SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCG* [2018] QCA 361
PARTIES:	**R** **v** **CCG** **(appellant/applicant)**
FILE NO/S:	CA No 118 of 2018 DC No 561 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Cairns – Date of Conviction & Sentence: 19 April 2018 (Morzone QC DCJ)
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2018
JUDGES:	Philippides JA and Brown and Ryan JJ
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – MISCELLANEOUS POWERS OF COURTS AND JUDGES – SUMMING UP – where the appellant was convicted by a jury of two counts of indecent treatment of his stepdaughter under 12 (domestic violence offences) – where count 1 was particularised as the appellant putting his hands inside her pants and touching her backside for five minutes – where count 2 was particularised as the appellant telling the complainant to get into his bed, where he was naked and telling her to put her hand on his penis and moving it up and down – where in the complainant's police interview she referred to other uncharged acts when she was called into the appellant's room to hold the appellant's penis – whether there was a failure to adequately identify count 2 for the jury in the summing up such as to amount to a miscarriage of justice – whether the trial judge's summing up resulted in a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – TEST TO BE APPLIED – where the appellant was acquitted of one count of common assault which was particularised as the appellant throwing the complainant against the wall – where the appellant submitted that verdicts of guilty for count 1 and 2 were unreasonable as the acquittal of common assault was inconsistent with the

guilty verdicts on counts 1 and 2 – whether the verdict was unreasonable or cannot be supported having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the appellant was sentenced to nine months' imprisonment for count 1, 12 months' imprisonment for count 2, to be served concurrently and to be partly suspended after serving six months with an operational period of two years – where if only ground 1 of the conviction appeal is successful the appellant seeks an extension of time to appeal against sentence imposed on count 1 – where the Verdict and Judgment Record shows that the appellant was sentenced to imprisonment for nine months, suspended after having served six months – where the appellant submitted it was not the sentencing judge's intention to require the appellant to serve more than half of the head sentence and the sentence for count 1 should be varied by substituting four and a half months for six months – whether the sentence for count 1 should be varied

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
R v AAY [2016] QCA 300, cited
R v BM; Ex parte Attorney-General (Qld) [2002] 1 Qd R 274; [2001] QCA 59, cited
R v Garget-Bennett [2013] 1 Qd R 547; [2010] QCA 231, cited
R v GAW [2015] QCA 166, applied
R v KP; Ex parte Attorney-General (Qld) [2006] QCA 301, distinguished
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
R v OT [2017] QCA 257, considered
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, considered
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, distinguished

COUNSEL: M J Copley QC for the appellant/applicant
D C Boyle for the respondent

SOLICITORS: Giudes and Elliott Solicitors for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** The appellant was convicted by a jury on 19 April 2018 of two counts of indecent treatment of a child with the aggravating circumstances that the complainant was under 12 and the offence was a domestic violence offence (counts 1 and 2). He was acquitted on a count of common assault (count 4). All the counts

concerned the same complainant, who was born on 30 March 2005, and who was the stepdaughter of the appellant.

[2] The appellant was sentenced to concurrent terms of nine months imprisonment on count 1 and 12 months on count 2, suspended after six months with an operational period of two years.

[3] The appellant appeals against his conviction on two grounds:

1. A miscarriage of justice occurred because conduct alleged to constitute count 2 was not adequately identified for the jury in the summing up.

2. The verdicts of guilty were unreasonable in that the verdict of acquittal on the count of common assault was inconsistent with the guilty verdicts on counts 1 and 2. Inconsistent verdicts are a manifestation that the guilty verdicts are unreasonable.[1]

[4] The appellant submitted that, should ground 1 be established, the appropriate orders would be that the appeal be allowed to the extent that the verdict of guilty on count 2 is set aside and that there be a new trial on count 2. It was submitted that should ground 2 be established, the appropriate orders would be that the appeal be allowed, the verdicts of guilty be set aside and that verdicts of acquittal be entered on each count.

[5] If the appellant succeeded on ground 1 only, an extension of time was sought within which to appeal against the sentence imposed on the remaining count (count 1). The application is brought because the Verdict and Judgment Record[2] showed that on count 1 the appellant was sentenced to imprisonment for nine months, that term to be suspended after he had served six months. That order for suspension was consistent with the sentence order for count 2 (imprisonment for 12 months, suspended after six months). It was not the sentencing judge's intention to require the appellant to serve more than half of the head sentence. The sentence order on count 1 should be varied by substituting four months for six months.

The evidence of the offending

[6] Both offences were alleged to have been committed in the family home.

Count 1

[7] Count 1 was alleged to have occurred when the complainant was in the kitchen washing up after lunch.

[8] In her police interview, pursuant to s 93A of the *Evidence Act* 1977 (Qld),[3] the complainant, after having referred to generalised complaints of sexual offending that "happened all the time", was asked to identify "the very first incident that you could remember".[4] The complainant said that the appellant approached her from behind while she was washing up in the kitchen and put his hands down her shorts inside her underwear, touching her bottom for about five minutes. The

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1 *Mackenzie v The Queen* (1996) 190 CLR 348 at 365.

2 The Verdict and Judgment Record is the authority for the appellant's detention in prison (*Corrective Services Act* 2006, s 9(1)).

3 AB2 at 184-186.

4 AB2 at 184.40.

complainant's little sister was asleep on the couch. Her brothers were playing Lego and then came into the kitchen but were told by the appellant to go back to their bedroom. The appellant warned the complainant, "If you tell Mum that I ever did this you – you will pay".[5]

Count 2

[9] In her police interview, the complainant was asked to tell the police officer "about the next incident" and responded by referring to "numerous times" when she was called into the appellant's room, "non-stop", and "He'd get his front part out of his pants … and grab [her] hand and hold it on it". She was then asked to recount "one time that [she] remembered really well".[6] The complainant answered by referring to the conduct alleged to constitute count 2 as follows:[7]

> "Um, he said he called me - he said, 'Come into my room. Shut the door behind you.' My brothers were outside, they were like worried and stuff, um, and he said, 'Get in the bed. Get in the bed now.' He grabbed my hand instantly, put - got his thing out of his pants put mine on it and was moving my hand up and down and when - and he has a disease on it which is something I didn't really want to do 'cause and I would have never let that happen. The first time he did it I think I was only eight or nine."

[10] The complainant was asked about "this particular time", by the police officer who said "we'll say it's the first time that you remember him doing it".[8] The complainant gave evidence[9] of one occasion when she was playing on her brother's DS and they were outside.[10] The appellant called her to his bedroom while he was in bed. He told her to shut the door and get in the bed. She said, "he got his thing out of his pants, pulled his pants off, threw them on the floor and was naked in the bed". The appellant put the complainant under the blanket. He grabbed her hand and moved it up and down. He used his left hand and was squeezing her hand so that it was "very purple". She did not know the correct name for his "thing" but also called it his "doodle" and said he used it for peeing. The complainant said after she jumped out of bed, ran out, washed her hands and ran to her room and shut the door. She said she was pretty sure she was nine turning 10 at the time. It happened after lunch on a weekend which the complainant thought was the first weekend at her mother's (she spent alternate weekends with each parent).[11]

[11] The complainant was asked whether she could remember other times apart from the incidents in the kitchen and bedroom she had described and replied that the appellant "did it numerous" times.[12] The complainant was unable to be specific about any of the other occasions. In her evidence in chief, the complainant added to her police statement by referring to an occasion when she was in the bath tub with her sister and the appellant took the complainant's sister from the bath and to her room.

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5 AB2 at 186.35-186.36.
6 AB2 at 189.1.
7 AB2 at 189.4-12.
8 AB2 at 189.23.
9 AB2 at 189-191.
10 AB2 at 189.50.
11 AB2 at 191.
12 AB2 at 192.21.

He returned, getting into the tub with the complainant, who got straight out.[13] The complainant also said the appellant used to put his hand on her leg when he was in the car with her.[14]

[12] The complainant was cross examined about what she meant when she referred to the "numerous times" and replied that she was referring to six or more times.[15]

Count 4

[13] In relation to the count of common assault, of which the appellant was acquitted, the complainant's evidence was that the appellant threw the complainant up against the wall. The complainant and one of her brothers were told they were going to get the strap after they had taken jelly beans out of the fridge without asking.[16] The complainant said, "please don't strap me" and she ran out of the room and that the appellant grabbed her and threw her up against the wall.[17]

Other evidence

[14] The complainant's younger brother recalled the appellant being in bed with the complainant playing on his DS on two occasions: once in the complainant's bed; and once in the appellant's bed.[18] He also said they had the blankets up.[19]

[15] The complainant's father gave evidence that in the September school holidays in 2014 the complainant was "pretty upset" and told him the appellant made her lie with him and "[made] her touch him and [made] his skin go up and down".[20] A similar complaint was made to the complainant's mother but she was told it occurred in the complainant's bed.[21] The complainant was very straight faced at the time she told her.[22]

[16] The complainant's parents gave evidence that the appellant denied the allegations when confronted by each of them.[23] The appellant did not give or call evidence at the trial.

Ground 1 – error in the directions as to count 2

The appellant's submissions

[17] The appellant submitted that the trial judge erred in the directions he gave as to count 2. It was argued that the summing up left it open to the jury to find the appellant guilty of count 2 upon their being satisfied that he procured the complainant to masturbate him on *any* of a number of occasions, without the jury being unanimously satisfied about the particular occasion alleged to constitute count 2. The summing up failed to ensure that the jurors focused on the same event. Relying on *S v The Queen*,[24] it was argued that there was a real possibility that different jurors might have had

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13 AB2 at 7.14-7.18.
14 AB2 at 192.3.
15 AB2 at 17.5.
16 AB2 at 187.
17 AB2 at 36.45.
18 AB2 at 205-206.
19 AB2 at 47.19.
20 AB2 at 78.36-79.2.
21 AB2 at 88.8-13.
22 AB2 at 88.16.
23 AB2 at 83.27; 88.32.
24 (1989) 168 CLR 266 at 288.

different occasions in mind when they considered count 2. It was also possible that some jurors had no particular occasion in mind but proceeded to verdict upon a satisfaction that on a number of occasions such an act occurred. In either circumstance, it was not possible to be sure that the jury as a whole was satisfied as to the appellant's guilt of an individual act answering to the description of the offence charged.

[18] The appellant's complaint was primarily directed to a particular portion of the trial judge's summing up where he reminded the jury by way of a "brief summary" of the complainant's evidence as to counts 1 and 2.[25] Having dealt with count 1, his Honour turned to count 2 stating:[26]

> "… there was non-stop, she said, calling her into his room, saying, 'Get in the bed.' And, as she said, 'He'd get his front part out of his pants,' and she continued a little later, describing, 'and grab my hand and hold it on it and the continued and was moving my hand up and down.' She described that these things occurred when she was eight or nine or later – and later said nine turning 10. ***She later described the thing as the [appellant's] doodle and something she described was using (sic) for peeing, and she recalled it was a weekend.***" (emphasis added)

[19] The appellant argued that this passage conveyed to the jury that count 2 comprised or was constituted by repeated invitations ("non stop ... calling her into his room") followed by repeated acts of indecency ("these things") which often occurred ("these things occurred when she was eight or nine or ... said nine turning 10"). It was contended that the nearest the summary, or indeed the summing up as a whole, came to identifying a single occasion was "she recalled it was a weekend".

[20] The appellant contrasted the complainant's evidence as to count 1, in respect of which she spoke of only one occasion in the kitchen, when the appellant put his hands in her pants. The appellant submitted the complainant's evidence that the appellant "always" called her in and made her touch "his front part"[27] and that it occurred "numerous times[28] when she was aged eight or nine to 10 or turning 10[29] was evidence concerning conduct that *could* constitute count 2. It was accepted that the complainant was asked to detail one time that she recalled really well[30] and that she *then* related her recollection of an occasion.[31] It was submitted that while, the police officer designated that occasion as the "first" occasion that the complainant could recall of this type of conduct[32] the complainant did not actually adopt it as such.

[21] The appellant also relied on the following specific statements, extracted from the summing up, relating to the defence case as to count 2:[33]

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25 AB1 at 45.35.
26 AB1 at 45.41-45.50.
27 AB2 at 179.58.
28 AB2 at 188.58 and 192.16-20.
29 AB2 at 189.11-20.
30 AB2 at 189.1.
31 AB2 at 189.3-189.10, 189.29-191.45.
32 AB2 at 189.22 and 191.18.
33 AB1 at 60.10-60.34.

> "[Counsel for the defence] also referred to matters involving this count. He said to you [the complainant's] evidence was it was non-stop that she described the [appellant] would call her into his room.
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> …He also in respect of this count said that her evidence was that these things happened numerous times, but she could not precisely say what numerous times, could not say when the first time was or when the last time was.
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> …He also remarked that she said that it could have happened six or a few more times and yet could not recall anything about any of those occasions."

[22] The appellant argued that, given the terms in which count 2 was opened (referring to the charged and uncharged acts[34]) and the absence of particulars for the jury to have recourse to, the impression created in the summing up was consistent with the way count 2 was opened. It was thus submitted that it was necessary for the precise act or event relied on for count 2 to be identified for the jury in the summing up, and that the summation of points made in defence counsel's address reinforced the impression generated by the "summary" given by the trial judge that count 2 was proven if the jury was satisfied that on *any* occasion alleged the appellant had compelled the complainant to masturbate him. The obligation to identify properly the particular occasion alleged to be the subject of the count was not met[35] and resulted in a miscarriage of justice.[36]

Respondent's submissions

[23] The respondent submitted that the act constituting the offence was clearly identified in the summing up. The jury would not have misapprehended the occasion of the act on which they were convicting in respect of count 2. It was submitted that none of the difficulties identified by the Court in *S v The Queen* arose in the circumstances of this case. Accordingly, there was no miscarriage of justice. Furthermore, a conviction based on a duplicitous count may be upheld on the ground that there has been no substantial miscarriage of justice, even if an objection had been raised at the trial.[37]

[24] On the evidence, count 2 was not duplicitous. The complainant, in her police interview, did refer to surrounding circumstances which differentiated the count charged from other alleged uncharged acts.[38] The police officer asked her about the one time that she "remember[ed] really well".[39] She then detailed the acts constituting that offence.[40] She said she was playing a DS game with her brothers when she was called into the appellant's bedroom.[41] It was a weekend after lunch. She said she was "pretty sure" she was nine turning 10 at the time.[42] While the complainant also told the police officer that it occurred numerous other times, she could not

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34 AB1 at 18.18-18.25.
35 *R v BM; ex parte Attorney-General* [2002] 1 Qd R 274 at 276 [14].
36 *S v The Queen* (1989) 168 CLR 266 at 282 and 288.
37 *R v Garget-Bennett* [2013] 1 Qd R 547 at 563 [55] per Fryberg J.
38 *R v BM; ex parte Attorney-General* [2002] 1 Qd R 274.
39 AB2 at 189.1.
40 AB2 at 189-191.
41 AB2 at 189.
42 AB2 at 191.

remember details of those occasions.[43] She said it occurred six or more times,[44] being the conduct relied upon as uncharged acts. The trial judge properly directed that the jury could only use that evidence if satisfied beyond a reasonable doubt that it occurred and for a limited purpose.[45] The jury heard the evidence of the complainant twice. The jury would not have had any difficulty in understanding the event on which they were convicting. Furthermore, the defence case at trial was that the jury would not be satisfied beyond a reasonable doubt that the acts occurred. That included both the offences and the uncharged acts. Different defences did not arise on the different acts.

[25] As to the risk that the jury may have reasoned from the numerous occasions that the appellant must be guilty of at least one, the jury were cautioned against propensity reasoning.[46]

Consideration

[26] In my view, the respondent's submissions on the matter of duplicitous charges should be accepted. The difficulties of inadequate particularisation, identified in *S v The Queen* and summarised in *R v KP; Ex parte Attorney-General (Qld)*,[47] did not arise in this case, given the detail provided in the complainant's s 93A statement as to the events constituting count 2. The complainant's evidence identified the occasion with sufficient particularity so as to exclude any possibility of latent ambiguity. Accordingly, this was not a case where latent ambiguity was raised. Nor is it surprising that no particulars were sought as to count 2.

[27] As to the trial judge's summing up as to count 2, the appellant's submissions focussed on a single portion of the summing up quoted in para [18] hereof. That paragraph reflected the defence address concerning that count:[48]

> "Now, in respect of the second count of indecent treatment, that in – that concerns the allegation of [the appellant] placing [the complainant's] hand on his penis. [The complainant] begins by telling police that he would non-stop call her into his room, and my learned friend has earlier today drawn your attention to all of these uncharged acts which she says proves that [the appellant] had a sexual interest in [the complainant]."

[28] Both the defence address and the summing up reflected the s 93A evidence of the complainant who when asked about the "next incident", referred to "non-stop calling me into his room", before detailing a particular occasion particularised as count 2.

[29] As to the paragraph of the summing up the subject of complaint, while it may have been better for the trial judge to have distinguished the uncharged acts from the particular occasion forming count 2, I do not consider a miscarriage of justice resulted flowed from that complaint Taking the summing up as a whole into

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43 AB2 at 192.
44 AB2 at 17.5.
45 AB1 at 47.45-48.3.
46 AB1 at 48.22-48.31.
47 [2006] QCA 301 at [48].
48 AB1 at 30.29-34.

account, the jury would not have been left in any confusion that the act the subject of count 2 and conduct the subject of the uncharged acts were distinct and that count 2 concerned a specific occasion that the complainant recalled occurring on a weekend in the appellant's bedroom.[49]

[30] His Honour's "brief summary" of the complainant's evidence concerning count 2 commenced with a reference to the uncharged conduct before referring to the complainant's recollection of count 2 as occurring on "a weekend". After doing so, his Honour returned to the matter of the generalised uncharged acts and gave the jury specific instructions of the limited manner in which that evidence was able to be used by them as follows:[50]

> "In this case, the prosecution relies upon additional evidence which are (sic) not the subject of the specific charges. The [appellant] here is charged only with the three offences on the indictment. In addition to the evidence of the complainant relating to those charges, the prosecution has led evidence of other alleged incidents which [the prosecutor] says are of a nature – of a sexual nature involving the [appellant] and that she relies upon those things as showing a sexual interest. These are things that the complainant has not been specific about when the activity has occurred or other more specific events that she has remarked about. I can summarise these for you."

[31] A little later in the summing up, his Honour provided the jury with a document described as a flowchart containing a list of questions concerning each count.[51] In relation to count 2, the trial judge directed the jury in terms of a single allegation and stated that "the allegation" concerned "the putting of [the complainant's] hand on the [appellant's] penis and moving it up and down".[52] Also, when referring to this document the trial judge directed the jury in terms that the prosecution case concerned a single occasion, when according to the complainant's evidence, the appellant, "asked her to go to his bedroom and on the bed and … he moved her hand on his penis and moved it up and down on his penis".[53]

[32] That direction correctly set out the Crown case. Although the prosecutor opened the Crown case by also referring to uncharged acts of masturbation, the closing address referred to count 2 as an incident in the bedroom which the complainant had given evidence of and which was also supported by the evidence of the complainant's little brother.[54]

[33] His Honour then referred to the defence submissions, including as to how the uncharged acts were to be approached as demonstrating sexual interest in the complainant, a matter his Honour had already specifically directed the jury on in some detail and in respect of which there was no complaint. No application for redirections was made at the conclusion of the summing up.

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49 AB1 at 60.1-60.5.
50 AB1 at 47.14-47.21.
51 AB1 at 52.40. The list of questions was marked as MFI G and is at AB2 at 228-230.
52 AB1 59.5.
53 AB1 at 60.03-60.05.
54 AB1 at 24-25.

[34] The difficulties of inadequate particularisation, identified in *S v The Queen* and summarised in *R v KP; Ex parte Attorney-General (Qld)*,[55] did not arise in this case, given the detail provided in the complainant's s 93A statement as to the events constituting count 2. The complainant's evidence identified the occasion with sufficient particularity so as to exclude any possibility of latent ambiguity. Accordingly, this was not a case where latent ambiguity was raised. Nor is it surprising that no particulars were sought as to count 2. In any event, there was no risk that the jury might have considered it sufficient to convict on count 2 on the basis that the appellant had on some unspecified and uncharged occasion and in respect of which no detail was provided, engaged in acts of the general nature alleged, given the directions given as to the use of the evidence of charged acts and the differentiation made by the trial judge between the unspecified uncharged acts and the occasion when the complainant was more specific and which was the subject of count 2. The specifics concerned that the complainant was in the appellant's bedroom, that she had been playing on her brother's DS when called inside, that the appellant had the blankets up, that he squeezed her hand so that it was "very purple" and that it happened after lunch on a weekend. The complainant's younger brother's evidence was corroborative in that he referred to seeing the complainant in the appellant's bed and having the blankets up. Count 2 was clearly not duplicitous.

[35] There was no unfairness to the appellant resulting in a miscarriage of justice from the manner of the trial judge's summing up. This ground of appeal fails. It also follows that the issue of an extension of time within which to appeal against sentence does not arise for consideration.

Ground 2 – unreasonable verdicts

The appellant's submissions

[36] The appellant argued that the guilty verdicts on the two counts of indecent treatment were unreasonable given the verdict of not guilty on the common assault charge. The acquittal on the assault count was said to be inconsistent with the guilty verdicts because the complainant's evidence about the assault[56] was of the same quality as her evidence about counts 1 and 2.

[37] The assault (throwing the complainant against a wall) was alleged to have occurred sometime after the complainant had made a complaint to each of her parents about the sexual misconduct. The complainant adhered to her evidence about the assault under cross examination.[57] The prosecution case on each count depended solely on the complainant's testimony. There as no independent evidence supportive of her evidence about either count 1 or the count of common assault.

[38] Apart from the younger brother's evidence that on a couple or three occasions he saw the appellant and the complainant in a bed playing on a DS,[58] there was no independent evidence to support the complainant on count 2. The strength of the prosecution case was the same on all counts. The different verdicts show that the jury did not properly apply the standard of proof to counts 1 and 2. Had the jury

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55 [2006] QCA 301 at [48].
56 AB2 at 179.28-311; 187.43-49.
57 AB2 at 36.36-37.11.
58 AB2 at 205.38-206.15; AB2 at 47.5-47.25.

done so then those verdicts would have been the same as the verdict returned on the count of common assault.

Consideration

[39] The principles concerning inconsistent verdicts were set down by the High Court in *MacKenzie v The Queen*.[59] The test is one of "logic and reasonableness".[60]

[40] The principles were summarised in *R v GAW*.[61] The onus is on the appellant to satisfy the Court that "no reasonable jury, who had applied their mind properly to the facts in the case could have arrived" at the verdicts.[62] There may be a number of relevant factors which could explain the differing verdicts.[63] As was stated in *MacKenzie*:[64]

> "… if 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." (footnotes omitted)

[41] The offence of common assault was of a very different nature and did not arise in the context of the appellant's alleged sexual offending. To that extent it was an offence that could be considered by the jury discretely from the other offences; count 4 was alleged to have been committed in the context of disciplining the complainant for stealing jelly beans. The jury were correctly directed to consider each charge separately. They were also directed in accordance with *R v Markuleski*,[65] that if they had a reasonable doubt concerning the truthfulness or reliability of the complainant on one count they must take that into account in assessing the truthfulness and reliability of her evidence generally.[66]

[42] In the present case, as the respondent submitted, the acquittal of the common assault count was explicable on a basis other than disbelief of the complainant. It was open to the jury to consider that the assault on the complainant in a disciplinary context did not justify criminal culpability. Such a view would not be an unreasonable affront to logic and common sense. The guilty verdicts were not unreasonable on the basis of inconsistent verdicts.

[43] It was not submitted on behalf of the appellant that the verdicts were otherwise unreasonable on the evidence.

Order

[44] The appeal against conviction should be dismissed.

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59 (1996) 190 CLR 348.
60 (1996) 190 CLR 348 at 366.
61 [2015] QCA 166 at [19]-[23] which was followed in *R v AAY* [2016] QCA 300.
62 [2015] QCA 166 at [19].
63 *R v Smillie* (2002) 134 A Crim R 100.
64 (1996) 190 CLR 348 at 367.
65 (2001) 52 NSWLR 82.
66 AB1 at 49.35-49.40.

[45] **BROWN J:** I have had the advantage of reading the reasons of Philippides JA and Ryan J. I agree with the reasons of their Honours, and agree with the proposed order of Justice Philippides, that the appeal against conviction should be dismissed.

[46] **RYAN J:** I agree with the order proposed by Philippides JA but wish to add some additional reasons of my own in respect of each ground of appeal.

Miscarriage of justice, inadequacy of summing-up: Introduction

[47] His Honour's summing up, and the adequacy or otherwise of the way in which the conduct the subject of count 2 was identified for the jury, must be assessed in the context of the evidence led at trial.

[48] The complainant's section 93A interview contained clearly delineated evidence of two specific occasions on which the appellant dealt with her sexually, and one occasion on which he physically abused her, reflecting the three counts on the indictment for the jury's consideration (counts 1, 2 and 4).[67]

[49] The appellant's counsel's cross-examination of the complainant reinforced the particulars of each of the counts. The complainant agreed with counsel for the appellant that she told the police officer about "three specific occasions" that she "could definitely remember".[68] Counsel questioned her about the "very first thing" she could recall the appellant doing to her, and she spoke about the appellant's sticking his hand down her pants while she was washing up.[69]

[50] He questioned her about the "second incident" on three occasions. First, he asked her about "some other incident"; the "one" incident which involved "the occasion when … [the appellant] placed [her] hand onto his doodle and was moving it up and down".[70] A little later in cross-examination, counsel returned to the topic of the "second incident" and took the complainant through the details or particulars of it.[71] And on a third occasion during cross-examination, he questioned the complainant about "the second of the incidents" (with a view to establishing that she was vague about when it happened during the year and its duration). His questions differentiated between the second incident and "this sort of incident" which "happened numerous times" but about which the complainant could recall "nothing at all".[72]

[51] In the course of putting to the complainant that the appellant never threw her against the wall, the complainant repeated the detail of count 4.[73]

The complainant's evidence

[52] An outline of the complainant's evidence follows, demonstrating the way in which the police officer led the complainant to provide particulars of count 2; and the way in which cross-examination reinforced the particulars of that count.

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67 Count 3 was discontinued by the prosecution before trial.
68 ARB 2 at 16, 18 – 20.
69 ARB 2 at 12, 45 – 48.
70 ARB 2 at 14, 42 – 15, 3.
71 ARB 2 at 19, 33 – 20, 25.
72 ARB 2 at 24, 38 – 25, 37.
73 ARB 2 at 36, 37 – 37, 3.

[53] At the beginning of her interview with Senior Constable Goodwin, the complainant, after stating her name, age and school year, complained that her stepfather – the appellant – kept on being "really rude, calling me into the bedroom and then like telling me to lay in the bed and he forced me to touch his front part".[74] She also complained that "he'd come out into my room when I was sleeping, hop in the bed with me and … put his hands down my pants".[75]

[54] She repeated her general complaint about having to touch the appellant's penis and made other complaints about him. She explained that he required her to touch his penis a lot. She said "he called me in nearly every weekend and say (sic) 'lay in the bed'". He told her not to tell her parents, otherwise she would be in big trouble. She said she told her mother and he threw her "up at the wall".[76] She complained that the appellant was "very mean" and required her and her brothers to "do chores" for him "every five seconds".[77] She said he was always getting her brothers and her in to trouble "for no reason".[78] She said that the appellant "always" called her "in" and made her touch his "rude part"[79] which she did not like.[80]

[55] The police officer told the complainant that she wanted to get more information about a lot of things. She said she would start at the "very first thing" and work her way through it and then the others in more detail.[81]

[56] The police officer then asked the complainant questions about the appellant and the other members of her family and established the time at which the offending began.

[57] She confirmed with the complainant that the first time anything happened was after the family moved to Weipa. She asked the complainant to describe "the very first incident" that she remembered. The complainant said, "I was washing up … put his hands down my pants … second is he called me into the bedroom –". The police officer interrupted the complainant and told her that they would talk about the incident which occurred when she was washing up, then she would move to the next one.[82]

[58] In response to the police officer's questions, the complainant described in detail the conduct the subject of count 1. That was the only incident of that kind (involving the appellant putting his hand down her pants while she was somewhere other than in her bed) that she mentioned. She told the police officer that the appellant told her if she told anyone that she would "pay" or "[s]omething along the lines of that".[83]

[59] She said that after she told her mother (which was not until she had been required to masturbate the appellant) he threatened to strap her for taking a jelly bean from the fridge, and then threw her up against the wall (count 4).

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74 ARB 2 at 178, 50-55.
75 ARB 2 at 179, 1 – 3.
76 ARB 2 at 187, 40 – 48.
77 ARB 2 at 179, 10 – 14.
78 ARB 2 at 179, 30 – 38.
79 ARB 2 at 179, 55 – 58.
80 ARB 2 at 180, 3.
81 ARB 2 at 180, 10 – 14.
82 ARB 2 at 184, 38 – 55.
83 ARB 2 at 186, 35 – 42.

[60] After exhausting the details of the first incident, the police officer said to the complainant:[84]

> "So tell me about the next incident, so he's put his hands down your pants on the – the first time. Tell me about the next incident that happened?"

The complainant replied:[85]

> "Non-stop calling me into his room, saying 'Get in the bed'. He'd get his front part out of his pants … and grab my hand and hold it on it."

[61] The complainant explained that conduct of this sort happened numerous times.[86] The police officer asked the complainant to tell her about "one time that you remember really well".[87] The complainant described a particular incident in detail as follows:

> "[THE COMPLAINANT]: Um, he said he called me – he said, 'Come into my room. Shut the door behind you.' My brothers were outside, they were like worried and stuff, um, and he said, 'Get in the bed. Get in the bed now.' He grabbed my hand instantly, put – got his thing out of his pants put mine on it and was moving my hand up and down and when – and he has a disease on it which is something I didn't really want to do 'cause and I would have never let that happen. The first time he did it I think I was only eight or nine.
>
> SCON GOODWIN: Okay.
>
> [THE COMPLAINANT]: Yeah, nine, because I was 10 when it stopped.
>
> SCON GOODWIN: Okay.
>
> [THE COMPLAINANT]: Or turning 10.
>
> SCON GOODWIN: All right. So you were eight or nine, so this particular time um we'll say it's the first time that you remember him doing it so your brothers were outside?
>
> [THE COMPLAINANT]: Um, yeah, my brothers.
>
> SCON GOODWIN: And where was Mum?
>
> [THE COMPLAINANT]: Mum, I can't remember where Mum was.
>
> SCON GOODWIN: Okay. Was she home?
>
> [THE COMPLAINANT]: Yeah. I think she might have been at work maybe at Woolies or cleaning – no, she was working at Goodline at the time, cleaning houses for Miss Kennedy.

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84 ARB 2 at 188, 20 – 25.
85 ARB 2 at 188, 25 – 29.
86 ARB 2 at 188, 58.
87 ARB 2 at 189, 1 – 2.

SCON GOODWIN: Okay. All right. Okay, so Mum was at work and um your stepdad's called you into his bedroom and he has [INDISTINCT] right. So he's um he's called you into the bedroom and he's um told you to shut the door and get into bed and he's grabbed your hand. Yeah. And then—

[THE COMPLAINANT]: He grabbed it and was squeezing it, I had no movement or control of my own hand.

SCON GOODWIN: Yeah. And then what did he do?

[THE COMPLAINANT]: He put me under the blanket. I was playing a DS game at the time, by brother's DS, it was [INDISTINCT].

SCON GOODWIN: Yeah.

[THE COMPLAINANT]: Um, he got his thing out of his pants, pulled his pants off, threw them on the floor and was naked in the bed. Um, I still had no movement on my hand and he grabbed his thing and put my hand on it and was moving it up and down.

SCON GOODWIN: Okay. All right. So he was naked and he was in the bed and so when – and you said that a blanket was over you.

[THE COMPLAINANT]: I could – I could – over my body not my head but.

SCON GOODWIN: Okay, yeah.

[THE COMPLAINANT]: Um—

SCON GOODWIN: So were you lying down or—

[THE COMPLAINANT]: Lying down, yes.

SCON GOODWIN: Yeah.

[THE COMPLAINANT]: He grabbed me and put me in the bed.

SCON GOODWIN: Okay. And so he's naked; do you remember what you were wearing?

[THE COMPLAINANT]: Um—

SCON GOODWIN: It's okay if you can't. That's fine. All right? That's fine. If you can't remember something that's fine, don't make anything up. It's fine to say that you don't remember. Okay? Okay. And um so and then you said that he's um he's got your hand, and do you remember which hand he grabbed at all?

[THE COMPLAINANT]: Left hand.

SCON GOODWIN: Yeah.

[THE COMPLAINANT]: He grabbed it, squeezing it—

SCON GOODWIN: Grabbed it with his left hand?

[THE COMPLAINANT]: --once he finished squeezing it my hand was very purple.

SCON GOODWIN: Oh, okay. And he's made, you said that he's made you touch his thing?

[THE COMPLAINANT]: Yeah, he—

SCON GOODWIN: So do you know what his thing's called?

[THE COMPLAINANT]: Doodle.

SCON GOODWIN: His doodle? Yeah. And do you know what a doodle is used for?

[THE COMPLAINANT]: Peeing.

SCON GOODWIN: Peeing. Yeah. Do you know any other names for a doodle? Do you know what the correct name is for a doodle? No? That's okay. Right, so, all right, and it's – and it's what he uses to pee? Yeah. Okay. All right. And you said that he's – he had a disease on it. Tell me more about that?

[THE COMPLAINANT]: I only know Mum told me that he had a disease, that's all I know.

SCON GOODWIN: Okay.

[THE COMPLAINANT]: Mum has better details of all that.

SCON GOODWIN: So did you see at the time that he had a disease on it or that's just something that Mum's told you afterwards?

[THE COMPLAINANT]: Um, Mum had no idea that he was doing this until I told her.

SCON GOODWIN: Okay.

…

SCON GOODWIN: Right. Okay. So this time that he um the – the first time that you remember that he's made you touch his things, um, you said that he made you rub it up and down. Yeah. And what happened after that? So--

[THE COMPLAINANT]: I jumped out of the bed and ran out, washed my hands and ran into my room and shut the door. He made me so angry and sad that I felt like running away.

SCON GOODWIN: Okay. And do you remember what time of day it was or what day?

[THE COMPLAINANT]: After lunch.

SCON GOODWIN: It was after lunch? Do you remember what day it was? No?

[THE COMPLAINANT]: I just remember—

SCON GOODWIN: Do you remember—

[THE COMPLAINANT]: It was a weekend.

> SCON GOODWIN: A weekend?
>
> [THE COMPLAINANT]: Otherwise I would have been at school.
>
> SCON GOODWIN: And you said that you were, yeah, and you said it was um you were eight or nine at the time?
>
> [THE COMPLAINANT]: I'm pretty sure I was nine turning ten."

[62] After describing that particular incident, the police officer said to her:[88]

> "You said at the start, um, [the complainant], that he did this to you a lot of times. Are there other times that you can remember?"

[63] The complainant said no. She explained that he did it numerous times but she couldn't really remember because it was a while ago. She said it stopped when she told her father and her father told her mother.[89] She said her brothers saw it and that she asked her brother K to remind her of it so that she could remember to tell her father. She thought her brother saw it on one occasion when the appellant came into her room.[90] On that occasion, she said she asked the appellant if she could leave her door open and he allowed her to. She said that the appellant got in the bed with her, but did "nothing" – just lay there.[91] The rest of her interview concerned her complaint to her father and events thereafter.

[64] In his cross-examination of the complainant, counsel for the appellant asked her to describe the very first thing she could recall the appellant doing to her that was rude. She said that the appellant stuck his hands down her pants when she was washing up.[92] Counsel asked several questions designed to establish the time at which that incident occurred, but the complainant was not quite sure.[93]

[65] Counsel then said to the complainant (my emphasis):[94]

> "You told the police officer Jackie of **the incident** when you'd been washing up or cleaning up, the one we spoke about before. You remember that? --- Yes.
>
> And you also told her of **some other incident**. Do you remember that?--- Yes.
>
> **One** of them involved you going into – being called into the bed – into your mother and father's bedroom by [the appellant]?--- Yes.
>
> And this is **the occasion** when you say that [the appellant] placed your hand onto his doodle and was moving it up and down--- Yes."

[66] A little later in cross-examination she was asked about "the second incident" (my emphasis):[95]

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88 ARB 2 at 144.
89 ARB 2 at 192.
90 ARB 2 at 192, 50 – 193, 5.
91 ARB 2 at 194, 10 – 20.
92 ARB 2 at 12, 45 – 48.
93 ARB 2 at 13.
94 ARB 2 at 14, 39 – 15, 3.
95 ARB 2 at 19, 33 – 37.

> "**The second incident** that you recall – that is, that you told police officer Jackie – was this occasion when he had – when he placed his hand onto his doodle. You remember that?--- Yes he placed my hand.
>
> Sorry he placed your hand onto his doodle, my apologies?--- Yes."

[67] Defence counsel then went through the particulars of that second incident as follows:[96]

> "Now again, both of your brothers were there that day?--- Yes, but they were out in the lounge room.
>
> They were out in the lounge room. And he called you into the bedroom?--- Yes.
>
> And did you get under the covers with him?--- He said to.
>
> He said to. Were you playing a DS time at the time?---Yes, I was out in the lounge with by brothers playing.
>
> Well, did you have the DS game with you when you went into the room?--- Yes.
>
> And you were still playing that when you got under the covers with him?--- No.
>
> What did you do with the DS game?--- He took it from me.
>
> Okay. Where did he put it, do you remember?--- He play – fiddled with it and then put it on – I don't know where. I can't remember where he put it.
>
> What were you – were you out in the lounge room with your brothers when you were called into the room?--- Yes.
>
> And what were your brothers doing at that stage?--- I can't recall what they were doing.
>
> Okay. Were they playing the DS game, as well, for example?--- I don't remember.
>
> And on this occasion do you recall whether the door was open or closed?--- Yes.
>
> Was the door open?--- I can't recall.
>
> So you can't recall whether the door was open or closed?--- Yes, I think it might have been closed.
>
> How long were you in the room with [the appellant] for?--- I can't recall."

The assistance the jury required to identify the evidence relating to each count

[68] Having regard to the way in which the complainant's evidence was elicited from her by the police officer, and the way in which the complainant was cross-examined, the jury were unlikely to have needed much in the way of instruction from the learned trial judge about the evidence relating to each of the three counts they were to consider. Indeed, the cross-examination of the complainant, which reinforced the particulars of each count, was the very last thing the jury heard before returning

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96 ARB 2 at 19, 39 – 20, 25.

their verdicts (having asked for the complainant's "transcripts" during the course of their deliberations).

[69] This case may be compared to the matter of *R v OT*.[97] In *OT* the appellant was convicted of 14 charges of a sexual nature committed against his stepdaughter. The particulars of each charge were read to the jury by the prosecutor during her opening, but the particulars were not mentioned by the trial judge in his summing up.

[70] As in this case, it was not suggested that the evidence led did not support every charge but it was argued that a miscarriage of justice had occurred because the trial judge did not distinguish between the various counts by instructing the jury, charge by charge, about the particular facts which had to be proved for each charge.

[71] In allowing the appeal on all but two counts, McMurdo JA, with whom Fraser JA and McMeekin J agreed, emphasised the need for the jury to understand the conduct said to relate to each of the charges. In the case of two of the 14 charges, the relevant conduct could have been identified from the indictment and the complainant's evidence, and those convictions were sustained. That was not possible in the case of the other charges.

[72] His Honour said:[98]

> "In order for the jury to properly consider an individual charge, the members of the jury had to have an understanding, and importantly the same understanding, about what conduct was the subject of that charge. Clearly that would have been an impossible exercise, without a particularisation of the prosecution case. The conduct which was relevant for a particular charge could not have been identified simply from the indictment and complainant's evidence. That was because a certain incident, according to the evidence, could have been related to more than one of the counts as pleaded on the indictment, and secondly, because of the high incidence of other similar events, of which the complainant gave evidence but which were not the subject of any charge.
>
> The case was properly particularised by the prosecutor's opening and the question is whether that was sufficient for the jury's purposes, at the end of the trial, when they were considering their verdicts. Although the jury had listened to that opening, much of it would not have been clear in their minds by the end of the case. With two exceptions, any of the events the subject of a certain charge might have been confused with the subject of at least one other charge. Those exceptions are counts one and nine. The jury is likely to have identified count one as the event in which the appellant was alleged to have licked the complainant's vagina, because there was no such other incident recalled by the complainant and because she had said that this was the first of the offences committed. Similarly, count nine was the only occasion in which, she said, there had been some penetration of her vagina and this was the only count of rape."

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97 [2017] QCA 257.

98 Ibid at [31] – [32].

[73] His Honour considered that there was a risk that the jury misunderstood what constituted the relevant evidence for a particular charge (or that different jurors had different understandings of it) with the exception of counts one and nine. Those counts were of a remarkably different character to the rest of the counts, and the jury would not have been mistaken about the evidence relevant to those two counts.

[74] In the present case, the jury would not have been assisted by the prosecutor's opening. She did not differentiate the particulars of count 2 from the complainant's general evidence about conduct of that kind. However, as was the case in respect of counts one and nine in *OT*, the jury in the present case would have been able to identify the conduct relevant to each of the three counts from the document provided to them for their assistance during their deliberations[99] and the complainant's evidence.

The summing up

[75] It is against the background of the complainant's testimony, including her cross-examination, and the trial as a whole, that the adequacy of his Honour's directions must be considered.

His Honour's directions on count 2

[76] In his summary of the evidence, his Honour said:[100]

> "She gave evidence in relation to count 2 to this effect – and, again, I am summarising – that in Weipa … there was non-stop, she said, calling her into his room, saying, 'Get in the bed.' And, as she said, 'He'd get his front part out of his pants', and she continued a little later, describing, 'and grab my hand and hold it on it and then continued and was moving my hand up and down.' She described that these things occurred when she was eight or nine or later – and later said nine turning 10. She later described the thing as the defendant's doodle and something she described was used for peeing, and she recalled it was a weekend."

[77] Later in his directions, his Honour said:[101]

> "In this case, the prosecution relies upon additional evidence which are (sic) not the subject of the specific charges. The defendant here is charged only with the three offences on the indictment. In addition to the evidence of the complainant relating to those charges, the prosecution has led evidence of other alleged incidents which [the prosecutor] says are of a nature – of a sexual nature involving the defendant and that she relies upon those things as showing sexual interest. These are things that the complainant has not been specific about when the activity has occurred or other more specific events that she has remarked upon. I can summarise these for you …"

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99 ARB 2 at 228 – 230.
100 ARB 1 at 45, 42 – 50.
101 ARB 1 at 47, 14 – 21.

[78] In his directions about the elements of count 2, which drew upon the prosecutor's address, his Honour said:[102]

> "In respect of this allegation, she reminded you that the defendant, according to [the complainant's] evidence, asked her to go to his bedroom and on to his bed, and there she moved her hand on – sorry, he moved her hand on to his penis and moved it up and down on his penis. And she says to you that in respect of count 2, you would find that she was under 12, she was dealt with, it was indecent in that way and there was no justification or excuse or authority in law to do those things …"

The brevity of the trial

[79] Although the trial occupied three days, the evidence occupied about three hours.

[80] The Crown opened its case at 12.36 pm on Tuesday 17 April 2018. No evidence was tendered until after lunch, and that evidence, which included the complainant's recorded evidence, concluded at about 4.30 pm on day one. The trial did not start until about 11 am the next day. The Crown case closed at about 12.15 pm. The appellant did not give or call evidence. Counsels' addresses commenced at 2.20 pm and concluded at about 4 pm on day two.

[81] His Honour's summing up commenced at 11 am on day three and concluded at 1 pm. At about 3 pm, the jury asked for "the transcripts" of the first police interview with the complainant. Rather than provide the transcript to the jury, the entirety of the complainant's evidence was replayed to them, taking the jury through until 5.39 pm. At 5.45 pm, the jury indicated that they had reached a verdict. Thus, the last thing that the jury heard was the cross-examination of the complainant which, as I have stated, reinforced the particulars of each of the counts.

Discussion

[82] Viewed in isolation from the rest of the summing up, the learned trial judge's "summary" or "reminder" of the evidence of the complainant did not adequately differentiate between the complainant's evidence which formed the basis of count 2 and her general evidence of similar, but uncharged, conduct. The position was clarified to some degree in his Honour's later directions to the jury which, in effect, contrasted the evidence of the specific charges with the "additional evidence" not the subject of charges, which was relied upon by the Crown to prove sexual interest only. While his Honour also gave the jury directions about the elements of count 2, those directions did not, in my view, clarify the matter any further.

[83] It would have been preferable had his Honour set out the complainant's evidence in respect of each count in full. However, his Honour's directions on count 2, considered as a whole, in the context of the complainant's evidence at trial and her cross-examination, were adequate to ensure that the jury understood the matters of which they had to be satisfied to convict the appellant of count 2. Indeed, in my view, independently of his Honour's summing up, the jury were not likely to have been left in any doubt about the details of the complainant's evidence which were relevant to each charge. The jury would have understood that the complainant's

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102 ARB 1 at 60, 1 – 8.

detailed description of the one incident of masturbation that she was able to remember in detail was the subject of count 2, just as her detailed description of the appellant putting his hand down her pants while she was washing up was the subject of count 1.

[84] In those circumstances, there has been no miscarriage of justice.

Unreasonable verdict

[85] With respect to the ground of appeal which argued that the verdicts were unreasonable as reflected in their inconsistency, it is my view that the jury may have had a doubt about whether the complainant's description of the way in which the appellant punished her for taking a jelly bean – that is, by throwing her up against the wall, a serious allegation of physical violence – contained some exaggeration, similar to that found in her complaint that the appellant required her and her brother to do things "every five seconds" or that the appellant called her into his room "non-stop".

[86] In my view, it was not unreasonable for the jury to have proceeded cautiously, as directed by his Honour,[103] in their approach to this evidence, and not to have convicted the appellant of common assault on the strength of it, while at the same time being satisfied, beyond reasonable doubt of the appellant's guilt of the sexual offences.

[87] The jury may have thought, logically and reasonably, that the complainant's description of being thrown up at the wall involved exaggeration, but that it was child-like exaggeration, not of such a nature as to cause them concern about her credibility generally. And, as Philippides JA has pointed out, it was a matter for the jury whether any doubt they might have had about the complainant's allegation of assault detracted from the truthfulness or reliability of her evidence generally.

[88] The verdicts were not unreasonable.

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[103] ARB 1 at 49 1 – 8.