SUPREME COURT OF QUEENSLAND

CITATION:	*R v Draguceanu* [2018] QCA 242
PARTIES:	**R** **v** **DRAGUCEANU, Catalin Sebastian** (appellant)
FILE NO/S:	CA No 69 of 2018 DC No 2473 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 27 March 2018; Date of Sentence: 28 March 2018 (Rafter SC DCJ)
DELIVERED ON:	28 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2018
JUDGES:	Sofronoff P and Boddice and Crow JJ
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – GENERALLY – where the female complainant was a 10 year-old child at the time of the offending – where the female complainant had engaged in swimming games with the appellant and the appellant's two children – where the female complainant alleged the appellant touched her inappropriately, and indecently exposed her to his penis during those games – where the female complainant gave preliminary complaint evidence to family members, friends, and the Kids Help Line – where the female complainant also gave evidence to police, and at trial via s 93A *Evidence Act* 1977 (Qld) – where the female complainant was consistent in her statements CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR UNSUPPORTABLE VERDICT – where the appellant was charged with five counts of indecent treatment of a child under 16, under 12, under care – where counts 1, 2 and 3 related to a female complainant, and the remaining counts to her cousin – where the appellant pleaded not guilty to all counts – where the appellant was convicted by a jury of counts 1 and 2, but not guilty of each of the remaining counts – whether the conviction on count 1 arose as a result

of a miscarriage of justice – whether the verdict of guilty on count 1 is unreasonable and cannot be supported having regard to the whole of the evidence – where the particularisation of count 1, as the third occasion of touching, occurred during the trial – whether the appellant was denied an opportunity to fairly test the case against him

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted on counts 1 and 2, but acquitted of count 3 – where count 1 referred to the inappropriate touching of the female complainant, and counts 2 and 3 referred to indecent exposure of the female complainant to the appellant's penis – whether the verdict of guilty on count 2, but not guilty on count 3 were inconsistent – where time elapsed between the conduct the subject of counts 2 and 3 – whether it was open to the jury to distinguish between those counts

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Bond [2018] QCA 130, applied
R v CX [2006] QCA 409, cited
R v GAN [2012] QCA 50, applied
R v SBL [2009] QCA 130, cited
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited

COUNSEL: A J Kimmins for the appellant
C N Marco for the respondent

SOLICITORS: Bosscher Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Boddice and Crow JJ.

[2] **BODDICE AND CROW JJ:** On 19 March 2018, the appellant pleaded not guilty to five counts of indecent treatment of a child under 16, under 12, under care.

[3] On 27 March 2018, the jury found the appellant guilty of counts 1 and 2, but not guilty of each of the remaining counts.

[4] The appellant appeals those convictions. The grounds of appeal on the first count are that the conviction on the first count arose as a result of a miscarriage of justice and that verdict is unreasonable and cannot be supported having regard to the whole of the evidence. The ground of appeal in respect of the second count is that the verdicts of the jury on counts 2 and 3 were inconsistent.

Background

[5] Counts 1, 2 and 3 on the indictment related to one female complainant, aged 10 years. Counts 4 and 5 related to one male complainant, aged 10 years.

[6] Counts 1, 2 and 3, arose out of one incident. Counts 4 and 5 arose out of a separate incident, alleged to have occurred at a different time and in different circumstances.

[7] As the appeal against conviction does not rely on the acquittals of counts 4 and 5 as being in any way material to the verdicts in counts 1, 2 and 3, it is unnecessary to outline the evidence relevant to counts 4 and 5.

Crown case

[8] The female complainant lived with her mother and grandparents in a house adjacent to the appellant's house. Her family were close friends with the appellant and his family. The female complainant had formed a close friendship with the appellant's daughter, who was a similar age.

[9] The Crown case in respect of counts 1, 2 and 3 relied primarily on the evidence of the female complainant. Evidence was called from several preliminary complaint witnesses. The content of a pre-text telephone call between the appellant and the female complainant's grandfather, was also relied upon by the Crown.

[10] Count 1 alleged that the appellant, in the course of playing a game in the swimming pool at his residence, placed one of his hands under the female complainant's swimming costume and rubbed the top part of her vagina. The female complainant gave evidence this had occurred about three or four times. The Crown particularised the third occasion as the basis for count 1 on the indictment.

[11] Count 2, committed after count 1, alleged that when the female complainant and the appellant's daughter were playing a game of holding their breath under water, the appellant pulled his shorts down, exposed his penis and placed the female complainant's hand on his penis.

[12] Count 3 also involved wilful exposure of the appellant's penis. It was particularised that the appellant, immediately after the commission of count 2 on the indictment, continued to wilfully expose his penis underwater to the female complainant.

Evidence

<u>Female Complainant</u>

[13] The complainant was interviewed by police on 3 and 10 February 2017. Those interviews were admitted, pursuant to Section 93A of the *Evidence Act* 1977. The complainant also gave evidence by way of pre-recorded evidence prior to trial. That evidence was played to the jury, pursuant to Section 21AK of the *Act*.

[14] In her initial interview with police, the complainant said she had come to talk to police about something that had happened with her neighbour that was "not okay". Her grandparents had gone away and her mother was working, so she had gone to the appellant's house to have a swim. The appellant had come into the pool with her and his son and daughter. Whilst in the pool, the appellant played a game of throwing them into the pool. As he picked up the complainant, he pulled back her togs and touched her private part. That happened for a "little bit".

[15] After the appellant's son left the pool, the complainant and the appellant's daughter engaged in another game of holding their breath underwater. When the complainant was under the water, the appellant took her hand and put it on his private part. She

tried to swim away. The appellant's daughter then suggested they hop out of the pool. The complainant dried herself and got changed upstairs. The appellant then took them in his car for a slushy. The appellant was looking at the complainant in the car mirror. It made her feel really uncomfortable.

[16] The complainant said they initially were playing the game of the appellant lifting each of them up, like Superman, and throwing them into the pool. As part of the game, you had to wait whilst the last person thrown, swam away. Whilst the complainant was waiting, the appellant had his hand on the female complaint's stomach and a hand in between her legs. The appellant pulled the bottom tog to the side, and started stroking and touching her vagina. It was mainly the top part of her vagina.

[17] The complainant was shocked when it first happened because it had never really happened before. She was trying to stay calm. She did not think she could run away or scream out because no one would believe her. The appellant was also a really strong man. She tried to tell the appellant's daughter, but she did not think she was paying much attention.

[18] The complainant described the appellant's fingers as slipping in between and rubbing back and forth. It happened for about one to two minutes, whilst she was lining up to be thrown by the appellant. The appellant's fingers were moving in and out for about a minute, half a minute. The appellant then threw her into the pool. When she was thrown, her togs slid back into the correct position. Each time the complainant lined up to be thrown, the appellant did the same thing. When asked how many times she remembered it happening, the complainant replied "I remember about three, four times; around that number".[1] When asked about the fourth time, the complainant replied "it just kept on happening pretty much the same".[2] The complainant kept lining up because she assumed it would stop.

[19] The game went on for about 10 or 15 minutes, before they moved on to the next game. As part of the next game, the appellant's daughter and the complainant went underwater whilst the appellant counted how long they remained under water. The complainant was wearing goggles. When she was underwater the appellant had pulled his pants down. He grabbed her left hand and put it on his penis. At the time this occurred, the complainant was holding on to the ladder into the pool.

[20] The appellant's daughter was beside the complainant. However, her eyes were closed because she did not have goggles. The complainant said when the appellant grabbed her hand he wrapped it over his penis. She felt very uncomfortable, unsafe and a bit shocked. When she went up for air the appellant let go of her hand. The appellant kept his pants down for the rest of the time in the pool. His penis was sticking out. The complainant tried to close her eyes to ignore it.

[21] After this game, the appellant's daughter and the complainant hopped onto an inflatable item in the pool, known as 'the thong'. The appellant kept trying to push them off. Whilst they were playing the thong game, the appellant still had his pants pulled down. The complainant could still see his penis. The thong game continued for, what felt like, about five minutes or so. The appellant's daughter would have

---

1 AB vol 2, 351/35-50.
2 AB vol 2, 351/54.

been able to see the appellant with his pants down and penis out, but she was not wearing any goggles.

[22] The complainant told the appellant's daughter the appellant had touched her inappropriately. The daughter said 'no, are you crazy?'. The complainant then pretended it was a joke. After that conversation, the appellant's daughter did handstands in the pool before they started playing the breathing game. The complainant accepted she had forgotten that part when she first recounted it to the police.

[23] The complainant described the appellant's shorts as like normal fabric shorts, something you would wear to football training. The complainant had not been in the appellant's pool with the appellant since that episode. She had used the pool about twice since then, but the appellant had not been there. The complainant agreed this was the only time something had happened with the appellant.

[24] The complainant told her mother, grandparents and next door neighbour, ND, what had happened with the appellant. She called the Kids Help Line the day before the interview and told them as well. The complainant told her mother about two days after the incident. She was too embarrassed and scared to tell her grandparents at that time. Her mother did not know what to do. ND had been told in about October or November of last year. The complainant told the grandparents the day before the interview with police.

[25] In her later interview with police, the complainant said she had forgotten to tell police about two friends she had told the appellant had touched her inappropriately. She did not tell those friends the full story. She had also told her cousin.

[26] The complainant first told her mother after school, a few days after the incident. Initially, she told her mother that on the weekend when she was working, the complainant had gone to the pool with the appellant and the appellant touched her inappropriately. The appellant had also put her hand on his private part. After dinner, the complainant told her mother everything "full on".[3] The complainant told her mother as the appellant went to throw her in the pool, he had pulled back her bottom togs and started playing with her private part. The complainant also said when the appellant's daughter and the complainant were holding their breath the appellant took the complainant's hand and put it over his private part.

[27] The complainant said her mother did not know where to go and they later spoke to their next door neighbour ND. The complainant found it helped to tell ND. She had gone to her for a few other problems. ND thought about it for a while and after Christmas called up Braveheart. That occurred the day the complainant told her grandparents, and Kids Help Line. The complainant estimated she told ND quite a few weeks after the incident.

[28] When the complainant spoke to Kids Help Line, they said it would be good to address it with the police. They gave the complainant's mother a few websites to call up to help her. The complainant's grandparents also rang Adult Help Line. The complainant thought it was best to tell her grandmother because she let the grandchildren play over at the appellant's house and it had also happened to the complainant's cousin (the male complainant in Counts 4 and 5).

---

3 AB vol 2, 381/46.

[29] The complainant told her grandmother and that on one of the weekends on holidays whilst her mother was at work, the complainant had gone to the appellant's pool. As the appellant was about to throw her in the pool, he pulled back the complainant's togs and played with her private part. The appellant then threw the complainant in the pool. That continued to happen for a bit. The complainant told her grandmother she had asked the appellant's daughter if it had ever happened to her. The daughter said no, and thought the complainant was a bit crazy.

[30] The complainant also told her grandmother that when the appellant came back from going to the toilet, they commenced a game of holding their breath. As the complainant went down under water, she saw the appellant had his pants half down. The appellant put the complainant's hand over his private part. After that happened, they went in his motor car to get a slushy. Whilst they were in the car, the complainant could see the appellant's eyes rolling up and down like he was looking at her private part. She said the appellant always winked at her and looked at her body and made her feel uncomfortable.

[31] The complainant told her grandfather later the same day she told her grandmother. She told him the appellant had touched her inappropriately and played with her private part, and that he took her hand and put it on his private part.

[32] The complainant also told two friends, RC and YM. She told them the appellant had inappropriately touched her and had put her hand over his private part. She told them at the same time whilst at school. The complainant could not remember when, but said it was last year, in the final days of school.

[33] The complainant had also asked her cousin (the male complainant) if the appellant had ever touched him inappropriately in the pool. He said no, then mumbled something else and said he was just joking. The complainant said he said no, not in the pool and then "like yes" and then he mumbled something and then said "just joking".[4]

[34] In evidence, the complainant said she played the Superman game and the holding breath game a lot in the appellant's pool. The Superman game involved the appellant holding one hand on her stomach and one hand on her leg before throwing her into the pool. The appellant was standing in the pool at the time they played this game.

[35] On the other occasions, the appellant had placed his hand just above her knee, on her thigh with his other hand on her stomach. On the day of the incident, the appellant placed his hand higher up near the complainant's vagina. The appellant had not done this before when they played the game. The appellant put his hand on her vagina the very first time they played the Superman game that day. When the appellant put his hand near her vagina, he pulled back her togs and started playing with her vagina. The appellant was putting his two fingers in between the middle part of her vagina, rubbing them back and forth.

[36] Later on the same day, when the appellant's daughter and the female complainant were holding their breath, the complainant saw the appellant's pants were pulled down and his penis was sticking out. The appellant grabbed her hand and placed it on his penis. That game took place down near the ladder in the pool. The complainant described the togs she was wearing that day as a one-piece having a

---

4 AB vol 2, 395/44.

yellow outline with the yellow frilly part at the top and a yellow bow. They had a rainbow design down the tummy part, with black dots.

[37] In cross-examination, the complainant accepted that when she first spoke to police, she did not mention telling her two friends, RC and YM about the incident. That was something she remembered between the first time she spoke to the police and the second time she spoke to police. The complainant accepted she first told her mother a few days after the incident, on a school day. The complainant was not sure how long it was between when she told her mother and when she told her two friends. She told her mother the incident had happened in the pool around June 2016. She told police she thought it happened on a Sunday because the next day was a school day.

[38] The complainant accepted that when she told police the appellant was looking at her private parts, when she was in the car getting the slurpee, she was referring to the appellant using the rear vision mirror of the car to look at her private parts. She denied telling her mother the trip in the motor car happened before she was in the swimming pool. The complainant accepted that as a result of the appellant looking at her in the rear vision mirror, she felt uncomfortable.

[39] The complainant accepted she thought about whether she should not go back swimming in the appellant's pool any more after the incident. She agreed she did not like what the appellant had done and she did not want him to do it again. The complainant wanted to stay as far away as possible from the appellant. The complainant accepted that after June 2016 she had continued to visit the appellant's house quite often. She continued to be very good friends with the appellant's daughter who was her best friend at the time. There were occasions where she swam in their pool after the incident.

[40] The complainant accepted the appellant had touched her private parts under her togs on the first occasion he threw her in the water whilst playing the Superman game. She had thereafter lined up again to be thrown into the pool. When she lined up, she was very close to the pool ladder situated in the shallow end of the pool. The pool gradually got deeper as you got closer to the centre of the pool. The appellant was not standing in a deep part of the pool, as she was being thrown into the deeper part of the pool. The touching of her vagina had happened three or maybe four times on the day of the incident.

[41] The complainant said when the appellant lifted her for the Superman game, her stomach was just touching the water. He then lifted her up higher to throw her into the pool. The appellant was throwing her in a horizontal way up and over. She had her arms out in front of her when she was thrown into the pool to help her dive into the water. Sometimes, they would bomb dive in afterwards. The complainant accepted that as part of the Superman game, it was necessary for the appellant to have his hands somewhere around the top of her legs, near her thigh. Usually it was lower than on the day of this incident. The complainant did not accept the appellant's hand might have brushed across the front of her private parts outside her togs accidentally.

[42] The complainant had spoken to the appellant's daughter that day about what had happened because she was not sure in her own mind if the appellant had touched her accidentally on the private parts. The appellant's daughter did not seem to understand what the complainant was getting at in that conversation. The

complainant accepted she did not actually come out directly and say anything to the appellant's daughter about what the complainant thought the appellant had done to her.

[43] After the Superman game, the appellant left the pool for a short time. When the appellant returned to the pool, they commenced holding the breath game under the water. The complainant accepted that after the appellant made her touch his penis she did not get out of the water straight away. The complainant and the appellant's daughter then played with an inflatable thong. When she fell into the water from the thong, she could see the appellant's pants down because she was wearing goggles. The complainant denied she could see the appellant's pants were down from above the water. The appellant was was standing near the middle of the pool not near the ladder.

[44] The complainant accepted that when she first spoke to ND, just after Christmas 2016, she said the appellant "was inappropriate with me in the pool the other day". The complainant denied she was meaning to convey to ND that something had happened to her in the pool around Christmas time. The complainant denied that when she spoke to ND she was uncertain about whether she had been touched accidentally by the appellant. The complainant was positive it was not an accident. The complainant told ND the appellant had pulled his pants down and put her hand on his private parts.

[45] The complainant accepted she was visiting the appellant's house in 2016 a few times each week. There were times before the start of 2016 when she would play the Superman game in the pool with the appellant. There were also times when she would play the holding the breath under water game with the appellant in the pool. There were a number of times when the appellant drove her and his children to the shops to get slurpees.

[46] The complainant accepted that on occasions she would give the appellant a hug when she first arrived at his house. Sometimes she would call him "Daddy". She had noticed that as time went on, the appellant was not keen on her giving him a hug or calling him Daddy. She denied she was offended by that change. She denied she continued to attend sleepovers at the appellant's house after the incident in the pool. While she had gone for a swim in his pool in the last few months of 2016, she never went in the pool when the appellant was in the pool.

[47] In re-examination, the complainant accepted the first person she told was her mother. Her mother did not take her complaint to anyone at that time. The complainant next told ND. ND asked if it could have been an accident. The complainant said it was not an accident. If it was an accident, the appellant would not have rubbed her vagina or moved aside her togs. The same thing happened on each occasion. The appellant had put her hand on his penis during the holding the breath under water game.

[48] The complainant agreed her mother had not told her grandparents until ND said she thought it was time for the complainant's grandparents to know, as they were letting other cousins go over to the appellant's house. The complainant agreed the appellant pulled aside her togs and rubbed her vagina before she was thrown in the air. At that time, she was lying on her tummy on the top of the water. The appellant's hand was underneath her while she was lying on the water.

Preliminary complaints

[49] YM, a school friend of the complainant, told police in her initial interview the complainant had told her she was playing a game with other children in a pool when a man touched her inappropriately. The man then grabbed the complainant's hand and put it on him inappropriately. The man's children and the complainant's cousin were in the pool at the time. The complainant told her and her friend RC of the incident before she told anyone else because the complainant was too embarrassed to tell her parents.

[50] The complainant had told them about the incident a couple of weeks ago (YM was interviewed on 16 March 2017). The complainant looked sad. YM asked the complainant if she was okay. The complainant said "no, not really". The complainant told her she was playing in the pool and that when we went under water the man had pulled over her togs and rubbed her inappropriately. The man put his hand on her vagina. He then grabbed her hand and put it on his penis. After that they had gone in his car to get a slushy. Whilst in the car the man had looked at the complainant weirdly in the rear view mirror. YM thought the complainant said it was a year ago or something like that.

[51] YM asked the complainant if she had told her mother yet. The complainant said she was going to tell her grandparents to help her tell her mother. YM said the man's daughter went to the same school. She was in the classroom next to them.

[52] In cross-examination, YM accepted she told police, when she was interviewed on 16 March 2017, that the conversation occurred only a couple of weeks before that interview. YM accepted that meant the complainant must have told her not long after she had started back at school in 2017. There was only ever one time when the complainant told her anything about the incident. The complainant told her she had not yet told her mother. The complainant said the incident had happened about a year before her conversation with YM.

[53] RC was interviewed by police on 26 March 2017. RC told police the complainant told her that on an occasion when the complainant's mother was at work the complainant went to a neighbour's house to go swimming in their pool. Whilst there a man touched her inappropriately. This conversation occurred at lunch-time, at school, a few weeks before the interview with police.

[54] RC said whilst they were eating lunch the complainant told her she had had to go to the police station. When RC asked why, the complainant said she was touched inappropriately whilst in the swimming pool. There were other children in the pool. RC did not remember the complainant saying anything about where she was touched. The complainant said it had happened a few months ago.

[55] In evidence, RC agreed there was only one occasion when the complainant told her and YM about what had happened in the swimming pool. That conversation took place a few weeks before RC was interviewed by police. The conversation was some time after the start of the 2017 school year. The complainant told her the incident had happened about a year ago. In the same conversation, the complainant said RC would have to go to the police station at some stage.

[56] The complainant's mother gave evidence that the complainant, who was born on 5 March 2006, spoke to her about something that had happened between her and the appellant, whilst playing in the appellant's swimming pool. The complainant was friends with the appellant's daughter and regularly visited the appellant's house.

She also often swam in their pool. The pool was used not just in the warmer months, as it was a heated pool.

[57] The conversation with the complainant occurred around Christmas 2016, whilst the complainant and her mother were visiting another neighbour, ND. The complainant told them that when she was taking part in a game in the appellant's pool, the appellant had moved the bottom of her togs and rubbed her private parts. The game involved the appellant throwing them into the pool, like in a Superman position. The appellant had also pulled down his pants and grabbed her hand and put it on his private parts.

[58] The complainant remembered the date as being in June 2016, as her mother had to go to work and had packed her bag with swimmers and a towel and asked the appellant and his wife if the complainant could stay at the appellant's house. It was on that occasion this touching had taken place. The complainant was scared to get out of the pool as she did not know whether the appellant would pull her back into the pool. She stayed in the pool with the appellant's daughter.

[59] The complainant's mother did not tell her parents until February 2017. She was trying to find the right words. During that conversation with the grandparents, the complainant said the appellant was throwing her into the pool as a Superman and pulled her tog bottoms across and rubbed her private parts. The appellant's daughter was in the pool as well. The complainant also played a game where you hold your breath under water. During this game, the appellant pulled his pants down and put the complainant's hand on his private parts.

[60] In cross examination, the complainant's mother accepted that the first time the complainant ever mentioned anything about inappropriate touching by the appellant was at ND's home in December 2016. That was about five or six months after the occasion of inappropriate touching by the appellant. The complainant may also have mentioned in that conversation, or in the subsequent conversation with the grandparents, that before the incident in the swimming pool, she had travelled in the appellant's car to the slurpee store with the appellant's daughter and son. The complainant's mother thought that related to an occasion prior to the day of the incident in the swimming pool.

[61] The complainant's mother agreed the complainant spent quite a deal of time over at the appellant's home. She had slept at that home on numerous occasions and had been welcomed into the appellant's family, like one of their own children. The complainant's mother could not recall whether there had been any sleepovers after June 2016, but accepted there may have been sleepovers at least up until December 2016.

[62] ND lived next door to both the complainant's family and the appellant's family in 2016. They would regularly attend each other's houses. Their children would play at each other's houses and swim in each other's pools. The appellant's family pool had a heater and could be swum in for most of the year round. The complainant's family pool was usually only used during the summer time, particularly school holidays. Newton specifically recalled the appellant's family pool being used in the winter months, particularly during the school holidays and sometimes on weekends.

[63] Sometime in late 2016, between Christmas and New Year, the complainant spoke to Newton about an incident involving the appellant. The conversation took place in Newton's lounge room. Newton, the complainant, her mother and Newton's

daughter were present in the lounge room. The complainant said she had something to share with Newton that was not very nice. The complainant said when she was in the pool one day with the appellant, he was inappropriate with her. The complainant said the appellant had touched her inappropriately. When Newton asked what she meant, the complainant said the appellant had lifted her up and had put his fingers in her private place. The only time period mentioned by the complainant was "the other day".

[64] The complainant indicated the appellant's his fingers went in underneath her swimming togs, whilst they were playing a game the children regularly played with him, the Superman throw. Newton asked the complainant whether it might have been an accident. The complainant stopped and said "no, I don't think so". When asked why, the complainant said because not long after that we were playing another game and the appellant had his pants down and put the complainant's hand on his private parts. When asked whether the complainant meant the appellant's penis, the complainant replied "yes".[5] After the school year had started, Newton reported the matter to police.

[65] Newton was also present when the complainant had a conversation with the complainant's mother and grandmother. That conversation was in line with the conversation Newton had had with the complainant at an earlier time. One question put to the complainant during this conversation was when the incident had happened. The complainant's response was that it was at a time when her mother was at work and her grandparents had gone on a road trip and the complainant was being looked after by the appellant and his wife. The complainant said that was a couple of months before the conversation.

[66] In cross examination, Newton accepted that when she asked whether the touching could have been an accident, the complainant considered the question for a period of time before responding she did not think it was an accident. Part of the complainant's response was that after that had occurred, and whilst the appellant's daughter was at the other end of the pool, the appellant pulled down his pants and took the complainant's hand and put it on his private parts.

[67] ML, a counsellor with Kids Help Line, received a telephone call from the complainant at approximately 5.03 pm on 2 February 2017. The complainant reported that approximately six months prior to the telephone call, she had been touched inappropriately by an adult male neighbour. The complainant had been playing with her friend next door, another 10 year old female, in the pool with this adult male, something they had done in the past. The adult male was throwing the girls into the pool, as had occurred in the past.

[68] Whilst doing so, the complainant had been held by this male by her tummy and her private parts. The the adult male had also pulled down her swimmers as well as his own and attempted to place her hand on his penis. The incident had made the complainant feel very uncomfortable. The complainant reported this information to her mother approximately two or three days after it had occurred. The complainant indicated she had continued visiting the next door neighbour's home after that incident.

[69] The complainant's grandmother gave evidence that she lived with her husband, daughter and the complainant in a home adjacent to the appellant's family. The

---

5 AB vol 2, 162/45.

families had a close relationship. The children from each family would swim in each other's pools. The complainant's family pool was cold and was not used until around late October and then through the summer months. The appellant's pool was used more regularly because it was heated through winter. The appellant's family often had pool parties in the winter months. On occasions, the families would also engage in sleep overs. If the grandmother was unable to look after the grandchildren, the appellant's wife would volunteer to have them stayover or to help out looking after them.

[70] The complainant's grandmother said in early February 2017, the complainant spoke to her about an incident involving the appellant. The complainant, her mother and their next door neighbour, ND, were present with the grandmother. The complainant said that she had been in the appellant's pool, doing the Superman, when the appellant picked her up with one hand on her tummy and one hand in her private areas. When asked what she meant by private areas, the complaint said "between my legs".[6] The appellant's hand had gone inside her togs and his fingers were moving on her in a backwards and forwards sort of motion. The complainant said they also played another game involving holding her breath under water. Whilst the complainant and the appellant's daughter were playing that game the appellant grabbed the complainant's hand and, whilst his pants were down, put her hand on his private part.

[71] The complainant said the incident happened on an occasion when the grandmother and grandfather were away in their car and the complainant went to stay at the appellant's residence until they came home that afternoon. The complainant's grandmother recalled that trip had occurred about June last year. The complainant's grandmother was able to place a date on the occasion from photographs taken that day. The date was 26 June 2016. The complainant's mother was at work that day. The appellant's wife had volunteered that the complainant could stay with them until the grandmother returned from that trip. They had returned home from the trip around 4.00 pm. When she went to the appellant's house to get the complainant, the appellant, his daughter, the complainant were all in the pool. It was a Sunday afternoon.

[72] The complainant's grandmother said during this conversation with the complainant, the complainant said she now felt quite uncomfortable around the appellant. He was winking and smiling at her. There was occasion when she went to the slurpee shop with the appellant and his two children. The appellant sat her in the middle and angled the rear vision mirror onto her when they drove there. The complainant's grandmother said arrangements were then made to report the matter to police.

[73] In cross examination the complainant's grandmother agreed that in her statement provided to police, she stated she had questioned the complainant about what she meant by 'between the legs', to which the complainant had said "private parts". The grandmother had then asked "was it the crotch area", to which the complainant said "yes", before saying that the appellant's hands went under her togs and was touching her private parts. The complainant then said the appellant's daughter and her were playing how long you could hold your breath. The appellant grabbed the complainant's hand, pulled his pants down and put her hand on his private part.

---

6 AB vol 2, 171/18.

[74] The complainant's grandfather gave evidence that the relationship between his family and the appellant's family was very close. They regarded them as good friends. Their children regularly played in each other's pools. The children were invited over more to the appellant's house during the winter months, because they had a heater in their pool. The children could swim in it when it was cold. The children would also have sleepovers at each other's houses.

[75] The grandfather recalled that on 2 February 2017, he was called upstairs to have a conversation with his wife, his daughter, the complainant and a next door neighbour, ND. He could not recall any particular comments made by the complainant during that conversation. However, as a result of it, on 16 February 2017, he made a telephone call to the appellant. That call was recorded at the Morningside police station.

Pretext call

[76] During the recorded telephone conversation with the appellant, the grandfather told the appellant he had something serious to talk to him about, namely that he had been told by his grandchildren that the appellant had molested them. The grandfather said he could not understand how the appellant could have done that, as they were good friends. He felt the appellant had betrayed that friendship. In response, the appellant said "yeah, I'm sick of, I'm sick too, I yeah well, it's funny, I don't, I don't know, I don't know, that what's exactly, how's its, I don't know, what can I tell you, I don't know".

[77] The grandfather said the complainant said that the appellant put his hands inside her togs and touched her indecently, whilst she was in the pool and that he pulled his pants down and put her hand on the appellant's penis. In response, the appellant replied "oh yeah, I don't know about that, yeah, probably when, when I've done, when I've done the Superman, how they call them, yeah, probably my hand slipped, you know, like I can't, I can't, it probably slipped in a couple of times when I've done this, but yeah, it depends, I reckon its, yeah, all a bit, no I didn't pull it down….. I'm mate, I can't, I can't, I honestly, I'm shocked by myself and probably yeah, probably too much drunk and probably too much of a shit with that, yeah".[7]

[78] Later, the appellant said "I'm so sorry about all these things, but as I said I was, oh yeah, probably I recognised, yeah, probably with, with TS, yeah, because of the slip of the hand and something like that, but molest, I don't think it's pushing a little bit then, no. But I'm, I'm, I don't know, oh, nothing I can say, but I'm so sorry about everything. Wow yeah, I understand you, hmmm. Yeah, but probably was too much drink and that's um, when I was in the pool with TS, that's all".[8] Further, the appellant said "there is nothing I can, I can't defend myself you know".[9]

Appellant

[79] The appellant gave evidence that he and his family moved into their residence, next to the complainant's family in 2008 or 2009. The families became very close. The children would play in each other's yard and swim in each other's pool. On many occasions, the complainant slept over at the appellant's house. His relationship with

---

7 AB vol 2, 592/56-593/10.
8 AB vol 2, 594/1.
9 AB vol 2, 594/15.

the complainant was so close that on occasions she would jump into his arms and say "Hello daddy, I'm here".[10] He found it a little bit awkward, initially.

[80] The appellant described his pool as being located in the front yard, next to the public roadway. It contained one set of steps on a pool ladder. Photographs identified the depth of the pool when the appellant was standing in it, both near the ladder and more towards the middle of the pool. The deepest part of the pool was the centre. The appellant would regularly be in the pool with his children and the complainant. Whilst heated, it was expensive to run during the winter time. The heating was only run during the school holidays in the June/July period.

[81] The appellant would engage in games with the children, including throwing them into the deeper part of the pool. That was called the Superman game. The appellant would pick up the child from the tummy up. Where you actually put your hands had to be adjusted depending upon the child's height and weight. You then would turn and aim the child like a javelin being thrown into the pool. There were many occasions when he had played this game with his children and the complainant. On occasions, the appellant would throw each child, three, four, six or seven times in a row. It was very demanding.

[82] The appellant would wear white rugby-type shorts in the pool, although they were not very comfortable because they would soak in water. He wore underwear underneath. The appellant denied on any occasion, whilst he was in the pool with the complainant, intentionally and deliberately trying to put his hand inside her togs. He denied ever moving his fingers around deliberately on her vagina. The appellant accepted the pool contained inflatable toys. On occasions, he would play a game with the children, involving trying to push the children off the inflatable toy.

[83] The appellant also played a game with the children in the pool, during which the children would hold their breath. That game was played closer to the ladder, as it made it easier for the children to concentrate and go deeper. The appellant would count whilst they were underwater. There were many occasions he had played this game with his daughter and the complainant. The appellant denied ever, on any occasion, pulling his swimming costume and underpants down to expose his penis whilst the complainant was holding her breath underwater. He denied ever wandering around the pool with his pants down and his penis exposed underwater. It was impossible as there were other children around, or his wife was watching from the balcony.

[84] The appellant gave evidence that he was not at his home on 26 June 2016. He produced a frequent flyer platinum statement indicating a transaction at Woolworths at Dalby on 26 June 2016. The family went to visit friends in Dalby. They also visited, nearby, Broadwater Lake.

[85] In cross examination, the appellant accepted he would swim with the children on weekends. On occasions, he would drink alcohol before he went into the pool with the children. He accepted he played various games with the children in the pool, including the Superman game and the hold your breath game. The appellant was careful when he held the children, but said once the children put sunscreen on and hopped into the water they became very slippery.

---

10 AB vol 2, 210/2.

[86] The appellant would normally hold the child on the leg area when doing the Superman game. If the child was heavier, you may go up a little bit higher in the chest area and down from the groin area, towards the knees. He denied ever placing his hand between the child's legs. His palm was very big and covered a lot of surface of the child. There was no reason to hold a child in the groin area or between their legs. That was not in the centre and you had to spread their weight to balance them.

[87] The appellant accepted he would run their heated pool in the winter months, on occasions. He would run it for one or two weeks during the school holidays. He did not agree he would run it outside the school holidays. He accepted his children's birthdays were in June and July. They did, on occasions, have parties for their birthday. That included pool parties. The children's birthday parties were held on weekends, so that other children could come over.

[88] The pool had a three step ladder at one end. That was the only steps into the pool. Whilst he was standing in the pool he would on occasions crouch down when lifting a child. He also would swim on occasions. He didn't just throw the children in the pool. When he needed a rest he would go away from where the children were playing or would go out of the pool and go inside the house. Photographs of the appellant standing in the pool had been taken some three or four weeks before the trial, during summer time.

[89] The appellant recalled going to Dalby because they visited not only his friend, but also Broadwater Lake. The visit to Dalby was not written down on any calendar. His recollection was that they left for Dalby on a Saturday afternoon and returned on Monday. He had looked at the pictures from that weekend. They did not contain a date, but the computer program specified when the photographs had been taken by his telephone.

[90] The appellant accepted that in the four or five years since he had known the complainant, and played with her, it was a possibility his hand could brush her vagina when he was throwing the children into the pool. He denied ever pulling the complainant's togs aside. He denied ever touching her there intentionally. It was impossible for him to pull his pants down while in the pool. The pants were very tight and he was above the water line. He denied putting the complainant's hand on his exposed penis.

Others

[91] The appellant's wife described the complainant's parents as dear friends. She considered them to be their extended family. They had numerous occasions of contact with the complainant between 2008 and 2016. On occasions, the complainant would stay at their house. The back and front door was open at any time for the complainant. The complainant as a very happy child, looking for attention. Whenever she was playing, she would play like she was wanting people to look at her. The appellant's wife observed the complainant playing in their pool on many occasions. On occasions, the appellant would be in the pool. She had seen the appellant throwing the children into the pool as part of a game.

[92] The appellant's wife said they attended Lake Broadwater, near Dalby on the afternoon of 26 June 2016. A photograph was taken at 4.27 pm that day, of the appellant with his good friend. Other photographs were taken of the appellant, his wife and their children at the same time and at the same place.

[93] The appellant called three character witnesses. Each gave evidence they had known the appellant for some years. Each had regular contact with him throughout that time. Each said he was well regarded and he had a good reputation in the community.

Admissions

[94] It was formally admitted that during the period, from June 2016 to December 2016, the complainant's mother regularly worked 24 hour shifts, during which period the complainant was frequently left in the care of her grandparents. Further, there were numerous occasions when the complainant's grandparents would go out on day trips, both with their Ford Fairlane and without, and that on many of the occasions when they went out on day trips, and the complainant's mother was working, the complainant was left in the care of the appellant's family.

Appellant's submissions

[95] The appellant submits that as a result of a late particularisation of count 1 a miscarriage of justice has occurred as the appellant was deprived of the opportunity to fairly test the evidence against him in relation to count 1 and the jury was misled in relation to the state of the evidence grounding that count. The cross examination of the complainant, conducted before that particularisation, did not focus on the actual occasion of touching, the subject of that count.

[96] The appellant's submission as to the verdict on count 1 being unreasonable is that "The Court would find that in all the circumstances, the third occasion of touching was so poorly defined and supported by the Crown case that no jury, acting reasonably, could be satisfied of the guilt of the Appellant beyond a reasonable doubt in relation to count 1."

[97] The appellant's submission on the ground that the verdict on count 3 is inconsistent with the verdict on count 2 is that, as a matter of logic and reasonableness, it is inconsistent for the jury to accept the appellant exposed his penis and placed the complainant's hand upon it (whilst engaged in the game of holding one's breath) and reject a similar allegation of exposure of his penis in the later game of throwing the female children upon the floating thong.

Respondent's submissions

[98] The respondent submits the appellant was not deprived of the opportunity to fairly test the case against him in relation to count 1. The appellant's case was that he never put his hands inside the complainant's swimwear, or touched her vagina. No further questioning of the complainant regarding the third alleged occasion could have elicited greater detail. Accordingly, there has been no miscarriage of justice, as the appellant has not been deprived of a significant possibility of acquittal.

[99] Further, the jury were not misled in relation to the true state of the evidence in respect of count 1 on the indictment. Evidence sufficient to establish that offence, as particularised, arose from the recorded police interviews. The complainant stated the appellant touched her vagina with his fingers, underneath her swimwear, on at least three occasions, in the same manner. The jury were specifically instructed they could only convict if they were satisfied that the conduct occurred on three occasions. Significantly, the appellant's counsel did not seek any redirections.

[100] The respondent submits the verdict of the jury in relation to count 1, was not unreasonable. It was supported by consideration of the evidence as a whole. The complainant gave a consistent account of the appellant pulling the bottom part of her swimwear to the side and stroking and touching her vagina on at least three occasions whilst she was in the pool playing the Superman game. Any inconsistency in the description of how she was being touched was a matter for the jury. The complainant's evidence was bolstered by the preliminary complaint evidence, which was consistent in the nature and frequency of that contact. The directions to the jury appropriately focused the jury's attention on the need to be satisfied the conduct was deliberate.

[101] Finally, the respondent submits there was no inconsistency in the verdict of guilty on count 2 and not guilty on count 3. Having accepted the complainant on count 2 of the indictment, it was open to the jury to reason that they were not satisfied beyond reasonable doubt that the continuing exposure of the appellant's penis, the subject of count 3 was deliberate or intended to expose the complainant to his penis. That evidence was not bolstered by any preliminary complaint evidence, unlike count 2. That difference in the quality of the complainant's evidence, supported a conclusion that the jury, consistent with their directions, considered each charge separately. It does not follow the difference in verdict was as a consequence of a different assessment of the honesty and reliability of the complainant's evidence.

Consideration

Appeal ground 1 (a)(i) The verdict arose as a result of a miscarriage of justice

[102] The primary evidence proving count 1 is the testimony of the complainant. Patiently and in a non-leading fashion, over eight pages of transcript, the interviewer attained from that 10 year old complainant allegations of fact that the appellant, over a period of 10 to 15 minutes,[11] touched her private part at least three times whilst engaged in a "Superman" game in the appellant's pool. During this game in the pool, on three or four occasions, the appellant touched and stroked the top part of the complainant's vagina for "about a minute, half a minute".[12]

[103] The complainant was consistent in her allegation that this occurred on at least three occasions. The complainant said "I had about three goes"[13], "I can't quite remember but I had about three goes, around that number",[14] "about three times I'm not quite sure I think it was about that that many times",[15] "I remember about three times, four times"[16]

[104] When the interviewer attempted to seek from the child complainant clarification as to whether it occurred three or four times. The complainant's evidence was as follows:[17]

> "CON MIDGLEY: Well h-, how many times do you remember it happening?
>
> CHILD: I remember about three, four times.

---

11 AB vol 2, 346/15-16.
12 AB vol 2, 346/30-5.
13 AB vol 2, 351/17-18.
14 AB vol 2, 351/22-23.
15 AB vol 2, 351/39-40.
16 AB vol 2, 351/45.
17 AB vol 2, 351/42 - 352/25.

CON MIDGLEY: Okay.

CHILD: Around that number.

CON MIDGLEY: So you've just spoken about th-, three times. What about the fourth time?

CHILD: It just kept on happening pretty much the same.

CON MIDGLEY: So you just-, so you-, you would-, you just kept l-, lining up after each time--

CHILD: Yeah.

CON MIDGLEY: It happened.

CHILD: I w-, just in a bit o' shock like I didn't really know what to do.

CON MIDGLEY: Mmhmm.

CHILD: So I just assumed it would stop happening.

CON MIDGLEY: An'-, an' how long did-, you said it happened the four times from--

CHILD: About--

CON MIDGLEY: Lining up

CHILD: Four-, I think, I'm not a hundred percent sure.

CON MIDGLEY: Okay.

CHILD: It was about three of four times."

[105] In its opening, the Crown particularised count 1 as the touching of the vagina of the child on "… those times when they were playing the Superman game … ."[18] The Crown opened its case that the appellant "did this to her at least three or four times."[19] As set out above, the child complainant had, on 3 February 2017 in the detailed police record of interview, alleged she was so touched on three occasions and possibly on a fourth occasion.

[106] On the morning of the second day of trial counsel for the appellant raised with the prosecutor "… an issue … about the particulars for count 1" and the primary judge commented that there would be a "need to identify which of those acts it is unless [it was suggested] that it's one continuous thing".[20] Defence counsel did not seek further particularisation at that point. In order to make things certain and in the absence of the jury the Crown particularised their case as touching being "one continuous event … but alternatively … the last time."[21]

[107] Towards the end of day three of the trial, counsel and the trial judge further discussed the particularisation of charge 1. After detailed discussion the prosecutor particularised count 1 as the third occasion of touching. As His Honour commented "well the first time may have been accidental - - - and by the third time, it clearly

---

18 AB vol 2, 97/23-24.
19 AB vol 2, 96/8.
20 AB vol 2, 112/31-32.
21 AB vol 2, 115/24-28.

was not".[22] Following the particularisation of count 1, defence counsel stated there was no concern about count 1 being the third occasion.

[108] The appellant's submission that the late particularisation of count 1, something which defence counsel sought at trial, resulted in a miscarriage of justice because the defendant was deprived of the opportunity to fairly test that allegation against him. Defence counsel at the pre-record had a complete and detailed report of the child's allegations concerning touching on three, potentially four occasions.

[109] That Defence counsel's awareness of the allegations made is plainly evident by the careful and thorough cross-examination of the complainant at the pre-record. In the cross-examination concerning the touching in the pool, the subject of count 1, the following question was put to the complainant:[23]

> "DEFENCE COUNSEL: And you told the police officer that that had happened three and possibly maybe four times that you were - - -
>
> CHILD: Yes."

[110] There was also detailed questioning as to the methods of the touching.

[111] The above summary amply demonstrates that the relevant issues were known and addressed by defence counsel in cross examination of the complainant. Further, the jury were specifically directed that in order to convict the appellant of count 1, they must be satisfied beyond reasonable doubt that the third occasion of touching by the appellant had taken place in the pool on that day.

[112] There is no prospect the appellant was denied a fair chance of acquittal in such circumstances. Ground 1(a)(i) of appeal fails.

Appeal ground 1(a)(ii) – verdict is unreasonable

[113] Having regard to the contents of the pretext telephone conversation, it was open to the jury to reject the appellant's denials of ever having moved the complainant's togs and touched her vagina whilst throwing her into the pool. That rejection was open, notwithstanding the appellant's evidence he was in Dalby on 26 June 2016. The jury may well have concluded the date nominated by the complainant's grandmother was an error.

[114] Once the jury rejected the appellant's evidence, the evidence of his wife and of the character witnesses did not assist the jury in a material determination of his guilt of the offence in count 1. Whether the jury was satisfied beyond reasonable doubt of the appellant's guilt of that count rested squarely upon the jury's acceptance of the complainant's account as both reliable and accurate.

[115] A consideration of the complainant's evidence, and of the other evidence establishes that there was ample evidence to satisfy the jury beyond reasonable doubt that the appellant had, as the complainant swore, moved her togs and touched her vagina on three occasions, including the third occasion, the subject of the particularisation of count 1.

---

22 AB vol 2, 197/39-44.
23 AB vol 2, 22/18-19.

[116] The complainant gave consistent evidence of three occasions of touching of her vagina by the appellant whilst playing the Superman game in the appellant's pool. The consistency of that account was supported by the evidence of the preliminary complaint witnesses. It was a matter for the jury, which was properly directed that before it could convict the appellant of count 1, it had to be satisfied beyond reasonable doubt that all three occasions of touching had occurred and were deliberate, to accept or reject the complainant's evidence. The directions to the jury emphasise the jury's need to scrutinise the evidence of the complainant with care.

[117] An independent review of the record of the proceedings, establishes that it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt of count 1, particularly when regard is had to the advantage enjoyed by the jury in having seen and heard the witnesses give evidence at trial.[24]

[118] This ground also fails.

Appeal ground 1(b) – Inconsistent verdicts

[119] In order to succeed, the appellant must satisfy the appeal court "that no reasonable jury who applied their mind properly to the facts in the case could have arrived at the various verdicts."[25]

[120] In *R v GAN*[26] Fraser JA summarised the relevant principles related to appeals on the basis of inconsistent verdicts as follows:

> "The courts afford respect to the jury's constitutional role in determining guilt or innocence at trial. An appellate court will not lightly conclude that there is an inconsistency between jury verdicts which justifies the court in setting aside a guilty verdict. In *MacKenzie v The Queen*,[27] Gaudron, Gummow and Kirby JJ said:
>
> > '…[I]f there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury.'
>
> In *R v CX*https://www.queenslandjudgments.com.au/case/id/76612_ftn8,[28] Jerrard JA referred to a number of matters of principle that were settled about an appellate court's assessment of claims that verdicts were inconsistent, including:
>
> > '1. Where inconsistency is alleged as to verdicts of acquittal and conviction on different counts, the onus is on the party alleging that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the

---

24 *R v Baden-Clay* (2016) 258 CLR 308 at 329.
25 *R v Bond* [2018] QCA 130 at [96]-[98] per Boddice J.
26 [2012] QCA 50 at [37] – [40].
27 (1996) 190 CLR 348 at 367.
28 [2006] QCA 409 at [33].

performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. Where that inconsistency rises to the point that the appellate court considers that intervention is necessary to prevent possible injustice, the relevant conviction will be set aside.

2. Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts?

3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent in the sense described, and if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted. …

4. The view may properly be taken in a criminal trial that different verdicts, claimed to be inconsistent, reveal only that the jury 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 reasonable doubt. Alternatively, an appellate court can conclude that a jury took a merciful view of the facts on one or more counts, a function which is open to a jury.'

In *R v Smillie*,[29] Holmes J (as her Honour then was) identified grounds upon which verdicts may rationally differ, including differences in the quality of the evidence on different counts:

> 'The jury may have found the quality of the crucial witness's evidence variable while accepting it as generally truthful. For example, the witness may have exhibited faulty recollection on some points or been able to provide more particularity about the details of some events than others. A complainant may have failed to mention some offences in his or her original complaint, giving rise to a question about the accuracy of later recollection. The witness may have been given to exaggeration in some instances, or there may have been an inherent unlikelihood to some aspect of the evidence, which casts doubt on its accuracy in those respects, but not of the witness's general honesty…' (citations omitted)

It is also relevant here to bear in mind that verdicts of acquittal on some counts do not necessarily indicate that the jury found that the

---

29 [2002] QCA 341; (2002) 134 A Crim R 100 at 106-7 [28].

> events recounted by the complainant did not occur; they might show only that the jury was not satisfied to the criminal standard of proof that the acts alleged in those counts occurred at the times, or in circumstances, particularised by the prosecution."[30]

[121] The time period which elapsed between the two games is not the subject of specific evidence. It cannot be inferred it was immediate or occurred over an "uninterrupted period" as was the case in *R v Bond*.[31] It is therefore possible that the jury accepted that the exposure, the subject of count 2, was intentional, because of a finding that the appellant placed the complainant's hand on his penis; but that the jury was not prepared to find that any continuing or subsequent exposure had been intentional. Upon that basis, the guilty verdict on count 2 was not inconsistent with the not guilty verdict on count 3.

[122] Further, unlike the complainant's evidence of the initial exposure of the penis and placement of her hand on that penis by the appellant, the complainant's evidence of continuous exposure of the penis after her hand had been placed on the penis by the appellant, was not supported by the preliminary complaint evidence. This lack of support in that aspect of the complainant's account, provides a logical and rational basis for the differing verdicts reached by the jury on counts 2 and 3.

[123] Rather than suggesting the jury have been unreasonable and illogical, when reference is had to the difference in the evidence, the verdicts on counts 2 and 3 demonstrate the jury's careful application of the requisite criminal standard of proof beyond reasonable doubt to each count separately.

[124] This ground also fails.

Order

[125] We would order the appeal be dismissed.

---

30 See *R v SBL* [2009] QCA 130 at [32], per Applegarth J, Margaret Wilson J and Chesterman JA agreeing.

31 [2018] QCA 130 at [100] per Boddice J.