SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nijamuddin* [2012] QCA 124
PARTIES:	**R** **v** **NIJAMUDDIN, Arif** (appellant)
FILE NO/S:	CA No 51 of 2011 DC No 390 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	15 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2012
JUDGES:	Margaret McMurdo P and Fraser JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed.** **2. The verdict of guilty on count 1 is set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where appellant pleaded not guilty to two counts of indecent treatment of a 14 year old girl – where he was convicted of grabbing complainant's right breast (count 1) but not touching her genital area (count 2) – whether the jury verdict was unreasonable or not supported by the evidence – whether the guilty verdict on count 1 was inconsistent with the not guilty verdict on count 2 CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where a video recording of the complainant's pre-trial evidence was marked as an exhibit – where the exhibit was allowed into the jury room during their deliberations – whether the provision of the exhibit to the jury was an irregularity and an error

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the prosecution alleged that the appellant had lied during a police interview out of a consciousness of guilt – where the trial judge directed the jury as to the lies – whether the direction constituted an error of law

Criminal Code 1899 (Qld), s 632, s 668E

Broadhurst v The Queen [1964] AC 441; cited
De Jesus v The Queen (1986) 61 ALJR 1; (1986) 22 A Crim R 375; [1986] HCA 65, cited
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, discussed
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, distinguished
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: P E Smith, with K M Hillard, for the appellant
B J Power for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, a 28 year old taxi driver and student, pleaded not guilty in the District Court at Southport to two counts of indecent treatment on 11 June 2010 of a child, a 14 year old female passenger in his taxi. On 24 March 2011 he was convicted after a two day jury trial of the first count (grabbing the complainant's right breast) and acquitted on the second (touching her genital area inside her underpants). He was sentenced to six months imprisonment suspended after three months with an operational period of 12 months. By the time of the appeal hearing, he had served his actual custodial sentence. He has appealed against his conviction on three grounds. The first is that the verdict of guilty on count 1 was unsafe and unsatisfactory (that is, it was unreasonable or cannot be supported having regard to the evidence under s 668E *Criminal Code* 1899 (Qld)) and inconsistent with the verdict of not guilty on count 2. The second is that there was a fundamental defect in the trial process in the complainant's pre-recorded evidence being provided to the jury during deliberations. The third is that the judge erred in directing the jury as to the issue of lies.

[2] Before discussing these grounds of appeal, it is necessary to refer to the evidence at trial, aspects of the judge's directions to the jury, and the circumstances of how the pre-recorded evidence came to be provided to the jury.

The evidence at trial

[3] The prosecution case turned largely on the complainant's evidence which included her two interviews with police, the first on the evening of the alleged offences on 11 June 2010 and the second five months later on 11 November 2010. They were tendered under s 93A *Evidence Act* 1977 (Qld) as her evidence in chief. She also gave brief pre-recorded evidence (mostly cross-examination) under Pt 2 of Div 4 *Evidence Act* on 14 January 2011.

The complainant's interview with police on 11 June 2010

[4] In her first police interview she gave the following account. She "was very uncomfortably touched in a cab by an Indian cab driver". She was returning from Brisbane and left the train at Helensvale at 6.29 pm. She saw some girls she knew at the train station. She did not get along with them. She phoned her mother and asked her to pick her up. Her mother said that she had been drinking and could not drive and told her daughter to take a taxi. The girls screamed at her and one of them hit her. As soon as a taxi pulled up, she sat in the back. One of the girls sat in the front passenger seat and told the taxi driver that the complainant had no money and would "jump" his cab. To show the driver this was untrue, the complainant took $20 from her purse and showed it to the taxi driver. The girl in the front grabbed the $20 note and fled. The complainant told the taxi driver she had more money and asked him to drive off.[1] He drove away from the station. He invited her to get in the front seat and she complied. As he drove, he sympathised with her predicament and asked her where she wanted to go. She said she wanted to go home. He asked if she was hungry and offered to get her something to eat. She declined, but he insisted. He was driving in the opposite direction to her home and she asked him to turn the taxi around. He complied. The taxi meter was off.

[5] They began to talk. She told him she was born in Australia but grew up in New Zealand. He asked how old she was and she told him she was 14. He said that a lot of New Zealand girls were "quite big or with really big boobs and everything". He asked her why she did not have "big boobs". He grabbed her right breast and she "kind of like grabbed him, pushed him away". Later she added that he said that New Zealand girls were "pretty hot" and usually they have "really big boobs and everything". He asked her if she would mind if he touched hers. She told him that it was "kind of like, inappropriate". She tried to "look smart and everything". He grabbed her breast. She responded, "OK, that's not cool" and pushed his hand off a little bit. He apologised and said he did not mean to "freak her out". She told him she just wanted to go home. The touching felt disgusting but did not hurt (count 1).

[6] He said he was "a really good guy" and apologised if he made her feel uncomfortable. He asked if she was scared. She told him she was not scared but she felt uncomfortable. She was thinking of everything that had happened that night and began to cry. Her jaw was sore and swollen. He felt her face. She told him she was OK and pushed his hand away. He began by "cuddling" her knee and patting it then rubbing it and then began to rub up and down her leg. He moved a little bit higher. He was rubbing with his left hand and holding the steering wheel with his right. He sympathised with her and said "it's alright, don't worry". He told her that the people she was hanging out with were bitches and that she did not need that. She at first ignored his rubbing of her leg as she did not want to offend him and

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1 In her pre-recorded evidence, the complainant said she told the taxi driver she had no more money left, see AR 21.

hoped he would stop. He put his hand a little bit further up her leg inside her pants. This episode only took about 30 seconds. Out of nowhere he "kind of dove like, he just put his hand … inside my pants and my underwear". She pushed him off and started "kind of screaming". In answer to a leading question, she said he touched her vagina but she earlier said that he did not put his fingers inside her but just touched her skin (count 2).

[7] She pushed him back and told him to "fuck off" and to pull over as she was getting out. At first he refused. He told her she had to repay him somehow. As he slowed down, she opened the door, jumped out and ran home crying. She told her mother what happened. Her mother called the police.

[8] She did not consent to either touching and let him know on both occasions that she was not comfortable with it.

The complainant's interview with police on 11 November 2010

[9] Police interviewed the complainant again on 11 November 2010. When questioned about count 2, she added that "he didn't really get in too far cause [she] kind of pushed him away … [b]efore anything else happened". He did not really touch her vaginal area but she thought he got pretty close to it, touching skin inside her underwear. She marked on a drawing of a body that he touched her in the middle and top of the pubic bone.[2]

The complainant's pre-recorded evidence

[10] The complainant gave evidence at a preliminary hearing on 14 January 2011. This evidence was recorded and the CD containing it was played at the trial. The primary judge, unrequested by counsel had the CD marked as an exhibit.[3] Counsel did not object. The pre-recorded evidence, which was admissible at trial under s 21AK and s 21AM *Evidence Act*, included the following.

[11] The complainant gave her date of birth and stated she was 15 years old. She confirmed she gave an interview to police about this incident on 11 June 2010 which was her recollection of what happened. She gave a second interview to police on 11 November 2010 to clarify where the appellant had placed his hand in the area of her groin.[4] She marked where the appellant touched her groin on a diagram.[5] What she told the police on 11 November 2010 was her best recollection of what had happened on 11 June 2010.

[12] In cross-examination she said that Euni, an old friend, was one of the girls who attacked her at the railway station and then stole her money. Euni and her friends had been drinking but the complainant was perfectly sober. She stayed at a friend's house in Brisbane the previous night. She thought her mother would be angry with her when she got home as she had stayed out longer than planned. She told the appellant that her mother would pay him when she got home and that she just needed to get home. He said that he did not need any money and he had seen everything. She maintained that the appellant offered her a free ride and talked about New Zealand girls having "big boobs". She denied telling him that one of the

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2 Exhibit 3.
3 Exhibit 4.
4 Exhibit 2.
5 Exhibit 3.

girls had struck her in the chest area; he did not put his hand on the upper part of her chest where she indicated she had been hit. She then conceded that at first he put his hand high on her chest but within a few seconds he moved it down to feel her breast. She was unsure whether he touched her left or right breast. Defence counsel suggested that the appellant asked her to move from the back of the taxi into the front because he was concerned she might vomit. She responded that he may have been concerned about this but he did not say so. He simply pulled over to the side of the road and said, "come and jump in the front". She could not remember if he gave any reason. She maintained that he touched her in the crotch or vagina area.

[13] When she telephoned her mother from the train station, she knew she was in trouble but her mother was not angry and said to "make it home safe and then we'll talk about it". She did not think she was "in real trouble" with her mother. She "would never make up something this bad just to get out of trouble".

[14] Defence counsel asked her if she had seen the taxi CCTV footage. She agreed that it did not show the appellant touching her in the pubic area. She added that, from what she had seen, "the cameras only go up to about shoulder height". She also agreed that there was nothing in the taxi CCTV footage which supported her claim that she was screaming at the appellant and pushing him away after she claimed he had touched her in the pubic area.

[15] The prosecution did not re-examine the complainant.

The evidence of the complainant's mother

[16] The complainant's mother gave the following evidence. The complainant had originally arranged to arrive by train from Brisbane at Helensvale at about 5.30 pm and to then catch a bus home. The complainant texted that she had had a fight with her girlfriend and asked her mother to pick her up. The mother was having a drink and thought it prudent not to drive; she needed her licence for her work. The mother agreed that the complainant should catch a taxi home. When the complainant arrived home at about 7.00 pm she was extremely distressed, trying to catch her breath and crying. The mother asked her what was wrong and what happened. The mother expected that the taxi would be waiting outside for payment. The complainant said, "the taxi, he grabbed me". She indicated with her hands on her breast and crotch in one movement. She was extremely upset. The mother said she would have to call the police. The complainant adamantly agreed. The complainant told her she had jumped out of the taxi whilst it was still moving and ran home. She was crying and had a shower. Police arrived within 15 minutes and they interviewed the complainant later that evening.

[17] In cross-examination, she confirmed she did not speak to her daughter by phone from the train station; they communicated by text messages. She texted the complainant that she would pay for the taxi when the complainant got home.

The police evidence

[18] Police officer Corby gave evidence including the following. He investigated this complaint. He recorded the interviews with the complainant on the evening of the alleged offence and six months later on 11 November 2010. He obtained digital images from a video surveillance system fitted to the taxi driven by the appellant when the complainant was a passenger. After obtaining video surveillance from Queensland rail and making enquiries of the taxi company, he located the appellant at his home and interviewed him.

[19] In cross-examination, he agreed that he did not obtain enough information from the complainant to positively identify any of the girls who upset and assaulted her at the railway station earlier on 10 June 2011.

The taxi CCTV footage

[20] The taxi CCTV footage was tendered.[6] It recorded images every few seconds but there were longer breaks, the filming being activated by braking and other actions of the driver. It showed the complainant entering the back seat of the taxi. Another girl in the front of the taxi took the complainant's money. The complainant was upset. The appellant gestured towards her with his hand. They drove off. She moved through the middle of the two front seats into the front passenger seat. She was crying and wiping her eyes and nose. She spoke to the appellant and smiled at him from time to time. The appellant reached over with his left hand towards the complainant with his hand above her right arm. The footage did not show whether he touched her. The complainant was wearing a seatbelt. Towards the end of the trip she seemed to become more upset and to cry. When she got out of the taxi it seemed to be stationary. The footage did not depict the appellant touching the complainant on the leg or in the vicinity of her shorts; it showed the complainant only from the hip or waist up.

The police interview with the appellant

[21] The appellant's flatmate, Mr Coothall, a psychologist, was present during the police interview.

[22] The appellant was a citizen of Bangladesh and his first language was Bengali. He was in Australia on a student visa. When the police officer asked him to come to the police station for a formal interview, he appeared to faint. An ambulance was called and the interview suspended. Later, the interview continued and the appellant gave the following account.

[23] He picked up the complainant in his taxi from Helensvale station the previous night. She had been in a fight with other young people there. They were hitting each other. She got into the back seat. Two other girls almost came into the taxi and tried to hit her. One of the girls entered his taxi and told him that the complainant did not have any money and not to take her. The complainant said she had money and asked him to drive off because they were trying to hit her. The complainant took out a $20 note and the girl in the front took the money, got out and tried to hit the complainant. He drove off as "a favour" to the complainant. He asked if she would sit in the front to make sure she was alright. He offered to drop her home. The complainant told him to stop a little bit before her house and he complied. She said she was from New Zealand and that she was 14. She was hungry and he offered her $5 for food and to drive her to McDonald's. As he did not see any McDonald's he dropped her home.

[24] The prosecution relied on the following exchange as showing that the appellant had lied out of a consciousness of guilt:

> "SCON CORBY: Okay. Now ah along that, after you turned over she says that you ah touched her on the breast with your ah left hand as you were driving along.
> [APPELLANT]: I didn't. I touched her?

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6 Exhibit 8.

SCON CORBY: Yeah. Touched her on the breast?
[APPELLANT]: No, she was touching herself. She was like, she said I has [INDISTINCT] pain. She's, they probably, she got a [INDISTINCT] in there, there. She was sort of just saying me all these things. I didn't--
SCON CORBY: Yeah.
[APPELLANT]: Touch anything at all.
SCON CORBY: So you didn't touch her at any stage?
[APPELLANT]: No, I just like driving. And she [INDISTINCT] said um so what happened she said she was crying and she was touching herself.
SCON CORBY: Yeah.
[APPELLANT]: And I said what happened mate. And she said no they hurt me in there.
SCON CORBY: Yeah.
[APPELLANT]: That's alright. [INDISTINCT] is it a [INDISTINCT] pain? She said yeah just a little bit sore. And that's what she [INDISTINCT] I just pointed [INDISTINCT] there. I said it is there it hurts?
SCON CORBY: Yeah.
[APPELLANT]: She said yes. I just, alright, I just like, that was in like when, just before she got home.
SCON CORBY: Okay. So you pointed at her?
[APPELLANT]: I just like, I [INDISTINCT] is there. And I s-, point [INDISTINCT] myself, is it I there?
SCON CORBY: Yeah.
[APPELLANT]: She said no the other side.
SCON CORBY: So you pointed at yourself?
[APPELLANT]: My [INDISTINCT] there.
SCON CORBY: You didn't point--
[APPELLANT]: No.
SCON CORBY: At her?
[APPELLANT]: No, no, nothing at all. I just like talking to her. 'Cause she was crying.
SCON CORBY: Okay.
[APPELLANT]: And she's just like, you know, just she, they hurt me on the face and stuff.
SCON CORBY: Okay, alright. Um she says that as she, she was getting closer to ah the, her house--
[APPELLANT]: Yes.
SCON CORBY: Where she got out of the taxi, that you reached over and started rubbing her leg, um and then that you put her, your hand down ah her pants inside her ah, her underwear, and touched on the vagina.
[APPELLANT]: It just, no, it didn't happen anything.
SCON CORBY: It didn't happen?
[APPELLANT]: Nothing [INDISTINCT] nothing at, at all [INDISTINCT].
SCON CORBY: Okay.
[APPELLANT]: What I'm saying, I just touched myself.
…

> SCON CORBY: … Did it, did at any time you touch her at all?
> [APPELLANT]: No, nothing, just didn't happen, nothing at all.
> SCON CORBY: Okay. Did you reach over with your left hand?
> [APPELLANT]: No, no.
> SCON CORBY: Okay.
> [APPELLANT]: Nothing. I just like drivings like this.
> SCON CORBY: So you, so you, you, obviously there's no video camera here. But you're indicating your hands were pretty well on the wheel?
> [APPELLANT]: Yes.
> SCON CORBY: Is that what you're saying or?
> [APPELLANT]:Yes. I just like driving like this.
> SCON CORBY: Yeah.
> [APPELLANT]: And it just didn't happen like. Um she just explained to me everything like, you know, she, they hurt her in there and there, that's all [INDISTINCT].
> … "

[25] The appellant denied touching the complainant on the breast. She was crying and touching herself. He asked her what happened. She responded "they hurt me in there" and that she was "just a little bit sore". He pointed and asked her if it hurt there and she said it did. He was talking to her because she was crying. She said they hurt her "on the face and stuff".

[26] He denied touching her on the leg, rubbing her leg, or putting his hands inside her underpants and touching her on the vagina. He denied touching her at all. He said that he touched himself. She said she was hurt. He told her to let him know if she needed anything like water or if she needed to "spew". She said she was alright. She asked him to pull over, probably close to her house. She got out and walked away. He denied reaching over towards her with his left hand. He was just driving the cab. He did not turn on his meter because the girl's money was taken by her friends. She said that she lived with her parents. He advised her to just go home and have a sleep. He agreed he travelled in the wrong direction but this was only until he realised he was on the wrong road. He asked her if she was scared and she said she was not. He told her he had taken the wrong street and he would turn around. When he realised he had gone the wrong way he wanted to reassure her that "everything is safe". She told him that the girls had hurt her. She demonstrated how they grabbed her around the throat. It was then that he pointed to his own throat asking whether she was hurt there and she agreed.

[27] He did not know why she had made a complaint against him as he did her a favour when her friends could have bashed her.

[28] Police officer Corby agreed in cross-examination that he had seen the taxi CCTV footage before he interviewed the appellant and did not disclose to him that it showed him moving his left hand towards the complainant.

The defence case

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

Relevant aspects of the judge's directions to the jury

[30] The judge early in his directions to the jury set out what the prosecution contended was a lie by the appellant demonstrating a consciousness of guilt:

> "The Crown here are relying also upon a lie, which it says the [appellant] told in his interview with the police officer. It says it can establish that what he said - and I'll refer to it - it can establish that is a lie by reference to the images taken from the taxi camera. Now, normally lies go - if you are satisfied that the person has told lies, and told lies deliberately, normally lies will go only to the credit of a witness. And you might think that somebody who tells lies has less credibility and is less credible as witness. *In certain circumstances, and the Crown submits this is one, a lie can go further, and can amount to an admission of guilt on the part of the person telling the lie. … .*" (emphasis added)

[31] His Honour explained that the defence case was that the prosecution had not proved the appellant committed the two offences and that in light of his record of interview with police they would at least be left in doubt about his guilt on both charges. The complainant may have made up allegations to escape getting into trouble with her mother. Once having made the complaint, she was unable to back away from it. Why would the appellant touch the complainant in this way when he knew there was a camera in the taxi? The jury would not be satisfied that the appellant lied to police or that he did so out of a consciousness of guilt.

[32] The jury must approach each charge separately. If they had a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one count, whether by reference to her demeanour or for other reasons, that must be taken into account in assessing the truthfulness or reliability of her evidence generally. They should approach her evidence with great care and caution and scrutinise it carefully, only acting on it to convict the appellant if satisfied of its accuracy and reliability beyond reasonable doubt. They needed to be satisfied of its accuracy and reliability beyond reasonable doubt before they could convict. His Honour continued:

> "It is important in cases such as this to see whether there is evidence which corroborates or supports, in a material particular, the evidence of the complainant.
>
> Corroborative evidence is evidence which supports – which confirms, supports or strengthens the evidence of the complainant in that it renders it more probable. It's evidence which confirms, in some material particular, that the offences took place and that the [appellant] was the man who committed them.
>
> Now, the Crown says here that so far as the - count 1 is concerned the image from the taxi camera of the [appellant's] arm going across to his left towards where the complainant was sitting is evidence which corroborates the account of the girl in relation to count 1.
>
> He says - the Crown also says that, 'And you should look at the image shown to you by [defence counsel] up here of the arm going over there.' Does that support or confirm the evidence that the girl gave about what she said the [appellant] did to her or not?
>
> *That evidence is also relied upon as establishing the lie, because the Crown says to you that the* [appellant] *lied about doing that, the lie is proved by the camera in the taxi and that that lie, if you find it to be*

> *a lie, can amount to corroboration and also an admission by the* [appellant]." (emphasis added)

[33] His Honour then dealt with the mother's evidence of the complainant's distress before again returning to the alleged lie:

> "… The Crown says that this is the lie: the [appellant] said in his interview with the police officer - he was asked, 'Did you reach over with your left hand?' 'No, no.' The Crown says the lie is that he did not reach over to the complainant - towards the complainant with his left hand in the context of the complainant's allegation that he touched her on the breast as he was driving along and that he would have had to have, you know, put his left arm out to touch her. The Crown says that in the context of that allegation which was put to him by the police officer the lie is that he did not reach over to her with his left hand.
>
> Now, the Crown says the lie is proved by the image from the taxi camera. Now, it's up to you, what does that image show? Is it just a gesture towards her or is it a reaching over to touch her? Is what the [appellant] said, namely, 'No, no, I - no, no, I didn't reach over with my left hand.' Is that a lie or not? The defence says it's not. The Crown says it is. It's a matter for you in the context to determine whether that is or is not a lie and to determine whether it is or is not you consider all of the evidence, but, in particular, this image, the image from the taxi camera which shows him extending his left arm towards where the complainant would have been.
>
> If you determine that it is a lie do you consider it relevant only to his credit or does it go further? The Crown says here, well, it's relevant to his credit, but here it also goes further and it means two things: it corroborates her, the complainant's version, and it also is an implicit admission of guilt on his part, because if he had told the truth, if he had said, 'Yes, I did put my hand out towards her.' he would know the truth would implicate him. So he told a lie, said, 'I didn't extend my hand towards her.' That's the way the Crown puts it.
>
> *See, ordinarily the telling of a lie will merely affect the credit of the witness who tells it. A lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence and amount, therefore, to an implied admission of guilt. In this way the telling of a lie may constitute evidence. When it does so it may amount to corroboration*. Here it would only be corroboration in relation to the first count, because it's in relation to that that it's said to be related to.
>
> *So the prosecution relies upon what it says to be a lie and it's a matter for you as to whether it is or is not as showing that the* [appellant] *is guilty of the offence in count 1*.
>
> Now, before you can use the evidence that way you must be satisfied of a number of matters and unless you are satisfied of all of these matters, then you can't use the evidence against the defendant otherwise than as relevant to credit, possibly.

First, you must be satisfied that the [appellant] has told a deliberate untruth. Now, there's a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. A defendant may have been confused or there may be other reasons which would prevent you from finding that he deliberately told an untruth. *See, to conclude that a statement is a lie is to conclude that the truth lies elsewhere*.

Secondly, you must be satisfied that the lie is concerned with some circumstance or events connected with the offence, that is, that it relates to a material issue, and the lie on which the Crown relies here is clearly connected with the conduct amounting to the first offence charged against the [appellant].

See, you could only use a lie against the [appellant] if you're satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.

Thirdly, you must be satisfied that the lie was told because the [appellant] knew that the truth of the matter would implicate him in the commission of the offence. He must be lying, because he is conscious that the truth would convict him.

Now, there may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying. So you have to determine whether this was a lie in the circumstances and in the context of what was being put to the [appellant]. See, people may lie to bolster up a just cause or out of shame or out of a wish to conceal some embarrassing or disgraceful behaviour. People may lie out of panic or confusion or to escape an adjust [sic] accusation. So, I mean, if they lie for those reasons, well, then you can't use it against them as evidence of guilt, because there's another explanation for the lie.

You must first find it to be a lie before you can then go on to consider whether you can use it in the way the Crown submits you should.

So if you accept that there is another reason other than guilt for the lie or there's another reason of this kind which is the explanation for the lie, if you find it to be. If you don't find it to be a lie, then you just ignore the evidence, but if you find there is another reason other than guilt, then you can't use it against the [appellant]. You can only use it against him if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence.

So before you can use the lie against him you must be satisfied beyond reasonable doubt not only that he lied, but also that he lied because he realised the truth would implicate him in the offence in count 1.

So that's how you should approach the lie. You have to determine, firstly, whether it is a lie and, if it is a lie, does it go as far as the Crown says it goes?" (emphasis added)

[34] The appellant relies on the italicised portions of these directions as amounting to a misdirection.

The pre-recorded evidence in the jury room

[35] The judge accepted the parties' submissions that the recordings of the complainant's interviews with police should not go into the jury room. There was no discussion as to whether or not the CD of the pre-recorded evidence, ex 4, should go into the jury room. After the jury returned its verdicts and during the sentencing submissions, the judge informed counsel that ex 4 had inadvertently been sent to the jury room during the jury deliberations.

[36] In response to the standard letter under s 671A *Criminal Code* inviting the trial judge to make a report on a criminal case the subject of appeal, his Honour stated that he did "not wish to add to the transcript except to say that exhibit 4 was inadvertently provided to the jury. It consisted almost entirely of cross-examination of the complainant by the appellant's counsel."

Was the jury verdict unreasonable or not supported by the evidence

[37] The first ground of the appeal is that the guilty verdict on count 1 was unsafe and unsatisfactory (that is, in terms of s 668E *Criminal Code*, it was unreasonable and could not be supported by the evidence). The appellant contends the jury should not have acted on the complainant's evidence. Her evidence was inconsistent with the taxi CCTV footage which showed she did not get out when the taxi was moving and nor did she appear to be screaming. Her evidence also differed from that of her mother. The complainant said she phoned her mother from the station and gave details of their phone conversations, but her mother said they communicated by text messages. The appellant also contends the guilty verdict on count 1 was unreasonable because it was inconsistent with the not guilty verdict on count 2.

[38] The complainant consistently maintained her account that the appellant touched her on the breast throughout her interviews with police and later during cross-examination. This claim was supported by the taxi CCTV footage which seemed to show the appellant moving his arm across towards her, and by the appellant's false denial that he did so. Her evidence that the appellant touched her on the breast was also consistent with her immediate complaint to her mother and her distressed condition when she returned home (even though she indicated that he touched her in the genital region and the jury acquitted on this count).

[39] In determining whether a guilty verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, the question is whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *M v The Queen*;[7] *MFA v The Queen*.[8] My earlier review of the relevant evidence in this case well satisfies me that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of count 1.

[40] But was the guilty verdict on count 1 nevertheless inconsistent with the not guilty verdict on count 2? The relevant principles in determining this issue were discussed in *MacKenzie v The Queen*.[9] Sometimes a jury verdict may appear difficult to

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7 (1994) 181 CLR 487, 493–495.

8 (2002) 213 CLR 606, 614–615 [25], 624 [59].

9 (1996) 190 CLR 348.

reconcile logically because it is based on a jury's innate sense of fairness. In such cases, appellate courts should not be too ready to conclude that because a verdict of guilty cannot be reconciled as a matter of strict logic it is unreasonable. Appellate courts should interfere with jury verdicts only where the inconsistency amounts to an affront to logic and common sense, strongly suggesting a compromise in the performance of the jury's duty so that appellate intervention is necessary to prevent a possible injustice.[10]

[41] Here, the judge correctly told the jury both that they could return separate verdicts on the two counts and also, consistent with *R v Markuleski*,[11] that sometimes a doubt held by the jury about one count would amount to a doubt in respect of the other.

[42] But this case is distinguishable from *Markuleski*. The complainant's evidence on count 2 on which the jury acquitted, unlike on count 1, was not independently supported by the taxi CCTV footage. Nor could the prosecution contend in respect of count 2, as they could in respect of count 1, that the appellant lied about count 2 out of a consciousness of guilt. Her claims that she pushed him away and screamed at him as soon as count 2 occurred, and then jumped out of the taxi when it was still moving, were not recorded on the taxi CCTV footage. Further, in her first interview she stated in respect of count 2 that he touched her on the vagina, but in her second interview she indicated that he touched her at the top of the pubic bone. For these reasons, a reasonable jury may have considered the complainant's evidence on count 2 could not be accepted beyond reasonable doubt, but felt comfortably satisfied beyond reasonable doubt of his guilt on of count 1.

[43] The differing jury verdicts in this case are logically reconcilable and are not an affront to logic and common sense suggesting a compromise in the performance of the jury's duty. The guilty verdict on count 1 is reasonable, supported by the evidence and consistent with the not guilty verdict on count 2. This ground of appeal is not made out.

The pre-recorded evidence in the jury room

[44] It is common ground that the judge erred, first, in having the CD of the pre-recorded evidence marked as an exhibit (ex 4) and, second, in allowing it into the jury room: *Gately v The Queen*.[12] That was because the complainant's pre-recorded testimony was not real evidence but oral evidence. Real evidence is evidence of a physical character, for example, the alleged weapon in an assault, photographs of an alleged crime scene or of fingerprints, or breathalyser test results, and is commonly tendered as an exhibit at trial. By contrast, questions of fairness mean that it is ordinarily inappropriate to tender oral evidence as an exhibit and to give juries unsupervised access to it. The pre-recorded evidence should only have been marked as an exhibit for identification. If the jury during their deliberations required to hear the evidence again, the pre-recorded evidence should have been replayed in open court in the presence of the judge and counsel.[13] The error in tendering the oral evidence as an exhibit was compounded when the judge inadvertently sent that

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10 *MacKenzie v The Queen* (1996) 190 CLR 348, 367–8 (Gaudron, Gummow, Kirby JJ), citing *R v Kirkman* (1987) 44 SASR 591, 593 (King CJ, Olsson and O'Loughlin JJ agreeing).

11 (2001) 52 NSWLR 82, 122 [188]–[191].

12 (2007) 232 CLR 208, 211 [3] (Gleeson CJ), 220 [29], 226 [54] (Kirby J), 234–237 [85]–[93] (Hayne J), 241 [111] (Heydon J), 244 [126] (Crennan J).

13 Above.

exhibit into the jury room during the jury deliberations. It is also common ground that the jury room was equipped to play the exhibit. The provision to the jury of ex 4 was irregular and the appeal must be allowed if this irregularity amounted to a miscarriage of justice: s 668E(1) *Criminal Code* and *Gately*.[14]

[45] Whilst conceding that providing ex 4 to the jury was an irregularity and an error, counsel for the respondent submitted that it was not a fundamental irregularity; this Court should apply s 668E(1A) *Criminal Code* and dismiss the appeal despite the error because there has been no substantial miscarriage of justice. He contended, consistent with the trial judge's report, that to have ex 4, which contained her cross-examination but not her interviews with police which were essentially her evidence in chief, was to assist the defence case, not to harm it. The cross-examination of the complainant in ex 4 revealed the defence case.

[46] It has long been recognised that cases involving allegations of sexual misconduct can arouse feelings of high emotion and even prejudice: see Gibbs CJ's observations in *De Jesus v The Queen*.[15] In this case where the complainant was a 14 year old female passenger in the older, foreign appellant's taxi, the judge was required to take particular care to ensure that the trial process was conducted according to law and to do all that reasonably could be done to eliminate the potential for irrational and emotional prejudice in the jury's deliberations.

[47] It is well established that if a jury wants to hear again a complainant's evidence given by way of s 93A *Evidence Act* or her pre-recorded evidence given by way of s 21AK and s 21AM *Evidence Act*, the evidence is not provided to the jury to play in the jury room. It is necessary to reconvene the court and to replay the evidence before the judge, jury and counsel: see *Gately*.[16] That is because, as Hayne J explained:

> "95. … there is the risk that undue weight will be given to evidence of which there is a verbatim record when it must be compared with evidence that has been given orally. Secondly, there is the risk that undue weight will be given to evidence that has been repeated and repeated recently. Other risks may arise from the circumstances of the particular trial.
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> 96. The purpose of reading or replaying for a jury considering its verdict some part of the evidence that has been given at the trial is only to remind the jury of what was said. The jury is required to consider the whole of the evidence. … the overriding consideration is fairness of the trial. … Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused. … Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence."[17]

[48] It is true, as the trial judge stated in his report to this Court, that ex 4 consisted primarily of defence counsel's cross-examination of the complainant. But it

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14 Above, 211–212 [4] (Gleeson CJ), 241 [111]–[112] (Heydon J).

15 (1986) 22 A Crim R 375, [4].

16 *Gately v The Queen* (2007) 232 CLR 208, 211 [3] (Gleeson CJ), 237–238 [94]–[96] (Hayne J), 241 [111] (Heydon J).

17 Above, 237–238 [95]–[96].

depicted the complainant giving significant evidence and reminded the jury of her young age. It also confirmed that her account to the police officers was her best recollection of the crucial events. Defence counsel made no particular progress in cross-examining her and she maintained throughout her evidence recorded in ex 4 that the appellant had touched her indecently on the breast. Assuming, as this Court must, that the jury did view ex 4 during their deliberations, defence counsel lost the opportunity to ask the judge to remind the jury of the countervailing defence submissions, in particular the appellant's account to police that he had not touched her indecently.

[49] There are significant differences between this case and *Gately* where the High Court accepted this Court's determination that there had been no miscarriage of justice under s 668(1A). First, unlike in *Gately*, defence counsel did not consent to the jury having access to ex 4. Second, unlike in *Gately*, this appellant gave a contrary version to police in his record of interview which contradicted the complainant's evidence. Defence counsel in this case lost the opportunity to submit that the judge should direct the jury that undue weight should not be given to ex 4. The defence case here turned on inconsistencies in the complainant's evidence which were not evident from ex 4 alone but arose from comparing the complainant's evidence to the evidence of her mother and the taxi CCTV footage. The defence case also emphasised that the complainant had a motive to make a false complaint and to exaggerate so as to gain her mother's sympathy and avoid censure for staying overnight in Brisbane without permission.

[50] Before determining whether the irregularity of providing ex 4 to the jury during their deliberations amounts to a miscarriage of justice excluding the application of s 668E(1A), I wish to discuss the third ground of appeal.

Did the judge err in directing the jury as to lies?

[51] The prosecution at trial alleged that the appellant lied to police when he said that he did not take his hands from the steering wheel and did not move his arm towards the complainant. The taxi CCTV footage showed it was a lie. The prosecution contended that this was capable of amounting to a lie of the kind discussed in *Edwards v The Queen*.[18]

[52] The appellant contended that the emphasised portion of the judge's directions as to the lie[19] constituted an error of law. The direction suggested that this lie was out of the ordinary and that, if the jury found the appellant lied, he was guilty. The judge should have addressed the factors peculiar to this case which suggested the lie was made out of a consciousness of guilt. The judge should have reminded the jury that English was not the appellant's first language; he was in Australia on a student visa; and he fainted when police first spoke to him. All this suggested that he was stressed and may have panicked when he said he did not move his arm towards the complainant. She agreed he touched her on the upper chest; if the appellant touched her in this way innocently, he may have lied about it because he feared this innocent touching could be misconstrued and wrongly implicate him in the offence. The jury should have been reminded that the footage did not show any actual touching, either of the breast or at all. They should have been directed that even if they were satisfied he lied out of a consciousness of guilt, that was only a piece of evidence; they still had to consider whether they were satisfied beyond reasonable doubt of

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18 (1993) 178 CLR 193.

19 Set out at [32] and [33]of these reasons.

the truthfulness of the complainant's evidence on count 1. This followed from Kirby J's observations in *Zoneff v The Queen*.[20]

[53] The judge's directions to the jury about lies were unnecessarily complicated by his Honour's otiose reference to corroboration in law: see s 632(1) *Criminal Code*. Early in his directions his Honour told the jury that the defence case was that they would not be satisfied the appellant told a lie to the police. Later, his Honour again told the jury that one aspect of the defence case was that the jury would not be satisfied the appellant lied to police at all. The judge repeated this a third time. Instead of using the *Edwards* direction which requires the jury to consider whether the lie was told out of a consciousness of guilt, his Honour told the jury to consider whether the appellant's lie was "an implicit admission of guilt on his part". When the judge's directions as to lies are read as a whole, there was a danger that they may have led the jury to think that if they found the appellant lied to police about moving his hand towards the complainant, this amounted to an admission by him that he committed the offence and was in itself sufficient to convict the appellant. As Kirby J observed in *Zoneff*,[21] citing the leading opinion of the Privy Council in *Broadhurst v The Queen*[22] delivered by Lord Devlin:

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts … inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for that untruthfulness."

Kirby J continued:

> "Although this passage has sometimes been criticised as exhibiting 'circular reasoning', its essential point displays a great deal of common sense. The jurors are discharging functions that are onerous, formal and commonly unfamiliar to them. It would be relatively easy for them to fall into the error of attaching excessive or irrelevant significance to a conclusion that the accused … has told a lie. A warning of the *Broadhurst* kind, given with judicial authority, might be a healthy corrective to this kind of reasoning. Its general character and practical wisdom are precisely the kind of assistance which a judge might be expected to give to the jury where the suggestion of lying has been made by questioning or by submissions."[23] (citations omitted)

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20 (2000) 200 CLR 234, 257 [57].

21 Above.

22 [1964] AC 441, 457.

23 (2000) 200 CLR 234, 257–258 [58].

[54] Kirby J's observations are apposite in this case where there were obvious reasons other than a consciousness of guilt for the appellant to have made a confusing or wrong statement to the police about the movement of his arm. The judge needed to assist the jury with more than the broad general statements of the standard *Edwards* direction. His Honour should have reminded the jury that the appellant was being interviewed by police in English which was not his first language and that the interview was likely to have been a frightening experience for him so that he may have lied out of panic. The judge should have told the jury to consider the possibility that the appellant touched the complainant innocently on the upper body (as the complainant agreed in her evidence) and that he lied about this fearing that if he had told the truth it may have falsely implicated him in the alleged indecent touching on the breast.

A miscarriage of justice?

[55] The question of the lie seems to have been an important factor in this case and is very likely to have been the explanation for the differing verdicts. The error in the judge's directions on lies and the irregularity in sending ex 4 into the jury room means that the appeal must be allowed unless this Court is satisfied under s 668E(1A) that there has been no substantial miscarriage of justice. I find it impossible to reach that conclusion where there has been both an error in the directions as to lies and also an irregularity in providing ex 4 to the jury during their deliberations.

[56] It follows that the appeal must be allowed, the conviction set aside and a new trial ordered. It is a matter for the prosecution whether to now pursue a retrial when the appellant has already served a sentence for the alleged offence which was at the high end of the permissible sentencing range.

ORDERS:

1. The appeal against conviction is allowed.

2. The verdict of guilty on count 1 is set aside.

3. A retrial is ordered.

[57] **FRASER JA:** I have had the advantage of reading the reasons of the President. For the reasons given by her Honour, the guilty verdict on count 1 is reasonable, supported by the evidence, and consistent with the guilty verdict on count 2.

[58] I also agree with her Honour's reasons for concluding that it was an error to admit the CD of the pre-recorded evidence into evidence and, more significantly, to allow that CD into the jury room. In my respectful opinion, her Honour's reasons on that ground compel the conclusion that there is no scope for the application of the proviso in s 668E(1A) of the *Criminal Code* 1899 (Qld). For those reasons, I agree with the orders proposed by the President.

[59] In relation to the remaining ground of appeal, I respectfully agree that it would have been desirable for the trial judge to direct the jury to take into account the possibilities that the appellant might have lied out of a panic, induced by a frightening experience of being interviewed by police in English, which was not his first language, and out of fear that, if he admitted innocently touching the complainant, the admission might have implicated him in the alleged indecent

touching. As I have concluded that the appeal must be allowed and a new trial ordered in any event, it is not necessary for me to elaborate upon the doubt which I respectfully hold upon the question whether the absence of those specific directions itself contributed to a miscarriage of justice.

[60] **MARGARET WILSON AJA:** I agree with the orders proposed by the President, and with her Honour's reasons for judgment.