SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wales* [2019] QCA 157
PARTIES:	**R** **v** **WALES, Cornelius** (appellant)
FILE NO/S:	CA No 18 of 2018 DC No 177 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 8 February 2018 (Jones DCJ)
DELIVERED ON:	20 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after a three day trial on three counts of indecent treatment of a child under 12 – where the appellant challenges his convictions on the sole ground that the verdicts were unreasonable and cannot be supported by the evidence – where the appellant's contentions are centred around the allegations of sexual misconduct and lies which, it is said, the complainant told his mother and doctor – where it was conceded by the complainant that he might be telling lies about some of the events, but not others – where it was submitted that to convict the appellant the jury had to exclude the reasonable hypothesis that the complainant was fabricating the allegations – where the jury could not exclude the reasonable possibility that the complainant felt pressured into making the allegations – where the jury were given appropriate warnings about the need to scrutinise the complainant's evidence very carefully before they reached a conclusion of guilt – whether the jury's conclusion of guilt was reasonable, based upon the evidence *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: D R Wilson for the appellant
D Balic for the respondent

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

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

[2] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** The appellant was convicted after a three day trial on three counts of indecent treatment of a child under 12. The general particulars of the charges were: count 1 - the appellant kissed an eight year old boy on the lips, putting his tongue inside the boy's mouth; count 2 - the appellant exposed his penis in front of the boy and then masturbated, ejaculating into a toilet; and count 3 - the appellant forced the boy to watch two pornographic movies on the appellant's iPad.

[4] The appellant challenges his convictions on the sole ground that the verdicts were unreasonable and cannot be supported by the evidence.

Legal principles

[5] The principles governing how this ground of appeal must be approached are not in doubt. In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[1] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[6] In *M v The Queen* the High Court said:[2]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[7] *M v The Queen* also held that:[3]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only

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1 (2011) 243 CLR 400, [2011] HCA 13, at [20]-[22]; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.

2 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen*.

3 *M v The Queen* at 494.

> where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

[8] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[4] As summarised by this Court recently in *R v Sun*,[5] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[6] in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[7]

[9] Further, as was said by this court in *R v PBA*,[8] in the course of elucidating the applicable principles:

> "The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted."

Complainant's evidence

[10] The complainant was about eight years old when he was interviewed by police. The recording of his interview was tendered under s 93A of the *Evidence Act* 1977 (Qld) and the transcript appears in the appeal book.[9] The complainant told the police that he was there to see them because the appellant had "doing really bad stuff", which he identified as "sex".[10] He was asked to explain about the sex and he said that the appellant "was … making me watch videos and I was trying to look and he got my head and made me watch it, but I got loose easily, so I went in my room, locked the

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4 (2016) 258 CLR 308, [2016] HCA 35, at [65]-[66]; internal citations omitted.
5 [2018] QCA 24, at [31].
6 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.
7 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606, [2002] HCA 53, at 621-622 [49]-[51], 623 [56].
8 [2018] QCA 213 at [80].
9 AB 179.
10 AB 181 lines 43-55.

door so he couldn't get in, and I was just on my X-box".[11] He described the videos as involving naked girls and boys having sex, which he described as "humping each other".[12] When asked to described what he meant by humping he said, "Like rip their clothes off and going inside her or going and sucking on it".[13]

[11] When asked to describe what it was that was "going inside" the girls, he pointed to his penis, and then when asked what the penis was "going inside" he said "the bum", which he described as "gross" and it looked "yuck".[14]

[12] The complainant identified the time of that event[15] as being in the appellant's apartment the same year as the interview, namely 2015. He was unable to give an address for the apartment, but said it was after they had moved to Brisbane, and near his school. He said that it was downstairs in the house, and he and the appellant were the only ones there.[16] He described the time of day as the morning and it was "all foggy". He said that he went downstairs and the appellant asked him to come in, but he (the complainant) did not want to do that because "I knew there was gonna be something going on".[17] When asked how he knew that, he said it was because the appellant "had his iPad and it was on and he was about to click something" which he identified as a "T" symbol.[18] He said he knew that the T means "the bad things … the T means for the sex and that. So once when you press the T, it comes up with naughty pictures".[19]

[13] The complainant explained that there was a T on the appellant's iPad as well as his phone but the complainant never used it. He said that before the appellant hit the T he said that if the complainant told anyone he (the appellant) would tell the complainant's mother that he had looked at naughty pictures and the appellant would be sent to jail.[20]

[14] The complainant said that the appellant hit the T and then "I was getting his hand off and I kind of kicked him … on his leg".[21]

[15] As he continued to describe the event, the complainant added further details, saying that the appellant was asleep and he (the complainant) was "trying to be sneaky" to go and get some juice but he tripped over and caused the appellant's phone alarm to go off, waking up the appellant.[22] At that point he tried to run, but slipped and the appellant "got me" and he "put the T on".[23]

[16] The complainant said that he slipped and hit something, spinning around and sliding so he nearly hit a table He continued:[24]

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11 AB 182 lines 8-11.
12 AB 182 line 28.
13 AB 182 line 38. Here, as in other places during the interview, the transcript uses "INDISTINCT" to indicate words that were not transcribed, but the actual words can be heard on the video.
14 AB 183.
15 Which corresponded with count 3.
16 AB 189-190.
17 AB 191 line 40.
18 AB 191 lines 44-50.
19 AB 191 lines 50-60.
20 AB 193 lines 19-21.
21 AB 193 lines 23-30 and AB 194 lines 32-42.
22 AB 193-194.
23 AB 195 line 29.
24 AB 197 lines 18-25.

> "He walked up … I hit the table and I was knocked out and then I got woked up and … I wasn't actually knocked out. I accidentally hit my head. I was on the ground holding my head and holding it so, and then he got me and said, are you all right? I'm like, yeah. And then he put the T on, he pressed the T and … I didn't wanna watch it so I kicked his leg and went upstairs and locked the door, ding, ding."

[17] The complainant said this was the first time the appellant had shown him "naughty pictures on his computer". He had used the appellant's computer before but "always on the games", and denied that he had seen any of the pornographic images, saying "I've never gone through them 'cause they look gross".[25]

[18] The complainant then gave an account of the events concerning count 2. He was asked whether anything else had happened with the appellant and said "he did play with himself", which he then described as "he got his willie out and started going like that to it", at that time mimicking masturbation.[26] He continued: "And then, after when he stopped, he said, this bad word … Cum. And he went to the toilet, grabbed my hand and like … some liquid … squirted out and … I was gonna punch him but I knew I was gonna get in trouble, so I … kind of pinched him … And he said , ouch, and then I ran off."[27]

[19] He said this event occurred in the lounge room when the complainant was trying to go back upstairs. The appellant opened the door and "he found me, so then he got my hand and then he has … he masturbated himself … With his um willie … He made me try to touch it but I [indistinct]. I was trying to do it, then he said, anyway, I wanna cum. So he didn't make me do it. … And then next he takes me into the toilet … liquid came out of him … [out of] the willie … It was white stuff".[28]

[20] The complainant identified this event as happening in Brisbane at a time when his mother and siblings were still in Gympie. The appellant again told him that if he said anything to his siblings or his mother then the appellant would be sent to jail.[29]

[21] The complainant was able to describe what the appellant was wearing on that occasion, in some detail. This included clothing and underwear which had Star Wars or Grand Theft Auto designs and colours.

[22] Subsequently but in the same interview, the complainant was asked whether he had ever touched the appellant in any way, other than being forced to when the appellant seized him by the hand. At first the complainant shook his head, then he said that the appellant "has kissed me once".[30] He described this as happening one night at the house in Gympie, at a time when the complainant was playing darts by himself. He said the appellant came over while the complainant was throwing darts and "he kissed me … On my lips … It was … like when the tongue, when the tongue goes in your mouth".[31]

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25 AB 198.
26 AB 198 lines 37-46.
27 AB 198 line 50 to AB 199 line 3.
28 AB 199-200.
29 AB 201 line 21.
30 AB 205 line 30.
31 AB 205 lines 35-50.

[23] Initially the complainant said that nothing was said on that occasion by the appellant, but then said there was an exchange when he asked the appellant "Why'd you kiss me", and the appellant replied "… because I love you".[32]

[24] The complainant said he had told his mother and brothers about some of the events. One of his brothers was upset and threatening to find the appellant and "beat him up". There was some inconsistency in the complainant's account because he at first said that he had told his mother and brothers "everything",[33] but then said that he did not tell his mother much of it.[34]

[25] The complainant's pre-recorded evidence took place when he was nearly 11 years old. In his evidence in chief he affirmed that he had told the police officers the truth. He also identified a photograph as showing a stylised T as the symbol he had seen on the appellant's iPad.[35]

[26] In cross-examination the complainant described aspects of his relationship with the appellant. In his police interview he had described him as a friend and someone that he had known for ages. He had no idea how old the appellant was but the appellant lived with them at Gympie and then in Brisbane, and the complainant's mother had taught the appellant how to drive. In the pre-recorded evidence the complainant described himself as being "below the class" at school with the consequence that the teacher gave him easy work, and he did not like doing homework.[36] He denied suggestions that the appellant helped him to learn how to read better, and that he read books to the complainant. He did, however, accept that the appellant helped him with his homework, and it was something the appellant was quite strict about.[37] He also said the appellant helped making dinner, looking after the complainant, driving the complainant to places such as school or the movies, and sometimes helping him wash his hair.

[27] He was cross-examined about count 1, the occasion of the kiss. The complainant affirmed that he was playing darts outside when the appellant kissed him. At the time his two brothers, his mother and his grandfather were inside having dinner.[38] He said that from the position of the dart board one could not see into where they were having dinner, though he could see the kitchen.[39] The reason he was outside was that he had already had his dinner and "came out to throw some darts". He was asked whether there was any conversation between him and the appellant at the time of the kissing and responded:[40]

> "Kind of. … when he kissed me, he said, "I love you". And I … was just standing and I practically just walked back inside.
>
> Did you say anything to [the appellant] before he said that? --- No. No, I didn't.
>
> Are you quite certain you didn't say anything to him? --- Yes."

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32 AB 206 lines 50-57.
33 AB 203 line 3.
34 AB 207 line 25.
35 Exhibit 1.
36 AB 23.
37 AB 23 lines 12-24.
38 AB 24 lines 32-35.
39 AB 24-25.
40 AB 26 lines 19-26.

[28] It was put to the complainant, and firmly denied by him, that there had never been a kiss on the lips, and the appellant had never put his tongue into the complainant's mouth.

[29] Cross-examination then turned to count 2, the masturbation event. The complainant was asked to be more specific about the time of day, and nominated "late morning". He said it was at their apartment in Woodridge, at which the complainant slept in his mother's bedroom upstairs, and the appellant had a bedroom downstairs. He said it was the toilet downstairs where the masturbation occurred.[41] He described the event in these terms:[42]

> "Why did you … walk downstairs at that time? --- I just wanted – I just like walking down – I just walked down there sometimes.
>
> And what did you see? --- I saw [the appellant].
>
> In the toilet, you said? --- Yes, in the toilet.
>
> And where were you standing when you saw him in the toilet? --- I was near the lounge room.
>
> …
>
> And … so what could you see? You said you saw him masturbating. What could you …. see --- Yeah, I saw his thing and … I just saw him sitting down on the toilet and, yeah, I just walked back upstairs.
>
> And when you say, "thing", do you mean his penis … or willy? --- Yeah. Yeah.
>
> HIS HONOUR: And at that stage, you said he was sitting down on the toilet? --- Yes."

[30] The cross-examination then turned to count 3, concerning the videos. The complainant identified that it occurred on the appellant's iPad and reaffirmed his evidence about seeing the "T" on it.[43] He agreed that the appellant would let him use the iPad to play games,[44] but again said that he did not watch the videos, just played the games.[45]

[31] He described the location as being while they were sitting on the lounge watching TV,[46] at which time the appellant "just made me watch it – watch it … he grabbed … my head, and just made me watch – turn me to it".[47]

[32] A number of propositions were put to the complainant about that event. All of them were denied. They included that: (i) the appellant never showed him any videos on the iPad of people having sex; (ii) that the complainant might have found some on an occasion when he was playing on the iPad; and (iii) he was lying about that event.[48]

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41 AB 27.
42 AB 28 lines 1-45.
43 AB 29.
44 AB 30 line 5.
45 AB 29 line 46.
46 AB 31 lines 44-46.
47 AB 31 lines 3-10.
48 AB 33 lines 4-25.

[33] The complainant also denied the proposition that he was lying about counts 1 and 2.[49]

[34] The cross-examination then turned to things which the complainant had told his mother. Those propositions and the responses can be summarised as follows:

(a) the complainant told his mother that the appellant had tried to put his penis into his bottom; the complainant agreed that he had; he agreed it was untruthful but he said it because he was simply trying to agree with what his mother was suggesting to him;[50]

(b) it was suggested that the complainant had told a similar thing to a psychologist, but the complainant denied he had ever said that;[51]

(c) it was put that he told a doctor that the appellant had touched the complainant on his penis, which he agreed having said and also agreed that it was untrue, but said for the same reason (trying to agree with what he thought his mother wanted him to say);[52] and

(d) it was also suggested that he had told the doctor that the appellant had sucked his penis a few times; the complainant said that he had told the doctor that, but it was true, and he had simply forgotten to tell the police because "when I went in that day [to the doctor], I forgot everything – what I told Mum".[53]

[35] It became clear that the day which the complainant referred to as being when he went in and forgot everything was the day he saw the doctor, but he denied that his mother helped him remember what to say.[54] He was then asked whether that was why he "made some things up". He responded "Yeah. Well, she did help me sometimes. She did help me kind of. … But mostly times I just forget".[55] He then denied that his mother would tell him what to say, using the phrase "not really", clarifying that she would remind him of what he had told her on the previous occasion.

[36] The cross-examination also put a version of what the complainant had told the doctor, at the commencement of the propositions concerning the conversations with that doctor. The passage of evidence is important because it was relied upon by Counsel for the appellant as demonstrating a lie, whereas watching the pre-recorded evidence tends to leads to the conclusion that the complainant was confused by the questioning. The exchange is as follows;[56]

> "… can you remember what you spoke to [the doctor] about? --- No. No.
>
> …
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> Do you remember saying to him things like that [appellant] had touched your body parts do you remember saying that? --- No. No. I don't.

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49 AB 33 lines 27-32.
50 AB 35 lines 7-40.
51 AB 36.
52 AB 37 lines 18-25.
53 AB 37 lines 27-34.
54 AB 37 lines 36-46.
55 AB 38 lines 1-4.
56 AB 36 line 36 to AB 37 line 6.

> Do you remember saying to him that, "[The appellant's] not supposed to touch my private parts"? --- I did hear about – I can't remember about that one.
>
> Yeah. That's --- ? --- I do remember about that.
>
> You remember saying that? --- Yeah.
>
> All right. Again, that's not the truth, is it? --- Ahh, no.
>
> Is that, again … something you said because your mum was there and you thought she wanted you to say it? --- Yeah."

[37] The cross-examination concluded with a passage in which it was put to the complainant that he was lying in order that the appellant would not live with them anymore:[57]

> "Now, just to finish off … I just want to make it clear that the position of my client … is that he never did any of these terrible things to you? --- He did.
>
> That you're telling lies? --- Some I might be telling lies about, but the other ones are true.
>
> And did you [sic] mum tell you that if you told the police these things that [the appellant] wouldn't have to live with you anymore? --- Yes.
>
> …
>
> HIS HONOUR: Did you not want to live with [the appellant] anymore? --- Well, not anymore because he did all the rude stuff to me, and – yeah.
>
> COUNSEL: And is another reason that he was very strict with you? --- Not that reason. I understand he was strict because … I'm a really silly boy. I'm sometimes really silly around him, and I just get really lazy in homework. That's why he's really strict."

Evidence of the complainant's mother

[38] The complainant's mother described the houses in which they lived, and the living arrangements. On numerous occasions when she had to work in Gympie the appellant looked after the complainant. She then described hearing a comment by another person (Bond) which gave her a feeling that something might have happened between the complainant and the appellant. She said she spoke to him straight away. Her evidence of the conversation was in these terms:[58]

> "… I said has [the appellant] ever touched you around the willy or around the bum area or anything like that, and he had put his head down and I said, "Look, you know, please tell me the truth", and he nodded his head. And at that time … my other son was there at the table … and then he said straight away, "No, it wasn't [the appellant]'. It was someone at the day care centre that he went to and he said the boy's name and he said this boy – he's not there anymore and I said "Well what if I was to go to the day care centre

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57 AB 38 line 36 to AB 39 line 7.

58 AB 65 line 38 to AB 66 line 11.

> and, you know, go and ask?' He said no. And I said to, "I've never heard you mention this kid before. So where did this come from?" You know, it just sound [sic] as if it was a scripting. And I said, "Did [the appellant] tell you to tell me this or something?" and he said, "[The appellant] said that if I said anything he would go to jail."
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> ...
>
> I then went in and spoke to [the complainant] when he was in the shower and I just said to him, "Can you please tell me a bit more about what happened?" and … I said "Did [the appellant] ever try to do anything around your backside area?" and he just said, "Well, he did once, but it was too thick". And I just left it at that …"

[39] In cross-examination the mother confirmed that she had trusted the appellant and permitted him to be a carer for the complainant. She was led to understand by something which the appellant had apparently told Bond, that the appellant was bi-sexual. It was put to her in cross-examination that Bond had told her that fact.[59]

[40] Having said in evidence-in-chief that the appellant had an iPad which the complainant used, in cross-examination the mother said she did not access the iPad or a Facebook account on it, and that when she wanted to use something for work she only used the computer, not the iPad.[60]

[41] It was put to the mother that she had told the complainant what to say when they went to see the doctor. She denied that.[61] She also denied telling the complainant what to say when they saw various people, and denied "putting words into his mouth".[62]

[42] The mother was cross-examined about her personal beliefs about matters of sexuality, agreeing that she held traditional values and was opposed to homosexuality, paedophiles, and gays and lesbians.[63] She explained her position as being that:

> "I don't agree with homosexuality or … Lesbians – however, I actually work with a lot. Whatever they do is their discretion, but to me this is completely different when children are involved. I don't believe that goes under homosexuality."[64]

[43] She agreed that when she initially spoke to the complainant, the complainant's response was firstly yes, and then no.[65] She said that her son told "fibs" but no more than any other child, and denied that she had put the complainant up to making the complaint about the appellant because of the appellant's bi-sexuality.[66]

Evidence by Bond

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59 AB 69 line 44 and AB 70 line 8.
60 AB 72.
61 AB 74 lines 19-29.
62 AB 75.
63 AB 75-76.
64 AB 76 lines 3-6.
65 AB 76 lines 8-13.
66 AB 76 lines 27-32.

[44] Bond was a sometime resident at the property, along with the complainant, his mother and the appellant. He gave evidence of a conversation with the appellant in August 2015 when the appellant told him that he was bi-sexual.[67] The following day he had a conversation with the complainant and the complainant's mother. She asked if the appellant had ever touched him, and the complainant responded, "yes". She then asked for specifics and the complainant replied "[The appellant] had tried to … put himself in me, but it was too big".[68] He said that was really all he could recall.

[45] In cross-examination Bond was not challenged as to what he had been told by the appellant. He was asked about his police statement in which he had said that he asked the complainant whether the appellant ever tried to put his penis in his mouth, receiving a "yes" response. He was asked whether he accepted that he had said that in his statement, and responded "I put that in the statement, but I couldn't recall given that it happened … two and a-half, three years ago".[69]

[46] Bond confirmed as correct another paragraph of his police statement in which the complainant revealed to Bond that the appellant had called the complainant into a bathroom where the appellant rubbed himself and "then I saw white stuff in his penis".[70]

Evidence of Senior Constable Mitchell

[47] Senior Constable Mitchell gave evidence concerning a search of the appellant's residence. It revealed various items of clothing containing a Star Wars theme, as well as an iPad which, when tested, had an application on it identified by a "T". When the T was clicked it revealed three pornographic videos. The photograph of the application with T on the iPad was Exhibit 5.

Submissions

[48] The appellant's contentions are centred around the allegations of sexual misconduct and lies which, it is said, the complainant told his mother and the doctor. Principally, the contention relied upon the evidence that he complained of attempted anal sex by the appellant and the appellant touching his penis. Though he said such things to his mother, in the presence of Bond, and to the doctor, there was no mention of it in his police interview. That together with the complainant's concession that he might be telling lies about some of the events, but not others, was contended to make it a case where the jury could not accept his evidence. In that regard it was said that the corroboration otherwise was inconsequential. For example, the fact that the complainant could identify the Star Wars clothing and underwear worn by the appellant was explicable simply on the basis that they lived for some time in the same house. Moreover, the fact that the complainant correctly identified the T screen on the iPad and that it linked to pornographic videos was explicable on the basis that the complainant used the iPad on a number of occasions and could have accidentally viewed the pornography.

[49] It was submitted that to convict the appellant the jury had to exclude the reasonable hypothesis that the complainant was fabricating the allegations because he thought

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67 AB 86 line 3.
68 AB 87 lines 32-43.
69 AB 88 lines 26-33.
70 AB 88 lines 34-36.

his mother wanted him to say that the appellant had engaged in improper conduct. The jury could not exclude the reasonable possibility that the complainant felt pressured into making the allegations.

[50] For the respondent it was contended that the complainant was a young child who was able to, despite assertions as to coaching, give a lucid and fluid account of the events the subject of the indictment. Whilst there were inconsistencies in the preliminary complaint evidence, the complainant himself was forthcoming about the extent of the untrue disclosures, and maintained his versions of events with little evident scope for reconstruction. In particular, it was said, his description of count 2 involving the masturbation was quite graphic in nature and incapable of invention. It was submitted that the jury were appropriately warned that their acceptance of the complainant's evidence was crucial to a finding of guilt, and they were reminded to take particular care when scrutinising the complainant's evidence before arriving at a guilty verdict.

Discussion

[51] It is true to say that there are inconsistencies in the complainant's evidence when one compares the police interview with the pre-recorded evidence. And it is also true to say that some of those inconsistencies could be characterised as untruthful. The best example is the one which the appellant relies upon, namely that in the police interview no mention was made of an occasion of attempted anal sex, or other touching of the complainant by the appellant. However, there are a number of reasons why it was, in my respectful view, open to the jury to accept the evidence of the complainant on the three counts with which the appellant was charged.

[52] First, it has to be borne in mind, as no doubt it was by the jury, that the complainant was only about nine years old when he was interviewed by the police, shortly after the events had been uncovered. The evidence of the mother was that on the same night as she had a conversation with the complainant about what had happened, one of her sons stayed with the complainant while she and Bond went to get her other son from Gympie, and on the way they contacted the police.[71] The police interview was conducted on 12 August 2015 when the complainant was a couple of months off being nine years old. The pre-recorded evidence took place on 31 May 2017 when the complainant was 10 and a-half.

[53] That being the case, and the conversation with his mother having taken place only a short while before, the ground rules set in the police interview come sharply into focus. The complainant was told that it was important that he speak only of things that have really happened. What then followed immediately was a description of count 3 concerning the videos. The complainant's description of them strongly echoed his age. His anatomical descriptions were simplistic[72] and hardly bore any of the hallmarks of a response either coached or made up. The suggestion that he might have accidentally come across the pornographic videos is, of course, possible but the evidence was that he would have to identify the "social media section" first then click on that in order to arrive at the screen with the application and the T, and then click on the T.[73]

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71 AB 66 lines 21-26.

72 When asked what the penis looked like he said it looked "big" and "gross". When asked what it was going into, the description was "the bum", which was "gross as well" and "yuck".

73 AB 107.

[54] Secondly, the description given of the masturbation in count 2 was rightly described by counsel for the Crown as graphic. There was no suggestion in the evidence that anything seen on the pornographic videos matched what was described for count 2. That included the complainant, at his young age, being able to mimic masturbation as part of his description and then graphically describing ejaculation. Furthermore, the complainant was able to use the word "masturbated" to describe what had occurred, which might be thought to be an unusual thing for an eight or nine year old, unless it had actually been experienced.

[55] Thirdly, the evidence sustained a conclusion that the appellant discussed his bi-sexuality, and what it was, with the complainant. There is no evidence that anyone else referred to such a thing, yet the complainant knew what it was, and said that he had learned about it from the appellant.[74] Bond's evidence was to the same effect. Significantly, Bond's evidence that the appellant told him that he was bi-sexual was not challenged in cross-examination. The jury could well have then asked themselves, what was the occasion that called for the appellant to discuss bi-sexuality with an eight or nine year old?

[56] Fourthly, the complainant's description of what occurred in count 1 (the kissing incident) was one which the jury might have thought was graced with simplicity and a lack of artifice. The complainant's account not only described it as the sort of kiss when the tongue goes into the mouth, but nothing was added to that description then or afterwards. If he was the committed liar that the defence case made out, it would have been easy to add some other form of touching to this account so as to embellish the evidence. Indeed, the same could be said of the other events as well.

[57] Fifthly, there was no embellishment in respect of any of the three counts when it came to the pre-recoded evidence. Once again, if the complainant was the committed liar that the defence suggested, the jury might well think there would be some sign of that in the recounting of the evidence concerning the three particular counts. Instead there was none. That is not to say that there were not some inconsistencies, but that is to be expected with evidence from a young child given on disparate occasions.

[58] Sixthly, the evidence concerning what the complainant told his mother and Bond, as to attempted anal sex, has to be seen in light of the explanation the complainant gave for saying it. The initial question in the pre-recorded evidence was that he said yes when his mother asked that question because he was trying to agree with his mother and "just agreeing with what your mum had suggested".[75] The same explanation applies to the statement made to the doctor that the appellant had touched his penis. Putting aside for one moment the likelihood that the complainant was confused by the cross-examination when the topic was first raised as to what was said to the doctor, and putting to one side his evidence that when he went to see the doctor he "forgot everything", what one is left with is the explanation that things said that day him were prompted by his mother and agreed with by him because he thought his mother wanted him to say it.[76] In such a circumstance the jury might well have reasoned that the complainant was not a committed liar, but rather a little boy trying to please his mother but at the same time deal with an unpleasant truth. That is a form of reasoning which sits wells with the complainant's own evidence

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74 AB 204.
75 AB 35.
76 AB 37-38.

when he said that "some I might be telling lies about, but the other ones are true".[77] In the same vein, the jury could well have found the complainant's explanation of his position justifiable, if not compelling, when he explained that he didn't want to live with the appellant anymore "because he did all the rude stuff to me".[78]

[59] The jury having seen the video of the pre-recorded evidence and the police interview could well have formed the view that the complainant was an unsophisticated young boy unlikely to be indulging in lies motivated by some desire to get rid of the appellant. More likely is it that he struck the jury as a somewhat distracted young boy, not proficient at school or with homework,[79] but nonetheless able to realise he was in need of assistance in his schooling.[80]

[60] Finally, the jury were given appropriate warnings about the need to scrutinise the complainant's evidence very carefully before they reached a conclusion of guilt, bearing in mind that the complainant's evidence was critical. The matters raised by counsel for the appellant are all matters that fall, quintessentially, within the scope of the jury's task as the constitutional arbiters of fact. This Court must be careful not to substitute trial by an appellate court for trial by that constitutional arbiter.[81]

[61] I am unpersuaded that it was not open to the jury to accept the evidence of the complainant, and come to a conclusion that beyond reasonable doubt, the appellant was guilty on all three counts. I am not persuaded that an innocent person has been convicted.

[62] The appeal should be dismissed.

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77 AB 38 line 39.

78 AB 39 line 2.

79 Describing himself as a "really silly boy" who was "lazy in homework" and "below the class" at school.

80 The response is at AB 23 and 39 in the pre-recorded evidence match that description as does his description of Bond as a "nice guy actually", who "might help me with my homework" if the appellant went to jail: AB 189 line 25.

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