SUPREME COURT OF QUEENSLAND

CITATION:	*R v SDI* [2019] QCA 135
PARTIES:	**R** **v** **SDI** (appellant)
FILE NO/S:	CA No 280 of 2018 DC No 256 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba – Date of Conviction: 24 October 2018 (Muir DCJ)
DELIVERED ON:	4 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR OFFENCES – OFFENCES AGAINST DECENCY AND MORALITY – CHILD PORNOGRAPHY AND CHILD EXPLOITATION MATERIAL OFFENCES – where the appellant was found guilty after trial of six offences of making child exploitation material by taking five photographs of his daughter and her friend and then uploading the photographs from his camera to the hard drive of a computer – where the five photographs were taken as part of a larger series of 45 photographs from the same evening – where the appellant's daughter's friend gave evidence at trial that the appellant asked the children to pose and to give each other "wedgies" and lifted up the skirts of the children – where the appellant's counsel at trial addressed the jury that the photographs depicted children at play and were not child exploitation material – where the appellant's counsel also addressed the jury that the taking of one of the photographs was "clearly an accident" because the photograph was out of focus – where the learned trial judge directed the jury on the meaning of "child exploitation material" – whether there was an error of law in directing the jury on the meaning of "child exploitation material" – whether there was an error of law in failing to direct the jury

on the defence of accident under ss 23(1)(a) and (b) of the *Criminal Code* (Qld) – whether there was an error of law in failing to direct the jury on the defence of genuine artistic purpose under s 228E of the *Criminal Code* (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – PARTICULAR OFFENCES – OFFENCES AGAINST DECENCY AND MORALITY – CHILD PORNOGRAPHY AND CHILD EXPLOITATION MATERIAL OFFENCES – where the appellant was found guilty after trial of six offences of making child exploitation material uploading the photographs from his camera to the hard drive of by taking five photographs of his daughter and her friend and then a computer – where the five photographs depicted, amongst other things, the bare buttocks of the children and one child's crotch – where the five photographs were taken as part of a larger series of 45 photographs which were taken on the same evening – where the appellant's daughter's friend gave evidence at trial that the appellant asked the children to pose and to give each other "wedgies" and lifted up the skirts of the children – where the appellant's case at trial was that the photographs depicted children at play and were not child exploitation material – whether it was open to the jury to be satisfied beyond reasonable doubt that the photographs constituted child exploitation material – whether the verdict is unreasonable or cannot be supported having regard to the evidence

Criminal Code (Qld), s 207A, s 228B, s 228E

CCI v The Queen [2011] QDC 375, applied
Phillips v Police (1994) 75 A Crim R 480; [1994] SASC 4848, distinguished

COUNSEL: B J Power for the appellant
C N Marco for the respondent

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

[1] **SOFRONOFF P:** I agree with Gotterson JA.

[2] **GOTTERSON JA:** The appellant, SDI, was charged with six offences against s 228B(1) of the *Criminal Code* (Qld). Counts 1 to 5 alleged that he made child exploitation material on 9 March 2008 by taking five separate photographs of a child or children in a sexual, offensive and demeaning context. Count 6 alleged that he uploaded these photographs from his camera to the hard drive of a computer.

[3] The appellant pleaded not guilty to each charge. He was tried over three days in the District Court at Toowoomba. On the third day of the trial, the jury delivered verdicts of guilty on all counts. The appellant was sentenced to six months imprisonment for each offence with all terms to be served concurrently. The imprisonment was suspended immediately for an operational period of two years. Convictions were recorded.

[4] On 2 November 2018, the appellant filed a notice of appeal against the convictions.[1]

Circumstances of the alleged offending

[5] At the time of the alleged offending, the appellant was the father to a daughter, J, and a son, B, then aged 10 years and eight years respectively. J had a female friend, S, who was almost 10 years old.

[6] The appellant owned a Kodak EasyShare digital camera which time-stamped photographs when they were taken. A series of some 45 photographs were taken with the camera in the 20 minute period between 8.17 pm and 8.37 pm on 9 March 2008.[2] Several of the photographs depicted the appellant and were not taken by him.[3] Apart from them, the photographs were taken by the appellant. They depicted one or more of the children.

[7] The photographs were then uploaded in one batch either directly from the camera or from an SD card and on to the appellant's computer on 10 March 2008. They were recorded on a hard drive connected to the computer. All of the photographs were subsequently deleted on 24 April 2008.

[8] The hard drive for the computer was seized during the execution of a search warrant on 11 May 2012. By the use of forensic software, the photographs were located in a directory called "My Documents" and also in "My Pictures" which probably was the standard default directory for the hard drive.[4]

[9] A disc recording the 45 photographic images which were retrieved from the hard drive was tendered at trial (Exhibit 1). Prints of the photographs were tendered in three separate exhibits. Exhibits 2 and 3 contained 34 and six prints respectively. It was Exhibit 4 that contained the prints of the remaining five photographs. It was these photographs which were alleged to constitute child exploitation material.

[10] These five photographs were marked A, B, C, D, and E respectively. They constituted the offending material for Counts 1 to 5 in that order. The offending content of each photograph on which the Crown relied was described as follows in a Particulars document[5] tendered by the prosecutor:

A S standing with her skirt pulled down just past her knees, her underwear remained on (Count 1)

B S's bare buttocks; J touching the small of S's back. J's face is not shown

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1 AB 1 1-3.
2 AB 2 86 l36; AB 2 91 ll39-40.
3 The evidence suggested that they were taken by the appellant's son: AB 2 160 l44 – AB 2 161 l4.
4 AB 2 89 ll1-4.
5 MFI "A": AB 2 197.

(Count 2)

C S's underwear, up her skirt. S is sitting. The photo focused on her crotch. Her upper torso and face are not shown. (Count 3)

D J exposed her buttocks; S is pulling her underwear up. No faces are shown. (Count 4)

E S and J lying together on a bed with their skirts up, exposing their underwear. (Count 5)

The evidence at trial

[11] Technical evidence relating to the seizure of the hard drive and the discovery of the deleted photographs was given by Senior Constable PV Earl who, at the time, was a forensic computer analyst with the Electronic Evidence Examination Unit of the Queensland Police Service. The other witnesses in the Crown case were J, B and S.

[12] J and B had been interviewed separately by police in July 2012. S was interviewed by police in December 2012. At the trial, J and B gave evidence via video link. S gave evidence in the presence of the jury in a closed court. Prior to the calling of each of these witnesses, an edited version of the recording of the police interview of the witness was played to the jury.[6] An edited transcript of each interview was marked for identification.[7]

[13] **J's evidence:** During her interview, J was shown one of the photographs taken on 9 March 2008 (Exhibit 6 which was one of the photographs in Exhibit 2). She said that she had never seen it before. She recognised that it had been taken at her grandparents' house where her family was then living. It depicted her, B and S with B holding a large toy clown. J could not remember anything of the evening when the photograph was taken.[8]

[14] In evidence in chief, J agreed that other photographs (from Exhibit 2) had been shown to her in conference shortly before the trial but they had not refreshed her memory.[9] She identified the room in which the photograph (Exhibit 6) had been taken, as being a spare room, also known as "Opa's room".[10] J said that her father, the appellant, had a camera and that he would take photographs of all of her friends and herself with it. He did not often take photographs of her brother, B.[11] When J would have S stay over, the appellant would play with them.[12]

[15] In cross-examination, J said that the appellant had owned a Kodak camera. She was not sure if it had an SD card or not.[13] She said that she could upload photographs to the computer and that she may have seen the appellant do the same.[14] J accepted

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6 Exhibits 5, 7 and 9.
7 MFI "G": AB 2 200-272; MFI "H": AB 2 273-308 and MFI "I": AB 2 309-346.
8 AB 2 264 l1 – AB 2 266 l30.
9 AB 2 99 ll17-32.
10 AB 2 100 ll12-22.
11 Ibid ll24-29.
12 AB 2 101 ll6-13.
13 AB 2 101 ll28-30.
14 Ibid ll32-39.

that she used the camera to take photographs and that B may also have done that. She had certainly seen the appellant use the camera for that purpose.[15]

[16] **B's evidence:** B was also shown the same photograph as had been shown to J in her interview. He identified the three children in it. He said that the photograph was taken in the evening at his grandparents' house.[16] He did not think that the appellant was there on the evening when the photograph was taken.[17]

[17] In his evidence in chief, B said that he did not recall taking any photographs himself that evening. His father, the appellant, had a digital-type camera at the time.[18] He was "not really" allowed to use that camera.[19]

[18] In cross-examination, B said that if ever he were to use the camera, it would be in the appellant's presence.[20] He did not know whether he himself had taken photographs that evening or not. Nor did B remember whether the camera had an SD card or not.[21] He did not know how photographs taken on the camera were uploaded on to the computer.[22]

[19] **S's evidence:** In her police interview, S said that she had been a friend of J and had slept over at J's grandparents' house.[23] She recalled that the appellant had a camera.[24] She related that on one occasion, she and J were watching a movie in the appellant's bedroom. The appellant was there with his camera. He said that he liked taking photographs.[25] According to S, J began posing for photographs. She could not remember how J was posing. S asked her "what the hell are you doing?" It appeared to S that J thought "it was normal" from which S reasoned that it must be.[26]

[20] S was not sure if B was in the bedroom or not. The appellant was taking photographs. At the time she thought they were "innocent".[27] This event occurred on her third or fourth stayover at the house.[28]

[21] During the interview, S was shown the same photograph that had been shown to J and B in their interviews. She said that it had been taken in J's grandparents' bedroom.[29] She remembered the night that the photograph was taken.[30]

[22] In evidence in chief, S agreed that she had been shown photographs within Exhibits 2 to 4 during a pre-trial conference and that seeing them had jogged her memory of their being taken.[31] S said that the appellant took most of the photographs she was shown

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15 AB 2 102 ll6-17.
16 AB 2 304 ll38-56.
17 AB 2 307 ll8-9.
18 AB 2 108 ll14-21.
19 AB 2 112 ll2-3.
20 Ibid ll20-25.
21 AB 2 113 ll40-41.
22 AB 2 113 l43 – AB 2 114 l5.
23 AB 2 318 ll12-19.
24 AB 2 317 l3.
25 AB 2 321 l34 – AB 2 322 l10.
26 AB 2 322 l19 – AB 2 323 l4.
27 AB 2 323 ll31-48.
28 AB 2 325 l54.
29 AB 2 327 ll39-40.
30 AB 2 328 ll18-20.
31 AB 2 140 ll32-45.

but not the ones that he was in.[32] She identified many photographs as ones taken by the appellant. They included the five photographs marked A to E that constituted Exhibit 4.[33]

[23] According to S, the photographs were taken at a sleepover at J's house. They had just had dinner and were going to watch some movies. The appellant decided to take some photographs of them. She said that B asked the appellant to take some photographs of him because he was feeling left out.[34]

[24] S testified that when the photographs were taken, the appellant was asking them to pose and to give each other "wedgies", and directing them where to lie. With regard to photograph E, S said that the appellant lifted up her and J's skirts and asked J to give her a "wedgie". She was holding J's arm back when the photograph was taken.[35] For photograph B, the appellant had asked J to give her a "wedgie" so that he could photograph it,[36] while, for photograph D, the appellant had asked S to give J a "wedgie".[37]

[25] S was shown photograph C. She identified herself as the girl whose crotch had been photographed and the appellant as the photographer.[38] S described photograph A as having been taken after they had "started to play dress ups" and identified the appellant as the photographer.[39]

[26] In cross-examination, S agreed that she knew what a "wedgie" was when she was asked to give one.[40] The appellant himself did not participate in giving "wedgies" or in dressing up.[41] S rejected a suggestion that because "they were just playing around", she did not recall much about the photographing that evening.[42] She maintained that it was after, and not during, her pre-trial conference with the Crown that she learned that the evidence she would be giving would be against the appellant for the production of child exploitation material.[43]

[27] S denied attempting to reconstruct events.[44] She disagreed with the suggestion that the appellant had never directed her to expose her buttocks or to give "wedgies".[45] She also rejected the description of what had been happening as just "three young children playing around" and the suggestion that she found what they were doing "amusing".[46]

[28] S was shown photograph C by defence counsel who described it as a "blurry-type photo of your crotch". She accepted that it might not have been a posed photograph but insisted that the other photographs she was shown were posed.[47] Defence

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32 AB 2 141 ll1-9.
33 AB 2 l48 l18 – AB 2 149 l14.
34 AB 2 142 l38 – AB 2 143 l9.
35 AB 2 148 ll18-27.
36 Ibid ll29-34.
37 AB 2 148 l36 – AB 2 149 l1.
38 AB 2 149 ll3-7.
39 Ibid ll9-14.
40 AB 2 149 ll35-36.
41 AB 2 150 ll5-13.
42 Ibid ll19-25.
43 Ibid ll39-43.
44 AB 2 151 ll4-5.
45 AB 2 152 ll14-41.
46 AB 2 153 l47.
47 AB 2 155 ll40-46.

counsel suggested that the taking of photograph C "almost looks like an accident". S's response was "not within the context of the other photos".[48]

[29] The Crown then closed its case. Defence counsel made a no case submission in respect of Counts 2, 4 and 5. It was dismissed.[49] The appellant did not give or call evidence.

The grounds of appeal

[30] At the hearing of the appeal, the appellant was granted leave to amend the grounds of appeal to the following:

1. That the verdict is unreasonable or cannot be supported having regard to the evidence.

2. That there was an error of law in directing the jury as to the definition of "child exploitation material".

3. That there was an error of law in directing the jury as to the definition of "making" child exploitation material.

4. That there was an error of law in failing to direct the jury on the defence of accident under s 23(1)(a) and (b) of the *Criminal Code* (Qld).

5. That there was an error of law in failing to direct the jury on the defence under s 228E of the *Code*.

[31] During the hearing of the appeal, counsel for the appellant abandoned Ground 3 and limited Ground 4 to Counts 3 and 6.[50] In submissions, counsel addressed Grounds 2, 4 and 5 before addressing Ground 1. I propose to consider the grounds of appeal in a similar order.

Ground 2

[32] **Statutory provisions:** Chapter 22 of the *Code* (ss 207A – 229B) is titled "Offences against Morality". It contains s 228B which was enacted by the *Criminal Code (Child Pornography and Abuse) Amendment Act* 2005 (Qld) ("the amending Act") s 6. At all relevant times, it has provided that a person who makes child exploitation material commits a crime[51] and defined "make" to include producing child exploitation material and attempting to make the same.[52]

[33] The amending Act also introduced a definition of "child exploitation material" into s 207A of the *Code*. At the time of the alleged offending, the definition was in the following terms:

> "means material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years–
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> (a) in a sexual context, including for example, engaging in a sexual activity; or

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48 AB 2 156 ll1-2.
49 AB 2 176-177.
50 Appeal Transcript ("AT") 1-29 ll8-23.
51 By subs (1).
52 By subs (4), originally numbered subs (2).

(b) in an offensive or demeaning context; or

(c) being subjected to abuse, cruelty or torture."

The amending Act also introduced a definition of "material" as including "anything that contains data from which text, images or sound can be generated".

[34] The Bill for the amending Act was the *Criminal Code (Child Pornography and Abuse) Amendment Bill* 2004. The Explanatory Notes for the Bill said of the definition of "child exploitation material" that it includes an objective test – that the material is likely to cause offence to a reasonable adult. It commented that that test would ensure that "innocent family photos, such as a naked toddler in the bath, are not caught within the definition."[53]

[35] The amendments enacted in 2005 also included s 228E which provides for certain defences that are available to a person charged with an offence against s 228B. I shall refer to its provisions in the discussion of Ground 5.

[36] **The directions given at trial:** The jury were given a one page document for use in their deliberations.[54] It listed the six counts and set out the definitions of "child exploitation material" and "material".

[37] Her Honour gave the following directions to the jury as to the law:[55]

> "As I've set out in the document before you, child exploitation material means material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person or a representation of a person who is or who apparently is a child under 16 years in a sexual context including, for example, engaging in a sexual activity or in an offensive or demeaning context. Material includes anything that contains data from which text, images or sound can be generated. In this case, it is not in issue that the children in the photographs are under 16 years and that the photographs constitute material. The real issue for your determination is whether, in a way likely to cause offence to a reasonable adult, the photos depict the children in a sexual or offensive or demeaning context."

No redirection or further direction was sought.

[38] **Appellant's submissions:** The appellant submitted that these directions were deficient in two respects. They are:[56]

(i) Each of the terms "offensive" and "demeaning" should have been explained to the jury such that less serious connotations of those terms were excluded.

(ii) The jury should have been directed that in their consideration of each of the photographs A to E, the context of that photograph within the series of other photographs taken had to be considered in determining whether, viewed in such a context, the photographs satisfied the statutory definition of "child exploitation material".

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53 At page 7.
54 Exhibit MFI "F": AB 199.
55 AB 1 28 ll1-10.
56 Appellant's Outline of Submissions ("AOS") paragraph 10.

[39] As to (i), counsel for the appellant referred to the pre-trial ruling in *R v Melville*[57] in which Clare SC DCJ considered the definition of "child exploitation material".[58] Speaking of limb (b) in the definition, her Honour cited dictionary definitions of both "offensive" and "demeaning". The definition cited for "offensive" from the Shorter Oxford Dictionary included "displeasing; annoying; insulting"; whereas the cited definition taken from the Macquarie Concise Dictionary for the same word included "repugnant to good taste". Her Honour also cited the Macquarie Concise Dictionary meaning of "demean" as including "lower in dignity".[59] In developing the submission, counsel contended that the Explanatory Notes for the Bill revealed that the definition of "child exploitation material" was not intended to capture images that were merely "displeasing", "annoying" or "not in good taste".[60]

[40] Counsel referred to the decision of this Court in *R v McBride*.[61] The trial judge in that case had cited to the jury a dictionary definition of "indecent" as meaning "unbecoming or offensive to common propriety". The accused's conviction on a count of indecent assault was set aside. In applying reasoning in *R v Bryant*,[62] Holmes JA (with whom de Jersey CJ and White AJA agreed) held that by incorporating that definition, the trial judge had set the parameters for a finding of indecency too widely and beyond the range of conduct within the meaning of "indecently" in s 352(1) of the *Code*.[63]

[41] Here, the submission was not that the learned trial judge necessarily should have cited dictionary definitions of "offensive" and "demeaning" in directing the jury on the law. It was that having regard to the wide range of meanings each word has, her Honour should have given guidance to the jury concerning the narrower range of meaning each word has within the context of the definition. Absent such guidance, it is to be assumed, it was submitted, that the jury wrongly would have assigned meanings to those words at least as wide as their dictionary meanings. It was therefore an error not to give such guidance by way of a direction.[64]

[42] With regard to (ii), counsel for the appellant submitted that there was a tension, hitherto unresolved by a decision of this Court, between two pre-trial rulings by judges of the District Court as to the relevance of the context in which material was found, to the characterisation of it as child exploitation material. One of them was the ruling in *Melville* in which, it was submitted, Clare SC DCJ held that the material was to be examined stripped of any context or purpose.[65] The other ruling was by Reid DCJ in *CCI v The Queen*[66] in which his Honour held that it was not appropriate to view the 25 images in question divorced from the physical context in which they were found, that is, within a video file containing adult pornography, in determining whether they were child exploitation material.[67]

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57 [2009] QDC 436.
58 AOS paragraph 12.
59 At [9].
60 AOS paragraph 13.
61 [2008] QCA 412, referred to at AOS paragraph 11.
62 [1984] 2 Qd R 545.
63 At [21].
64 AOS paragraph 14.
65 At [11].
66 [2011] QDC 375.
67 AOS paragraph 15.

[43] It was argued for the appellant that it was relevant here that the photographs A to E were part of a series of photographs, the remainder of which were not the subject of charges; that the counts on the indictment did not follow the order in which photographs A to E were taken; and that all of the 45 photographs had been uploaded in bulk and then deleted in bulk. The jury should have been specifically instructed that these matters gave a context to the charged photographs which they were to take into account in determining whether the latter were child exploitation material.[68]

[44] **Respondent's submissions:** The respondent agreed with the appellant's submission that within the definition of "child exploitation material", the words "offensive" and "demeaning" did not have meanings as wide as the dictionary definitions that had been cited by Clare SC DCJ in *Melville.* The respondent submitted that the range of meanings to be attributed to them is influenced by the linguistic formulation of the term for which they are employed to define. In particular, the word "exploitation" serves to exclude material that is merely displeasing, annoying, insulting or not in good taste. The respondent proposed that unlike the *Code* provision under consideration in *McBride*, the definition itself provides further guidance for the range of meanings to be attributed to "offensive" and "demeaning" by means of the requirement that the material describe or depict in a way likely to cause offence **to a reasonable adult**.[69]

[45] As to context, it was submitted that, by its terms, the definition of "child exploitation material" does not permit it to be taken into account. Context has a relevance, the respondent suggested, only if it raises a defence under s 228E.[70]

[46] As to the direction that was given, the respondent contended that it was unnecessary that it have been accompanied by elaboration of the meanings of "offensive" and "demeaning" as suggested by the appellant. That was because the five photographs the subject of the charges also fell within limb (a) of the definition in that they depicted J and S, or either of them, in a sexual context.[71]

[47] In a submission in the alternative, the respondent argued that if this Court were to conclude that the direction was deficient for a failure to elaborate upon the meanings of "offensive" and "demeaning", it would conclude that the deficiency had not led to a miscarriage of justice thereby triggering the proviso in s 668E(1A) of the *Code*. That is because upon an examination of the photographs A to E, the Court would conclude that they depicted a child or children in a sexual context and also in an offensive or demeaning context that was not merely displeasing, annoying or in bad taste.[72]

[48] **Discussion:** The focus of the complaint of deficiency by way of failing to elaborate upon the range of meanings of "offensive" and "demeaning" in limb (b) of the definition of "child exploitation material" is upon meanings which those words may have in standard English usage but, it is submitted by the appellant, they do not have within the context of limb (b). Examples of those excluded meanings are "displeasing", "annoying" or "not in good taste". The respondent has submitted an

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68 AOS paragraphs 16-19.
69 Respondent's Outline of Submissions ("ROS") paragraph 22.
70 ROS paragraph 24.
71 ROS paragraph 25.
72 ROS paragraph 26.

alternative basis for circumscribing the range of meanings of those words in that context.

[49] I would accept that there is scope for legitimate debate as to the meaning of "offensive" and "demeaning" within the context of limb (b). But the mere fact that there is cannot itself substantiate a ground of appeal. It is for the appellant to establish that, in the circumstances of this case, there was a need for the learned trial judge to have elaborated upon the meanings of those words in that way.

[50] In my view, no such need arose. That is because an examination of each of photographs A to E reveals that it satisfies limb (a) of the definition in that it depicts the child or children photographed in a sexual context. If they also satisfy limb (b) as offensive or demeaning, it is only because of the sexual context. That context displaces any scope for characterisation of what is depicted in the photographs as merely displeasing, annoying or not in good taste. It is unsurprising then that no direction was sought at trial for an elaboration upon the meanings of "offensive" and "demeaning" of the kind that the appellant now suggests should have been given.

[51] It is appropriate that I explain why it is that I consider that each photograph clearly depicts the subject or subjects in a sexual context. The uncontradicted evidence was that the appellant took each of the photographs and that, with the possible exception of photograph C, he directed the subject or subjects how to pose for them.

[52] It was clearly open to the jury to find that for photographs A, B, D and E, the subject or subjects had been placed in a stylised sexual pose by the appellant and then photographed. Photograph C depicts S with her legs apart and drawn up and her covered crotch area exposed. That area is photographed close-up. It is at the centre of the photograph.

[53] In my view, the direction given was not legally deficient on that account. Her Honour did not err in law in this respect.

[54] Turning to the second deficiency in the direction alleged by the appellant, I note that in ruling on the no case submission, the learned trial judge made reference to the decision of the Court of Criminal of Appeal of South Australia in *Phillips v Police*[73] as authority for the proposition that the circumstances of the production, sale, exhibition, delivery or possession of alleged child exploitation material are irrelevant to determining whether it is child exploitation material. That authority is of no real assistance here because the legislation that the court there was to apply expressly provided that those contextual features were irrelevant to determining whether the material was indecent or offensive.[74] There is no like provision in Chapter 22 of the *Code*.

[55] In my view, the determination of whether material satisfies the definition of child exploitation material in s 207A of the *Code* is not necessarily confined to an examination of the material itself to the exclusion of any contextual features. For example, the fact that a series of photographs taken by the one person of a child may disclose a focus upon certain physical attributes of the child may serve to give a sexual context to the depiction of the child in each photograph in the series. The approach

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73 (1994) 75 A Crim R 480.

74 *Summary Offences Act* 1953 (SA) s 33(4).

taken by Reid DCJ in *CCI* was, I think, correct in having regard to a contextual feature of that kind.[75]

[56] The direction on the law given by the learned trial judge did not refer specifically to context. However, it was not deficient in law on that account in my view. That is because, firstly, all of the photographs taken that evening were tendered in evidence and available for the jury's consideration; secondly, both the prosecutor and defence counsel addressed upon contextual aspects of them[76] and, thirdly, in the summing up, the learned trial judge referred to submissions made by counsel with respect to such features.[77] Hence both the addresses and the summing up proceeded on the footing that the contextual features to which reference had been made were potentially relevant. It was therefore not necessary for her Honour to have specifically referred to context in her direction on the law. She did not err in not doing so.

[57] For these reasons, I conclude that this ground of appeal has not been established.

Ground 4

[58] **Appellant's submissions:** The appellant submitted that on the evidence, it was open to the jury to find that the taking of photograph C was an unwilled act for the purposes of s 23(1)(a) *Code* or that the making of that photograph was the unforeseen consequence of a depression of the camera button for the purposes of s 23(1)(b) thereof. In either case, the appellant would not have been criminally responsible for the production of that photograph.[78]

[59] With regard to Count 6, there arose on the evidence scope for the application of s 23(1)(b), it was submitted. It was possible that an uploading of the photographs could have occurred automatically once the camera was connected to the computer.[79]

[60] There was, therefore, an error of law by the learned trial judge in failing to direct to the jury as to the defence of accident under both ss 23(1)(a) and (b).

[61] **Respondent's submissions:** The respondent submitted that there was no evidential basis for a s 23(1) direction with respect to Count 3. Specifically, as to s 23(1)(a), there was no evidence that the taking of photograph C was not done deliberately by the appellant. The content of the photograph itself did not suggest that. Further, as to s 23(1)(b), the case had not been conducted on any basis other than that the photographs were deliberately taken with an intent to depict what the photographs captured.

[62] There was, therefore, no legal error in not directing the jury as to s 23(1).[80]

[63] **Discussion:** With regard to Count 3, I accept the respondent's submission that there was no evidential basis for a direction based on either limb of s 23(1). The appellant, of course, did not give evidence which would have justified such a

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75 See *CCI* page 6, features (a), (b) and (d).
76 See *per* defence counsel at AB 1 18 l5 – AB 1 19 l45.
77 AB 1 30 l26 – AB 1 31 l21.
78 AOS paragraphs 31, 32.
79 AOS paragraph 34.
80 ROS paragraph 31-33.

direction. Nor did any of the other witnesses. Further, as noted, photograph C depicts J's crotch area in the centre and photographed in focus.

[64] It is true that to the right in the photograph there is seen part of what appears to be a man's arm which is blurred. It appears to have been closer to the camera lens than J's crotch area and is photographed out of focus. That appears to be the blurriness to which defence counsel alluded in his question. Neither the question nor defence counsel's remark that "it almost looks like an accident", nor his submission to the jury that it is "clearly an accident"[81] was evidence in the case. At most, the blurriness of the arm might have justified a conclusion that the inclusion of the arm in the photograph, rather than the taking of the photograph itself, was accidental.

[65] As to Count 6, there was also an insufficient evidential basis for a s 23(1)(b) direction with respect to it. I acknowledge that Senior Constable Earle did say that it was probable that the download to the default directory from the camera occurred automatically.[82] However, that was an incomplete basis for reasoning that the downloading of the photographs was an unforeseen consequence within the meaning of the section.

[66] The evidence was that the camera and the computer belonged to the appellant. There was a sound basis for inferring that it was the appellant who connected the camera to the computer and that that act was a willed one on his part. Further, the only reason for making such connection would have been to download photographs that had been made with a camera. The downloading was an obviously foreseeable consequence of the connection. That the downloading may have occurred automatically did not make it unforeseen.

[67] Consistently with these reasons, I consider that the learned trial judge did not err in not directing the jury on the defence of accident under ss 23(1)(a) or (b) *Code*. This ground of appeal also cannot succeed.

Ground 5

[68] This ground of appeal seeks to invoke a provision in s 228E *Code*. Relevantly, it provides that it is a defence for a person charged with an offence against s 228B for the person to prove that he engaged in the conduct alleged to constitute the offence for a genuine artistic purpose and that his conduct was, in the circumstances, reasonable for that purpose. Counsel for the appellant sought to characterise the charged photographs as artistic in that they and others taken that evening were of "children at play" in its various forms.[83] That characterisation is, with respect, quite unrealistic.

[69] The appellant gave no evidence to that effect. Further, the uncontradicted evidence was that, with the possible exception of photograph C, the appellant directed the children how to pose for the photographs. He did not photograph children in self-directed playful self-expression. As well, in two of the photographs, no face is shown. Lastly, there was no evidence that after the photographs were taken, the appellant had applied them in some way that fulfilled an artistic purpose.

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81 AB 1 19 ll1-2.

82 AB 2 89 ll1-4.

83 AT 1-39 ll23-30. Defence counsel in his address had described the subject of the series of photographs as "kids playing around": AB 1 19 l18.

[70] Further, accepting that the posing was directed, there was no evidential basis for inferring that the directing was done for an artistic purpose. Unsurprisingly, defence counsel had not addressed, nor sought a jury direction, on that basis.

[71] The proposition in this ground of appeal that the learned trial judge erred in law by not directing as to a defence available under s 228E is untenable in my view. It cannot succeed.

Ground 1

[72] This ground of appeal is also untenable. On the evidence which I have reviewed and summarised, it was clearly open to the jury to be satisfied beyond reasonable doubt that the appellant deliberately took photographs A to E and that the taking of them constituted the making of child exploitation material because they depicted children under 16 years of age in a sexual context and in a way likely to cause offence to a reasonable adult.

[73] It was equally open to the jury to be satisfied to the same standard that the appellant facilitated the uploading of the photographs to the hard drive of his computer.

Disposition

[74] Since no ground of appeal has succeeded, this appeal must be dismissed.

Order

[75] I would propose the following order:

1. Appeal dismissed.

[76] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.