house at Paradise Point",[40] which he described as the appellant's "mum's other house".[41] The complainant then directed the police to an address at Sovereign Island which he identified as the other house. He said that he and his mother had "slept over there one night and then [the appellant] came over and it happened again".[42]

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37 AB 269.

38 AB 269-270.

39 AB 270.

40 AB 277.

41 AB 277.

42 AB 277-278.

[23] The complainant provided further details of that offending on 13 May 2014 in the third s 93A statement.[43] The complainant said that he had forgotten about the incident and that it happened when the appellant "took [him] for that drive"[44] in the Chrysler and they had gone to the appellant's house. The complainant said that the appellant had also taken him to "that house on Sovereign Island".[45] The complainant said that the incident took place on the stairs of that house. He said he was sitting near the top of the stairs while the appellant was crouching one or two steps down.[46] The complainant said that he was reiterated that he thought that the house was another house owned by the appellant's mother.

[24] The complainant's mother gave evidence that one of the places that she and her sons had stayed at was a house owned by the appellant's mother at Runaway Bay located "sort of just before Paradise Point".[47] It was where the appellant and his three children lived.[48] She identified the house as that depicted in exhibits 9 and 10 and that the stairs depicted in exhibit 16 as being in that house.

Were the verdicts unreasonable?

[25] In *R v Ali*,[49] the relevant High Court authorities as to the correct approach in respect of a complaint that the verdict was unreasonable or cannot be supported by the evidence were summarised as follows:

> "1. The question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty.[50]
>
> 2. In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred.[51]

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43 AB 280-284.

44 AB 281.

45 AB 281.

46 AB 281.

47 AB 113.

48 AB 113.

49 [2017] QCA 300 at [31].

50 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615 [26]; *SKA v The Queen* (2011) 243 CLR 400 at 405.

51 *M v The Queen* (1994) 181 CLR 487 at 494; *MFA v The Queen* (2002) 213 CLR 606 at 623 [56]; *SKA v The Queen* (2011) 243 CLR 400 at 406.

3. However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the Court is bound to act and to set aside a verdict based upon that evidence.[52]

4. This Court must, therefore, undertake 'its own independent assessment of the evidence, both as to its sufficiency and its quality'[53] and determine 'whether, notwithstanding that there is evidence upon which a jury might convict, "none the less, it would be dangerous in all the circumstances to allow the verdict of guilty to stand"'.[54]

5. In doing so, this Court as an appellate court must always be mindful of the primacy of the jury in criminal trials.[55]"

[26] The appellant submitted that all counts were tainted by the unreasonableness of the verdict on any one count, given that the credibility of the complainant was the central issue[56] and that his credibility issues tainted all counts.

[27] The appellant made particular submissions as to the unreasonableness of the jury verdicts in respect of specific counts as follows.

Counts 1 and 2

[28] The appellant submitted that the complainant's evidence in respect of counts 1 and 2, concerning the two incidents alleged to have occurred when the complainant went alone with the appellant to McDonalds, was not supported by the boyfriend of the complainant's mother, S. This submission referred to a sworn statement given by S. No evidence was given at the trial by S as he was not able to be located, but the police officer who took his statement gave evidence that S said that he could not recall anything happening between the appellant and the complainant and that he never saw them go out together by themselves during the period in question.[57] S did however also recall the appellant coming around to the house five or six times[58] and

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52 *M v The Queen* (1994) 181 CLR 487 at 494-494; *MFA v The Queen* (2002) 213 CLR 606 at 623.

53 *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at 406.

54 *SKA v The Queen* (2011) 243 CLR 400 at 406.

55 *SKA v The Queen* (2011) 243 CLR 400 at 405; *R v Baden-Clay* (2016) 258 CLR 308 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.

56 *R v Markuleski* (2001) 52 NSWLR 82.

57 AB 175-176.

58 AB 176.8.

that the complainant's mother stated that the appellant visited at the address about five or six times.[59] As can be seen, there was nothing particularly compelling about the sworn statement and it was a matter for the jury to determine what weight was to be given to that evidence.

[29] The appellant also submitted that, although the complainant's evidence was that he told his mother of the trip to McDonalds, the mother did not give evidence of having recalled such an occasion, although she did recall a trip to get fish and chips.[60] It is to be noted that, in fact, the complainant's mother's answer when asked if she recalled the appellant taking the complainant to McDonalds by himself was that she "never gave him permission to, no",[61] but that he "could have a couple of times … Easily".[62] There was nothing in that evidence that was likely to have troubled the jury but such matters were for the jury to consider as part of their task in taking into account all of the evidence and determining the facts.

[30] The appellant also contended that, on the face of it, the scenario in count 2 in respect of the appellant "both driving and pulling his own pants down simultaneously", was a seemingly implausible manoeuvre. I am unpersuaded that the complainant's evidence was so implausible that it was unsafe to act on it or was such as to indicate the verdict was rendered unreasonable. Moreover, the complainant's s 93A statements and cross examination evidence as to counts 1 and 2 were coherent and consistent. Where there was a variation, it underlined the consistency of the account. The complainant's minor variation regarding the appellant asking whether anyone had "touched [him] like this"[63] as opposed to his earlier account which was whether anyone else had "ever done this"[64] to him is in this category and supportive of the general consistency in the complainant's account.

Count 3

[31] The appellant argued that count 3 was implausible in that the appellant was standing while performing fellatio on the complainant who was seated on a lounge in the theatre room.

[32] The complainant's s 93A evidence concerning count 3 was that the appellant "pulled down my pants and started doing it to me again and then he was talking",[65] but he could not remember what he said. The police officer asked the complainant

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59 AB 110.29-110.30.

60 AB 115.

61 AB 124.29.

62 AB 124.39-124.40.

63 AB 262.

64 AB 256, 274.

65 AB 265.

whether the appellant was "standing at the time", to which he answered yes.[66] The jury may well have considered that the complainant's reference to the appellant's standing was ambiguous, in that it was not clear whether the complainant was conveying that the appellant was standing when he performed fellatio or when he was talking to the complainant. The resolution of such matters are classically within the province of the jury.

Counts 5 and 6

[33] As to counts 5 and 6, the appellant argued that the offending was, on the evidence of the complainant, a continuation of the one act of indecent treatment, which the prosecution charged as two offences. It was submitted that the charging of the two separate counts stemmed from the evidence of the complaint's mother, which arguably supported a proposition that the fellatio was interrupted by her arrival and recommenced after she left. It was said that, on the complainant's evidence, there was no interruption of the fellatio and that the evidence of the mother was not merely inconsistent with that of the complainant but contradicted it. It was submitted that the contradiction was such as to give rise to a reasonable doubt that the allegation in either count occurred.

[34] However, as the respondent submitted, the complainant's initial account to the police about what occurred did not necessarily lead to a conclusion that he was indicating that what occurred was a continuous activity. The complainant's evidence in his first s 93A statement was that his mother "walked off and then [the appellant] just kept on doing it".[67] When cross examined on the matter, the complainant also said that the appellant stopped performing fellatio on him when his mother entered the room and that he then kept going when she walked out,[68] which account he reiterated.[69]

[35] The appellant placed great emphasis on what was said to be the clear contradiction in the evidence between the complainant and his mother (who it was submitted had no reason to support the appellant and whose stated purpose was to check on the complainant). This conflict in the evidence ought to have left a jury with a reasonable doubt about the offending on these counts.

[36] There are a number of difficulties with the appellant's contentions. Before dealing with them, it is convenient to set out the following portion of the complainant's mother's evidence:[70]

> "Now, you said something about a lay-down chair?---Yeah, it was like a – a leather lay-down couch.

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66 AB 265.

67 AB 267.

68 AB 53.

69 AB 57.

70 AB 112-113.

> All right. Now, during the time you stayed in this house, did you see [the complainant] in this room at any time?---Yes.
>
> When did – do you recall when that was?---Yes, it was the first night I stayed there.
>
> I was downstairs with [my other son], and I walked up to the top of the stairs to check on [the complainant], and when I got to the top of the stairs, I stuck my head in the door, and [the complainant] and [the appellant] both looked at me, and I just thought, 'Oh, he's okay,' so I walked back downstairs.
>
> Okay. When you stuck your head in the door, where was [the complainant]?---He was laying on the couch, and [the appellant] was squatting down beside him.
>
> So, you say, lying on the couch - - -?---Sort of, sitting up, but with his feet up, like that, and [the appellant] was sitting right there.
>
> Right?---Squatting down beside him, facing him.
>
> … Can you describe exactly where you recall [the appellant] being?---He was about midway, sort of, about here, and he's just squatting down beside him, just, sort of, leaning on the couch and when I walked in the door, they both turned around and looked at me. And then I just walked out.
>
> All right. Okay. So when you say squatting, where was he – where was his feet? On the floor?---On the floor, on the ground, yep.
>
> Okay?---And he sort of just squat down beside - - -
>
> All right. … ---I just poked my head in the door …".

[37] The complainant's mother also gave the following cross examination evidence:[71]

> "Now, you do remember the time that [the appellant] was alone in the room with [the complainant] in the theatre room?---Yes.
>
> And, in fact, that was … at Paradise Point?---Yeah.
>
> So that's the first of the three houses?---Yes.
>
> And you say that was the first night there?---Yes.
>
> And, in fact, you – the whole point – you were staying in the bedroom downstairs?---Yes.
>
> The theatre was upstairs?---Yes.
>
> The whole point of you going up the stairs was to check on [the complainant]?---Yes. Correct.

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[71] AB 120.

> And check that he was okay?---Yes.
>
> You walked up there?---Yes.
>
> You walked in?---Yes.
>
> You saw nothing untoward going on?---No, just [the appellant] squatting down near [the complainant] and they both looked at me when I walked in the door.
>
> But you saw – you didn't see any - - -?---And I thought he's okay and I walked back downstairs.
>
> You didn't see [the complainant] with his pants down around his ankles or anything like that?---No.
>
> And if his pants were down around his ankles, you would have seen that from where you were looking?---Yes.
>
> And you didn't see anything untoward going on?---No.
>
> Now, then you moved – so that was there for two nights, or you think there for two nights?---Yeah, a couple of nights, yep."

[38] The first matter to observe is that, although the complainant's mother said she saw nothing untoward, the jury may have found the complainant's mother supportive of the complainant's evidence in important aspects, such as the timing of the allegations in counts 5 and 6, that the appellant was alone with the complainant in the theatre room and the positioning of the appellant vis-a-vis to the complainant (that he was squatting down beside the complainant and facing him) and that they both turned towards her which supported the complainant's account that fellatio ceased when she was present.[72]

[39] Further, the jury may have doubted whether the complainant's mother was in a position to observe and comprehend what was occurring. The jury may also have discounted the mother's evidence that she would have been in a position to see any sexual activity had it occurred, given her own evidence that she "just stuck [her] head in the door".[73] Further, there was the complainant's explanation for his mother's lack of reaction being that she was "probably" on drugs.[74] The complainant had mentioned her drug use earlier in his statement[75] and there was some support from the witness, AM, that she could not recall whether anyone went to McDonalds to buy food because they had all been using drugs and she could not "really remember eating at that stage".[76]

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72 AB 112.

73 AB 112.

74 AB 267.

75 AB 257.

76 AB 168.

[40] Moreover, the jury may well have concluded that there was no real contradiction between the evidence of the complainant and his mother. It is to be observed that, in cross examination, the complainant did not insist that his mother must have seen what occurred, rather he stated that he "assume[d]" that his mother had seen something.[77] The clinical psychologist, C, reported in her evidence that the complainant had told her that he did not believe that his mother was aware of what was happening because, to use "his words", she was "sleepy".[78] Additionally, in giving evidence about the complainant's first mention to her of the sexual abuse, the complainant's mother herself said that the complainant told her that "he thought that [she] saw what happened and allowed it. That's what he thought for so many years".[79]

[41] There was another aspect of the evidence that was the focus of submissions by the appellant. That concerned the mother's evidence that the complainant was lying on the couch when the appellant was squatting down beside him. It is to be noted that the mother qualified that evidence by stating that the complainant was "sitting up".[80] Some confusion in the evidence of the complainant seems to have arisen from the fact that the complainant was cross examined on the basis of his having accepted a statement put to him at the committal that, on his version, he was lying on his back on the couch with his pants around his ankles.[81] It is unfortunate that a state of affairs was put to the complainant as his own account, when that was not correct. Even so, the complainant insisted in cross examination that he was "half sitting up"[82] and never conceded that he was "lying on [his] back ... on the couch".[83]

[42] On the whole of the evidence, I am of the view that the matters raised by the appellant do not demonstrate that the jury's verdicts were unreasonable.

Count 9

[43] The appellant argued that there was at least some reasonable doubt that what was alleged on count 9 was a repetition of count 4 with some inconsistency in the location and that the jury ought, at least, not to have convicted on both counts. Further, it was submitted that, as a separate count, count 9 could not have happened at the address which prompted its purported recall. Evidence was given by an investigating police officer that the house at Sovereign Island identified by the complainant was not occupied by or related to the appellant or his mother.[84]

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77 AB 55.

78 AB 147.

79 AB 115.

80 AB 112.

81 AB 51.11-51.12.

82 AB 52.25.

83 AB 51.11-51.22.

84 AB 176.

[44] The complainant was adamant that count 9 took place in a separate house and that he thought the appellant's mother owned a second house. The complainant gave evidence that at the pre-recording, his memory had focused on the house being the one with the staircase.[85] In relation to the complainant's erroneous identification of the house at Sovereign Island, he stated that a lot of the houses looked the same,[86] but that "wherever the second house is that was the house that [the appellant] did stuff to me".[87] The complainant's only mention of an event having occurred on the staircase was that in respect of count 9. The complainant stated that neither his mother nor his brother were present at the time, which he confirmed in cross examination.[88]

[45] The complainant's mother also identified a photo of the stairs as being the stairs at the house at Runaway Bay, where they had stayed for a few days.[89]

[46] It was open for the jury to convict the appellant on count 9 notwithstanding that the address actually identified by the complainant was not one where count 9 could have occurred and that the complainant did not mention the events concerning that count in the first s 93A interview. The jury's attention was specifically drawn to these matters by the trial judge who directed as follows:[90]

> "… whilst I'm on the point of count 9 I told you yesterday the particulars the Crown relied upon in relation to count 9, and that is the evidence that the [appellant] had driven the complainant to another home associated with the [appellant's] mother, and this was the home that is pictured in exhibits 10, 11 and 12, although this was not the property that was identified by the complainant in the drive-around. The complainant's evidence that the Crown relies upon was that at this address [the complainant] was sitting at the top of the stairs and the [appellant] was one or two steps below him, and the defendant crouched over him, pulled down [the complainant's] pants and underwear and sucked on [the complainant's] penis. Now, this property was known to the complainant because he had stayed at that house for a couple of days but the complainant's evidence was that this incident did not occur at a time when he was staying there with his mother and his little brother.
>
> So the Crown's case in relation to count 9 is that it's not – is that this occurred on the second day that the complainant and his mum were staying at the [Paradise Point] address, and this comes from some

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85 AB 43.

86 AB 46.37.

87 AB 47.7-47.8.

88 AB 49.1.

89 AB 114.

90 AB 209.23-209.40.

> evidence the complainant gave on the 13th of May 2014 to the police. So the Crown case is that count 9, whilst it's listed as count 9 on the indictment, it didn't occur last in time."

General credit issues

[47] In addition to the matters addressed by the appellant concerning specific counts, the appellant argued that there were other aspects of the complainant's conduct and evidence going to credit which should have left the jury with a reasonable doubt generally about guilt. It was submitted that the complainant's credibility was seriously questioned and that, in a single witness case, that issue alone raised at least some concern about the verdicts.

[48] In that regard, it was submitted that the complainant had been cared for by numerous family members and attended numerous schools, requiring extra support before any alleged offending and that the complainant had quite significant behavioural issues. Reference was made to evidence that the complainant was on the verge of being placed into foster care[91] and being expelled from school[92] shortly before the complaint was first raised. It was argued that no preliminary complaint was made until the prospect of being placed into foster care and expelled from school loomed, despite attendance on psychological experts and other intervention at school and through outside agencies.[93]

[49] While there was clear evidence that the complainant was a troubled child and the complainant readily accepted that he had been aggressive and had told lies to get out of trouble,[94] the complainant rejected that his motivation for the complaint was to get out of trouble with the school or to avoid going to foster care.[95] The complainant's mother stated that the complaint to her was not made in the context of avoiding foster care.[96] The jury may well have reasoned that the explanation given by the complainant's for telling his mother of the sexual abuse which was that he started:[97]

> "… realising like about – a whole year or something I started realising what [the appellant] was actually doing – made me quite upset and angry and stuff, and I spoke to mum about it, and yeah."

[50] Further, it was argued that the preliminary complaints were inconsistent with each other and with the ultimate allegations. An example relied upon was that he told his

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91 AB 47.

92 AB 129.

93 AB 158, AB 160.

94 AB 30.

95 AB 47.21-47.23.

96 AB 123.

97 AB 63.10-63.12.

grandmother that the sexual abuse had been going on for two years,[98] whereas he told C, a clinical psychologist, that a man took him into a room and touched him "down there" three times.[99] It is to be recalled that the complainant denied that he told his grandmother that the abuse had been going on for two years.[100] Nor was it an aspect of the preliminary complaint evidence that appeared elsewhere in his evidence. As the respondent submitted, it was not unreasonable to reject that aspect of the complaint evidence. The other aspects of the disclosure to the grandmother were consistent with his evidence and it was a matter for the jury what they made of the grandmother's evidence as to the two year period. It may have been understood as a reference to the period over which the complainant came to realise the nature of what had happened to him, which he said had taken place for a long period.

[51] As to the preliminary complaint evidence, the first person the complainant spoke to about what had occurred was his mother.[101] It was open to the jury to conclude that the disclosures that the complainant ultimately made to his mother were not inconsistent with his evidence.[102] He also made a complaint to his grandmother.[103] In between those disclosures, he told the clinical psychologist, A, about being sexually abused, which was then discussed with the grandmother.[104] That the disclosures to the clinical psychologist, A, were of a general nature can be readily understood.[105] As for the complaint evidence to the clinical psychologist, C,[106] although there was arguably inconsistency as to the number of occasions on which the abuse occurred, when, read in context, the reference to being taken to "a room" three times may have been intended as a reference to the three different houses.[107] But, in any event, this is not a factor that so undermines the complainant's credibility as to render the verdicts unreasonable.

Unreliability and delay

[52] The appellant made submissions as to the reliability of the complainant's evidence. It was argued that the complainant's evidence more in the nature of "[a] realisation or even discovery, rather than memory", that seemed "to have dawned on the complainant, in respect at least of some offending". In that regard, reference was made to his evidence that when he turned nine years old he "found out what [the

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98 AB 101.30-101.31.

99 AB 147.

100 AB 59.24.

101 AB 38.14-38.15.

102 AB 115.25-115.28.

103 AB 38.

104 AB 58.25-58.27.

105 AB 127.15-127.22.

106 AB 146-147.

107 AB 147.6-147.13.

appellant] was doing"[108] and that he "didn't want to tell anyone".[109] It was also said that the offending commenced spontaneously and ended suddenly after a very short period and that was little or no grooming. The appellant argued that some of the offending was alleged to be in a house where many others were present but several of those individuals were unavailable to give evidence and none supported any allegation or even, in some cases, any opportunity. The complainant's recollection as to the time of the year the offending occurred was faulty since he described it as a hot time of the year, yet the Helensvale house was sold in July.

[53] The appellant submitted that the delay in reporting the abuse has significance in terms of the reasonableness of the verdicts.

[54] It was also submitted that the length of time between the offending and the first complaint to police was important, as was the length of time between that complaint and the appellant being made aware of it. This was particularly so since other witnesses who could have had a recollection about opportunity and other critical aspects of the complainant's account could not be asked to provide evidence until many years later. It was contended that, while the delay warranted the warnings given by the trial judge, no warning could have sufficiently repaired the unreliability of the account, the fairness of the trial or confidence in the verdict. That was particularly so given the age of the complainant at the time of the offending and the delay in his recollection, the known propensity of the complainant to lie and his precarious home predicament.

[55] The respondent submitted that the complainant's memory about the offending accurately recalled the surrounding circumstances. His account, while simple, was also combined with other memories, such as McDonalds, Sponge Bob, music being played by the appellant, his mother walking to the door of the theatre room, the staircase, his brother being present at times and other similar facts he recalled. Faulty recollection as to the time of the year was not of great significance. I would accept these submissions. The degree of surrounding factual detail was relevant to the jury's consideration of the weight to be given to the complainant's evidence and was capable of countering an argument of unreliability.

[56] That offending happened suddenly is not an unusual feature of opportunistic sexual offending against children. In any event, as the respondent submitted, arguably, counts 1 and 2 could be seen as grooming. Likewise, the appellant's comment that he had "done it to his own son", were capable of being viewed as a technique to normalise sexualised conduct against the complainant by the appellant.

[57] The evidence indicated that the complainant had a very troubled upbringing. He went from home to home, got into trouble at school, his father went to prison and he had not seen his mother for a significant period of time. The complainant did not attempt to hide from his faults and problems. At the time of the offending, the

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108 AB 258.

109 AB 258.

complainant's home environment was unstable; he was staying with his mother who was relying on the appellant for accommodation, staying at three different houses in the space of about a week. Furthermore, the complainant's evidence was that he was too young to understand the nature of what took place at the time of the abuse and that he came to do so as he got older. He thought that his mother had seen one of the sexual abuse incidents and had allowed it. The jury may well have thought that an eight year old child would not complain in those circumstances. Indeed, it was open to the jury to understand the delay in this context and to discount any element of reconstruction or false memory.

[58] The jury were given a detailed *Longman* direction[110] which was provided in advance to counsel. The trial judge addressed the consequences of the long delay in reporting the incidences, including the opportunities lost by the delay. Her Honour warned the jury of the danger of convicting on the complainant's testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation including the complainant's age and paying heed to the warning they were satisfied of its truth and accuracy.

[59] I consider that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty on each count. While there were aspects of the evidence that contained discrepancies and inconsistencies, as I have explained, I do not consider that there was any significant possibility that an innocent person was convicted. I reach that conclusion having undertaken my own independent assessment of the evidence both as to its sufficiency and quality. I consider that the verdicts were entirely open to the jury and that the verdicts entered were not unreasonable.

Orders

[60] The order I propose is that the appeal is dismissed.

[61] **McMURDO JA:** I agree with Philippides JA.

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[110] *Longman v The Queen* (1989) 168 CLR 79.