SUPREME COURT OF QUEENSLAND

CITATION:	*R v MDC* [2018] QCA 332
PARTIES:	**R** **v** **MDC** (appellant)
FILE NO/S:	CA No 308 of 2017 DC No 1661 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 15 December 2017 (Butler SC DCJ)
DELIVERED ON:	30 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2018
JUDGES:	Holmes CJ and Morrison and McMurdo JJA
ORDERS:	**1. Appeal allowed.** **2. Set aside the conviction on each count.** **3. Acquit the appellant on each count.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted by a jury of nine counts of indecent treatment of a child under 12 and one count of rape – where the complainant on each count was the appellant's niece – where there were inconsistencies between the complainant's evidence and the evidence of other witnesses in relation to three of the charges – where those inconsistencies cast doubt over the complainant's testimony overall – whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the complainant's evidence was played to the jury on the first and second days of the four day trial – where the jury retired in the morning of the third day – where, on the afternoon of the third day, the jury asked to re-watch the entirety of the

complainant's evidence – where, after the jury finished watching the complainant's evidence for a second time, the judge directed against giving disproportionate weight to the complainant's evidence because it had been played twice, that the jury had to bear in mind all the evidence in the case and to consider any "consistencies or inconsistencies" between the evidence of the complainant and the other witnesses – where the jury retired again at around midday on the fourth day and returned with a verdict of guilty on all charges at around 2.15 pm that day – where the appellant submits that the judge's directions were inadequate, because fairness required the jury to be given again the directions which they had been given in the summing up, which included a *Longman* direction and the identification of some of the major inconsistencies and inaccuracies in the complainant's evidence – whether there was a miscarriage of justice as a result of the jury not being properly redirected after the complainant's evidence was replayed

Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited

COUNSEL: P J Callaghan SC for the appellant
D Nardone for the respondent

SOLICITORS: Quinn & Scattini for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of McMurdo JA and with the orders he proposes.

[2] **MORRISON JA:** I have had the advantage of reading the draft reasons prepared by McMurdo JA. I agree with his Honour's reasons and conclusion in respect of ground 2 of the appeal concerning an alleged miscarriage of justice based upon the directions to the jury.

[3] However, I have respectfully come to a different conclusion in respect of ground 1, that being that the verdicts were unreasonable. As mine is the minority view, and in light of his Honour's synopsis of the evidence, I am able to state my reasons in shorter form than might otherwise be the case.

[4] Counts 1 and 2 both concerned incidents which the complainant alleged had occurred when she was in the appellant's computer room, using an application on his computer to do some "paintings" on it. The complainant said that she usually sat on the appellant's lap in the computer room. As to the first occasion she said that the appellant "touched my butt like squeezed it". She said that occurred inside her clothes but on the outside of her underwear. When pressed to give a more detailed description of the event she said that the appellant "squeezed it and rubbed it a little bit".

[5] The complainant's evidence about Count 2 was similar to Count 1, except that this time "it went to the front part like in between my legs". She described that occasion as being one where her cousin, D, was absent because "she had Karate or something on that day", and the appellant's wife was absent, working at Kmart. The complainant said that the appellant told her that he had "this new thing and it's a sort of pencil thing you can write on the pad and it comes up on the computer", which he wanted to show her. Once again she sat on his lap, at which time he "reached … in under the clothing in between my legs". The complainant said that he rubbed his fingers on her vaginal area.

[6] There was unchallenged evidence at the trial that the complainant did spend time alone with the appellant in his computer room, and sitting on his lap. That evidence came from the complainant's mother and father, and her two brothers. The father estimated that the appellant took the complainant into the computer room to do paint and drawing on the computer "about fifty per cent of the time we used to go there". Each of the mother and father, as well as the complainant's two brothers estimated that the complainant would be in the computer room with the appellant for about twenty minutes, or more.

[7] All of that unchallenged evidence can be contrasted with the evidence given by the complainant's cousin, D. I will return to her evidence in more detail shortly, but at this point it is sufficient to note that her evidence was that the complainant would "very rarely" play on the computer in the computer room, though she said "she has used it". She explained that to mean that she had only witnessed it happening a couple of times. However, she said she had never seen the complainant and the appellant together in the computer room, nor the complainant ever sitting on the appellant's lap.

[8] Count 3 was the charge of rape. The complainant said that it occurred on an occasion when her brothers and D were swimming in a neighbour's pool. The complainant said she could not swim so she went back to the appellant's house, where the appellant got her to participate in a blindfold game which involved identifying the flavour of something put in her mouth. The complainant also identified a timeframe for Count 3, by reference to the fact that it was a few days before she received a particular doll on her sixth birthday. The doll was "one of those like human ones you could walk around". She recalled that the doll was not given to her on the day of her birthday, but a week or so after it.

[9] The complainant described that the blindfold used in the game as like a cloth or tablecloth. The appellant pretended that he was using his finger with something on it, when in fact it was his penis. She saw that when the blindfold "went to the side". She described the substance as "like a chocolate sort of taste". When asked what kind of things the appellant would usually put on his finger for the purposes of that game she answered "like Nutella or umm like peanut butter or something like that". When asked to identify who had previously played that game she said she had only seen it played once and she was "pretty sure that was my cousin and my two brothers but I could be wrong but I think it was them". When pressed to identify the substance that she had described as tasting a bit like chocolate, she said "I think it was Nutella". She said the appellant's family had Nutella in their pantry, which she recalled from being there and making sandwiches. She said she could taste and smell the substance "a little bit", so she "knew it was Nutella or something".

[10] In cross-examination the complainant said she was certain the blindfold event happened when she was six, and when her brothers and D were swimming in the neighbour's pool. When pressed to identify others who had participated in the game prior to that event she identified herself, her brothers and D. Pressed as to whether she was sure she had played the game with her elder brother she said "I'm pretty sure", adding that she knew she had played it with other people and she was "pretty sure" it was her two brothers. Pressed as to the identity of the substance used, the complainant said that she was "pretty sure" that it was Nutella, it had a chocolate taste because she had told the appellant she didn't like the taste of chocolate, but on this occasion the appellant used Nutella.

[11] The complainant's mother gave evidence that in February 2015 she was told about the appellant playing a game with the complainant "with a mask", which involved him putting a mask over her eyes. She said the complainant told her that she had to hold the appellant's finger, but it wasn't the finger she was holding. The explanation came on an occasion when the complainant was "crying and shaking and … really upset", and when the complainant "found it very difficult to tell us things".

[12] The complainant's father also gave evidence that on that occasion the complainant was crying and shaking.

[13] The complainant's brothers each said that they had swum in the neighbour's pool, together with D. Each of them said that it was not frequent, the older brother nominating once or twice, and the younger brother remembering only one occasion. The younger brother said the complainant was unable to swim. Neither of the brothers could recall playing a blindfold game with the appellant.

[14] It was not put to either of the complainant's brothers that there was no occasion when they and D swam together in the neighbour's pool. Nor was it put to either of the brothers that there was no occasion when the complainant was present when they were swimming in the pool.

[15] The evidence of the brothers can be contrasted with that of D. D confirmed that her father did play a blindfold game where the essence of the game was to have something put in the mouth and the player had to guess what it was. However, she disagreed that he would use his finger, saying it was "always on a spoon". Further, D said that she had never played that game with the complainant or with either of the complainant's brothers. Furthermore, D said that it was only "extremely rarely" that she swam in the neighbour's pool, and never when the complainant was there, nor either of the complainant's brothers. D also said that she never had a conversation with the complainant about the blindfold game.

[16] In cross-examination D said that they "never ever bought Nutella" and "none of us liked peanut butter, so it was never in the house". She also said that they did not have chocolate spread because her mother "didn't really like buying a lot of sugary stuff for me as a child".

[17] Counts 4-7 and 9-10 have been adequately summarised by McMurdo JA below: see paragraphs 54, 55, 60 and 61 of his Honour's reasons.

[18] Count 4 occurred at a time when the complainant identified she was playing the piano in her room, and the appellant was trying to show her a song on the keyboard.

While she was practising he rubbed her on the chest, under her shirt. Count 5 occurred in the same sequence of events, which the complainant described as being rubbed on her "butt". Because she was sitting down with her legs crossed, "it just went like just down to the top of my butt". She said that was on the outside of her clothes.

[19] Counts 6 and 7 were identified by the complainant as occurring on an occasion when the appellant invited her to his car because he said he had a present for her. His car was in a carpark. The present was a "Bratz magazine" which he gave her while she was standing next to the driver's seat with the driver's door open. It was then that the appellant rubbed her chest on the outside of her clothing (Count 6). The appellant then ran his hands down her front and in between her legs (Count 7). She described that as being on the inside of her tights and the inside of her underwear. When pressed in her police interview to identify just precisely where she was touched she said it was outside the vaginal lip area, but not at any time through the lips and "he never put like his finger inside".

[20] The complainant's mother confirmed that the complainant had a Bratz magazine or diary, as did the younger brother.

[21] The complainant's evidence in respect of Count 8 was that it occurred on a New Year's Eve, at the appellant's house. Her family were staying the night at the appellant's house because the adults had been drinking. In her police interview the complainant said she couldn't stay up until New Year's Eve "so I just went to bed early". The complainant slept on a mattress on the floor and D slept on the bed next to her. She woke up "a few hours later" and the appellant was licking her vagina. She identified the particular New Year's Eve by the fact that she was "around nine" at the time. When asked to remember what time she went to bed she answered "I think it was around 10".

[22] She described being aware of what occurred in this way:

(a) "Well, when I woke up I … felt that something was like down there … and I looked down and it was [the appellant] licking my vagina";

(b) she could feel her pants down around her knee area;

(c) she "just felt something weird … something wet … I looked down and it was dark but … I knew it was [the appellant] cause there was a little bit of moonlight that … went into the room";

(d) the appellant was lying on his stomach between her legs, licking around her vagina but not licking inside it;

(e) he was licking "in between the lips sort of part", but he only used his tongue;

(f) it went on for "maybe five minutes" after she woke up;

(g) when asked what she did when she saw the appellant, the complainant answered "I didn't really do anything well I wasn't sure if he was actually if it was a dream or not … because [D] was right there I didn't think he was going to do that if his daughter might have woken up saw that but yeah it wasn't a dream just so you know"; and

(h) the appellant did not know that she had woken up.

[23] In cross-examination the complainant confirmed that before she had come in to give her pre-recorded evidence she had been shown a video clip of the New Year's Eve party of 2008-2009. The video clip showed the celebration of the arrival of the New Year and on that basis it was put to the complainant that it was clear she did not go to bed early. She responded that it was "still pretty early for …" at which point her answer was cut off by the next question. When pressed on the fact that she had told police that she had gone to bed at about 10 pm the complainant responded "Well, I know that I left early", but accepted that "it must not have been 10".

[24] When D gave evidence she confirmed that her room was the green room as shown on a plan.[1] There was also a blue room in which guests would stay when parties were on. In cross-examination it was put to D that there was a single bed with a pull out mattress underneath.[2] D agreed. It was put to her that that the rollaway type bed used to be in her own room. D said that she was not sure and could not remember that.

[25] The complainant said the events the subject of count 9 occurred when she was washing D's guinea pigs in the laundry, and the appellant came in and felt her breasts under her shirt. She said she was about nine or ten at the time, and not wearing a bra. She identified the way in which it occurred, with the appellant standing to her left side, rubbing her right breast with his left hand. In cross-examination it was not suggested to the complainant that she had never washed the guinea pigs. Each of the complainant's brothers gave evidence that D had guinea pigs and that the children, including the complainant, helped to wash them. That evidence can be contrasted with the evidence of D. She said she owned guinea pigs but that they were never washed by the complainant, or either of her brothers. Her response to one question, namely whether the older brother had washed the guinea pigs, reflected aspects of her evidence generally. The response was "No, absolutely not".

[26] The evidence of the complainant's boyfriend, M, was only as to the preliminary complaint. Two weeks after he started dating the complainant in September 2013, the complainant told him about "sexual kind of things". He was asked if he could recall the exact words used, and he responded "He used to just play around with her down there …". The complainant did not say who it was, nor any specifics about where things happened. When asked if the complainant went into detail about where she was touched, M's answer was "Just the bottom".

[27] In cross-examination M agreed that a week or two after the complainant had gone to hospital with chest pains she told M, and the complainant's mother and father and her brothers, this:

> "When I was about five years old she [sic] played around with me. It went on till I was 10. That night my father saw me naked was the night [the appellant] put his tongue down my private part."

[28] That comment was put to the complainant in cross-examination and denied by her on the basis that she definitely did not say it. It was not put to the complainant's mother or father, or her brothers.

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1 The complainant said that she had gone to sleep in the green room, with D.

2 Referred to as a rollaway type bed.

[29] D's evidence was evidently rejected by the jury. It was open to them to do so given the nature of her evidence which, in my respectful view, may well have been considered to go beyond an understandable inclination towards her father's case. The jury might well have thought that many of D's answers reflected an attempt to minimise the significance of any assertion that would harm her father. Some examples will suffice to make the point:

(a) contrary to other witnesses she said that the complainant "very rarely" used the computer in the computer room, saying it was only a couple of times;

(b) contrary to other witnesses she said she never saw the complainant together with the appellant in the computer room, nor the complainant ever sitting on her father's lap;

(c) she said that it was only "extremely rarely" that she had swum in the neighbour's pool, again nominating two times as a maximum, at the same time saying that neither the complainant nor her brothers were ever there;

(d) she said that neither the complainant nor her brothers ever washed the guinea pigs, using the phrase "absolutely not" when responding about the younger brother; and

(e) she denied ever having a conversation with the complainant about the blindfold game, saying "that never happened".

[30] Those matters may well have been seen by the jury as discrediting D's evidence, particularly as it was so at odds with other witnesses. They also may have taken the view that D's evidence about when the computer pen program was brought into the appellant's house was doubtful. It was only that evidence which suggested that the complainant's recall of the time period for Count 2 might be unreliable. The indictment charged that offence as having commenced in a period ending on 14 May 2006. The indictment was amended to extend that period until 1 January 2008. Part of the reason for that was D's evidence as to when the program was brought back from Scotland. However, the responses to that issue were given in answer to leading questions in cross-examination:

> "OK. Listen, do you remember that pen program that got brought back from Scotland? --- Yes.
>
> Would that have been about, what, 2007, wasn't it? --- Correct, yes, in the month of November.
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> In November 2007? --- Yeah.
>
> Is that – did your dad have a trip to Scotland? --- He did, yeah. He went around October and he came back at the end of November."

[31] Although leading questions are permissible in cross-examination, the jury may have thought that the way in which the evidence was adduced detracted from the reliability of what D said.

[32] The appellant's contentions as to unreasonable verdicts focused on Counts 2, 3 and 8. It was said that doubts about them should have led to a doubt about the complainant's evidence overall, such that it should have been rejected in entirety, or at least, led to the jury being unable to be satisfied beyond reasonable doubt of guilt on any count.

[33] I do not consider that the complainant's evidence concerning Count 8, particularly as to her nomination of the time when she went to bed and the events when she woke up, was such that the jury would have been compelled to reject or doubt the evidence. It is true that in her police interview the complainant recalled that she went to bed at about 10 pm and the video tape showed she was still at the party when the arrival of the New Year was celebrated. In her cross-examination she accepted that the video demonstrated it was not 10 pm but she maintained that she went to bed early, and that midnight was "still pretty early for …". It was open to the jury to conclude that simply demonstrated an error of recollection rather than some intractable problem with her reliability.

[34] Further, her evidence about the events when she woke up did not have to be seen by the jury as indicating uncertainty about what happened on the basis that she was unsure it was a dream. What the complainant said in her police interview was that she woke up to find the appellant licking her vagina, and that continued for some minutes thereafter. Moreover, the "dream" was in her explanation of why she did not do anything at the time. It was open to the jury to understand that comment as meaning that when the complainant first woke up she wasn't sure whether it was a dream or not, but discovered it was not, in fact, a dream as the next few minutes of activity made quite clear. In my respectful view the jury were not compelled to conclude that the complainant was describing the entire incident as being possibly a dream, as opposed to her initial reaction.

[35] Nor was it necessarily the case that the jury should have doubted the complainant's account of events simply because the complainant was lying on the mattress next to where D was in bed. The complainant's evidence was that it was some hours after they had gone to bed, and the room was dark. Nothing whatever in her account suggested noise or undue movement that might have attracted attention.

[36] It is true that the complainant's boyfriend, M, accepted that the complainant had previously said that that night was the same night as when her father had seen her naked. However, the jury were not compelled to accept the evidence of M, especially as on his own account he was told very little. Further, the complainant denied saying what was attributed to her by M, and it was not put to anyone else who participated in the conversation.

[37] Further, the jury were not necessarily compelled to discount the complainant's evidence simply because when M answered the question where the complainant said she was touched by using the phrase "just the bottom". The jury did not have to accept that as meaning the complainant's bottom, as opposed to just the bottom half rather than the top. Such a construction would sit conformably with his previous answer that the appellant played around with her "down there".

[38] I am respectfully unable to agree that, allowing for the advantages enjoyed by the jury, there remained a significant possibility that the events of Count 8 did not occur. In reaching this conclusion I am mindful of what the High Court said in *R v Baden-Clay*.[3]

[39] The reservations I have expressed carry through into a consideration of Count 3. There was a deal of evidence which supported the complainant's account. If the jury rejected D's evidence, as they were entitled to, then there was support for the

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3 *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, at [65]-[66].

complainant's version that this event occurred on an occasion when the complainant's brothers and D were swimming in the neighbour's pool. There was no challenge to the complainant's evidence that she was not swimming, and the evidence of one of her brothers was that she could not swim. There was support for the fact that the appellant did play a blindfold game which involved the player having a substance put in their mouth and having to identify what it was. It was only D's evidence that suggested: (i) that she had never played the game with the complainant; (ii) the complainant's brothers had never played the game; and (iii) in her experience a finger was not used, but rather a spoon.

[40] If the jury rejected that part of D's evidence, as they were entitled to, that left the jury with the evidence from the complainant, and the evidence from her mother which included the fact that the complainant's first report of any events included reference to a blindfold game. If she had never played it, and D never told her about it, both of which were parts of D's evidence, the jury might have wondered how she knew about it. Further, the jury did not have to doubt the complainant's evidence where it differed from that given by her mother, simply because that account was different from that given by the complainant in her evidence:[4] (i) the account was given to her mother when the complainant was an a highly agitated state; (ii) at the time she was not disposed to revealing all the facts; and (iii) the mother may have misheard her in those circumstances.

[41] The jury had the unquestioned advantage over this Court, in that they saw and heard the evidence of the witnesses apart from the complainant. More particularly, they were in a position where they saw and heard that extra evidence at the same time as they saw and heard the pre-recorded evidence of the complainant. The critical features of the support or lack of support from the evidence of the other witnesses fell to be assessed by the jury in a way this Court cannot replicate.

[42] In my view it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the appellant's guilt. More particularly, I am unpersuaded that it was not open to the jury to be satisfied to the requisite standard in respect of Counts 3 and 8. Put another way, I am unpersuaded that the jury necessarily should have had such doubt about the evidence concerning Counts 3 and 8 that it not only infected those counts, but all other counts with which the appellant was charged.

[43] I would have dismissed the appeal.

[44] **McMURDO JA:** After a four day trial, the appellant was convicted of the 10 offences charged on the indictment, which were nine counts of the indecent treatment of a child under the age of 12 years and one count of rape. It was the same complainant in each case, who was the appellant's niece. He was sentenced to various concurrent terms of imprisonment, the longest being one of three years suspended after 18 months for the rape offence.

[45] He appeals against those convictions upon two grounds. The first is that the verdicts were unreasonable. As I will discuss, the effect of that argument is that it was not open to the jury to be satisfied of the appellant's guilt on three of those charges (including the rape charge) because of inconsistencies between the

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[4] The complainant's mother gave evidence that she had been told the blindfold game consisted of "… she had to hold his finger, but she said it wasn't his finger she was holding" (AB 91).

complainant's evidence about the three charges and the evidence of other witnesses, from which the jury should have been in doubt about her testimony overall.

[46] The second ground of appeal complains of a miscarriage of justice, it is argued, from the jury not being properly directed, when after the summing up, the entire of the complainant's evidence was replayed to them.

The prosecution case

[47] The offences were alleged to have been committed during various periods, the earliest of which being between 13 May 2004 and 14 May 2006 and the latest being between 13 May 2009 and 14 May 2011. The complainant was born on 14 May 1999.

[48] The prosecution case was entirely dependent upon the jury's acceptance of the complainant's evidence, which consisted of her statement to police on 17 March 2015[5] and her oral evidence which was recorded on 25 July 2017. The trial was conducted over four days commencing 12 December 2017.

[49] The complainant lived with her parents and her two brothers, who are about four years and six years older than her. The appellant is the brother of the complainant's father. The appellant and his wife have a daughter who is four years older than the complainant. I will refer to her as D.

[50] The first of the offences charged was an event which happened when the complainant's family was visiting the appellant's house, as regularly occurred. The complainant said that she was around five or six years old at the time. When visiting the appellant's house, the complainant would do some "painting" on the appellant's computer, usually sitting on the appellant's lap as she did so. She said that on one of these occasions, the appellant "touched [her] butt" and "squeezed it and rubbed it a little bit".

[51] Count two was an allegation of a similar event, although this time the appellant put his fingers underneath her underwear and rubbed her vagina. In her s 93A statement, she told police that this incident occurred "maybe six months" from the first. Originally the indictment charged this offence as having been committed between 13 May 2004 and 14 May 2006, but that was amended so that the period extended until 1 January 2008. The complainant said that on this occasion, she was encouraged to go to the appellant's computer when he told her that he had a "sort of pencil thing" which would allow her to "write" on the computer.

[52] Count three was the charge of rape. It was alleged to have occurred between 28 February 2005 and 14 May 2006, again at the appellant's house. The complainant was more precise in her evidence, saying that it occurred just a few days before her sixth birthday (14 May 2005). She said also that it occurred a "couple of months" after count two.

[53] She described the event of count three as follows. She was at the appellant's house with her two brothers when they and her cousin D went swimming in a neighbour's pool, and the complainant and the appellant became alone in his house. He then played a game with her, by which she was blindfolded and she had to identify a substance which he was to put on his finger and insert into her mouth. She said that she had played this game before at the appellant's house, with the other children. She said that she could taste something like chocolate, before the blindfold started to slip off

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5 Tendered under s 93A of the *Evidence Act* 1977 (Qld).

which enabled her to see that the substance, which she was adamant was "Nutella", was on the appellant's penis rather than on his finger. In describing this event to police, she said that the appellant's family always had Nutella in their pantry.

[54] The events which were the subject of counts four and five occurred on an occasion when the appellant was at the complainant's house. She said that she was "maybe seven or eight" at the time. She was in her bedroom playing on a keyboard, when she said the appellant came in, sat down next to her and "rubbed [her] chest". The complainant's father called out for the appellant who answered that he would be with him in a minute, after which the appellant "started rubbing [the complainant's] butt".

[55] The events the subject of counts six and seven were said to have occurred on the one occasion, which was the day before the complainant's birthday when she was "maybe eight or nine". The two families were at a sports centre when the appellant asked the complainant to accompany him to his car so that he could give her a present. She was standing by the driver's side door and he was in the driver's seat, when she said he rubbed her chest before undoing the tights she was wearing and rubbing his hand between her legs. She said the episode was interrupted by the approach of her mother, and nothing was then said before the appellant, the complainant and her mother walked back to the sports centre. This was a public carpark at a time when there would have been others coming and going. The complainant's mother could not recall such an occasion when she gave evidence in the prosecution case.

[56] The offence the subject of count eight was alleged, by the particulars given by the prosecution, to have occurred at the appellant's house during a New Year's Eve party when the complainant was "around nine" years old. The complainant told police that she went to bed early, at around 10 pm, as did D who was sleeping in the same room. D was on the bed and the complainant was sleeping on a mattress on the floor next to the bed. The complainant said that some hours later, she woke to find that her pants were down and the appellant was licking her vagina. She said she did nothing at the time because she was not sure whether she was dreaming. Her evidence was that this conduct continued for about five minutes after she awoke.

[57] Shortly before her pre-recorded evidence was given in July 2017, the complainant had been shown a video recording of events at a party at the appellant's house on New Year's Eve 2008. In cross-examination she was clear that this was the party which she described as the occasion for the incident the subject of count 8. The video recording contained footage of streamers and people celebrating the arrival of the new year, and it showed both the complainant and D then present. The complainant did not suggest that this was another New Year's Eve party. She conceded that she had not gone to bed around 10 pm, but maintained that she left the party "early".

[58] In cross-examination she was asked about what she had said to her boyfriend, whom I will call M, about this incident. It was put to her that she had told him that the occasion on which the appellant performed oral sex on her was on a different night at the appellant's house, when her father had found her sleeping naked. M gave evidence that she said that to him and her family in 2015, at a time which was just

after she had made the complaint to her mother and not long before she was interviewed by police. But she denied that she had said that to anyone.

[59] The complainant's father gave evidence that there was an occasion when he had seen her sleeping naked at the appellant's house (which had an innocent explanation) but he was certain that it was not during a New Year's Eve party.

[60] The event the subject of count nine was said to have occurred at the appellant's house, where the complainant's family were present for a barbeque. The complainant said that she was washing D's guinea pigs in the laundry when the appellant came into the room and felt her breasts under her shirt. She said that this occurred for just a few seconds before one of her brothers came into the room.

[61] Count 10 alleged that on another occasion at the appellant's house, when the two families were socialising, the appellant asked her to go into the computer room. At first she refused but then went with him to the room where after asking her about her boyfriend, he pulled her shirt down and rubbed her breasts.

[62] In September 2013, the complainant said to M that "he" used to "play around with her down there", without identifying the man involved. When asked whether the complainant had gone into detail about where she was touched, M answered "just the bottom". This was the only conversation between the complainant and M on the subject before she gave her statement to police. The complainant told police that she had identified the appellant in what she had said to M.

[63] In February 2015, the complainant took herself to a hospital, saying that she was suffering from stomach cramps. The complainant's mother drove to the hospital to see her and on the way, picked up M. He then told her something which, it was to be inferred, was about the complainant being sexually assaulted some years earlier. Later that night, when the complainant was at home, her mother raised the subject. The mother testified the complainant responded by saying that the appellant "had been doing things to her for a long time". The complainant told her mother "a few things that had happened", and in particular, that the appellant "had been touching her" and that "one night he was licking her down – down there". The mother said that the complainant did not say where she had been touched and the complainant was "crying and shaking and … really upset", finding it "very difficult to tell us things". After that conversation, the complainant and her mother immediately spoke to her father. The mother's evidence was that the complainant then said that the appellant "had been doing things to her for a few years" and that "she whispered about getting licked and touching her and playing a – a game with a mask." The mother's evidence about this conversation was he put a mask on her and she was to hold his finger, except that "it wasn't his finger she was holding".

[64] The complainant's father testified that he recalled this occasion, had no specific recollection of what the complainant had said, but recalled that the complainant was crying and shaking.

[65] By the time she complained to her parents, the complainant was at odds with some of her extended family, especially the appellant and his wife. At Christmas 2014, she posted messages on Facebook saying that she was not going to any more "family things", because she had not received Christmas presents for three or four years, whilst her older brothers had received gifts from "the aunties and uncles" until they were 16.

[66] Each of the complainant's brothers gave evidence in the prosecution case. The older of them had no recollection of playing a blindfold game with the appellant. He could recall swimming in the neighbour's swimming pool "once or twice", when he was swimming with his brother, D and the complainant, and said that the appellant would have been there at the time. He recalled that D had pet guinea pigs which all of the children would sometimes wash.

[67] The other brother had no recollection of playing a blindfold game with the appellant. He could recall swimming in the neighbour's pool with his brother, D, the complainant and the appellant being present. He had no particular recollection of the complainant and the appellant together leaving the pool at any stage. He recalled the complainant helping to wash the guinea pigs.

[68] D gave evidence in the prosecution case. In evidence in chief, she recalled a blindfold game which she would play with her father, the appellant. She was asked whether the game would involve the appellant putting something on his finger, getting the child to taste it to guess what it was, and she answered "I don't agree with the finger thing. It was always on a spoon." D said that she would have been somewhere between eight and 10 years of age when this game was played. She is four years older than the complainant. She said that she did not play that game with her father and the complainant, or with the complainant's brothers. Again in evidence in chief, she recalled swimming in the neighbour's pool but no more than twice. She said that the complainant was not with her on those occasions and nor were the complainant's brothers. She said that her cousins would play with the guinea pigs but that they did not wash them. In evidence in chief, she said that there was only one occasion in which the complainant slept over at her house when, she said in cross-examination, the complainant was jumping up and down on the bed, taking her clothes off and just "mucking around". D could recall a "pen program" which her father had brought back from a visit to Scotland in November 2007. She said that the family had never had Nutella, peanut butter or any "chocolate spread" in their house.

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

Unreasonable verdicts?

[70] The appellant's argument focusses upon counts two, three and eight, from which it is then said that a doubt about them should have left the jury in doubt about the complainant's evidence more generally, so that each of the convictions should be set aside.

[71] It is submitted that an integral part of the complainant's testimony about count two was the evidence about the use of the "pencil". Originally the indictment charged this offence as having been committed in a period ending on 14 May 2006, consistently with the complainant's statement to police that the incident occurred perhaps six months from the first incident at which time the complainant was aged around five or six. The argument emphasises the inconsistency between this evidence and that of D, who provided a particular basis for her recollection that the pencil had been acquired in November 2007. Of course the jury was not obliged to accept D's evidence in that respect. D may have been mistaken in her recollection of when it was that her father made the trip to Scotland (she would have been about 12 at the time) or she may have been told about the timing of that trip by one or

both of her parents. But if D's evidence was accepted on that point, that would have left the jury in doubt about whether the incident occurred at a time prior to the middle of 2006. But it is another thing to say that the jury should have been left in doubt as to whether the incident occurred at all.

[72] There were more substantial arguments which were put to the jury to challenge the complainant's evidence of counts three and eight.

[73] Dealing first with count eight, the complainant was forced to agree that her evidence that she and D had gone to bed at around 10 pm was incorrect. Her comment that, nevertheless, she had gone to bed "early" was not compelling.

[74] There was the evidence of her boyfriend, that she had said to him that the episode of oral sex had occurred on a different occasion at the appellant's house, when her father had found her sleeping naked. There was such an occasion, said her father, but it was not a New Year Eve's party and D's evidence supported the father's evidence in that respect. The complainant denied that she had told her boyfriend that this was when the oral sex occurred but the jury had to consider how likely it was that he could have been mistaken in that respect. He was still her boyfriend when he gave that evidence at the trial. All of this evidence should have left the jury in doubt as to whether the complainant was accurately recalling such an incident on the night of the New Year's Eve party.

[75] There were further and important aspects of the complainant's testimony about count eight which detracted from the likelihood that it was true. The event was said to have occurred next to where the appellant's daughter was sleeping, and whilst many others were in the house. And importantly, the complainant said that as the event was happening, she was unsure if it was a dream.

[76] All of these matters, taken in combination, were cause for particular concern about the accuracy of her testimony in the proof of count eight. Allowing for the advantages enjoyed by the jury, my view is that there remained a significant possibility that this event, as the prosecution had particularised it, did not occur. In my conclusion it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of this offence.

[77] The doubt which should have been held by the jury in respect of count eight should have affected the jury's consideration of the other counts, including count three. And there were further reasons to doubt the complaint on that charge. There was the inconsistency between the initial complaint to the mother and what the complainant said to police a few days later about count three. The mother's recollection was that the complainant said that she had been holding the appellant's penis. If the mother's recollection was accurate, it was damaging to the prosecution case that the appellant's penis had been in the complainant's mouth. It is unlikely that the complainant would have been mistaken when speaking to her mother but not mistaken in her evidence. It is also unlikely that the mother would have been mistaken in her recollection in this respect: had the mother been told that the appellant had put his penis in the complainant's mouth, it is very likely that she would have recalled that in her testimony. There are other possibilities, one being that the mother misunderstood what the complainant was saying at the time, when the complainant was crying and shaking; and another being that in that distressed state, and in the presence of her parents, the complainant had not been prepared to say exactly what had occurred. But neither possibility provided a compelling reason for dismissing the effect of the mother's evidence.

[78] The complainant's brothers had no recollection of playing a blindfold game, as the complainant said had occurred on a previous occasion, which again suggested an unreliability in the complainant's evidence.

[79] D said that the game had never been played with them or the complainant. D also said that when playing the blindfold game with her, the appellant would use a spoon. D was adamant that she grew up in a house which had no Nutella or anything similar.

[80] There was no fatal tension between the evidence of the brothers and that of the complainant as to who was present at the neighbour's pool. Putting other matters on one side, the jury could have considered the brothers' testimony was not inconsistent with the complainant's version that she was first at the pool, but left whilst they were swimming. D's evidence, if accepted by the jury, was more damaging to the prosecution case. D said that none of the complainant's family had been in the pool.

[81] The jury was not obliged to accept D's testimony in its entirety. They may well have considered that D's recollection was affected by an understandable inclination towards her father's case. And the jury may have considered that if, as D said, a blindfold game had never been played with the complainant, it was remarkable that the complainant would spontaneously refer to it when first telling her parents about these things. This Court must have regard to the potential advantage to the jury from having seen and heard D's evidence as it was given.

[82] Nevertheless, I am persuaded that it was not open to the jury to convict the appellant of count three. The principal reasons for a doubt about count three are the markedly different description by the complainant of the alleged act, according to the mother's evidence, and a more general doubt about the complainant's credibility or reliability from the evidence about count eight.

[83] Further I am persuaded that in consequence of the doubt which should have been held in relation to counts three and eight, and there being no proof of the charges apart from the complainant's evidence, it was not open to the jury to be satisfied, beyond a reasonable doubt, of the appellant's guilt on any of the counts.

[84] Consequently I would allow the appeal, set aside the convictions and order that the appellant be acquitted on each count.

The other ground of appeal

[85] The complainant's evidence was played to the jury on the first and second day of the trial, concluding at about 10.45 am. There was then the evidence of the other witnesses and the prosecution case was closed. Each counsel addressed the jury and the judge commenced his summing up on that afternoon. The jury retired just after 10 am on the following morning.

[86] At about 3.40 pm on the third day, the jury sent a note asking to watch again the entirety of the complainant's evidence. The statement to police took more than an hour and half to play and the pre-recorded evidence, an hour and 10 minutes. The judge then reminded them that there was no significance in the fact that the complainant's evidence had been presented by those recordings and directed that because they would be hearing this evidence for the second time, very late in the trial and distinctly from the other evidence, it was important for them to guard

against giving it disproportionate weight. He told them that they should keep in mind the evidence of the witnesses and the other evidence in the trial and factor all of that into their assessment. The jury was then played some of the interview by police before the Court adjourned at about 4.30 pm.

[87] On the following morning, the balance of the complainant's police interview and then her pre-recorded evidence was played, finishing at a little after midday. Before the jury retired again, the judge directed as follows:

> "As I said to you before, ladies and gentlemen, what you have just heard, of course, is all the evidence, both primary evidence and also the cross-examination of the complainant. You have heard that evidence twice now, and of course, you have heard it at a very late stage in the trial. So you should guard against the risk of giving it disproportionate weight for that reason. It is necessary that when you are deliberating, you give consideration – bear in mind all the other evidence in the case. You have to decide the case upon all of the evidence, and bear in mind that the defendant through his plea, denies the allegations, and that the Prosecution bear the onus of proving his guilt.
>
> In addition to considering the evidence of the complainant which you have just heard, also remember the evidence given by the other witnesses. There was the evidence of the other members of the family, her parents, her brothers and [M]. Consider any consistencies or inconsistencies should you find them to have occurred between the complainant and those witnesses. Also remember the evidence of [D], the defendant's daughter. You might think that her evidence conflicts with that of the complainant in a number of ways.
>
> [D] said [the complainant] very rarely played on the computer in the computer room. She said that she herself never played the tasting game with [the complainant] and her father. She said when her father played it with her, he used a spoon. She said they never had Nutella or chocolate spread in the house. She said neither [the complainant] or her brothers were with her on the rare occasions she swam in the pool. She said she only recalled one night [the complainant] had a sleepover at their home. She said neither [the complainant] nor [the complainant]'s brothers ever washed the guinea pigs. And she said she never had a conversation with the complainant about the blindfold game. So think about all of the evidence, taking into account – all the evidence into account, that is, the videos that you just watched and the testimony of the other witnesses and the exhibits when you are deliberating on your verdicts."

[88] The jury retired at around 12.25 pm and returned with a verdict at around 2.15 pm on that day.

[89] The appellant's argument is that the judge's directions were inadequate, because fairness required the jury to be given again the directions which they had been given in the summing up. The judge had directed the jury according to *Longman v The Queen*.[6] He had also said that there was a need to carefully scrutinise the complainant's

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6 (1989) 168 CLR 79; [1989] HCA 60.

evidence because of "a number of apparent inaccuracies or inconsistencies" that required the jury's close attention. The judge had identified what he called "the major ones" in some detail. He had referred to the "inaccuracies" in the complainant's evidence about when she went to bed on New Year's Eve and about the timing of the acts in count two. He had referred to the inconsistency between the complainant's evidence and the mother's evidence about count six. He had referred to the inconsistency between the complainant and her boyfriend about count eight. The judge had said that the jury would also consider the differences between the complainant's evidence and those of her brothers and D on matters relevant to count three. The judge had concluded that part of the summing up by saying that because of all of those considerations, the complainant's evidence was to be approached with "special care" and they were reminded that "the only person providing an account of sexual offending is the complainant herself."

[90] The appellant's argument is that it was insufficient for the jury to be reminded, after re-hearing the complainant's evidence, that there had been evidence from members of the family and the boyfriend and that any "consistencies or inconsistencies" between their evidence and that of the complainant was to be considered. It is said that there was something wrong in the use of the word "consistencies" by the judge, because that may have tended to reinforce the effect of the complainant's evidence. It is said that to achieve balance, what was required was a repetition of what the judge had said in his summing up about the other evidence or at least a reminder of the key points. Part of the complaint appears to be that the judge made only a general reference to the evidence of the other witnesses, whilst focussing more on the evidence of D, when the evidence of the others was particularly important because of the absence of any suggestion of partiality.

[91] The question here is whether there was a miscarriage of justice as a result of the jury not being redirected, effectively as they had been directed in the summing up. This was on the fourth day of the trial, the jury having heard the other evidence and the addresses of counsel on the second day and the relevant directions from the judge on the third day. I am unpersuaded that the jury would have forgotten the important parts of the other evidence or the judge's directions about it, after they had re-heard the complainant's evidence. I am unpersuaded that the effect of replaying the entirety of the complainant's evidence, without effectively replaying the summing up, resulted in an imbalance which was adverse to the appellant's case. There was no prejudice to the appellant's case from repeating particulars of D's evidence. And there was no unfairness in the jury being reminded that they should consider consistencies as well as inconsistencies between the complainant's evidence and other evidence. I would have rejected this second ground.

Orders

[92] I would order that the appeal against each conviction be allowed and that on each count the conviction be set aside and the appellant be acquitted.