

SUPREME COURT OF QUEENSLAND

CITATION: *R v KAD* [2010] QCA 110

PARTIES: **R**
v
KAD
(appellant)

FILE NO/S: CA No 307 of 2009
DC No 1781 of 2009

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 14 May 2010

DELIVERED AT: Brisbane

HEARING DATES: 2 and 3 March 2010

JUDGES: McMurdo P, Holmes and Chesterman JJA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal allowed.**
2. The verdicts of guilty on counts 1 and 2 are set aside.
3. Instead, verdicts of acquittal are entered.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – OTHER MATTERS – appellant convicted of one count of indecent treatment of a child under 12 in his care and one count of indecent treatment of a child under 16 in his care – complainant appellant's stepdaughter – complaint not timely – complainant's mother gave evidence – mother's evidence inconsistent with complainant's evidence – whether the complainant's evidence was truthful and reliable beyond reasonable doubt – whether the guilty verdicts are unreasonable and cannot be supported having regard to the whole of the evidence

Criminal Code 1899 (Qld), s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited

COUNSEL: D R Mackenzie for the appellant
M J Copley SC for the respondent

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

- [1] **McMURDO P:** The appellant was convicted on 3 December 2009 of indecent treatment of a child, under 12 and in his care, between 1 May and 31 July 2006 (count 1) and of indecent treatment of a child in his care between 30 December 2006 and 30 March 2007 (count 2). He was sentenced on count 1 to 21 months imprisonment and on count 2 to 15 months imprisonment. The complainant is the appellant's stepdaughter. She was 11 years old when count 1 was said to have occurred and 12 years old when count 2 was said to have occurred. He now appeals against his conviction on four grounds. First, he contends that the guilty verdicts were "unsafe and unsatisfactory". Second, he contends that the judge erred in not giving adequate directions to the jury as to lies. Third, he submits that the judge erred in not strongly cautioning the jury as to the dangers of acting on the complainant's evidence. Fourth, he contends that the judge's directions about the evidence from the complainant's mother and its potential as independent support for the complainant's evidence were not balanced.¹

Were the guilty verdicts unreasonable or unsupported having regard to the evidence?

- [2] The first question for determination is whether the guilty verdicts were "unsafe and unsatisfactory", that is, whether they were unreasonable or cannot be supported having regard to the evidence: s 668E(1) *Criminal Code* 1899 (Qld). If the appellant is successful on this ground, the convictions must be set aside and instead verdicts of acquittal entered so that it will be unnecessary to consider the remaining ground. A consideration of this ground of appeal requires this Court to determine whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of either or both counts: *M v The Queen*;² *MFA v The Queen*.³ This requires a review of the evidence and relevant aspects of the trial.

The complainant child's evidence

- [3] The complainant child's evidence was given by way of her statement to police during a video recorded interview on 23 September 2008 admitted under s 93A *Evidence Act* 1977 (Qld) and by way of pre-recorded evidence taken on 1 October 2009 under Subdiv 3 of Div 4A of Pt 2 *Evidence Act*.

¹ There was a fifth ground of appeal: that the judge erred in not giving adequate directions to the jury as to not drawing any adverse inference from the appellant's decision not to give or call evidence. That ground has been abandoned since transcript not included in the appeal record book, became available which unequivocally established that the judge gave that direction. As a result, orders made by this Court on 2 March 2010 allowing the appeal on this basis were vacated on 3 March 2010. The Court was informed of the true position after it adjourned on 2 March 2010 so that the orders pronounced by it that day were not taken out. The parties informed the Court later on 3 March 2010 that they did not require a further hearing and that this Court should determine the appeal on their filed written submissions and their oral submissions made on 2 March 2010.

² (1994) 181 CLR 487, 493-495; [1994] HCA 63.

³ (2002) 213 CLR 606, [25], [59]; [2002] HCA 53.

The complainant's statement to police

- [4] She told police the following in respect of the events relied on as count 1. Police asked her "how everything eventuated". She responded that "it started off I think it was 2006". She and her younger brother were arguing. The appellant called her into his room, closed the door and put a stool behind it so it could not be opened. He told her to lie on the bed and that he was checking her for breast cancer. She believed him. He took her shirt off and pulled down her pants. He touched her breasts. When he took down her pants he was "playing with himself". This went on for about half an hour. He did not penetrate her.
- [5] Police asked "did it only happen on one occasion?". She responded: "it happened twice". As to this second occasion (count 2), she said she was sleeping and woke up to find the appellant's hand down her pants. She turned around. He pulled out his hand and pretended that nothing had happened. She also pretended that nothing had happened, rolled over, and cried herself back to sleep.
- [6] Later in the interview she provided more details about count 1. Her younger brother tried to come into the room. The appellant quickly threw a blanket over her. Her brother asked the appellant what was going on. The appellant told him to be quiet and that the complainant was sleeping. She was facing away from her brother so he would not have seen her face. The episode took about 15 minutes. The appellant told her that nobody would ever believe her, not even her mother. He left in the car with her brother to pick up her mother from work. During the episode he touched her around her "vaginal, bum area, and just feeling around". She confirmed that he did not penetrate her. He "was playing with himself" while he touched her. He used his hand to massage his penis which he had taken out of his pants. His penis was "hard and it was up in the air". She got up, went "to the bathroom to go vomit and cry". When the appellant returned with her mother, the complainant watched TV and pretended it had not happened.
- [7] She also provided police with more details about count 2. It occurred in January or February 2007 when her immediate family was living with her great-grandmother and uncle. Her family members did not have beds and were sleeping on mattresses on the lounge room floor. Her mother was sleeping on the appellant's right side; he was in the middle; she was on the left of the appellant and her brother was next to her but on the couch. She was asleep and woke to find the appellant's hand inside her pyjama pants. He "was playing with himself once again". When she rolled over "he quickly pulled his hand away like nothing was going on". The TV was on and threw enough light for her to see. Her mother was "very asleep ... it was about 1 or 2 in the morning". Her brother was also asleep. The appellant was awake watching a movie. She "rolled around cried and wrapped [her]self in the blanket tightly so he couldn't get back in and [she] went back to sleep". He "just layed there pretending nothing went on". Nothing had happened since.
- [8] She told her mother's friend, P, about what happened. P was talking to her friend, C, about how P was molested as a child and how P regretted not saying anything because the offender got away with it. The complainant's allegations against the appellant "just slipped out of her mouth". The complainant decided she would tell her mother who straight away called the police.
- [9] At the time of the police interview, the appellant was separated from the complainant's mother. The complainant lived with her mother whilst her brother lived with the appellant.

[10] The following exchange occurred during the police interview:

"POLICE OFFICER: we've covered most things, there's only the two occasions that you were aware of?"

COMPLAINANT: yeah

POLICE OFFICER: we'll just worry about this one at the moment

COMPLAINANT: That's all I can recall"

[11] At the end of the interview she was asked if she could think of anything else and she responded in the negative.

The complainant's pre-recorded evidence

[12] A few days before the pre-recorded hearing on 1 October 2009, the complainant told the prosecutor of additional uncharged improper fondlings of her by the appellant. At the pre-recorded hearing, she gave evidence that, apart from the occasions constituting counts 1 and 2, there had been other occasions of "Inappropriate tickling". The appellant "would be like he would start tickling [her] stomach and then slowly move his way upwards" to her breasts which he would rub. These episodes lasted only a few minutes. They commenced when she was aged nine in Grade 5. They increased over time, from about once in every few months to once every week. He used one hand to tickle her. Sometimes he would tickle her hips and stomach area. He usually touched her right breast.

[13] In cross-examination, she agreed that the tickling was in a different category to the two episodes charged as counts 1 and 2. Sometimes it hurt as he pinned her down; other times it was fun. She agreed that the tickling was always by way of fun and games. She added that she felt very uncomfortable when the appellant rubbed her breasts. These episodes of tickling progressed to the rubbing of her breasts. They happened many times over about three years, perhaps 100 times or more. She agreed that she did not tell the police about them and that she told police that the appellant's inappropriate touching happened only twice. She accepted that was untrue. She told her mother that the appellant had only touched her indecently on two occasions and she agreed that was not true.

[14] As to count 1, she said Uncle H did not come into the room when this episode was occurring and she did not tell her mother that he did. The first people she told about the appellant's conduct were her mother's friends, P and C.

[15] Count 2 occurred when she was about to commence year 8. The appellant touched her inside her pyjama pants and rubbed her vagina. He did not touch her breasts on this occasion and she did not tell her mother that he touched her breasts on this occasion. The day after count 2 occurred, her mother asked if there was something she wanted to tell her. The complainant responded, "Nothing. I'm okay ... everything's fine."

[16] When she told P and C in September 2008 about the appellant's conduct, she had drunk a vodka cruiser. She did not want P and C to tell her mother about the touching as her mother was at work. P and C told her that she had two or three days to tell her mother or else they would. She felt she had no choice but to tell her mother because of what P and C had said. She denied telling either P or C "little fibs to get their attention".

- [17] Later in September 2008, she told her mother that the appellant had touched her. She told her mother she did not want to talk to her about it or tell her where he touched her.
- [18] She denied the suggestions put to her by defence counsel that counts 1 and 2 did not occur.
- [19] In re-examination, she said that she did not tell the police about the episodes of tickling that led to the rubbing of the breasts because she "didn't find it very inappropriate until [she] had told [her] mum and she told me I should tell the police about it".

The evidence of the complainant's mother

- [20] The complainant's mother gave the following evidence.
- [21] She had been in a relationship with the appellant for about 11 years. She had two children: the complainant and her brother, who was four years younger.
- [22] In September 2008, P telephoned her. The complainant had stayed with P the previous night. She then spoke to the complainant who said she had something to tell her when she got home. She pressed the complainant to tell her over the phone. The complainant said, "Dad touched me." She asked the complainant how many times and if it happened more than once. The complainant responded in the affirmative. The mother became very distressed; she was shaking, crying, in a state of shock and she could not stand or talk. She spoke to her manager, who called a police officer from a nearby police station to speak to the mother. P picked the mother up from work as she was in such a "bad way".
- [23] When she got home the mother spoke further with the complainant. The complainant told her that when the mother was working as duty manager at a southside hotel, she and her brother were home with the appellant. He "got cranky at them" and sent the complainant into the main bedroom. He sent the brother into the lounge room. The appellant asked the complainant to take off his clothes, masturbated himself and touched her. He said, "Don't fucking tell your mum because she won't fucking believe you."
- [24] The complainant then told her about a second occasion at the home of the mother's grandmother. She said that, when they were all lying on the mattress together and the mother was asleep, the appellant rolled over and touched the complainant's breasts because the mother would not let him touch hers. The complainant could feel the appellant persistently try to wake up the mother and touch her. The mother asked her how long it went on because she thought she "felt it that night". The complainant said, "a couple of seconds." The mother asked if the appellant removed his hand and she responded in the affirmative. The mother asked that question because "at that point [she] had felt that [she] could feel that happening". The mother had some memory of this happening. She was very tired that night and just wanted to go to sleep because she had been working long hours. The appellant was trying to touch the mother who told him to leave her alone. The mother pretended to go back to sleep, hoping he would. She felt him roll over onto his side and his arm swing across to her daughter's side. She "thought it was swallowing [the mother] up". She then felt the complainant "grab his hand and throw it like off

her". At this point, defence counsel objected to the manner of questioning. When the question was re-phrased, the mother said she did not see anything happen that night between the complainant and the appellant.

[25] When asked whether she remembered anything of the evening when count 1 was said to have occurred, the mother stated: "That night sticks in my memory so clearly because something in my stomach said something was wrong." When the appellant picked up the mother from work, she asked whether the children were awake. He said the complainant was upset and in bed. This was highly unusual and she asked why. He said, "Because she was having a shower and she was worried about a lump on her breast." The appellant said that the complainant had thought she might have breast cancer and the appellant decided to go and have a look. The mother thought this was strange. The appellant added that whilst he was checking the complainant, the younger brother walked in and Uncle H was walking around. He said that the complainant was upset because she was worried the brother and Uncle H may have seen her naked. When the mother got home, she was concerned and she checked to see where the complainant was. The complainant was in her bed and the lights were off. She called her name, but the complainant did not answer. Eventually the complainant told her to leave her alone and that she was sleeping.

[26] In cross-examination, the mother said she was unsure whether the complainant told her that when count 1 occurred Uncle H walked in. The complainant did tell her that the complainant's younger brother walked in. The mother agreed that on an earlier occasion when she gave evidence, she said the complainant told her that when count 1 occurred, both the younger brother and Uncle H walked in. The mother then agreed that the complainant did tell her that Uncle H walked into the bedroom on the occasion when count 1 was said to have been committed.

[27] The mother agreed in cross-examination that the complainant had not told her about any other occasions when the appellant had touched her inappropriately or fondled her:

"Apart from these two occasions, the one that happened in the bedroom and the one that happened in the lounge room, [the complainant] has not told you about any other occasion when [the appellant] has touched her inappropriately or fondled her?-- No.

You accept that proposition that I put to you?-- Can you please explain your last line of questioning again?

Sure. The proposition that I'm putting to you is this, [the complainant] has never told you about any occasion other than the two occasions you've already given evidence about where [the appellant] touched her inappropriately or fondled her?-- Yeah, correct."

[28] When the complainant first told her about the appellant's conduct the mother was very distressed. She had a very hazy memory of the following two or three weeks.

[29] On the occasion when the family was lying on the mattress and count 2 was said to have been committed, she could feel the appellant's body in close proximity to hers. She felt him turn over and extend his arm. He was lying only a few centimetres

from her. He was not of slight build. She felt his arm move and extend towards her daughter. She felt the mattress moving. She felt the floor was swallowing her up. Then she felt movement which was not his body movement. She "felt his arm sort of flop". That was when she thought the complainant had "picked his hand up and flopped it". The appellant was not physically touching her but he was only about two centimetres from her.

- [30] She agreed that in her statement to police she said that she had actually seen the appellant moving and his arm reaching over to the front of the complainant. She had in fact seen those things out of the corner of her eye whilst half asleep. She could not recall whether she also told the police that she saw the complainant push the appellant's arm away.
- [31] She also agreed that when she gave evidence on an earlier occasion about count 2, she said that she saw the complainant pushing the appellant's arm away. Her memory of the events was not good as the incident happened some time ago. She remained adamant that she physically felt the appellant reach over the complainant's chest on that occasion.
- [32] She agreed that at about the time count 1 was said to have been committed, the main bedroom door would not stay closed. She and the appellant would put a stool against it to stop it opening. It would not stay shut without the stool.

C's evidence

- [33] C gave the following evidence. One Saturday evening in September 2008, P arrived at her house with the complainant. C's friend, S, was also present. C's children were upstairs. The adult women were having a few drinks around the kitchen table discussing past life experiences. The complainant was with them. She "got a bit upset and then said that she had been touched" by the appellant. C, P and S questioned her. One of them asked if he penetrated her and she responded in the negative. The complainant said it had been going on since she was eight or nine. They did not ask too many questions because the complainant's mother was not present. They told her to speak to her mother and explained that the complainant would "have to go to the doctor and the police and Court and all that sort of stuff". The complainant was upset. C told her to wash her face. P and the complainant spent the night at C's house.
- [34] In cross-examination, C said that she did not find out until later that the complainant had been drinking that night. She agreed that she and the other women present gave the complainant an ultimatum; she either had to tell her mother within two or three days or one of them would.

P's evidence

- [35] P's evidence included the following. In late September or early October 2008, the complainant stayed with her when they visited C's house. S was also present. The adult women were discussing past experiences and future plans. The complainant "kind of just blurted out that [the appellant] had been touching her". When questioned, the complainant said that he had not penetrated her and that he was not doing it any more. The adult women explained to her that she would have to go to court and gave her "the run down on ... what was going to happen and ... that it was

a scary situation to be in but ... if it happened, she's got to tell someone and we've got to do the right thing". Either that night or a couple of days later, the complainant said something about the appellant "touching her boobs and checking for breast cancer or lumps or something like that". The next couple of days "got really quite intense and just seemed to blur into one another". The complainant told her mother about the fondlings the following day. P stayed the night at C's house because she had had a few drinks and could not drive. When she returned to her home the next day, she called the complainant's mother.

- [36] In cross-examination, P agreed that the complainant had consumed one alcoholic drink and that this had happened with the permission of the complainant's mother. She agreed that she and the other women present gave the complainant an ultimatum: either tell her mother in two or three days or they would. P was "pretty sure" that the complainant had told her that the appellant touched her breasts whilst he claimed to be examining her for breast cancer. When shown her earlier statement to police, she agreed that, in fact, that information had come from the complainant's mother.

Relevant directions in the judge's summing-up

- [37] The judge gave the following directions to the jury about the mother's evidence:

"Scrutinise the evidence of her mother carefully. There are two important aspects of that evidence that you may consider. One is her evidence that in the car on the way home from work, and this is said to be relevant to the first occasion, the [appellant] said something to her about checking for breast cancer. I will just find that. At page 1-28 her evidence was this:

'He picked me – [The appellant] picked me up from work that night. When I got in the car it was quite early in the evening, I can't be sure, in between 6 and 8. I said, 'Is [the complainant] – are the kids up to see me when I get home?' 'No, [the complainant's] in bed upset.', which is highly unusual and I said, 'Why?' "

Presumably she was quoting [the appellant].

"'Because she was having a shower and she was worried about a lump on her breast.', and he stated that she said that she thought she might have breast cancer, so he decided to go and have a look for her. I thought that strange."

She went on with her account.

The relevance, if anything, from the prosecution's point of view of that is that it is a statement which demonstrates that [the appellant] was conscious of guilt.

Before you could rely on that statement as evidence against him you have to be satisfied first that it was, indeed, made and, second, that it was, indeed, made, if it were made, because he was guilty of the offence charged, that he had a sense of guilt.

The second aspect of her evidence that the prosecution would rely on was her evidence of what she was feeling [as] they lay on the

mattress and that relates to the second count. She was cross-examined at some length about that.

The reason I mention those two pieces of evidence and suggest to you that you scrutinise them carefully is that unless you accept that evidence there is no evidence independent of [the complainant] to prove the charges, so you must scrutinise her evidence very carefully and as [the prosecutor] submitted at the outset really, unless you can accept the evidence of [the complainant] beyond reasonable doubt, you would be unlikely to convict.

I will just go back over that again so I don't confuse. You should be cautious in dealing with the evidence in this case and you have already been told you would not convict unless you are satisfied beyond reasonable doubt. Scrutinise the evidence of [the mother] carefully. It has those two important aspects; one relating to the first count and one relating to the second count. Unless you accept her evidence about those aspects, there is no evidence independent of [the complainant] to prove the charges. If you get to that point then, and in any case, you must scrutinise her evidence, [the complainant's] evidence, carefully. Unless you can accept [the complainant] beyond reasonable doubt you would be unlikely to be able to convict on either charge."

- [38] The judge summarised the prosecution case in this way. The complainant's evidence should be accepted as credible, reliable and truthful. The appellant had the opportunity to commit the offences. The complainant's evidence received some support from the mother's evidence which the jury would also accept as honest and reliable.
- [39] The judge summarised the defence case in this way. The jury should approach the complainant's evidence with caution as she was a child and they would be left in doubt as to her truthfulness and reliability. She told police that only two incidents happened, but later said that the appellant had touched her inappropriately on the breasts on hundreds of occasions. She mentioned this to no-one until preparation for the pre-trial recording in October 2008 when she told a prosecutor. Her explanation is unconvincing because it was not supported by the mother's evidence. He emphasised inconsistencies in the complainant's evidence which undermined its reliability. She told her mother that Uncle H walked in to the main bedroom when count 1 was said to have been committed. The mother's evidence was also unconvincing and far-fetched. There were inconsistencies between the mother's evidence and the complainant's evidence. The mother said the complainant told her that count 2 involved a touching on the breasts whereas the complainant's evidence was that count 2 was a touching in the area of the pants. The circumstances of the complaint to P and C were consistent with the complainant telling untruths from which she could not then extricate herself. Her delay in making the complaint and the inconsistencies between her evidence and the evidence of others meant that her evidence could not be relied on beyond reasonable doubt. The mother's evidence could not be relied on beyond reasonable doubt and did not provide support for the complainant's evidence.

Re-directions

- [40] The jury retired at 12.43 pm on the second day of the trial. At 3.59 pm, they asked for the complainant's evidence to be replayed. The court reconvened for this

purpose. They separated for the evening at about 6.00 pm and resumed deliberations the next morning. At defence counsel's request, the court was reconvened so that the judge could give the direction to the jury about the appellant not giving or calling evidence which had been overlooked the previous day. The jury returned with their guilty verdicts at 12.15 pm.

Are the guilty verdicts unreasonable?

- [41] The prosecution case turned on the complainant's evidence. The jury could convict on either or both counts only if they were satisfied beyond reasonable doubt that the complainant's evidence in respect of those counts was truthful and reliable.
- [42] The complaint was not timely. It was made in circumstances which raised the possibility that in making it, the 12 year old complainant, who had consumed an alcoholic drink, may have exaggerated her account in an effort to be included in the conversation of the adult women present about their past experiences of sexual abuse. She did not want to tell her mother about the appellant's alleged misdeeds and was cajoled into doing so by P and C. Those matters did not mean her evidence was untruthful or unreliable, but they were reasons for scrutinising it carefully.
- [43] When the complainant reported counts 1 and 2 to P and C, to her mother, and then to the police, she said nothing about her claim that the appellant frequently touched her breasts during tickling episodes. She made no complaint to the authorities about those matters until just before the pre-recording of her evidence in October 2008. During her re-examination that day, she explained that she had informed her mother about these incidents but her mother told her that they were not important enough to refer to the police. On one view, this explanation appeared plausible and logical. Touchings on the breasts during a tickling romp between a prepubescent girl and her stepfather could well be entirely innocent. The complainant's evidence did not disclose *when* she told her mother about these touchings on the breasts following episodes of tickling. The complainant's explanation for not telling the police was not supported by the mother's evidence. The mother gave evidence that the complainant only ever told her about two occasions of inappropriate touching or fondling constituting counts 1 and 2. Whilst the complainant's explanation for not telling the police about the touchings on the breasts during tickling episodes seems logical enough, when her interview with police is examined carefully, it is surprising that she did not at least mention these touchings to police. They asked her more than once if anything else other than counts 1 and 2 happened with the appellant.
- [44] The trial judge and the jury had the advantage over this Court of seeing the witnesses, including the complainant's mother, give evidence. His Honour's directions to the jury about the mother's evidence which I have set out earlier suggest his Honour was concerned about the quality of the mother's evidence. As his Honour explained to the jury, the mother's evidence was potentially significant. It was capable of supporting the complainant's evidence on both counts. Defence counsel described the mother's evidence as unconvincing and far-fetched. Having carefully reviewed the mother's evidence, I also found aspects of it concerning. At the time the mother gave her statement to police, she was separated from the appellant and her son was living with him. The tone and content of her evidence at trial suggested she was highly strung and emotional to the point where I found her unpersuasive and concluded that I could not be satisfied as to the reliability of her evidence. I could not accept the mother's evidence beyond reasonable doubt where it was not unequivocally supported by other independent evidence.

[45] Had the complainant's evidence stood alone without the mother's testimony, I would have been prepared to accept the complainant's evidence on counts 1 and 2 beyond reasonable doubt. But instead of supporting and strengthening the complainant's evidence, the mother's evidence weakened it. The task of this Court in determining whether the jury verdict was unreasonable is to consider the whole of the evidence. Apart from the mother's evidence, the complainant's evidence was unsupported. Her complaint was not timely and it was made in slightly unusual circumstances. The appellant was separated from the complainant's mother at that time. There were significant inconsistencies between the complainant's evidence and the mother's evidence, particularly as to whether Uncle H entered the room on the night when count 1 was said to have occurred; whether the complainant told her mother that he did; and whether the complainant told her mother that count 2 involved a touching of the breasts, not a touching in the pants area. Another inconsistency of real significance was whether the complainant told her mother about the uncharged acts of touchings on the breasts during tickling episodes and whether the mother told her that these were not important enough to mention to the police.

[46] The contentions as to whether the jury verdicts of guilty in this case are unreasonable are finely balanced. True it is that a jury, theoretically, could reject the mother's evidence and act solely on the complainant's evidence. But such an approach is unsatisfactory in this case. The complainant's evidence on counts 1 and 2 may well be true. I consider it probably is. But that is not sufficient to allow the convictions to stand. This Court is required to review the whole of the evidence, including the mother's evidence, in determining whether it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt. The mother's evidence, in my view, raises real doubts about the truthfulness and reliability of the complainant's evidence. After carefully reviewing the whole of the evidence, including the mother's evidence, I am ultimately satisfied that I cannot accept the complainant's evidence as truthful and reliable beyond reasonable doubt. It follows that the guilty verdicts returned by the jury are unreasonable and cannot be supported on the evidence. This ground of appeal must succeed. The appeal must be allowed; the verdicts of guilty on counts 1 and 2 set aside; and instead verdicts of acquittal entered. It is therefore unnecessary to consider the remaining grounds of appeal.

ORDERS:

1. Appeal allowed.
2. The verdicts of guilty on counts 1 and 2 are set aside.
3. Instead, verdicts of acquittal are entered.

[47] **HOLMES JA:** I agree with the reasons of McMurdo P and the orders she proposes.

[48] **CHESTERMAN JA:** I agree with the orders proposed by the President for the reasons given by her Honour.