SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAX* [2020] QCA 139
PARTIES:	**R** **v** **FAX** (appellant)
FILE NO/S:	CA No 37 of 2020 DC No 67 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Childrens Court at Southport – Date of Conviction: 4 February 2020 (Kent QC DCJ)
DELIVERED ON:	26 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2020
JUDGES:	Sofronoff P and Boddice and Ryan JJ
ORDERS:	**1. The appeal be allowed.** **2. The verdict of guilty be set aside.** **3. There be a retrial on the count of rape.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was found guilty of one count of rape after a judge alone trial – where the appellant was sentenced to supervision for a period of two years under the *Youth Justice Act* 1992 (Qld) – where a conviction was not recorded – where the appellant appeals his conviction on the ground that the trial Judge erred in law, failing to or failing to fully and adequately apply the relevant principles of law and procedure applicable to the trial under the *Childrens Court Act* 1992 (Qld) – where the trial Judge failed to record in the reasons that there was no obligation on the appellant to give evidence at trial and that no adverse inference could be drawn from his decision not to do so – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant appeals his conviction on the ground that the verdict of the trial Judge was unreasonable and

cannot be supported having regard to the evidence – where there were a number of matters which called into question the reliability and credibility of the complainant – whether it was open to the trial Judge to be satisfied beyond reasonable doubt that the appellant raped the complainant – whether the verdict of the trial Judge was unreasonable

Childrens Court Act 1992 (Qld), s 23
Criminal Code (Qld), s 615C, s 615D
Youth Justice Act 1992 (Qld), s 193

AK v Western Australia (2008) 232 CLR 438; [2008] HCA 8, cited
R v DAH (2004) 150 A Crim R 14; [2004] QCA 419, cited
R v R, R and R, LJ [2008] SASC 35, considered
R v Schneiders [2007] QCA 210, cited

COUNSEL: A J Kimmins for the appellant
D Balic for the respondent

SOLICITORS: PHV Law Solicitors and Consultants for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Boddice J.

[2] **BODDICE J:** On 4 February 2020, a judge of the Childrens Court of Queensland found the appellant guilty of one count of rape, after a judge alone trial.

[3] On 5 February 2020, the appellant was sentenced to supervision for a period of two years under section 193 of the *Youth Justice Act* 1992. A conviction was not recorded.

[4] The appellant appeals his conviction. He relies on two grounds:

(1) The learned trial Judge erred in law, failing to or failing to fully and adequately apply the relevant principles of law and procedure applicable to the trial under section 23 of the *Childrens Court Act* 1992.

(2) The verdict of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence.

Background

[5] The appellant was born on 12 February 2001. He was aged 14 years at the time of the offence and 18 years at the date of his conviction and sentence.

[6] The complainant was a female aged 13 years at the time of the offence. She and the appellant are cousins by marriage.

[7] The offence of rape was committed between 29 January 2016 and 1 February 2016. The act was particularised as digital penetration of the complainant's vagina.

Evidence

[8] On 17 May 2018, the complainant approached Darren Lawrence, the school chaplain. She wanted to tell him something but asked about his reporting obligations.

[9] On 28 May 2018, the complainant came to Lawrence's office with another student. The complainant again clarified his reporting requirements. The complainant said she felt she needed to tell him something because she needed support for it and she knew a relative could get into trouble.

[10] The complainant told Lawrence that she had been at her uncle's place at a party. The adults were outside and the complainant had fallen asleep. She woke up and her cousin, FAX, had his hand down her pants. FAX then dragged her into the bathroom and attempted to have intercourse with her. The complainant said she was able to push him off and ran outside to the adults but did not say anything to anyone.

[11] Lawrence did not ask any questions but made notes during the conversation. His training was not to ask any questions about matters concerning sexual assault. He explained to the complainant that he needed to pass the information on and discussed the reporting process through the school system.

[12] Lawrence immediately had a verbal conversation with the school principal. He prepared a student protection report within 30 minutes of speaking to the complainant. He organised support for the complainant in the way of counselling and contacted the complainant's mother to advise of the disclosure.

[13] Lawrence provided a statement to police on 13 November 2019. That statement contained quotes of his actual conversation with the complainant. The statement recorded the following account by the complainant:

> "I was at my Uncle WH's house in Brisbane. My cousin, FAX, who is WH's partner's grandson, about 15 years old, was at the house. The adults were outside and I was asleep on a bed inside when I woke to FAX with his hand down my pants. He then dragged me into the bathroom and attempted to have intercourse with me but I was able to push him off and run out of the bedroom and outside to where the adults were."

[14] Lawrence said that, when speaking to the complainant, he wrote down specific words such as the appellant's name, the uncle's name and age. He made full notes whilst preparing his official report. He did not ever show his report or statement to the complainant. If he thought he had misunderstood something, he would have sought clarification. His obligation is to record as best as possible the complaint.

[15] The complainant's mother was told by Lawrence that something of a sexual nature had happened to the complainant in the past. She told the complainant's sister, who spoke to the complainant in early June 2018, at the request of her mother.

[16] The complainant's sister told the complainant she was proud of her for speaking up and asked the complainant to tell her in her own words, if she felt comfortable. In response, the complainant said she had been sitting on a couch, watching a movie. She woke with the appellant's hand in her pants. The complainant's sister estimated

the conversation took five to 10 minutes. It took a while to get going because it was obviously quite an emotional time.

[17] The complainant's sister had a further conversation with the complainant on 28 June 2018. The complainant said they had been watching "Die Hard" on the couch at her uncle and aunty's house; that she had fallen asleep on the appellant's shoulder and awoke to his hand in her pants and several fingers inside of her. The complainant said she woke up feeling a bit groggy and did not really know what was going on but, once it clicked what was wrong, she sat up and tried to step away and then tripped on a blanket. The complainant's sister agreed she had asked a few more questions in the second conversation with the complainant, knowing they were going to the police. She wanted to know exactly what had happened to the complainant.

[18] The complainant first spoke to police on 30 June 2018. She was taken to the station by her mother and sister after the police had contacted her mother.

[19] The complainant told police the sexual assault occurred one night in February about two years earlier while watching the movie Die Hard. The adults were drunk and being loud outside. They were the only children at the party. The complainant said she told the chaplain at her school about the incident a couple of weeks before speaking to police. The chaplain had told her mother straight away.

[20] The complainant said she was sitting with the appellant on the couch, with a blanket on their laps. She fell asleep and ended up leaning against the appellant. When she woke up, the appellant had his hand down her pants with his fingers inside of her. He snatched his hand away.

[21] The complainant said:

> "I didn't realise what had happened I suppose. Um, um and then I, I pushed him, like I, I like I pushed him away and then he sat up and obviously I was, I was really groggy 'cause I had just woken up. And um, and then he, like he stood up and he, he grabbed me by the forearm and he, he yanked me up and I, I um, I tripped over. Assumedly the blanket had fallen on the floor. Um and, and I, d-, I nearly fell over the, the tables, the coffee tables, so he, he put around like, my shoulder and his other arm on my, on my arm and like pulled me through the living room. Um, and then I, I remember asking him, you know, where, where are we going and the point I, I s'pose I, I hadn't what had happened. I kind of, it, it didn't seem real, I guess. Um, and he, I, I can't like physically remember him saying but um, so you got the living and then there's a open space where there's a sliding door to the outside where all the adults were and then there's a hallway. Um, and, but it stuck in my head for some reason that he said that we were going to look at the movies which are all in the hallway. So, I, I thought that's what we'd been doing. So, I, I suppose I, I hadn't questioned it. Um, he um he kinda turned so um, he was in front of me so he was blocking the view from the, so in case anybody had looked inside they couldn't really see me, they could just see him. Um and he, he pulled me into the hallway and I, I do remember by that point I had s-, I had woken up a

bit and I, I just started panicking but I still couldn't really remember what had happened before and um, but it was kind of like, he's my cousin so I'm just like you know, he can't be doing anything bad. He's my cousin, he, he's my friend, he's family. Um so, and then it's when he went further than the movies and I tried, I was trying to pull away from him and I, I was like where are we going, FAX. I, I wanna go back and he, he, I, he just was [INDISTINCT] you know, its fine. Um, he um, he, he, it, then he, he turned around, around the corner which is then straight towards the bathroom and he pushed me into the bathroom and that's when I, I realised something was w-, wrong and, and I, I, I said to him, no. I wanna get out FAX. And he, he'd shut the door and I heard the door click, click, and I told him that I wanted to get out and I edged, I edged around so I was ne-, at the wall next to the door. Um, and then I was, you know, I was talking to him going, I wanna get out FAX. I, you know, I, I don't know what you're doing but I wanna get out. And then he was, I managed to edge around so my back was towards the door and I, I didn't wanna do anything 'cause obviously I didn't know what he was gonna do and then he was, so he was like, in front of me and I, I was, I was gonna like say something like, you know, yell for somebody but then he, it's stupid really, but um his was just, it's hard to explain. His face just went completely blank if that makes sense –

…

At all. Um and, and that made me panic. I, you know, I felt like I was going to be sick and I, and then his hands went to the waistband of his, of his pants and then I turned around and I was tryna open the door. And I, and I, I couldn't open it and, and I, I remember I kept saying over and over again, just no, n-, please, no. I don't wanna don't wanna do this. And his, i-, I felt his hand on my waist and that's when I turned around and I pushed him against the wall. I said no, and I managed to open the door and I ran straight outside to all the adults. And um, I, I didn't tell anybody obviously. Um and I, I was out there all night until everybody else went home.

…

Um, and then mum made me come inside and, 'cause we, 'cause it was at my um, uncle's place. We um, s-, stayed there the night and so did FAX and his family. Um, and like they, they stayed on, they were um, so they were there that night but I went and I, 'cause I didn't see him for quite a while afterwards so I went and, that night, and so I went and um, I was sitting on um, one of the other couches um, like with a book and he'd come i-, back on the couch oppose me. And I, you know, I didn't know what to do so I just, I pretended he wasn't there and I, I didn't wanna say anything because I didn't wanna draw attention because I dunno, I, I didn't want people to know. Um, and then he, he, he said, I'm sorry I guess, and then, it's the way he said it, he just, he, he didn't sound like me-, meant it at all, but I dunno. It's ha-, it's hard to say but, scared the hell out of me and I, I felt like I was going to be sick and I, I ran out of there straight away. Um, and he, he didn't speak to me for the rest of that

> but I, I, we, we, like we stayed there the night and we slept on a, a mattress, mum and I, and I stayed as far away as I could from him and we, yeah. We, I didn't see him since then. That's the last contact I've had, had, had with him."[1]

[22] The complainant said when she awoke, she could feel the appellant's fingers. The complainant had no idea what it was because she had never felt it before. She only had about a "second of it because he'd realised I'd woken up and that pulling out feeling".[2] The pulling out feeling was described as removing his fingers from inside her vagina. She felt her pants snap back. The complainant was wearing "super short"[3] sports shorts and a sports singlet. She had underwear under those shorts and singlet.

[23] As the complainant pushed the appellant away, he stood up and grabbed her by the forearm. She described the appellant as guiding her through the room. She said:

> "At that point I was, I was dizzy and I had zero idea what was going on. Um, yeah. And then we got into like the end of the um living room, I asked him where he was taking me."

[24] The complainant said she did not suffer any injuries from the incident other than a bit of a bruise on the back of her arm when she struck the door, running out of the bathroom. She had kept it for two years. She spent most of the time pretending it did not happen. It had affected her schooling and her health.

[25] In cross-examination, the complainant said she believed she was on school holidays at the time of the incident. She was going into year 9. She could not recall what else she had done earlier that day. She did not know what time they had gathered at the house. She did not go for a swim, although there was a pool at the house.

[26] The complainant recalled arriving at the house with her mother. There were a number of adults present. Prior to dinner, she looked after two children of one of those adults. The appellant's younger brother was also present at the residence.

[27] The complainant recalled watching several movies, chosen from a bookshelf in the hallway. She was sitting on one sofa, next to the appellant. The appellant's brother was sitting on the other sofa. She watched part of the movie before falling asleep. She did not know how long she was asleep.

[28] The complainant said there were no lights on in the room. A blanket was over them as she gets cold very easily. She clearly remembered a blanket. The complainant accepted the day was a warm summer day. Her shorts were loose sports shorts.[4] She had changed into those shorts from a dress after dinner.

[29] The complainant accepted that when she woke up she was groggy and did not have a full understanding of what was happening around her. She was at least half asleep. She did, however, have a specific memory of the appellant's finger or

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1 AB279/30 – 281/25.
2 AB292/15.
3 AB289/49.
4 AB26/25.

fingers being in her vagina.[5] When asked to explain what she meant by saying she did not understand what was going on, the complainant said:

> "I knew that he had his fingers inside of me, however, I was a child that didn't understand what that meant and I didn't want to believe that my family was – my own family member was doing that to me."[6]

[30] The complainant did not believe she had had sex education. Her father had talked to her about it, but only in a medical book so she did not understand. She did not really understand what was a bad touch. She had never experienced or talked about it. That weekend she had her period for the first time. She was using a pad, not tampons. She was not sure whether she was wearing a pad that evening.

[31] The complainant said when the appellant first pulled her up from the sofa, he told her they were going to look at the movies. She started resisting just in front of the toilet. The appellant pushed her in and locked the door. That gave her a fright. She did not believe she was in the toilet for very long. She went outside and joined the adults.

[32] The complainant accepted her mother was outside. They were not very close at the time. There was no-one she was particularly close to at the party. The appellant was probably the only person "that I was really comfortable around at that point".

[33] The complainant said she first mentioned the incident to a friend, a few months before speaking to the chaplain. She told the friend she had been through "a traumatic incident with a male". She did not go into detail. The first person she told about what actually happened to her was the chaplain.

[34] The complainant said she told the chaplain that a few years before her cousin had put his fingers down her pants and sexually assaulted her. The chaplain did not ask for any more detail. He obtained details of the family and then reported it to police.

[35] The complainant said she did not have a memory of the appellant touching her whilst she was in the bedroom. She did not remember ever telling anyone that she was on a bed in a bedroom when the appellant had his hand down her pants. The complainant said that was wrong; "I never said that".[7]

[36] The complainant said the next person she spoke to after the chaplain was her sister. She told her the same as she told the chaplain. By that stage it had been reported to police by the chaplain. She has never told her mother about the incident. She believes her sister did tell her mother.

[37] The complainant did not accept that at one point that evening she held hands with the appellant or that the appellant had his arm around her or that she put her head on his lap. She denied speaking to the appellant at breakfast the next morning.

[38] The complainant's mother recalled going to a family gathering on the weekend of 30 and 31 January 2016, at her brother's and sister-in-law's home. There were around 20 people, although that number may have ballooned to 25 people in the

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5 AB30/20.
6 AB30/40.
7 AB36/35.

evening. There was a barbecue held at around 7 or 8 o'clock in the evening. The appellant arrived after them, with his parents and younger brother. The appellant was a couple of years older than the complainant.

[39] The only children there were the complainant, the appellant and his brother. The children mostly kept to themselves. After dinner, they went inside and watched movies together in the lounge room. You could not see into the lounge room from outside in the pergola area, where the adults were mainly standing after dinner.

[40] The complainant's mother remembered hearing the television on in the lounge room. At one point, she saw the complainant sitting on a couch next to the appellant. His brother was sitting on another couch. The complainant was asleep. Her head was resting on the appellant's shoulder. The appellant and his brother were awake. There was a blanket over the complainant and the appellant.

[41] The complainant's mother saw the complainant later that night. The complainant came out to the back pergola area and sat down and read a book.

[42] In cross-examination, the complainant's mother said it had not been the intention to stay at her brother's home. At some point, a decision was made to stay the night. She had been drinking throughout the afternoon and into the night. A lot of people there had too much to drink. The adults were drunk and being loud. It was a happy occasion. She estimated she went to bed at around midnight.

[43] The complainant's mother said she went into the lounge room after her brother said "come and have a look at this. Isn't it cute?". She saw the three children positioned as she had described in her evidence. She had no memory of engaging in any conversation at that time. She remained in the room only for a short period.

[44] The complainant's mother left at around 6 o'clock the next morning to pick up her other daughter from a transit centre. By the time she returned to her brother's residence, everyone was awake. They had breakfast together. Everyone was talking and eating except for the complainant, who sat beside her and read a book and did not enter into any conversation. She agreed she had not mentioned recalling that the complainant was reading a book at breakfast in a statement she had given to police on 10 July 2018 or in a further statement to police on 4 February 2019.

[45] The complainant's mother accepted that the complainant was having a number of physical problems in 2018. It was during that time that she became aware that the complainant was making a complaint against the appellant. The complainant was suffering from migraines and was having problems at school because of the pain. The doctors medicated her for migraines because she was falling down stairs. The complainant was later diagnosed as suffering from post-traumatic stress disorder. At one point, the complainant had tried to take her life by taking a large quantity of drugs.

[46] The complainant's cousin, BT, was present at the gathering on the last weekend of January 2016. She recalled 10 to 15 people being present. She recalled seeing the complainant as well as the appellant and his brother. She could not recall many other children being present. The main people at the party were adults. It was a hot day. She went for a swim in the pool. Her recollection was that all of the children went for a swim.

[47] BT recalled seeing the complainant, the appellant and his brother sitting in front of the television in the lounge room. The complainant and the appellant were sitting

on one couch, the appellant's brother was sitting on another couch. She was a little cranky at the children sitting inside watching television when they had visitors over from the United Kingdom.

[48] BT recalled observing the complainant laying on the couch, with her head against the right hand side of the armrest. She appeared to be asleep. The appellant was awake, sitting on the couch next to her. The television was quite loud. She recalled it was mid-afternoon. There was a blanket draped over the complainant and the appellant. BT told them they should all be outside but received no response. BT left the party at about 9 pm. She described all of the adults as "just relaxed". She did not think any of them were blind drunk.

[49] In cross-examination, BT accepted she could have arrived at the party with the complainant and her mother. She was unsure whether the appellant and his family were present when she arrived at the party.

[50] BT accepted that when she spoke to police on 1 February 2019, she made no reference to observing a blanket on the complainant and the appellant. She said that, having regard to the heat of the day, she was quite surprised as a blanket was not necessary. She recalled thinking, "why, it's so warm".[8]

[51] At the end of the Crown case, the appellant elected not to give evidence but called as witnesses his mother and father, as well as his uncle and his uncle's son.

[52] The appellant's father said he attended the family get together at the end of January 2016 with his wife, the appellant and the appellant's brother. They arrived at around 4 o'clock in the afternoon. He recalled seeing the appellant, the appellant's brother and the complainant sitting in the lounge room watching movies throughout the night.

[53] The appellant's father said, on the first occasion he went into the lounge area he observed the appellant and the complainant sitting side by side, very close, on one of the couches. The appellant's brother was sitting on another couch. He did not stop on this occasion. He was passing through, "checking". He recalled going into the lounge area numerous times that day. The children basically stayed in the same position, with the appellant and complainant "very, very close on the couch".[9] At no time did any of them appear to be asleep.

[54] The appellant's father said the children came outside for dinner and then returned back to the lounge area. They started to eat dinner at around 7.30 in the evening. The process took about an hour. He was then involved in cleaning up for about an hour or hour and a half. Whilst doing so, he went back into the lounge area a few times. Other adults were in and out of the lounge area as well.

[55] The appellant's father said, at one point, WH called them in and pointed to the appellant and the complainant. They were both asleep on the couch. The appellant was "pretty much upright with his head back",[10] the complainant had her knees up towards her chest and was snuggled in close under the appellant's arm. The appellant's father recalled comments being made such as "How sweet is that".[11]

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8 AB82/39.
9 AB96/10.
10 AB97/20.
11 AB97/35.

[56] The appellant's father said, after that observation, the party started to close down and people commenced leaving. People were coming and going through the lounge area. The appellant's brother, had gone out to the patio area, but returned to the lounge room. The appellant's father did not go back into the lounge area.

[57] The appellant's father described the complainant as wearing "very short, denim shorts" that were "very much riding up her bottom."[12] She was wearing a singlet tee shirt top. He never saw a blanket over the complainant or the appellant. It was a warm day. The couches did have coverings on them. They were a thin, cotton blanket type cover. He did not see those coverings over the complainant or the appellant at any time.

[58] The appellant's father said they all had breakfast together the next morning. The complainant was at breakfast. He did not sense any problems between the complainant and the appellant at breakfast.

[59] In cross-examination, the appellant's father said it was around 10 to 10 in the evening that he was called in to see the appellant and the complainant on the couch. He did not have the appellant under his observation for the whole day. It is possible that the appellant's brother could have left the couch and come back to the lounge room without the appellant's father seeing him. At some stage, both the appellant and the complainant came outside for short periods of time.

[60] The appellant's father accepted that the covers on the couch would crumple and move when people sat on the couch. It was possible a blanket could have been thrown over the complainant and the appellant when he was not there. On the occasions he walked into the lounge room he was still doing other duties. He would check on them for a minute or two at a time. He did not have them under his observation very much at all during that period.

[61] The appellant's mother recalled attending the party on 30 January 2016, with her husband and children. They arrived at about mid-afternoon. The complainant and her mother were already at the house. The complainant followed the boys into the lounge area. The boys knew where the movies were kept and knew how to use the television and DVD player.

[62] The appellant's mother estimated that people started eating at around 6.30 in the evening. The children joined them for dinner. They then went back inside. She would go periodically into the lounge area. On the first occasion she went into the lounge area, she observed the three children sitting on one couch. The complainant was sitting next to the appellant. She did not recall the children changing positions at all on the several occasions she went into the lounge area. When she went into the lounge area, all three of them were awake.

[63] The appellant's mother said, at one point she was called into the lounge area by the complainant's mother. She saw the complainant sitting next to the appellant, thighs touching, with the complainant nestled onto the appellant's shoulder. The complainant's mother said, "Isn't that cute".[13] Both the complainant and the appellant were awake.

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12 AB99/ll28–29.

13 AB109/8.

[64] The appellant's mother recalled the complainant was wearing pale coloured shorts and a blue singlet top. They were "very, very short"[14] canvas pants with a zipper at the front. They did not have an elasticised waist. The complainant's "buttocks cheeks were hanging out the end."[15] All three children attended breakfast the next morning.

[65] In cross-examination, the appellant's mother was 100 per cent certain about the positions of the children on the couch. She did not think it was cute when she observed the complainant leaning into the appellant. She thought it was inappropriate. She spoke to her husband about her concern.

[66] The appellant's mother estimated that she checked on the appellant and his brother on five or six occasions during the course of that night. On occasions, she stopped to watch the film to make sure it was okay. She had spent up to half an hour with the children over the entire period of the night. She did not ever see any of the children have a blanket or throw rug on top of them. She did not see a blanket or throw rug on the couch at all. She did not think it was possible there was ever a blanket.

[67] WN had travelled with his partner from England. His parents put on a party for them at their home. People were constantly arriving throughout the day. The complainant and her mother arrived early in the day. The appellant and his family also arrived at the house.

[68] WN thought the complainant was dressed "inappropriately"[16]. She was wearing short, "very, very tight"[17] jean shorts that did not "leave much to the imagination."[18] They did not fit the description of black sports pants with an elasticised waist.

[69] WN saw the complainant, the appellant and the appellant's brother in the lounge area. The brother was sitting on a sofa by himself. The complainant and the appellant were sitting together on another sofa. He was constantly going into the lounge area throughout the night, welcoming and farewelling guests. On most of the occasions, the complainant and the appellant were sitting together.

[70] There was one time when he saw them being a little bit too affectionate towards each other. They were very close and quite cuddly. They were touching hands. When he walked past, they pulled away. He described them as affectionate. There were absolutely no problems and there was no animosity. They were "pretty much glued to the hip" for the whole day.[19]

[71] When he observed them being very close and cuddly, he raised it with his father, WH. It was late afternoon or early evening. He told his father that he needed to keep an eye on them. He did not observe any other type of physical contact between the appellant and the complainant.

[72] WN said there was a communal breakfast the next morning. Everyone was chatting and having a laugh. The children were together and seemed normal.

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14 AB109/36.
15 AB109/43.
16 AB124/18.
17 AB124/ll24–25.
18 AB124/25.
19 AB125/40.

[73] In cross-examination, WN accepted he was not keeping an eye on the appellant and the complainant 24/7. On the occasion he observed them touching hands and then move their hands apart from one another, he became alarmed and spoke to his father. It was probably a good one or two seconds. Their hands moved away very quickly. Both were awake at that time.

[74] WH recalled hosting a party for his son and partner. Guests started arriving just after midday. The party went through into the night. He was travelling through the lounge/dining area regularly throughout that day and night.

[75] WH said the complainant was wearing short shorts and a top. There was not "much material in the shorts."[20] When the complainant "opened her legs, … you could see the lining of her … underpants."[21] There was an occasion during the course of the afternoon when he told the complainant something along the lines of "Close your legs [INDISTINCT] can see what you had for breakfast".[22]

[76] WH said the complainant, the appellant and the appellant's brother were together in the lounge area throughout the afternoon. The appellant's brother was sitting on one sofa. The appellant and the complainant was sitting on the other. The television was on at the time. The appellant and the complainant were cuddled up together. They seemed to be quite happy. Apart from snuggling up, he did not see them touching each other.

[77] WH said he was a little bit concerned and spoke to the appellant's father and the complainant's mother. He asked them to keep an eye on the complainant and the appellant.[23] He thought both of them were too close.

[78] The next morning, at the communal breakfast, he did not notice any animosity between the three children. They were still "sticking to each other like flypaper at that time".[24] He did not observe any animosity between the complainant and the appellant that night. If he had, he would have done something about it.

[79] In cross-examination, WH accepted he was not watching the children 24/7 that afternoon or evening. He did walk past them many times. When he observed them snuggled together they were both awake. It was in the afternoon. He never saw them asleep at any time. He thought he was the only one who was taking that much notice. He recalled seeing the complainant and the appellant on the sofa when it was dark.

Judgment

[80] In his reasons for judgment, the trial Judge specifically observed that, as it was a criminal charge, the onus was on the prosecution and the standard was beyond reasonable doubt. Further, the case was one where it was appropriate to direct himself in terms of a *Robinson* direction:

> "[T]hat is, that because of some of the features of the case and they include the delay, in circumstances that I will further explain, and also to some extent the inconsistencies, or perhaps it is best to say some of the more vague peripheral areas of the Complainant's

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20 AB133/ll 17–18.
21 AB133/ll 21–22.
22 AB133/35.
23 AB135/15.
24 AB136/20.

> evidence, it is appropriate to approach the matter on the basis of what is often referred to as a *Robinson* direction – that is, the warning as to how to approach the case where the evidence of the witness requires a special warning."

[81] The trial Judge further observed that he should only act on the complainant's unsupported evidence:

> "[I]f after considering it with the warning in mind – that is, the warning to scrutinise her evidence with great care before arriving at a conclusion of guilt – I am nevertheless convinced, taking into account it and all of the other evidence, that I am convinced of its truth and accuracy."

[82] The trial Judge recorded other matters of law, including that as evidence was pre-recorded pursuant to section 21AK of the *Criminal Code*; he should take into account the way in which the *Code* directs that evidence of affected children should be approached, namely, that they were routine practices; that he was not to draw any inference as to the defendant's guilt because of those legal measures; and that the probative value of the evidence was neither increased nor decreased by those measures and was not to be given any greater or lesser weight as a consequence of those routine measures.

[83] The trial Judge also recorded that he was to take a cautious approach to preliminary complaint type evidence. That was evidence of the fact of the complaint, rather than evidence of the truth of its contents. Its use is limited to the purpose of either forming a buttress to the complainant's credit, because of consistency of account, or damage to the complainant's credit because of inconsistency.

[84] After summarising in detail the evidence of the witnesses, the trial Judge recorded that the parties agreed that the real issue in the case was whether the episode occurred, rather than issues of consent or mistake of fact.

[85] The trial Judge recorded that the defence case was that the complainant's evidence was weak and tenuous and contained errors such as the starting time of the party and the presence of younger twin cousins on that day. The complainant was also wrong about only watching movies after dinner and inaccurate about the clothes she was wearing that day.

[86] The defence submitted that one of the consequences of delay was the absence of a very timely investigation, thereby preventing clear empirical evidence about some matters, such as what the complainant was wearing at the time. The defence further submitted that:

> "If the offence could in theory, on the complainant's version, be committed surreptitiously so that the many witnesses who were in the house at the time and in and around the relevant area would not have seen it, it was nevertheless much more difficult to conclude that the struggle afterwards, that is, the pulling up of the complainant from the couch and the struggle down the corridor and the struggle into the toilet, those were significantly more violent and demonstrative and much more likely to have been observed by someone in the house at the time."

[87] The defence submitted that, as no-one in the house had given evidence of observing such an event, it was very difficult to accept the complainant's evidence. Her description of waking up dizzy and confused gave rise to the possibility of

inaccuracy and confabulation that she was digitally penetrated, rather than the appellant's hand merely being in her shorts.

[88] The defence also submitted that the preliminary complaint to Lawrence was inconsistent and a significant blow to the complainant's creditworthiness. Further, the comings and goings of other people in the house rendered it simply unlikely that this kind of offending could happen undetected, rendering significant problems for the complainant's credit, such that, in the context of the warning, the evidence fell short of accepting the complainant's evidence beyond reasonable doubt.

[89] The trial Judge recorded that the prosecution submitted that the complainant had been consistent in the core of her evidence. Further, the terms of the preliminary complaint as recorded by Lawrence were significant. He recorded that the adults were outside; that the complainant was asleep on a bed inside when she awoke to the appellant with his hand down her pants; that the appellant dragged the complainant into the bathroom and attempted to have intercourse with the complainant, but that the complainant was able to push him off and run out of the bathroom and outside to the adults. The reference to the bathroom was significant. It was unlikely to be explained by defence counsel's contention that what was being referred to was an ensuite.

[90] The prosecution also submitted that her evidence about being groggy must be viewed against the circumstance that she was asleep and woke up dazed and confused, trying to rationalise the fact that a trusted family member would do that act to her. That circumstance also explained the delay in the complaint. The prosecution submitted that the complainant had no motive to lie about the appellant and there was a lack of logic in any such complaint being fabricated or mistaken for two and a half years later.

[91] The prosecution submitted that it was a brazen offence, committed by the appellant when his actions were concealed by a blanket. His later conduct was also significant as, if the complainant was giving a false version of events, she ran the risk of being immediately contradicted by other witnesses in the house. There was also supportive evidence of the existence of a blanket from the complainant's mother and BT.

[92] The trial Judge recorded that the appellant's mother said there was no blanket and that the prosecution raised the unlikelihood of the complainant's mother considering the scene of the two of them cuddling together as sweet as a reason to reject the appellant's mother's evidence. The trial Judge said "[i]t is not easy for me to reach a concluded view either way on that".[25]

[93] The trial Judge recorded that the prosecution submitted that the version recorded by Lawrence should be rejected, to the extent that it was inconsistent with the complainant's version. Lawrence did not take down the complainant's account verbatim. The account as recorded was simply not logical, there being no explanation for how someone gets from the bathroom to run out of the bedroom. The trial Judge recorded "[i]n my view, those submissions are reasonably well-founded".

[94] Finally, the trial Judge recorded that the prosecution submitted that the complainant's demeanour was quite persuasive that she had given the kind of

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peripheral detail which had a ring of truth and she had made reasonable concessions in her evidence.

[95] The trial Judge the made the following findings:

> "In conclusion, then, at the end of the day, what I conclude is that I should accept the complainant to the required standard as to the elements of the offence. In my conclusion, the complainant was forthright and consistent in the central details of her version. She did make mistakes about peripheral details, and that is understandable. But none of those, in my view, or the reasons primarily as argued by Mr Hynes, were significant blows to her [creditworthiness].
>
> I do take into account her demeanour, particularly during the police section 93A interview, which, in my view, was that of someone giving an honest recount. In particular, she was upset at appropriate times in a manner which I do not consider to have been feigned, or at least showing no indicia of that.
>
> I also accept, as Mr Hynes submits, that her version was both logical and appropriately detailed, and she was a witness who made reasonable concessions which, of course, is a boost to her [creditworthiness]. It's also worth observing – and whilst bearing in mind, and keeping at the front of my mind very clearly that one has to be very careful about, in any way, eroding the burden of standard of proof in a criminal case, but it is, nevertheless, true to say that the complainant's version as to the events was uncontradicted.
>
> True it is, as Mr Kimmins argues, that she did make errors about peripheral details. Those included the interaction with the twins, the timing of the start of the party, the description of being dizzy and confused. None of those, in my view, erode her central [creditworthiness] in any significant degree.
>
> I don't accept that she was inconsistent in what she said to Mr Lawrence. Frankly, I have doubts about the accuracy of his recording of that conversation, and I am boosted in that conclusion by the way in which the complainant's version was given to her sister, DF, on the two separate occasions. When first asked, she went no further than the defendant having his hand down her pants, and that is consistent with what she said to Mr Lawrence. I find that final sentence in his notes somewhat difficult to understand, and I simply don't accept that it was precisely recorded by him.
>
> On the topic of the nature of the complainant's shorts, it's hard for me to reach a concluded view at this stage – certainly to a standard of beyond reasonable doubt – exactly what garment she was wearing that night. I do not think the evidence allows of any doubt that the shorts were of such a nature as to physically prevent an offence of this kind happening. As I understand the evidence, the idea of impossibility was not directly put to the complainant. And, in all of the circumstances, in my view, whatever the precise nature of the clothing, the complainant's evidence satisfies me to the required standard that the offence occurred.

> Therefore, the finding will be that the child is guilty of the offence charged."[26]

Appellant's submissions

[96] The appellant submits that the finding of guilt is unreasonable and cannot be supported having regard to the evidence. A number of features of the complainant's evidence brought her reliability into question to such a degree that it was not reasonably open to the trial Judge to be satisfied of the appellant's guilt beyond reasonable doubt.

[97] The complainant's account was not reported to any person for over two and a half years and the complainant consistently described her state of mind at the time of the incident as being groggy. There was inconsistency in the complainant's recollection of the clothing she was wearing as compared to the evidence of other witnesses, who described the shorts as very short, tight denim type shorts, rendering the prospect of the appellant being able to physically place his hand down the complainant's shorts very unlikely. The complainant also recalled twin boys being present at the gathering, when those children's mother gave evidence that the twins were not at the party. There was also inconsistency between the complainant's account and the preliminary complaint evidence. There is also no reference to penetration in the version given by way of preliminary complaint to her sister, despite the sister pressing the complainant to get as much information as possible to tell police.

[98] The appellant further submits that the trial Judge made his findings having regard to an erroneous or prohibited considerations, ignoring the onus and burden of proof and erroneously concluding that it was incumbent upon defence to put to the complainant's mother the issue of improbability of the event having regard to the nature of the clothing. The Crown did not challenge any defence witness as to their description of the complainant's shorts. The trial Judge also misidentified the counsel's submissions concerning evidence of migraines as going towards credibility rather than reliability.

[99] The appellant submits that the trial Judge, sitting without a jury, was obliged to conduct the trial in the same way as if trial by jury. There was an obligation on the trial Judge to expressly state in the reasons for judgment the principles of law to which regard was had, as well as the process of reasoning by which the finding of guilt was reached on the evidence.

[100] A consideration of the reasons given by the trial Judge supports a conclusion that the trial Judge failed to direct himself in respect of relevant principles of law in accordance with the Benchbook and failed to adequately explain his reasoning for accepting that the prosecution has established the appellant's guilt of the offence beyond reasonable doubt.

Respondent's submissions

[101] The respondent submits that the trial Judge's reasons support a conclusion that the trial Judge properly directed himself as to the relevant principles of law and gave transparent reasons for the finding of guilt beyond reasonable doubt. Whilst the

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trial Judge did not expressly direct himself in accordance with specific Benchbook directions, a proper reading of the reasons leads to the inevitable conclusion that the trial Judge was aware of the relevant principles of law and applied those principles of law in determining the appellant's guilt.

[102] The respondent submits that the verdict of guilty was not unreasonable. The complainant's recollection of the rape was clear and consistent. Her description of being groggy was consistent with having just woken up and the surreal nature of the event. Crucially, the complainant consistently described waking up to the feeling of the appellant pulling his fingers out of her vagina. Inconsistencies in her recollection of aspects of the surrounding circumstances enhanced her credibility. Other witnesses' descriptions of her shorts did not affect the certainty of the complainant's recollection of the appellant having digitally penetrated her vagina. There was no evidence that her clothing was inaccessible to the appellant's hand. Whilst the lack of presence of the twins negatively reflected on the complainant's reliability, that inconsistency was explicable by delay. When the complainant initially spoke to police, closer in time to the offence, she told police the appellant and his brother were the only children present at the party.

[103] The respondent submits that inconsistency in a preliminary complaint is a common feature, consistent with human frailty. Whilst Lawrence recorded in his notes that the incident occurred in a bedroom, the complainant never reported telling him the location of the incident, but reported consistently with Lawrence's account that he did not ask for further detail. The lack of graphic detail did not detract from the complainant's consistent account of the appellant having stuck his hands down her pants. There was also support from other witnesses as to the presence of a blanket, and of the two being together on a couch, at a time leading up to the offence.

Consideration

Ground one

[104] Section 23 of the *Childrens Court Act* 1992 provides that issues of law and fact are to be decided by a judge as if the trial were a trial on indictment in the Supreme Court. No further guidance is given in that Act as to the method by which a judge of the Childrens Court is to decide those issues.

[105] To that extent, section 23 may be contrasted with the provisions of section 615C of the *Criminal Code*, which contains a specific requirement for a judge in a trial without a jury to identify in reasons the principles of law applied by that judge and the findings of fact relied upon in determining whether the defendant is guilty or not guilty.

[106] Whilst that provision of the *Code* specifically does not apply to a trial on indictment in the Childrens Court,[27] the contents of that section are consistent with the common law obligation on any judicial officer to give reasons. That requirement includes obligations to state the relevant principles of law being applied, and the factual findings adopted in the application of those principles.

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27 *Criminal Code*, section 615D.

[107] The duty to give reasons operates as a safeguard to the interests of the accused and the public interest generally.[28] As a matter of general principle, the giving of reasons should include an identification of the principles of law and the findings of fact, together with a statement of "the reasoning process linking them and justifying the [findings of fact] and, ultimately, the verdict that it reached".[29]

[108] Whilst no particular formula is necessary, reasons given in a judge only trial should contain details of the evidence admitted at trial, an explanation as to the use made of that evidence, the inferences drawn from that evidence and the judge's approach to the evidence, with an appropriate identification of the relevant principles of law to be applied in assessing the evidence and in determining whether the prosecution had established the defendant's guilt of each offence beyond reasonable doubt.

[109] The form and content of reasons will depend upon the issues in dispute at trial. However, the observations of Gray J in *R v R, R and R, LJ*[30] are apposite:

> "It is important that a judge presiding alone in a criminal trial should give adequate reasons for the verdict. Those reasons should provide a clear explanation for the reasons for the verdict and be sufficient to allow an appellate court to review the verdict. It might be expected that the reasons would demonstrate that the trial Judge had proper regard to the relevant legal principles to be applied. The reasons should demonstrate an appropriate awareness of the burden of proof and the need for that burden to be satisfied in regard to each of the elements of an offence. The reasons should also allow the conclusion that proper regard was had to particular risks, for example, the dangers of convicting in the absence of supporting evidence, the weaknesses and the risks attaching to identification and recognition evidence and the significance of prior inconsistent out-of-court statements. These are but examples of difficulties that need to be addressed in particular circumstances. The reasons in appropriate cases should explain the way in which such issues have been addressed. There is no fixed formula for how this should be done. It is a matter for the individual judge. Some judges may choose to demonstrate their awareness in the language of a warning or direction. Other judges may choose to demonstrate their awareness by their process of reasoning."

[110] It is incumbent upon a judge presiding over a trial by judge alone to not only direct himself or herself as to the relevant principles, but to record those relevant principles in the reasons for judgment. The recording of those principles does not require that the judge set out the principles in the form of a Benchbook direction to a jury. Benchbook directions, by necessity, are framed on the basis they are given to an audience of lay people. A level of detail is required which it is not necessary to enunciate in the reasons of a judge alone trial.

[111] A failure to refer to a relevant principle of law in those reasons gives rise to two possibilities. First, that the principle was applied but not recorded by the judge;

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28 *AK v Western Australia* (2008) 232 CLR 438 at [104] per Heydon J.

29 *AK v Western Australia* per Gummow and Hayne JJ at [44], citing with approval *Fleming v The Queen* (1998) 197 CLR 250 at [28].

30 [2008] SASC 35 at [21].

second, that the principle was not applied or overlooked by the judge. If the principle is a relevant principle, the failure to refer to it gives rise to error as it breaches the obligation to record the principles of law applied by the judge in reaching a verdict. If the principle was not applied or overlooked, that also would give rise to error.

[112] Both errors may be a foundation for a conclusion that there has been a miscarriage of justice, necessitating a setting aside of the verdict, although that conclusion will depend on a consideration of all of the circumstances of the particular case.

[113] The appellant's contention that the reasons in the present case were deficient because there was not specific regard to full directions as per the Benchbook overstates the obligation on a judge hearing a judge only trial. However, a consideration of the trial Judge's reasons does support a conclusion that the trial Judge failed to record having regard to a number of relevant principles of law.

[114] First, the use to which evidence called by the defence may be considered in determining whether the prosecution had established the appellant's guilt beyond reasonable doubt. Second, that no adverse inference was to be drawn from the fact that the defendant did not give evidence. Third, the relevance of the prosecution's submission of there being no real motive for the complainant to lie. Fourth, the relevance of evidence led as to what occurred in the bathroom, where those acts had been the subject of counts which were not proceeded with when a nolle prosequi was entered on the first day of trial.

[115] Whilst the failure to refer to those principles in the course of the reasons is supportive of a conclusion that the trial Judge failed to have regard to those important principles of law in determining the appellant's guilt, a specific aspect of the reasons supports a conclusion that the trial Judge misdirected himself in respect of one fundamental principle of law. That principle related to the relevance of the appellant not having given evidence at trial.

[116] In the reasons for judgment, the trial Judge recorded the following, after accepting the prosecutor's submission that the complainant's version was both logical and appropriately detailed and came from a witness who made reasonable concessions:

> "It's also worth observing – and whilst bearing in mind, and keeping at the front of my mind very clearly that one has to be very careful about, in any way, eroding the burden of standard of proof in a criminal case. But it is, nevertheless, true to say that the complainant's version as to the offence was uncontradicted."

[117] In context, the reference to the complainant's version of events being uncontradicted cannot be other than a reference to the fact that the appellant had not given evidence at trial. It is impermissible for a jury to reason that the absence of evidence from an accused strengthens a Crown case. An essential element of any direction sufficient to guard against such impermissible reasoning is a direction that "the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant …".[31]

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[31] *R v Schneiders* [2007] QCA 210 at [25], citing with approval the statement of White J, with whom McPherson JA and Cullinane J agreed in *R v DAH* [2004] QCA 419 at [86].

[118] The conclusion that the trial Judge misdirected himself in relation to this fundamental principle of law is reinforced by the trial Judge's failure to record in the reasons that there had been applied the fundamental principles that there was no obligation or requirement for the appellant to give evidence at trial, and that no adverse inference could be drawn from his failure to do so.

[119] The failure to properly record such fundamental principles of law in the reasons for finding the appellant guilty of the offence supports a conclusion that there has been a miscarriage of justice. In those circumstances, the verdict must be set aside and a retrial ordered, unless the appellant is successful on the second ground, namely, that a verdict of guilty was unreasonable and not supported by the evidence.

Ground two

[120] A determination of this ground requires the Court to independently assess the record as a whole to determine whether it was open to the trial Judge, on a consideration of the whole of the evidence, to be satisfied of the appellant's guilt of the offence of rape beyond reasonable doubt. If, after making full allowance for the advantages enjoyed by the trial Judge in seeing and hearing the witnesses, there is a significant possibility an innocent person has been convicted, the verdict is unreasonable.[32]

[121] In undertaking that assessment, the Court assumes that any witness whose evidence must be accepted as reliable and credible to establish guilt beyond reasonable doubt, was found to be reliable and credible. That assumption does not, however, conclude the determination of a ground of unreasonable verdict.

[122] The issue for this Court is whether, notwithstanding the acceptance of that witness as reliable and credible, a consideration of the record as a whole reveals discrepancies or inconsistencies of such a nature that the trial Judge ought to have entertained a reasonable doubt as to the appellant's guilt.[33]

[123] In the present case, it was essential for the trial Judge to be satisfied of the complainant's reliability and credibility before the trial Judge could be satisfied beyond reasonable doubt of the appellant's guilt of the offence. There were a number of matters which called into question the reliability and credibility of the complainant.

[124] First, there was the inordinate delay in the making of the complaint. Second, there was the unlikelihood of the events, said to have taken place in the bathroom, occurring where there were numerous adults present at a party, with adults moving in and out of the house regularly throughout the day and evening. Third, there was the complainant's own account of grogginess when she awoke and of being half asleep.

[125] Whilst those matters, properly, were matters for consideration in assessing the complainant's reliability and credibility, there were a number of matters supportive of a conclusion that the complainant was both credible and reliable. Those matters included the consistency of her account of waking up to the appellant's hand down her pants and the specificity of her allegation of feeling his fingers inside her vagina.

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32 *M v The Queen* (1994) 181 CLR 487 at 494; *MFA v The Queen* (2002) 213 CLR 606 at 623.

33 *Pell v The Queen* [2020] HCA 12 at [39].

[126] The fact that there was a lack of specificity of the nature of the allegation, when complaint was first made to Lawrence and subsequently to the complainant's sister, did not detract from the consistency in the complainant's account as to the appellant having his hand down her pants and of feeling his fingers inside her vagina.

[127] The inconsistency between Lawrence's record of the preliminary complaint and the complainant's own account, was explained by the circumstance in which the complaint was recorded by Lawrence. On his own account, he did not ask questions of the complainant and he recorded his more detailed account after having spoken to the principal. Further, the likelihood of inaccurate recording by him was supported by the internal inconsistency in his record between the incident being in the bathroom and the complainant running out of the bedroom.

[128] Having considered the evidence as a whole, it was open to the trial Judge to be satisfied beyond reasonable doubt that the appellant raped the complainant by placing his fingers in her vagina when she was asleep.

[129] Nothing in the evidence raised discrepancies or inconsistencies of such a magnitude as to support a conclusion that the trial Judge ought to have had a reasonable doubt as to the appellant's guilt.

[130] The verdict of the trial Judge was not unreasonable. This ground fails.

Orders

[131] I would order:

(1) The appeal be allowed.

(2) The verdict of guilty be set aside.

(3) There be a retrial on the count of rape.

[132] **RYAN J:** I agree with Boddice J.