SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBD* [2012] QCA 268
PARTIES:	**R** **v** **DBD** (appellant)
FILE NO/S:	CA No 75 of 2012 DC No 18 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	5 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2012
JUDGES:	Fraser and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant convicted of maintaining an unlawful relationship of a sexual nature with a child under 16 years – where appellant argued that verdict was unsafe and unsatisfactory – where appellant argued complainant's initial disclosure was in response to leading questions and contained no details of alleged offence – where appellant argued inconsistencies between complainant's evidence and evidence of complainant's friend – where appellant argued witness not seeing alleged conduct weakened Crown case – whether on the whole of the evidence it was reasonably open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASES – where appellant argued that trial miscarried as a result of jury hearing recorded statements by sister of complainant as to her opinion of complainant's reluctance to attend school and what her

mother had said on the same subject – where defence counsel did not object – where trial judge ruled evidence inadmissible and instructed jury that the evidence was irrelevant – whether the admission of the inadmissible evidence resulted in a miscarriage of justice

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

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Nudd v The Queen (2006) 225 ALR 161; [2006] HCA 9, cited
Patel v The Queen (2012) 290 ALR 189; [2012] HCA 29, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: J R Hunter SC for the appellant
A W Moynihan SC for the respondent

SOLICITORS: Chris Trevor & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant has appealed against his conviction of maintaining an unlawful relationship of a sexual nature with a child under 16 years between 23rd May 2007 and 1st June 2010. The complainant is the appellant's niece. She was between seven and 10 years old at the time of the alleged offence.

Appeal ground 1: the verdict is unsafe and unsatisfactory in all the circumstances

[2] The first ground of the appellant's appeal is that the verdict was unsafe and unsatisfactory in all the circumstances. That invokes the ground in s 668E(1) of the *Criminal Code* 1899 (Qld) that the verdict was unreasonable or cannot be supported having regard to the evidence. Under that ground of appeal, the court is required to review the record of the trial and decide 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] If that review results in this Court having a reasonable doubt about the appellant's guilt the conviction must be set aside unless that doubt is capable of being resolved by reference to the jury's advantage over this Court in seeing and hearing the evidence as it was given.[2]

The evidence at trial

[3] During the period of the alleged offence the complainant's mother's work often prevented her from being at home when the complainant finished school. The complainant regularly went from school to the home of her aunt and uncle, Mrs DA and the appellant. Mrs DA usually arrived home between about 6.00 and 6.30 pm. The appellant usually arrived home some hours earlier than his wife. Their adult

1 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.
2 *M v The Queen* (1994) 181 CLR 487 at 494.

daughter DS also lived in the house and part way through the relevant period she had a baby.

[4] The complainant's mother gave evidence that, whilst she was putting the complainant to bed on 31st May 2010, the complainant said that she had a secret. The complainant started to cry and became hysterical, repeatedly saying that she could not talk about it and that it was "bad". The complainant's mother comforted the complainant and asked her whether anyone had been touching her. The complainant nodded and went on crying. The complainant's mother asked her whether it was "Uncle DBD" and the complainant said, "Yes". The complainant said that she was touched in "bad places" and that it had been going on since she was seven. She asked her mother whether she was going to get into trouble. The complainant's mother said "No". The complainant said that "…he told me I'll be in trouble". In cross-examination the complainant's mother said that she had asked the complainant whether anyone had been touching her in bad places and then, after the complainant had nodded, asked whether it was "Uncle DBD". The complainant's mother put the question that way because the complainant had another "Uncle DBD".

[5] On the following day the complainant participated in a recorded police interview. The complainant was then ten years old. The first 16 pages of a transcript of the recording concerns uncontroversial matters, including comments and questions by the police officers which were designed to put the complainant at her ease. After the police officers explained the difference between "good secrets" and "bad secrets", the complainant apparently nodded when asked whether anybody had asked her to keep a bad secret that's "yucky". When asked to tell about the "bad secret" the complainant referred to "my uncle". The complainant then referred to "My Uncle DBD". The complainant identified the appellant as the offender when she agreed, apparently by nodding, that she was referring to the uncle who lived with her Aunt DA (the appellant's wife). When asked when he had told her to keep the secret, the complainant responded that it was a long time ago. She thought that she would have been seven.

[6] The complainant said that her uncle "…doesn't do very good things to me…[a]t his house". The "bad things" happened in his bedroom when she went there to watch TV. He was always on the computer playing "Spiders" (a card game which the complainant described). Usually DS was playing on her computer in the lounge room. No one else was there when it happened. The complainant said that "…he's been doing it for a very long time". The complainant would be lying down in bed or sometimes sitting on the end of the bed, watching television. The appellant would come over from the computer and do "bad stuff" and "rude things" which made her feel bad. The complainant said that "He touches me". The complainant indicated on her doll that he touched her in the area of her hip and her vagina. She said that he "pokes me" on the place used for "peeing"; he poked her with two fingers underneath her underpants, touching her skin. It was "[s]ort of both" inside and outside. She said that it felt horrible and it hurt. The complainant said that he told her not to tell anyone.

[7] When the complainant was asked how many times she thought that this had happened, she responded that it happened every time she went there. She thought it was mainly just DS and her baby who were home when it happened recently. When DS was home she might be out the back on her laptop, changing the baby's nappy,

putting the baby in the bathtub, or having a shower with him. The complainant was asked whether she had ever touched her uncle or whether he had ever asked her to do it. She said that he had told her to but she said "no". He kept asking her. The complainant said that he asked her to touch him on his "rude part" that you "…pee out of…". It happened most of the time. The only two times it did not happen were because she had one of her friends go there with her. When asked to say how many times it had happened, the complainant did not respond until after the police officers gave examples of possible numbers. The complainant then said that she thought it was "About this year probably about 38 times". When asked why she gave that number the complainant replied, "Because it's happened every time".

[8] The complainant went on to say that it had happened in the bedroom and sometimes when she was in the lounge watching TV and when DS was out the back on her laptop. The appellant would sit where her feet were and move upwards and touch her. Apparently with reference to her statements that she was touched whilst in the lounge room, the complainant said that it happened three or four times that year. When asked about how many times it had happened in the bedroom since Easter, the complainant responded, "Maybe 19". The complainant referred to a particular occasion when she was given a soccer ball for her ninth birthday. She also said that she could remember that she was seven when it started because she could remember that the touching started a few weeks or months after her seventh birthday party. The complainant said that her uncle would stop and quickly stand up and go back to his computer every time he heard or saw someone coming.

[9] The complainant gave pre-recorded evidence 14 months later, when she was 11 years old. In evidence-in-chief she affirmed the truth of what she had told the police. In cross-examination she gave evidence which was consistent with her police interview. At one point she became upset and did not wish to proceed, but after a short break she completed her evidence. Defence counsel referred the complainant to her statement in the police interview that the appellant touched her every time she stayed over and she agreed with the suggestion that it was most of the time. The complainant said that she could not recall having told her friends ST (ST) and DZ at a birthday party that her uncle used to touch her arms, her tummy, her boobs, and her bottom, and she could not recall saying that he took her shirt off when he was touching her. The complainant said that she was telling the truth about what her uncle did to her and that she was not in the habit of making things up. When she was asked whether she was getting a lot of attention at home since her mother had got a new boyfriend and her father had got a new girlfriend, she answered that she was, that she and her father usually went to places, and that her mother and father gave her much the same amount of attention.

[10] The complainant's older sister KE participated in a recorded police interview when she was 13 years old, and she gave pre-recorded evidence 13 months later when she was a few days short of 15 years of age. In the police interview, she spoke of an earlier period when she went with the complainant to her aunt and uncle's house after school. She usually watched television in the lounge room and the complainant went into her aunt's and the appellant's room to watch television. Her uncle always played solitaire on the computer. He was either on the computer or he was watching television as well. He sat at his chair at the computer. When he was watching television "…he was lying down as well". The complainant had never spoken to her about anybody making her feel uncomfortable or anything like that.

[11] In KE's pre-recorded evidence she affirmed the truth of what she had said in the police interview. In cross-examination she agreed that she sometimes went into the bedroom unannounced. She said that the door was always shut. When she was asked whether she was sure about that, she responded that she was pretty sure but that it could have been left open occasionally. When she went into the bedroom, she noticed her uncle lying next to the complainant on the bed, watching TV with her. She did not see him touch her sister inappropriately.

[12] ST participated in a recorded police interview, when she was 10 years old. She gave pre-recorded evidence about a year later, when she was 11 years old. In her police interview she said that on the complainant's birthday that year (2010), whilst they and their friend DZ talked about secrets. The complainant said that her uncle would try to touch her and referred to "sensitive spots". ST identified the house where the uncle lived. ST said that complainant referred to her uncle touching her on the boobs, putting his hands down her pants, and touching her on the bottom and vagina. The complainant would tell him not to and then would go into the room that she slept in. The complainant also said that her uncle had tried to do it again and that she had not told her mum. The complainant told ST not to tell the complainant's mother and father. ST told her to tell her mother if her uncle tried to do it again. The children's conversation was interrupted and they did not talk about the topic again. In ST's pre-recorded evidence, she affirmed that she had told the police officer the truth. In cross-examination, defence counsel elicited a substantial repetition of the essential aspects of ST's evidence in the police interview, apparently to emphasise the inconsistencies between that preliminary complaint evidence and the complainant's evidence.

[13] The prosecutor called the complainant's father to make him available for cross-examination. In cross-examination, he gave evidence that when he collected the complainant from the appellant's house the appellant was usually at home and his daughter DS was probably home on 40 per cent of those occasions. The appellant's wife was very rarely there. The complainant's father had a good relationship with the complainant. She did not tell him of the allegations she made against the appellant. The complainant's father said that on the majority of the occasions when he collected the complainant she was on the bed watching TV when he arrived. There were a couple of occasions when she was not in the bedroom. When the complainant was in the bedroom the appellant was also in that room. There were times when he was on his computer. The bedroom door was open the majority of the time and he could not say that it was closed every single time. The complainant's father did not witness her uncle inappropriately touching her.

[14] The appellant gave evidence and he called his wife and his daughter DS to give evidence. The appellant gave evidence that until about mid-2007 he was at home at around about 3.00 pm but his roster then changed so that he arrived home between 4.50 and 5.00 pm. On average, the complainant was at his place once or twice a week. The appellant said that his daughter DS was always there and his daughter DJ, and occasionally his daughter DB and his son-in-law DC, were also there. His grandson born in February 2009 was also there. His daughter DS was either in the lounge room or with her baby. His daughter DJ was usually in the lounge room watching TV, and if his daughter DB and son-in-law DC were at the house they might be in the lounge room or in the dining room area as well. Occasionally some of them sat on the back patio to smoke. The appellant said that his routine on arriving home from work was that, after changing and making a cup of coffee, he

would go into his bedroom and play "spider solitaire" on his computer for a couple of hours or an hour until dinnertime when he would buy groceries and cook dinner.

[15] The appellant said that he and the complainant were friends and played games together in the backyard. The complainant was in and out of his bedroom. After DS's baby was born, the complainant would help DS bathe the baby. She would run into the lounge room to see what was on the other TV. She did not spend a prolonged amount of time in his bedroom. When she was in his bedroom, the complainant lay on the bed watching TV. The appellant said that his door was always open when the complainant was in the bedroom watching TV. The appellant denied that he had touched the complainant for the last three years. He would never do that to the complainant. He agreed that he was frequently alone with the complainant whilst he was on the computer and she was on the bed. The appellant said that the only time that he would have been on the bed was if he was lying there watching the replays of the football and the complainant would come running in and jump up on the bed and try to change the channel. The appellant adhered to his evidence-in-chief, including that the bedroom door was not shut when the children were in there. The appellant denied the prosecutor's suggestions that whilst the complainant was alone in the room with him he touched her on the vagina and he asked her to touch his penis.

[16] Mrs DA gave evidence of innocent interactions between the complainant and other members of the family, including the appellant. She said that the complainant did go into the bedroom at times to say hello to the appellant and to watch TV. The door to the bedroom was never closed when the complainant was in the bedroom with the appellant. In cross-examination, Mrs DA said that the appellant and the complainant did not spend time alone together in the house before she got home because their daughter DS was at home and her baby was also there after February 2009.

[17] DS also gave evidence of innocent interactions between the complainant and the appellant. DS had always lived in her parents' house and her son lived there also from when he was born in February 2009. Her evidence of her father's routine was consistent with his evidence. In addition to visiting the house with her family on the weekend, the complainant came after school, sometimes a couple of times a week and sometimes only once a month. The complainant was happy and played with DS and her father. Mostly the complainant stayed until just after 4.00 pm and sometimes she stayed until dinnertime. DS agreed that the complainant went into the appellant's and his wife's bedroom to watch TV. Since her baby was born, the complainant constantly wanted to be around him, helping DS to bathe him and play with him, and she would also sit in the lounge room and watch TV with DS and the baby. The complainant also helped DS bathe the baby and play with her. The door to the bedroom was always open when the complainant was there with the appellant. DS did not notice anything untoward about the complainant's interaction with the appellant. DS adhered to her evidence in cross-examination.

Summary of the arguments and consideration

[18] The appellant emphasised that the complainant made the initial disclosure to her mother in response to leading questions, that the complainant gave no details of the alleged offence in that initial disclosure. The appellant argued that the complainant's police interview was not compelling, including because there was considerable hesitancy and prolonged silences which caused the police to ask leading questions. It was submitted that the complainant's specification of the

precise number of times the appellant had touched her was odd. The appellant relied upon the inconsistencies between the complainant's evidence and TS's evidence of the complainant's statements. The evidence that KE occasionally walked unannounced into the bedroom, but only ever saw the appellant on his computer and the complainant watching television, was submitted to weaken the Crown case. It was also significant that the appellant gave sworn evidence denying the allegations.

[19] I accept the respondent's submissions that the complainant's disclosure described in her mother's evidence seemed apparently natural and normal in the circumstances. The evidence of that initial disclosure contained nothing adverse to the complainant's credibility. The complainant's initial disclosure of wrongdoing was not elicited by a leading question, but thereafter the complainant's mother did identify the appellant before the complainant had done so. This point deserved the jury's consideration, but it was reasonably open to the jury to find that it did not reflect adversely upon the complainant's subsequent evidence. I also accept the respondent's submission that the complainant's mother's evidence of the distressed condition of the complainant when she made the initial complaint makes it seem unsurprising that the complainant's initial complaint was devoid of detail.

[20] The appellant's senior counsel did not elaborate upon the submission that hesitancy and silences in the complainant's police interview contributed to it being less than compelling. Those features of the evidence are consistent with a credible and reliable account by a young child speaking of unwelcome conduct by someone who was close to her. The police officers did put leading questions, but the complainant initially described the offending in response to non-leading questions. As to the complainant's account of the frequency of the touching, she referred to figures only when pressed by the police officer. It would be unsurprising if the jury thought that the precise figures she mentioned were not very reliable, but it does not follow that there was anything unreliable about her evidence that the appellant frequently touched her in the way she described.

[21] ST's evidence that the complainant told her that the appellant had touched her on the vagina "most of the time" when she was at the appellant's house was consistent with the complainant's evidence, but her evidence that the complainant said that the appellant touched her arms, tummy, breasts and bottom, and had taken her shirt off, was not reflected in any evidence given by the complainant. In summing up, the trial judge appropriately directed the jury that ST's evidence could only be used as it related to the complainant's credibility, that consistency between ST's account of the complainant's evidence was something that the jury might take into account as possibly enhancing the likelihood that the complainant's testimony was true, and that inconsistencies between the complaints to ST and the complainant's evidence might cause the jury to have doubts about the complainant's credibility or reliability. The trial judge gave further, conventional directions about that issue. The jury evidently found that the inconsistency did not create or contribute to a reasonable doubt that the appellant was guilty. That was not unreasonable. Consistently with the complainant having given a reliable account in evidence, the inconsistency might have been a consequence of the young age of both children, the apparent brevity of their conversation before it was interrupted, the consequential potential for misunderstandings between them, and the lapse of time between the commencement of the appellant's conduct and when ST gave evidence of the conversation.

[22] Contrary to the appellant's submission that KE only ever saw the appellant at his computer when she walked into the bedroom, KE gave evidence that she saw the appellant on the bed with the complainant. The evidence that there were other people present in the house when the appellant was with the complainant was certainly relevant, but, as the respondent submitted, it is not inherently implausible that nobody in the house saw the conduct described by the appellant. Each episode might have occupied a very short time. There were divergences in the evidence as to whether the door was open or closed. The jury could also accept and place weight upon the complainant's evidence that the appellant stopped touching her as soon as he heard noises indicating that someone was approaching. The fact that there were other people in the house did not necessarily give rise to a doubt about the accuracy of the complainant's evidence.

[23] It was the jury's role to assess the conflicting evidence. There was nothing inherently implausible or surprising in the appellant's sworn denials, but this properly directed jury evidently rejected that evidence, found that the complainant's evidence was credible and reliable, and, notwithstanding the appellant's evidence, did not harbour a doubt about the appellant's guilt. The complainant's evidence seems to have been very persuasive and the jury's advantage in seeing and hearing the appellant deny the allegations and in seeing and hearing other witnesses cannot be regarded as insignificant in this case. I conclude that on the whole of the evidence it was reasonably open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt, despite the appellant's evidence.

Appeal ground 2: the trial miscarried as a result of the playing before the jury of recorded statements by the sister of the complainant as to: (a) her opinion as to why the complainant might have been reluctant to attend school; and (b) what her mother had said as to the mother's own opinion on the same subject

[24] Just before the conclusion of KE's police interview the following exchange occurred over about two minutes:

> "CON SWEETNAM: No. Have you - have you noticed that um, like - does KD like school?
> KE: Um, um, not really.
> CON SWEETNAM: No.
> KE: She was always trying to like, stay home.
> CON SWEETNAM: Is that fairly normal for her?
> KE: Um, grade like, when I was in grade 4, which she would have been like, grade 1, she used to like, want to go to school more often than that--
> CON SWEETNAM: Yeah.
> KE: --um, but before we found out, she used to like, cry to get out of it and say that she was sick.
> CON SWEETNAM: Yeah. So that was – what do you mean before you found out?
> KE: Um, like before Mum told us, me, well, before Mum actually found out.
> CON SWEETNAM: So, since - since you guys have found out - since - since KD's told your mum about what happened, um, has she been trying to get out of school still or?

> KE: No.
> CON SWEETNAM: No.
> KE: 'Cause she'd - I um, think she knows that she doesn't have to go there.
> CON SWEETNAM: So you're - so what you're saying is that she used to cry to get out of school so she didn't have to go to school or so she didn't have to go to her [INDISTINCT]--
> KE: So she didn't have to like, go back to their house.
> CON SWEETNAM: Oh, okay. So KD would - so even though you caught the bus home, KD would go to your uncle and aunty's?
> KE: Yeah.
> CON SWEETNAM: And so she would not want to go to school because she'd have to go there of an afternoon?
> KE: Yeah.
> CON SWEETNAM: Is that right after school?
> KE: Yeah, she um - she never said that but um, I think, yeah, that would be why.
> CON SWEETNAM: Yeah. [KE: And I have heard mum say that too.[3]] Okay. Yeah. Um, and what about – so recently though, have you heard her say she doesn't want to go to school or anything like that?
> KE: Um, no."

[25] Defence counsel did not object to that evidence. Immediately before the last of the passages attributed to Constable Sweetnam (commencing "Yeah. And I've heard mum say that too …"), the trial judge required the recording to be stopped and the jury left the court room. The trial judge asked the prosecutor to explain how KE's interpretation of her sister's behaviour was admissible. The prosecutor initially contended that the evidence was "part of the narrative", but ultimately accepted that the evidence was not admissible. Defence counsel made no submission. The trial judge foreshadowed that, notwithstanding the absence of objection, he would instruct the jury that this evidence was irrelevant. The jury returned and the trial judge instructed them that the opinion of this witness was "of no evidentiary value whatsoever", the evidence was "strictly inadmissible" and "quite irrelevant", the jury should disregard that evidence, the jury must base their determination and decision upon the admissible evidence "rather than the opinion evidence of a 13 year old given with the benefit of hindsight", and the jury should "just disregard that." The remainder of the police interview was then played, followed by KE's pre-recorded evidence. The inadmissible evidence in the police interview was not touched upon in her pre-recorded evidence.

[26] The playing of recorded police interviews and pre-recorded evidence occupied the first day of the trial. The second day of the trial, a Friday, was occupied by the evidence of the remaining witnesses in the Crown case and the evidence given and called by the appellant. Defence counsel addressed the jury shortly after the resumption of the hearing on the following Monday. After the conclusion of defence counsel's address, various matters were raised in the absence of the jury. Relevantly, the prosecutor submitted that defence counsel's suggestion to the jury that there had been no change in the complainant's behaviour was inconsistent with what KE had said in her police interview in relation to the complainant not wanting

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[3] This sentence does not appear in the transcript of the recording, but it was common ground that it was audible when the recording was played to the jury. The jury were not given the transcript.

to go to the appellant's home after school, the Crown had not been permitted to lead that evidence, and it was inadmissible. Defence counsel conceded that the trial judge should give directions to the jury to correct defence counsel's submission. The prosecutor did not mention the topic in her address to the jury.

[27] Near the beginning of the summing up, the trial judge directed the jury that they must accept the law stated by the trial judge and apply all directions given by the trial judge on matters of law. In relation to the present issue, the trial judge reminded the jury that defence counsel had made some submissions about the lack of evidence of any change in the complainant's behaviour over the relevant period and directed the jury that, "…as a matter of law, that evidence of such nature, even if it exists, is inadmissible…" and "…you should not speculate in that regard." There were no requests for re-directions. In this appeal the appellant did not challenge any aspect of the summing up. After the jury retired to consider their verdict, they asked for the complainant's and ST's police interviews and their cross-examinations in the pre-recorded evidence to be played again. That was done on the following morning. After the jury again retired to consider their verdict, they sought clarification of what constituted "reasonable doubt". The trial judge gave the jury a standard direction on that topic. The jury retired shortly after 1.00 pm and delivered their verdict shortly before 3.00 pm.

[28] As the appellant argued, the focus of attention under the present ground of appeal must be the impact that the inadmissible evidence had upon the trial.[4] The question is whether the admission of the inadmissible evidence resulted in a miscarriage of justice.[5] Defence counsel's failure to object to the evidence does not militate against a finding that there was a miscarriage of justice because that failure to object is not objectively explicable as a forensic decision in the interests of the appellant.[6]

[29] The appellant argued that there was a serious risk that the evidence which suggested that the complainant was reluctant to attend school might be misused by the jury as independent confirmation of the complainant's account. This was submitted to find support in the circumstance that the police who interviewed KE seemed to regard this evidence in that way. The appellant also argued that the prosecutor's submission concerning defence counsel's address indicated that the prosecutor then laboured under the misapprehension that KE's evidence was that the complainant did not want to go to the appellant's home after school. It was also submitted that the inadmissible evidence might have proved significant in light of the fact that the Crown case was not strong and the jury had requested that some of the recorded evidence be played again after they had retired.

[30] The appellant's argument should not be accepted. The jury must have understood that they were obliged to follow the trial judge's directions on questions of law and the trial judge directed the jury that as a matter of law they should disregard the inadmissible evidence. Those directions were effective to ensure that the inadmissible evidence did not contribute to a miscarriage of justice. The playing of the inadmissible evidence occupied only about two minutes. Any significance that evidence otherwise might have had for the jury was defused when the trial judge quickly intervened and gave the jury clear and emphatic directions to ignore it. The

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4 *TKWJ v The Queen* (2002) 212 CLR 124 at [31] (Gaudron J); *Nudd v The Queen* (2006) 225 ALR 161 at [12] (Gleeson CJ).

5 *Patel v The Queen* [2012] HCA 29 at [67] (French CJ, Hayne, Kiefel and Bell JJ).

6 See *Patel v The Queen* [2012] HCA 29 at [114] and the decisions cited in footnote 51.

trial judge's description of the evidence as "the opinion evidence of a 13 year old given with the benefit of hindsight" was effective to reinforce his directions that the jury must disregard the evidence because it was inadmissible, irrelevant, and of no evidentiary value. There is no reason to think that the jury did not conscientiously comply with the trial judge's directions. Complying with those directions, the jury would have disregarded both the evidence played before the trial judge intervened and the subsequent answer in which KE indicated that her mother had expressed the same opinion and that the complainant had not recently indicated that she did not want to go to school.

[31] Furthermore, and consistently with the trial judge's directions, there was no reference to the topic in KE's pre-recorded evidence or in the evidence of the complainant's mother. The prosecutor did not seek to take advantage of the inadmissible evidence. Whilst the topic was to some extent revived by defence counsel's submission to the jury, the effect of his submission was that there was no evidence that the complainant's behaviour had changed during the relevant period. The trial judge's subsequent direction to the jury that any evidence of any change in the complainant's behaviour was inadmissible and that the jury should not speculate about that topic again reminded the jury to ignore the topic altogether.

[32] The trial judge clearly explained to the jury that the Crown case rested on the complainant's evidence, directed the jury that they should scrutinise her evidence with great care before they could arrive at a conclusion of guilt, and directed the jury to act on the complainant's evidence only if, after considering it with that warning and the other evidence, the jury were satisfied of its accuracy and truth beyond reasonable doubt. In light of those appropriate directions, and having regard also to the repeated directions that the jury should ignore the inadmissible evidence, the fact that the jury required some of the recorded evidence to be replayed is not an indication that the jury might have seized upon KE's inadmissible evidence to resolve a doubt about the appellant's guilt. Rather, it suggests that the jury undertook their task conscientiously.

[33] Having regard to the course of the evidence and the trial judge's directions, the playing of the brief passage of inadmissible evidence to the jury did not result in a miscarriage of justice.

Proposed order

[34] I would dismiss the appeal.

[35] **GOTTERSON JA**: I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[36] **McMEEKIN J**: I have had the advantage of reading the reasons of Fraser JA. I agree with his Honour that the appeal should be dismissed for the reasons that he has given.