SUPREME COURT OF QUEENSLAND

CITATION:	*R v MAL* [2005] QCA 238
PARTIES:	**R** **v** **MAL** (appellant)
FILE NO/S:	CA No 36 of 2005 DC No 225 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court
DELIVERED ON:	28 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 June 2005
JUDGES:	Williams, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal against all convictions** **2. Set aside those convictions** **3. Enter verdicts of not guilty on those charges**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – appellant convicted of rape and indecent treatment of his six year old daughter – complainant's two police interviews admitted as evidence – complainant also gave evidence by video-recording at trial – complainant's three accounts of abuse were all very different and bizarre – no evidence supporting the occurrence of the particular events alleged in the charges – medical evidence given that complainant had probably been sexually abused at some time – whether it was open to the jury to find that any of the offences charged had occurred *Criminal Code* 1899 (Qld), s 668E(1) *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4A *Evidence Act* 1977 (Qld), Div 4A, s 21AW *Jones v R* (1997) 191 CLR 439, cited *MFA v R* (2002) 213 CLR 606; (2002) 193 ALR 184, cited

R v M [2001] QCA 458; CA No 126 of 2001, 26 October 2001, cited
R v Markuleski [2001] NSWCCA 290; (2001) 52 NSWLR 82, cited
R v S [2002] QCA 167; (2002) 129 A Crim R 339, cited

COUNSEL: M C Chowdhury for the appellant
G P Long for the respondent

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

[1] **WILLIAMS JA:** All relevant background facts are set out in the reasons for judgment of Jerrard JA which I have had the advantage of reading. I agree with the reasoning stated therein for concluding that the appeal against convictions should be allowed and verdicts of acquittal entered, but I wish to add some observations by way of emphasis.

[2] All the alleged offences were said to have occurred between 1 January and 15 November 2002. The first relevant interview with the complainant took place on 24 April 2003 when she was seven years of age. On that occasion she referred to events which arguably could be said to form the basis of counts 4, 5 and 6 on the indictment. She was next interviewed on 31 December 2003, by which time she was eight years of age, when arguably the events forming the basis of counts 1 and 2 were recounted; they had not been referred to in the earlier interview. But what is more significant is that in the second interview the events recounted in the first were not repeated. Counsel for the respondent on the hearing of the appeal submitted that that was understandable; the complainant was merely adding further complaints to what she had said earlier. But a consideration of the second interview does not support that. It seems clear that the police in the course of the second interview were seeking as comprehensive an account as possible from the complainant of what had occurred. The failure then to refer to the events on which counts 4, 5 and 6 were clearly based is of real concern because, if the complainant is to be believed, the events surrounding counts 4, 5 and 6 were the more horrendous.

[3] All that is compounded by the fact that the events forming the basis of count 3 on the indictment were not referred to by the complainant at all in either interview.

[4] The video tapes of those two interviews were before the jury, and they had the assistance of transcripts of what was said. In addition evidence from the complainant was placed before the jury in accordance with the procedure laid down in Division 4A of the *Evidence Act* 1977 (Qld). During questioning by counsel on either side for that purpose, brief mention was made by the complainant of an incident broadly in similar terms to that forming the basis of count 2 on the indictment, but otherwise there was no recounting of events on which the other charges were based. The evidence thus led could well have been regarded by the jury as providing some vague, general evidence of inappropriate sexual activity between the appellant and the complainant, but nothing more.

[5] It was submitted on behalf of the appellant that evidence from the complainant's grandmother that when she took the complainant into her care in mid-November 2002 the complainant's vagina appeared red and gave off an offensive odour, and

that the complainant then complained of being sore in that area, and evidence that the complainant suffered from urinary incontinence was wrongly admitted into evidence before the jury. In many cases of sexual abuse of young children evidence of such matters could well be highly probative of the fact that there had been some sexual interference. But it will always be necessary to link evidence of that nature to the events charged. Where, for example, there was a close temporal relationship between a specific alleged act and a complaint of that nature the evidence may be highly relevant. Further, in many instances it would be necessary to lead medical evidence suggesting a link between the complaint and the alleged sexual activity. Here there was no such linking evidence. Because the complainant's evidence was so vague as to when the incidents in question occurred little or no weight could be attached to evidence that she made complaints of vaginal soreness in November 2002. Further, the doctor was not asked any questions designed to link the matters referred to by the grandmother in her evidence with the alleged offences.

[6] In those circumstances the jury ought to have been told that the evidence was of no probative value because the prosecution had not adequately linked it to the alleged offences. The evidence was potentially probative and therefore one cannot say it was wrongly admitted, but by the end of the trial it had not been sufficiently linked to the charges so that the jury could attach weight to it when considering their verdict. The jury was not adequately instructed in relation to that, and in consequence the evidence could have had some general prejudicial effect on the mind of the jury.

[7] It is also not without significance that the complainant's account of relevant events contained allegations which could have been objectively confirmed, but there was no such evidence. For example, the smashing of the neighbour's telephone after the neighbour heard the complainant's screams during the events which constituted counts 4, 5 and 6 would have been an occurrence of some significance. One would have thought that if that had occurred then the neighbour (or perhaps the telephone company) would have been able to confirm it. Similarly, the complainant alleged that the appellant in the course of the events constituting counts 1 and 2 on the indictment broke a plate and used the broken plate to cut her ankle. If that had occurred one would ordinarily expect there to be some observable cut to the ankle of a six year old girl which required attention. There is nothing in the evidence to support either allegation made by the complainant. Whilst that is by no way conclusive against the credibility of the complainant's story, the absence of confirming evidence strengthens the conclusion that the complainant's story contains many improbables.

[8] Finally I make some observations on the evidence led by the prosecution from the complainant's mother and the mother's sister as to events which occurred on a Friday night in November 2002. The only explanation for leading that evidence is that the prosecution were contending that the events constituting counts 4, 5 and 6 occurred on that night. One would expect that if the six year old complainant had on that night been subjected to the horrendous treatment which forms the basis of counts 4, 5 and 6 then the mother's sister would have observed some injury or distress in the child when she arrived. Contrary to that, her evidence is that the children were outwardly happy and had no trouble sleeping. The evidence from the sister of the complainant's mother if anything strongly suggests that the sexual abuse allegedly constituting counts 4, 5 and 6 did not take place on that night shortly before she arrived at the house.

[9] Counsel for the respondent conceded that if the convictions were quashed there was no proper basis on which he could submit that a retrial was appropriate.

[10] In the circumstances I agree with the orders proposed by Jerrard JA.

[11] **JERRARD JA:** On 25 January 2005 MAL was convicted by a jury of two counts of rape and three counts of unlawfully and indecently dealing with a child who was under the age of 12 years and in his care. All offences were alleged to have been committed between 1 January 2002 and 15 November 2002, in a period in which the complainant child SM lived with him, after he and SM's mother had separated in February 2002. MAL was the child's father, and SM went to live with her grandmother in New South Wales in mid-November 2002. MAL was found not guilty on a fourth count of indecently dealing with SM, and has appealed his convictions on the other counts.

[12] The original grounds of appeal were that the verdicts were unreasonable and could not be supported having regard to the evidence, and were "unsafe and unsatisfactory". That last ground should be understood as a complaint that for that reason there was a miscarriage of justice.[1] The appellant was given leave to add further grounds, which complained respectively of the learned trial judge failing to direct the jury regarding SM's pre-recorded evidence in the terms required by s 21AW(2) of the *Evidence Act* 1977 (Qld); of the admission of evidence from SM's grandmother that when the latter took SM into her care in mid-November 2002, SM's vagina appeared red and gave off an offensive odour, and that SM complained of being sore in that area; of the admission of evidence that SM suffered from urinary incontinence, and some possible reasons for that; and of alleged deficiencies in the trial judge's directions to the jury about the use they could make of prior complaints by SM to her grandmother, and of the proper approach by the jury to the appellant's evidence.

[13] SM was six years old at the time of the alleged offences, and seven when first interviewed about the matters on 24 April 2003. She was eight when interviewed a second time on 31 December 2003, and also when giving her evidence-in-chief, and when cross-examined, in a proceeding in the District Court which was video recorded and conducted by a judge pursuant to Div 4A of the *Evidence Act* 1977.

[14] SM's mother, Ms K, had been married to MAL, and they had two children, SM and JM, the latter child born in October 1997. When Ms K and MAL separated in February 2002, MAL moved into a unit, which he shared with a man named "Peter". MAL moved from that unit to a house which he occupied from August until October 2002 with SM and JM. Ms K moved into that house herself in October 2002. After another two weeks, MAL was asked to leave that home, and did. Ms K's evidence included that she knew of a friend of MAL's called "Michael", who had a pony tail and a "beard sort of thing".[2] Michael was in his early twenties. MAL was in his mid-twenties in 2002.

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1 See s 668E(1) of the *Criminal Code*: the question for this Court is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt MAL was guilty (*MFA v R* (2002) 193 ALR 184 at [25] and [59])

2 AR 102

The alleged offences

[15] The learned judge summarised count 1 to the jury as an occasion on which MAL had allegedly cut up some tomatoes and put them on SM's chest. He fastened them there with sticky tape. He then allegedly placed a banana between her legs. This had happened "in the old house, not Peter's house", on SM's account. The learned judge described count 2 to the jury as an occasion on which MAL had had four ropes, and had tied SM's arms to the bed, and had then spreadeagled her legs and tied those to the bed. He then stripped SM naked and sat on top of her. He was also naked and he began to rub her chest with his hands. As put to the jury, counts 1 and 2 allegedly occurred on separate dates.

[16] Count 3, apparently also a separate incident from the others, was based on an occasion when a neighbour, a Mr M, entered MAL's residence and saw him lying on a lounge, with SM lying on her back on top of his stomach. MAL had a blanket over himself and the child, and Mr M saw that MAL's hand was moving under the blanket in the area of the child's genitals. MAL was acquitted of that count.

[17] The learned judge instructed the jurors that counts 4, 5 and 6 all allegedly occurred on the one occasion, and the acts alleged to constitute count 4 consisted of MAL sitting on SM with his legs astride and spread open, and his moving his penis up and down her body and over her stomach, and down to her vulva. Count 5, the first count of rape, consisted of his having allegedly placed his penis in SM's mouth on that occasion, and count 6 his having placed his penis in SM's vagina.

Directions given by the trial judge

[18] In the summing up the learned judge warned the jurors that evidence given by the child's mother, Ms K, of having once observed through a window that MAL and SM were in the lounge, (both fully clothed) and that MAL had an erection,[3] and evidence of other sexual acts described by SM in her interviews and with which MAL had not been charged, were all put before the jury only as evidence of the relationship between MAL and SM. The judge explained that it had been led to provide a context on which the jury were to decide the charges before them, and they were not to reason from that evidence that MAL was the sort of person likely to commit the offences charged. The learned judge also directed the jurors that that evidence of MAL having been seen to have an erection when the child was in his presence was not capable of corroborating SM's account of the six occasions on which he allegedly committed the offences charged, and nor was the evidence of the uncharged acts capable of constituting corroboration of the commission of the charged acts as described by the complainant. The judge likewise directed the jurors that evidence from SM's grandmother about the child's preliminary complaints[4] made to her, and evidence that SM's hymen was found to be ruptured when SM was medically examined in late 2003, was also not capable of corroborating SM's evidence about the charged acts. The learned judge did direct the jury that the evidence of Mr M was capable of corroborating SM's evidence generally.

[19] MAL's experienced trial counsel did not ask for any further directions or warnings to the jury in addition to those the learned trial judge gave, which included warnings

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3 The evidence-in-chief was at AR 107-8; the cross-examination was at AR 117-120

4 This term reflects s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld)

which repeated the defence submissions to the jury about SM's lack of credibility and the danger of convicting on her description of events. That danger was very real. In her interview on 24 April 2003, SM did not describe any of the events which allegedly constituted counts 1, 2 and 3 on the indictment. In that interview she appeared to describe only one occasion on which abuse allegedly occurred, that being when the matters described or alleged in counts 4–6 allegedly happened. The description she gave strongly suggested both that she was very ready to accuse MAL of wrongdoing and was hostile to him, and that her accusations seemed to include a good deal of fantasy.

Counts 4–6

[20] In that first interview she said that "Dad" did "all these things" to her, and that a person "Michael" "did things to my sister".[5] She said that happened when she was sleeping one night and her father came to the bedroom. He "kind of sat on me" and she called out for her mother. SM and JM were then in the bottom bunk of a double bunk bed. Her mother was not there, and her father and Michael each put a hand on each child's "private", and "it really hurted us". JM was five at the time.

[21] Those statements by SM were not inherently improbable, although they included a description of two men each molesting a small female child in the other's presence; what increased the oddity of the account was the description of there being 10 boys present, whose names SM largely forgot, who either watched or participated. One boy's name was Trent, who knew her father; another was called Dick, and a third Jake. Her father had wanted her to hold his "private", but she did not want to; and her father grabbed her hand and put it on his genitals. He then did the same to her, which she did not like. Neither of those alleged acts were the subject of a charge. Then "they pulled the cord out of the phone", because SM was going to call the police, but "Dad" didn't let her. He (Dad) "didn't have that many friends and he was a drunko and he smoked some [indistinct] things". She also said "Dad lies a lot".

[22] All of this was said very soon after that interview started. In further questioning SM said that the events had happened in her bedroom, and that she had gone to sleep with her door open. JM slept with her because JM was scared of the dark. When SM was in bed asleep "they" were hiding "at the bushes or in the garden", and "they came inside", and then "all of the rude stuff happened". ("They" seemed to include the 10 boys, and perhaps Michael and her father; it is unclear). She said her father had woken her and JM up by shaking each of them by the shoulder, JM apparently being in the lower bunk bed, and SM had screamed. The next door neighbour heard, and the neighbour was going to ring the police, but "Michael smashed her phone". He (either her father or Michael) started doing "rude things to me", and SM kept screaming. Nobody heard her screams, except the next door neighbour. Her father said "shut up", but she didn't; he then sat on her with his legs spread open, and was moving his "private" up and down on her "belly".[6] Her father then moved his "private" into hers, and then her "private" hurt. That appears to be the sole description in the evidence of the events alleged to constitute counts 4 and 6.

[23] That interview continued, and she described both her father and Michael being in that bedroom at the same time, with Michael "doing it" to JM on the top of the

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5 AR 407. She said Michael was a friend of her father's, who had long hair which he wore "up"; and hair on his face and chin

6 These descriptions are at AR 412 and 413

bunk. Michael had climbed up the ladder, broken it, and she saw he "went up there with my sister grabbing her from the neck. I think he was choking her." She said her father was naked, and that he looked "disgusting" with a hairy belly, a big belly button, and that his [indistinct] (apparently his penis) was big, and that it had hair on it. She also said that she had not seen this, but that JM had told her; and further that she knew that it was his "private" that was rubbing up and down, because "I saw it and [JM] saw it, too, but I didn't remember". She said that Michael had jumped onto JM, and copied what "Dad did", and that she had seen this. It happened when "Dad" was going to get a drink. What she saw was Michael putting his "private" into (JM's) mouth, and that "He just - both of them did that to me and [JM]". That appears to be the only description in evidence of the event alleged in count 5.

[24] She repeated that she had seen Michael doing that to JM, and that her father had done the same to her, and this was after he had been moving his "private" up and down in her "private". Then "he" (either her father or Michael) was putting it in "her" mouth (probably JM's) and rubbing it all over "us", and SM started to get sick and "I spewed all over him" (apparently MAL). She said that happened in the toilet, and that she grabbed JM and they both jumped out of the window, and "we hide and they went looking for us".[7]

[25] She said that she had vomited all over her father in the toilet, when he was in the bed. Asked how she did that, she repeated her description of having gone to the toilet and then grabbed her clothes, and having leapt with JM out of the toilet window.

[26] She said her father took off his clothes when he started doing the rude things, and that "Michael liked [JM] so he got [JM]", and "Dad like me and he got me". She insisted she had seen Michael putting his "private" into JM's mouth, and that Michael had "snuck" into "her" (the neighbour's house), ripped the cord (of the phone) out, and "took it outside and he stepped on the phone and he was wearing Mum's shoes".[8] That was so he could break the telephone.

[27] The questioner returned to the topic of the 10 boys, and SM volunteered that "a couple of them or all of them did to me and my sister",[9] and then that "they all just sat there and laughed" at "what Michael and Dad did"; and then "Trent did all of the same things that Dad did and then a different boy did all of the same things [to her and JM] what Dad did - what Michael did and they all just did the same".[10] She said that was done to her by Trent, who was Dad's friend, aged about 15 or 20, with a "cute little face"; but that happened before she vomited; and that Trent was rubbing his private all over her and inside her "private". She saw him do that and it made her sick and nervous. She also said that a person called Dick did the same to JM as Michael had, except that Dick did it after Michael left, and Dick put JM on the floor. This happened when "They were already going out to get a drink", apparently referring to Michael and her father. She described Dick as wearing black pants, a black shirt, a black jacket and black sunglasses. She repeated that when she had gone to sleep he (apparently her father) "got his other friends. They were all hiding out in the bushes."

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7 This appears at AR 419
8 At AR 420
9 At AR 421
10 AR 421

[28] That account makes potentially as strong a case against each of Michael and Dick of sexually abusing JM, as it does against Trent and MAL of sexually abusing SM. However, there was no evidence led of any medical examination at any time of JM. The account describes two adult males grossly abusing two small girls in the presence of up to 10 potential witnesses, of whom some or all then joined in and repeated the abuse, although one child had screamed for at least some of the time, loudly enough for a neighbour to hear, and whose phone was then removed and deliberately destroyed, apparently in the sight of the child who had screamed and who was being abused. The incident ended with both children outside. In the absence of some credible evidence supporting that account, such as evidence from the neighbour, it contains elements so improbable that a jury could not reasonably be satisfied it was true in its entirety; and it would be unsafe to choose part as true and reject the rest. There is no evidence that MAL's friend Michael has been charged with any offence against either SM or JM; no-one else allegedly present has been identified.

Was this the event?

[29] Ms K, and her sister, MK, described between them in their evidence an occasion on which MAL and his friend Michael were in the house together at night with some other males, and with SM and JM. Since the Crown led the evidence, presumably the jury were being invited to infer that that could have been the occasion on which the offences alleged in counts 4–6 occurred. There seems to have been no other purpose for leading the evidence, which was as follows: after Ms K had resumed co-habitation with MAL in October 2002, and after she had evicted him from the house, on a Friday night in November 2002 she wished to go out to a local nightclub, and arranged with him that he would take care of SM and JM. He did arrive to look after the children, at some time in the afternoon, with the man Michael. It was "getting on dark" when Ms K left for the nightclub[11] which Ms K left at 3.00 am. As Ms K was driving home a friend stopped her and that led to Ms K's keys being locked in her car. Fortunately, her sister MK arrived in another vehicle, with SM and JM. The two girls then went home with their mother.

[30] MK's evidence was that on an evening in November 2002 when MK knew that Ms K was going out nightclubbing, MK went to the house between 10.00 pm and 10.30 pm to see what Ms K was up to. When MK arrived, she could hear loud music and talking, and found SM and JM were both up, and playing with their dolls on the floor of the bedroom the two girls shared. Neither child seemed distressed. MAL, Michael, and three other men unknown to MK were in the main bedroom "drinking, smoking pot, taking tables [sic], talking about sex".[12] MK knew Michael and his surname and nickname. If there was any basis for considering that Michael committed serious offences that night on JM, then the evidence of MK both identified Michael and also made it very unlikely that the events SM described in her interview of 24 April 2003 could have happened earlier on that night.

[31] MK's evidence was that MAL decided to go for a drive to get more alcohol, but MK would not allow him to take the children with him, because he had been drinking; she offered to wait in the house while he went to purchase the alcohol. He left, with all his male visitors going with him on the trip; she learned later (this evidence was

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11 AR 103

12 AR 146

led in cross-examination) that MAL had been stopped in his vehicle and charged with drink driving that night, and kept in custody for some hours. In any event, he did not return to the house and MK eventually fell asleep, waking up at about 2.30 in the morning, after which time she went to look for her sister Ms K, finding her on the side of the road with the keys locked in the car. That evidence from MK and Ms K established only that there was an occasion when Michael and other unidentified males were with SM and JM in the home that MAL had lived in, and if put forward as a possible occasion on which gross sexual abuse of either child had occurred, only demonstrated how flimsy the prosecution case was. MK's evidence included that when she arrived between 10.00 and 10.30, she simply told the children to go back to bed.

[32] MAL gave evidence about that same occasion, but his evidence was that MK had arrived much earlier – about 7.00 pm – and had consumed some of the cannabis. He said two men from the lodge at which he then lived came over and had some alcohol and cannabis; they left before he went to get more alcohol. MAL could not remember their names or describe them, and said they were friends of Michael's. He thought he was arrested for driving while his blood alcohol concentration was .054 around 10.00 pm; it was put by the prosecution that it was after midnight, and that he told the police then that he had had three beers at a nearby hotel. Even rejecting that version does not make it more likely than MK's version does, that any sexual abuse happened that night.

Counts 1 and 2

[33] SM was interviewed a second time on 31 December 2003, this time by Queensland police officers, and the transcript reveals that she came to the police station that day with her mother and sister JM. SM had just turned eight by the time of that interview, and her answers showed that she remembered being interviewed on an earlier occasion by police in New South Wales about "yukky stuff our Dad done to us".[13] Asked what this yukky stuff was, she said that "he was blowing up balloons and putting them in - getting some [indistinct] and putting them on our privates". She then added that he was "getting some pegs and he was putting them on our privates".

[34] She enlarged on that, to explain that the pegs were clip-on plastic ones, which MAL "just clipped" on "our privates"[14], and that he also put two "round ones" (apparently balloons) on the front of her chest, after he had "stripped us off"[15]. In answer to questions she said that the pegs were just clipped on to her skin, and "he stuck on [sic] between our legs", and that it hurt. Further questions elicited that she said a long balloon had been placed between her legs, with a peg inside her "rudey-dudey", with the balloon outside. This had all happened at "Mum's old house".[16]

[35] She said that that had all happened when she was, "little; five or four or three or something", and no charges were laid which reflected any of that alleged conduct by MAL. It had happened about eight times "or something", and she knew the number because she was "counting with my head", but "I didn't count it loud because I wasn't supposed to be saying a word, because he said that he would kill me if I say a

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13 AR 429
14 AR 429
15 AR 430
16 This evidence is at AR 431

word".[17] This had also happened at his friend Peter's house; and happened to JM as well.

[36] She said that Michael had done "it" to JM, and Michael was doing the same thing that MAL was doing to her, with the balloons and "all of the fruit and that".[18] Further questioning elicited that MAL had some fruit and "vegetables and that" and "but with the tomato, he cut - opened them up, cut two round ones up and he stuck them here and there" indicating her chest. She added that "He - and he got a banana and he - he stuck it - and he stuck it between my legs". That description constituted the basis of count 1 on the indictment; it had not been given at all in the earlier interview in April 2003. She described the banana as being "all inside" her "rudey-dudey" and that this happened at Mum's old house. That was the same place where the balloons had been used on her, and she was four years old, she said, when MAL used the banana.[19] If correct, that means those events happened in 2000, not 2002.

[37] In further answers she said that MAL had put sticky tape over her nose, mouth, and eyes, "when he was doing the balloons", and said he had said that if she told "Mum or my nana", "he is going to kill me and my nana and my mum",[20] and that JM was in the other room and "Michael was doing things to her". She said she knew that because JM told her, and JM had said that Michael had broken her pillow and gotten the fluff out of it and "he stuck it into her rudey-dudey". She had not seen that happen.

[38] She said that Michael had put balloons on her and sticky tape "Lots of times",[21] and her answers indicated that she said the same about the fruit, and that "he always used bananas and tomatoes".[22] This had always happened at the old house, and MAL did not "do any of the banana and the - and the tomato" at Peter's house. At that residence she said MAL broke a plate and cut her around the ankle; it had healed,[23] but MAL had done it on purpose.[24] (No evidence was led of any healed cuts to her leg.) Her mother did not know that MAL had done those things to her, and SM had not told her mother because she was too scared to tell her. SM thought that she was going to get into trouble.[25] Asked then if anything else had happened to her, she described the events constituting count 2 in the indictment, namely how MAL had "laid me down on the bed and he tied both of my arms to the bed" and that "he had two more ropes left and he spread our - my legs out and then he tied the - my legs onto the bed as well", and "he was sitting on top of me".[26] MAL was rubbing SM on the chest with his hands, and she was naked. This had happened at Peter's house; she thought Peter was at Sydney when MAL was "doing these rude things".[27] MAL was also naked; this had happened when she was still four, and she was with MAL at Peter's place because "Mum was going out to the club".[28]

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17 AR 432
18 AR 433. This was her first reference to fruit as something used to abuse her
19 AR 433
20 AR 434
21 AR 435
22 AR 435
23 AR 436
24 AR 438
25 AR 437
26 AR 438
27 AR 439
28 AR 440

[39] That description in the second interview is the only evidence of the events constituting counts 1 and 2. SM did not give any evidence of the event reflected in count 3, of which MAL was acquitted. She did not claim in December 2003 to have actually witnessed Michael replicating with JM the acts constituting counts 1 and 2 allegedly performed on her by MAL, and she said that she was five years old when the last thing was done that either MAL or Michael, or anybody, had done to her. Her account in December 2003 therefore excluded 2002 as a year when any abuse happened. That, coupled with the fact that the counts 1 and 2 events were not described in April 2003, and the counts 4–6 events were not described in December 2003, the nature of the description given and the complete absence of supporting evidence about the events in counts 4–6 which could be expected to be available if SM's evidence was all true, persuades me that it was not open to the jury to be satisfied beyond reasonable doubt on SM's evidence that MAL was guilty of any of the five charges on which he was convicted. The improbability of the counts 4–6 descriptions and the lack of verifying details of those has to be taken into account when considering the convictions on counts 1 and 2 (*R v Markuleski* [2001] NSWCCA 290; *R v M* [2001] QCA 458 at [17]-[22]; *R v S* [2002] QCA 167 at [8],[29]; *Jones v R* (1997) 191 CLR 439 at 453 and 455). Since SM's evidence was the only evidence supporting any of those actual charges, MAL's convictions should be set aside.

[40] Mr Long argued for the respondent that the more lurid aspects of SM's accounts advanced her credibility, since it was unlikely those aspects could be imagined, and there was sufficient detail in her accounts for the jury to accept real events were being described. I respectfully disagree that implausibility should add to credibility, which is what the well-presented arguments really said; the details of the accounts were given in answer to questions, and did not add anything to the likelihood the incidents had happened.

[41] Evidence led by the prosecution from SM's grandmother provided the most potentially credible evidence in the trial, of complaints by SM of sexual abuse by MAL. However, complaints in the terms the grandmother heard were not repeated in either of the two interviews with the police, and the prosecution did not attempt to place the grandmother's account of her conversations with SM before the jury in a document tendered pursuant to s 93A of the *Evidence Act* 1977 (Qld). Accordingly, those statements by SM to the grandmother could not be used as evidence of the truth of their contents, but only as evidence of preliminary complaints pursuant to s 4A of the *Criminal Law (Sexual Offences) Act* 1978 (Qld), and relevant only to the credibility of SM, or lack of credibility, according to the degree of consistency of those preliminary complaints with her statements to the police. If evidence of those complaints to the grandmother had been admissible as evidence of their truth, they may have supported a charge against MAL of maintaining a sexual relationship with the child SM.

[42] The grandmother's evidence was that on the trip from Queensland to New South Wales with the two children in mid-November 2002, both girls kept wanting to stop to go to the toilet all the time, and "they were complaining of being very sore around their vaginas [sic] areas".[29] The grandmother observed when she arrived home that SM's genital area and vagina was "all very red", and "very sore-looking, and [SM] was saying it was hurting when she went to the toilet". The grandmother

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29 AR 123

noticed a "really bad smell" coming from that area, which she treated by the application of cream.

[43] In December 2002 SM said to her grandmother that "her dad did things to her, that he would rub real hard between her legs with his hands and then he would get his stick and rub really hard between her legs and then rub it over her body and over her tits and then put the privates in her mouth. And that made me feel sick". A few days later SM said that "dad used to come into my bedroom, take my pants off, hop on top of me, and put his stick inside me and move in and out". The grandmother said that SM demonstrated how that was done. She remembered a third conversation in late December 2002 or early January 2003, in which SM also said that MAL "used to suck between my legs, suck and lick between my legs and suck my tits".[30]

[44] The grandmother recalled that after the occasion in April 2003 when she had taken SM to a Department of Community Services office in New South Wales to be interviewed by the police, SM had said to her that "Dad had a blown up round balloon and pegged them to her tits and blew up a long balloon and pegged it to her nudey-rudey which was her vagina. She said either side of the pink part with pegs [sic], then would lick and suck the balloons and then get the big balloon, the big long one and rub it really hard up and down between her legs".[31]

[45] The grandmother did not specify quite when that was said, but in context it seems clear that the grandmother was told about the balloons and pegs in New South Wales long before the police were told about those things in Queensland in December 2003. There was no charge before the jury which was based on the use of either balloons or pegs, and accordingly the grandmother's evidence of those particular preliminary complaints by SM (about balloons and pegs) could only be used by the jury in support of SM's general credibility, and not as independent evidence that any of those events did happen.

[46] The only admissible evidence of the charged acts was in SM's statements in her two interviews with the police, which interview did not elicit the complaints made to the grandmother of repeated cunnilingus, fellatio, and intercourse. There was therefore no admissible evidence that could be used to prove that SM was routinely subjected to that more commonly described sexual abuse; and the grandmother's evidence could support SM's credibility only in showing some consistency in describing the use of pegs and balloons in indecent and painful ways. There is a difficulty in accepting even that evidence, in the absence of any other evidence of signs of injuries from the application of pegs to the vulval or chest regions of either SM or JM. MK said she had seen both girls almost daily in the period from February to November 2002, and had not seen any signs of abuse of either. Another difficulty about the evidence of use of the balloons and pegs is that it too sounds so improbable, even though described both to the grandmother and the police. Perhaps that explains why no charges were laid, based on those complaints, even though they were the only complaints which were made with any consistency.

[47] There was evidence from which the jurors could have inferred that MAL maintained a sexual relationship with SM, but the jurors appear to have rejected that. That was the evidence of Mr M, who lived in the unit next to Peter. He had gone next door to

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30 This evidence is at AR 123 and 124

31 At AR 126

borrow a cigarette, and walked into the living room, to find MAL on the lounge with SM sitting on MAL's chest. It was a hot day but MAL had a blanket over himself and the child, and it appeared to Mr M that MAL's hands "were around [SM's] genitalia area",[32] and MAL's hands were "moving up and down. They were making an up and down motion".[33] Mr M thought that MAL was interfering with SM. When challenged in cross-examination, he insisted that what he had seen was not fondling or a playful gesture,[34] and said that SM was not smiling or laughing at all, and Mr M was emphatic it was a sexual fondling.[35] He added that he had not reported it to the police because Peter had kicked MAL out, because he wasn't paying rent, wasn't buying food, and "he was whacked out on drugs",[36] (apparently meaning MAL).

[48] The jury acquitted on that count and so could not have accepted beyond reasonable doubt the inference Mr M drew. That incident therefore cannot be used to support a finding that there was a generally sexualised relationship between MAL and SM. It is only fair to MAL to record that he agreed the incident occurred, said it was a cold day (in May or June), and denied any wrongdoing at all. He likewise denied even possessing sticky tape, or ropes; he said his bed at Peter's unit was of the double mattress variety, with little scope to tie ropes to corners.

[49] There was medical evidence called from a Dr Birkby, who examined SM on 15 September 2003, and who found that SM had a healed tear to the hymen, leaving a scarred area on it. That finding indicated that something had penetrated SM's vaginal opening, and Dr Birkby explained such tears usually occurred when a female had her first episode of sexual intercourse of some form. The jury could conclude from that evidence, and from the evidence already described, that SM had been both emotionally and sexually abused in her young life, as well as getting poor general care, and could conclude it was possible that MAL had abused SM in each of the three ways just described; but that is a different conclusion from the conclusion beyond reasonable doubt that he had committed the particular offences alleged by the Crown in the unusual, if not bizarre, manner and circumstances which SM described in those two interviews. Even being satisfied that MAL had maintained a sexual relationship with SM, as described by SM in her complaints to her grandmother, falls short of, and is very different from, being satisfied that the five offences charged ever happened.

[50] When SM was examined and cross-examined in the District Court in the proceedings video-taped in 2004, she described the events charged in count 2, namely being tied up on a bed by her arms and legs by MAL when he was naked, but could not recall if anything happened to her.[37] She was not sure if anything unusual had happened when she was in her bunk bed, but she could remember MAL's friend Michael. She could not remember what she told the "policemen" in 2003; she could recall that she had told one that her father had done some "yukky stuff". Likewise she could remember speaking to a policeman about fruit, and could

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32 AR 153
33 AR 154
34 AR 160
35 AR 161
36 AR 159
37 AR 86

remember that "It really happened",[38] and that she had not told the policeman anything that wasn't true.[39]

[51] In those circumstances I am satisfied that MAL should succeed on his first ground of appeal, and that there should not be any order for a re-trial on those charges. The prosecution case is not going to get any better on those charges on a re-trial. It is a matter for the police and Director of Public Prosecutions to decide whether prosecutors attempt to bring a charge on which MAL was not committed for trial, namely that he maintained a sexual relationship with SM.

[52] That conclusion on the original grounds of appeal makes it unnecessary to consider the merits of the grounds added by leave, but it is appropriate to observe that s 21AW of the *Evidence Act* 1977 (Qld) contains mandatory directions for instructions to be given to a jury where an affected child's evidence is pre-recorded pursuant to Division 4A of the *Evidence Act* 1977 (Qld). I would allow the appeal against all convictions, order that those be set aside, and that verdicts of not guilty be entered on those charges.

[53] **KEANE JA:** I agree with the reasons of Jerrard JA and with the orders proposed by him.

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38 AR 92

39 AR 93