SUPREME COURT OF QUEENSLAND

CITATION:	*R v Flynn* [2010] QCA 254
PARTIES:	**R** **v** **FLYNN, Martin Francis** (applicant/appellant)
FILE NO/S:	CA No 16 of 2010 CA No 52 of 2009 DC No 60 of 2010 DC No 2696 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2010
JUDGES:	Fraser and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeals against conviction in CA 52 of 2009 and CA 16 of 2010.** **2. Grant the appellant's application for leave to appeal against sentence only to the extent of allowing the appeal against the sentences imposed for counts 2 and 3 in indictment 2696 of 2008.** **3. Vary those sentences by substituting sentences of four years' imprisonment for count 2 and three years' imprisonment for count 3 in indictment 2696 of 2008.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant appealed against his convictions after two separate trials – where on the first indictment the appellant was convicted of maintaining a sexual relationship with A (count 1), taking an indecent photograph of A (count 2), taking an indecent photograph of B (count 3), indecent treatment of A (count 4), procuring a sexual act by coercion by administering a drug to A (count 5), rape of A (count 6) – where counts 2, 3 and 4 charged as circumstances of aggravation that A and B were children under the age of 12, under the appellant's care – where the appellant argued the conviction on count 3 was unreasonable

– where the appellant submitted that B's evidence was vague, contradictory, insufficiently particular and could not safely sustain a conviction and was not supported by A's evidence – whether it was open to the jury to be satisfied beyond reasonable doubt that an indecent photograph was taken of B – whether the photograph taken was indecent – whether on the whole of the evidence it was reasonably open to the jury to be satisfied beyond a reasonable doubt that the appellant was guilty of the offence charged in count 3

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant was convicted on the second indictment of maintaining a relationship with C, a child under 16 (count 1), and rape of C at Brisbane (count 2) and at Burpengary (count 3) – where the appellant argued that the verdicts were unreasonable given the deficiencies and contradictions in the evidence – where the appellant pointed to C's initial denial of oral and anal intercourse, failure to disclose the two rapes in his first police interview, and discrepancies between his statement to the prosecutor and his pre-recorded evidence as to where counts 2 and 3 occurred – whether the inconsistencies amounted to such significance as to preclude acceptance of the substance of C's evidence – whether the convictions on counts 1, 2 and 3 of the second indictment were unreasonable – whether it was reasonably open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt on counts 1, 2 and 3

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the appellant argued that the convictions on counts 2 and 3 on the first indictment were miscarriages of justice as each count was duplicitous and the precise offence in each count was not identified – where the trial judge referred the jury to the evidence of the complainants and Crawford which gave different descriptions of the circumstances in which the indecent photograph in count 2 was taken – where there were discrepancies in the evidence of A and B and Crawford as to where the indecent photograph in count 3 was taken – whether the trial judge erred in failing to identify for the jury whether count 2 was based on the evidence of the complainants or Crawford – whether the trial judge erred in failing to direct the jury that it had to be satisfied beyond reasonable doubt that the indecent photograph in count 3 was taken in the kitchen rather than the bedroom – whether the conflicts within the evidence about the nature of the photographs taken in counts 2 and 3 were for the jury to resolve – whether miscarriages of justice were occasioned

CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – OF COUNTS – SAME FACTS OR SERIES OF OFFENCES OF SAME OR SIMILAR CHARACTER – where the appellant argued the joinder of count 3 with counts 1, 4, 5, and 6 on the first indictment was unlawful – where the appellant argued that count 3 was not founded on the same facts and did not form part of a series of offences of a similar character as those charged in counts 1, 4, 5, and 6 – where the appellant argued that evidence in support of count 3, and B's evidence in relation to that count, was not admissible in proof of counts 1, 4, 5 and 6 or any of the counts relating to A – whether count 3 was properly joined with counts 1, 4, 5 and 6 of the first indictment – whether the joinder of count 3 resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant argued that the trial judge failed to direct the jury in accordance with s 102 *Evidence Act* 1977 (Qld) in relation to the s 93A statements of A, B and C in the first trial, and A and C in the second trial – whether a direction to the jury in accordance with s 102 was required – whether the trial judge's failure to give such directions constituted a miscarriage of justice – whether the trial judge fulfilled the duty, expressed in s 620(1) *Criminal Code* 1899 (Qld), of identifying for the jury the real issues, relevant law and explanation of the application of the law to the facts relevant to the issues – whether the trial judge's directions in relation to A's evidence were adequate – whether the trial judge's failure to give further directions in relation to the manner in which they should assess A's evidence gave rise to a miscarriage of justice

APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant appealed against the sentences imposed by the primary judge for counts 2 and 3 on the first indictment on the ground that the sentences were manifestly excessive – whether in all the circumstances the sentences for counts 2 and 3 were manifestly excessive

Criminal Code 1899 (Qld), s 210(1)(f), s 567(3), s 620(1), s 668E(1)
Evidence Act 1977 (Qld), s 93A, s 102
Penalties and Sentences Act 1992 (Qld), s 161B

Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, cited
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
R v Beattie [2008] QCA 299, cited
R v Cranston [1988] 1 Qd R 159, applied
R v MAY [2007] QCA 333, cited
R v Navarolli [2010] 1 Qd R 27; [2009] QCA 49, cited
R v Siedofsky [1989] 1 Qd R 655, cited
R v TQ [2007] QCA 255, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited

COUNSEL: P J Callaghan SC, with S M Ryan, for the applicant/appellant
T A Fuller for the respondent

SOLICITORS: Ryan and Bosscher for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant has appealed against his convictions after two separate trials before juries which were presided over by the same trial judge in the District Court. The appellant has also applied for leave to appeal against sentence. I will discuss the sentence application after I have separately considered each of the conviction appeals.

CA 52 of 2009: Appeal against conviction

[2] The appellant was convicted on 16 February 2009 after a trial of six counts on indictment 2696 of 2008: count 1, maintaining a sexual relationship with A, a child under 16 years; count two, taking an indecent photograph of A, a child under 16 years; count three, taking an indecent photograph of B, a child under 16 years; count four, indecent treatment of A, a child under 16 years; count five, administering a drug with intent to stupefy A to enable a sexual act to be performed; count six, rape of A. Counts 2, 3 and 4 charged circumstances of aggravation that the child was under 12 years and in the care of the appellant.

[3] At the hearing of the appeal the appellant abandoned the grounds stated in the notice of appeal and was given leave instead to argue the following grounds:

> "(A) The conviction of the appellant for the offence in count 3 was unreasonable;
>
> (B) The conviction on count 3 was a miscarriage of justice – the count was duplicitous: the precise offence with which the appellant was charged was not identified;
>
> (C) The conviction on count 2 was a miscarriage of justice – the count was duplicitous: the precise offence with which the appellant was charged was not identified;
>
> (D) The joinder of count 3 with counts 1, 4, 5 and 6 was unlawful;

(E) The learned trial judge erred in law by failing to direct the jury in accordance with section 102 of the *Evidence Act* 1977 (Qld); and

(F) The learned trial judge erred in law by failing to direct the jury adequately as to the manner in which they ought to approach the evidence of [A]."

Summary of the proceedings at trial

[4] A was between 10 and 12 years old during the period charged in the maintaining offence in count 1 (between 1 January 2006 and 15 February 2007) and he was 11 years old when the other offences were allegedly committed in late 2006 or early 2007. In count 3 the complainant was A's half-sister B, who was seven years old at the time when that alleged offence was committed in late 2006 (on the same occasion as the similar offence charged in count 2 in relation to A).

[5] The children's mother ("M") gave evidence that she regularly left A with the appellant to go bike riding with him from about July 2006. On occasions she also left B in the appellant's care at his home. A went to the appellant's home once or twice a month between July 2006 and February 2007 and B went less often, probably on three or four occasions in addition to the first occasion in July 2006. Usually the appellant would collect A on Saturday afternoon and return him on Sunday afternoon. In October 2006 when M was in Melbourne during a weekend on which her grandmother died, the appellant collected A and B from M's friend's house on Saturday and returned them late on Sunday. M gave evidence that there were other weekends before and after that occasion when A and B stayed at the appellant's house. There was an interruption in the visits between mid-November 2006, when A fractured his arm, and mid-January 2007, when A again started visiting the appellant's house, with only one occasion in that intervening period when A stayed at the appellant's house while he had a cast on his arm.

[6] M agreed to clean the appellant's house in late January or early February 2007. In the course of cleaning the appellant's bedside table she noticed that he had a bottle of pills called "Ducene 5". The appellant told M that this was to help him sleep. On 12 February 2007 the appellant visited M and told her that the police had searched his house and found some photographs of her and her children and that the police would telephone her about it. The appellant told M that she did not have to get the children involved if she did not want to. M spoke to her children the same afternoon. M said to A that she needed to speak to him about something that was pretty serious. A asked whether it was about the appellant and said that the appellant didn't do anything. When M said that it was serious and she needed to know, A cut her off, saying "But if I tell", before he was interrupted by B coming into the room. M said that if the appellant had touched A or made him feel uncomfortable in any way she needed to know. B asked whether they were talking about the appellant.

[7] M separated the children. A told her that the appellant would make him get undressed and touch him and A pointed to his groin. The appellant used to stand up and watch him when he was in the shower and the appellant took photos of him. A said that this had also happened to B. As A said that, B was walking into the room. She said, "Yeah, he did that to me too". B said that the appellant used to look at her in the shower briefly and take photographs of her. She said that the appellant did this to build up her confidence with her body.

[8] The investigating police officer gave evidence that when executing a search warrant at the appellant's house on 11 February 2007 police took possession of a camera and a computer. The police officer also saw a gold coloured vibrator and containers labelled "Anal Lube" in a drawer in the appellant's bedroom ensuite . The appellant said that these were his items. (An acquaintance of the appellant, Mr Herron, gave evidence that towards the end of 2006 he saw three vibrators, including a gold plastic one, and containers of "anal lube" in the appellant's bedside drawers). The police officer also found a photograph on the appellant's computer and photographs which were later proved to be of A and B and M. The appellant declined to identify the photograph on his computer as being a photograph of A.

[9] Police interviews with A, B, and another child, C, were admitted under s 93A of the *Evidence Act* 1977 (Qld) and each of them gave pre-recorded evidence under the provisions of Part 2, Division 4A of that Act.

[10] In A's first police interview on 14 February 2007, when he was 12 years old, the police officer told A that he was only interested in things that actually happened and things that A saw, nothing that was a lie or that was made up. The police officer established by reference to examples that A appreciated the difference between telling the truth and telling a lie. In this interview A said that the appellant frequently touched him on his penis. A denied that the appellant had touched him anywhere else. A refused the appellant's request to perform oral sex on A. He had seen the appellant masturbating himself. A said that the appellant's friend Crawford was present and saw "stuff" but did not want to get involved.

[11] When A was asked whether he saw anything happen to his sister he responded: "I was in, I was in the room when he tried to pull me he was naked and he tried to force my sister her clothes off and I was trying to say something but he wouldn't let me and I, it was as soon as we got home from something, he would tell me to take my clothes off … and when I haven't, he'd say I asked you to do something, he would act like my parent." A went on to say that his sister took her clothes off, "because she's had enough, he had to, or else he would have done something to her." A said that the occasion when this occurred was when M had gone to Melbourne for a funeral. This occurred at the appellant's place. The appellant had no clothes on at the time and the appellant had also made A take his clothes off. A said that his sister, "was on the floor like and then her clothes were on the floor because she like… and his excuse was, for us to be confident about our bodies." A said that Crawford was there in the bedroom when A and B were told to take their clothes off. A described the appellant's digital camera. The appellant took one or more photos of B and A whilst they were naked. A saw the photos on the screen at the back of the camera showing himself and B. When asked to describe the photographs of B, A said that he thought they were of her body and he thought they showed her private parts but he was not one hundred percent sure because a lot of things had happened since then. A said that he made sure that B was not touched. The police officer asked A whether there was anything else that he thought the police officer should know about. A replied, "Nah".

[12] Subsequent forensic analysis of the camera taken from the appellant's house retrieved a photograph of a boy face down with a vibrator in his anus. M identified the child as A. When A was shown the photograph in a police interview on 7 August 2007 he said that he could not remember it because he was asleep. When asked how he could sleep through what was shown in the photograph he said that

the appellant gave him two sleeping pills. After a while he went to bed and didn't wake up until the next morning. When A woke up the appellant showed him the photo on the back of the appellant's digital camera. The appellant took the vibrator out of his bedside table and told him how he had used it, as the photograph showed. A felt ill.

[13] A was again interviewed by police on 29 August 2008, following a conversation between A and Crown prosecutors. A said that the appellant had tried to use the vibrator on him before giving him the tablets, touching it between his buttocks. A quickly moved away. A thought that the appellant probably got him to take the tablets because he would not relax as the appellant had asked him to do. A again referred to the conversation in the morning when the appellant said what he had done and showed A the photograph. A said that one of the appellant's good friends (Crawford) was there. When the appellant attempted to use the vibrator on A, Crawford was not there and B was asleep. A was also asked about the photographs the appellant took of him and B when they were naked. A said that the appellant closed the blinds of his window and A and B stood at the wall next to the window. Crawford was there. A also said that the appellant frequently asked A to touch C and told them both not to be afraid of each other or embarrassed, but both of them would not allow it.

[14] A gave pre-recorded evidence on 10 October 2008, when he was 13 years old. He said that what he said to police in his interviews was true. He gave evidence of his regular visits to the appellant's house. Sometimes B went with him. Crawford was there. A gave evidence of the appellant's conduct generally in accordance with his statements in the police interviews. In evidence in chief he referred to the appellant taking a photograph of B in the following terms:

> "Can you tell me about one of the times [B] came over?--
> *It was - she came over because there was one time we had to go down - like, I and the rest of my family had to go down to Melbourne because we had just lost our great-grandmother.*
>
> So your mother went to Melbourne for a funeral, did she?--
> *Yes and it was in [the appellant's] bedroom when he kept on telling my sister to take her clothes off.*
>
> Did your sister take her clothes off?--
> *He forced her.*
>
> All right, were you in the bedroom then as well?--
> *I just walked - I walked into the door as he was forcing her.*
>
> What were you wearing?--
> *I had my clothes on at that stage.*
>
> You say you had them on at that stage. Did there ever come a time they weren't on?--
> *Yes, he also forced me to take them off, too.*
>
> On this same occasion when he forced [B] to take her clothes off or a different time?--
> *Same occasion.*
>
> All right. Were you both in that same room with your clothes off?--
> *Yes.*

What happened next?--
He got his digital camera out and started - he got his camera out and started taking pictures of me and my sister separately. The pictures were separate.

What was [the appellant] wearing?--
I think he was wearing his boxers, or nothing, I don't know.

Was there anybody else in the room as well as you and [B] and [the appellant]?--
I think Brad [Crawford] was standing at the door at that time.

All right, did Brad ever ask you to take your clothes off or do anything?--
No. No, he didn't.

Did Brad ever touch you or do anything else to you?--
No.

Was there only one person who only ever did anything to you?--
Yes.

Who was that?--
That was [the appellant]. [The appellant].

Was that the only time that [the appellant] took photographs of you naked?--
From what I can remember, yes.

Right?--
But I don't know.

Right. Was that the only time he ever took photographs of [B] naked?--
Yes.

That you saw?--
Yes, it is. Yes, it is."

[15] A referred to an occasion a few days after a cast had been taken off his arm when he went to the appellant's place. A described the appellant's conduct of touching him with the vibrator and A moving away. A said that later that night the appellant gave him two sleeping pills and after A went to sleep the appellant took advantage of him. A said he did not remember the appellant using the vibrator but the appellant showed him a picture in the morning. A agreed that he had not mentioned the vibrator incident in his first interview on 14 February 2007. When the appellant showed A the image on the back of his digital camera Crawford was sitting next to the appellant. The appellant told A that he had taken the photograph and he had put the vibrator inside A's anus. A said that before the police officer had shown him the photograph on his computer he had not remembered that happening, but the photograph "triggered my memory because of – after the tablets I couldn't even remember what happened that night", and "the vibrator on the photograph triggered what happened before I took the tablets." (A paediatrician gave evidence that Ducene 5 tablets contain 5 milligrams of Diazepam. If an 11 year old boy was given two such tablets, which would be four to ten times the usual dose, that would induce sleepiness and grogginess and act as a muscle relaxant, and it might cause temporary or permanent loss of some portion of memory).

[16] In cross examination A denied that anyone at the DPP suggested to him that the person who had put the vibrator in his anus could have been the appellant or could

have been Crawford. A said that he already knew that it was the appellant because the appellant said that he had done it. Crawford never gave him any tablets. Crawford was not there when the appellant used the vibrator but arrived the next morning. Crawford did not take any photographs of him.

[17] When A was cross examined about the photographs of his sister, A said that the appellant told him and his sister B, "take our clothes off, that's it, and the photo taking of when we were in his bedroom." When defence counsel suggested to A that he had not seen any photographs of his sister he said that he only got "a flash" of one because the appellant gave him a "quick glimpse" of it on the back of the camera screen. A said that B had her clothes off when the appellant took the photograph. A was in the room at the time. It was the appellant's room with the waterbed in it. That was the only place he could remember. It was put to A that he wasn't certain that he saw B with her clothes off in the appellant's bedroom. A said that he did see her clothes off. Crawford was at the door. A denied the suggestion that he was not certain that the appellant took photographs of him. A denied that Crawford had taken photographs of him or persuaded him to take off his clothes.

[18] B was interviewed by police on 14 February 2007, when she was eight years old. B was asked to say what made her uncomfortable and she referred to "sometimes people forcing me to take my clothes off… like [the appellant]". She said that she "felt uncomfortable that I didn't tell mum so I just kept it a secret". When asked whether Crawford had ever done anything that made her feel uncomfortable or whether he had done anything rude, she did not identify anything untoward. When asked about the appellant B said that, "He took his clothes off too… and sometimes he peeped on the shower, when I was in the shower and he took a photo and after on that he took a photo of me on a digital camera… naked… sometimes we're, he's in his room lying down and he just he just wanted me to be confident that's what he just said he wanted me to be confident like and anything and not to be scared of nothing". B said that when that happened she was in the appellant's room on his waterbed. The appellant told B "not to tell mum". He said, "come on then take your clothes off it doesn't matter it just, just you being confident". B said that this occurred when her mother was in Melbourne going to the funeral. She said that she saw A take his clothes off. When the appellant asked her take her clothes off she was no longer on the waterbed but standing up on the floor. When asked about how her clothes came off she said she took them off because the appellant forced her. The appellant was initially lying down on the waterbed with his clothes on but he took all of his clothes off. B described a digital camera which the appellant had which showed a picture. After she was asked how many pictures the appellant took the following exchange occurred:

> "B Um I think it was about 2's think, if not I don't know either I think their (sic) was 2.
>
> Q Was that on the time when you were in the bed when you had too (sic) take your clothes off, in the bedroom when you had to take your clothes off.
>
> B No, we were down in the kitchen.
>
> …
>
> B Yep the curtains were shut and all that.

Q And was that the same day your mum was down in Melbourne.

B Yep.

Q So what happened, how did you get to the kitchen from the er from bed where you had all your clothes off.

B Um I think I just walked

…

Q Were you able to tell me where the camera, so what your telling me is you were standing on the floor in [the appellant's] bedroom.

B Yeah.

…

Q A photo of you from the front or a photo of you from the back, were you standing or sitting when he took the photo.

B Standing.

Q And you had clothes on, so you had no clothes on and where was when he took the photo was he facing you or was he from behind.

B I don't really know that question because I forgotten a bit.

Q Ok where was [the appellant] when he took the photo.

B Where the fridge is.

Q Where the fridge is and where were you.

B Near the sink.

…

B Any, he didn't do me and [A] together he did it one at a time.

Q Yeah and did and could you see your boobies.

B I don't have any yet (laugh).

Q UI did you see your nipples.

B Oh I think it was just a little, yeah.

Q Could you see your vagina or fanny.

B I don't know about the nipples or the fanny really."

[19] B also said that sometimes the appellant peeked into the shower while she was showering. He would walk in, stay for a couple of minutes, and walk out. He would watch B for a while, while she was washing.

[20] B gave her pre-recorded evidence on 10 October 2008, when she was nine years old. She said that the appellant forced her to take her clothes off whilst the appellant was wearing no clothes. The Prosecutor asked her if she could remember anything happening in her kitchen when she had no clothes on and B said that the appellant took a photograph. She didn't think any photographs were taken in the bedroom. In cross examination B said she could not remember how many times she stayed at the appellant's place overnight but she did stay there when her mother went to Melbourne. She denied having had a shower at the appellant's place when Crawford was there and she denied that Crawford had a camera or took photographs of her. When it was put to her that she had not seen her brother being photographed she said she had seen it once in the kitchen. When asked whether A was "clothed or dressed" B said that she couldn't remember. She agreed that she never saw any naked photographs of herself or her brother. She denied that the appellant did not tell her to take her clothes off, that he did not take photographs of her and that she had not seen the appellant with no clothes on. She said that she saw the appellant come into the shower while she was in there. The appellant did not talk to her. He just used to go in and out. She denied that she was mistaken and that it was Crawford.

[21] C was interviewed on 30 July 2007 and 30 August 2008. In the first interview C said that on one occasion when he was at the appellant's house he saw the appellant put his hand down A's pants. In the second interview C was asked whether the appellant ever tried to make him and A sexually touch each other. C responded that the appellant might have asked him to touch A once but he refused. The appellant told C not to be afraid to touch A. C thought that A was not there at the time but was coming over. C said that the appellant wanted him to let other kids touch him and told him don't be afraid to touch A. In C's pre-recorded evidence on 10 October 2008, when C was 16 years old, C repeated the substance of his earlier statements to police. He said that he walked in on the appellant and A, and saw the appellant withdrawing his hand from A's genital area. In cross examination C agreed that although there could have been a time when the appellant spoke to him and A together, he did not have a memory of that.

[22] Crawford gave evidence that he visited the appellant's house on four occasions between September 2006 and February 2007. On one occasion they were on the way home from motorbike riding with A. The appellant told A that the appellant was taking him out motorbike riding and when they got back the appellant would like A to do something that the appellant liked. After they arrived at the appellant's home the appellant took a photograph of A with his pants down. Crawford said that the appellant told him that he played with A's genitals and was going to ask if he could perform oral sex on A. Crawford also gave evidence of a different occasion, when A and B were both present in the appellant's house whilst their mother was in Melbourne for her grandmother's funeral. Crawford saw the appellant with his hand down the front of A's shorts. Crawford said that on the following morning the appellant called him into his bedroom, where the appellant was naked on his bed and A and B were both in the room. The appellant persuaded A and B to take their clothes off. Crawford said that the appellant took photographs of the children wrestling. On another occasion, in January 2007, the appellant said that he was going to give A sleeping tablets that also were a muscle relaxant which enabled the appellant to move people without them knowing. On this occasion Crawford had been drinking bourbon and smoking marijuana. The next morning the appellant came into the lounge where A and Crawford were sitting and told A that the

appellant got some really good photographs of him last night. The appellant showed A and Crawford the picture of A with the vibrator. A said that he felt really sick, fell to his knees and went pale.

[23] In cross examination Crawford agreed that he had been sentenced to imprisonment for indecently dealing with boys. In one of his serious offences he had supplied cannabis, to stupefy a child. He was subject to a suspended sentence for sexual offences when in January 2008 he was arrested for another offence. His sentence was reduced because of his cooperation in these proceedings. Crawford had sexual urges in respect of children that were heightened when he used cannabis. Crawford denied that he had put the vibrator near A's anus. He agreed that he had not told the police about the incident with the vibrator in his first statement on 16 February 2007. On 8 August 2007 at the committal hearing when Crawford was asked whether anything untoward happened during his visit to the appellant in January 2007 Crawford said "no". On the day of the committal hearing, police officers had showed Crawford the photograph of the complainant with the vibrator. Crawford agreed that he had been wondering if he might be accused of using the vibrator. The trial was the first time Crawford had said that the appellant had told him that the medication the appellant was about to give A relaxed muscles and the appellant could move people without them knowing.

[24] The appellant did not give or call evidence.

Ground A: The conviction of the appellant for the offence in count 3 was unreasonable

[25] Under this ground of appeal the Court must 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 the offence.[1]

[26] Section 210(1)(f) of the *Criminal Code* 1899 (Qld) provides that any person who, "without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years; is guilty of an indictable offence." Count 3 charged an offence against that provision that on a date unknown between 26 October 2006 and 1 November 2006 at Burpengary in Queensland the appellant without a legitimate reason took an indecent photograph of B, a child under 16 years, with circumstances of aggravation that B was under 12 years and that the appellant had her under his care. B was seven years old during the charge period.

[27] The appellant argued that the prosecutor conducted the trial on the basis that the particulars of count 3 were to be derived from B's evidence in chief to the effect that the appellant had taken a photograph of her naked in the kitchen; B's evidence of the incident was vague, contradictory, insufficiently particular, and could not safely sustain a conviction; A's evidence on this count was vague and did not support the existence of an indecent photograph of the complainant taken in the kitchen, as B described in her evidence; and there was virtually no evidence about the nature of the photograph. The appellant also argued that it was not open to the jury to be satisfied beyond reasonable doubt that an indecent photograph was taken of B; the fact that B was naked when the photograph was taken did not necessarily mean that the photograph revealed a naked image of B; it could, for example, have been a photo taken only of her head.

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1 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 614 to 615.

[28] The record book does not support the appellant's submission that the prosecutor confined the Crown case to a photograph taken in the kitchen. There were no particulars of count 3 given by the Crown otherwise than by the supply to the defence of the complainants' and Crawford's statements. The appellant's submission was also inconsistent with the prosecutor's submissions at trial concerning the directions which the trial judge should give in relation to counts 2 and 3. Consistently with the prosecutor's submissions, in summing up to the jury in relation to count 3 the trial judge told the jury that the relevant evidence was given by A, B and Crawford, and his Honour summarised their evidence about the appellant taking photographs of B naked, in each case reminding the jury of the judge's earlier warning about the special need for caution about Crawford's evidence. Defence counsel did not object to the prosecutor's submission or to the Crown case being put to the jury in that way. The jury was also entitled to take into account B's evidence that the appellant had looked at her when she was in the shower. The trial judge directed the jury that it could only use that evidence if the jury accepted it beyond reasonable doubt and was satisfied that the evidence demonstrated that the appellant had a sexual interest in B and gave effect to that interest by taking a photograph of her; if the jury was so persuaded then it might think it more likely that the appellant did that which was alleged in count 3, although that was for the jury to determine. The trial judge directed the jury that it was obliged to decide whether, having regard to the whole of the evidence relating to count 3, that offence had been established to its satisfaction beyond reasonable doubt.

[29] B's answer in cross examination that she did not see a "photograph" of herself naked was not necessarily inconsistent with her having seen an image on the screen of the appellant's digital camera. Her evidence that the appellant took a photograph of her while she was naked was supported by the evidence of A and Crawford. Crawford's evidence on this topic might well be regarded as including elements of his own fantasies or as otherwise unreliable, but the jury was entitled to act upon A and B's evidence. The conflict in their evidence about the room in which the photograph of A was taken and the fact that B's original complaint to her mother followed a similar complaint by A in her hearing were not such significant matters as necessarily to require the jury to harbour a doubt that the appellant had taken a photograph of B while she was naked. The fact that the police did not find any image of B on the appellant's digital camera much later was not inconsistent with A and B's evidence.

[30] On that evidence it was reasonably open to the jury to find beyond reasonable doubt that the appellant had taken a photograph of B whilst she was naked, but it was necessary for the Crown also to prove beyond reasonable doubt that the photograph was itself indecent. The appellant did not take issue with the trial judge's direction to the jury that "indecent" bears its ordinary every day meaning – that is, what the community regards as indecent; it is what offends against currently accepted standards of decency; and indecency must always be judged in the light of time, place and circumstances. The evidence which suggested that the appellant's purpose in taking the photographs of B was indecent is not directly relevant to the offence in s 210(1)(f), but it was a circumstance the jury could take into account in determining whether the appellant had captured an indecent image. Although the evidence as a whole suggested that the appellant's main interest in his dealings with B may have been to further his continuing exploitation of A, the jury was entitled to infer from A and B's evidence that the appellant set out to take a photograph of

B which clearly depicted the child's naked body also for the purposes of his own sexual gratification. There being no apparent obstacle to the appellant succeeding in capturing an image of that kind the jury could safely infer that he did succeed. That was also suggested by A and B's evidence that the appellant retained an image of B on his camera. Despite the vagueness of A and B's evidence about what the image depicted, a feature of their evidence which the jury might have thought was understandable in light of their young ages and experiences whilst under the care of a man whom they regarded like a parent, it was open to the jury to conclude that the appellant had taken a photograph of B that clearly depicted her naked body.

[31] The fact that the image was of a naked seven year old girl was not the only matter which bore upon the question of whether the image was indecent. Having regard to the additional circumstances that the image was on the appellant's camera, that it depicted a seven year old girl naked in the kitchen or bedroom of the appellant's house, and that the appellant was unrelated to the child and had no arguably legitimate justification for having such an image on his camera, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the image offended against currently accepted standards of decency.

Grounds B and C: The convictions on counts 2 and 3 were miscarriages of justice, each count was duplicitous: the precise offence with which the appellant was charged was not identified.

[32] Under these grounds of appeal the appellant argued that miscarriages of justice had been occasioned by the absence of any Crown particulars which tied the charges to a particular version of the evidence and that because the trial judge referred the jury to the evidence of each complainant and also to Crawford's evidence it was not possible to know which part of evidence the jury accepted. In relation to count 2, the appellant argued that the trial judge erred by failing to identify for the jury whether count 2 was based upon the complainants' or Crawford's different descriptions of the circumstances in which the indecent photograph was taken; that the directions wrongly permitted the jury to convict the appellant on this count if it was satisfied of either version; and that there was no way of knowing whether the jury was unanimous as to which photograph was taken. In relation to count 3 the appellant argued that the trial judge erred in failing to direct the jury that it had to be satisfied beyond reasonable doubt that the appellant took a photograph of B in the kitchen rather than in the bedroom.

[33] Section 567(3) of the *Criminal Code* provides:

> "(3) Where more than 1 offence is charged in the same indictment, each offence charged shall be set out in the indictment in a separate paragraph called a ***count*** and the several statements of the offences may be made in the same form as in other cases without any allegation of connection between the offences."

[34] The form of counts 2 and 3 complied with that provision because each charged the taking of one indecent photograph on one occasion between 26 October 2006 and 1 November 2006. The appellant referred to *S v The Queen*[2] but there is no relevant analogy with that case. In *S v The Queen* the indictment charged the accused with three counts of carnal knowledge of his daughter. Each count charged one act of

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2 *S v The Queen* (1989) 168 CLR 266.

carnal knowledge on a date unknown within a specified period of 12 months. No particulars were given. The complainant's evidence referred to two specific acts of intercourse. There was no evidence to link either act to any of the specified periods and she also gave evidence of numerous other acts at unspecified times over a period of years which comprehended the periods specified in the counts. The evidence in the Crown case was therefore capable of establishing a number of different offences, each of which fitted the charge in each count: it was that which constituted the objectionable defect in each of the counts.[3]

[35] Counts 2 and 3 do not suffer from any similar defect. Although the complainants referred at some points to more than one photograph, each of those counts charged only the taking of one indecent photograph of the complainant and the evidence in the Crown case closely confined the occasion to the weekend in October 2006 when the children's mother was in Melbourne, both children were in the care of the appellant, the appellant used his digital camera to take photographs of A and B at about the same time and whilst each was naked in the appellant's bedroom or kitchen, and the appellant took those photographs shortly after he had required each child to undress in the bedroom.

[36] There were discrepancies in the evidence as to whether the photographs of A and B were taken in the bedroom (as A and Crawford said) or in the kitchen (as B said) and as to whether A and B were together on the appellant's bed when the photograph was taken (as Crawford said) or whether individual photographs were taken of each of them (as A and B said), but the Crown case was plainly tied to the one occasion which I have described. The conflicts within the evidence about the nature of the photograph which the appellant took on that occasion were for the jury to resolve, but the appellant was not confronted with a case in which there was evidence that a number of different photographs fitting the charges in counts 2 and 3 were taken on different occasions within the charge period.

[37] Before the trial started the Crown case was outlined to the appellant in detail in the s 93A interviews of the children and Crawford's evidence at the committal. The appellant was not denied an opportunity to test the credit of the complainants and other witnesses by reference to surrounding circumstances of the kind which might be revealed by any further particularisation of the charge. The appellant's case was that he did not take either of the photographs charged in counts 2 and 3 and that if anyone did so it was Crawford. That case was put to the complainants during their pre-recorded evidence and to Crawford when he subsequently gave evidence. Each of them denied it, with the result that there was no evidence to support the appellant's case, but the appellant was not prejudiced in seeking to make that case by any ambiguity in or lack of particularity of counts 2 and 3. Defence counsel's omission to seek further particulars of counts 2 and 3 presumably reflected the absence of any perceived difficulty for the appellant in preparing for the trial of those charges.

[38] For these reasons, none of the considerations which underlie the principles invoked by the appellant was engaged here.[4] There was no difficulty in the trial court knowing the charge it was entertaining in order to ensure that evidence was properly admitted and to instruct the jury properly as to the law to be applied; in the event of

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3 (1989) 168 CLR 266 at 274 per Dawson J; at 280 to 281 per Toohey J; at 284 to 286 per Gaudron & McHugh JJ.

4 See *S v The Queen* (1989) 168 CLR 266 at 285 to 286 per Gaudron & McHugh JJ.

conviction the trial court would know the offence for which the appellant was to be punished; and the record would show the offence of which the appellant was acquitted or convicted in order to enable him to avail himself, if the need should arise, of a plea of autrefois acquit or autrefois convict.

Ground D: The joinder of count 3 with counts 1, 4, 5 and 6 was unlawful.

[39] Section 567(2) of the *Criminal Code* provides that charges for more than one indictable offence may be joined in the same indictment against the same person if those charges are "founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

[40] The appellant argued that although count 3 might have been joined with count 2, there was no basis for joining count 3 with the other counts; it was not founded on the same facts as counts 1, 4, 5 and 6 and it was not part of a series of offences of a similar character as those charged in counts 1, 4, 5 and 6. There was no factual similarity between count 3 and counts 1, 4, 5 and 6; the evidence in support of count 3 was not admissible in proof of counts 1, 4, 5 and 6; and although, in the absence of count 3 on the indictment, B could have been called as a witness to give direct evidence of the appellant's conduct towards her brother, B's evidence of what she said occurred to her was inadmissible in relation to any of the counts relating to A. The appellant's senior counsel submitted that the charge in count 3, that the appellant took an indecent photograph of B, could not "by any stretch of the imagination" be regarded as part of a series of offences which included the charged rape of A.

[41] The respondent contended that count 3 was properly joined with the other counts on the indictment because it formed "part of… a series of offences of a similar nature". There was an underlying similarity because each of the offences related to a "sexual interaction" between the appellant and children of the same family with whom the appellant came into contact in the same way; B was present in the house because of the appellant's engagement with A over a period of time and interaction between the appellant and the family of A and B; and more broadly, each of the offences charged in the indictment substantively related to indecent treatment of a child.

[42] The question whether offences form part of a series of offences of the same or similar character is to be answered by reference to a test "in which time, place and the other circumstances of the offences as well as their legal character or category are all factors which are considered for the purpose of seeing whether the necessary features of similarity and connection are present."[5]

[43] Reference to the legal character and circumstances of the charges in this indictment demonstrates sufficient similarities and connections between each of them to justify their joinder in one indictment. Turning first to the joinder of count 2 in the indictment, the offence it charged was not of the same legal character as the offences charged in counts 1, 4, 5 and 6, but taken together those counts charged a series of offences of a broadly similar character. Each charged the appellant with conduct which, though of varying degrees of seriousness, was appropriately to be stigmatised as indecent, and the Crown case on each count was that the appellant exploited a child for the appellant's sexual gratification. There were the further

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5 *R v Cranston* [1988] 1 Qd R 159 at 164.

connecting circumstances that each of counts 1, 2, 4, 5, and 6 charged offences in relation to the same child, at the same place (the appellant's home), counts 2, 4, 5 and 6 charged offences within the same or overlapping periods, and each of those counts charged offences within the same overall period during which count 1 charged that the appellant maintained an unlawful sexual relationship with the child.

[44] As to count 3, the joinder of which is in issue, it charged an offence of the same legal character as count 2. Furthermore, on the evidence in the Crown case counts 2 and 3 concerned offences at the same place, at the same time, and each involving the appellant using the same camera to take a photograph of each child after first persuading the child to undress for the same reason and with the same, or similar, corrupt motive. B's evidence of the appellant's offence against her in count 3 was also inextricably bound up with her evidence of the appellant's offence against A in count 2. Count 3 was therefore connected with counts 1, 4, 5, and 6 by the same broad similarities as was count 2, except that count 3 involved a different complainant. Because count 3 involved a different complainant the broad similarities between count 3 and counts 1, 4, 5 and 6 might not themselves have justified the joinder,[6] but on the Crown case there were additional connecting circumstances: the close familial relationship between B and A; count 3, like counts 2 and 4, charged as a circumstance of aggravation that the complainant was under 12 years of age and under the appellant's care; the complainants came to be in that situation and, in relation to all counts, at the appellant's house where all offences allegedly occurred, in similar circumstances arising out of their mother's relationship with the appellant; and B was alleged to be present in the appellant's house when he committed other offences involving A (in relation to count 6, for example, A said that B was present and asleep in the house).

[45] The fact that B's evidence of the offence against her was not admissible in proof of the offences against A other than count 2 called for clear directions to the jury, but in light of the connecting circumstances that fact did not render the joinder improper. In that respect, in *R v Navarolli*,[7] Chesterman JA, with whose reasons Muir JA (in this respect) and Fryberg J agreed, analysed the relevant authorities on this question:

> "[135] The appellant's counsel submitted that "the test for the application of s 567" was found in *Phillips v The Queen* (2006) 225 CLR 303 at 307, in which the Court said:
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> > 'It was not in controversy that if the evidence of each complainant were admissible on the charges relating to incidents narrated by other complainants, there would be a 'nexus or connection' between the charges sufficient to make them a series within the meaning of s 567; and if the evidence were not admissible, there would not be a series, and unacceptable prejudice would arise ...'.
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> [136] *Phillips* was a case in which the accused was charged with eight offences, six of rape, one of assault with intent to rape and one of indecent assault. The charges arose out of separate incidents involving six complainants. The eight counts were charged on the

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6 C.f. *R v MAY* [2007] QCA 333 per Holmes JA at [34] - [36].

7 [2010] 1 Qd R 27; [2009] QCA 49.

one indictment. As the passage quoted shows it was only if the evidence led in support of each charge was admissible on each of the others as similar fact or propensity evidence that there was any connection at all between the offences. The High Court ruled that the evidence was not so admissible.

[137] From this case the appellant reasons that the *only* basis for a joinder of charges on the one indictment is that the evidence relevant to each charge be admissible as evidence supporting the others.

[138] This is not what the section says. It provides for three bases for joinder: charges founded on the same facts; charges which form part of a series of offences of the same or similar character; charges which constitute a series of offences committed in the prosecution of a single purpose.

[139] The appellant's proposition was rejected in *R v Kray* [1970] 1 QB 125 in which Widgery LJ said (for the court) (130–131):

> '... offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is not restricted to such cases. ... All that is necessary ... is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together.'

…

[141] The question was discussed in *R v Collins, ex parte Attorney-General* [1996] 1 Qd R 631 at 636 - 637 by McPherson JA and Lee J. Their Honours said:

> 'It has long been accepted that the basic criterion for the joinder of counts ... is the existence of some connection or nexus between them, each limb of the subsection being illustrative of the circumstances giving rise to that nexus ... . In defining in broad terms what connection is sufficient ... examination of the cases demonstrates that an appropriately liberal reading be given to the text of the section, consistent with its underlying policy. That policy, it was stated in *Kray*, is to enable the joinder of charges which may be 'properly and conveniently' dealt with together ... . It is obviously desirable both in the interests of the due and expedient administration of criminal justice and in the interests of finality of litigation in relation to the particular accused, that there be a single and final inquiry into matters which arise out of or which

> essentially involve common issues of fact or law. Any injustice which such a course has the potential to produce is adequately catered for by the discretion to sever provided for in s 597A. If nothing else, consistency in decision making would dictate that the one tribunal resolve such questions, little being gained from a fragmented approach. The simple means which the legislature has provided for giving effect to this policy is to allow the joinder of multiple counts ... in an appropriate case 'so that the whole of the facts can be adjudicated upon by one jury': ... . Indeed so extensively has this policy been recognised, that the courts have laid down the general rule that matters which can be joined without prejudice to the accused ought generally to be ...'.

[142] Section 597A provides that before or during a trial if the court is of the opinion that the accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence on the same indictment the court may order a separate trial of any count or counts. No application was made to the trial judge for separate trials and no complaint was made about the joinder until after conviction. No prejudice or embarrassment to the appellant in his defence of any of the counts was identified by his counsel.

[143] In *R v Cranston* [1988] 1 Qd R 159 Macrossan J (with whom McPherson and de Jersey JJ agreed) said (165 - 166):

> 'The question immediately arises whether, even though an erroneous joinder may have been permitted, any miscarriage of justice to the accused occurred. In *Dearnley v The King* ... the Court of Criminal Appeal seemed to regard the fact that no injustice resulted from an improper joinder as a sufficient answer to any later complaint although it must be acknowledged that in that case no objection to misjoinder had been taken at the trial ... . Further cases are collected and a similar view is expressed ... in *R v Phillips and Lawrence*. In *R v Bedington* ... the Court again stated that an improper joinder was not a ground for setting aside a verdict unless there had been a miscarriage of justice.'"

[46] For these reasons, count 3 was properly joined in the indictment. In any case, had I concluded that the joinder was improper I would nevertheless have rejected this ground of appeal. Section 668E(1) of the *Criminal Code* provides that on an appeal against conviction of this character the Court shall allow the appeal "if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal." Section

668E(1A) provides that "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[47] The appellant argued that the present ground of appeal invoked the ground in s 668E(1) of a "wrong decision of any question of law". However the appellant did not apply for separate trials under s 597A. No objection was taken to the form of the indictment and the trial judge was not asked to give any ruling in that respect and did not do so. Thus the appellant could not point to any wrong decision of any question of law. It was therefore necessary for the appellant to establish the ground in s 668E(1) that the joinder resulted in a "miscarriage of justice".

[48] In that respect, the appellant argued that B's evidence was alarmingly prejudicial and that the jury might have used it in an improper application of propensity reasoning against the appellant. The appellant referred to the trial judge's comments, when summarising the submissions for the Crown, that "[The Crown Prosecutor] submitted that all three children say it was the defendant who did these things. Their evidence is uncontradicted by any sworn evidence. [The Crown Prosecutor] submitted that the question was do you believe these children" and "[The Crown Prosecutor] pointed out that the children were all adamant about these matters. They support each other…" The context of the second of those comments shows that it was related to B's evidence that the appellant convinced her to take her clothes off, evidence which supported count 3 and, inextricably, count 2. In any event, it seems unlikely that the jury would have used impermissible propensity reasoning that the evidence of B made it more likely that the appellant was the sort of person who would commit the more serious offences involving A charged in the indictment. Any prospect that the jury might have reasoned in the way for which the appellant contends was displaced by very clear and emphatic directions by the trial judge.

[49] Early in the summing up on the morning of the fourth day of the trial, a Friday, the trial judge referred the jury to the fact that separate charges had been preferred by the Crown and directed the jury that it "must consider each charge separately, evaluating the evidence relating to that particular charge, to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved its essential elements". The trial judge directed the jury that the evidence in relation to the separate offences was different so that the verdicts need not be the same and the elements of the offences were different, so that again the verdicts need not be the same. The trial judge subsequently reminded the jury that it must consider each charge separately, evaluating the evidence relating to that particular charge to decide whether it was satisfied beyond reasonable doubt that the prosecution had proved its essential elements. His Honour then directed the jury that it "must consider the charges relating to [A] that is counts 1, 2, 4, 5 and 6, separately from the charge relating to [B], which is count 3. The evidence relating to the counts involving [A] has no bearing on your consideration of the charge relating to [B]." The trial judge went on to identify and summarise each piece of evidence which was relevant to whether the appellant had maintained a relationship with A (count 1), and directed the jury that in relation to other counts relating to A, counts 2, 4, 5 and 6 the jury must consider the evidence relating to each of those particular charges.

[50] At 12.45pm the trial judge released the jury until the following Monday morning. The prosecutor then submitted that a direction should be given that the jury should not reason from acceptance of the evidence of A or B that the appellant was the kind of person who was likely to have committed an offence involving the other child. There was a discussion about the appropriate form of direction and defence counsel agreed that such a direction should be given. When the trial judge resumed summing up on the following Monday morning, the fifth day of the trial, his Honour again reminded the jury that it was obliged to consider each charge separately and gave the following directions:

> "Moreover, you must consider the charges relating to [A] separately from the charge involving [B]. If you accept [A's] evidence with respect to any or all of counts 1, 2, 4, 5 and 6 you must not use that to conclude that the defendant is someone with a tendency to commit these types of offences and to reason from that that he is therefore the type of person who is likely to have committed count 3, the offence involving [B]. Similarly, if you accept [B's] evidence relating to count 3, you should not use that to conclude that it is likely that the defendant committed the offences relating to [A]. As I have said, you must consider each charge separately."

[51] The trial judge then turned to the elements of each of the six counts. In relation to count 3, the trial judge summarised the evidence, including that of B, in terms which unequivocally related that evidence only to that count.

[52] In light of the trial judge's unambiguous directions warning against impermissible propensity reasoning and directing the jury to take B's evidence into account only in relation to count 3, no miscarriage of justice arose from the joinder of count 3 with the other counts in the indictment.

Ground E: The Learned trial judge erred in law by failing to direct the jury in accordance with s 102 of the *Evidence Act* 1977 (Qld)

[53] This ground of appeal concerned the sufficiency of the trial judge's directions about the weight of the statements by A, B, and C in their police interviews admitted under s 93A of the *Evidence Act* 1977 (Qld). Section 102, which is in the same part of that Act, provides:

> "In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including –
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> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[54] The appellant argued that s 102 required the trial judge to give comprehensive directions to the jury identifying the inferences and circumstances from which

inferences could reasonably be drawn as to the accuracy or otherwise of the children's statements rendered admissible by s 93A, including directions about the relative informality and contemporaneousness of those statements with the occurrence of the relevant events when compared with statements in the children's pre-recorded evidence. Whilst it was not necessary for the trial judge to refer in terms to s 102, that section made it mandatory for the trial judge to give specific directions referable to that section. In the appellant's submission it was insufficient if the relevant circumstances and their bearing upon the weight of the statements under s 93A must have been obvious to the jury from the evidence and with the benefit of directions which the trial judge gave in compliance with *Robinson v The Queen*.[8] The appellant's senior counsel submitted that the construction of s 102 which the appellant advanced found support in Williams JA's and Mullins J's reasons in *R v TQ*.[9] Williams JA referred to the evidence of a complainant's sister in a trial of two counts of unlawful and indecent dealing, observed that because it was of limited relevance it was incumbent upon the trial judge to direct the jury as to the use that could be made of it once it was agreed that the evidence should be played to the jury a second time, and added that such a warning was arguably mandated by s 102.[10] Mullins J agreed that the appeal should be allowed and a retrial ordered on two of the counts because of the trial judge's failure to give to the jury on the replaying of that evidence the warnings identified in Jerrard JA's reasons for judgment and because of the trial judge's failure to direct the jury in accordance with s 102.[11]

[55] The respondent argued in its written submissions that reference to the history of the relevant provisions in the *Evidence Act* 1977 (Qld) suggested that s 102 applied in relation to the admissibility of statements under s 93A but did not apply in relation to the weight which was to be attributed to such statements, but that argument was ultimately not pressed in oral submissions. The respondent emphasised its alternative argument that if s 102 did apply, the real issues to which it gave rise at the trial were sufficiently dealt with by the trial judge's directions.

[56] The principal judgment in *R v TQ* was given by Jerrard JA, with whose reasons Williams JA agreed. Jerrard JA analysed the legislative history concerning evidence and concluded that after the amendment which inserted s 93A, s 102 became a provision authorising, in appropriate cases, directions to a jury on the circumstances relevant to the weight to be given to the statement.[12] Jerrard JA, held that the matters in s 102 constituted "no more than a statutory expression of the sort of matters relevant to the reliability and accuracy of a complainant's account, and requiring a warning to a jury, as referred to in *Robinson v The Queen* (1999) 197 CLR 162", and that what mattered was not a reference in terms to s 102, "but directions to a jury to matters relevant to judgments by a jury on the reliability of a critical witness." In *R v Beattie*[13] Holmes JA, with whose reasons Wilson and Dutney JJ agreed, referred to Jerrard JA's observations in *R v TQ* with apparent approval. The appellant's submissions are not reconcilable with those authorities.

[57] As was submitted for the respondent, s 93A was not in the Act when s 102 was enacted, but the same authorities make it clear, as is apparent from the unambiguous

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8 *Robinson v The Queen* (1999) 197 CLR 162.
9 *R v TQ* [2007] QCA 255.
10 *R v TQ* [2007] QCA 255 per Williams JA at [4]-[5].
11 *R v TQ* [2007] QCA 255 per Mullins J at [44].
12 *R v TQ* [2007] QCA 255 at [20].
13 [2008] QCA 299 at [38].

terms of those provisions, that s 102 applies to statements rendered admissible by s 93A and requires the described circumstances to be taken into account in estimating the weight, if any, to be attached to such statements. It is equally clear from the terms of s 102 and those authorities that it does not mandate any particular direction. Rather, s 102 requires the tribunal of fact (the jury in this case) to have regard to all of the relevant circumstances, including those specifically identified in the section. The section therefore forms one aspect of the law applicable in the trial which the trial judge must bear in mind, to the extent that it is relevant in the particular case, when formulating directions to the jury. The trial judge's fundamental obligation in that respect, expressed in s 620(1) of the *Criminal Code*, is "to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make." Fulfilment of that obligation requires trial judges to identify the real issues in the case and the relevant law and explain to the jury how that law applies to the facts which are relevant to the issues.[14]

[58] Accordingly, whether or not particular circumstances and inferences adverted to in s 102 must be called to the jury's attention by a trial judge must depend upon the circumstances of the particular case. It would be counter-productive for trial judges to be required to give yet further directions specifically directed to s 102 in all cases, when in many cases such directions would simply render juries' tasks more difficult by adding to already lengthy directions and without any meaningful elucidation of the task. In some cases it will be necessary for trial judges to formulate specific directions referable to the terms of s 102 but in other cases, including cases where the relevant circumstances and available inferences about the weight of the s 93A evidence which are relevant to the real issues at trial must be obvious to the jury with reference to uncomplicated evidence and other directions, it will be unnecessary for the trial judge to give any such specific directions. This is such a case.

[59] The appellant argued that additional directions specifically referable to s 102 were required in this case by the delay between the alleged rape of A in January 2007 and A's first allegation of it in the police interview on 7 August 2007 (A not having alleged it in the first interview on 14 February 2007) and the delay between the appellant's alleged conduct in placing the vibrator against A's buttocks whilst A was awake and A's first allegation of that event on 29 August 2008, even though A had been shown the photograph on 7 August 2007. The appellant submitted that the latter allegation was critical because, if accepted, it supported the Crown case that it was the appellant rather than the "intoxicated paedophile Crawford" who had raped A. The appellant argued that a s 102 direction was mandatory in relation to the statements by C in his 30 August 2008 interview because that interview mirrored A's 29 August 2008 interview and might have led the jury to conclude that the appellant had a sexual interest in A and was therefore guilty of the alleged offences. The appellant also argued that A's omission to complain of the most serious offences in an early police interview was especially significant because the relative informality of the police interviews justified an inference that they were particularly conducive to full disclosure.

[60] Those arguments should be rejected. The trial judge gave the jury conventional directions about its duty to decide the facts upon the whole of the evidence and

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[14] *Alford v Magee* (1952) 85 CLR 437 at 466; *Fingleton v The Queen* (2005) 227 CLR 166 at 196 to 197.

referred to the distinction between the credibility of witnesses, concerning honesty, and the reliability of their evidence. In instructing the jury about the factors to be considered in deciding what evidence to accept, the trial judge expressly referred to the question whether a witness had said something different at an earlier time. Subsequently the trial judge referred to the preliminary complaints by A and B and quoted the relevant evidence. After further directions on that topic the trial judge specifically directed the jury to bear in mind that A's complaint to his mother related only to touching on the groin and taking photographs (counts 1 and 2) and that he made no complaint to his mother of the events surrounding counts 4, 5, and 6. The trial judge directed the jury that the fact that A made no mention of those events until some time later was relevant to the jury's assessment of A's credibility. Furthermore, in the course of separate directions upon count 4, the trial judge reminded the jury that defence counsel's cross examination had established that A had not said anything to the police about the events alleged in count 4 in A's police interviews on 14 February 2007 and 7 August 2007. The trial judge directed the jury that the fact that A had not mentioned that incident in the earlier interviews, "means you should scrutinise this aspect of his evidence before acting on it. You should scrutinise his evidence on this aspect very carefully."

[61] Similarly, in relation to count 5, the trial judge directed the jury that A had not referred to his having been given sleeping tablets in his first police interview on 14 February 2007 or his complaint to his mother on 12 February 2007. Again, in giving separate directions in relation to count 6, the trial judge reminded the jury that the subject of the photograph was discussed in the 7 August 2007 police interview and referred to statements by A in the 29 August 2008 interview. In the course of summarising defence counsel's submission, the trial judge reminded the jury of defence counsel's submission that A had "no memory of the vibrator for about 20 months", which was submitted not to be consistent with the doctor's evidence about the effect of the medication; that in A's first police interview he made no mention of the vibrator incident; that at the second police interview A had some recall; and then in the further interview on 29 August 2008, which was some 20 months after the event, defence counsel submitted there was a "miraculous improvement" in A's memory. The trial judge reminded the jury of defence counsel's submission that there was "an air of scripting" about the 29 August 2008 interview and defence counsel's submission that A didn't say anything to his mother even after he said that something had apparently happened to his sister. The trial judge directed the jury that if it had a reasonable doubt concerning the truthfulness or reliability of A's evidence in relation to one or more of the counts, whether by reference to his demeanour or for any other reason, that must be taken into account in assessing the truthfulness or reliability of his evidence generally.

[62] In light of those very clear directions, and bearing in mind the simplicity and short compass of the evidence which identified the dates and content of A's interviews with police and his pre-recorded evidence, the jury cannot have failed to appreciate either the potential significance of A's delay in alleging the events charged in counts 4, 5, and 6 or that the police interviews were relatively informal. As to the last point, whilst the police officer endeavoured to avoid excessive formality, the seriousness of the occasion and the necessarily difficult nature of such an interaction between a child and the police could not be avoided. The relatively greater formality of A's pre-recorded evidence (in which he gave detailed evidence of the most serious offences) was in part attributable to his having given that evidence under oath, a factor which has conventionally been regarded as adding weight to

such evidence.[15] This may explain why defence counsel did not ask the trial judge to give those directions specifically concerning the relatively greater informality of the police interviews which the appellant now contends were mandatory. Whether that is so or not, however, the omission to give such directions did not occasion any miscarriage of justice in circumstances in which the interviews were played to the jury, it was in a good position to consider the significance of the matters now advanced for the appellant, and the trial judge gave the extensive directions I have summarised.

[63] As to the evidence of C that he saw the appellant pulling his hand away from A's groin and that the appellant told C that it was all right for him to touch A, the trial judge directed the jury that it and other evidence identified by the trial judge was relevant to the issue whether the appellant maintained a relationship with A, which was an element of count 1. The trial judge directed the jury that this evidence could only be used if the jury accepted it beyond reasonable doubt and only if the jury was satisfied that the evidence demonstrated that the appellant had and was willing to give effect to a sexual interest in A. In that event the jury might think that it was more likely that the appellant did what was alleged in the charge under consideration, but that was a matter for it to determine; and it did not inevitably follow that the jury would find the defendant guilty of the relevant matter. The trial judge told the jury that such evidence came before it for the limited purposes mentioned and that before the jury could find the appellant guilty the jury must be satisfied beyond reasonable doubt that the charge had been proved by evidence relating to that charge. In the course of summarising defence counsel's submission, after the trial judge referred to A's failure to complain to his mother about events the subject of some of the counts the trial judge referred to defence counsel's submission that C's evidence "was likewise unreliable and inconsistent and you should not accept it."

[64] It again must have been obvious to the jury that C's 30 August 2008 interview was not contemporaneous with the events which he alleged. In that interview C said that the appellant told C not to be afraid to touch A. C had not made that allegation in his 30 July 2007 police interview. The extracts of the police interview which were tendered were very short, occupying less than half a page each in transcript form and C's evidence was also very short. The jury cannot have failed to appreciate the dates of those interviews, the differences upon which the appellant now relies, and the differences in the time which elapsed between each version and the events which C alleged.

[65] The trial judge fulfilled the duty of identifying the real issues and the relevant law and explaining to the jury how that law applied to the facts which were relevant to the issues. No further directions were required to ensure that the jury understood the law in s 102 as it applied to the relevant issues at trial. There was no miscarriage of justice.

Ground F: The learned trial judge erred in law by failing to direct the jury adequately as to the manner in which they ought to have approached the evidence of [A].

[66] Under this ground the appellant argued that even if s 102 did not mandate the directions for which the appellant contended, the trial judge's directions concerning

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15 See *Siedofsky* [1989] 1 Qd R 655 per Thomas J at 661.

the evidence of A were inadequate because of the omission to refer to the delay between A's allegation of the appellant placing the vibrator against A's buttocks, the failure of the photograph to prompt A's memory of that allegation, and the omission of a reference to A's statements to the police officer in A's first interview that the appellant did not touch him on the buttocks and that there was nothing else that the police officer should know about. These arguments fail for the reasons given in relation to ground E. The trial judge's directions sufficiently instructed the jury as to the relevant issues and appropriately reinforced the jury's obligation to scrutinise A's evidence very carefully before accepting it.

[67] This ground of appeal did not refer to directions about the evidence of B but the appellant argued that the trial judge erred in failing to direct the jury to take into account that her first complaint followed upon her brother's complaint in her presence and was not a complaint made independently by her. The evidence on those topics was, however, quite clear. Furthermore, in the course of giving the jury conventional directions about preliminary complaint evidence the trial judge reminded the jury that "it is contended on behalf of the defence, that [B] was, at least at some point during this conversation between [M] and [A], apparently overhearing at least part of it", and that when B first made her complaint about the appellant taking a photograph, B walked into the room and said that the appellant "did that to me too". Defence counsel did not seek a direction of the kind now advocated either in the discussion about appropriate directions before the summing up commenced or by way of any request for a redirection.

[68] The appellant also argued that the trial judge should have placed greater emphasis upon directions concerning the vagueness and internal inconsistencies of B's evidence. However the inconsistencies were obvious enough, the summing up reveals that defence counsel emphasised what were thought to be the significant inconsistencies, and the trial judge reminded the jury that inconsistencies in describing events were relevant to whether or not evidence about them was truthful and reliable.

[69] The trial judge's omission to give any further directions concerning the manner in which the jury should approach the assessment of the evidence referred to under this ground of appeal was not productive of any miscarriage of justice.

Proposed order

[70] For the above reasons I would dismiss the appeal against conviction in CA 52 of 2009.

CA 16 of 2010: Appeal against conviction

[71] The appellant was convicted on 22 January 2010 after a trial of three counts on indictment 60 of 2010: count 1, that between 15 December 2003 and 6 December 2006 the appellant maintained a sexual relationship with C, a child under 16 years; count 2, that the appellant raped C at Brisbane between 15 December 2003 and 1 May 2004; count 3, that the appellant raped C at Burpengary between 1 January 2005 and 1 January 2006.

[72] The ground stated in the appellant's notice of appeal is that the jury's verdict was unsafe and unsatisfactory. That invokes the ground in s 668E(1) of the *Criminal Code* that the verdict should be set aside on the ground that it is unreasonable or

cannot be supported having regard to the evidence. At the hearing of the appeal the appellant was given leave to rely upon the further ground that the learned trial Judge erred in law by failing to direct the jury in accordance with s 102 of the *Evidence Act* 1977 (Qld).

Summary of the proceedings at trial

[73] C (who was also a witness in the proceedings considered in CA 52 of 2009) was aged between 11 and 14 during the period of the alleged maintaining offence, 11 or 12 at the time of the first alleged rape in Brisbane, and 13 at the time of the second alleged rape in Burpengary. C's parents had separated before he and his mother met the appellant in December 1999 during a holiday at a caravan park. C and his mother continued to have contact with the appellant after the holiday ended, both by telephone and face to face. The appellant moved to a house at Wavell Heights in December 2003 while C was living at Deception Bay. C and his mother visited the appellant at the Wavell Heights house during 2004. C's mother gave evidence that these visits increased in the second half of the year when C developed an interest in riding motorbikes, which the appellant facilitated. C's mother gave evidence that she left C in the care of the appellant at his house in Wavell Heights only once, for about an hour, in the first part of 2004, but the effect of the complainant's evidence was that he was there without his mother and with the appellant for longer periods on other occasions.

[74] At the end of 2004 the appellant moved to Burpengary, close to where C lived with his mother. The frequency of C's visits to the appellant increased and by this time they had been going together on motorbike rides, usually on weekends. C's mother gave evidence that she was a careful parent and was vigilant about the people with whom C associated. She accepted in cross examination that her vigilance was reflected in the fact that she had not permitted C to stay overnight at the appellant's house in Wavell Heights and that, whilst the appellant lived at Burpengary, C was allowed to stay there overnight only whilst there were other adults present. However C's mother also gave evidence that the appellant visited C and his sister at home, including when they were in the care of their grandmother, without their mother's knowledge. She gave evidence that the appellant did not spend the night at C's house, but she also said that on a few occasions a child who was younger than C, A (one of the complainants in the proceedings considered in CA 52 of 2009), was at the appellant's house with C. C's mother later discovered that those children had stayed overnight at the appellant's house without any other adult on occasions when C's mother had thought that other adults would be present. C's mother regularly asked C whether anything inappropriate had occurred when he visited other people, including the appellant, and on each occasion C said that nothing inappropriate had occurred.

[75] A's mother gave evidence that A was picked up by the appellant nearly every second weekend, to go motorbike riding, and that on the majority of those occasions, the appellant told her that C was also over at his house.

[76] Crawford, a friend of the appellant's, visited the appellant's house at Burpengary after Crawford was released from custody for serious child sex offences. Crawford gave evidence that he met both C and A at the appellant's house. On the first occasion when Crawford went to the appellant's house the appellant rang C and invited him over to go motorbike riding. The appellant picked C up. Crawford said

that whilst he was talking to the appellant in the lounge room, the appellant pulled C's shorts across exposing C's penis. The appellant looked at Crawford and smiled. C left the room, apparently embarrassed. Crawford said that the appellant later showed him naked photographs of C in indecent poses when C was younger. The appellant showed Crawford a Polaroid camera and a little silver digital camera. In cross examination Crawford agreed that on 31 August 2008 he had told police that he had seen a photograph which appeared to have been taken in the back shed of the appellant's house in Burpengary, which showed a person bent forward and being sodamised. Crawford said the appellant told him that was a photograph of the appellant sodomising C. C did not give evidence of any such event. Crawford also said that the appellant told him that whilst the appellant was living at C's mother's house the appellant had sex with C whilst C's mother was not there. Again, C did not make such a complaint.

[77] On 11 February 2007 police executed a warrant at the appellant's home. The investigating police officer gave evidence that he found a small, silver, digital camera. No photographs were found. Crawford gave evidence that the appellant told him when the police had raided his house that the appellant had got rid of everything. (The evidence did not make it clear when the appellant claimed to have got rid of the incriminating material.)

[78] Recorded police interviews with A and C were admitted under s 93A of the *Evidence Act* 1977 (Qld). In a police interview with A on 14 February 2007, A told the police that on many occasions he had seen the appellant and C touching each other's genitals under their clothes, the last occasion being in about October 2006 before C went to visit his father who was then in China. In a police interview with C on 30 July 2007, C gave evidence to similar effect, that he and the appellant had touched each other's genitals on many occasions, the last sexual contact was in late 2006 before C went overseas, when the appellant put his hands down C's pants, and A would have seen that happen. Consistently with A's mother's evidence, C said that he visited the appellant regularly at the Wavell Height's house. C said that he used to see the appellant about two or three times a week. C said that he visited the appellant at the appellant's Burpengary house perhaps twice a month when they went bike riding. C described other indecent acts which the appellant had asked him to perform. C said that the appellant took a number of photographs of him naked both at the Wavell Heights house and at the Burpengary house. C said that the appellant used a Polaroid camera at Wavell Heights and a digital camera at Burpengary. C denied that the appellant had attempted anal penetration. C said that he had refused the appellant's request to suck C's penis. A was interviewed by police for a second time on 29 August 2008. A said that the appellant regularly asked A and C to touch each other but they both refused to do so.

[79] A and C gave pre-recorded evidence on 10 October 2008. A gave evidence that he had seen the appellant with his hand down C's pants and the appellant grabbing C's hand and putting it down the appellant's pants; and that the appellant asked A and C to touch each other and both of them refused. C gave evidence that both in the Wavell Heights house and the Burpengary house the appellant touched his genitals and he also gave evidence that the appellant asked him to touch A. He estimated that this occurred on a few occasions at each house, perhaps up to seven times in all. C said that the appellant had sex with him on two occasions, once at each house. The first occasion was at the Wavell Heights house in the bedroom on the appellant's water bed early in 2004 when C was 12 years old. The appellant told

C that he had done nice things for C, a reference to the appellant taking C motorbike riding, working on motorbikes, and watching motorbike racing on many occasions, and it was time for C to do "nice stuff" for the appellant. C protested but the appellant persisted. C described the following rape in detail. C said that the second occasion was at the Burpengary house in 2005 when C was at the appellant's house in connection with motorbike riding. C again protested but the appellant insisted that because he had done good things for C, C had to do something for the appellant. C said that he did not want to do it because it was very painful but the appellant insisted. C gave evidence that this occasion was a little bit shorter but a lot more painful. He described the rape in detail.

[80] C gave evidence that he had not earlier disclosed that the appellant had quite regularly told him not to tell anyone anything about what was going on and that if he did they would get into trouble. He said that he didn't mention in his statement to police on 30 July 2007 that the appellant had sex with him because it was embarrassing. The first person he told was a doctor in China. After seeing the doctor he got a bit scared so he decided to tell his mother, who told him that he would have to go to the police. He went to the police when he got home in August 2008. (C's mother did not corroborate his evidence that he disclosed the rapes to her at that time.)

[81] In cross examination C agreed that he did not tell his mother that he did not want to go to the appellant's house even though he did not like being sexually abused because he was afraid to tell people. C agreed that when he was in China in February 2007 he telephoned the appellant in response to the appellant's attempts to contact him. He said that he did not tell the police in July 2007 about the anal intercourse because he was afraid and embarrassed. He said that in an interview with the Crown Prosecutor on 4 August 2008 he told her that the sex occurred at the Wavell Heights house and at the Burpengary house: he disagreed with the suggestion that he did not mention Wavell Heights. (That evidence was inconsistent with an admission made by the Crown at trial that on 4 August 2008 C told the prosecutor that: "the sex occurred at Burpengary. That he was aged 11 to 13 and that it was about four months after moving into that house. [C] stated that the sex occurred twice." The Crown also admitted that C stated in the same conversation that the appellant would suck his penis.) C was cross-examined about his father being a homosexual, with a view to the suggestion, which he denied, that he had learned from his father a colourful expression about anal rape which he had attributed to the appellant. He said that he hadn't told his mother or anyone else about what was going on at the appellant's place because he was afraid to tell people. He repeated that he had not told the police about the anal intercourse because he was afraid and embarrassed and that he remembered that this had happened both at the Burpengary house and at the Wavell Heights house. He agreed that he had a long standing friendship with the appellant, who had taken him motorbike riding, taught him how to ride a motorbike, helped him to repair his motorbike, and spent a lot of time in his company. When he was pressed for details of the occasion of the sex at Wavell Heights he said that he had been trying to forget "this whole ordeal". He denied that he had become upset with the appellant when the appellant did not get him a more powerful bike and would not let him ride the small one because he didn't fit it properly. C adhered to his evidence in chief about the appellant's offences against him.

[82] Defence counsel's cross examination of Crawford established that he was a paedophile with convictions for serious child sex offences. Crawford had provided

a statement to police in 2007 and continued providing further information about the appellant. At the end of 2008 Crawford was convicted of offences himself and he gave an undertaking to give evidence against the appellant which resulted in Crawford receiving a lesser penalty than he otherwise would have received. He understood that his sentence would be increased if he failed to give evidence in accordance with his undertaking. The appellant knew that. Crawford gave the undertaking to obtain a reduction in his sentence. Crawford said that the appellant told him that on one occasion C's mother nearly discovered the appellant having sex with C at C's mother's house. (C did not give evidence of such an occasion). Crawford was not sure why he had not mentioned in his evidence in chief that in his statement to police of 31 August 2008, the appellant had shown him a photograph apparently taken in the back shed of the house in Burpengary which showed a person bending forward and being sodomised. Crawford was not charged with contravention of an order which prohibited him from keeping company with teenage boys, even though Crawford had told the police officer to whom he gave his statement that he was keeping company with teenage boys. (The police officer testified that Crawford had not told him that he was keeping the company of teenage boys in contravention of the order, although the police officer learned from Crawford that he was in the company of C whilst Crawford was with the appellant.) Crawford agreed that he drank and he smoked cannabis at the appellant's house at Burpengary and that made his memory worse and heightened his sexual desire for children. He denied having a fantasy about C but admitted that he had fantasies about other children of a different type. Crawford adhered to his evidence that the appellant had shown him a photograph of the appellant sodomising C and that C had stayed over night whilst Crawford was present.

[83] The appellant did not give or call evidence.

Ground 1: The verdict was unreasonable

[84] The question for the Court under this ground of appeal is 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 the offence.[16]

[85] The appellant argued that the deficiencies and contradictions in the evidence could not be explained by C's youthfulness or by his claimed embarrassment and fear of reporting his allegations. The appellant pointed to the significant discrepancy that C had denied anal and oral intercourse in the 30 July 2007 interview but on 4 August 2008 C had told the prosecutor that the appellant had performed oral intercourse on him twice at Burpengary. C contradicted this account in his pre-recorded evidence on 10 October 2008 when he said that anal intercourse occurred once at Wavell Heights and once at Burpengary and when he did not allege that the appellant had performed oral intercourse on him. The appellant submitted that this could not have resulted from confusion because in C's evidence he had given details which differentiated the rape at Wavell Heights from the rape at Burpengary. The appellant also referred to C's mother's evidence of her vigilance, including that she had left C alone with the appellant at Wavell Heights on only one occasion for one hour; C's years of denials to his mother that anything inappropriate had occurred; the fact that C continued to contact and visit the appellant despite the alleged painful anal intercourse; and the failure of police to find any indecent photographs of C. There was no medical evidence which corroborated C's evidence. The prosecution

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16 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 614 to 615.

did not call the doctor to whom C said that he had complained in China. C's mother did not give evidence which was consistent with the evidence of C that he had told her about the anal intercourse when he complained to the doctor in China in October 2007. Despite their return to Australia on 7 February 2008 the first complaint of anal intercourse was made some ten months later in August 2008. The appellant also pointed to weaknesses and inconsistencies in Crawford's evidence. The prospect that Crawford falsified evidence to garner favour with the police was very real. His evidence that the appellant had told him that a photograph showed the appellant sodomising C was inconsistent with C's allegations and Crawford did not mention it in evidence in chief or in cross examination until prompted to do so. Crawford's evidence that the appellant had got rid of the photographs after his house was searched made little sense. Crawford's assertion that the appellant told him that the appellant and C had showered together at the caravan park was irreconcilable with the evidence of C's mother that she was particularly vigilant in her supervision at that time. Crawford's claim that the appellant told him that the appellant and C regularly had sex at C's house was inconsistent with the evidence, particularly the evidence of C.

[86] Whilst there were some significant contradictions and discrepancies in the evidence, the verdict was supported by persuasive evidence. Acknowledging the evident danger of relying upon Crawford's evidence, there was support for C's evidence that there was a sexual relationship between him and the appellant in A's consistent evidence. Crawford's evidence of the photographs and the two different kinds of cameras used by the appellant was also consistent with similar evidence given by C. That evidence, taken together with the evidence of A's and C's mothers which threw doubt upon the effectiveness of their vigilance, provided a solid foundation for the jury to accept C's evidence that the appellant had and took advantage of opportunities connected with the appellant's facilitation of C's motorbike activities, to develop a sexual relationship with C. The same evidence supported C's explanation of why he did not report the appellant's misconduct to his mother and why he continued to visit the appellant despite the appellant's sexual abuse. The jury was entitled to accept and evidently did accept the evidence that the appellant corruptly established a disturbing and secretive sexual relationship with C. In that context there was nothing inherently unreliable about C's explanation that he was too afraid and embarrassed to report the appellant's sexual abuse of him.

[87] In relation to C's failure to disclose the two alleged rapes when first interviewed by police on 30 July 2007, it is relevant that C did not initiate that interview. It is evident from the terms of the interview itself that C appeared to be reticent and embarrassed. It was reasonably open to the jury to accept C's subsequent explanation in evidence about why he had not earlier disclosed the anal intercourse which he said had occurred once at Wavell Heights and once at Burpengary. The omission from his evidence of his allegation (made in his interview with the Crown prosecutor on 4 August 2008) of oral intercourse did not constitute a denial that it had occurred. His failure to have disclosed that earlier was also explicable for the reasons he gave in evidence.

[88] The discrepancy between C's statement on 4 August 2008 that the sex occurred at Burpengary, and his subsequent evidence on 10 October 2008 that it occurred once at Wavell Heights and once at Burpengary, is of more concern. However, reference to the evidence and the trial judge's direction reveals that this inconsistency, whether viewed alone or in the context of the other matters relied upon by the appellant, does not justify the conclusion that the jury's verdicts involved any

miscarriage of justice. The admission was in the following terms: "The Crown admits that on the 4th of August 2008 [C] had a conversation with [the Crown Prosecutor]. [C] stated to [the Crown Prosecutor] that the sex occurred at Burpengary. That he was aged 11 to 13 and that it was about four months after moving into that house. [C] stated that the sex occurred twice."

[89] The trial judge specifically drew to the jury's attention the discrepancy between C's 4 August 2008 conversation with the prosecutor and his evidence and quoted the relevant exchanges in C's cross examination. The trial judge told the jury that there was no reasonable doubt about the accuracy of the Crown's admission and that this was a significant inconsistency in C's evidence which the jury must consider in their evaluation of his evidence. Similarly, the trial judge directed the jury that it should bear in mind that when C was spoken to by the police on 30 July 2007 he was asked a direct question about anal intercourse and he denied that occurred, and that although in C's evidence he affirmed the truth of what he said in his interview he went on to describe the two acts of anal intercourse the subject of the charges. The trial judge also drew to the jury's attention the other inconsistencies in the evidence upon which the appellant now relies, including the absence of evidence from the doctor in China as well as C's mother's evidence that C did not ever say anything to her about what was happening. Having isolated the relevant inconsistencies, the trial judge directed the jury "to scrutinise [C's] evidence carefully" and to act on his evidence only if, after considering it and all the other evidence in the case, the jury was convinced that his evidence was truthful and accurate.

[90] Bearing those directions in mind, it remained open to the jury to discount the significance of the admission about C's conversation with the prosecutor which, though it conveyed that C told the prosecutor that sex had occurred twice at the Burpengary house, did so very briefly and with no detail of either event. The admission also did not expressly state that anal intercourse had not occurred at the Wavell Heights house. C gave clear and apparently compelling evidence that sex occurred at both places. He described each event in detail, differentiating between them. It is appropriate in this case to assume that the jury complied with the trial judge's directions, took into account the inconsistencies upon which the appellant now seeks to rely, and nevertheless accepted that C's evidence of the two rapes was accurate.

[91] The trial judge gave similar directions in relation to A's evidence.

[92] In relation to Crawford's evidence that the appellant had exposed C's penis to him and showed him photographs depicting C naked, the trial judge directed the jury that it could only accept C's and Crawford's evidence about sexual matters which were not specifically charged if the jury was satisfied that the evidence demonstrated that the appellant had a sexual interest in C and had been willing to give effect to that interest by doing those other sexual acts; in that event the jury might be satisfied that it was more likely that the appellant did what was alleged in the charges, but that would not inevitably follow and the jury must decide whether the offence charged had been established beyond reasonable doubt.

[93] The trial judge again referred to the matters upon which defence counsel relied as inconsistencies in the course of summarising defence counsel's submissions.

[94] The jury retired shortly before the end of the third day of the trial. Shortly after lunch on the fourth day of the trial the jury asked to be reminded of some of the

evidence, including C's mother's evidence about visits to the appellant's house at Wavell Heights, the questions and answers in C's 30 July 2007 police interview regarding visits to Wavell Heights, and to view again the pre-recorded evidence of C of 10 October 2008. After hearing submissions from the prosecutor and defence counsel, in which the relevant parts of the evidence were identified, the trial judge directed the jury to take into account that their verdicts must be based on a consideration of the whole of the evidence and that they should not give the evidence of C any additional weight merely because they would be seeing it a second time. The trial judge then read out the relevant parts of the transcripts and a tape of C's evidence was played. The jury returned verdicts at the end of the fourth day of the trial.

[95] There were some significant inconsistencies in the evidence as the appellant contended, but those inconsistencies were in many respects explicable by reference to C's youthful age and the disturbing nature of his relationship with the appellant of which he gave evidence. In context the inconsistencies did not together amount to such significance as to preclude acceptance of the substance of C's evidence, which was corroborated in some important respects by the evidence of Crawford and A. The trial judge's directions clearly drew the jury's attention to the inconsistencies in the evidence and no objection was taken to those directions by defence counsel. The jury's request after it had retired indicates that it conscientiously sought to fulfil its duty.

[96] For the reasons I have given, it was reasonably open to this properly directed jury to find that the appellant was guilty beyond a reasonable doubt of each of the offences charged against him.

Ground 2: Failure to direct in terms of s 102 *Evidence Act* 1977 (Qld)

[97] Under this ground the appellant and respondent relied upon the arguments summarised in paragraphs 53 to 55 of these reasons. For the reasons given in paragraphs 56 to 58, the question whether particular circumstances and inferences adverted to in s 102 concerning the weight of evidence admitted under s 93A of the *Evidence Act* 1977 (Qld) must be specifically called to the jury's attention by the trial judge must depend upon the circumstances of the particular case.

[98] In the circumstances of this case s 102 did not require any direction in addition to those given by the trial judge. As to the statements of A which were admitted pursuant to s 93A, the trial judge correctly referred to those statements being made in police interviews and reminded the jury of their dates in February 2007 and August 2008. In the same passage the trial judge referred to A's pre-recorded evidence given in court in October 2008. It must have been obvious to the jury that A's statements were made well after the events to which they related. Any reference by the trial judge to the other matter specifically identified in s 102(b), the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts, would likely have worked only to the prejudice of the appellant. It was not suggested that A had any incentive to conceal or misrepresent the appellant's sexual misconduct towards C which A described.

[99] The appellant referred also to the fact that it was not until 29 August 2008, in a second police interview, that A made statements that the appellant asked A and C to touch each other. As to that, the trial judge directed the jury that one of the factors to be taken into account in assessing the evidence of a witness was whether the

witness had said something different at an earlier time. The trial judge observed that: "Obviously the reliability of a witness who says one thing one moment and something different the next about the same subject matter is called into question. In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it." The trial judge told the jury to be aware of such discrepancies or inconsistencies and, where the jury found them, to "carefully evaluate the testimony in light of the other evidence". The trial judge specifically drew the jury's attention to the particular dates upon which A made his statements to the police and accurately summarised the substance of what he said on each occasion. It must have been obvious to the jury that A did not state that the appellant asked him and C to touch each other until 29 August 2008, which the jury certainly must have appreciated was a considerable period after the events in question.

[100] In relation to the police interviews of C, the appellant's senior counsel accepted in the course of argument that there was a comprehensive "*Robinson* direction"[17] which appropriately drew attention to the inconsistencies upon which the appellant now relies. The submission was that s 102 required an additional direction, drawing attention to the relative informality of the police interview, compared with the pre-recorded evidence, and that this was rendered all the more necessary because C's explanation for denying that the appellant had raped him and not disclosing that until after the police interview was that he was embarrassed. The particular direction which was submitted to be required was not expressed, but it would presumably refer to the facts that towards the beginning of the 30 July 2007 police interview the police officer told C that he was only interested in things that had actually happened and things that he actually saw, and not in anything that was a lie or made up; and that C did not take any oath or affirmation for the purposes of that interview. It was not necessary for the trial judge to remind the jury of those matters, or the suggested degree of informality of the police interviews, which the jury heard for itself. Such directions might also have led to undue emphasis upon the fact that the most serious allegations were made in detail in C's pre-recorded evidence which, unlike the police interviews, was evidence given under oath.[18]

[101] The trial judge's directions drew the jury's attention to each of the inconsistencies upon which the appellant now relies and required the jury to take into account those inconsistencies in assessing his evidence. Those were the matters which defence counsel emphasised at trial and the trial judge's directions appropriately reflected those issues. Defence counsel did not ask the trial judge to give any direction of a kind which is now said to have been mandatory.

[102] In these circumstances there was no miscarriage of justice.

Proposed order

[103] I would dismiss the appeal against conviction in CA 16 of 2010.

CA 52 of 2009 and CA 16 of 2010: Application for leave to appeal against sentence

[104] At the conclusion of the first trial, when the appellant was convicted of the charges in indictment 2696 of 2008, at the request of the parties the sentence was adjourned until the conclusion of the trial of the offences in indictment 60 of 2010.

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17 *Robinson v The Queen* (1999) 197 CLR 162.

18 C.f. *Siedofsky* [1989] 1 Qd R 655 per Thomas J at 660 to 661.

[105] In relation to indictment 2696 of 2008, the trial judge sentenced the appellant to concurrent terms of imprisonment of 15 years on counts 1 and 6, 10 years on counts 4 and 5, and eight years on counts 2 and 3. The sentencing judge declared pursuant to s 161B of the *Penalties and Sentences Act* 1992 (Qld) that the convictions on counts 1, 4, 5 and 6 were convictions of serious violent offences. In relation to indictment 60 of 2010, the trial judge sentenced the appellant to concurrent terms of imprisonment of 15 years on each of counts 1, 2 and 3. The period of 1,079 days which the appellant spent in pre-sentence custody from 15 February 2007 until the date of sentence, the 29 of January 2010, was taken into account but not declared to be imprisonment already served under the sentence.

[106] In imposing those sentences the trial judge took into account very serious circumstances of the appellant's offending and his relevant criminal history. He had previously been imprisoned for sexual offending against children both in Victoria (in 1993 when he was 23 years old, he was re-sentenced, on appeal, to three years imprisonment) and in Queensland (in 1999, when he was sentenced to four years imprisonment). The appellant was between 34 and 37 years old when he committed the offences in these matters and he was 40 years old when he was sentenced. The trial judge analysed the evidence in these trials and concluded that the appellant manoeuvred his way into the children's families with a view to creating opportunities to sexually abuse the young boys. He was a deviant, persistent, predatory sex offender and represented a serious danger to the community.

[107] It is unnecessary to discuss the sentencing remarks in more detail because the appellants' written submissions confirmed the statement in the grounds of the appellant's application for leave to appeal against sentence that if, as I would hold, the convictions on all counts were upheld, the appellant sought leave to appeal only against the sentences of eight years' imprisonment imposed for counts 2 (concerning the indecent photograph of A) and 3 (concerning the indecent photograph of B) in indictment 2696 of 2008.

[108] As those sentences were ordered to be served concurrently with the other much longer terms of imprisonment for more serious offences any reduction in their length will not affect the effective overall sentence. The appellant argued, however, that those sentences should nevertheless be reduced. The appellant argued that the eight year terms of imprisonment for counts 2 and 3 in indictment 2696 of 2008 were manifestly excessive. The appellant contended that the appropriate sentences did not exceed four years' imprisonment. In the appellant's submission the sentences imposed failed properly to take into account the nature of the photograph in each case and the circumstances in which the photographs were taken, which the appellant submitted included that each complainant was photographed separately after the appellant encouraged them to be confident about their bodies, there was no violence, and the photographs were not distributed.

[109] I would reject, as the jury presumably rejected, the appellant's self-serving and obvious lies to the children that his indecent treatment was designed to improve their confidence in their bodies. Even so, and although the maximum penalty for the indecent treatment offences charged in counts 2 and 3 is 20 years' imprisonment,[19] the respondent appropriately conceded that the sentence of eight years' imprisonment on count 3 is difficult to support when the appellant's taking of the indecent photograph of B was an isolated offence, at least so far as she was

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[19] s 210(3) and (4) *Criminal Code* 1899 (Qld).

concerned. The respondent argued that a more severe sentence was appropriate for the offence in count 2 against A because the appellant took that photograph against a background of abuse and for the appellant's sexual gratification and disclosure to others, so that this was a serious example of the offence.

[110] In relation to both counts, the sentence imposed upon the appellant should be more severe than otherwise would be appropriate for an offender who did not engage in similar conduct as part of a pattern of behaviour designed to further other and even more serious offending and who did not have the appellant's relevant criminal history. Accepting so much, the sentence of eight years' imprisonment for that single offence seems excessive, both in its own terms and in comparison with the proper sentences imposed for the other more serious offences. The trial judge's sentencing remarks do not explain the reasons for the severity of these sentences, presumably because they have no particular bearing upon the effective period of imprisonment imposed upon the appellant. In the circumstances which I have summarised, the appropriate sentences appear to me to be four years' imprisonment for count 2 and three years' imprisonment for count 3.

Proposed orders: appeals against conviction and application for leave to appeal against sentence.

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

1. Dismiss the appeals against conviction in CA 52 of 2009 and CA 16 of 2010.

2. Grant the appellant's application for leave to appeal against sentence only to the extent of allowing the appeal against the sentences imposed for counts 2 and 3 in indictment 2696 of 2008.

3. Vary those sentences by substituting sentences of four years' imprisonment for count 2 and three years' imprisonment for count 3 in indictment 2696 of 2008.

[112] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with those reasons and the orders proposed by his Honour.

[113] **MULLINS J:** I agree with Fraser JA.