SUPREME COURT OF QUEENSLAND

CITATION:	*R v IG* [2019] QCA 208
PARTIES:	**R** **v** **IG** (appellant)
FILE NO/S:	CA No 31 of 2019 DC No 217 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 13 February 2019 (Clare SC DCJ)
DELIVERED ON:	11 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2019
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – MISCELLANEOUS OFFENCES – OTHER MISCELLANEOUS OFFENCES AND MATTERS – REMOVAL OF CHILD FROM STATE FOR FEMALE GENITAL MUTILATION – where the appellant took her two daughters to Somalia in which a procedure to excise the clitoral hood was performed on them – where the two daughters were examined by a paediatrician – where it was confirmed by medical examination that an excision procedure had taken place – where the appellant was convicted of two counts of removal of a child from Queensland for female genital mutilation, with the aggravating circumstance of being a domestic violence offence – where the two daughters initially gave evidence detailing what had happened to them in Somalia but later retracted it stating that nothing had happened to them – where the two daughters were allegedly bribed by a step-sister to give evidence against their mother – where the appellant challenges her conviction on two grounds – whether the verdict was reasonable – whether there has been a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant challenges her conviction on the

ground that the verdict was unreasonable and could not be supported having regard to the evidence – where the appellant challenges her conviction on the ground that there has been a miscarriage of justice because the jury was not adequately instructed about the effect of the two daughter's retracted evidence and the use they could make of the medical evidence – where the two daughters stated that they had a procedure in Somalia but retracted that evidence saying that no procedure had taken place in Somalia – where the reliability of the evidence of the two daughters was called into question – whether the verdict was unreasonable – whether there has been a miscarriage of justice

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v PBA [2018] QCA 213, cited

COUNSEL: R M O'Gorman with R C Taylor for the appellant (pro bono)
D Balic for the respondent

SOLICITORS: Wallace O'Hagan Lawyers for the appellant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

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

[3] **MORRISON JA:** On 16 April 2015 the appellant left Australia with her two daughters, AKD aged 11 and a-half, ASI aged eight and a-half. They travelled to Kenya and on to Somalia, where they stayed with the appellant's mother.

[4] They returned on 9 November 2015. Eight days later police and Child Safety officers went to their house and spoke to the girls through the front door. According to the police officer the girls confirmed that a procedure had been performed on them while in Somalia.

[5] On 26 November 2015 the girls were examined by a paediatrician. He took a history from them, which was that a procedure had been carried out near the beginning of their time in Somalia. AKD said she had suffered bleeding for a day, and pain for three days. ASI agreed.

[6] The doctor's examination revealed that genital mutilation had taken place on each girl, consisting of the excision of the clitoral hood, resulting in the abnormal flattening of that area with associated loss of pigmentation of the skin. He could not think of a cause of such injuries other than excision of the clitoral hood.

[7] On 27 November 2015 police interviewed the two girls. In summary the girls told police that soon after their arrival in Somalia, while staying with their grandmother, a woman had come to the house, and done something to them. They were not told what was to happen and neither saw what it was, but AKD said it happened "where I pee". AKD said that she was not given a needle. ASI was upset when it

happened. They were both awake during the event. It had caused pain for a time, but after three days they felt better.

[8] The appellant was charged with two counts of removal of a child from Queensland with the intention of having genital mutilation performed, with the aggravating circumstance of being a domestic violence offence. She was convicted on each count following a trial.

[9] The appellant challenges her convictions on two grounds:

(a) the verdict was unreasonable and could not be supported having regard to the evidence; and

(b) a miscarriage of justice occurred because the jury was not adequately instructed about the effect of AKD and ASI's retracted evidence and the use they could make of the medical evidence.

Legal principles

[10] The main ground of appeal was that the verdict was unsafe. The principles governing how that ground of appeal must be approached are not in doubt.

[11] 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.

[12] 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."

[13] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[3] As summarised by this Court recently in *R v Sun*,[4] 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",[5] in which the court must have "particular regard

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1 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; 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 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.
4 [2018] QCA 24, at [31].
5 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.

to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[6] The High Court said:[7]

> "With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court must always be whether the [appeal] court 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."

[14] 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."

Evidence at the trial

[15] Evidence at the trial came from a variety of witnesses. First, the interviews of AKD and ASI were admitted under s 93A of the *Evidence Act* 1977 (Qld) and their pre-recorded oral evidence was admitted under s 21AK of that Act. Others included the doctor, the girls' step-sisters, the investigating police officer and a Child Safety officer.[9] Also in evidence was the recorded police interview with the appellant. Finally, the parties made some formal admissions.

[16] AKD's evidence was that she, ASI and the appellant, had recently been on a holiday to Somalia, where they stayed with her grandmother. A couple of days after they got there a woman came to the house and she and ASI had something done to them. She was told nothing beforehand and though she was awake at the time she did not know what it was. It happened "where I pee", and hurt for two to three days, and when she went to the toilet.

[17] ASI said that they stayed with the grandmother and it happened "when we first went in there". She was not told anything in advance. She was awake at the time but could not say what was done. She had been upset when it was done. It hurt for about three days.

[18] In oral evidence AKD retracted her account to police. She said that while in Somalia she had not been cut on any part of her body, nor did a lady come to the

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6 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.

7 *Baden-Clay* at 330 [66].

8 [2018] QCA 213 at [80].

9 In these reasons I intend to refer to the step-sisters as SIS1 and SIS2.

house, nor was she sore when she peed. She explained that she lied to police because her step-sister (SIS1) had bribed her to do so, offering $50 and an iPhone.

[19] In oral evidence ASI said she did not have an operation in Somalia, nor did anyone cut her on any part of her body. She explained being upset as because she had a skin rash. ASI recalled SIS1 coming over to their house after they got back from Somalia, and taking ASI and AKD into their room. SIS1 "… told us to do that and agree everything what the police said, and, 'I'll give you an iPad and $50', but I wasn't listening". When asked if she had said what she said in the police interview because of what SIS1 said to her, ASI said "No, I wasn't listening what she said"

[20] Dr Mills examined both AKD and ASI on 26 November 2015. He took a history from the girls. AKD told him it happened near the beginning of their time in Somalia. AKD said she had bleeding for a day, and she had been in pain for three days. ASI agreed.

[21] He explained what he discovered on examination of each girl. The area around the clitoral hood was abnormally flat, without the contour that was normally there. There was also discolouration of the skin, meaning that there was some loss of pigment over the clitoris where the hood would normally be.

[22] His professional opinion was that there had been an excision of an amount of tissue from the area of the clitoral hood. He could not conceive of any reason why excision would have a genuine therapeutic purpose, unless it was for something like cancer. His findings did not fit within the natural variation of female genital appearance. Dr Mills could not conceive that it could have occurred by accident, nor by fingernail scratching, nor by infection. He would expect it to cause pain, and quite significant bleeding, and in the acute phase shortly after the excision, difficulties with urination would occur. In his opinion and experience there was no other condition which explained what he had found, i.e. the appearance was abnormal with type 1 genital mutilation.

[23] SIS1 denied she had asked AKD or ASI to lie to police, or that she promised $50 and an iPhone.

[24] SIS2 was the older step-sister of AKD and ASI. She denied telling AKD or ASI to lie to police or the Department of Child Safety, in order to say that something happened while they were on holidays in Somalia, or that she promised them money or an iPad to do so. SIS2 agreed that it was she who contacted Child Safety about AKD and ASI.

[25] On 17 November 2015 Detective Sergeant Geck went to the children's family home and spoke to AKD and ASI at the front door. AKD confirmed that she and ASI had a procedure carried out on them while in Somalia.

[26] Formal admissions were made that the appellant had organised the flights to Somalia. They left on 16 April 2015 and returned on 9 November 2015.

[27] In her police interview the appellant repeatedly denied she had done anything to her daughters while in Somalia. She said it was just she who organised the girls' passports and tickets. She said what was apparent in AKD and ASI was from God and SIS1 had told the girls to lie to the police.

Submission – ground 1

[28] At the forefront of the contentions advanced by Ms O'Gorman and Ms Taylor, commendably appearing on a pro bono basis for the appellant, were the retractions by each of AKD and ASI in their oral evidence. Each of them denied that what they told the police about being cut was true, and in AKD's case it was said to be prompted by SIS1's promise that if they did so she would give them $50 and an iPhone.

[29] The central contention was that those retractions were such that the credibility and reliability of each of AKD and ASI was irrevocably damaged. That was the case, it was said, no matter which version was true, that is to say, the version in the police interview, or the version in the oral evidence. Either way AKD and ASI had lied to somebody. A further part of the contention was that the retractions were true, and the content of the police interviews had to be rejected as lies prompted by the bribe offered by SIS1.

[30] The second part of the contention was that the evidence simply did not establish that the female genital mutilation, which for the purposes of the appeal was accepted to have occurred, took place while in Somalia on the trip in 2015. As the contention went, the medical evidence could not establish when that occurred, and it was equally open that it could have occurred in Australia before the girls left on the trip. Once one put aside the accounts in the police interviews, the evidence otherwise was simply the medical evidence, which was that it was impossible to say when the excisions occurred.

[31] Part of the submission also pointed to the evidence of each of SIS1 and SIS2, whose criminal histories and enmity towards the appellant rendered their evidence wholly unreliable. It was said that, on balance, that left it likely that AKD and ASI's account of being offered the bribe, and responding to it by lying was credible and reliable.

Discussion – Ground 1

[32] In my view, there were several pieces of evidence which it was open to the jury to accept, and conclude that the genital mutilation occurred in Somalia in 2015. For the purposes of this discussion it is significant that on the appeal the fact that genital mutilation had occurred was not in issue.

[33] AKD's evidence was that the 2015 trip to Somalia was the first time she had been there.[10] She had been born in Australia and this was the first time she had been overseas.[11] There was no challenge to that evidence, nor was it implicated in the alleged bribe and retractions in oral evidence.

[34] As for ASI, she said she had been to Somalia once before,[12] but there is reason to think that she did not really answer whether she had been there before, as opposed to saying how many times she had been there. No other evidence suggested that she had travelled to Somalia previously and, given her age it was more than unlikely unless one or other of the parents had accompanied her, and there was no suggestion of that. Other than the holidays to Somalia she said she had not lived anywhere

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10 AB 288.
11 AB 289.
12 AB 301.

else.[13] Finally, in her oral evidence she said that the visit in 2015 was the first time she had stayed with her grandmother in Somalia.[14]

[35] In the appellant's police interview, the appellant said it was she who organised the passports for the girls.[15] When asked to focus specifically on who organised the passports, the appellant said "Just me".[16] Her account was that when they travelled to Kenya she expected her mother to meet them there, but her visa had expired and she was not able to come down. As a consequence they went to Somalia to stay with her.[17] The appellant's husband knew that they were going overseas, but, it seems, only to Kenya. However, once the mother was unable to travel, he then knew that they were going to Somalia.[18]

[36] That the plan was to travel to Kenya is supported by the admissions.[19] The first flights were booked to Kenya, by the appellant.

[37] As to the evidence that genital mutilation had happened in Somalia as opposed to anywhere else, that appeared from:

(a) the interview with AKD who acknowledged that they had been on a holiday to Somalia and it had happened a couple of days after they arrived.[20]

(b) the interview with ASI who said that it happened at Somalia in her grandmother's house when they first went into Somalia;[21] in her oral evidence ASI denied that what she had said to the police was the product of SIS1's bribe, because she had not listened to SIS1;[22]

(c) each of AKD and ASI had agreed when first spoken to by DS Geck that something had happened in Somalia; and

(d) the history taken by Dr Mills was that it had happened "near the beginning of their time in Somalia".[23]

[38] Further, there was no question about the fact that at some point genital mutilation had been carried out on the two girls. Whilst denying that it had been done in Somalia, neither they nor the appellant suggested that it had been carried out anywhere else. It may be that at the time AKD and ASI gave their oral evidence the object of the defence was to deny that any mutilation happened at all, but the difficulty the appellant's case confronts now is the concession that genital mutilation did occur.

[39] In my view, it was open to the jury to conclude on the basis of the evidence to which I have referred, that the only place to which the evidence pointed was Somalia, and the fact that passports were organised for AKD's first trip there in

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13 AB 308.
14 AB 356.
15 AB 374-375.
16 AB 375.
17 AB 376.
18 AB 376-377.
19 AB 251.
20 AB 292.
21 AB 304.
22 AB 353-354.
23 AB 158 line 22.

2015 pointed fairly plainly to the conjunction of that trip and the place being Somalia.

[40] For a number of reasons I am unable to accept the appellant's contention that the retractions by AKD and ASI in their oral evidence had to be believed over what was said in the police interviews, or were destructive of the credibility and reliability of AKD and ASI in relation to their evidence otherwise.

[41] First, it was said that the retractions by each of AKD and ASI were on the basis that they had lied to the police, encouraged to do so by a bribe from SIS1, to the effect that she would give them $50 and an iPhone (or an iPad) if they would either say that a lady had come to the Somalia house and did it, or alternatively agree with whatever the police were saying.[24] There are a number of features about the facts given in the police interviews which, the jury could have found, were inconsistent with merely telling a story given in bare terms in accordance with SIS1's alleged instructions[25] or simply agreeing with police. Examples of those in the interview of AKD are:

(a) she did not know why she was at the police station;[26]

(b) she was asked if she recalled what she told the police at the front door, and she said: "But … I think I've got it wrong. … because my mum said an infection thing we have, like, when you cut something and then you twirl it up but we never had some";[27] that linked the event to a cut and an infection;

(c) it happened near the beginning of their time in Somalia; a couple of days after they got there;[28]

(d) they didn't go anywhere, because "they come to your house";[29]

(e) she was awake when it was done;[30]

(f) "But it wasn't an operation. I don't know but it's not operation 'cause I never had the thing, needle thing, something ..."; "… we never even had a needle";[31]

(g) she felt everything that happened; but she did not know what the lady did;[32]

(h) she went first;[33] ASI was playing outside when AKD was called in;[34]

(i) she was not told what was going to happen;[35]

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24 There were differences. AKD said the bribe was $50 and an iPhone, whereas ASI said it was $50 and an iPad. Further, according to AKD they were asked to say a lady came to the house and did something and it hurt for two or three days, but under cross-examination by a different Counsel, it was to "agree with whatever the police were saying to you". According to ASI it was to simply agree with everything the police said, though that may be doubted because ASI said she wasn't listening to what SIS1 said.

25 Say a woman came to the house and did it and it hurt for two to three days.

26 AB 287.

27 AB 291.

28 AB 292.

29 AB 292.

30 AB 292, 293.

31 AB 293.

32 AB 293.

33 AB 293.

34 AB 297.

35 AB 293, 294.

(j) she was told nothing "Because I wasn't there I came after the lady because I was playing with my friend";[36]

(k) "the lady doctor said to put hot water on instead of using cold water";[37]

(l) it happened "where I pee";[38] and

(m) she fell asleep after it was done.[39]

[42] Examples in the case of ASI are:

(a) it was not OK that the police wanted to have a chat;[40]

(b) she did not know why she was at the police station;[41]

(c) it happened "when we first went in there" to Somalia;[42]

(d) it happened in the grandmother's house;[43]

(e) she was awake when it happened;[44]

(f) she did not know what part of her body it was;[45]

(g) when it happened she was upset;[46]

(h) it hurt a little bit;[47] it went on three days: the first day she was upset, the second "a bit normal" and the third "I was happy";[48]

(i) she was not told what was going to happen;[49] and

(j) no one had talked to her about it since; and she had not spoken to AKD about it.[50]

[43] That level of detail, the jury could have found, was inconsistent with the two girls going along with the bribe, on either version of what they should do. The jury may well have doubted the retraction was truthful. For example, if the bribe had been truly offered and accepted, why would either of them say they did not know why they were there at the police station? Equally, why would both of them say they had no idea what was done to them, but they were awake when it was done? AKD's explanation that it was not an operation because a needle was not used, and that the lady doctor said to put hot water on it instead of cold water, are matters that the jury may well have thought tell in favour of the interview being accurate, rather than a lie. Further, each of them said that they were not told anything about it in advance, or about what had happened, which does not sit well with willing liars co-operating with the bribe.

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36 AB 293.
37 AB 294.
38 AB 294.
39 AB 297.
40 AB 300 – shook her head in response to that question.
41 AB 301.
42 AB 304.
43 AB 304-305.
44 AB 305.
45 AB 306.
46 AB 306.
47 AB 306.
48 AB 307.
49 AB 307.
50 AB 307.

[44] Secondly, in her oral evidence ASI said twice that she was not listening to what SIS1 was saying. The jury may have considered whether the first such response meant simply that she was not paying attention, rather than not actually listening. However, the second response makes it very difficult to contend that the contents of the police interview should be disregarded. The second response was to the cross-examination question aimed at having her say that she only said the things in her police interview because of the bribe. Her answer was clear: "No, I wasn't listening what she said". That response, the jury might have thought, was fairly destructive of the retraction at least on the part of ASI.

[45] Thirdly, according to AKD and ASI the bribe was only in respect of what they told the **police**. Yet, the evidence of Dr Mills was that the history he took from AKD, and agreed by ASI, was that some form of procedure had been done in Somalia, near the beginning of their time there, and it had caused bleeding and pain for some days. None of that could be true according to their evidence about the bribe.

[46] Fourthly, the jury may well have been concerned about the quality of the evidence they heard in the oral hearings, at least in relation to the retraction, by the fact that the cross-examination was on behalf of the mother and father of the girls, and announced expressly that way at the commencement of all but one of the cross-examination sessions. What then followed was hardly a true cross-examination but rather what might have been thought to be a partisan form of questioning which did not really test the truth or accuracy of what they said. The appellant's contentions would have it that the denials that anything happened to them were a response to "brief and mild questioning".[51] However, those questions were all leading questions permitting only of a "yes" or "no" response and, the jury might have thought, betrayed an effort not to implicate their mother, the appellant. In my respectful view, it was open to the jury to conclude that the oral evidence of AKD and ASI reflected that they regretted the fact that their interviews led to their mother being charged, and facing the prospect of imprisonment.

[47] Moreover, the quality of those denials has to be assessed now by this Court in light of the concession that genital mutilation had actually occurred, even if there was no concession as to when or where. The denials might have been easier to accept had they effectively said "not in Somalia but somewhere else".

[48] In any event those denials are only part of the evidence of AKD and ASI, the balance of which consisted of an attempt to raise the spectre that what was seen by the doctor was the product of the girls scratching themselves because of a rash brought on by swimming. That attempt suffered when, in turn, AKD and ASI said they did not scratch that area, or at least not very much, and it did not leave any mark.

[49] Fifthly, the new version given in the oral evidence was hard to reconcile with Dr Mills' evidence about his examination and the physical changes to the girls' bodies. As was conceded before this Court, female genital mutilation had occurred at some point. The evidence otherwise was that this was the girls' first trip to Somalia, and they had not otherwise been out of Australia. That left two possibilities; it was either in Somalia, or it was some time in Australia. There was not the slightest suggestion that it could or might have occurred in Australia. If

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51 Appellant's outline, para 37.

such a possibility was going to be raised as a reasonable hypothesis which had to be excluded, one would have expected some scintilla of evidence that pointed to it. There was none.

[50] Finally, the learned trial judge gave classic and unobjectionable directions to the jury, to the effect that it was up to them to decide whether they believed all or part of a witness's testimony, which part, and what weight should be given to which part.[52] The jury were not obliged to reject all of the interviews, simply because of the evidence given orally. It was open to them to reject that evidence, but nonetheless take the view that the level of detail and consistency in the accounts given by AKD and ASI in their police interviews, when supported by the physical findings by Dr Mills, meant that their evidence should be accepted, notwithstanding the difficulties raised by the retractions and the story of the bribe.

[51] Further, the jury were not bound to conclude that the evidence of SIS1 and SIS2 was so lacking credibility or reliability that it had to be rejected in its entirety. SIS1 did not deny speaking to AKD and ASI, but rather she denied that she had told them to lie or that she had offered them a bribe. Leaving aside the impact that her criminal history might have had, the main attack on SIS1 was the suggestion that because of ill-feeling between her and the appellant, she was likely to have encouraged the girls to lie so as to implicate the appellant. There are some difficulties with that. One is that SIS1 lived with the appellant and her husband until she left to get married. That does not suggest a level of ill-feeling that might lead to the extreme attempt to harm the appellant by persuading the girls to lie. Further, the second part of the affidavit read out to SIS1 in cross-examination made it plain that what was being referred to was an attempt to implicate their **father**. It was that which prompted SIS1 to say that SIS2 had "gone very far". In any event, there was evidence from SIS1 that the affidavit was signed at the behest of her father, who she felt an obligation to obey as a matter of culture.

[52] Insofar as SIS2 is concerned, the jury may well have been puzzled by the cross-examination which suggested that she had lied in her evidence when she denied that she told the girls to lie to police and promised them an iPad and money.[53] There was no evidence from AKD or ASI, or by the appellant in her interview, which suggested that SIS2 had come to see the girls, spoken to them in a room, or offered them anything. SIS2 said she had never spoken to the two girls, nor seen them.[54] In the circumstances it was open to the jury to accept that evidence, even though it was SIS2 who conveyed information to Child Safety. That contrasting involvement is readily explicable when one considers that SIS1 may have told SIS2 what she had found out from the girls. Plainly, SIS1 found out that the genital mutilation had occurred, and together with SIS2, decided to take some step in respect of it. As the jury could well have accepted, they were right. Dr Mill's evidence showed that genital mutilation had occurred. It was right to go to Child Safety as a result, and it was right to interview the two girls who had been subjected to the mutilation. The mere fact that the doctor had discovered genital mutilation on each of AKD and ASI was, in the circumstances, a powerful piece of evidence justifying SIS2's contact with Child Safety. One might ask, then, why would the jury come to the belief that SIS2 was a liar and a participant in the conduct attributed to SIS1. Since there was

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52 AB 52 Vol 1.
53 AB 194.
54 AB 195 line 2.

no suggestion that SIS2 was a participant in speaking to the girls beforehand, the bribe theory becomes even more tenuous, in the sense that it required that SIS1 had lied to SIS2 by indicating the genital mutilation had occurred when neither of AKD or ASI said so, or pretending that it had occurred when it had not.

[53] In my respectful view, it was open to the jury to conclude that AKD and ASI were simply attempting to protect their mother when they gave their oral evidence, and the truth lay in their police interviews. This ground fails.

Discussion – ground 2

[54] The contention here is that whilst the trial judge urged the jury to carefully scrutinise the evidence of AKD and ASI, the directions relevant to how the jury would approach the fact that the girls had completely retracted their evidence were not in sufficiently strong terms given the centrality of the girls' testimony.[55] Further, complaint was made that the jury were not instructed that the medical evidence was only corroborative of the fact that female genital mutilation had occurred at some unknown time when the doctor's evidence was that he could not date the injuries and they could have occurred years earlier.

[55] The directions as to how to approach the evidence of AKD and ASI,[56] included the following central passage:[57]

> "It is common ground that the children have given different versions. It is common ground that their accounts to the Court tend to contradict – either directly or at least indirectly, what was said in 2005.[58] The question of contradictions are relevant to the general assessment of a witness's credit. Obviously, you would question the reliability of a witness who said one thing one moment or – one day and then retracted it or gave a completely different version on another day.
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> Here, the girls' account about what happened to them comes from the evidence of what they said out of Court as well as what they have said in Court. Their accounts – in 2015 are the only direct evidence – the only possible direct evidence that they underwent a procedure while on the Somali trip with their mother. Then, in Court in 2017, each of those girls said it was all a lie. Their retraction of the earlier allegations does not necessarily mean, however, that you cannot rely upon what they said earlier. As I said to you, in respect of any witness, it does not have to be all or nothing from that witness but you need to carefully scrutinise the evidence before you could use anything that the girls have said against the accused.
>
> Notwithstanding their retractions, it is still open to you, after review of all of the evidence, to find their original answers in 2015 to be true but greater care is needed before you could be satisfied that those original versions are reliable. You could not act on those versions unless you were satisfied of their truth and accuracy. You need to

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55 Appellant's outline para 56.
56 AB 53-54.
57 AB 53 lines 4-28.
58 This is a typographical error for 2015.

> consider whether the circumstances are such that you could not now rely on anything that those girls have said at any time, or whether there is a reasonable possibility that the last version was the truth. You need to carefully evaluate those different versions in light of the other evidence."

[56] The learned trial judge then gave further directions about the necessity to compare the quality of the evidence in the police interviews with the quality of the evidence given in court. The jury were reminded that they had to make their own assessment and it was a matter for them whether they accepted any of the allegations that the children made, and if they did, what weight or significance they placed on it.

[57] The jury were then reminded that before they could use the evidence from the conversations between the girls and DS Geck, and the girls and Dr Mills, the jury would need to be satisfied firstly that those things were said, and that when they had determined what statements were made, they had to be considered along with the interviews and other evidence. The jury were then reminded that there were two child witnesses, not just one and: "You need to consider all of the circumstances that might impact [upon] reliability or unreliability of those statements by the child, in relation to the 2015 statements and again in relation to the 2017 evidence."[59]

[58] I am unable to accept the criticism that the jury were not sufficiently directed as to the need to carefully scrutinise the girls' evidence because of the retractions. They were told expressly that in the passage referred to in paragraph [55] above.

[59] It is true that the learned trial judge did not use the word "dangerous" in the phrase that warned them of the danger of convicting without carefully scrutinising the evidence. But in my view, that was conveyed in any event. The jury could have been left in no doubt about the need to consider what evidence they accepted, how it fitted in to the evidence otherwise, and the need to carefully scrutinise the girls' evidence before they could use anything they said against the appellant.

[60] The second part of the contentions in respect of ground 2 was that the jury was not, but should have been, directed that the doctor's evidence was only corroborative of the fact that female genital mutilation had occurred at some unknown time, and reminded that the doctor could not date the injuries and agreed that the injuries could have occurred years earlier.[60]

[61] I reject this contention. In the course of the directions the learned trial judge turned specifically to the doctor's evidence about the examination.[61] Her Honour summarised his evidence, concluding:[62]

> "He said he could not date the injury, except to say that it was not recent because it had healed. So he said it could be any time from a number of weeks, six months, or even older. He said that the account of initial bleeding with three days of pain and apparent healing without ongoing symptoms could be consistent with a cutting to that area, and it would not be surprising if a child initially had trouble urinating."

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59 AB 54 lines 13-15.
60 Appellant's outline para 57.
61 AB Vol 1, 63.
62 AB Vol 1, 63 lines 9-13.

[62] The jury were therefore reminded in the learned trial judge's own summary of the evidence, of the inability of the medical evidence to date the mutilation.

[63] The jury had been reminded earlier that the prosecution could only succeed if they proved that the appellant took the two girls from Queensland to Africa with the intention of having female genital mutilation performed on the girls.[63] The jury were specifically directed that for each count, a conviction could only follow if they were satisfied beyond reasonable doubt of two things. The first is that the girl was taken out of Queensland, and the second was that the female genital mutilation was actually performed on the child while they were out of Queensland. Her Honour directed the jury:[64]

> "There has been no dispute in the trial about the taking of either of these children. [The appellant] has admitted, and the Defence accept, that she took both children from Queensland to Africa and that she remained there for the period of the indictment. The dispute is in relation to the second element, intention – [the appellant's] intention when she took the girls. The accused has denied having any improper intention, and there is no direct evidence that she did intend to get these procedures done when she left Queensland. The Prosecution relies on the circumstantial evidence. The most critical piece of circumstantial evidence concerns the performance of the procedure on each child while they were overseas.
>
> If the girls did not undergo a female genital mutilation procedure while they were in Africa, there would be nothing to indicate that that was what [the appellant] intended when she took them out of Queensland; therefore, in the circumstances of this case, proof of the offence first requires that the Prosecution prove that the accused took the child, the child named in the charge, out of Queensland and, secondly, that female genital mutilation was actually performed on that child while they were out of Queensland. If those two things are proved, the law presumes that the accused did have the intention unless the contrary is proved. I will say that again.
>
> Those two things, which I have just told you about, the two things that the Prosecution must prove are essential: that the accused took the child out of Queensland and, secondly that female genital mutilation was actually performed on that child while they were out of Queensland. If those two things are proved, the law presumes that the accused had the intention when she left Queensland – when she took the children – unless the contrary is proved."

[64] Thus the jury were told that the prosecution could only succeed if it was proved that female genital mutilation was actually performed while the child was out of Queensland, and, in the circumstances of this case, in Africa. And secondly, they were reminded that the doctor's evidence established female genital mutilation, but could not date it.

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63 AB Vol 1, 56.

64 AB Vol 1, 56 line 25 to 57 line 2.

[65] In the circumstances the jury were adequately directed on the issues with which they were confronted, and the limitation on the medical evidence. I am unable to reach the conclusion that there was any insufficiency which may have affected the verdict, either in respect of the retraction of evidence by AKD and ASI, or in respect of the limitations on the medical evidence.

[66] This ground fails.

Conclusion

[67] As all grounds have failed, the appeal must be dismissed.