SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bradfield* [2012] QCA 337
PARTIES:	**R** **v** **BRADFIELD, Allan William** (appellant/applicant)
FILE NO/S:	CA No 25 of 2012 CA No 36 of 2012 DC No 1782 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2012
JUDGES:	Holmes and Muir JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal against conviction on count 1.** **2. Set aside the conviction on count 1 and order a re-trial.** **3. Dismiss the appeal against conviction on counts 3 and 10.** **4. Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted on one count of maintaining an unlawful sexual relationship and two counts of indecent treatment of a child under 12 years – where the appellant was acquitted on two counts on the indictment alleging exposure of the complainant to an indecent film – where the verdict on one of those counts was a majority verdict – where those offences did not constitute offences of a sexual nature as defined in s 229B(10) of the *Criminal Code* and could not be relied on to prove an unlawful sexual relationship – where the trial judge did not distinguish those counts but directed the jury that the Crown relied on all the counts in the indictment to prove the

unlawful sexual relationship – where the member of the jury who did not agree with the acquittal on one of the counts involving exposure of the complainant to an indecent film may have based their verdict of guilt on it – where s 229B(3) required that all members of the jury be satisfied beyond reasonable doubt of an unlawful sexual relationship involving unlawful sexual acts – whether there has been a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted on one count of maintaining an unlawful sexual relationship and two counts of indecent treatment of a child under 12 years – where the appellant contends that the verdicts of guilty were unreasonable as inconsistent with acquittal on other counts – where the complainant raised the offences the subject of the convictions at her first interview with police but did not mention the offences in respect of which the appellant was acquitted until her second interview – whether the verdicts were capable of being reconciled on that basis – whether the verdicts of guilty were unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted on one count of maintaining an unlawful sexual relationship and two counts of indecent treatment of a child under 12 years – where the appellant contends that the evidence of the complainant was unreliable and contradicted by the evidence of other witnesses – whether the verdicts of guilty were unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted on one count of maintaining an unlawful sexual relationship and two counts of indecent treatment of a child under 12 years – where the appellant was sentenced to two years imprisonment on one of the indecent treatment convictions – whether the sentence imposed on that conviction was manifestly excessive

Criminal Code 1899 (Qld), s 21(1)(e), s 229B

R v ACK [2000] NSWCCA 180, cited
R v Asplin [1999] WASCA 148, cited
R v Brackenrig [2010] QCA 41, considered
R v JJT [1997] NSWSC 601, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, considered
R v MBF [2008] QCA 61, considered

R v Murray [2006] QCA 516, considered
R v NH [2006] QCA 476, considered
Williams v R [2000] TASSC 182, cited

COUNSEL: M J Copley SC for the appellant/applicant
S J Farnden for the respondent

SOLICITORS: Russo Mahon Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant appeals against his conviction on one count of maintaining an unlawful sexual relationship and two counts of indecent treatment of a child with a circumstance of aggravation (that the child was under 12 years). There are two grounds of appeal. The first concerns only the maintaining count, and is that the trial judge erred in directing the jury that acts which were not offences of a sexual nature as defined in s 229B(10) of the *Criminal Code* 1899 could be relied on to prove that offence. The second is that the verdicts of guilty were unreasonable as inconsistent with acquittal on other grounds and as based on the child's evidence, which, it is said, was unreliable and contradicted by other evidence.

[2] The appellant was sentenced to a term of four and a half years imprisonment on the maintaining conviction, and concurrent terms of two years and eighteen months in respect of the indecent treatment convictions. He seeks leave to appeal against sentence generally, on the ground that his sentence was manifestly excessive.

The allegations and verdicts

[3] The three convictions involved offences against a girl, A, who was aged between six and 11 years at the relevant times. The appellant was acquitted on a further two counts of indecent treatment and one of rape in respect of A, while the jury was unable to reach a verdict on another four counts of indecent treatment in respect of the same child. The remaining four counts concerned a second girl, B. The jury acquitted the appellant of three of the counts concerning her and was unable to agree on the fourth. Another child, C, was also a Crown witness, but her evidence tended to be exculpatory of the appellant.

[4] The ages of the three girls assumed some importance. Their birth dates were given in evidence: A was born on 22 September 1995; B on 27 January 1997; and C on 26 December 1998. A and B stayed at the Arana Hills house of the appellant and his de facto wife, Ms Williams, from time to time; their parents were friends of his. C was a young relative.

[5] The Crown provided particulars of the 14 counts based on the s 93A statements of A and B. Count 1 was the maintaining count, which concerned A. Count 2 was a count of wilfully exposing A to an indecent film and involved the same incident as count 11, which charged exposing B to the same film. Both counts were based on B's statement, in which she said that when she was about nine years old, she, A, and C had slept at the appellant's house after a party. The appellant came into the room and put on a DVD with pornographic content, which B described. A made no reference to that incident in any of her evidence. The appellant was acquitted on both count 2 and count 11.

[6] Count 3 was based on A's statement. She said that when she was about five or six (although other evidence suggested that she was older when the relevant events occurred), there was a birthday party at the appellant's house. She and a number of other children were playing with their Barbie dolls in an upstairs room. The other children included B, C and another girl, Z. The appellant came into the room and the children put their dolls away to go to sleep on mattresses. The appellant lay down with C. A said she was not sure what he did to C, but she could see movement with his arms below the blankets, down around the child's vaginal area. Then he moved to her, A. He began to hug her, pulled her pants down and touched her vaginal area and her clitoris with his hand. The appellant was found guilty by majority verdict on this count.

[7] On another occasion, according to A's evidence, she was sleeping in Ms Williams' bedroom and woke to find the appellant on top of her, touching her clitoris with his penis. That allegation was the subject of count 4. Immediately after, A said, the appellant turned on the television in the bedroom and watched "porn"; that gave rise to count 5. Count 6 again concerned an incident at the Arana Hills house. On this occasion, A said, the appellant had licked her genital area. The jury was unable to agree on any of counts 4, 5 or 6.

[8] In another incident, according to A, she was in Ms Williams' room pretending to be asleep. The appellant lay down with her and moved his fingers inside her vagina (count 7, the rape count). Count 8 was based on A's description of the appellant's making her masturbate him. The appellant was acquitted on counts 7 and 8. The offence the subject of count 9 was also said to have taken place in Ms Williams' bedroom at the Arana Hills house. A said she was then six or seven years old. She was about to go to sleep on a mattress when the appellant came in, removed her underpants, put her legs up and put his penis on her clitoris and moved it around. The jury was unable to agree on count 9.

[9] The remaining incident involving A, the subject of count 10, occurred when she was in grade 4 or 5. The appellant had moved to share a unit at Northgate with a friend. A said she had regularly stayed at the unit, sleeping in a bedroom with a single bed and a television in it. When first interviewed by police in 2010, she described an evening when she was in the room watching television and the appellant came in and lay down with her. Once again, he "did the same thing" - put his penis on her clitoris - but on this occasion, he moved his penis to what she described as her "lower area". Questioned further, she said that was her vagina, which started hurting. She was asked whether it was hurting on the outside and answered, "On the inside".

[10] In her second interview, in 2011, A described what appeared to be the same incident, but this time she said she was trying to sleep when the appellant climbed on top of her and performed the manoeuvre of moving his penis on her clitoris, moving up and down for 10 or 15 minutes. Then, she said, he "just stopped". The particulars the Crown gave of this count indicated that it was relying only on the second description of the encounter, not any allegation of vaginal contact or penetration. The appellant was convicted of count 10.

[11] B was the complainant in the remaining counts. Count 11 concerned exposing B to the same pornographic DVD which was the subject of count 2. B said that after the children had watched the DVD, the appellant took her trousers, but not her

underwear, off. Lying down with his knees up, he sat her on top of him and started moving her up and down. She felt that he had an erection, although he still had his clothes on. It was painful and she told him that she needed to go to the toilet, upon which he released her. That was the subject of count 12, on which the jury were unable to agree. When B returned upstairs she saw that the appellant was sitting at a computer. He told her to come over to it and put some headphones on her. Again, she was shown a pornographic film; that gave rise to count 13. After that, she followed the appellant and the other children, A and C, into a room which contained boxes and magazines. He showed them the centrefold of a magazine depicting a naked woman (count 14). The jury acquitted the appellant on counts 11, 13 and 14.

[12] The child C was interviewed by police in 2010. She was then 11 years old. She remembered occasions when she, A and B slept on mattresses in the lounge room at the appellant's house. In her s 93A statement, C said she had never seen any magazines at the house; she had never been shown any "adult" videos or magazines; and no-one had done anything to her to make her feel uncomfortable. C gave evidence at a pre-recorded hearing when she was 12 years old. She said that she could remember one occasion when she slept in the lounge room at the appellant's house with A, B and Z. She could not remember the appellant lying down with the girls or touching her around her vaginal area. He had not pulled off A's pants in front of her. There had been no occasion when the appellant had shown her, A and B a pornographic film or pornographic magazines.

Misdirection - the maintaining conviction on count 1

[13] The first of the appeal grounds concerned only count 1. Section 229B of the *Criminal Code* 1899, which creates the offence of maintaining a sexual relationship with a child, contains these relevant provisions:

> "**229B Maintaining a sexual relationship with a child**
>
> (1) Any adult who maintains an unlawful sexual relationship with a child under the prescribed age commits a crime.
>
> …
>
> (2) An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
>
> (3) For an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.
>
> (4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship—
>
> (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and

(b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and

(c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

...

(10) In this section—

offence of a sexual nature means an offence defined in section 208, 210 (other than section 210(1)(e) or (f)), 215, 222, 349, 350 or 352.

...

unlawful sexual act means an act that constitutes, or would constitute (if it were sufficiently particularised), an offence of a sexual nature."

[14] The trial judge directed the jury generally on the offence of maintaining:

"An unlawful sexual relationship is a relationship that involves more than one unlawful sexual act over any period. Unlawful sexual act means an act that constitutes an offence of a sexual nature.

...

All of you must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.

The prosecution is not required to allege the particulars of the unlawful sexual acts. It is not required that you be satisfied of the particulars of any unlawful sexual act. It is not required that all of you be satisfied about the same unlawful sexual acts.

...

In this case the Crown relies on the other specific counts on the indictment as evidence of that relationship, but also as well as those specific counts the prosecution relies on the evidence of the child that other like sexual acts of a sexual nature occurred in order to establish the defendant maintained the sexual relationship with the child. The child has not been able to be specific about when or under what circumstances those acts occurred.

If you have a doubt about the specific offences, then you should only convict the defendant on the basis of the evidence of the other alleged acts if, after carefully scrutinising the evidence of the child, you are satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment."

[15] The appellant argued that in the penultimate paragraph of that passage, the trial judge was effectively telling the jury that the acts which could be relied on to prove the maintaining ("the other specific counts on the indictment") included those said to constitute counts 2 and 5. They were the counts of wilful exposure to an indecent film, which were offences defined in s 210(1)(e) of the *Criminal Code*, and were thus excluded from the definition of "offence of a sexual nature" in s 229B(10). That submission, as counsel for the respondent conceded, must be accepted. The trial judge erred in referring generally to the other counts on the indictment and in not directing the jury to exclude from their considerations the offences which were the subject of counts 2 and 5.

[16] That error was, the appellant submitted, consequential: although s 229B(4)(c) permitted the jury to reach their state of satisfaction about different sexual acts, s 229B(3) required that all members of the jury be satisfied beyond reasonable doubt of an unlawful sexual relationship involving unlawful sexual acts. The risk was that some of the jurors might have been satisfied of the acts which constituted counts 2 and 5 (particularly count 5, on which they had been unable to agree) and relied on them as proving count 1. There could be no reassurance in the fact that the applicant was convicted of two counts (counts 3 and 10) which did fall within the definition of "offence of a sexual nature", because the verdict on count 3 had been a majority verdict. It was conceivable that the juror who was not satisfied of the appellant's guilt on that count had, for example, convicted him of the maintaining offence on the strength of being satisfied of his guilt on counts 5 and 10. There would then be no unanimity, as s 229B(3) required, in the conclusion that the appellant was guilty of maintaining an unlawful sexual relationship.

[17] The respondent suggested that some comfort could be drawn from the fact that the jury had not accepted the children were shown pornographic films. They had acquitted on count 2, so it could be assumed that they had not acted on the basis of that evidence in convicting of maintaining. Although they were unable to agree on count 5, a request for redirection suggested their view. Counts 4 and 5 turned, respectively, on A's allegations that the appellant had sexually assaulted her and that he had then turned the television on to pornographic material. The jury asked whether they could make a decision on count 4 alone, explaining the basis for their question: "[b]ecause… count 5 is watching TV, but there was no TV in bedroom ([Ms Williams'] evidence)…" (In fact, Ms Williams had said that there might have been a television in the bedroom, but she did not remember it.)

[18] The trial judge directed the jury that it was open to them to convict on one of the counts in question and to acquit on the other; in the event they failed to agree on either count. The respondent argued that the inquiry indicated that the jury had accepted the evidence that there was no television in the bedroom where the offence relevant to count 5 was said to have occurred, and hence that there was no such offence. But that argument requires a good deal of speculation: that the jury note reflected the view of all jurors, and that all remained of the view expressed in it. That seems unlikely, given their ultimate inability to agree on a verdict in relation to the count.

[19] The possibility that the dissenting juror on count 3 based his or her conclusion about the maintaining count on a view that the appellant was guilty of the offence in count 5 cannot be ruled out. Consequently, there is no basis on which this Court can conclude that the jury, as the section requires, reached the necessary state of

unanimous satisfaction that there had been two acts which were offences of a sexual nature as defined in s 299B(10).

[20] As to the possible application of the proviso, there are limitations on this court's capacity to assess the evidence at trial. Although all of the children's evidence exists in recorded form as the jury saw it, the evidence of the adult witnesses, of course, does not. There were aspects of Ms Williams' evidence favouring the appellant, the credibility of which it is impossible to evaluate from the transcript. In the result, I cannot conclude that the appellant was proved beyond reasonable doubt to be guilty of the offence of maintaining so as to be satisfied that there has been no substantial miscarriage of justice. The conviction on count 1 must be set aside and a re-trial ordered.

Inconsistency and the convictions on counts 3 and 10

[21] The second ground of appeal was that the verdicts of guilty on counts 3 and 10 were unreasonable. The appellant's primary submission was that they could not be reconciled with the acquittals on counts 7 and 8. On count 3, a majority of the jury had found the appellant guilty, although A's testimony was contradicted by that of the child C. On the other hand, in relation to counts 7 and 8, where there was no evidence to contradict A, the jury acquitted. The doubts that the jury obviously had about A's reliability or honesty in respect of those counts should also have led to acquittals on counts 3 and 10. There was no evidence independent of A to support count 10, and there was no difference in the quality of the evidence in relation to counts 7, 8 and 10 respectively.

[22] The respondent made this point about A's evidence: A had been interviewed twice, on 22 January 2010 and on 11 August 2011. In the first interview she had given details of the incidents which were the bases for counts 3, 4, 5 and 10. In the second interview, she had repeated, unprompted, the allegations in relation to count 3 and had referred to count 10. A had not mentioned the circumstances giving rise to counts 7 and 8 (the digital penetration and the masturbation of the appellant) in the first interview, so it was explicable that the jury had not been satisfied beyond reasonable doubt of guilt on those counts.

[23] Whether jury verdicts are inconsistent is a question "of logic and reasonableness", but the court will be hesitant to conclude that there is such an inconsistency between verdicts that no reasonable jury could have arrived at them; and will, if there is a proper way to reconcile the verdicts, do so.[1] It is of some significance that in this case a *Markuleski*[2] direction was given to the jury. The learned trial judge said this:

> "If you, in considering the evidence of one of the complainants, for example, in relation to one of the counts, you think that that evidence is not credible or reliable, whether by reference to demeanour or something else, then you must take that into account when assessing the truthfulness or reliability generally, so in other words, if you find that someone's evidence is not credible or reliable on a count, then when you come to consider the other counts, you have got to think to yourself, well, hang on, I've already found that she has been unreliable on one count, can I really be satisfied beyond a reasonable doubt about her truthfulness and accuracy about what she said on this

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1 At 367.

2 *R v Markuleski* (2001) 52 NSWLR 82.

> other account. That's again a matter for you to ultimately consider. It is something you have to take into account."

[24] The effect of that direction was repeated when the learned judge came to re-direct in response to the jury's question as to whether they could convict on count 4 if they acquitted on count 5. His Honour pointed out that if there were a concern about A's credibility or reliability in relation to count 5, it should be taken into account in assessing her credibility generally. Assuming, as one must, that the jury had proper regard to the directions given to them, the inference is that whatever caused them doubt about counts 7 and 8, it was not such as to cause them to question the reliability of A's evidence on counts 3 and 10.

[25] In *R v Markuleski*, Spigelman CJ reviewed circumstances in which a jury's apparent acceptance of a complainant's evidence on some counts but not others did not result in a conclusion of inconsistency. Of relevance here is this observation:

> "In some cases a jury has acquitted on counts which were not the subject of the original complaint. Although such a discrepancy is capable of affecting credit, it has not been found to require an acquittal on other counts."[3]

Spigelman CJ cited a number of examples in which that result had been reached: *R v JJT*[4]; *R v ACK*[5]; *R v Asplin*[6] and *Williams v R*[7].

[26] The respondent's submission that the convictions on counts 3 and 10 may reflect the fact that they were the subject of the original complaint to the police, while counts 7 and 8 were not then mentioned, conforms with Spigelman CJ's observation. It does, in my view, provide a rational basis on which the jury might have regarded A's evidence on counts 3 and 10 as more reliable than that on counts 7 and 8 and distinguished between those two sets of counts when it came to giving verdicts. The different verdicts are thus capable of being reconciled, and are not unreasonable for any reason of inconsistency.

Unreasonableness generally and the convictions on counts 3 and 10

[27] The appellant advanced other arguments independent of the inconsistency point about the quality of the evidence on counts 3 and 10. In particular, it was said that the evidence of the other children should have given rise to a reasonable doubt about the indecent dealing in count 3. C remembered the night when she had stayed with A, B and Z at the appellant's house, but she had no recall of the appellant coming into the room, let alone of any sexual act done to her or any other girl in the room. B, cross-examined in the pre-recording, said that she could not remember any incident where she, A, C and Z were all in a bedroom together. And there had been no evidence from Z.

[28] As to both counts, there were reasons, the appellant contended, for doubting A's reliability. In her pre-recorded evidence she gave a description of seeing B sitting on the appellant's lap at a computer which was displaying pornography; the appellant had "placed his fingers inside [B]". B gave no evidence of any such

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3 At 102.
4 [1997] NSWSC 601.
5 [2000] NSWCCA 180.
6 [1999] WASCA 148.
7 [2000] TASSC 182.

event, although she gave detailed evidence of other sexual misconduct (described above at paragraph [11]). Cross-examined about it, A initially said she was "positive" that it had happened but had "not a very strong memory" of it, finally conceding that she could not really remember it at all.

[29] The appellant also placed some reliance on this passage in the cross-examination of A:

> "And when you spoke to the police this second occasion on the 11th of August 2011 did you tell the police about an occasion when Allan put his penis in your vagina?-- Not on the second occasion.
>
> So you told the police this on the first occasion, you think?-- Yes.
>
> And that was - that was a matter that you took seriously when you said that to the police?-- Yes.
>
> And it was something that was different from the other occasions, wasn't it?-- Yes.
>
> Even though he actually - you say he put his penis inside your vagina, is that right?-- Yes.
>
> Did you tell prosecutions yesterday that - by 'prosecutions' I mean the Prosecutor that was just asking you questions before, did you tell them yesterday that Allan had never put his penis inside your vagina?-- Yes.
>
> Okay. So you told the police on the first occasion that he did put his penis in your vagina but you told the Prosecutor yesterday that he didn't put his penis in your vagina. Is that correct?-- Yes."

This, counsel said, represented a prior inconsistent statement.

[30] It is not clear what the questioner was referring to when he asked A about what she had said to the prosecutor "yesterday"; nothing of the kind appears in the transcript of her examination-in-chief. One can only proceed on the basis that she had made the statement to the prosecutor in conference and it had been relayed to defence counsel. It was put to A, and she accepted, that she had made the allegation of penetration and subsequently denied its occurrence. That certainly amounts to a previous inconsistent statement, but the contrast in A's statements as outlined in cross-examination is not so stark when one looks at what she actually said in the first interview. She spoke of the appellant moving his penis to her "lower area" or vagina, which hurt "inside", but did not say that there had been actual penetration.

[31] It seems entirely possible that A did not recall the detail of what she had said to the police about the incident, and assumed when asked about it in cross-examination that she had alleged penetration. It is difficult, without detail and context of what she said to the prosecutor, to know exactly what the change in her account was, or its significance. Her monosyllabic answers certainly do not assist in clarifying how the change in allegation, if that is what it was, occurred. At any rate, while the inconsistency was something which had to be taken into account in assessing A's reliability, it was far from clear or conclusive.

[32] The fact that B and C did not recall the events which A described and which gave rise to count 3, while Z did not give evidence at all, is not such as to discredit A.

Although she said she saw movement below a blanket in relation to C, she did not assert that she saw the child sexually interfered with. It was not alleged that either B or Z was the subject of any sexual act on this occasion. In those circumstances, it is not unreasonable that the evening might not have been memorable to the other girls or that they might not have been alert to what was happening to A. In sentencing, the learned judge concluded, by reference to evidence about the timing of Z's family's arrival in Brisbane and the installation of a pool at the Arana Hills house, that the offence the subject of count 3 had probably occurred in late 2004. A would then have been about nine. If that reasoning is correct, B and C would have been about seven and six respectively. (According to A, Z was the same age as she was.) Given their youth, I do not think any conclusion can be drawn from their failure to confirm the incident.

[33] Nor do I think that A's account of seeing the appellant digitally penetrate B necessarily affected her credit in relation to what had happened to her. B was not asked about such an event. Her failure to volunteer it suggests at least that she did not recall it, but it does not necessarily follow that what A said was invention. A's progressive concessions that she had no real memory of it may simply reflect the fact that it was some distance in the past and was not a clear memory. It may also reflect the fact that she was not a confident witness when challenged, for reasons which may have had more to do with her age and apprehensiveness in an unfamiliar setting than her credit.

[34] The identified matters do not alone or collectively raise such significant questions about A's credibility that the jury could not properly have acted on her evidence. On the whole of the evidence, I am satisfied that the jury was entitled to accept A's account of the commission of the two offences and to be satisfied beyond reasonable doubt of the appellant's guilt on counts 3 and 10. The contention that the verdicts were unreasonable must be rejected and the appeal against conviction, so far as these counts are concerned, should be dismissed.

The application for leave to appeal against sentence

[35] The appellant sought leave to appeal against sentence generally, but the conclusion that the conviction on count 1 must be set aside makes it unnecessary to consider the sentence imposed on that count. The application was not maintained in respect of the sentence of 18 months imprisonment imposed on count 3, which involved digital touching of A's clitoris and vaginal area. But it was contended that the sentence of two years imprisonment on count 10, which involved penile contact with A's clitoris, was excessive, and should have fallen within a range of 12 to eighteen months. Counsel did not, however, assist with any comparable sentences on which to base that argument.

[36] The offence in respect of count 10 (particularised as between December 2004 and January 2007) rendered the appellant liable to a maximum penalty of 20 years imprisonment. The appellant was aged between 31 and 35 at the time the offences were said to have occurred, and was 39 at sentence. He had three children with Ms Williams. He had a relatively lengthy criminal history dating from 1990, principally for public order type offences and possession of dangerous drugs, always dealt with in the Magistrates Court. The most severe sentence previously imposed on him was three months, fully suspended.

[37] A review of some previous decisions of this court involving indecent treatment offences of broadly similar gravity has convinced me that the sentence was not outside a proper exercise of discretion. In *R v NH*,[8] this court re-sentenced an applicant who was charged with three counts of indecent dealing (touching the eight year old complainant under her clothes on her vulval area) and one count of rape (digitally penetrating her). The aggravating circumstances were the child's age, the fact that the applicant was in a position of trust, that he had threatened to tell people her father was in prison if she disclosed what he had done and that the offences occurred on three different occasions. The mitigating factors were the applicant's previous good character and exemplary working history. After a review of authorities relating to digital penetration charged both as indecent dealing and as rape, this court imposed sentences of two and a half years imprisonment on each count.

[38] In *R v Murray*,[9] the applicant had pleaded guilty to five counts of indecent dealing with children under 12, involving four complainants. The first four offences occurred when the children, aged between 7 and 10, were staying at the applicant's home for a sleep-over with his daughter. He touched two of the children on the vaginal area, attempted unsuccessfully to make one touch his penis and bathed with another child while they were both naked, rubbing her stomach. On a separate occasion, he touched an 11 year old girl briefly on the vaginal area inside her clothing. The applicant's only previous convictions were for minor street offences. He was an illiterate disability pensioner with two young children, suffered from severe alcohol and drug problems and was receiving treatment for depression. There was no evidence of any lasting impact on the complainants. A head sentence of three years imprisonment on each offence was set aside, and sentences of two and a half years imprisonment substituted on four of the counts, with suspension after the 13 months which the applicant had already served. On the remaining count, a period of imprisonment followed by probation, allowing for his immediate release, was imposed.

[39] In *R v MBF*,[10] the applicant sought an extension of time within which to seek leave to appeal against sentence. He pleaded guilty to one count of rape which was constituted by digital penetration of his 13 year old niece, and another of indecent treatment, touching her on the breast area. The offences had occurred on a single occasion. The applicant was 28 years old and was affected by alcohol and cannabis when he offended. There was an early plea of guilty; the sentencing judge noted the applicant's good employment history and his remorse. His application for an extension of time within which to seek leave to appeal a head sentence of three years imprisonment was refused as having no real prospect of success.

[40] In *R v Brackenrig*,[11] the applicant was sentenced to two years imprisonment in respect of one count of indecent treatment of a child under 12, and 12 months imprisonment on each of the remaining counts against him, of possessing child exploitation material and using a carriage service to access child pornography material. He was a man in his 50s and had previously been dealt with on six counts of indecently dealing with a child under 12, for which he received a wholly suspended period of imprisonment. He also had some prior convictions for

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8 [2006] QCA 476.
9 [2006] QCA 516.
10 [2008] QCA 61.
11 [2010] QCA 41.

dishonesty. His prior indecent dealing offences involved relatively brief touching of the young daughters of his de facto wife around their vaginal areas and buttocks.

[41] The complainant in the offence which was the subject of Brackenrig's application for leave to appeal against sentence was the seven year old daughter of a neighbour. Precisely what occurred was unclear: the applicant admitted to lifting the child's nightgown and pulling down her pants to look at her bottom; the child said that the applicant had played with her "front part" and pulled her underpants down. The prosecution accepted it was not clear what the child meant by her "front part"; it might have been limited to the part of her body covered by the top part of her underwear. However, this court observed that while those acts were at the lower end of the range of seriousness for the offence, the offending was opportunistic and cynical. The applicant knew that the child came from a vulnerable family situation and exploited that fact, and his offending was aggravated by his history of similar offending. The two year sentence of imprisonment imposed was well within range and a parole eligibility date after one third sufficiently recognised the mitigating factors.

[42] Different aspects of the appellant's offending here are both more and less serious than those in the cases to which I have referred. He was not charged with rape, although the penetration of the vulva which must have been involved in touching the child's clitoris might have founded such a charge. At any rate, the assaults on the girl were invasive of her body. The appellant was a mature man who could not be said to have been of previous good character, although his criminal history did not contain any like offences. Importantly, A was a young child and although it was not charged as an aggravating circumstance, he was, to some extent, in a position of trust in relation to her. The sentence of two years imprisonment might be regarded as high, but as the decisions to which I have referred indicate, it was not outside a proper range. I would refuse the application for leave to appeal against sentence.

Orders

[43] The orders which should be made are:

1. Allow the appeal against conviction on count 1.
2. Set aside the conviction on count 1 and order a re-trial.
3. Dismiss the appeal against conviction on counts 3 and 10.
4. Refuse the application for leave to appeal against sentence.

[44] **MUIR JA:** I agree with the reasons of Holmes JA and with the orders proposed by her Honour.

[45] **DAUBNEY J:** I respectfully agree with Holmes JA.