SUPREME COURT OF QUEENSLAND

CITATION:	*R v Oliver* [2020] QCA 76
PARTIES:	**R** **v** **OLIVER, Wayne Paul** (appellant)
FILE NO/S:	CA No 237 of 2019 DC No 340 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 22 August 2019 (McGinness DCJ)
DELIVERED ON:	Date of Orders: 17 April 2020 Date of Publication of Reasons: 21 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2020
JUDGES:	Fraser JA and Bond and Callaghan JJ
ORDERS:	**Orders delivered: 17 April 2020** **1. The appeal is allowed.** **2. The verdicts are set aside.** **3. The appellant's convictions are quashed.** **4. Verdicts of acquittal are entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted by a jury of indecent treatment and rape – where the complainant said the offences occurred when she was nine years old – where the complainant disclosed the alleged offending to a friend immediately after it occurred and to a school counsellor when she was 16 – where there were a number of inconsistencies between the complainant's evidence and evidence given by the friend and the school counsellor – where there was a long delay between the alleged offending and the first complaint to a person in authority – where the appellant gave evidence denying he committed the offences – whether the verdicts are unreasonable or cannot be supported having regard to the evidence *Criminal Code* (Qld), s 668E *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4A *Dyers v The Queen* (2002) 210 CLR 285; [2002] HCA 45, cited

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, considered
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Pell v The Queen [2020] HCA 12, considered
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Dalton [2020] QCA 13, applied
Whitehorn v The Queen (1983) 152 CLR 657; [1983] HCA 42, considered

COUNSEL: J D Briggs for the appellant
S J Bain for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** After a trial in the District Court occupying about one and a half days in August 2019 the appellant was convicted by a jury of indecent treatment and rape committed on one occasion on a date between 30 June 2007 and 8 November 2009. The ground of the appellant's appeal against those convictions is that the verdicts are unreasonable or cannot be supported having regard to the evidence.

[2] The complainant gave evidence that she was nine when the appellant committed the offences. The complainant frequently played with the appellant's daughter, J, who lived with her grandmother in a house very close to the complainant's house at the Gold Coast. J was about two years older than the complainant. The complainant twice visited J when she was at her parents' house, which was also at the Gold Coast. The complainant stayed overnight at that house once a few months before the date of the offences and again on the weekend when the appellant committed the offences. On the second occasion the complainant's mother drove her there. J was then wearing a cast from her wrist to her shoulder because she had broken her collarbone.

[3] The complainant stayed in J's room, with J sleeping in her single bed and the complainant sleeping on an air mattress on the floor. A few hours after arriving at the house the complainant was sitting with J and her parents in the yard. J stormed off to her room after an argument with the appellant. The complainant followed and asked to be let into the room. J told her to go away. The complainant went to the yard and told J's parents. The appellant suggested that the complainant try again and said he would be there in a second. The complainant returned to the room and knocked on the door. J did not answer. The appellant was not far behind. When he arrived he and the complainant faced the bedroom door, with the appellant on the complainant's left. The appellant grabbed the complainant's left wrist with his right hand and put her hand into his pants. The complainant felt his erect penis and pubic hair. The appellant held her hand there when she tried to pull away. Shortly afterwards he swapped hands, so that his left hand held her hand onto his penis whilst he put his right hand down her pants and put multiple fingers inside her vagina. Neither the appellant nor the complainant said anything while the appellant was doing this to the complainant. The complainant was visibly upset and crying to herself. The appellant had his fingers in her vagina for five seconds. Not very long after this, J's mother came in a screen door and said the appellant's name. The door

was "pretty much directly down the hallway" from J's room. The complainant heard the screen door open. J's mother didn't walk into the house. She said the appellant's first name as she opened the door. She closed the door and went back outside. The appellant let go of the complainant's hand and walked outside.

[4] The complainant knocked on J's door and said she had to tell her something. J opened the door. The complainant walked into her room. They closed the door. The complainant said J's dad had touched her "down there". J cried and was shocked. They stayed in J's room for about 20 or 30 minutes. The complainant went to the bathroom and found she had bled through her underwear and shorts. The complainant stayed overnight, as arranged, because she was scared and didn't have a mobile phone. The next day the complainant's mother drove her home. The complainant did not say anything to her mother. She did not say anything to another adult until she was 16, when she said to a counsellor at her school in New South Wales that her best friend's dad sexually assaulted her when she was nine. The counsellor said it was mandatory for her to report that.

[5] In cross examination the complainant said the hallway between the screen door and J's room was not straight. She agreed that if you were at the screen door you could see J's door. From the screen door J's mother would have been able to see the complainant and the appellant outside J's room. Immediately before the incident the appellant was encouraging J to come out from her room. That evidence was given with reference to a police statement in which the complainant said the appellant was knocking on J's door and saying, "Come on J. It's your friend." There was nothing to stop J from opening her door or to stop J's mother from putting her head inside the screen door and seeing what was at the end of the hallway. The appellant's encouragement of J to come out of her room and his offending all happened in a matter of seconds.

[6] The school counsellor to whom the complainant disclosed the offending when she was 16, Ms Handosa, told her that the school principal, the complainant's parents, and Family and Community Services would be told about the complainant's disclosure. It was possible, but the complainant could not recall, that she told Ms Handosa she did not want to take the matter any further or to press charges. The complainant would not have told J she saw the appellant's private parts. She did not recall saying she had been touched by a man in Sydney. She did not recall being touched by anyone except the appellant. She did not recall a conversation about being touched occurring in front of both J and a girl called Tiana or a girl called Ayleigh. The complainant denied she had made up parts of her evidence. She denied the appellant had not touched her in any sexual way and she might have confused the appellant with somebody else. The complainant was not confused. She vividly remembered the house and the occurrence.

[7] The complainant's mother gave evidence that J was about 18 months older than the complainant. She did not recall the complainant staying with J at her parents' place. It was possible that her husband had permitted it and she assumed the complainant was staying at J's grandparents' place. The complainant's mother never dropped the complainant at J's parents' place for a sleepover. She recalled J having a broken arm in or about 2009. That was at the end of the period when the complainant lived with her parents at their house near J's grandparents' house.

[8] Ms Handosa gave evidence in which she referred to her notes of a disclosure by the complainant in September 2016. The complainant was at J's house. J lived with

her grandmother and father. The complainant was between eight and ten years old. After an argument J locked herself in her room and left the complainant alone with her dad. J's mother was having a cigarette outside. The complainant and the appellant went to J's room to check if J was okay and so the appellant could apologise about an altercation between them. The appellant put the complainant's hands down his pants and then he put his hands down her pants and fingered her inside. The complainant was bleeding as a result and had to change her clothes. In cross examination Ms Handosa agreed the complainant told her the conduct she described did not affect her and she brought it up because she was now in a new relationship. The complainant did not want to take it further. She did not want to press charges. She was scared of going to court and had not told her parents about it.

[9] A Queensland police officer gave evidence of having received an interstate case referral from the New South Wales Police in 2017. The officer had a telephone conversation with Tiana but she failed to attend to give a statement. A person mentioned by J, Ayleigh, declined to provide a statement to police. In cross examination the officer agreed his statement did not detail any investigation into obtaining a statement from J's mother, who was said to have been present on the day of the alleged offences. The officer said that was referred for further investigation to someone in Toowoomba, where it was believed that J's mother resided with the family, and the officer did not follow that up.

[10] J gave evidence. She thought she was older than the complainant by a couple of years. The complainant slept with her at her mother's house once or twice. It "would have been" just one occasion when she was in grade five and had a broken arm, in 2008 or 2009. She could not recall a fight with the appellant that afternoon. She could not recall that the complainant stayed the night. She recalled that the complainant made disclosures to her of a sexual nature when the complainant stayed at her mother's house. The disclosures were at the house or outside the front of the house. She could not remember much. All she could really remember was the complainant saying that she had seen the appellant's "parts" or genital area. The complainant didn't say "genital area". She couldn't really remember that far back.

[11] In cross examination, J said she recalled giving a statement to police in November 2017. She had read it that morning before giving evidence. She gave a new statement at lunchtime that day. She had not stated there was a time when the complainant came into her bedroom and told her that something had happened. She could not remember that. She could not remember telling anyone of a fight between her and the appellant that resulted in her going into the bedroom upset and closing the door. She could not remember telling anyone about the appellant and the complainant trying to get into her bedroom. When the complainant said she had seen "his" genitals she did not say the appellant's name. She assumed the complainant must have been talking about the appellant because he was the only adult there. J agreed that in her statement in 2017 she said Tiana was present when the complainant told her about that. She agreed with the suggestion that she had said that occurred in 2010 when she was in year 7. She added that she had got her dates mixed up. She agreed that in her statement taken during lunch on the day she was giving evidence she said there was a conversation in 2008 when the complainant and Tiana were present. J subsequently said this happened when she had a broken arm. At no time had she referred to a conversation just between herself and the complainant. J agreed that in her original statement in 2010 she told

police that the complainant told Tiana and her about a man in Sydney who had touched her. J added she "had to get reminded about this whole story by Tiana, because I had forgotten it … I had forgotten bits of it …". When reminded of her statement about this in 2017, J agreed she spoke of a conversation she had with Tiana and the complainant that involved a man in Sydney who had touched the complainant. She added, "because I got it wrong … I got the story wrong – the conversation wrong". J said her memory of the one occasion when the complainant talked about being sexually assaulted was that she did not think Tiana was there, but it was all so long ago that she could not remember much.

[12] The appellant gave evidence. He denied he had engaged in any of the offending conduct described by the complainant. The last time he saw J was in 2016. When he lived with J's mother he had a good relationship with J. Now and then they fought but only over games and stuff like that. His friends often visited when he was living at the house at the Gold Coast where the offences were alleged to have occurred. He referred to friends visiting five or six times a day. The appellant recalled one occasion when the complainant came to the house. Only the complainant, the appellant, his wife and J were home. He recalled J playing with the complainant in the house and yard. He did not recall the complainant staying the night. His only contact with the complainant was to say hello. He did not recall having a fight with J on that night. He had never had any physical contact with the complainant.

[13] In cross examination, the appellant reiterated that when he fought with J it was only about little things. The prosecutor suggested a series of possible events to the appellant. The appellant repeatedly said he had no memory of these events. He agreed with the following suggestions. It was possible that they had a fight on the day the complainant visited. J might have run into the bedroom after a fight. The complainant might have gone into the house, tried to get into the room, and come outside saying that J would not come out. He might have said to the complainant, "why don't you go in, and I'll be in shortly" or words to that effect. He might have followed the complainant in when she had gone back inside to try and get J to come out. The appellant disagreed with the suggestion that J had her own room at his place. He said that she did not have a room there but slept in the lounge room or sometimes with the appellant and J's mother in their bedroom. The appellant agreed that J had a broken arm around the time that the complainant came over. He disagreed with the suggestion that the complainant stayed overnight. The appellant repeatedly denied suggestions in which the prosecutor put to him the complainant's account of the offences.

[14] The ultimate question for the Court raised by the appellant's ground of appeal is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In considering this question, the Court must take into account the seriousness of setting aside a jury's verdict on the ground that it is "unreasonable" and that such a decision is "not to be taken without 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".[1] The ground must be upheld, however, if "even making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted".[2]

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1 *R v Baden-Clay* (2016) 258 CLR 308 at 329 – 330 [65] – [66].

2 *MFA v The Queen* (2002) 213 CLR 606 at 623, quoting *M v The Queen* (1994) 181 CLR 487 at 494.

[15] The respondent does not suggest that any evidence corroborated the complainant's evidence but the respondent relies upon the appellant's evidence (and some of the evidence given by J) that the complainant visited the appellant's address when J had a broken arm or collarbone and the other persons present were J's mother and the appellant. That evidence established that there was such an occasion. The appellant's agreement in cross examination[3] that it was "possible" that the sequence of events described by the complainant occurred was consistent with his sworn denials being true. The Crown case depended upon the jury accepting the honesty and reliability of the complainant's account of the alleged offending.

[16] The respondent argues that the verdicts were open to the jury in light of the evidence of the complainant which, the respondent submits, was clear, unambiguous, and unchanged during cross examination. The respondent also relies upon consistency between the complainant's evidence and Ms Handosa's evidence of the complainant's disclosure to her in late 2016 as enhancing the complainant's credibility. The appellant argues that a combination of many matters rendered it unreasonable for the jury to accept that the complainant's evidence satisfied the onus upon the Crown to prove beyond reasonable doubt that the appellant committed the charged offences.

[17] Two of those matters lack any significance in this context:

(a) The absence of evidence that the appellant had sexually offended before or demonstrated any propensity to offend sexually, or that he was intoxicated and thus less likely to control any such urge, or that he had ever attempted to "groom" the complainant.

Whether or not such evidence might be admissible in a different case, no circumstance suggests that the absence of such evidence is relevant in the assessment of the evidence that was adduced at this trial.

(b) The timing and content of questions asked by the jury whilst it was deliberating upon its verdicts is consistent with the jury finding the appellant guilty even though they were uncertain about what had occurred between the complainant and J.

After retiring to consider their verdicts the jury asked the trial judge if they could see statements from the complainant and J (the request was denied), the jury subsequently informed the trial judge that after two votes they could not come to any agreement, and the jury subsequently informed the trial judge that they were not close to a decision. That sheds no light upon the jury's reasoning process.

[18] Many other points argued for the appellant have little force as factors militating in favour of a conclusion that the verdicts were not reasonably open to the jury:

(a) The complainant agreed in cross examination that the way she had described the events to the police in 2016 was a little bit different from the way she described them in her evidence in chief.

Her evidence was that the appellant committed the offences simultaneously but in 2016 she told police that the appellant had put his right hand down the front of her shorts only after the complainant had pulled her hand out of his

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[3] See [13] of these reasons.

pants when the appellant had let her hand go. That minor inconsistency is readily reconcilable with the complainant's account that the appellant committed both offences, particularly given the very short period of time during which the complainant said the offences occurred, her age at the time, and the shocking character of the conduct she described.

(b) Ms Handosa reported that the complainant said that when J locked herself in her room she left the complainant alone with the appellant, whereas the complainant's evidence was that J's mother was also outside.

It was open to the jury to conclude that, having regard to the apparently condensed version of the disclosure recounted by Ms Handosa, her evidence was consistent with the complainant's evidence that she was alone with the appellant whilst he committed the offences when they were at the door to J's room and J's mother was outside smoking a cigarette.

(c) Ms Handosa reported the complainant as saying that she and the appellant went to J's room to check if J was okay and so that the appellant could apologise about their altercation, whereas upon the complainant's evidence the appellant went to J's room after the complainant and not with a view to apologising.

This aspect of Ms Handosa's evidence does not necessarily convey that the appellant walked next to the complainant to J's room and the inconsistency concerning the proposed apology is readily explicable by matters of the kind mentioned in (a).

(d) It was only in cross examination that the complainant accepted that the appellant had knocked on the door and encouraged J to come out of the room.

The complainant did not earlier volunteer that evidence but no question directed the complainant's attention to the topic in examination in chief. Her evidence that nothing was said up to "this point in time"[4] and the appellant "didn't say a word the whole time"[5] appears to refer only to the period during which the appellant engaged in the offending conduct, that being the topic of the immediately preceding questions.[6]

(e) The complainant did not anticipate when she first disclosed the offending to an adult that her disclosure would lead to the complaint being reported to the authorities and the complainant told Ms Handosa that she did not want to take it further.

Ms Handosa also gave evidence that the complainant explained that she did not want to take the matter further because she was scared of going to court and had never told her parents about the offences. The jury could regard this evidence as having no adverse impact upon the complainant's credibility or the reliability of her evidence.

(f) There was a long delay between the alleged offending and the first complaint to a person in authority.

Conformably with s 4A(4) of the *Criminal Law (Sexual Offences) Act* 1978 (Qld), the trial judge did not warn or suggest to the jury that the law regards

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4 Transcript 20/08/2019 at l-21, line 37.
5 Transcript 20/08/2019 at 1-22, line 2.
6 Commencing at Transcript 20/08/2019 at 1-20, line 36.

the complainant's evidence to be more or less reliable only because of the length of time before she made a preliminary or other complaint. The complainant's evidence is not necessarily less persuasive on account of the length of time that elapsed before she disclosed it to a person in authority.

(g) There was no evidence of any change in the personality or behaviour of the complainant in the years following the alleged offending, save in relation to emotional difficulties ongoing from the complainant's puberty (mentioned in her mother's evidence).

The submission is based upon an assumption, unsupported by evidence or otherwise, that the conduct described by the complainant should have affected her personality or behaviour before puberty and in a way that should have been observed and reported.

(h) There was an inconsistency between the complainant's evidence of the appellant's conduct (and of her disclosure of that conduct to J) and J's evidence that the complainant disclosed quite different conduct.

J's evidence is replete with disclaimers about her memory. Her evidence about persons other than herself and the complainant being present for a conversation about sexual offending is very confusing. Upon one reasonable view her evidence about the complainant saying a man in Sydney touched her[7] was based upon something she was told by somebody else. Even without reference to the possible significance of J's demeanour when giving evidence it was reasonable for the jury to reject as manifestly unreliable all of her evidence where it conflicted with the complainant's evidence and lacked support in other evidence.

(i) The complainant's evidence that after 20 minutes to half an hour in J's room she went to the bathroom and found blood on her underwear and shorts is inconsistent with her statement described by Ms Handosa that J helped her to get changed because she had blood on her clothes.

This difference may result from an incompleteness in either or both of Ms Handosa's account and the complainant's evidence and it concerns conduct after the offending conduct described by the complainant.

[19] It follows from (h) in the preceding paragraph that J's evidence should not be regarded as militating against the reasonableness of a conclusion by the jury that the complaint's credibility was supported by consistency between her own evidence and Ms Handosa's evidence of the complainant's account.

[20] It remains necessary, however, to discuss the appellant's argument that the prosecution case was weakened by consistent evidence of the appellant and J which contradicted the evidence given by the complainant that the room outside which the appellant committed the offences was J's bedroom and the evidence of the complainant's account to Ms Handosa to the same effect. This argument should be rejected.

[21] The only reference to the interior of the room was the complainant's evidence that there was a single bed and a mattress on the floor. Neither the appellant nor J contradicted that evidence. No witness was asked to describe the appearance of the room or indicated that it did not look like a child's bedroom. Such evidence as was

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7 See [11] of these reasons.

given on the point is equivocal. J said that she could not remember an occasion when the complainant "came into your bedroom and told you that something had happened".[8] When defence counsel suggested to her that it did not happen she answered that she could not remember. When pressed she said that she did not remember having a bedroom at her mother's house. It was only after those answers that J agreed with a suggestion by defence counsel that she didn't have a room in the house; and when defence counsel added the words "a bedroom" she immediately retracted her agreement by saying, "No. Like they had – no, I don't remember".[9] In the appellant's evidence, he first agreed that it was possible that J had run into "her bedroom"[10] although he could not remember it. Although he subsequently gave the evidence in cross examination upon which he relies in this appeal that she did not have her own room, he later agreed that it was possible that J might have run into "the bedroom" after a fight.[11] The fact that this point was not amongst the many suggested weaknesses in the Crown case mentioned in defence counsel's address to the jury is consistent with my view that it had no significance by the end of the trial.

[22] The appellant argues that a bizarre aspect of the complainant's account is that the appellant risked being discovered in the offences by his partner and, more significantly still, he positively encouraged J to open the door and thereby witness his sexual offending. The respondent argues that the fact that the offences described by the complainant were brazen did not render the complainant's account implausible; the appellant's subsequent conduct in rapidly desisting when J's mother called out his name is said to illustrate his ability to avoid detection. Very brazen sexual offending against children is not unfamiliar to the courts. It nevertheless seems surprising that upon the complainant's evidence, in addition to whatever risk the appellant perceived that J's mother might observe his offences, the appellant offended whilst facing the door to J's room immediately after he and the complainant encouraged J to open the door. Defence counsel appropriately emphasised this point when addressing the jury. It must be borne in mind, however, that an assessment of the significance of this evidence as an indication of improbability in the complainant's account involves a consideration of human behaviour, for which task a jury is pre-eminently qualified. This feature of the complainant's evidence did not require the jury to harbour a reasonable doubt about the honesty and reliability of her account of the offences.

[23] The appellant argues that the prosecutor's omission to call J's mother as a witness without explaining that omission contributed to unreasonableness in the verdicts. In the course of argument reference was made to the articulation in *Jones v Dunkel*[12] of the principle that inferences favourable to one party which are able to be drawn upon the evidence might more confidently be drawn where the other party, who appears to be able to give evidence of the true complexion of the facts grounding the inference, is not called to give evidence and no explanation for that party's absence is given in the evidence. Here the Crown case was not based upon inferences and defence counsel did not seek any direction of the kind formulated in *Jones v Dunkel*. In that case, however, Windeyer J quoted more generally stated

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8 Transcript 20/08/2019 at 1-62.
9 Transcript 20/08/2019 at 1-63.
10 Transcript 21/08/2019 at 2-13.
11 Transcript 21/08/2019 at 2-14.
12 (1959) 101 CLR 298.

propositions. In *R v Burdett*[13] Abbott CJ observed that when enough had been proved "to warrant a reasonable and just conclusion … in the absence of explanation or contradiction … and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"[14] Further, it is said in *Wigmore on Evidence*[15] that "[u]nless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case."[16]

[24] Subject to qualifications which are not presently relevant, the prosecutor should call all "material witnesses", meaning witnesses "whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based".[17] A failure by a prosecutor to call a material witness may give rise to a question whether it was open to the jury to be satisfied beyond reasonable doubt of the accused person's guilt.[18] An example may be found in Dawson J's conclusion in *Whitehorn v The Queen*,[19] with which Gibbs CJ and Brennan J agreed, that the absence of an adequate explanation for not calling the complainant child as a witness combined with other matters supported the conclusion that no reasonable jury could have been satisfied beyond reasonable doubt of the accused man's guilt upon the disputed evidence that he had confessed to police. Dawson J cited the well known passage[20] in *Blatch v Archer*,[21] in which Lord Mansfield observed that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted", and held that the absence of an explanation for the failure to call the complainant as a witness meant that the jury could only reasonably have assumed that the complainant's evidence would not have assisted the Crown case.[22]

[25] This case is quite unlike *Whitehorn*, in which the prosecutor's explanation for not calling the complainant was that the child would be useless as a witness, it was obvious that she could have shed light on the subject, and it was to be expected that the prosecutor would call her as a witness rather than bringing a prosecution based upon a disputed confession. Here the Crown case was based upon the direct evidence of the complainant. It might perhaps be inferred that when J's mother opened the screen door and called out the appellant's name she looked at the appellant. But upon the evidence the complainant and the appellant were then standing close together with their backs to the screen door. There is no ground for inferring that in that moment J's mother could discern whether or not the appellant

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13 (1820) 4 B & Ald 95 at 161; 106 ER 873 at 898.
14 101 CLR 298 at 321.
15 *Wigmore on Evidence* 3rd ed (1940) vol 2 ss 289, 290, pp 171 – 180.
16 101 CLR 298 at 321.
17 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 (Dawson J); *Dyers v The Queen* (2002) 210 CLR 285 at [18] (Gaudron and Hayne JJ).
18 *Whitehorn v The Queen* (1983) 152 CLR 657 at 660 (Gibbs CJ and Brennan J), 690 – 691 (Dawson J); *R v Apostilides* (1984) 154 CLR 563 at 577 – 578 (Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ); *RPS v The Queen* (2000) 199 CLR 620 at 633 [29] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Dyers v The Queen* (2002) 210 CLR 285 at 293 [13], 327 – 328 [120] – [123] (Callinan J); *Mahmood v Western Australia* (2008) 232 CLR 397 at 406 [27] (Gleeson CJ, Gummow, Kirby and Kiefel JJ).
19 (1983) 152 CLR 657.
20 See, for example, *Weissensteiner v The Queen* (1993) 178 CLR 217 at 225 at 227.
21 (1774) 1 Cowp 63 at 65; 98 ER 969 at 970.
22 152 CLR 657 at 690.

was engaging in any of the conduct described by the complainant. She was not a witness whose evidence was "necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based".

[26] The appellant also relies upon the absence of additional evidence in the Crown case about the blood the complainant said she saw on her underwear and shorts. The evidence does not justify an inference that J's mother could have noticed the presence or absence of blood on the complainant's clothes. If the complainant's mother noticed the blood it is to be expected that she would have questioned the complainant about it. The complainant's evidence that she did not say anything to her mother or to another adult about what had happened until she was 16 suggests that her mother did not raise the topic with her. At the highest for the appellant it might be said to be somewhat surprising that her mother did not notice and question the complainant about the blood she described, but even that is speculative. Amongst other matters it depends upon an assumption that the complainant was not then experiencing menstrual periods.

[27] The prosecutor was not asked to explain why any of the additional evidence discussed in [23] – [26] of these reasons had not been obtained from the complainant's mother or from J's mother. That is in itself a reason for concluding that it was not appropriate to give a *Jones v Dunkel* direction even if it were otherwise appropriate.[23] This case is within the general rule that a trial judge should not direct a jury in a criminal trial that they are entitled to infer that the evidence of witnesses who were not called would not have assisted the prosecution; if any direction were required upon the topic it would be not to speculate about what the witnesses might have said.[24]

[28] The appellant submits that nothing in his evidence contradicts or weakens the force of his denials on oath that he committed the offences. The respondent contests that argument and refers to two points the prosecutor emphasised when addressing the jury:

(a) There is an inconsistency between defence counsel's opening and evidence given by the appellant.

Defence counsel opened to the jury that the defendant had a good relationship with J and they never fought. The respondent contrasted that statement with the appellant's acceptance in cross examination that he and J used to fight occasionally over games and little things. The appellant gave similar evidence in chief that they fought "[n]ow and then, but only over games and stuff like that". He did not remember having a fight with J on the occasion when the complainant visited. In cross examination he agreed that it was possible that they did have such a fight. It was within the province of the jury to take this inconsistency into account as a factor supporting their rejection of the appellant's evidence.

(b) The appellant attempted to explain that he would not have digitally penetrated the complainant because he was then in a relationship with J's mother.

This argument is based upon a passage in cross examination. After the prosecutor said "No?" when the appellant denied the suggestion that he had

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23 See *Dyers v The Queen* (2002) 210 CLR 285 at 295 [17] (Gaudron and Hayne JJ).

24 *Dyers v The Queen* (2002) 210 CLR 285 at 291 [6] (Gaudron and Hayne JJ). See also *Police v Kyriacou* (2009) 103 SASR 243 at [14] – [16] (Gray J) and [59] – [63] (Sulan J).

> inserted his fingers into the complainant's vagina, the appellant added the remark upon which the respondent relies: "I had my woman in the house with me." The prosecutor then asked two questions at once: "So is that why you say you wouldn't do it? Because you're in a relationship?" The appellant stated, "Yeah, I was in a relationship then." When the prosecutor then put to the appellant, "that's why you wouldn't do that to…", the appellant said, "No, I wouldn't do it." The prosecutor continued the question, "… eight, nine year old girl?" and the appellant responded, "I'd never – I'd never do it."
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> Upon the face of the remark it might have been a result merely of the stressful situation in which an innocent man found himself or it might have been intended as a frustrated complaint about the authorities' failure to exonerate him by interviewing his former partner. However, the appellant's remark that his partner was "in the house with me" was volunteered in response to a suggestion that the appellant had engaged in offending conduct. In that context, the jury could conclude that the remark is inconsistent with the appellant's other evidence, upon which he could have had no recollection that his partner was either with him or inside the house upon the occasion when the Crown alleged he had committed the offences. The jury could also take this into account.

[29] In summing up to the jury the trial judge referred without comment to defence counsel's submission that the reliability of the evidence the jury was required to weigh up was affected by the slackness of the police in collecting evidence they should have collected, including evidence by J's mother and additional evidence by the complainant's mother. It is not appropriate to speculate about what evidence they might have given. However, the trial judge appropriately directed the jury about the effect of the complainant's long delay in reporting the events she said occurred in 2008 to 2009 in the following terms:

> "Her evidence cannot be adequately tested, or met, after the passage of so many years. The defendant having lost, by reason of that delay, means of testing, and perhaps meeting her allegations, that might otherwise have been available. By the delay, the defendant had been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other witnesses were doing when, according to the complainant, the incident happened. And had the complaint instead have been made known to the defendant soon after the alleged event, it may have been possible, then, to explore the circumstances in detail, and perhaps to gather, and look to call at trial, evidence throwing doubt on the complainant's story. So some of the opportunities, for example, that may have been lost by the delay include: loss of DNA testing or the opportunity for medical examination of the complainant, loss of potential alibi, loss of an opportunity to interview other witnesses, such as, J's mother or Tiana … or to interview any of these witnesses soon after the event when they could have given a more reliable evidence as to what occurred. You also will note the young age, at the time, of the complainant and J. So the fairness of the trial, as the proper way to prove or challenge an accusation, has necessarily been impaired by that delay.

> So, therefore, I must direct you that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are, nevertheless, satisfied beyond a reasonable doubt of the guilt of the defendant."

[30] No criticism was made of the content of that direction, which was derived from *Longman v The Queen*.[25] It is necessary for the Court to bear in mind the "serious forensic disadvantage involved in responding to accusations made many years after events" and, in the case of long delay such as occurred in this case, "the special danger presented by honest, and apparently convincing, but erroneous testimony".[26] This is the most significant factor in determining whether or not it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences of which he was convicted. But it did not necessarily preclude the jury from accepting that the complainant's consistent and apparently cogent evidence of the offences – which was essentially consistent with Ms Handosa's evidence of the complainant's disclosure in 2016 – should be accepted as honest and reliable notwithstanding the appellant's denials on oath. I am not persuaded that the evidence upon the record lacks probative force in a way which should lead to a conclusion that "there is a significant possibility that an innocent person has been convicted".[27] Making the necessary allowance for the advantages enjoyed by the jury, it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt.

[31] I would dismiss the appeal.

[32] **BOND J:** The sole ground of appeal invokes the language of s 668E of the *Criminal Code*, which requires the Court to allow an appeal such as the present "if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence".

[33] The way in which this Court must approach that ground of appeal has been considered many times in this Court and in the High Court of Australia.

[34] A recent summary of the law was set out in *R v Dalton* [2020] QCA 13 by Buss AJA (with whom Sofronoff P and Morrison JA agreed):[28]

> "[173] It is a question of fact whether, having regard to the evidence, a verdict of guilty on which a conviction is based is unreasonable or cannot be supported. See *M v The Queen*;[29] *Zaburoni v The Queen*;[30] *GAX v The Queen*.[31]
>
> [174] An intermediate court of appeal (the appellate court) must decide that question by making its own independent assessment of the sufficiency and quality of the evidence, and

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25 (1989) 168 CLR 79 at 90 – 91 (Brennan, Dawson and Toohey JJ).

26 *Doggett v The Queen* (2001) 208 CLR 343 at 379 [134] (Kirby J), quoted in *Tully v The Queen* (2006) 230 CLR 234 at 286 [176] (Crennan J).

27 *M v The Queen* (1994) 181 CLR 487 at 494.

28 At [173] to [181], footnotes in original.

29 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson & Toohey JJ).

30 *Zaburoni v The Queen* [2016] HCA 12; (2016) 256 CLR 482 [56] (Gageler J).

31 *GAX v The Queen* [2017] HCA 25; (2017) 91 ALJR 698 [25] (Bell, Gageler, Nettle & Gordon JJ).

determining whether, notwithstanding that there is evidence upon which a tribunal of fact might convict, nevertheless it would be dangerous in the circumstances to permit the verdict to stand. See *M* (492-493); *SKA v The Queen*.[32]

[175] The appellate court, in making an independent assessment of the whole of the evidence to determine whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, must weigh the whole of the evidence (in particular, the competing evidence). See *SKA* [22], [24].

[176] The appellate court's task is not to consider, as a question of law, merely whether there was sufficient evidence to sustain a conviction. See *Morris v The Queen*.[33]

[177] The appellate court, in assessing whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, "must not disregard or discount either the consideration that the [tribunal of fact] is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the [tribunal of fact] has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations": *M* (493); *R v Nguyen*;[34] *SKA* [13].

[178] The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494-495). See also *R v Hillier*;[35] *Fitzgerald v The Queen*;[36] *R v Baden-Clay*.[37]

[179] The setting aside of a tribunal of fact's verdict of guilty because, having regard to the evidence, it is unreasonable or cannot be supported is a serious step. Trial by the appellate court is not to be substituted for trial by the tribunal of fact. See *Baden-Clay* [65]-[66].

[180] The appellate court's reasons must disclose its assessment of the capacity of the evidence to support the verdict. See *SKA* [22]-[24]; *BCM v The Queen*;[38] *GAX* [25].

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32 *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 [14] (French CJ, Gummow & Kiefel JJ).

33 *Morris v The Queen* [1987] HCA 50; (1987) 163 CLR 454, 473 (Deane, Toohey & Gaudron JJ). See also *M* (492-493); *SKA* [20].

34 *R v Nguyen* [2010] HCA 38; (2010) 242 CLR 491 [33] (Hayne, Heydon, Crennan, Kiefel & Bell JJ).

35 *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 [20] (Gummow, Hayne & Crennan JJ).

36 *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

37 *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 [66] (French CJ, Kiefel, Bell, Keane & Gordon JJ).

38 *BCM v The Queen* [2013] HCA 48; (2013) 88 ALJR 101 [31] (Hayne, Crennan, Kiefel, Bell & Keane JJ).

> [181] The nature and extent of the appellate court's task, in a particular case, will be informed by:
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> (a) the elements of the offence;
>
> (b) the accused's defence;
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> (c) the issues in contest at the trial;
>
> (d) the manner in which the trial was conducted;
>
> (e) the way in which the case was ultimately left to the tribunal of fact;
>
> (f) whether the tribunal of fact was a judge (who must state the principles of law that he or she has applied and the findings of fact on which he or she has relied) or a jury (which does not give reasons); and
>
> (g) the particulars of and the submissions made in support of the ground of appeal."

[35] I would make only two additions to the summary of the law expressed in *R v Dalton*.

[36] First, I would add between [177] and [178] the sentence which, in *M v The Queen,* preceded the proposition cited at [178], namely that 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 appellate court 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: see *M v The Queen* at 494, quoted with approval in *MFA v The Queen* (2002) 213 CLR 606 at [56], *R v Nguyen* (2010) 242 CLR 491 at [33] and *Filippou v The Queen* (2015) 256 CLR 47 at [12].

[37] Second, I would note that in *Pell v The Queen* [2020] HCA 12 at [35] to [39] the High Court again emphasised the significance of the point made at [177] by reference to *M v The Queen*. The High Court held that courts of criminal appeal should not generally adopt the position that the mere existence of video recordings of the evidence of the alleged complainant is sufficient to make it appropriate for them to be the subject of independent scrutiny by such courts. The underlying problem in taking that approach would be that it would have a tendency to subvert the functional or "constitutional" demarcation between the province of the jury and the province of the appellate court, and that demarcation has not been superseded by the improvements in technology that have made the video-recording of witnesses possible.

[38] The present case is not one where the second addition has any significance. The complainant in this case, though a 9 year old child when she said the offences happened, was a 19 year old adult when she gave evidence and was physically present before the jury. However, the present case is one where the first addition is the point on which, to my mind, the success or failure of the appeal turns. The complainant's evidence supported the conviction and this Court must proceed on the assumption that the jury assessed her evidence as credible and reliable: see *Pell v The Queen* at [39]. The critical question is whether, having conducted the

independent assessment of the whole of the evidence in the way which the law requires, I should nevertheless reach the conclusion that there is a significant possibility that an innocent person has been convicted.

[39] I have had the very considerable advantage of having read in draft the judgments of Fraser JA and Callaghan J.

[40] I too would adopt the summary of the facts set out by Fraser JA. However my assessment of the evidence leads me to a different conclusion than that reached by his Honour. Rather, I agree with Callaghan J that, for the reasons he has expressed, the combined effect of the five aspects of the evidence identified by him justify appellate intervention in the present verdict.

[41] I agree with the orders proposed by Callaghan J.

[42] **CALLAGHAN J:** I have read the reasons of his Honour Fraser JA, and gratefully adopt his summary of the facts. I shall make further reference to the evidence only when necessary to explain why my conclusion is different from his Honour's.

[43] I have also had the advantage of reading a draft of the reasons given by Bond J, and respectfully adopt his Honour's analysis of the law which is applicable to an appeal brought on the basis that a jury's verdict is "unreasonable, or cannot be supported having regard to the evidence".

[44] Notwithstanding the fact that my conclusion is different from the one reached by Fraser JA, I am in respectful agreement with particular aspects of his Honour's judgment. Specifically, I agree that the absence of evidence as to propensity or intoxication is not a relevant consideration.[39] Nor could it be thought that the absence of evidence as to any change in the personality or behaviour of the complainant should bear upon the outcome.[40]

[45] And, broadly speaking, it is impossible to imbue the timing and content of a jury's questions with real meaning – so it is in this case.[41]

[46] It may, however, be noted that the verdicts were delivered a long time after the summing up had concluded. Any jury might struggle to recall, with precision, the exact terms of a summing up they had heard 22 hours previously. On the other hand, in this type of case, which is "peculiarly likely to arouse prejudice",[42] a jury will face difficulty in putting out of their minds the image of a witness in distress. The learned trial judge recorded that the complainant was "clearly very upset at times when she gave evidence in court."[43] Concerns raised by such a presentation are compounded by the fact that the Crown prosecutor, in his closing address, urged the jury to have regard to "those sort of emotions" when assessing the truthfulness of the complainant's account.[44]

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39 [17](a).

40 [18](g).

41 [17](b).

42 *De Jesus v The Queen* (1986) 68 ALR 1, 4-5 per Gibbs J.

43 ARB page 167 line 26.

44 ARB page 31 line 5. "In cases of this type prosecuting counsel are required to be particularly vigilant not to do anything which appeals to the prejudice or sympathy of the jury where such emotions are so easily aroused" – *R v M* [1991] 2 Qd R 68, 83 per Cooper J.

[47] However, whilst those considerations may well explain the verdict, they do not ultimately form an essential part of the reasoning from which my conclusion follows. That conclusion is informed by the combined effect of four different aspects of the evidence, and reinforced by a fifth. They are:

(a) The state of the evidence said to establish the location of the offending;

(b) The contextual and physical features of the offending;

(c) Inconsistency and inadequacy of evidence concerning the complaint;

(d) The delay and the dangers created by it; and

(e) The appellant's sworn denial.

The state of evidence said to establish the location of the offending

[48] The complainant was asked about sleeping arrangements at J's parents' house (meaning the house shared by the appellant and J's mother, "M"). She said that she slept in J's room with her – J sleeping on a single bed and the complainant on an air mattress on the floor. She said that the offending had taken place outside J's room. She identified J's room on a sketch which she prepared.

[49] J's evidence was unsatisfactory in many respects. But it was not ambiguous as to the fact that she did not have a bedroom at her parents' house.[45] Her concessions as to lack of memory were made in the context of responses to questions which allied reference to the bedroom with other matters. To my mind, J's evidence clearly contradicted the complainant's evidence about the existence of a room in which she claimed to have slept,[46] and to have entered[47] immediately after the offending had allegedly occurred.

[50] J's evidence in this respect was consistent with the evidence of the appellant, who swore that J did not have a bedroom at the house. Further, the appellant said that J slept in the lounge room or "in the room with me and M sometimes".[48] Neither of these propositions was challenged by counsel for the Crown; nor did the prosecutor suggest any basis upon which this aspect of the appellant's evidence might be discounted.[49]

[51] To my mind the evidence of J and the appellant did reduce the probative force of the complainant's evidence, which cannot be explained away on the chance that, by referring to J's room, she was in fact referring to J's parents' bedroom. Nor is it possible, in a case that was furnished by few particulars, to downplay the significance of the way in which the location of the offending was identified.

The contextual and physical features of the offending

[52] On the complainant's bald account, the offences occurred in something of a vacuum. This was not a case in which the appellant was in a position to take

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45 ARB page 128 line 6. Her statement: "I didn't have a bedroom there" was made during cross-examination, but was volunteered, and did not result from the adoption of a leading question.

46 ARB page 84 line 6.

47 ARB page 88 line 5.

48 ARB page 150 line 10.

49 Nor in fact was J's clear evidence on this point directly confronted in the closing address of the Crown prosecutor, who allowed that J was a "little confused" (ARB page 32 line 6) or a "bit confused" (ARB page 34 line 3) but was ultimately to commend complete acceptance of another unambiguous aspect of her evidence – see [69] below.

advantage of any familiarity he had with the complainant or her family – there was no pre-existing relationship of relevance.

[53] The alleged attack was sudden and brutal. It was described as involving a vigorous act of digital penetration committed with force sufficient to cause bleeding. Although the complainant asserted that she was upset and "crying to [her]self",[50] she did not purport to recall any pain associated with the event – at that time or thereafter.

[54] Anyone launching such an assault would have to anticipate a likelihood that the complainant might react in a highly distressed manner although, given the lack of any background knowledge, they could have had no idea how that might manifest itself.

[55] That lack of background also meant that there was no question of any sort of loyalty that would prevent a contemporaneous complaint being made. Nor was there anything said by the appellant – in the way of a threat or a promise – that might have compelled the complainant's silence. As reported, absolutely nothing at all was said as between complainant and appellant – about anything.

[56] On the complainant's evidence, a complaint was made to J,[51] but there was no evidence that suggested a basis upon which the appellant might have thought that any complaint would be so confined.

[57] The description of the physical activity involved in the offence involved awkward manoeuvring.[52] The complainant (then a nine year old child) and appellant (then a 29 year old adult male) were effectively said to be side-by-side. It is known that the complainant was wearing shorts and underwear, and there is nothing to suggest other than that the appellant was fully clothed himself. Their relative heights are not recorded, but whatever they were, the mechanical difficulties involved in the act alleged cannot be ignored.

[58] Importantly, as the appellant was alleged to have been committing this act, he was only ever a moment away from being discovered.

[59] It is not open to approach this case by attempting to reconcile the alleged behaviour with the expectations of ordinary people. Those who commit these type of offences are operating outside those boundaries, and conventional thought patterns are not necessarily followed. Events that would be regarded by most as unthinkable and/or improbable in the extreme not infrequently provide the foundation for convictions in cases of this nature. In particular, it is far from unprecedented for such offences to be committed within close proximity to others who might, but for the guile of the offender, easily have witnessed the offending. It is also true that an opportunistic offender might take advantage of a vulnerable child with whom there has been no pre-existing relationship. Those circumstances, of themselves, do not necessarily present obstacles for the prosecution.

[60] For all of that, it should also be accepted that such offenders almost invariably know about the consequences of detection, and will do what they can to avoid it. It is not expected that they will behave in a contrary fashion, and might actively draw attention to their offending. But that is what is alleged to have occurred here. The

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50 ARB page 87 line 21.

51 This is discussed further below [63].

52 As recorded by Fraser JA in [3].

appellant and the complainant are said to have been side-by-side at a position in which they were facing the door of "the bedroom".[53] The appellant was knocking on that door and importuning J to come out. The complainant was J's friend, so there was every possibility that she might have done exactly that. And yet it was within these "matter of seconds" that the offending was said to have occurred.[54]

[61] As noted above, cases of this nature must be approached on the basis that many things are possible. However, a certain improbability attaches to the proposition that the appellant made an open-ended request for the door to be opened even as he was performing complicated actions which injured the complainant to the point where she bled. At the very least, this means that before it can be certified beyond a reasonable doubt that such an event had occurred, evidence from the witness who asserted that it did should otherwise be unimpeachable. There are, however, further difficulties with it.

The complaints

[62] Evidence from two witnesses – J and Ms Handosa – was received as preliminary complaint, and was therefore available for the purposes of assessing the complainant's credibility.[55]

[63] Their evidence must be considered in conjunction with the complainant's own version of the complaint to J. That is, the complainant said that, after the offending, she went into J's room and told J that the appellant had "touched me down there".[56] She said that J was shocked and cried.[57]

[64] At this point the status of the room in question might be revisited. The complaint was an integral part of the narrative, and there was no uncertainty in the complainant's evidence as to where it was made. The room was J's and it was a space where J could assert privacy for a sustained period. J's evidence on the point has already been considered.[58] When the whole of the evidence about the "bedroom" is considered, it at least suggests that the complainant's testimony may be affected by some reconstruction.

[65] Further, the complainant said that after the offences had happened she stayed in J's room for about 20 minutes or half an hour, after which she then went to the bathroom and found that she had bled through her underwear and her shorts.[59] Of course, if events had unfolded that way, evidence of them would have precisely the effect for which it is intended, and have bolstered the complainant's credibility.

[66] However, J's evidence was:

> "And what can you recall [the complainant] telling you? --- Basically, that she's seen his parts. Like, his genital area.
>
> Okay? --- And that's all I can really remember. I can't remember much.
>
> Right? --- Yeah.

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53 ARB pages 99 – 101.
54 ARB page 100 line 30.
55 ARB page 51. This evidence was the subject of a standard direction about preliminary complaint.
56 ARB page 88 line 11.
57 ARB page 88 line 13.
58 See [88] and FN 45.
59 ARB page 88 lines 20 – 22.

> How old were you again? --- I was, like, 10.
>
> Okay. So what was the nature of the complaint and who was it about? I know that's two questions. So firstly, what was the – what kind of complaint was it? --- Like, she was – what do you – what do you mean by that? I'm like, she was – the way she said it was, like, she was scared to tell me. But I was in disbelief though.
>
> Yeah. And who was she talking about? --- [The appellant].
>
> Yeah? --- Because he was the only adult there ---
>
> Okay? --- that I can remember.
>
> All right.
>
> Her Honour: So what did she say, again? She'd seen his what? --- His, like parts, basically. She didn't say the genital area, but yeah. That's what---
>
> Well what words can you remember her saying? --- That's all I can really remember, really. Sorry."[60]

[67] In no part of the complainant's evidence did she ever assert that she had seen the appellant's genitals. Indeed, given the way in which she described events occurring, it is difficult to see how she could have.

[68] It is true that, as the passage quoted above demonstrates and as Fraser JA observes, J's evidence was flawed and might have been rejected as "manifestly unreliable".[61] If that is so, then the complainant's evidence must be assessed on the basis that there was no contemporary complaint available to "bolster her credibility", and thereby provide reassurance in face of the uncertainty that is created by the other concerns that I have identified.

[69] However, even though it can be accepted that much of J's evidence might be unreliable, it was not necessary, for the appellant's purposes, for the jury to be satisfied to any particular standard about any aspect of it. The functional question was whether there was a reasonable possibility that J was giving evidence of something that she remembered being said – namely, that the complainant said that she had seen the appellant's genitals.[62] Whatever else J might have forgotten – and candidly admitted to have forgotten – it seems to remain at least a reasonable possibility that this particularly startling assertion was actually recalled. Indeed, the Crown prosecutor himself went further, suggesting that there could be "no mistake that (J) was told something by (the complainant) very close in time to when (the complainant) alleges the events occurred".[63]

[70] If that was true, then the evidence allowed only for the conclusion that the "something" was inconsistent with anything alleged by the complainant. It was an inconsistency which tells against an acceptance of the complainant's evidence about the offences that were actually charged.

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60 ARB page 126 lines 21 – 47.
61 Fraser JA's reasons, [18](h).
62 ARB page 126 lines 30-33.
63 ARB page 32 line16 (emphasis added).

[71] Further, given that J was prepared to adhere to that particular aspect of her memory, the exercise of examining what she did not say is unavoidable. And there was no mention of a 20-30 minute period which would, it must be thought, have been dominated completely by conversation about or reflection upon that which had allegedly just occurred.

[72] At its worst for the appellant, the evidence from J – introduced in an effort to bolster the complainant's credibility – leaves the situation neutral.

[73] In fact, when considered in conjunction with the evidence of Ms Handosa, discussed below, the presence at the trial of J provided a real cause for concern about the complainant's credibility.

[74] As noted by Fraser JA, Ms Handosa was the counsellor who informed the authorities about the allegations made by the complainant.[64]

[75] However, the fact that the complainant could (as an adult) in large part repeat, in 2019, this version of events given to Ms Handosa in 2016 does little to make her trial evidence more reliable. To my mind, it does not take things much further than the fact that a witness statement was provided to police.

[76] There is, however, an aspect to Ms Handosa's evidence which is of some significance.

[77] Ms Handosa was told by the complainant that:

> "[S]he had her hands by her side, and that they were outside J's bedroom door, and then she said that [the appellant] put his hands down her pants and, her words again, fingered her inside. She said she was bleeding as a result and had to change her clothes."[65]

[78] Ms Handosa asked her if she had told anybody about this and she said that she had told J, and that J had helped her get changed, because she had the blood on her clothes.[66]

[79] It will be already apparent that J made no mention of blood or of changing clothes.

[80] It has already been acknowledged that allowance must be made for the deficiencies in J's memory, but it remains that she was willing to testify against the appellant to the extent of recounting a conversation in which the complainant said something potentially unfavourable about him. It could not be thought that she was somehow in the appellant's "camp". If there were failings in J's evidence, they were the result of memory loss, not bias. But it is difficult to allow that she could fail to recall an incident in which she had to assist her young friend to change clothing which was bloodstained by reason of something as dramatic and upsetting as that which was alleged.

[81] The account provided by the complainant to Ms Handosa does not dispel relevant concerns about her evidence, and in fact raises a new one.

Dangers created by delay

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64 Fraser JA's reasons, [4] and [6].
65 ARB page 115 lines 21 – 24.
66 ARB page 115 lines 35 – 38.

[82] I do not think it necessary, for current purposes, to consider the effect of principle articulated in the civil case of *Jones v Dunkel*.[67]

[83] I do regard as significant the impact of concerns identified in *Longman v The Queen.*[68]

[84] The disadvantages confronting the appellant are well illustrated by the issue just considered, namely the proposition that a wholly unnoticed consequence of the appellant's actions was that he caused the nine year old complainant to bleed through two levels of clothing.

[85] It is true that this was not part of the evidence about which the jury had to be satisfied beyond a reasonable doubt before they could convict. But detail otherwise was sparse – the story was devoid, for example, of reference to any physical sensations experienced or words spoken. In this context, the assertion that there had been bleeding assumed some significance.

[86] It was a claim that would have been objectively provable – the blood was either on items of clothing or it was not. This is not the sort of thing about which the complainant could have been mistaken.[69] The complainant did not suggest that any measures were taken by her to prevent blood from being discovered. It is, in the circumstances, not open reasonably to divorce an assessment of her reliability as a witness from the proposition that there were, proximate to the time of the offending, bloodstains on her clothes. Nor is it possible to ignore the fact that such stains should have been observed by J and that there is some likelihood that they would have been observed by M and, at some slightly later stage, the complainant's own mother.

[87] These difficulties must have been apparent to the prosecution. In circumstances where it must be thought it should have been able to do so, J's evidence did nothing to address the point. It is no part of proving a case beset by such difficulties simply to ignore them. But the failure by the prosecution to call either M or the complainant's mother was completely unexplained.

[88] And if it is accepted, as it must be, that there were dangers in convicting on the complainant's testimony alone, then a particular question is invited. What was required, in this situation, in order to minimise these dangers, such that a conclusion beyond reasonable doubt could be reached? In the particular circumstances of this case, the logical answer includes evidence from the mature females who were included in the narrative. It might be expected that, if the bleeding had occurred, one of them would have noticed something as a result – whether it was a stain, or the fact that the complainant had changed clothes. Of course there may have been a reason why these women might not have noticed such a thing, but without them – or an explanation for their absence – or any other evidence apart from the complainant's, the concerns identified in the direction reproduced by Fraser JA[70] were unallayed. The prosecution case contained nothing that could lower, to an acceptable level, the danger of a conviction.

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67 As advanced by the appellant, and discussed by Fraser JA at [23] [24] of his Honour's reasons.

68 (1989) 168 CLR 79 at 90 – 91, per Brennan, Dawson and Toohey JJ.

69 And by telling H that she was bleeding "as a result" of the appellant's actions, the potential significance of menstruation was removed.

70 At [29].

Appellant's evidence

[89] The proposition that a conviction was dangerous is fortified by the fact that the appellant gave sworn evidence in his own defence. There was, to my mind, nothing in that evidence of which fair criticism can be made.

[90] His counsel did open with the proposition the appellant "had a good relationship with J and that they never fought".[71] The appellant was not cross-examined about any of his instructions which might have provided the basis for Counsel's opening in that way.

[91] Nevertheless, it was accepted by the appellant, in cross-examination, that he and the complainant fought occasionally "over games and that".[72] The following exchange occurred:

> "So it's entirely possible that there was a fight about something on the day that [the complainant] came over? – Yeah, I can't recall it though.
>
> Yes. What I'm saying is it's entirely possible? --- Oh, yep.
>
> Yes. So rather than it being the case that you never fought, you used to fight on occasions, you agree with me on that? --- Yeah, but only on – it was little things, that's all ---
>
> Yes, that's all right. I'm not saying that it had to be over World War II, but on occasion, correct? --- Yep.
>
> And it's entirely possible that, on the occasion that [the complainant] came over, that you'd had a fight about something. You can't discount that, can you? --- No, I can't."[73]

[92] For any such variation as between defence opening and evidence to be exploited in a criminal trial[74] fairness demands that there be specific cross-examination on the issue, such that it can, if necessary, be addressed in re-examination, and further be the subject of directions as to the manner in which this sort of situation ought to be approached.[75]

[93] In the circumstances of this case it ought also be acknowledged that, within the context of family relationships, the word "fight" might have a protean quality. It would be wrong, in my view, to use what might be thought to have been no more than a reasonable concession as any sort of basis upon which to discount the appellant's sworn denial of sexual offending.

[94] Nor does the other exchange to which the respondent pointed as a basis for devaluing the appellant's testimony actually have that effect. Read in context, the

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71 ARB page 17 line 20.

72 ARB page 149 lines 6-7.

73 ARB page 149 lines 5 – 25.

74 In which a Crown Prosecutor always has a special responsibility (see the "Duty to be Fair" in Director's Guidelines, Department of Justice and Attorney-General (Qld), page 1. As noted above, prosecutors should be astute to observe those responsibilities in cases like this.

75 By analogy, some of the observations made in the Supreme and District Courts Criminal Directions Benchbook 32.2 have application. That is, considerable caution is required in allowing such tactics in criminal trials, since there may be any number of reasons for such variation. There may be a need for examination of the circumstances under which the defendant's instructions were taken, and to consider the possibility of error by counsel.

appellant's reference to the fact that his "woman" was "in the house"[76] can be understood as an effort to point out a feature of the Crown's own case which made the allegations inherently improbable. His frustration and inelegant expression is understandable in circumstances where the "woman" in question was a material witness whose absence should have been explained in evidence, or who should have been called as a witness by the very prosecutor who was then cross-examining him.

[95] The alternative suggestion – that the appellant was invoking the presence of that potential witness as a reason why he would not commit the offence – was unjustified, particularly in circumstances where the relevant answer followed a question which was improperly framed.[77] The appellant's evidence cannot be read as anything other than a square denial of all that was alleged against him. Its effectiveness to that end was entirely left intact after cross-examination.

[96] The evidence does not record whether the appellant took part in an interview with police, but in my view a fair appraisal of the situation is that "an innocent man could have done no more"[78] than he did by giving evidence and providing reasonable answers to all questions that were asked fairly. Especially is this so when he was defending himself against a spare allegation about something said to have occurred approximately 12 years previously, and in circumstances where the prosecution did not bother itself to so much as produce a photograph of the crime scene, still less to produce material witnesses to testify – as the appellant himself did.

Conclusion

[97] In any case, it was not for the appellant to prove his innocence. It is not suggested that anything in his evidence actually advanced proof of the prosecution case. In fact, to my mind it did add to the accumulation of circumstances which called into question the reasonableness of the verdict, but the doubt which ought to have been held by the jury was present as at the time the Crown closed its case.

[98] It is at that point that the "sense of unease" [79] which has been described in cases of this nature should already have been felt. The case proceeds on the assumption that the evidence of the complainant was assessed by the jury as credible and reliable.[80] It does not, however, withstand an examination of a record which reveals contradictions in evidence as to where the offence took place, some implausibility in the events as described, an inconsistency in the nature of the complaint, and inadequacies in the evidence – such as the lack of any support for the complainant's assertions about blood. These combine to present what should have been a "solid obstacle" in the path of reasoning towards a conclusion of guilt.[81] The jury, acting rationally and unaffected by the undoubtedly emotional circumstances of the trial, ought to have recognised that and entertained a reasonable doubt as to proof of guilt. I would set aside the verdicts, quash the convictions and enter verdicts of acquittal.

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76 ARB page 152 line 2.

77 See Judgment of Fraser JA at [28](b).

78 *M v The Queen* (1994) 181 CLR 487, 500, per Mason CJ, Deane, Dawson and Toohey JJ.

79 *R v Jones* (1997) 191 CLR 439, 469; *R v Dyer* (2002) 210 CLR 285, 76 per Kirby J.

80 *Pell v The Queen* [2020] HCA 12 per the Court at [39].

81 *R v Shah* [2007] SASC 68, [4] per Doyle CJ; *R v Klamo* [2008] VSCA 75, [40] per Maxwell P; *R v Place* [2015] SASCFC 163, [79] per Sulan, Peek and Lovell JJ; *Gant v The Queen* [2017] VSCA 104, [109] per Weinberg, Priest and McLiesh JJA.