SUPREME COURT OF QUEENSLAND

CITATION:	*R v SBQ* [2010] QCA 89
PARTIES:	**R** **v** **SBQ** (applicant/appellant)
FILE NO/S:	CA No 291 of 2009 DC No 353 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	23 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2010
JUDGES:	Fraser and Chesterman JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to amend the notice of appeal and the application for leave to appeal against sentence.** **2. Dismiss the appeal against conviction.** **3. Grant the application for leave to appeal against sentence and allow that appeal.** **4. Set aside the sentences imposed below and, subject to the appellant agreeing to the orders in (a) and (b) being made after the explanation to him as required by s 95 of the *Penalties and Sentences Act* 1992 (Qld), order instead as follows:** **a) On count 1, sentence the appellant to probation for nine months, such order to contain the conditions in s 93 of that Act.** **b) On count 2, sentence the appellant to probation for 12 months, such order to contain the conditions in s 93 of that Act.** **c) The appellant must report to an authorised Corrective Services Officer at a time and place agreed between the parties or in default thereof, such time and place as are specified by a judge.** **d) No convictions be recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL –

MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was convicted of two counts of indecent dealing with a child under 12 – where the prosecutor amended the particulars of count 2 following the closing addresses resulting in duplicity in count 2 – whether the trial judge's decision to allow count 2 to go to the jury as amended involved a wrong decision on a question of law – whether the error gave rise to a miscarriage of justice – whether the appeal should be dismissed pursuant to s 668E(1A) *Criminal Code* on the ground that the error of law did not result in any substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the appellant was sentenced to 12 months imprisonment served as an intensive correction order with convictions recorded – where the sentencing judge found that the appellant was 16 years old at the time of offending – where defence counsel consented to the amendment of particulars in relation to count 2 on the basis that if the jury returned a guilty verdict the appellant would only be punished on the particularised conduct of touching on the clothing over the vagina – whether the sentencing judge punished the appellant for both instances of touching particularised in count 2 – whether the sentencing discretion miscarried – whether the Court should set aside the sentence on each count and re-sentence the appellant

Criminal Code 1899 (Qld), s 210(1)(a), s 564, s 567(3), s 668E(1A)
Penalties and Sentences Act 1992 (Qld), s 93, s 95
Youth Justice Act 1992 (Qld), s 140(2), s 144(2), s 184

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited
R v B [1995] QCA 231, cited
R v PGW (2002) 134 A Crim R 553; [2002] QCA 462, cited
R v SBP [2009] QCA 408, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited
Walsh v Tattersall (1996) 188 CLR 77; [1996] HCA 26, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, cited

COUNSEL: J M McInnes for the applicant/appellant
M J Copley for the respondent

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

[1] **FRASER JA:** The appellant was prosecuted on an indictment which charged two counts of indecent dealing with a child under 12 years of age between 31 December 2006 and 1 January 2008. The two complainants were nine years old at the time and the appellant was 16 or 17 years old. After a three day trial in the District Court the jury found the appellant guilty and he was convicted of both counts on 9 November 2009. He was sentenced to imprisonment for a period of 12 months to be served as an intensive correction order. The appellant appeals against conviction and he applies for leave to appeal against sentence.

[2] The appellant's notice of appeal originally included three grounds of appeal against conviction and one ground of appeal against sentence. In the written submissions for the appellant two of the grounds of appeal against conviction were abandoned and leave was sought to amend the third ground. In its amended form the ground of the appeal is that the trial judge erred in law "in allowing the Crown to change the particulars of Count 2 in a way that made the count duplex". In the application for leave to appeal against sentence the appellant contended that the sentence was manifestly excessive. The appellant sought leave to add the further ground that the trial judge erred in imposing sentence on count 2 "by not restricting punishment to the touching on the vagina." The respondent did not oppose leave to amend the grounds of the appeal and the application.

Appeal against conviction

[3] The appellant contended and the respondent conceded that duplicity in count 2 emerged as a result of the prosecutor's amendment of particulars of that count towards the end of the closing addresses at the trial and that the trial judge's decision to allow the count to go to the jury as so particularised involved a wrong decision on a question of law. The respondent contended that the error did not give rise to any substantial miscarriage of justice and that the appeal should be dismissed under the proviso in s 668E(1A) of the *Criminal Code*. The appellant contended that the Court should not apply the proviso. His counsel argued that the Court could not conclude from examination of the record of the trial that there was no substantial miscarriage of justice and that in any event the error was so fundamental as to deny application of the proviso.

[4] Because the issues include the question whether the appeal should be dismissed on the ground that the error of law did not result in any substantial miscarriage of justice it has been necessary to consider the whole record of proceedings at trial.[1]

Outline of the proceedings at trial

[5] The Crown alleged that the 16 or 17 year old appellant indecently dealt with each of the nine year old complainants during a game of "spin the bottle" in a "cubby-house" at the appellant's grandmother's house. That property was across the road from the house where the complainant in the first count ("A") lived. She and the complainant in the second count ("B") were friends. On the day of the offence A's 11 year old sister ("C") was with the other children, including in the cubby-house, for some time but she had returned to her home before the offences allegedly occurred. The Crown's particulars of count 1 alleged throughout that the appellant persuaded A to take her shirt off during the game. The original particulars of count 2 are not clearly set out in the record but shortly after the appellant pleaded not guilty to

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1 *Weiss v The Queen* (2005) 224 CLR 300.

both counts on 15 October 2009 defence counsel told the court that the particulars of count 2 were, "about the lifting of the - of the top in relation to [B], force and the stripping." Understood in light of the pre-recorded evidence those particulars identified the alleged indecent dealing as the appellant persuading B to lift her shirt during the game of spin the bottle.

[6] The complainants gave pre-recorded evidence in October 2009 and A gave further pre-recorded evidence in November 2009. They were eleven years old when they gave evidence.

[7] B gave the following evidence. Shortly after Easter 2007 the complainants played a game of tiggy in the backyard of the appellant's grandmother's house. The appellant started doing something that she did not want. He put his hand down her pants and touched her bottom more than once during the game. They then went to the cubby-house at the appellant's suggestion. He suggested playing spin the bottle. B did not want to. A said that they should because she was scared because the appellant was trying to threaten them with a nail gun. The appellant said, "You should play or I'm going to like shoot you with my nail gun". B did not see the nail gun. The appellant said that whoever the bottle "landed on" had to take a piece of clothing off. When the bottle landed on B she lifted her shirt up past her belly but no further. A took her shirt completely off when the bottle landed on her. The appellant took all of his clothes off except for his underpants when the bottle landed on him. When C arrived and knocked on the door of the cubby-house the appellant and two complainants stopped the game and fully dressed before B opened the door.

[8] In cross-examination, B agreed that the two girls had gone to the appellant's place without being invited but were welcomed and then started to play tiggy out the back. The touching of B's bottom occurred in the course of a vigorous game of tag. She was wearing elastic waisted pants. She denied ever having played tag with the appellant in A's backyard. After the incident B went back to A's house. A's mother was home. B agreed with the suggestion that she had discussed the case with her mother and with A. B denied the cross-examiner's suggestions that she had not been in the cubby-house and that the appellant did not make any threat concerning a nail gun.

[9] The following exchange occurred at the end of the cross-examination:

> "That's all right. All right, so you can't remember. So there was - was it just general conversation about having fun playing spin the bottle?-- Yes.
>
> All right. And Stephen was just sitting there, he wasn't doing anything?-- Well, he was trying to touch me on the opposite side of my back.
>
> On the opposite side of your back?-- Yes.
>
> Were you sitting opposite him were you?-- Yes.
>
> All right. But you had - and that was just on you - he was trying to touch you on your back, was he?-- No."

[10] In re-examination B gave evidence that in the cubby the appellant touched her "down here's". She gave further evidence which made her meaning clear that the appellant touched her clothing (she was wearing shorts and underpants) over the

vagina. The appellant touched her there when A wasn't looking. In further cross-examination B agreed that when she first spoke to police in June 2008 in her mother's presence she did not say anything about that touching whilst she was in the cubby-house. She said that she had told her mother, A's mother, and a PACT worker on the day that the PACT worker came over to talk to her. In further re-examination she gave evidence that she had not told the police because she was too nervous.

[11] When B concluded her evidence the prosecutor told the court that B's evidence had taken him by surprise. He foreshadowed a possible amendment to the indictment. That topic was deferred until after completion of the pre-recorded evidence.

[12] A's evidence was mostly consistent with B's evidence but it differed in some details. A gave evidence that B came to her house and then went to a local school to play tag. The appellant invited them back to his house for some chocolate cake but when they arrived there was no cake. He suggested a game in his cubby. In the cubby the appellant suggested a game of spin the bottle. He explained the rules when A said that she did not know them. He threatened to shoot A with his nail gun, which is why the complainants agreed to play the game. When the bottle landed on her she took off her shirt. A said that the bottle kept landing on B, who took off her shirt and her pants but not her undies. When C knocked on the door the appellant and two complainants quickly dressed. The appellant told A not to tell anyone what had happened or he would shoot with his nail gun. A told her mother what had happened. Her mother had called the police because "we were getting sick of him doing the finger to us and yelling insults."

[13] In cross-examination A agreed that she did not like the appellant's grandmother, because she was always yelling at the children and their dog, and the children were sick of the appellant "throwing insults and such". She did not recall having had a big run-in with the appellant and his grandmother a few days before her police interview (which was on 18 June 2008). When A was cross-examined about her statement in the police interview that the bottle did not land on the appellant and he did not take any of his clothes off she said that she thought that the bottle did land on him, that she did not know why she had said no to the question whether he had taken any of his clothes off, that he did take his shirt off, and that was all she could remember him taking off. She said that she was sure that B took off all of her clothes except her undies. A recalled that the appellant and two complainants were sitting in a triangle during the game. She could not remember the conversation. The game of tiggy had taken place at the school which was about two minutes walk away. A disagreed with the suggestions that she had not been in the cubby-house and had never played spin the bottle with the appellant.

[14] In re-examination A said that the bad feelings between her family and the appellant and his grandmother started at the time when A told her mother about the appellant having chocolate cake.

[15] A's elder sister C gave pre-recorded evidence on 15 October 2009, when she was 13 years of age. She gave evidence of an incident after Easter 2007 which corroborated several aspects of the complainants' evidence: the appellant claimed to have but did not in fact have any chocolate cake; the complainants went to his house; he invited them into his cubby-house; the complainants remained there when she left; she returned to fetch them about half an hour later; and after she knocked on the door she could hear rushing and moving around for between about

30 seconds and a minute before the door opened. (She said that the appellant opened the door). C agreed in cross-examination that before A went to the police station there had been quite a nasty run-in with the appellant and his grandmother with name-calling on both sides. C did not identify the date of that incident.

[16] On 5 November 2009 the prosecutor and defence counsel made submissions about how the trial should proceed in light of B's evidence that the appellant had touched her clothing over her vagina. Defence counsel first argued that the Crown should not be permitted to change the particulars of count 2 because neither A nor B had been cross-examined in the context of any such allegation. Ultimately defence counsel identified the prejudice to the defence as concerning only the absence of an opportunity to cross-examine A about the new matter raised in B's evidence. The trial judge decided that the Crown should be permitted to rely upon B's evidence of the touching as identifying the indecent dealing charge in count 2 on the footing that A should be re-called to give further pre-recorded evidence. The appellant does not contend that there was any error in this ruling. The trial then proceeded on the basis that the Crown's particulars of the indecent dealing in count 2 referred to the appellant touching B's clothing over her vagina.

[17] In A's further pre-recorded evidence on 5 November 2009 she referred to having been scared when she was in the cubby-house because the appellant had threatened the complainants with his nail gun. She could not recall any conversation but she remembered the threat. She described how the three were sitting in a triangle on the floor and gave estimates of distances between them. A gave evidence that she could see both the appellant and B clearly but that she looked away from them and at other things in the cubby-house at times. She did not see the appellant touch B during the game of spin the bottle but thought she remembered him touching her when they were playing tiggy on the playground. There was no cross-examination.

[18] In opening the Crown case the prosecutor told the jury that with regard to A the appellant's indecent dealing was asking a nine year old girl to take off her clothes and that with regard to the second count the indecent dealing was that the appellant touched B on her clothes over the vagina. In the course of the opening the prosecutor referred to B's evidence that in the game of tiggy, whether played at the school or in the backyard of the house, the appellant on one occasion put his hands past her underpants and touched her on her bottom, showing a "very unhealthy interest in her."

[19] The pre-recorded evidence was played to the jury. The recorded police interviews with each complainant and A's elder sister C were tendered in evidence and played to the jury, excluding what was agreed to be some inadmissible material. There were minor differences in details but there was no significant inconsistency between the complainants' statements in their police interviews and their pre-recorded evidence. The prosecutor also called a police officer who went to the cubby-house in May of 2008. He described its layout in terms which were materially consistent with descriptions by the complainants. He gave evidence that the appellant was then present and had a nail gun in the cubby-house.

[20] B's mother gave the following evidence. After receiving a phone call from A's mother she asked B about what she had done on the day she visited A and whether she had met A's neighbours. B disclosed the first name of the appellant and agreed that she had played at his house. She said that she had played tiggy and seen the

appellant's cubby. She did not have fun and the appellant kept trying to pull her pants down and put his hand down her pants. When asked what happened next B said that they went to look at the appellant's plasma television in his cubby-house. At this point in the conversation B became agitated and grumpy. She did not want to talk about it. After her mother reassured her and asked her about what kind of games they played B said that the appellant made them play spin the bottle and that she did not want to play; A said that she would not be her friend if she did not play; A said that because she was scared, because the appellant was threatening them with a nail gun. B told her mother that she lifted her shirt when the bottle landed on her first and when the bottle landed on A, A had to take her shirt off. B's mother said that at this time B was getting quite upset and angry, she was starting to cry, she did not feel well, and she did not want to talk about it any more. After that B's mother did not raise the topic very often. When the prospect of a court case was mentioned B got angry. B's mother avoided talking about the incident except when it was necessary. On the day before B's evidence was to be pre-recorded, B told her mother that the appellant had touched her between the legs.

[21] In cross-examination B's mother agreed that B had not mentioned being touched between the legs to the PACT worker who had attended a couple of days before the pre-recorded evidence.

[22] A's mother gave evidence of recalling a time when the complainants had gone off to play somewhere. Her elder daughter C told her that the girls were at the appellant's house. Because she knew the appellant's grandmother was not there she sent C down to get the children. Subsequently, after there had been an incident between her family and the appellant and his grandmother on about 13 June 2008, A told her the following: the appellant had invited them home for chocolate cake at his house, he then told them he did not have any cake, he invited them to his cubby-house, and that he then threatened to shoot the girls with his nail gun if they did not play spin the bottle. A explained the rules of the game to her mother but she did not make further disclosures.

[23] A's mother gave evidence that her children would sometimes play in the backyard near the house occupied by the appellant's grandmother, who would be upset and swearing. In cross-examination she referred to several incidents involving the appellant and his grandmother. She had told her children to stay away from the part of the yard nearest to the appellant's house, but they had been known to stir up the appellant and his grandmother. On the day the police were called A was upset by the appellant driving up and down, using abusive language and threatening to run over the children's puppy dog. That was the occasion when A told her mother about the incident charged in count 1.

[24] The appellant did not give or call evidence. His case as it was put in cross-examination to each complainant and to C was that the complainants had never been in the cubby-house with the appellant. Each complainant and C denied those suggestions.

[25] The trial judge ruled against defence counsel's submission that there was no "dealing" within the meaning of s 210(1)(a) of the *Criminal Code*. The appellant concedes that it was open to the jury on the evidence to find such a dealing and that the trial judge summed up that issue in appropriate terms.

[26] The prosecutor addressed the jury in terms which were consistent with the particulars given earlier, that the indecent dealing in count 1 was that the appellant

caused A to remove her shirt and that the indecent dealing in count 2 was that the appellant touched B's vagina on the outside of her clothes. The prosecutor made no reference to B's evidence that the appellant had touched her bottom during the course of playing tiggy. In a succinct address, the prosecutor drew the jury's attention to the inconsistency in some of the details of the complainants' evidence, submitted that the discrepancies were of a kind that would be expected and that there was no possibility of concoction, explained B's late disclosure of the touching in the cubby-house by reference to her youth and evident reluctance to talk about it, and framed the question for the jury as being whether it was convinced beyond reasonable doubt that the accused threatened the girls, played spin the bottle, effectively forced A to take off her shirt and, when A was not looking, touched B on the clothes outside her vagina.

[27] In defence counsel's closing address he emphasised the differences in the details of the complainants' evidence. Defence counsel also submitted that the lifting of A's shirt might not be indecent dealing and emphasised the lateness of the disclosure by B of the claim that she was touched by the appellant whilst in the cubby-house.

[28] Following the closing addresses and in the course of the discussion of a précis of the trial judge's proposed summing up, the prosecutor submitted that, for reasons of fairness, the Crown should assume the onus under count 2 of proving beyond reasonable doubt both that the appellant touched B during the course of the tiggy and also that he touched her whilst in the cubby-house. The prosecutor added that if the jury found that both things happened "and he is convicted he would only be punished for the touching of her private parts." Defence counsel agreed that the trial judge should put the particulars of count 2 to the jury in the following written form:

> "Has it been proved beyond reasonable doubt that [the appellant] indecently touched [B] by putting his hand on her backside, under her pants, and touched her private parts?"

[29] In relation to count 2, in addition to providing to the jury a document which summarised important matters in issue, including the question about count 2 just quoted, the trial judge directed the jury that the question under count 2 was whether it had been proved beyond reasonable doubt that the appellant indecently touched B by putting his hand on her backside under her pants (that coming from the evidence about the tiggy game) and touched her private parts (that happening, according to her, in the cubby-house).

[30] The jury retired at mid-morning on the third day of the trial. About two hours later the jury asked two questions, only one of which requires discussion. In relation to count 2 the jury asked: "Is count two limited only to the key issues, is [B] shirt lifting an issue for count two?" Consistently with the submissions for the appellant and respondent, the trial judge directed the jury that it could take into account the inconsistency between B's evidence (that she only lifted her shirt up a bit) and A's evidence (that B's shirt and pants came right off leaving her with her undies). The trial judge directed the jury that the inconsistency could go to the credibility of the complainants about the events. The trial judge made it clear that the way the prosecutor put the Crown case on count 2 did not involve what happened to B's shirt.

[31] The jury delivered their verdicts during the afternoon of the third day of the trial.

Duplicity in count 2

[32] The indictment complied with ss 564 and 567(3) of the *Criminal Code*. There was no "patent duplicity"[2] in count 2, that is to say, there was no duplicity apparent in the terms of the indictment. However, duplicity was created by the trial judge's decision to put count 2 to the jury in terms of the late amendment to the original particulars. Despite the propriety of the prosecutor's motive, the result was an indictment which charged two quite distinct indecent dealing offences in one count, contrary to s 567(3) of the *Criminal Code*. In my respectful opinion the respondent's concession that this involved a wrong decision on a question of law must be accepted. The amendment was also inextricably linked with the prosecutor's contention that if the jury convicted on count 2 the appellant would be punished only for the second indecent dealing. That approach was offensive to the public interest in persons convicted of offences being appropriately punished for those offences.

[33] In the particular circumstances of this trial, however, I am satisfied that the error did not result in a miscarriage of justice. The latent duplicity in count 2 did not adversely affect the appellant's entitlement to know what aspect of his conduct was said to constitute an offence, it did not bear upon what evidence was received, it did not impinge upon the sentencing process otherwise than in a way that distinctly favoured the appellant, and it was not otherwise productive of any unfairness.[3] Defence counsel readily consented to count 2 being left to the jury in the manner proposed by the prosecutor, no doubt because the result of the amendment was that the jury should acquit even if it was satisfied beyond reasonable doubt of the alleged indecent dealing in the cubby-house, if it was not also satisfied beyond reasonable doubt of a less serious indecent dealing in the earlier game of tag.

[34] The appellant's counsel argued that an undesirable consequence of the amendment of the particulars was that no direction about propensity reasoning or the use of discreditable conduct was sought or given. His argument assumed that such a direction would have been given had count 2 charged only an indecent dealing in the cubby-house and the earlier alleged dealing was not charged in any count. Counsel did not formulate the suggested direction but in *HML v The Queen*[4] Hayne J held that in a case of that kind the jury should be directed that, if on all the evidence the jury was satisfied beyond reasonable doubt that the earlier act occurred, that might help the jury in deciding whether the charge is established; it might help because showing that the accused acted in that sexual way on that earlier occasion might show that the accused had demonstrated that he had a sexual interest in the complainant and had been willing to give effect to that interest by doing that other act; and if so, the jury might think it more likely that the accused committed the alleged offence. To the extent that the suggested direction would have directed the jury not to rely upon the earlier act unless satisfied beyond reasonable doubt that it occurred, the trial judge did give such a direction in this case. The suggested deficiency then is that the trial judge did not direct the jury as to the manner in which the alleged earlier touching was relevant to the question whether the appellant was guilty of the alleged touching in the cubby-house.

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2 *Walsh v Tattersall* (1996) 188 CLR 77 per Kirby J at 110.

3 Compare *Walsh v Tattersall* (1996) 188 CLR 77 per Kirby J at 111 and per Dawson and Toohey JJ (dissenting) at 84; *S v The Queen* (1989) 168 CLR 266 per Gaudron and McHugh JJ at 284-285.

4 *HML v The Queen* (2008) 235 CLR 334 at [132].

[35] The appellant's counsel argued that there was a miscarriage of justice because of the possibility that the jury's conclusion that the earlier alleged touching had occurred might have contributed to the jury's conclusion that the later touching also occurred, particularly because the earlier touching found some support in A's evidence whereas the latter did not. No doubt it would be wrong for the jury to have adopted "general propensity" reasoning, that is, to reason from the earlier act that the accused was the sort of person likely to have committed the second act. However the prosecutor in opening had foreshadowed reliance upon legitimate reasoning of the kind reflected in the direction described by Hayne J (sometimes called "specific propensity" reasoning). B's evidence was relevant for that purpose[5] and defence counsel did not object to it. Perhaps a direction on the topic might have been given had the particulars of count 2 not been amended, but the evidence was in any case unequivocally and relevantly directed to the appellant's alleged pursuit in the later act of a sexual interest in B which he had demonstrated in the earlier alleged act, an act of a very similar nature to, and committed very shortly before, the later act. In the prosecutor's closing address he did not ask the jury to adopt any form of propensity reasoning and he did not direct the jury's attention to the complainants' evidence about the earlier touching, but if the jury relied at all upon the earlier act there is no real prospect that the jury applied impermissible propensity reasoning.

[36] The substantial contest on count 2, as it appeared from defence counsel's cross-examination of the complainants and from the closing addresses, was whether or not the jury should be satisfied beyond reasonable doubt that the appellant touched B's clothing over her vagina whilst the children were in the cubby-house. In summing up, the trial judge emphasised and repeated that the jury must be satisfied beyond reasonable doubt of both that alleged touching, and the alleged touching in the earlier game of tag, before convicting the appellant on count 2. The summary of the evidence set out earlier reveals differences in details of a kind which would be expected by such young witnesses, but their evidence was consistent in all essential respects. The defence case put in cross-examination that the complainants were never alone with the appellant in his cubby-house was inconsistent with each complainant's evidence and C's evidence. B's evidence seems persuasive. Her explanation for late disclosure of the touching whilst in the cubby-house accorded with her mother's evidence of preliminary complaints made progressively by an apparently reluctant and very embarrassed nine year old girl. The jury's verdict reflects its acceptance beyond reasonable doubt that the appellant indecently dealt with B in the cubby-house in the way she described in her evidence.

[37] The appellant's counsel argued that there was evidence of accident in relation to the earlier touching but no direction was sought or given. That topic was raised in the course of discussion between the trial judge and the prosecutor. The prosecutor submitted that in the way it was put by B there was really no prospect of the event happening by accident. The evidence was not merely of touching but of the appellant putting his hand in between B's underpants and her skin. There was no real prospect this could happen accidentally. Defence counsel agreed with the prosecutor's submission. No basis appears for now adopting a different view.

[38] The appellant's counsel also argued that the apparent abandonment or relegation to mere matters of credit of the original particulars of count 2 might have created confusion for the jury, particularly when similar conduct (lifting a shirt) was

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5 *HML v The Queen* (2008) 235 CLR 334 per Gleeson CJ at [7]-[8]; per Hayne J (Gummow J and Kirby J agreeing in this respect) at [132]; per Heydon J at [345]; per Crennan J at [426]; per Kiefel J at [493].

charged in count 1. However the trial judge's directions in response to the jury's question made it plain that the evidence about shirt lifting could be used by the jury only on questions of credibility and formed no part of the particulars of count 2. It was not necessary for the trial judge to give any further direction in that respect.

[39] In deciding for ourselves whether there has been a substantial miscarriage of justice our obligation to refer to the whole of the record requires reference to the fact that the jury returned guilty verdicts.[6] Where, as I have concluded, the error of law made towards the end of the trial would not have affected the jury's process of reasoning towards the guilty verdicts, it is significant that B's evidence of both touching incidents was necessarily accepted by the jury in its verdict of guilty on count 2. In my opinion the error at the trial both should and would have had no significance in determining that verdict. Bearing in mind the jury's verdicts, I am satisfied beyond reasonable doubt that the appellant was guilty of count 2 despite the error of law.

[40] Defence counsel readily acquiesced in the process which resulted in the error and apparently for good forensic reasons. The error of law did not involve any denial of procedural fairness in view of the manner in which the duplicity in count 2 emerged late in the trial. The indictment charged a known offence and the duplicity in the amended particulars was to the apparent advantage of the appellant. The appellant had a trial which was in accordance with law and which was seen to be in accordance with law in all essential respects. In these circumstances, whilst there was a departure from the law which governed the procedure at the trial, there was no departure from any "essential requirement", and the error was not "fundamental" or one that went to "the root of the proceedings".[7] There is no ground in this case for exercising the discretion to order a new trial despite satisfaction beyond reasonable doubt of the appellant's guilt.[8]

[41] I would dismiss the appeal against conviction.

Application for leave to appeal against sentence

[42] The amendment of the particulars to count 2 was consented to by defence counsel and allowed by the trial judge only after the prosecutor stated that, if the jury convicted on count 2, punishment of the appellant on that count should be restricted to punishment for the particularised conduct of touching on the clothing over the vagina.

[43] In sentencing the appellant the trial judge observed that the jury by its findings had found, in effect, "that the episode with the children in the cubby-house amounted to an event which was against the law; that is to say you were indecently dealing with them, and they took that view that [A], who got her shirt off at the age of 9, was indecently dealt with by you as part of the game that you were apparently playing with them." In the passage which is directly relevant in this application, the trial judge continued:

> "They have also found that in [B's] case you stuck your hand down the back of her pants while playing tiggy against the skin, and also

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6 *Weiss v The Queen* (2005) 224 CLR 300 at [43].
7 *Wilde v The Queen* (1988) 164 CLR 365 per Brennan, Dawson and Toohey JJ at 372-3.
8 Cf *Weiss v The Queen* (2005) 224 CLR 300 at [44]-[45].

> that you touched her in the area of her vagina with your hand outside her clothing when you were sitting down playing spin the bottle."

[44] The trial judge went on to refer to "at least in two instances" in which the appellant achieved a deliberate effort on his part to become sexually close to these children, "especially touching a girl of course in the area of the vagina is very serious".

[45] The appellant's counsel argued that the sentencing discretion miscarried because the appellant was punished for both touching incidents particularised for count 2, inconsistently with the basis upon which the amendment of the particulars was allowed. The respondent argued that in the directly relevant passage the trial judge merely recited the effect of the verdict but that his Honour sentenced on count 2 only for the second and more serious of the two particularised events. In my respectful opinion the sentencing remarks when read as a whole convey the clear impression that the trial judge sentenced the appellant for both instances of touching charged in count 2. His Honour may simply have overlooked the point. A weekend had intervened between the prosecutor's earlier statement and the sentence and neither counsel referred to the point in their submissions on sentence.

[46] In the event that the Court reached that conclusion, the respondent did not argue that the Court should not set aside the sentence on each count and re-sentence the appellant afresh. On the footing that this Court would be required to re-sentence, the respondent accepted that the sentence proposed for the appellant of nine months probation for count 1, and 12 months probation for count 2, in each case without the recording of a conviction, was within the appropriate sentencing range.

[47] Those are appropriate sentences in the circumstances. The sentencing judge found that the appellant was only 16 years old when he offended. He was 19 years old when he was sentenced, so that by virtue of s 140(2) of the *Juvenile Justice Act* 1992 (now the *Youth Justice Act* 1992 (Qld)) he fell to be sentenced as an adult. Subsection 144(2) required the sentencing judge to take into account the fact that the appellant was a child when the offence was committed and to have regard to the sentence that might have been imposed upon him had he been sentenced as a child: see *R v PGW* [2002] QCA 462. The appellant had no prior criminal history. He had one subsequent conviction for burglary which he committed on 2 November 1997 when he was 17 years of age. He was sentenced to a bond and no conviction was recorded. Although the appellant could not be said to have rehabilitated himself by the time of sentence, there were some circumstances which suggested prospects of rehabilitation. He was youthful and his maternal grandmother looked after him and had raised him well. She attended court to show her support. He had completed Year 11 at Gatton with some remedial assistance. He suffered from attention deficit hyperactivity disorder for which he was taking medication. He had been in some employment as a trades' assistant and had a full time job with a roofing company, where he had worked for three and a half years. He had also served with the rural fire service before being stood down because of the offences charged in this matter.

[48] If the appellant had been sentenced as a child, it is likely that a custodial sentence would not have been imposed and the prima facie position under s 184 of the *Juvenile Justice Act* 1992 would have been that a conviction was not to be recorded: *R v SBP* [2009] QCA 408 at [21]; *R v B* [1995] QCA 231. As the trial judge observed it was of considerable concern that the appellant had made a deliberate

effort to get sexually close to the children and the offending was also aggravated by the threat of the nail gun. Nevertheless, bearing in mind the trial judge's finding that the appellant was a child at the time of the offences, the court's obligation to adhere to the sentencing requirements of s 144(2) of the *Juvenile Justice Act* 1992, and the appropriateness of a sentence which provides for continuing supervision, I would accept the submission for the appellant that the sentence should be a period of probation with no conviction recorded.

Proposed Orders

[49] In my opinion the following orders are appropriate:

1. Grant leave to amend the notice of appeal and the application for leave to appeal against sentence.

2. Dismiss the appeal against conviction.

3. Grant the application for leave to appeal against sentence and allow that appeal.

4. Set aside the sentences imposed below and, subject to the appellant agreeing to the orders in (a) and (b) being made after the explanation to him as required by s 95 of the *Penalties and Sentences Act* 1992 (Qld), order instead as follows:

   (a) On count 1, sentence the appellant to probation for nine months, such order to contain the conditions in s 93 of that Act.

   (b) On count 2, sentence the appellant to probation for 12 months, such order to contain the conditions in s 93 of that Act.

   (c) The appellant must report to an authorised Corrective Services Officer at a time and place agreed between the parties or in default thereof, such time and place as are specified by a judge.

   (d) No convictions be recorded.

[50] **CHESTERMAN JA:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[51] **ANN LYONS J:** I agree with the reasons of Fraser JA and with the orders proposed.